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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JEFFREY LYNN STONECIPHER,

Plaintiff,

Case No. 1:13-cv-01673-SKO
ORDER ON PLAINTIFF'S COMPLAINT
(Doc. No. 15)

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

Defendant.

INTRODUCTION

Plaintiff, Jeffrey Lynn Stonecipher ("Plaintiff"), seeks judicial review of a final decision of the Commissioner of Social Security (the "Commissioner" or "Defendant") denying his application for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") benefits pursuant to Titles II and XVI of the Social Security Act. 42 U.S.C. § 405(g). The matter is currently before the Court on the parties' briefs, which were submitted, without oral argument, to the Honorable Sheila K. Oberto, United States Magistrate Judge.¹

¹ The parties consented to the jurisdiction of a U.S. Magistrate Judge. (Docs. 8, 9.)

1 **FACTUAL BACKGROUND**

2 Plaintiff was born on July 28, 1964, and alleges disability beginning on June 1, 2010.
3 Plaintiff claims he is disabled due to hypertension, congestive heart failure, atrial fibrillation, and
4 valley fever. (AR 217.)

5 **A. Relevant Medical Evidence**

6 On May 28, 2010, Plaintiff was hospitalized at Kern Medical Center reporting symptoms
7 of chest pain and shortness of breath for three days. (AR 289-95.) A test measuring heart failure
8 indicated left ventricular hypertrophy, global hypokinesis of the left ventricle and “elevated [right
9 ventricular systolic pressure].” (AR 381.) A chest x-ray revealed congestive heart failure with
10 cardiomegaly, pulmonary vascular congestion, and interstitial edema. (AR 382.) The attending
11 physician diagnosed Plaintiff with atrial fibrillation – rate controlled, congestive heart failure,
12 hypertension, and a history of drug abuse was noted. (AR 381.)

13 On December 15, 2010, State Agency medical consultant Kenneth Glass, M.D., reviewed
14 Plaintiff's medical records and completed a residual functional capacity assessment form. Dr.
15 Glass opined Plaintiff could lift and carry 10 pounds occasionally and less than 10 pounds
16 frequently. (AR 578-82.) Dr. Glass further opined that Plaintiff could stand and walk at least 2
17 hours in an 8-hour day and sit about 6 hours in an 8-hour workday with occasional climbing of
18 ramps/stairs, kneeling, crouching, and crawling, but precluding from climbing ladders, ropes and/
19 or scaffolds. (AR 578-82.)

20 In March 2011, C. De La Rosa, a state agency physician, reviewed Plaintiff's medical
21 records and opined that Plaintiff was limited to lifting 20 pounds and standing and walking 2
22 hours out of an 8 hour work day. (AR 651-56.)

23 In August 2011, Rushabh Shah, M.D., Plaintiff's treating physician, reported Plaintiff was
24 diagnosed in August 2010 with atrial fibrillation and congestive heart failure, and Plaintiff had
25 been hospitalized multiple times for heart problems. (AR 769.) Dr. Shah opined that prior to his
26 illness Plaintiff could work and participate in activities of daily living, but since his illness,
27 Plaintiff's prognosis was poor and he was unable to work or hold gainful employment. (AR 769.)
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1 On September 29, 2011, Plaintiff was admitted to the cardiology clinic at Kern Medical
2 Center with complaints of nausea and diarrhea that had been bothering him for about two months.
3 (AR 772). Plaintiff complained of dizziness and palpitations (AR 772), and he was transferred to
4 the emergency room for further evaluation (AR 775). Plaintiff underwent further evaluation, and
5 was considered "improved" upon re-check. (AR 779.) He was given medication and his "A-fib"
6 was resolved. (AR 779.) A clinical impression of medication noncompliance and polysubstance
7 abuse was noted, but his condition was considered stable. (AR 779.)

8 **B. Plaintiff's Testimony**

9 Plaintiff is currently homeless, but stays at a "Christian home" occasionally to shower and
10 clean up. (AR 51.) Plaintiff admitted to previous periods of noncompliance with prescribed
11 medication because he "misplaces the medication" due to a lack of a "proper place to keep it."
12 (AR 51.) Plaintiff also claims there have been times he "completely ran out of medication" and
13 "did not have any way to get to . . . the pharmacy to pay for or to pick up any medication." (AR
14 60.) Plaintiff testified that prior to his last visit to the emergency room he had been fully
15 compliant with medication. (AR 61.)

16 Plaintiff experiences side effects from his medication which include everything becoming
17 "fuzzy" and as a result of this fuzziness he has fallen and hit his head. (AR 52.) He has to lie
18 down two to three times during the day due to nausea; on a bad day, he will lie down for most of
19 the day. (AR 53-54.)

20 Two weeks prior to the hearing, Plaintiff saw a cardiologist for a routine visit; an
21 electrocardiogram was administered and he was sent to the emergency room because his blood
22 pressure was extremely elevated and his heart rate was 140 and very erratic. (AR 51.)

23 Plaintiff testified that he experiences shortness of breath, mostly at night, and "sweat jags."
24 (AR 52.) Plaintiff explains "sweat jags" are episodes consisting of nausea and profuse sweating,
25 which occur two to three times a day. (AR 50.) Plaintiff testified that "sweat jags" require him to
26 lie down on average three times a day, and occasionally all day long. (AR 53.) Plaintiff states he
27 has "good days and . . . bad days." (AR 53.) He becomes nauseated four days of the week, mostly
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1 during the morning, but it occurs whenever he physically exerts himself or he is in a stressful
2 situation. (AR 55.)

3 Plaintiff testified that the nausea and sweating he experiences are a result of congestive
4 heart failure and occur at least four days a week for part of the day. (AR 55.) Plaintiff states these
5 symptoms can occur "if [he] ha[s] to climb a flight of stairs twice." (AR 56.)

6 Plaintiff last worked as a "steeplejack" which included working on chimneys at power
7 plants. (AR 54.) He can no longer perform that work because climbing ladders and stairs, which
8 was included in his past work, now makes him "sweat." (AR 55.)

9 **C. Administrative Proceedings**

10 On January 27, 2012, the ALJ issued a decision and determined Plaintiff was not disabled.
11 (AR 20-30.) The ALJ found that Plaintiff had severe impairments including atrial fibrillation,
12 congestive heart failure, hypertension, and valley fever. (AR 25.) The ALJ determined that these
13 impairments did not meet or equal a listed impairment. (AR 26.) The ALJ found Plaintiff
14 retained the residual functional capacity ("RFC") to perform a reduced range of sedentary work,
15 but was limited to occasional postural changes such as bending, stooping and kneeling; no
16 climbing ladders, ropes, scaffolds or work in unprotected heights. (AR 26.) Given this RFC, the
17 ALJ found that other jobs existed that Plaintiff could perform. (AR 29-30.) The ALJ concluded
18 that Plaintiff was not under disability, as defined in the Social Security Act, from June 1, 2010,
19 through January 27, 2012. (AR 30.)

20 **D. Plaintiff's Arguments on Appeal**

21 On October 16, 2013, Plaintiff filed a complaint before this Court seeking review of the
22 ALJ's decision. Plaintiff argues the ALJ failed to provide legally sufficient reasons for rejecting
23 Plaintiff's testimony about the extent of his limitations.

24 **SCOPE OF REVIEW**

25 The ALJ's decision denying benefits "will be disturbed only if that decision is not
26 supported by substantial evidence or it is based upon legal error." *Tidwell v. Apfel*, 161 F.3d 599,
27 601 (9th Cir. 1999). In reviewing the Commissioner's decision, the Court may not substitute its
28 judgment for that of the Commissioner. *Macri v. Chater*, 93 F.3d 540, 543 (9th Cir. 1996).

1 Instead, the Court must determine whether the Commissioner applied the proper legal standards
2 and whether substantial evidence exists in the record to support the Commissioner's findings. *See*
3 *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). "Substantial evidence is more than a mere
4 scintilla but less than a preponderance." *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th
5 Cir. 2008). "Substantial evidence" means "such relevant evidence as a reasonable mind might
6 accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
7 (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court "must
8 consider the entire record as a whole, weighing both the evidence that supports and the evidence
9 that detracts from the Commissioner's conclusion, and may not affirm simply by isolating a
10 specific quantum of supporting evidence." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir.
11 2007) (citation and internal quotation marks omitted).

12 **APPLICABLE LAW**

13 An individual is considered disabled for purposes of disability benefits if he or she is
14 unable to engage in any substantial, gainful activity by reason of any medically determinable
15 physical or mental impairment that can be expected to result in death or that has lasted, or can be
16 expected to last, for a continuous period of not less than twelve months. 42 U.S.C.
17 §§ 423(d)(1)(A), 1382c(a)(3)(A); *see also Barnhart v. Thomas*, 540 U.S. 20, 23 (2003). The
18 impairment or impairments must result from anatomical, physiological, or psychological
19 abnormalities that are demonstrable by medically accepted clinical and laboratory diagnostic
20 techniques and must be of such severity that the claimant is not only unable to do her previous
21 work, but cannot, considering her age, education, and work experience, engage in any other kind
22 of substantial, gainful work that exists in the national economy. 42 U.S.C. §§ 423(d)(2)-(3),
23 1382c(a)(3)(B), (D).

24 The regulations provide that the ALJ must undertake a specific five-step sequential
25 analysis in the process of evaluating a disability. In the First Step, the ALJ must determine
26 whether the claimant is currently engaged in substantial gainful activity. 20 C.F.R. §§
27 404.1520(b), 416.920(b). If not, in the Second Step, the ALJ must determine whether the claimant
28 has a severe impairment or a combination of impairments significantly limiting her from

1 performing basic work activities. *Id.* §§ 404.1520(c), 416.920(c). If so, in the Third Step, the ALJ
2 must determine whether the claimant has a severe impairment or combination of impairments that
3 meets or equals the requirements of the Listing of Impairments ("Listing"), 20 C.F.R. 404,
4 Subpart P, App. 1. *Id.* §§ 404.1520(d), 416.920(d). If not, in the Fourth Step, the ALJ must
5 determine whether the claimant has sufficient residual functional capacity despite the impairment
6 or various limitations to perform her past work. *Id.* §§ 404.1520(f), 416.920(f). If not, in Step
7 Five, the burden shifts to the Commissioner to show that the claimant can perform other work that
8 exists in significant numbers in the national economy. *Id.* §§ 404.1520(g), 416.920(g). If a
9 claimant is found to be disabled or not disabled at any step in the sequence, there is no need to
10 consider subsequent steps. *Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999); 20 C.F.R. §§
11 404.1520, 416.920.

12 DISCUSSION

13 A. The ALJ Erred In Assessing Plaintiff's Credibility

14 In evaluating the credibility of a claimant's testimony regarding subjective pain, an ALJ
15 must engage in a two-step analysis. *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). First,
16 the ALJ must determine whether the claimant has presented objective medical evidence of an
17 underlying impairment that could reasonably be expected to produce the pain or other symptoms
18 alleged. *Id.* The claimant is not required to show that her impairment "could reasonably be
19 expected to cause the severity of the symptom she has alleged; she need only show that it could
20 reasonably have caused some degree of the symptom." *Id.* (quoting *Lingenfelter v. Astrue*, 504
21 F.3d 1028, 1036 (9th Cir.2007)). If the claimant meets the first test and there is no evidence of
22 malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms
23 if she gives "specific, clear and convincing reasons" for the rejection. *Id.* As the Ninth Circuit has
24 explained:

25 The ALJ may consider many factors in weighing a claimant's credibility, including
26 (1) ordinary techniques of credibility evaluation, such as the claimant's reputation
27 for lying, prior inconsistent statements concerning the symptoms, and other
28 testimony by the claimant that appears less than candid; (2) unexplained or
inadequately explained failure to seek treatment or to follow a prescribed course of
treatment; and (3) the claimant's daily activities. If the ALJ's finding is supported
by substantial evidence, the court may not engage in second-guessing.

1 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.2008) (citations and internal quotation marks
2 omitted); *see also Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1226–27 (9th Cir.2009); 20
3 C.F.R. §§ 404.1529, 416.929. Other factors the ALJ may consider include a claimant's work
4 record and testimony from physicians and third parties concerning the nature, severity, and effect
5 of the symptoms of which he complains. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th
6 Cir.1997). The ALJ is required to state clear and convincing reasons to support discounting
7 Plaintiff's subjective complaints and credibility.

8 **1. The ALJ's Erred in Considering Plaintiff's Daily Activities**

9 Plaintiff argues it was error for the ALJ to discredit his symptom testimony based on his
10 daily activities. Plaintiff claims the mere fact he carries on normal daily activities does not detract
11 from his credibility as to his overall disability, and nothing in his testimony or reported daily
12 activities belies his assertion he experiences both “good and bad days.” Plaintiff maintains the
13 ALJ erred because he failed to demonstrate how the capability to perform the cited activities
14 translated into the ability to work on a full-time basis.

15 Defendant contends Plaintiff's statements in his function report contradict the argument
16 that he had a few good and mostly bad days. Defendant argues Plaintiff's ability to perform the
17 daily activities discussed by the ALJ show he is not as limited as Plaintiff claims.

18 The Ninth Circuit has held that the “mere fact that a Plaintiff has carried on certain daily
19 activities, such as grocery shopping, driving a car or limited walking for exercise, does not in any
20 way detract from her credibility as to her overall disability.” *Vertigan v. Halter*, 260 F.3d 1044,
21 1050 (9th Cir. 2001). It is only where the level of activity is inconsistent with a claimed limitation
22 that the activity has any bearing on credibility.” *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
23 1998). Further the ALJ must make “specific findings relating to daily activities and their
24 transferability to conclude that a claimant's daily activities warrant an adverse credibility
25 determination.” *Orn*, 495 F.3d at 639.

26 In assessing Plaintiff's credibility, the ALJ noted that “[a]fter careful consideration”
27 Plaintiff's “statements concerning the intensity, persistence and limiting effects of these symptoms
28 are not credible to the extent they are inconsistent with the above residual functional capacity

1 assessment.” (AR 29.) The ALJ stated Plaintiff failed to present “objective medical evidence to
2 support his claims,” and Plaintiff’s “reported activities of daily living [were] inconsistent with his
3 alleged inability to do all work.” (AR 29.) Plaintiff’s daily activities included “doing laundry,
4 ironing, sweeping and dishes, cooking, shopping, watching TV, and yard sales.” (AR 29.)

5 Plaintiff’s ability to engage in some activities of daily living does not necessarily reflect on
6 Plaintiff’s credibility. *Vertigan*, 260 F.3d at 1049-50. Plaintiff testified that he experiences nausea
7 and sweating at least four days per week, but these symptoms occur more frequently when he
8 exerts himself or when he encounters a stressful situation. (AR 9.) At times, nausea requires
9 Plaintiff to lie down all day. (AR 53.) Plaintiff also testified he experiences light-headedness and
10 has fallen down, losing consciousness as a result. (AR 52-53.) It is not clear how the ALJ’s
11 discussion of Plaintiff’s daily activities is relevant to these particular symptoms and limitations.
12 Plaintiff’s ability to iron clothing or watch television for a certain amount of time does not
13 necessarily bear on whether he experiences frequent nausea, sweating episodes, or dizziness. The
14 ALJ did not discuss how the frequency and nature of Plaintiff’s daily activities detract from his
15 symptom testimony. Plaintiff’s function report indicates he is able to do laundry and iron two
16 times per week, and he would perform sweeping activities up to four times per week, if the shelter
17 had openings. (AR 235.)² If so, he would help with daily chores. (AR 233.) Thus, many of the
18 activities the ALJ referred to as “daily” were not necessarily activities that Plaintiff undertook
19 every day for an entire 8-hour period.

20 Moreover, the daily activities noted by the ALJ are not so incongruent with Plaintiff’s
21 alleged symptoms that the credibility implication is obvious, requiring no particular discussion –
22 such as if a claimant alleged disabling and immobilizing back pain yet reported playing golf three
23 times per week. Plaintiff’s described activities were not clear and convincing evidence to reject
24 Plaintiff’s subjective symptom testimony related to his nausea, sweating episodes, and dizziness.

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28 ² As Plaintiff explained, he would have to inquire daily at the shelter about whether there was bed or meal availability
on any particular day. (AR 233.)

1 **2. The ALJ's Additional Bases for Rejecting Plaintiff's Credibility Were Not**
2 **Clear and Convincing**

3 The ALJ also found that Plaintiff's symptom testimony was not supported by objective
4 medical evidence. (AR 29.) Plaintiff maintains, however, that a lack of objective medical
5 evidence is not a sufficient basis, standing alone, to reject his symptom testimony. Therefore,
6 Plaintiff contends the ALJ erred in discrediting Plaintiff's symptom testimony on these grounds.

7 The ALJ specifically and expressly, in the credibility portion of the decision, stated that
8 Plaintiff "alleged disabling conditions yet does not have the objective medical evidence to support
9 his claims." (AR 29.) In another portion of the decision, the ALJ noted that "objective findings
10 fail to provide strong support for Plaintiff's allegations of disabling symptoms and limitations."
11 (AR 27.) The ALJ then listed some of the objective medical findings. An ALJ does not err in
12 considering a lack of objective medical evidence to support lay testimony as to the degree of a
13 claimant's pain, so long as this is not the sole basis for an adverse credibility finding. *Rollins v.*
14 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *see also Burch v. Barnhart*, 400 F.3d 676, 681
15 ("Although lack of medical evidence cannot form the sole basis for discounting pain testimony, it
16 is a factor that the ALJ can consider in his credibility analysis."). As set forth in 20 C.F.R. §
17 404.1529(c)(2), objective medical evidence "is a useful indicator to assist" the agency in making
18 "reasonable conclusions about the intensity and persistence of [a claimant's] symptoms and the
19 effect those symptoms, such as pain may have on [a claimant's] ability to work." However,
20 Section 404.1529(c)(2) also provides that the agency will not reject a claimant's statements
21 regarding the intensity and persistence of pain symptoms or whether those symptoms affect a
22 claimant's ability to work "solely because the available objective medical evidence does not
23 substantiate [the claimant's] statements."

24 Defendant argues there were two other legally sufficient bases the ALJ discussed in
25 rejecting Plaintiff's symptom testimony: Plaintiff's lack of medication compliance and that no
26 reliable medical source "endorsed" Plaintiff's subjective limitations. Therefore, the ALJ's
27 consideration of the lack of objective medical evidence was not the *sole* basis for rejecting
28 Plaintiff's subjective lay testimony.

1 While Defendant articulates the lack of a physician "endorsement" as a separate basis for
2 discrediting Plaintiff's symptom testimony, the ALJ's credibility analysis did not articulate such a
3 basis. It is also unclear that a distinction can be drawn between a finding that lay testimony is not
4 supported by objective medical evidence and a finding that lay testimony is not "endorsed" by a
5 physician. Additionally, it is not clear how a treating source would "endorse" subjective
6 limitations in any event. Plaintiff reported his symptoms to his treating physicians, which were
7 noted in his medical records. (AR 772 (Plaintiff reported nausea, diarrhea, dizziness, and
8 palpitations).) Plaintiff was prescribed multiple medications including Diltiazem, Lisinopril,
9 Simvastatin, "Coreg," Digitalis, Aldactone, and Lasix (*e.g.*, AR 772), and there is no indication his
10 alleged symptoms were not considered part of his diagnosed and treated conditions. Even to the
11 extent the lack of a treating doctor's "endorsement" of Plaintiff's symptoms was discussed by the
12 ALJ, it is not a clear and convincing basis to reject Plaintiff's testimony.

13 Defendant argues the ALJ also relied on Plaintiff's lack of medication compliance as a
14 basis to reject his symptom testimony. While not discussed in the credibility section of the
15 decision, the ALJ did note Plaintiff's lack of medication compliance. (AR 28.) Specifically, the
16 ALJ found that Plaintiff "has a history of noncompliance but states he takes his medications most
17 of the time." (AR 28.)

18 Substantial evidence does not support this finding, and it is not a clear and convincing
19 basis to discredit Plaintiff's symptom testimony. The ALJ's statement was not an accurate
20 characterization of Plaintiff's testimony about his medication compliance. Plaintiff indicated at the
21 hearing that he is *not* good at taking his prescribed medication because there are occasions when
22 he does not "have a proper place to keep it," and he has been unable to reach a pharmacy or pay
23 for the medications on other occasions. (AR 60.) Plaintiff did not state he takes his medication
24 most of the time; rather, he acknowledged his non-compliance and explained why he failed to take
25 his medication as prescribed. Not only did the ALJ fail to accurately characterize Plaintiff's
26 testimony about his medication compliance, but Plaintiff offered good reasons for not taking the
27 medication as prescribed – *i.e.*, lack of funds and, because he is essentially homeless, he often
28 lacks a good place to keep the medication. If a claimant offers a good reason for medication non-

1 compliance, such as not being able to afford the treatment, then the fact that a claimant is not
2 taking medication is not a clear and convincing basis for discrediting symptom testimony. *Smolen*
3 *v. Chater*, 80 F.3d 1273, 1285 (9th Cir. 1996). Even if the ALJ relied on Plaintiff's lack of
4 medication compliance as a basis to reject Plaintiff's credibility, under these facts it does not
5 constitute a clear and convincing reason and it is not supported by substantial evidence.

6 In sum, none of the ALJ's bases for discrediting Plaintiff's symptom testimony are clear
7 and convincing or supported by substantial evidence.

8 **B. Remand is Required**

9 “The court shall have power to enter, upon the pleadings and transcript of the record, a
10 judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security,
11 with or without remanding the cause for a hearing.” 42 U.S.C. § 405(g). In Social Security cases,
12 the decision to remand to the Commissioner for further proceedings or simply to award benefits is
13 within the discretion of the court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). “If
14 additional proceedings can remedy defects in the original administrative proceedings, a social
15 security case should be remanded. Where, however, a rehearing could simply delay receipt of
16 benefits, reversal [and an award of benefits] is appropriate.” *Id.* (alteration in original) (internal
17 quotation marks omitted); *see also Varney v. Sec’y of Health & Human Servs.*, 859 F.2d 1396,
18 1399 (9th Cir. 1988) (“Generally, we direct the award of benefits in cases where no useful purpose
19 would be served by further administrative proceedings, or where the record has been thoroughly
20 developed.” (citation omitted)). Here, the ALJ erred in assessing Plaintiff's credibility, which can
21 be given renewed consideration by the ALJ on remand. Because additional proceedings can
22 remedy the defect in the original proceedings, remand rather than reversal and an award of
23 benefits is appropriate.

24 **CONCLUSION**

25 Based on the foregoing, the Court finds that the ALJ's decision is not supported by
26 substantial evidence and is, therefore, REVERSED and the case REMANDED to the ALJ for
27 further proceedings consistent with this order. The Clerk of this Court is DIRECTED to enter
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1 judgment in favor of Plaintiff Jeffrey Lynn Stonecipher and against Defendant Carolyn W. Colvin,
2 Commissioner of Social Security.

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5 IT IS SO ORDERED.

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Dated: December 8, 2014

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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