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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

STEPHANIE WHEELER
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

No. 2:16-cv-02827 AC

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”), denying her application for disability insurance benefits (“DIB”) under Title II of the Social Security Act (“the Act”), 42 U.S.C. §§ 401-34.¹ For the reasons that follow, plaintiff’s motion for summary judgment will be GRANTED, and defendant’s cross-motion for summary judgment will be DENIED. The matter will be remanded for further proceedings.

I. PROCEDURAL BACKGROUND

Plaintiff applied for DIB on May 27, 2014. Administrative Record (“AR”) 73

¹ DIB is paid to disabled persons who have contributed to the Disability Insurance Program, and who suffer from a mental or physical disability. 42 U.S.C. § 423(a)(1); Bowen v. City of New York, 476 U.S. 467, 470 (1986).

1 (Decision).² The disability onset date was alleged to be April 30, 2014. Id. The application was
2 disapproved initially and on reconsideration. Id. On May 3, 2016, Administrative Law Judge
3 (ALJ) G. Ross Wheatley presided over the hearing on plaintiff’s challenge to the disapprovals.
4 AR 10-46 (Transcript). Plaintiff, who appeared with her counsel Mr. Fred N. Tabak and Mr. John
5 Roberson, was present at the hearing. AR 73. Ms. Cathleen Spencer, a Vocational Expert
6 (“VE”), also testified at the hearing. Id.

7 On June 30, 2016, the ALJ found plaintiff “not disabled” under Sections 216(i) and 223(d)
8 of Title II of the Act, 42 U.S.C. §§ 416(i), 423(d). AR 70-85 (Decision). On September 30,
9 2016, the Appeals Council denied plaintiff’s request for review, leaving the ALJ’s decision as the
10 final decision of the Commissioner of Social Security. AR 4-7. (Decision and Additional Exhibit
11 List).

12 Plaintiff filed this action on November 29, 2016. ECF No. 1; see 42 U.S.C. § 405(g). The
13 parties consented to the jurisdiction of the magistrate judge. ECF Nos. 5, 7. The parties’ cross-
14 motions for summary judgment, based upon the Administrative Record filed by the
15 Commissioner, have been fully briefed. ECF Nos. 13 (plaintiff’s summary judgment motion), 16
16 (Commissioner’s summary judgment motion), 19 (plaintiff’s reply).

17 II. FACTUAL BACKGROUND

18 Plaintiff was born on October 7, 1971, and accordingly was, at age 42, a younger person
19 under the regulations, when she filed her application.³ AR 47. Plaintiff has two years of college
20 education. AR 79. Plaintiff “has at least a high school high school education and is able to
21 communicate in English.” AR 83.

22 III. LEGAL STANDARDS

23 The Commissioner’s decision that a claimant is not disabled will be upheld “if it is
24 supported by substantial evidence and if the Commissioner applied the correct legal standards.”
25 Howard ex rel. Wolff v. Barnhart, 341 F.3d 1006, 1011 (9th Cir. 2003). “The findings of the
26

27 ² The AR is electronically filed at ECF Nos. 11-3 to 11-20 (AR 1 to AR 1061).

28 ³ See 20 C.F.R. § 404.1563(c) (“younger person”).

1 Secretary as to any fact, if supported by substantial evidence, shall be conclusive” Andrews
2 v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995) (quoting 42 U.S.C. § 405(g)).

3 Substantial evidence is “more than a mere scintilla,” but “may be less than a
4 preponderance.” Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012). “It means such
5 evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v.
6 Perales, 402 U.S. 389, 401 (1971) (internal quotation marks omitted). “While inferences from the
7 record can constitute substantial evidence, only those ‘reasonably drawn from the record’ will
8 suffice.” Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006) (citation omitted).

9 Although this court cannot substitute its discretion for that of the Commissioner, the court
10 nonetheless must review the record as a whole, “weighing both the evidence that supports and the
11 evidence that detracts from the [Commissioner’s] conclusion.” Desrosiers v. Secretary of HHS,
12 846 F.2d 573, 576 (9th Cir. 1988); Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985) (“The
13 court must consider both evidence that supports and evidence that detracts from the ALJ’s
14 conclusion; it may not affirm simply by isolating a specific quantum of supporting evidence.”).

15 “The ALJ is responsible for determining credibility, resolving conflicts in medical
16 testimony, and resolving ambiguities.” Edlund v. Massanari, 253 F.3d 1152, 1156 (9th
17 Cir. 2001). “Where the evidence is susceptible to more than one rational interpretation, one of
18 which supports the ALJ’s decision, the ALJ’s conclusion must be upheld.” Thomas v. Barnhart,
19 278 F.3d 947, 954 (9th Cir. 2002). However, the court may review only the reasons stated by the
20 ALJ in his decision “and may not affirm the ALJ on a ground upon which he did not rely.” Orn
21 v. Astrue, 495 F.3d 625, 630 (9th Cir. 2007); Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir.
22 2003) (“It was error for the district court to affirm the ALJ’s credibility decision based on
23 evidence that the ALJ did not discuss”).

24 The court will not reverse the Commissioner’s decision if it is based on harmless error,
25 which exists only when it is “clear from the record that an ALJ’s error was ‘inconsequential to the
26 ultimate nondisability determination.’” Robbins v. Commissioner, 466 F.3d 880, 885 (9th Cir.
27 2006) (quoting Stout v. Commissioner, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch v.
28 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005).

1 IV. RELEVANT LAW

2 Disability Insurance Benefits and Supplemental Security Income are available for every
3 eligible individual who is “disabled.” 42 U.S.C. §§ 402(d)(1)(B)(ii) (DIB), 1381a (SSI). Plaintiff
4 is “disabled” if he is “unable to engage in substantial gainful activity due to a medically
5 determinable physical or mental impairment” Bowen v. Yuckert, 482 U.S. 137, 140 (1987)
6 (quoting identically worded provisions of 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A)).

7 The Commissioner uses a five-step sequential evaluation process to determine whether an
8 applicant is disabled and entitled to benefits. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4);
9 Barnhart v. Thomas, 540 U.S. 20, 24-25 (2003) (setting forth the “five-step sequential evaluation
10 process to determine disability” under Title II and Title XVI). The following summarizes the
11 sequential evaluation:

12 Step one: Is the claimant engaging in substantial gainful activity? If
13 so, the claimant is not disabled. If not, proceed to step two.

14 20 C.F.R. § 404.1520(a)(4)(i), (b).

15 Step two: Does the claimant have a “severe” impairment? If so,
16 proceed to step three. If not, the claimant is not disabled.

17 Id. §§ 404.1520(a)(4)(ii), (c).

18 Step three: Does the claimant’s impairment or combination of
19 impairments meet or equal an impairment listed in 20 C.F.R., Pt.
20 404, Subpt. P, App. 1? If so, the claimant is disabled. If not,
21 proceed to step four.

22 Id. §§ 404.1520(a)(4)(iii), (d).

23 Step four: Does the claimant’s residual functional capacity make
24 him capable of performing his past work? If so, the claimant is not
25 disabled. If not, proceed to step five.

26 Id. §§ 404.1520(a)(4)(iv), (e), (f).

27 Step five: Does the claimant have the residual functional capacity
28 perform any other work? If so, the claimant is not disabled. If not,
the claimant is disabled.

Id. §§ 404.1520(a)(4)(v), (g).

The claimant bears the burden of proof in the first four steps of the sequential evaluation
process. 20 C.F.R. §§ 404.1512(a) (“In general, you have to prove to us that you are blind or

1 disabled”), 416.912(a) (same); Bowen, 482 U.S. at 146 n.5. However, “[a]t the fifth step of the
2 sequential analysis, the burden shifts to the Commissioner to demonstrate that the claimant is not
3 disabled and can engage in work that exists in significant numbers in the national economy.” Hill
4 v. Astrue, 698 F.3d 1153, 1161 (9th Cir. 2012); Bowen, 482 U.S. at 146 n.5.

5 V. THE ALJ’s DECISION

6 The ALJ made the following findings:

7 1. The claimant meets the insured status requirements of the Social
8 Security Act through December 31, 2018.

9 2. [Step 1] The claimant has not engaged in Substantial Gainful
10 Activity (SGA) since April 30, 2014, the Alleged Onset Date
(AOD) (20 CFR 404.1571 *et seq.*).

11 3. [Step 2] The claimant has the following severe impairments:
12 Migraine Headaches, Degenerative Disc Disease (DDD) of the
13 lumbar spine, degenerative Disc Disease (DDD) of the cervical
14 spine status-post discectomy and fusion, asthma, and rheumatoid
15 arthritis (20 CFR 404.1520(c)).

16 4. [Step 3] The claimant does not have an impairment or
17 combination of impairments that meets or medically equals the
18 severity of one of the listed impairments in 20 CFR Part 404,
19 Subpart P, Appendix I (20 CFR 404.1520(d), 404.1525 and
20 404.1526).

21 5. [Residual Functional Capacity (“RFC”)] After careful
22 consideration of the entire record, the undersigned finds that the
23 claimant has the Residual Functional Capacity (RFC) to perform
24 light work as defined by 20 CFR 404.1567)(a); except the claimant
25 can stand or walk 4 hours during 8-hour day and sit for 6 hours
26 during an 8-hour day, and no ladders, ropes or scaffolds, occasional
27 ramps and stairs, stooping, crouching, kneeling and crawling, and
28 frequent balancing. The claimant should avoid concentrated
exposure to irritants such as fumes, odors, dusts and gases and
poorly ventilated areas, and moderate exposure to hazardous
machinery and unprotected heights.

6. [Step 4] The claimant is capable of performing Past Relevant
Work (PRW) as a Bookkeeper. This work does not require the
performance of work-related activities precluded by the claimant’s
Residual Functional Capacity (RFC) (20 CFR 404.1565).

7. [Step 5] The claimant has not been under a disability, as defined
by Social Security Act, from April 30, 2014, through the date of this
decision (20 CFR 404.1529(f)).

AR 73-85.

1 As noted, the ALJ concluded that plaintiff was “not disabled” under Sections 216(i) and
2 223(d) of Title II of the Act, 42 U.S.C. §§ 416(i), 423(d). AR 33.

3 VI. ANALYSIS

4 Plaintiff alleges that the ALJ erred by (1) rejecting the testimony of plaintiff’s treating
5 physician, Dr. Lam; and (2) finding plaintiff’s disabilities non-severe. ECF No. 13 at 11-15.
6 Plaintiff requests that the matter be remanded to the Commissioner for an immediate award of
7 benefits.

8 A. The ALJ Properly Evaluated Dr. Lam’s Statements.

9 The ALJ gave little weight to the opinion of treating physician Giang Ngoc Lam, M.D.
10 AR 77. Dr. Lam’s report indicated that plaintiff suffers from anxiety and depression. AR 975-79
11 (Lam report). Dr. Lam opined that plaintiff is “incapable of even low stress jobs and that her
12 symptoms frequently interfere with attention and concentration.” AR 77 (quoting Lam report)
13 (internal quotations omitted). The ALJ did not err by rejecting Dr. Lam’s statements, as the
14 medical record contradicted his findings.

15 Medical opinions are statements from physicians and other acceptable medical sources
16 that reflect, among other things, judgments about “what [the claimant] can still do despite
17 impairment(s), and [the claimant’s] physical or mental restrictions.” 20 C.F.R. § 404.1527(a)(2);
18 see also 20 C.F.R. § 404.1513(b) (medical reports should include, among other things, a
19 statement about what the claimant can still do despite his impairments).

20 “We afford greater weight to a treating physician’s opinion because ‘he is employed to
21 cure and has a greater opportunity to know and observe the patient as an individual.’”
22 Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (quoting Sprague v. Bowen, 812 F.2d
23 1226, 1230 (9th Cir.1987)). “The ALJ may disregard the treating physician’s opinion whether or
24 not that opinion is contradicted.” Id. However, the ALJ may only reject the opinion of a treating
25 physician if he makes “findings setting forth specific, legitimate reasons for doing so that are
26 based on substantial evidence in the record.” Winans v. Bowen, 853 F.2d 643, 647 (9th Cir.
27 1987) (internal citations omitted). “The ALJ can meet this burden by setting out a detailed and
28 thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof,

1 and making findings.” Cotton v. Bowen, 799 F.2d 1403, 1408 (9th Cir. 1986) (per curiam),
2 superseded by statute on other grounds as recognized in Bunnell v. Sullivan, 912 F.2d 1149, 1154
3 (9th Cir. 1990). The court must uphold the ALJ’s decision where the evidence is susceptible to
4 more than one rational interpretation. Gallant v. Heckler, 753 F.2d 1450, 1453 (9th Cir. 1984).

5 The ALJ rejected Dr. Lam’s opinion because “[his] opinion is not supported by the record
6 as a whole.” AR 77. Specifically, the ALJ noted that the plaintiff “has not sought any mental
7 health specific treatment, and her mental health-related complaints have been sporadic at best.”
8 AR 77; ECF Nos. 11-14; 11-20. There are numerous accounts in the record that plaintiff does not
9 suffer from anxiety or depression. AR 337; 572; 603; 652; 662; 667. Furthermore, Dr. Lam’s
10 own reports indicate that plaintiff does not suffer from anxiety or depression. AR 675; 680; 689.
11 The ALJ also recognized plaintiff’s positive response to medication as evidence that plaintiff’s
12 mental impairments were non-severe. AR 77. The record reflects that, at least at one point in
13 2014, plaintiff medication prescribed by Dr. Lam for her anxiety. AR 605 (reflecting a 30 day
14 prescription for Lorazepam with no refills). While the ALJ does not specifically explain where
15 he finds that plaintiff responded positively to medication, there are at most sporadic instances in
16 which she mentions anxiety and depression.

17 Additionally, “Dr. Lam completed a Physical Residual Functional Capacity Questionnaire
18 (PRFCA) in which he indicated that the claimant suffers from significant limitations that would
19 completely erode the occupational base.” AR 82. The ALJ rejected this portion of Dr. Lam’s
20 opinion because the Medical Evidence of Record did not support his position. AR 82.
21 Furthermore, the ALJ found his opinion unreliable due to its inconsistencies. AR 82
22 (“Additionally, Dr. Lam opined that the claimant’s limitations existed as of February 2-16, which
23 is inconsistent with the claimant’s alleged onset date.”).

24 This court must uphold the ALJ’s decision regarding the treatment of Dr. Lam’s opinion
25 because, at the very least, the evidence in this case is susceptible to more than one rational
26 interpretation. Gallant, 753 F.2d at 1453. Prior to Dr. Lam’s finding that plaintiff suffered from
27 anxiety and depression, there were only a few instances in which any doctor acknowledge any
28 finding of as past history of anxiety or depression. AR 290 (“past medical” history of depression

1 anxiety noted on 10/18/2013 medical record); 306 (marked “depression/anxiety” on patient
2 questionnaire on 6/25/2013); 451 (“past medical” history of depression anxiety noted on
3 7/12/2013 medical record). None of these instances indicate anxiety or depression during the
4 alleged disability period. In one instance before the alleged disability onset date, a doctor made a
5 note that plaintiff was positive for anxiety but not depression. AR 391. However, in a list of
6 current problems within the same report, the doctor did not indicate that anxiety was a “current
7 problem.” AR 392. Within the report in which Dr. Lam prescribed anxiety medication, he
8 indicated that plaintiff did not have anxiety or depression. AR 603-04. Dr. Lam is the only
9 person in the record to prescribe medication for anxiety or depression.

10 The ALJ gave the appropriate amount of weight to Dr. Lam’s opinions. While more
11 information and clarity with respect to the reasons for finding Dr. Lam lacking credibility may
12 have been useful, the ALJ provided adequately specific and legitimate reasons for rejecting Dr.
13 Lam’s testimony. Furthermore, the ALJ’s finding that the evidence in the record largely
14 contradicted Dr. Lam’s opinion is supported by substantial evidence in the record. AR 77.
15 Therefore, the ALJ’s decision must be upheld.

16 B. The ALJ Improperly Dismissed Plaintiff’s Lupus as Non-Severe at Step-Two

17 “The step-two inquiry is a de minimis screening device to dispose of groundless claims.”
18 Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996). The purpose is to identify claimants
19 whose medical impairment is so slight that it is unlikely they would be disabled even if age,
20 education, and experience were taken into account. Bowen v. Yuckert, 482 U.S. 137, 153 (1987).
21 At step two of the sequential evaluation, the ALJ determines which of claimant’s alleged
22 impairments are “severe” within the meaning of 20 C.F.R. § 404.1520(c). “An impairment is not
23 severe if it is merely ‘a slight abnormality (or combination of slight abnormalities) that has no
24 more than a minimal effect on the ability to do basic work activities.’” Webb v. Barnhart, 433
25 F.3d 683, 686 (9th Cir. 2005) (quoting Social Security Ruling (“SSR”) 96-3p, 1996 SSR LEXIS
26 10 (1996)). The step two severity determination is “merely a threshold determination of whether
27 the claimant is able to perform his past work. Thus, a finding that a claimant is severe at step two

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1 only raises a prima facie case of a disability.” Hoopai v. Astrue, 499 F.3d 1071, 1076 (9th Cir.
2 2007).

3 At the second step, plaintiff has the burden of providing medical evidence of signs,
4 symptoms, and laboratory findings that show that his or her impairments are severe and are
5 expected to last for a continuous period of twelve months. Ukolov v. Barnhart, 420 F.3d 1002,
6 1004 (9th Cir. 2005); see also 20 C.F.R. §§ 404.1509, 404.1520(a)(4)(ii), 416.909,
7 416.920(a)(4)(ii). An ALJ’s finding that a claimant is not disabled at step two will be upheld
8 where “there are no medical signs or laboratory findings to substantiate the existence of medically
9 determinable physical or mental impairment.” Ukolov, 420 F.3d at 1005.

10 Plaintiff suffers from Lupus. AR 76. Plaintiff was admitted to Doctors Medical Center of
11 Modesto on May 2, 2014. AR 328. Her doctor noted that she suffered from lupus and
12 rheumatoid arthritis (“RA”), and that she reported weakness in both left sided extremities and
13 numbness to the left leg onset. Id. Because of her lupus and RA, she was given additional testing
14 and referred for outpatient treatment. Plaintiff was hospitalized again on May 2, 2014, following
15 her physician’s advice to report to the emergency department, complaining cramping in her left
16 leg for a month and woke up one morning unable to move her left arm. AR 352. She was
17 admitted with a preliminary diagnosis of “Weakness – left sided, Systemic Lupus Erythematosus,
18 CVA, Partial -possible.” AR 355. Furthermore, in May 2014, a doctor brought up plaintiff’s
19 rheumatoid arthritis and systemic lupus as a combined problem. AR 573. The doctor wanted to
20 continue plaintiff on plaquenil and methotrexate to treat her rheumatoid arthritis and systemic
21 lupus. AR 573. Similarly, in September 2014, a doctor found that plaintiff had scattered lymph
22 node after two trips to the emergency room. AR 595. These instances indicate that her lupus
23 may not be as under control as the ALJ indicated. AR 76. Given the fairly extensive medical
24 history, the ALJ improperly found that plaintiff’s lupus is non-severe.

25 C. The ALJ Properly Found that Plaintiff’s Aneurysm, Transient Ischemic Attacks,
26 Chronic Reflux Esophagitis, Anxiety and Depression are Non-Severe

27 As previously explained, a condition is non-severe if it a mere slight abnormality that only
28 minimally affects a person’s ability to engage in basic work activities. Webb, 433, F.3d at 686.

1 Plaintiff suffers from cerebral vessels arteriovenous aneurysm. AR 76. However, as the ALJ
2 pointed out, one of her doctors wrote, that “[t]he recommendation of the group was to observe
3 [the aneurysm] given its small size.” AR 1036. It was the consensus of her doctors that
4 observation was sufficient. Id. Due to the recommendation to simply observe the aneurysm, the
5 ALJ acted appropriately in finding that plaintiff’s aneurysm is non-severe and does not affect her
6 ability to engage in basic work activities.

7 Plaintiff suffers from a probable Transient Ischemic Attack (TIA) in May of 2014. AR
8 76; 1033. In follow-up medical records from June 12, 2014, a doctor found that plaintiff was
9 stable following her hospital discharge. AR 570. Notably, on September 10, 2014, a doctor
10 found that plaintiff showed “[n]o symptoms concerning for recurrent transient ischemic attack.”
11 AR 593. Thus, the ALJ was correct in finding that plaintiff’s TIA is non-severe.

12 Plaintiff also pursued treatment for chronic reflux esophagitis. AR76. The plaintiff failed
13 to demonstrate that her chronic reflux esophagitis caused anything more than minor irritation.
14 The record indicates that she takes medication for this condition, but the medical record supports
15 a finding that the medication has remedied her discomfort. AR 605. As the plaintiff failed to
16 show how her chronic reflux esophagitis affects her ability to do basic work activities, the ALJ
17 properly found her symptoms to be non-severe.

18 The plaintiff claims to be suffering from anxiety and depression. AR 76. These claims
19 are substantiated only by Dr. Lam’s report. AR 975-79. As stated previously, his report was not
20 reliable. Therefore, it was appropriate for the ALJ to give his testimony little weight. As there
21 are no other indications that plaintiff suffers from anxiety or depression affecting her ability to do
22 basic work activities, the ALJ properly found her anxiety and depression to be non-severe.

23 D. Remand for Further Analysis is Necessary

24 As discussed above, the ALJ improperly dismissed plaintiff’s alleged disability of lupus as
25 non-severe. The undersigned agrees with plaintiff that the ALJ’s error is harmful and finds
26 remand for further proceedings by the Commissioner is necessary. An error is harmful when it
27 has some consequence on the ultimate non-disability determination. Stout v. Comm’r, Soc. Sec.
28 Admin., 454 F.3d 1050, 1055 (9th Cir. 2006). The ALJ’s error in this matter was harmful;

1 plaintiff's lupus, properly considered as a severe impairment, may very well result in a more
2 restrictive residual functional capacity assessment, which may in turn alter the finding of non-
3 disability.

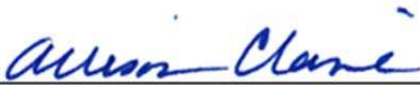
4 Remand for an immediate award of benefits is not appropriate in this case. It is for the
5 ALJ to determine in the first instance whether plaintiff has severe impairments and, ultimately,
6 whether she is disabled under the Act. See Marsh v. Colvin, 792 F.3d 1170, 1173 (9th Cir. 2015)
7 (“the decision on disability rests with the ALJ and the Commissioner of the Social Security
8 Administration in the first instance, not with a district court”). “Remand for further
9 administrative proceedings is appropriate if enhancement of the record would be useful.”
10 Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004). Here, the ALJ failed to properly include
11 plaintiff's lupus as a severe impairment at step two of his analysis. Further development of the
12 record consistent with this order is necessary, and remand for further proceedings is the
13 appropriate remedy.

14 VII. CONCLUSION

15 For the reasons set forth above, IT IS HEREBY ORDERED that:

- 16 1. Plaintiff's motion for summary judgment (ECF No. 13), is GRANTED;
- 17 2. The Commissioner's cross-motion for summary judgment (ECF No. 16), is DENIED;
- 18 3. This matter is REMANDED to the Commissioner for further consideration consistent
19 with this order; and
- 20 4. The Clerk of the Court shall enter judgment for the plaintiff, and close this case.

21 DATED: March 2, 2018

22 
23 ALLISON CLAIRE
24 UNITED STATES MAGISTRATE JUDGE