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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

TERREE SUMMER,

Plaintiff,

v.

NANCY A. BERRYHILL,

Defendant.

Case No. 16-cv-01872-BLF

**ORDER DENYING PLAINTIFF’S  
MOTION FOR SUMMARY JUDGMENT  
AND GRANTING DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT**

[Re: ECF 15]

Plaintiff Terree Summer (“Summer”) appeals from a final decision of Defendant Commissioner of Social Security, denying her application for a period of disability and disability benefits under Title II of the Social Security Act. Before the Court are the parties’ cross-motions for summary judgment, which have been fully briefed. Upon consideration of the briefing submitted and for the reasons set forth below, the Court DENIES Plaintiff’s motion and GRANTS Defendant’s motion.

**I. BACKGROUND**

**A. Factual Background**

Summer, a United States citizen, was born on September 27, 1956. Admin. R. (“AR”) 64, 149. Summer has held a variety of jobs including District Director for U.S. Congress, Vice President of Economic Development for the Chamber of Commerce, and most recently Director of Entrepreneurial Services at Arizona State University. *Id.* at 40. On June 4, 2012, Summer filed an application for a period of disability and disability insurance benefits beginning April 26, 2010. *Id.* at 20. Summer filed her initial claim for disability resulting from the following conditions: rheumatoid arthritis (“RA”), asthma, Grave’s Disease, irritable bowel syndrome (“IBS”), osteoporosis, recurrent sinusitis, and a compromised immune system due to RA medications. *Id.*

1 at 65. Summer’s initial application was denied on October 9, 2012. *Id.* at 20. Summer filed for  
2 reconsideration on November 30, 2012, which was later denied on July 16, 2013. *Id.* at 20, 99.  
3 On July 25, 2013, Summer requested a hearing before an administrative law judge (“ALJ”), which  
4 was granted. *Id.* at 103-104. At the hearing held on June 17, 2014, ALJ Brenton L. Rogozen  
5 heard testimony from an impartial vocational expert, Victoria Rei, and from Summer herself. *Id.*  
6 at 20. On September 15, 2014, ALJ Rogozen issued a written decision finding Summer not  
7 disabled and thus not entitled to benefits. *Id.* at 20-35. The ALJ’s decision was affirmed by the  
8 Appeals Council on February 22, 2016, making the ALJ’s decision the final decision of the  
9 Commissioner of Social Security. *Id.* at 1-4. Summer now seeks judicial review of the denial of  
10 benefits.

11 **B. Procedural Background**

12 Summer filed a motion for summary judgment on September 13, 2016. Pl.’s Mot. Summ.  
13 J. (“Pl.’s Mot.”), ECF 15. Both parties stipulated to two separate extensions of time in order for  
14 Defendant to file a motion for summary judgment. Stip. & Order First Extension for Def.’s Mot.  
15 for Summ. J.; Stip. & Order Second Extension for Def.’s Mot. for Summ. J.; ECF 17, 19. On  
16 November 9, 2016, the Court approved both extensions of time, and the ultimate due date for  
17 Defendant’s motion for summary judgment was November 22, 2016. *Id.* When Defendant did not  
18 file the motion on time, Summer moved for default judgment. ECF 23. In the order denying the  
19 motion for default judgment, the Court stated that the motion for summary judgment was deemed  
20 submitted without opposition. ECF 24.

21 Approximately five and a half months late, on May 9, 2017, Defendant filed a notice,  
22 motion, and memorandum in support of cross-motion for summary judgment and in opposition to  
23 Summer’s motion for summary judgment. Def.’s Mot. for Summ. J (“Opp’n”), ECF 26. In filing  
24 this motion, Defendant did not explain any reason for why the filing was late. *Id.* On May 23,  
25 2017, Summer filed a reply brief. Reply, ECF 27.

26 **II. LEGAL STANDARD**

27 **A. Standard of Review**

28 District courts “have power to enter, upon the pleadings and transcript of the record, a

1 judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security,  
2 with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). However, “a federal  
3 court’s review of Social Security determinations is quite limited.” *Brown-Hunter v. Colvin*, 806  
4 F.3d 487, 492 (9th Cir. 2015). Federal courts “leave it to the ALJ to determine credibility,  
5 resolve conflicts in the testimony, and resolve ambiguities in the record.” *Id.* (quoting *Treichler*  
6 *v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014)).

7 A court “will disturb the Commissioner’s decision to deny benefits only if it is not  
8 supported by substantial evidence or is based on legal error.” *Brown-Hunter*, 806 F.3d at 492  
9 (internal quotation marks and citation omitted). “Substantial evidence is such relevant evidence as  
10 a reasonable mind might accept as adequate to support a conclusion, and must be more than a  
11 mere scintilla, but may be less than a preponderance.” *Rounds v. Comm’r of Soc. Sec. Admin.*,  
12 807 F.3d 996, 1002 (9th Cir. 2015) (internal quotation marks and citations omitted). A court  
13 “must consider the evidence as a whole, weighing both the evidence that supports and the  
14 evidence that detracts from the Commissioner’s conclusion.” *Id.* (internal quotation marks and  
15 citation omitted). If the evidence is susceptible to more than one rational interpretation, the ALJ’s  
16 findings must be upheld if supported by reasonable inferences drawn from the record. *Id.*

17 Finally, even when the ALJ commits legal error, the ALJ’s decision will be upheld so long  
18 as the error is harmless. *Brown-Hunter*, 806 F.3d at 492. However, “[a] reviewing court may not  
19 make independent findings based on the evidence before the ALJ to conclude that the ALJ’s error  
20 was harmless.” *Id.* The court is “constrained to review the reasons the ALJ asserts.” *Id.*

## 21 **B. Standard for Determining Disability**

22 Disability benefits are available under Title II of the Social Security Act when an eligible  
23 claimant is unable “to engage in any substantial gainful activity by reason of any medically  
24 determinable physical or mental impairment which can be expected to result in death or which has  
25 lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §  
26 423(d)(1)(A).

27 “To determine whether a claimant is disabled, an ALJ is required to employ a five-step  
28 sequential analysis, determining: (1) whether the claimant is doing substantial gainful activity; (2)

1 whether the claimant has a severe medically determinable physical or mental impairment or  
2 combination of impairments that has lasted for more than 12 months; (3) whether the impairment  
3 meets or equals one of the listings in the regulations; (4) whether, given the claimant’s residual  
4 functional capacity, the claimant can still do his or her past relevant work; and (5) whether the  
5 claimant can make an adjustment to other work.” *Ghanim v. Colvin*, 763 F.3d 1154, 1160 (9th  
6 Cir. 2014) (internal quotation marks and citations omitted). The residual functional capacity  
7 (“RFC”) referenced at step four is what a claimant can still do despite his or her limitations. *Id.* at  
8 1160 n.5. “The burden of proof is on the claimant at steps one through four, but shifts to the  
9 Commissioner at step five.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1222 (9th Cir.  
10 2009).

11 **III. DISCUSSION**

12 **A. The Court will Consider the Commissioner’s Late Opposition & Cross-Motion**  
13 **and Amends its Prior Order in Part.**

14 Before turning to the parties’ briefing on the motions for summary judgment, the Court  
15 must decide whether to consider Defendant’s late-filed cross-motion and opposition to Summer’s  
16 motion for summary judgment. The Court construes the filing of Defendant’s cross-motion for  
17 summary judgment and opposition to Summer’s motion for summary judgment also as a motion to  
18 extend the time under Fed. R. Civ. Proc. 6(b). Fed. R. Civ. Proc. 6(b)(1)(B) governs extensions of  
19 time after the relevant deadline has expired and states, in pertinent part:

20 (b) Extending Time.

21 (1) In General. When an act may or must be done within a specified time, the  
22 court may, for good cause, extend the time:

23 . . .

24 (B) on motion made after the time has expired if the party failed to act  
25 because of excusable neglect.

26 Under this rule, when a motion to extend time is filed “after the time has expired,” the  
27 court may extend the time upon a showing of “good cause” and “excusable neglect.” Fed. R. Civ.  
28 P. 6(b)(1)(B). “To determine whether a party’s failure to meet a deadline constitutes ‘excusable  
neglect,’ courts must apply a four-factor equitable test, examining: (1) the danger of prejudice to

1 the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the  
2 reason for the delay; and (4) whether the movant acted in good faith.” *Ahanchian v. Xenon*  
3 *Pictures, Inc.*, 624 F.3d 1253, 1261 (9th Cir. 2010) (citing *Pioneer Inv. Servs. Co. v. Brunswick*  
4 *Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993)).

5 A district court abuses its discretion by failing to engage in this four-factor test or at least  
6 the “equitable analysis” captured by the test. *Ahanchian*, 624 F.3d at 1261. Additionally, a  
7 “district court is given broad discretion in supervising the pretrial phase of litigation, and its  
8 decisions regarding the preclusive effect of a pretrial order . . . will not be disturbed unless they  
9 evidence a clear abuse of discretion.” *The United States v. Thill*, No. 14-29-BLG-SPW-CSO,  
10 2015 WL 12592794, at \*1. (D. Mont. Jan. 28, 2015) (citing *Jorgensen v. Cassidy*, 320 F.3d 906,  
11 913 (9th Cir. 2003)) (internal quotation marks and citations omitted). “The law has a strong  
12 preference to determine cases on their merits whenever possible.” *Barg Coffin Lewis & Trapp,*  
13 *LLP v. Arlie & Co.*, No. 14-4740-LB, 2014 WL 7275360, at \*4 (N.D. Cal. Dec. 22, 2014) (citing  
14 *Brandt v. Am. Bankers Ins. Co. of Fla.*, 653 F.3d 1108, 1111-12 (9th Cir. 2011)).

15 Based on the parties’ briefings, the Court first finds that Defendant has not demonstrated  
16 excusable neglect for the late-filed opposition. Defendant submitted a cross-motion for summary  
17 judgment and opposition without any mention of or justification for the delay. *See* Opp’n, ECF  
18 26. As such, the Court determines that Defendant has not demonstrated excusable neglect for the  
19 late-filed cross-motion and opposition. The Court next must determine whether it should exercise  
20 its “broad discretion” to consider Defendant’s cross-motion and opposition nonetheless. *See*  
21 *Thrill*, 2015 WL 12592794, at \*1. While the length of delay is five and a half months, the parties  
22 do not argue and the Court does not find that the delay has impacted the proceeding of this case.  
23 Defendant also proffers no arguments pertaining to the reason for the delay, and whether the  
24 Defendant acted in good faith – so these factors do not weigh strongly in favor of this Court’s  
25 exercise of discretion. Finally, as to “the danger of prejudice” to Summer, the Court  
26 acknowledges that Defendant’s submission was late by nearly five and a half months. However,  
27 aside from noting that Defendant’s motion was filed five and a half months late, Summer did not  
28 provide any argument on whether the Court should consider Defendant’s delayed filing or whether

1 she would be prejudiced if the filing were to be considered. Reply 1. In light of all these factors  
2 and based on the law’s strong preference to determine cases on their merits, *see Barg Coffin Lewis*  
3 *& Trap*, 2014 WL 7275360, at \*4, the Court shall exercise its discretion to consider Defendant’s  
4 late-filed cross-motion and opposition on the merits. Consequently, the Court amends in part its  
5 order issued on December 20, 2017, and will consider Defendant’s cross-motion and opposition to  
6 Summer’s motion. *See* Order Denying Mot. for Default J., ECF 24.

7 **B. The ALJ’s Determination**

8 The ALJ determined that Summer met the insured status requirements of the Social  
9 Security Act through December 31, 2016. AR 22. At step one, the ALJ determined that Summer  
10 had not engaged in substantial gainful activity since her alleged onset date of April 26, 2010. *Id.*  
11 At step two, the ALJ found that Summer had the following severe impairments: “rheumatoid  
12 arthritis[] and status post pulmonary infection with residuals.” *Id.*

13 At step three, the ALJ concluded that Summer did not have an impairment or combination  
14 of impairments that meets or medically equals the severity of one of the listed impairments in 20  
15 C.F.R., Part 404, Subpart P, Appendix 1 (20 C.F.R. 404.1520(d), 404.1525 and 404.1526). *Id.* at  
16 23. The ALJ also found that Summer had the RFC “to perform the full range of sedentary work as  
17 defined in 20 C.F.R. 404.1567(a) and . . . must avoid exposure to heavy concentration of  
18 respiratory contamination and pollutants.” *Id.* At step four, the ALJ found that Summer was  
19 capable of performing past relevant work as a director of education program or vice president of  
20 any industry. *Id.* at 28. The ALJ determined that this work did not require the performance of  
21 work-related activities precluded by Summer’s RFC. *Id.* Thus, the ALJ concluded that Summer  
22 had not been under a disability, as defined in the Social Security Act, from April 26, 2010, through  
23 the date of the decision. *Id.* at 29.

24 Summer challenges the ALJ’s determinations, claiming that the ALJ committed three  
25 errors. Pl.’s Mot. 6–8. First, Summer argues that the ALJ violated a well-established principle by  
26 not analyzing all of her severe impairments. *Id.* at 7. Second, Summer purports that the ALJ’s  
27 credibility finding is erroneous. *Id.* Third, Summer states that the ALJ’s decision ignores the  
28 opinions of numerous treating physicians and therapists. *Id.* at 8. Summer thus concludes the

1 ALJ’s determination must be reversed. *Id.* at 10. In the alternative, Summer requests that the case  
2 be remanded for a new hearing. *Id.* The Court addresses below each of these arguments in turn.

3 **C. The ALJ’s Decision Considered All Plaintiff’s Impairments and Effects**

4 Summer first argues that the ALJ’s decision fails to include all severe impairments and  
5 effects, specifically arguing that her “numerous severe medical impairments” included “Crohn’s  
6 Disease/diverticulitis.” Pl.’s Mot. 6–7. Summer claims that “[n]owhere in the discussion of  
7 severe or non-severe impairments does the ALJ make any mention of Ms. Summer’s diverticulitis  
8 . . . .” *Id.* at 7.

9 Contrary to Summer’s argument, the Court finds that the ALJ properly considered all of  
10 Summer’s impairments and effects in his decision. The ALJ specifically noted that when  
11 determining the RFC, he “must consider all of the claimant’s impairments, including impairments  
12 that are not severe.” AR 21. The ALJ first considered Summer’s testimony that “she has  
13 diverticulitis and a compromised immune system because of the rheumatoid arthritis treatment.”  
14 *Id.* at 24. The ALJ further noted that treatment records from 2010 indicate her recurrent  
15 diverticulitis as confirmed by computed tomography scan. *Id.* Aside from the treatment records  
16 indicating Summer’s recurrent diverticulitis, the ALJ considered additional treatment records from  
17 2010, and found that Summer “was functioning well as manifested by her ability to carry out  
18 activities of daily living and hobbies . . . .” *Id.*

19 Given the detailed decision set forth by the ALJ, Summer’s contention that the ALJ failed  
20 to consider all her impairments is unfounded. *See* Pl.’s Mot. 6-7. The ALJ specifically stated that  
21 when making the RFC determination, he “must consider all of the claimant’s impairments,  
22 including impairments that are not severe.” AR 21. The Court is persuaded by Defendant’s  
23 argument, stating that the central issue is not whether the ALJ has considered Summer’s  
24 diverticulitis because the record clearly shows that the ALJ did. Notably, Summer provides no  
25 argument and points to no evidence in the record showing any legal error or abuse of discretion in  
26 the ALJ’s determination relating to her Crohn’s Disease/diverticulitis. After reviewing the ALJ’s  
27 decision and analysis, this Court concludes that the ALJ has considered all severe impairments and  
28 effects – including diverticulitis in his decision.

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**D. The ALJ Articulated Specific, Clear and Convincing Reasons for the Adverse Credibility Determination Regarding Plaintiff Summer**

Summer next argues that the ALJ erred in failing to fully credit her allegations. Pl.’s Mot. 7. Summer makes two arguments in support of her position. First, Summer argues that the ALJ mischaracterized medical evidence and made a mistake of law when he stated that “the credibility of [her] allegations regarding the severity of her symptoms and limitations is diminished because those allegations are greater than expected in light of the objective evidence of record.” *Id.*; AR 24. Second, Summer argues that the ALJ’s credibility analysis fell short of the “clear and convincing” evidence standard. Pl.’s Mot. 8.

“In assessing the credibility of a claimant’s testimony regarding subjective pain or the intensity of symptoms, the ALJ engages in a two-step analysis.” *Ghanim*, 763 F.3d at 1163 (internal quotation marks and citation omitted). “First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged.” *Id.* (internal quotation marks and citation omitted). “If the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant’s testimony about the severity of the symptoms if she gives specific, clear and convincing reasons for the rejection.” *Id.* (internal quotation marks and citation omitted). An ALJ may not simply “make a single, conclusory statement that ‘the individual’s statements about his or her symptoms have been considered’ or that ‘the statements about the individual’s symptoms are (or are not) supported or consistent.’” *Brown-Hunter*, 806 F.3d at 493.

“[T]he ALJ may not discredit a claimant’s testimony of pain and deny disability benefits solely because the degree of pain alleged by the claimant is not supported by objective medical evidence,” *Orteza v. Shalala*, 50 F.3d 748, 749-50 (9th Cir. 1994) (internal quotation marks and citation omitted), since “subjective descriptions may indicate more severe limitations or restrictions than can be shown by medical evidence alone.” *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006) (citing Titles II & XVI: Assessing Residual Functional Capacity in Initial Claims, Social Security Ruling 96-8p, 1996 WL 374184, at \*5 (S.S.A. July 2, 1996)). However, an individual’s statements about pain or other symptoms “will not alone establish that [an



1 individual is] disabled.” 20 C.F.R. §404.1529(a). When weighing an individual’s credibility, the  
2 ALJ may consider the following factors: “claimant's reputation for truthfulness, inconsistencies  
3 either in claimant's testimony or between her testimony and her conduct, claimant's daily  
4 activities, her work record, and testimony from physicians and third parties concerning the nature,  
5 severity, and effect of the symptoms of which claimant complains.” *Thomas v. Barnhart*, 278  
6 F.3d 947, 958-59 (9th Cir. 2002).

7 Here, the ALJ determined that Summer had reduced credibility based on her RFC to  
8 perform the full range of sedentary work as defined in 20 C.F.R. 404.1567(a) (“Sedentary work  
9 involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like  
10 docket files, ledgers, and small tools.”). For the first step of determining Summer’s credibility, the  
11 ALJ determined that Summer met the first requirement since her “medically determinable  
12 impairments could reasonably be expected to cause the alleged symptoms . . . .” AR 24. For the  
13 second step of determining Summer’s credibility, the ALJ did not note any evidence of  
14 malingering; however, the ALJ reasoned that “the intensity, persistence and limiting effects of  
15 [Summer’s] symptoms [were] not entirely credible to the extent that they [were] inconsistent with  
16 the residual functional capacity herein.” *Id.* at 24-25. The ALJ reasoned that the medical  
17 evidence is consistent with the RFC, but found clear and convincing reasons to discredit Summer  
18 based on the inconsistency with Summer’s allegations of her disabling limitations. *Id.* at 25. In  
19 light of the ALJ’s analysis, the Court finds that the ALJ properly followed the required two-step  
20 process and did not committed any mistake of law.

21 The Court now turns to the evidence in the record that the ALJ relied upon to make an  
22 adverse credibility determination to assess whether the ALJ provided a clear and convincing  
23 reason supported by substantial evidence. *See Brown-Hunter*, 806 F.3d at 488–89; AR 24. The  
24 ALJ first noted that Summer’s testimony concerning the severity of her symptoms and limitations  
25 “are greater than expected in light of the objective evidence of record.” *Id.* While a lack of  
26 objective medical evidence supporting a plaintiff’s subjective complaints cannot provide the only  
27 basis to reject a claimant’s subjective symptom testimony, it is one factor that an ALJ can consider  
28 in evaluating symptom testimony. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997);

1 *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (“Although lack of medical evidence cannot  
2 form the sole basis for discounting pain testimony, it is a factor the ALJ can consider in his  
3 credibility analysis.”). Specifically, Summer alleged that her conditions caused her frequent pain,  
4 fatigue, nausea, double vision, heart palpitations, and other symptoms. AR 24. Yet, the objective  
5 medical evidence suggested otherwise, which the ALJ noted. *Id.* at 25 (“It appears that the  
6 claimant’s flares occur only every few months and do not cause disabling symptoms, as the  
7 claimant is still able to complete her normal, routine activities.”). As another example, Summer  
8 alleges that her condition limited her to do normal routine activities such that she could “only walk  
9 from the car to the garage or from the parking lot to the store,” yet the record indicates that she  
10 attended “Zumba two to three times a week for 60 minutes each session.” *Id.*

11 Additionally, the ALJ noted that Summer “has described a wide variety of activities of  
12 daily living that are compatible with competitive work activity.” *Id.* at 24. For example, Summer  
13 admits that “she is able to do light stretching, use the computer, . . . drive, play piano at church  
14 weekly, and exercise three times a week.” *Id.*; *see Mayes v. Massanari*, 276 F.3d 453, 457, 461  
15 (9th Cir. 2001) (noting that claimant’s “testimony that she could do many daily activities,” such as  
16 watch television, straighten up her house, shop and wash laundry with help, paint by numbers, do  
17 puzzles, listen to music, try to exercise, and sometimes go to lunch and dinner with her boyfriend,  
18 “suggested that she could also work”). Further, the record indicates that Summer has been able to  
19 go on vacation internationally for a couple of weeks at a time, and spend time between Arizona  
20 and California for a couple of weeks at a time. AR 24; *see Tommasetti v. Astrue*, 533 F.3d 1035,  
21 1040 (9th Cir. 2008) (holding that the ALJ properly doubted the claimant’s testimony regarding  
22 the extent of his pain and limitations based on his ability to travel to Venezuela for an extended  
23 time to care for his ailing sister).

24 The Court finds nothing in the record or the ALJ’s decision indicating that the ALJ  
25 mischaracterized the evidence. Moreover, Summer’s ability to engage in extended travel is  
26 inconsistent with her allegations of extreme limitations is a clear and convincing reason in support  
27 of ALJ’s decision to reduce Summer’s credibility. AR 24. The minimal objective evidence of any  
28 significant impairment and the conflicting evidence from Summer herself also constituted

1 substantial evidence in support of the ALJ’s clear and convincing reasons that Summer’s  
2 statements are not entirely credible. *Id.*; see *Bunnell v. Sullivan*, 947 F.2d 341, 346 (9th Cir. 1991)  
3 (“[T]he adjudicator may discredit the claimant’s allegations based on inconsistencies in the  
4 testimony or on relevant character evidence.”). Because the ALJ set forth valid reasons for  
5 diminishing Summer’s credibility, all supported by substantial evidence in the record, the Court  
6 finds that the ALJ properly evaluated the credibility of Summer’s subjective complaints.

7 **E. The ALJ provided sufficient reasons for why he found Dr. Masood’s report**  
8 **probative and rejected the opinion of treating physicians and therapists.**

9 First, Summer argues that the ALJ gave preference to an amended report of Dr. Masood  
10 over the opinions of the aforementioned physicians and therapists (Mr. Randall, Dr. Lewis, and  
11 Dr. Sudduth). Pl.’s Mot. 9. Summer alleges that Dr. Masood’s amended opinion is “far less  
12 restrictive” than the first opinion and was signed a month after Dr. Masood’s only examination of  
13 Summer. *Id.* Summer argues that there is no reason for the change of opinion or the issuance of a  
14 new opinion stated in the record and describes the ALJ’s review of the records as “sketchy at best .  
15 . . .” *Id.* In response, Defendant argues that Summer’s argument is moot “because the ALJ in fact  
16 limited [Summer] to sedentary work consistent with Dr. Masood’s initial opinion.” Opp’n 12.  
17 Defendant reasons that the ALJ only gave Dr. Masood “some weight” and the RFC of sedentary  
18 work generously considered Summer’s subjective complaints. *Id.*

19 Next, Summer argues that the ALJ’s decision improperly ignored the opinions of  
20 numerous treating physicians and therapists – specifically including Dr. Mark Lewis, Dr. Nicole  
21 Suddath, and physical therapist Richard S. Randall. Pl.’s Mot. 8-9. Summer contends that “the  
22 opinions of treating physicians are ordinarily preferred to those of consulting examiners,” and that  
23 these opinions “clearly establish that [she] has no residual functional capacity.” *Id.* at 9. Summer  
24 avers that “the alleged reasons for disregarding the opinions of the treating physicians are not  
25 supported by the regulations or the record,” and argues that the ALJ failed to articulate a reasoned  
26 basis for deviating from the regulations. *Id.* In response, Defendant argues that Summer’s  
27 assertion is misleading as the ALJ is permitted to consider many factors in weighing doctors’  
28 opinions aside from treatment relationships. Opp’n 9; see generally 20 C.F.R. § 404.1527

1 (Evaluating opinion evidence includes consideration of the examining relationship, treatment  
2 relationship, supportability, consistency, specialization, and any other factors that tend to support  
3 or contradict the medical opinion). The Court will discuss below Summer’s objection as to each  
4 of the doctors in turn.

5 “Generally, the opinion of a treating physician must be given more weight than the opinion  
6 of an examining physician, and the opinion of an examining physician must be afforded more  
7 weight than the opinion of a reviewing physician.” *Ghanim*, 763 F.3d at 1160. “If a treating  
8 physician’s opinion is well-supported by medically acceptable clinical and laboratory diagnostic  
9 techniques and is not inconsistent with the other substantial evidence in the case record, it will be  
10 given controlling weight.” *Id.* (internal quotation marks, citation, and brackets omitted).

11 If the treating physician’s opinion is contradicted by the opinion of another physician, the  
12 ALJ may reject the treating physician’s opinion but only based upon “specific and legitimate  
13 reasons that are supported by substantial evidence.” *Id.* (internal quotation marks and citation  
14 omitted). In determining how much weight to give a treating physician’s opinion, the ALJ must  
15 consider the following factors: the length of the treatment relationship and the frequency of  
16 examination by the treating physician, the nature and extent of the treatment relationship between  
17 the patient and the treating physician, the supportability of the physician’s opinion with medical  
18 evidence, and the consistency of the physician’s opinion with the record as a whole.” *Id.* (internal  
19 quotation marks, citation, and brackets omitted). “An ALJ may only reject a treating physician’s  
20 contradicted opinions by providing ‘specific and legitimate reasons that are supported by  
21 substantial evidence.’” *Id.*; *see also Bray*, 554 F.3d at 1228 (“[T]he ALJ need not accept the  
22 opinion of any physician, including a treating physician, if that opinion is brief, conclusory, and  
23 inadequately supported by clinical findings.” (internal quotation marks, citation and alteration  
24 omitted)).

25 **i. Dr. Nayyar Masood**

26 Dr. Nayyar Masood, an internal medicine consultative examiner, assessed Summer. AR  
27 27. Dr. Masood initially assessed Summer with sedentary RFC, specifically regarding her history  
28 of rheumatoid arthritis. *Id.* At the consultative examination, Summer was found to have “limited

1 range of motion of the neck with some paraspinal muscle spasm with mild tenderness posteriorly  
2 about the cervical spine and upper borders of the trapezius.” *Id.* In the initial report, Dr. Masood  
3 determined that Summer was capable of occasional postural activities including bending, stooping,  
4 crouching, crawling, and climbing. *Id.* However, Dr. Masood submitted a corrected report,  
5 increasing Summer’s functionality, indicating that Summer was capable of performing a range of  
6 light residual functional capacity, with lifting and carrying up to 20 pounds occasionally and 10  
7 pounds frequently. *Id.* (citing to Ex. 30F, pp. 3-4). The State agency medical consultants adopted  
8 a majority of Dr. Masood’s assessments and opined that the claimant was capable of less than a  
9 full range of light work with frequent postural activities (including bending, stooping, crouching,  
10 crawling, and climbing). *Id.*

11 The ALJ provided “specific and legitimate reasons that are supported by substantial  
12 evidence” for considering Dr. Masood’s opinion more probative than those of other doctors. The  
13 ALJ gave some weight to the opinion of Dr. Masood, the internal medicine consultative examiner  
14 since the opinion was generally consistent with Summer’s medical treatment history and objective  
15 medical findings. *Id.* The ALJ further determined that the RFC of sedentary work as assessed  
16 took into account the “benign objective findings but also generously consider[ed Summer’s]  
17 subjective complaints.” *Id.* at 28. The ALJ provided specific reasoning for why he gave some  
18 weight to Dr. Masood’s opinions. AR 27. For example, the ALJ considered Summer’s extensive  
19 medical history, limitations, medical evidence, motor examinations, neurological examinations,  
20 and environmental limitations in order to assess Summer’s RFC. *Id.* The ALJ stated that though  
21 Summer “is limited by rheumatoid arthritis, the condition is under excellent management by her  
22 rheumatology specialists.” *Id.* As a result, the ALJ found that “[i]n view of all of the medical  
23 evidence, medical opinions, and other factors discussed above, the limitations on the claimant’s  
24 capacities, which were described earlier in this decision, are considered warranted, but no greater  
25 or additional limitations are justified.” *Id.* Given the consistency with Summer’s medical history  
26 and objective medical findings, the Court finds no error in the weight assigned to Dr. Masood’s  
27 amended opinion.

28 Although Summer takes issue with Dr. Masood’s amending his opinion, Summer fails to

1 explain why the sole fact that Dr. Masood amended his opinion would constitute error on the part  
2 of the ALJ. The Court notes that the only difference between Dr. Masood’s initial opinion and his  
3 amended opinion is in the functional capacity assessment (changing the initial assessment of  
4 “using both hands, she can lift, push or pull up to 5 pounds frequently and 10 pounds  
5 occasionally” to “using both hands, she can lift, push or pull up to 10 pound frequently and 20  
6 pounds occasionally”). AR 648. The ALJ also relied on Dr. Masood’s initial opinion in support  
7 of his finding and not his amended opinion.<sup>1</sup> AR 27-28. Though Summer argues that there is no  
8 reason for Dr. Masood to have altered his opinion, this argument is inapposite because the ALJ  
9 relied on Dr. Massod’s initial opinion. Further, the amendment of the Dr. Masood’s opinion also  
10 does not affect this Court’s review of the ALJ’s decision since the ALJ’s finding that Summer’s  
11 RFC to be consistent with Dr. Masood’s initial opinion is still supported by substantial evidence,  
12 as explained above.

13 **ii. Richard S. Randall, P.T.**

14 Mr. Randall, a physical therapist, performed a Functional Capacity Evaluation (“FCE”) of  
15 Summer on December 18, 2012. AR 482. At the request and referral of Scott E. Davis, Attorney  
16 at Law, Mr. Randall performed an FCE to determine Summer’s current fitness-for-duty and  
17 functional capacity to perform work for compensation or gain. *Id.* In his report, Mr. Randall  
18 recorded his observations of Summer including her cooperation, consistency of performance, pain  
19 behavior, safety, and quality of movement. *Id.* at 485-86. Specifically, Mr. Randall stated that  
20 Summer could not perform work since she was unable to perform “sitting manipulative activities  
21 longer than 20 minutes maximum at one single interval . . . and had difficulty with reaching  
22 forward.” *Id.* at 26. Mr. Randall concluded that Summer “would be unable to perform a job  
23 description at the sedentary work level on a full-time or even part-time basis.” *Id.* at 489.

24 Summer broadly argues that the ALJ’s decision ignored the opinions of Summer’s treating  
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26 <sup>1</sup> “Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or  
27 carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as  
28 one which involves sitting, a certain amount of walking and standing is often necessary in carrying  
out job duties. Jobs are sedentary if walking and standing are required occasionally and other  
sedentary criteria are met.” 20 C.F.R. § 404.1567(a).

1 physical therapist – Richard S. Randall. Pl.’s Mot. 8-9. Defendant disagrees, however, and states  
2 that Summer fails to discuss or challenge the ALJ’s reasoning beyond conclusory assertions of  
3 error. Opp’n 9. Further, the Defendant urges this Court to reject Summer’s argument as lacking  
4 any meaningful details. *Id.*

5 The Court finds that the ALJ did not err by giving little weight to Mr. Randall’s opinions.  
6 The ALJ reasoned that Mr. Randall’s opinion “[was] brief, conclusory, inadequately supported by  
7 clinical findings, and inconsistent with the claimant’s admitted activities.” AR 26. The ALJ  
8 further stated that according to 20 C.F.R. 404.1513(a) and (e), a “physical therapist is not an  
9 acceptable medical source and an opinion that is not from an acceptable medical sources is not  
10 entitled to be given the same weight as a qualifying medical source opinion.” *Id.* Finally, the ALJ  
11 found that Mr. Randall’s opinion was inconsistent with other medical evidence since he noted  
12 “significant physical limitations and deficits that were not noted by other physicians who treated  
13 or examined the claimant.” *Id.*

14 After reviewing ALJ’s reasoning, the record, and the governing authority, the Court  
15 concludes that Mr. Randall is not an “acceptable medical source[ ]” under 20 C.F.R. §  
16 404.1513(a). Rather, Mr. Randall is considered an “other source[ ]” that the ALJ may consider  
17 pursuant to 20 C.F.R. § 404.1513(d). As a result, “the ALJ is free to reject the testimony of an  
18 “other source[ ]” by furnishing reasons germane to that particular witness.” *Bowser v. Comm’r of*  
19 *Soc. Sec.*, 121 F. App’x 231, 239 (9th Cir. 2005) (holding that the ALJ did not commit legal error  
20 by rejecting the opinion of claimant’s physical therapist, a non-medical source, who reached  
21 conclusions that differed significantly from both the claimant’s testimony and the acceptable  
22 medical sources) (citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993)).

23 Further, the ALJ noted that Mr. Randall’s assessments were inconsistent with the  
24 claimant’s admitted activities and other medical evidence. Lay testimony may be discounted if it  
25 conflicts with the medical evidence. *Bowser*, 121 F. App’x at 239. The ALJ’s finding that Mr.  
26 Randall’s assessment is inconsistent with the record is supported by substantial evidence. Not  
27 only do Mr. Randall’s assessments conflict with those of Dr. Masood and the state agency  
28 reviewers, they contradict the testimony provided by Summer at her administrative hearing.

1 Whereas Mr. Randall opined that Summer could sit for no longer than 20 minutes at one single  
2 interval and had a limited ability to perform tasks in the standing position, Summer testified that  
3 she was able to sit for three hours total, stand for 30 minutes at a time, and walk for about 50  
4 minutes at a time. AR 24, 26. Thus, the Court finds the ALJ committed no error in the weight  
5 assigned to the opinion of physical therapist, Mr. Randall.

6 **iii. Dr. Mark Lewis**

7 Dr. Lewis, Summer's internist at the time, relied on the report of Mr. Randall and, at  
8 Summer's request, submitted a letter stating that Summer was able to lift and carry 5 to 10 pounds  
9 rarely. AR 26 (citing Ex. 24F, 4-8). Dr. Lewis further stated that Summer was unable to crawl,  
10 kneel, climb step ladders, or squat and can only sit and stand for 1 to 2 hours with breaks every  
11 hour or so. *Id.* Dr. Lewis opined that "due to the claimant's age, chronic medical conditions, and  
12 consistent medication side effects, the claimant would be unable to sustain gainful employment."  
13 *Id.*

14 Similar to the arguments pertaining to Mr. Randall, Summer generally argues that ALJ's  
15 decision incorrectly ignored the opinion of Dr. Lewis without pointing to any specific evidence in  
16 the record in support of her argument. Pl.'s Mot. 8-9. Defendant disagrees, however, and states  
17 that Summer fails to discuss or challenge the ALJ's reasoning beyond conclusory assertions of  
18 error. Opp'n 9.

19 The Court finds no error in the ALJ's conclusion that Dr. Lewis' opinion merited little  
20 weight because "the doctor relied almost entirely on the claimant's subjective complaints and the  
21 report of the physical therapist, Mr. Randall, for his assessment of the claimant's condition." AR  
22 26. Though the ALJ noted that the doctor included laboratory reports in his letter, he stated that  
23 the laboratory reports merely supported the existence of medical impairments but did not provide  
24 an appropriate explanation to support the functional assessment. *Id.* The ALJ reasoned that  
25 pursuant to 20 C.F.R. § 404.1527(e) and SSR 96-5<sup>2</sup>, Dr. Lewis' statement was not entitled to

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27 <sup>2</sup> Social Security Ruling 96-5 states that "[f]rom time-to-time, medical sources may provide  
28 opinions that an individual is limited to 'sedentary work,' 'sedentary activity,' 'light work,' or  
similar statements that appear to use the terms set out in our regulations and Rulings to describe  
exertional levels of maximum sustained work capability. Adjudicators must not assume that a



1 controlling weight or special significance since he did not provide an explanation for the  
2 functional assessment with medically acceptable clinical or diagnostic findings. *Id.* at 26-27.

3 The reasoning proffered above by the ALJ supports his exercise of discretion to “reject a  
4 treating physician’s contradicted opinions by providing ‘specific and legitimate reasons that are  
5 supported by substantial evidence.’” *Ghanim*, 763 F.3d at 1163 (internal quotation marks and  
6 citation omitted); *see also Bray*, 554 F.3d at 1228 (“[T]he ALJ need not accept the opinion of any  
7 physician, including a treating physician, if that opinion is brief, conclusory, and inadequately  
8 supported by clinical findings.” (internal quotation marks, citation and alteration omitted)).  
9 Moreover, an ALJ may reject a treating physician’s opinion if it is primarily based on a claimant’s  
10 statements of his own symptoms that have been discounted as incredible. *Tommasetti*, 533 F.3d at  
11 1041 (holding the ALJ’s adverse credibility determination supported the limited rejection of a  
12 doctor’s opinion since it was primarily based on the claimant’s subjective comments concerning  
13 his condition). Given the ALJ’s adverse credibility determination of Summer, as discussed above,  
14 the ALJ has properly rejected Dr. Lewis’ opinion since it was primarily based on Summer’s  
15 subjective comments concerning her condition and the physical therapist’s assessment. *See id.*  
16 Thus, the Court finds that the ALJ committed no error in the weight assigned to the opinion of Dr.  
17 Lewis.

18 **iv. Dr. Nicole Sudduth**

19 Following Dr. Lewis, Summer was under the care of another primary care physician, Dr.  
20 Sudduth. AR 27. On September 9, 2013, Dr. Sudduth submitted an Arthritis Medical Source  
21 Statement, in which she opined specific details of Summer’s restrictive limitations. *Id.* For  
22 example, Dr. Sudduth indicated that Summer could sit for less than two hours in an eight-hour  
23 day, stand and walk for less than two hours in an eight-hour day, rarely lift and carry less than 10  
24 pounds, needed unscheduled breaks, and would be off task from performing even simple work  
25 tasks for 25% of the workday or more. *Id.*

26 Summer reiterates the same argument as for the other doctors discussed above, summarily

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28 medical source using terms such as ‘sedentary’ and ‘light’ is aware of our definitions of these terms.”

1 contending that the ALJ’s decision also incorrectly ignored the opinion of Dr. Sudduth. Pl.’s Mot.  
2 8-9. Defendant also disagrees and states that Summer fails to discuss or challenge the ALJ’s  
3 reasoning beyond her conclusory assertions of error. Opp’n 9.

4 The Court finds that substantial evidence supports the ALJ’s conclusion that the lack of  
5 rationale for Dr. Sudduth’s conclusory statements rendered her of “limited probative value  
6 because the objective evidence [did] not support the highly restrictive limitations assessed.” AR  
7 27. Specifically, the ALJ found that the objective medical evidence was inconsistent with  
8 Summer’s activities of daily living. *Id.* Further, the ALJ noted that Dr. Sudduth did not have a  
9 longitudinal treatment relationship with Summer and that Dr. Sudduth primarily summarized  
10 Summer’s subjective symptoms, her diagnoses, and course of treatment. *Id.* The ALJ reasoned  
11 that Dr. Sudduth did not provide specific medically acceptable clinical or diagnostic findings with  
12 respect to the Summer’s functional abilities and stated that “the checklist-style form appears to  
13 have been completed as an accommodation to the claimant and includes only conclusions  
14 regarding functional limitations without any rationale for those conclusions.” *Id.*

15 In light of the ALJ’s reasoning, the ALJ’s decision to give little weight to Dr. Sudduth’s  
16 opinions is supported by substantial evidence in the record. Not only do Dr. Sudduth’s  
17 assessments conflict with those of Dr. Masood and the state agency reviewers, they contradict the  
18 testimony provided by Summer at her administrative hearing. Whereas Dr. Sudduth opined that  
19 Summer could rarely lift and carry less than 10 pounds, Dr. Masood reported that Summer was  
20 capable of performing a range of light residual functional capacity, with lifting and carrying up to  
21 20 pounds occasionally and 10 pounds frequently. *Id.* Moreover, Dr. Sudduth stated that Summer  
22 could sit for less than two hours a day and walk for less than two hours a day; however, Summer  
23 testified being able to sit for three hours total, stand for 30 minutes at a time, and walk for about  
24 50 minutes at a time. AR 24, 27. Lastly, Dr. Sudduth’s assessment of Summer’s restrictive  
25 limitations is incompatible with Summer’s admitted activities including her ability to do light  
26 stretching, use the computer, take Zumba classes several days per week, drive, play piano at  
27 church weekly, and exercise three times a week. *Id.* Thus, the Court finds no error in the weight  
28 assigned to the opinion of Dr. Sudduth.

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**F. Conclusion**

This Court’s task in performing the very limited review permitted by law is to determine whether the ALJ applied the correct legal standards and whether his written decision is supported by substantial evidence in the record. If the evidence could support either a favorable or an unfavorable outcome for Summer, the ALJ’s decision must be upheld. *Rounds*, 807 F.3d at 1002. In this case, the ALJ applied the correct legal standards and his findings are supported by substantial evidence.

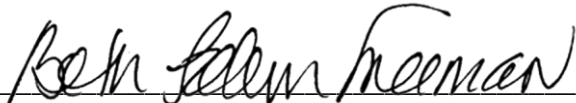
**IV. ORDER**

For the foregoing reasons, IT IS HEREBY ORDERED that:

- 1. Plaintiff Terree Summer’s motion for summary judgment is DENIED; and
- 2. Defendant’s motion for summary judgment is GRANTED.

The Clerk is instructed to close the file.

Dated: July 14, 2017

  
BETH LABSON FREEMAN  
United States District Judge