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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ROBIN P. STIVERS,  
  
Plaintiff,  
  
v.  
  
CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,  
  
Defendant.

Case No. 15-cv-270-BAS(NLS)

**ORDER:**

- (1) OVERRULING DEFENDANT’S OBJECTIONS;**
- (2) APPROVING AND ADOPTING REPORT AND RECOMMENDATION IN ITS ENTIRETY;**
- (3) GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT;**
- (4) DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT; AND**
- (5) REMANDING FOR FURTHER PROCEEDINGS**

**[ECF Nos. 12, 19, 21, 22]**

After receiving chemotherapy for breast cancer in 2008, Plaintiff Robin P. Stivers began suffering from numbness in her extremities, as well as lower back and leg pain. Plaintiff sought a disability determination from Defendant Carolyn W. Colvin, Acting Commissioner of Social Security.

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1 After denial of her application, Plaintiff requested and participated in a hearing  
2 before an Administrative Law Judge (“ALJ”). The ALJ concluded that, although  
3 Plaintiff “has the following severe impairments: degenerative disc disease and  
4 neuropathy in the hands” which “causes significant limitation in the [Plaintiff’s]  
5 ability to perform basic work activities,” her “statements concerning the intensity,  
6 persistence and limiting effects of these symptoms are not entirely credible.” (AR  
7 106, 113, ECF No. 10.) The ALJ concluded Plaintiff’s impairments were not of a  
8 severity to meet or equal the criteria of listed impairments. (AR 107.)

9 In making her decision, the ALJ rejected the opinion of Plaintiff’s treating  
10 physician, Dr. Fareed, that Plaintiff was severely limited due to her cervical  
11 spondylosis, neuropathy, disc displacement and sciatica, and that she would have  
12 difficulty sustaining full-time work due to chronic sciatica and neck disc disorders.  
13 (AR 112-13, 666-67.) Instead, the ALJ accepted the opinions of the agency’s non-  
14 examining physicians that Plaintiff was capable of performing light work. (AR 107.)

15 This Court agrees with United States Magistrate Judge Nita L. Stormes’ Report  
16 and Recommendation (“R&R”) that Plaintiff’s Motion for Summary Judgment  
17 should be **GRANTED**, Defendant’s Motion for Summary Judgment should be  
18 **DENIED**, and the case should be **REMANDED** for further proceedings.

## 19 20 **I. STATEMENT OF FACTS**

### 21 **A. Procedural History**

22 Plaintiff filed concurrent applications for disability insurance benefits and  
23 supplemental security income. (Compl. ¶ 6.) Defendant denied the applications  
24 initially and upon reconsideration. (*Id.*) Plaintiff requested and participated in a  
25 hearing before an ALJ. (*Id.* ¶ 7.) The ALJ denied Plaintiff’s claim for benefits. (*Id.*)  
26 Plaintiff filed a request for review of the ALJ’s decision with the Appeals Council.  
27 (*Id.* ¶ 8.) The Appeals Council denied the request for review, at which time the ALJ’s  
28 decision became the final decision. (*Id.*)

1 Plaintiff now files this Complaint seeking a review of the final decision  
2 denying her application for benefits. (ECF No. 1.) Plaintiff filed a Motion for  
3 Summary Judgment (ECF No. 12), and Defendant filed a Cross Motion for Summary  
4 Judgment (ECF No. 19). On January 15, 2016, Judge Stormes issued an R&R  
5 recommending that Plaintiff's Motion for Summary Judgment be granted,  
6 Defendant's motion for cross-summary judgment be denied, and the case be  
7 remanded for additional proceedings. (ECF No. 21.) Defendant filed objections to  
8 this recommendation. (ECF No. 22.)

9  
10 **B. Plaintiff's Condition**

11 This Court adopts the Statement of Facts outlining Plaintiff's medical history  
12 in the R&R (R&R 2:21-10:6), but adds the following overall summary. In the past,  
13 Plaintiff has worked as a cook, cook supervisor, cashier, and, most recently, a  
14 restaurant owner. (AR 34-35.) In 2008, she had chemotherapy for breast cancer,  
15 after which she began to experience numbness in her hands and feet, and sciatica,  
16 causing pain in her lower back and legs. (AR 33.) By June 1, 2009, Plaintiff testified,  
17 she could no longer work. (*Id.*) She was diagnosed with neuropathy in her feet, legs  
18 and hands, and sciatica. (*Id.*)

19  
20 **C. ALJ Decision**

21 The ALJ issued a decision denying Plaintiff's requests for disability insurance  
22 benefits and supplemental security income. (AR 101-20.) The ALJ concluded that  
23 Plaintiff "has the following severe impairments: degenerative disc disease and  
24 neuropathy in the hands" which "causes significant limitation in the [Plaintiff's]  
25 ability to perform basic work activities." (AR 106.) The ALJ noted that Plaintiff's  
26 treating physician Dr. Fareed "opined that [Plaintiff] would frequently experience  
27 pain or other symptoms severe enough to interfere with her concentration, persistence  
28 and pace in performing work tasks." (AR 110.) Nonetheless, the ALJ concluded

1 “the [Plaintiff] has the residual functional capacity to perform light work as defined  
2 in 20 CFR 404.1567(b) and 416.967(b)” like bartending, acting as a business owner  
3 or cashier. (AR 107.)

4 The ALJ discounted Dr. Fareed’s opinion that:

5 The [Plaintiff] could rarely lift and carry less than ten  
6 pounds and never more; . . . could sit or stand and/or walk  
7 in fifteen-minute intervals for about one hour in an eight-  
8 hour workday and would require a sit-stand at-will option  
9 and the ability to take unscheduled breaks during an eight-  
10 hour workday;...would have no use of either hand for gross  
11 handling, grasping, turning or twisting objects and would  
12 be limited to one-half hour with fine finger manipulation or  
13 reaching her arms in any direction, including overhead; . .  
14 . [and] could rarely bend or stoop and...would need to  
15 recline or lie down during an eight-hour workday due to  
16 chronic sciatica and neck disc disorders.

17 (AR 110-11, 666-67.) The ALJ found that this opinion was not entitled to  
18 “substantial persuasive weight” “due to inconsistencies in the record.” Instead, the  
19 ALJ concluded that Petitioner “could sit or stand and/or walk for six hours in an  
20 eight-hour workday,” “could lift and carry twenty pounds occasionally and ten  
21 pounds frequently,” “could occasionally climb, balance, bend, stop, kneel, crouch or  
22 crawl and frequently perform fine and gross manipulations.” (AR 107.)

23 The ALJ lists the following eight reasons for rejecting Dr. Fareed’s opinion:

- 24 (1) Plaintiff reports doing household chores “such as vacuuming and  
25 mopping, driving a vehicle and weekly grocery shopping.” (AR 112.)
- 26 (2) Dr. Fareed’s notes from his June 22, 2009 exam fail to indicate  
27 “someone experiencing a disabling level of impairment.” (*Id.*)
- 28 (3) Dr. Fareed’s notes from his February 22, 2011 exam similarly failed to  
list Plaintiff’s continuing complaints of a disabling level of impairment.  
(*Id.*)
- (4) The February 1, 2012 MRI scan of plaintiff’s cervical spine “revealed  
no more than some mild abnormalities at levels C4-5 through C6-7, and

1 has shown only mild interval worsening since . . . July 22, 2010.” (*Id.*)

2 (5) The October 29, 2012 MRI scan of Plaintiff’s lumbar spine “showed  
3 only a 2mm symmetric disc bulge at the L4-5 level with bilateral facet  
4 arthropathy resulting in only mild bilateral recess stenosis and minimal  
5 bilateral inferior, neural foraminal narrowing; however, the spinal canal  
6 and neural foraminal were otherwise adequate throughout.” (*Id.*)

7 (6) “The EMG/NCV study performed on May 31, 2013, showed only mild  
8 chronic right L4-5 and L5-S1 radiculopathy without an acute component  
9 and no evidence of peroneal neuropathy.” (AR 112-13.)

10 (7) No physician “ever opined that listing level limitations were ever met or  
11 equaled.” (AR 113.)

12 (8) “The objective evidence of the [plaintiff’s] medical record does not  
13 establish impairments likely to produce disabling pain or other  
14 limitations as alleged for any period of 12 or more continuous months.”  
15 (*Id.*)

16 The ALJ concluded that, although Plaintiff’s “medically determinable  
17 impairments could reasonably be expected to cause the alleged symptoms, . . . the  
18 [plaintiff’s] statements concerning the intensity, persistence and limiting effects of  
19 these symptoms are not entirely credible.” (AR 113.) The ALJ concluded Plaintiff  
20 is capable of performing her past work as a bartender, a business owner, or a cashier.  
21 (*Id.*)

22  
23 **D. The R&R**

24 The R&R recommends that this Court find the ALJ was incorrect when she  
25 discounted Dr. Fareed’s treatment notes and when she rejected Dr. Fareed’s opinion  
26 based on Dr. Stevens’ findings. (ECF No. 21.) The R&R points out: (1) the primary  
27 function of medical records is not to provide evidence for disability determinations;  
28 (2) the ALJ’s opinion failed to consider that Dr. Fareed referred Plaintiff to pain-

1 management specialist Dr. Stevens for treatment of her pain; and (3) the ALJ failed  
2 to consider Dr. Stevens' findings from late 2012 through 2013. (*Id.*) The R&R  
3 recommends this Court remand and that "on remand, the ALJ should provide due  
4 consideration to Dr. Fareed's findings and opinions in light of the evidence from Dr.  
5 Stevens' examination notes and findings that span from October 2012 and forward."  
6 (*Id.*)

## 7 8 **II. LEGAL STANDARD**

9 The court reviews *de novo* those portions of the R&R to which objections are  
10 made. 28 U.S.C. § 636(b)(1). It may "accept, reject, or modify, in whole or in part,  
11 the findings or recommendations made by the magistrate judge." *Id.* But "[t]he  
12 statute makes it clear that the district judge must review the magistrate judge's  
13 findings and recommendations *de novo* if objection is made, but not otherwise."  
14 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc)  
15 (emphasis in original); *see also* *Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226  
16 (D. Ariz. 2003) (concluding that where no objections were filed, the district court had  
17 no obligation to review the magistrate judge's report). "Neither the Constitution nor  
18 the statute requires a district judge to review, *de novo*, findings and recommendations  
19 that the parties themselves accept as correct." *Reyna-Tapia*, 328 F.3d at 1121. This  
20 rule of law is well-established within the Ninth Circuit and this district. *See* *Wang v.*  
21 *Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005) ("Of course, *de novo* review of a  
22 R & R is only required when an objection is made to the R & R."); *Nelson v.*  
23 *Giurbino*, 395 F. Supp. 2d 946, 949 (S.D. Cal. 2005) (Lorenz, J.) (adopting report in  
24 its entirety without review because neither party filed objections to the report despite  
25 the opportunity to do so); *see also* *Nichols v. Logan*, 355 F. Supp. 2d 1155, 1157  
26 (S.D. Cal. 2004) (Benitez, J.).

27 In the social-security context, the district court's jurisdiction is limited to  
28 determining whether the Social Security Administration's denial of benefits is

1 supported by substantial evidence in the administrative record. *See* 42 U.S.C. §  
2 405(g). A district court may overturn a decision to deny benefits only if it is not  
3 supported by substantial evidence or if the decision is based on legal error. *See*  
4 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995); *Magallenes v. Bowen*, 881  
5 F.2d 747, 750 (9th Cir. 1989). The Ninth Circuit defines substantial evidence as  
6 “more than a mere scintilla but less than a preponderance; it is such relevant evidence  
7 as a reasonable mind might accept as adequate to support a conclusion.” *Andrews*,  
8 53 F.3d at 1039. Determinations of credibility, resolution of conflicts in medical  
9 testimony, and all other ambiguities are to be resolved by the administrative law  
10 judge (“ALJ”). *See id.*; *Magallenes*, 881 F.2d at 750. The decision of the ALJ will  
11 be upheld if the evidence is “susceptible to more than one rational interpretation.”  
12 *Andrews*, 53 F.3d at 1040.

### 14 **III. ANALYSIS**

15 “The court reviews only the reasons provided by the ALJ in the disability  
16 determination and may not affirm the ALJ on a ground upon which [s]he did not  
17 rely.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). “Generally the opinions of  
18 examining physicians are afforded more weight than those of non-examining  
19 physicians. *Id.* at 631; *Andrews v. Shalala*, 53 F.3d 1035, 1040-41 (9th Cir. 1995)  
20 (“[M]ore weight is given to a treating physician’s opinion . . . because a treating  
21 physician ‘is employed to cure and has a greater opportunity to know and observe  
22 the patient as an individual.’”). Where the treating doctor’s opinion is contradicted  
23 by another doctor, “the ALJ may not reject [the treating doctor’s] opinion without  
24 providing ‘specific and legitimate reasons’ supported by substantial evidence in the  
25 record.” *Orn*, 495 F.3d at 632 (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th  
26 Cir. 1998)) (internal quotation marks omitted). “The ALJ must do more than offer  
27 [her] conclusions. [Sh]e must set forth [her] own interpretations and explain why  
28 [hers], rather than the doctor’s, are correct.” *Id.*

1            “An ALJ may reject an examining [or treating] physician’s opinion if it is  
2 contradicted by clinical evidence. But an ALJ does not provide clear and convincing  
3 reasons for rejecting an examining physician’s opinion by questioning the credibility  
4 of the patient’s complaints where the doctor does not discredit those complaints and  
5 supports his ultimate opinion with his own observations.” *Ryan v. Comm’r of Soc.*  
6 *Sec.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008).

7            A finding that a treating source medical opinion is not well-  
8 supported by medically acceptable clinical and laboratory  
9 diagnostic techniques or is inconsistent with the substantial  
10 evidence in the case record means only that the opinion is  
11 not entitled to ‘controlling weight’ not that the opinion  
12 should be rejected. Treating source medical opinions are  
13 still entitled to deference and must be weighed using all of  
14 the factors [listed by the Administration].

15 S.S.R. 96-2p at 4 (Cum. Ed. 1996) (available at 61 Fed. Reg. 34,490-91 (July 2,  
16 1996)). Those factors include: (1) “the length of the treatment relationship and the  
17 frequency of examinations,” (2) “the nature and extent of the treatment relationship,”  
18 (3) “the amount of relevant evidence that supports the opinion,” (4) “the consistency  
19 of the medical opinion with the record as a whole,” (5) “the specialty of the physician  
20 providing the opinion,” (6) “other factors such as the degree of understanding a  
21 physician has of the Administration’s disability programs and evidentiary  
22 requirements and the degree of his or her familiarity with the information in the case  
23 record.” 20 C.F.R. § 404.1527(c). “In many cases, a treating source’s medical  
24 opinion will be entitled to the greatest weight and should be adopted, even if it does  
25 not meet the test for controlling weight.” S.S.R. 96-2p at 4.

26            In this case, Dr. Fareed was one of Plaintiff’s treating physicians. He saw  
27 Plaintiff frequently from 2011 to 2013. Nonetheless, the ALJ rejected Plaintiff’s  
28 treating physician’s conclusions based on: (1) Plaintiff’s self-report of housework;  
(2) Dr. Fareed’s own notes; (3) the diagnostic tests; and (4) the ALJ’s conclusion that  
the overall medical record doesn’t “establish impairments likely to produce disabling  
pain or other limitations...for any period of 12 or more continuous months.” (AR



1 112-13.)

2 Defendant objects to the R&R's recommendation for remand, arguing that the  
3 ALJ's reliance on the absence of documentation of debilitating impairment in Dr.  
4 Fareed's treatment and progress notes was only one of many factors for rejecting Dr.  
5 Fareed's opinion. (ECF No. 22.) Defendant argues that the ALJ also relied on other  
6 valid considerations in rejecting Dr. Fareed's opinion. (*Id.*) Hence, this Court  
7 examines each of the ALJ's stated reasons, other than those already addressed in the  
8 R&R.

9  
10 **A. Plaintiff's Performance of Housework**

11 Defendant objects first that the ALJ also bases her rejection of Dr. Fareed's  
12 opinion on Plaintiff's completion of an Exertion Questionnaire. (AR 227-230.) In  
13 that Questionnaire, the ALJ states that Plaintiff admits performing household chores,  
14 such as vacuuming and mopping, driving a vehicle, and weekly grocery shopping.  
15 (AR 112.) The ALJ overrepresents Plaintiff's admissions. In the Questionnaire,  
16 Plaintiff says, "I have pain in my feet and legs weakness. I have a hard time walking  
17 and the top of my toes are numb." "I cook, vac, mop, I have to sit down every 10  
18 min. so it take me all day to do this thing." (AR 227.) She admits vacuuming and  
19 mopping only once a week, and says she has difficulty finishing. (AR 228.) Plaintiff  
20 indicates she drives to the grocery store 16 miles away but "it is very painful for me."  
21 (*Id.*) She always has a wheelchair to shop. (*Id.*) At the grocery store, she uses a  
22 powered wheelchair and it takes her hours because she has to stop to rest frequently.  
23 (*Id.*)

24 This hardly constitutes a contradiction of Dr. Fareed's ultimate opinion that  
25 "[Plaintiff] would frequently experience pain and or other symptoms severe enough  
26 to interfere with her concentration, persistence and pace in performing work tasks."  
27 (AR 666-67.) *See Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) ("This  
28 court has repeatedly asserted that the mere fact that a plaintiff has carried on certain

1 daily activities . . . does not in any way detract from her credibility as to her overall  
2 disability.”); *Reddick*, 157 F.3d at 722 (“[D]isability claimants should not be  
3 penalized for attempting to lead normal lives in the face of their limitations.”).  
4

5 **B. Dr. Fareed’s Notes**

6 Defendant argues the ALJ rejected Dr. Fareed’s opinion, not only because he  
7 failed to note complaints of neck and back pain, but also because his observations:  
8 that her neck was supple, her musculoskeletal system was unremarkable and  
9 essentially unchanged, her back had no spot tenderness, her motor and sensory  
10 systems were intact and unchanged from before, and her gait and balance were  
11 normal, were inconsistent with his ultimate opinion that Plaintiff was disabled. (ECF  
12 No. 22.)

13 None of these observations directly contradict Dr. Fareed’s ultimate opinion.  
14 The fact that a patient ambulates normally or seems to have no problems with her  
15 gait is not dispositive on whether she is in pain or able to stand for periods of time.  
16 Dr. Fareed never opined that Plaintiff was unable to walk at all. Instead, he concluded  
17 that she could not sit or stand for lengthy periods of time and would need to take  
18 frequent breaks to lie down. (AR 666-67.) He opined that she would have difficulty  
19 sustaining full-time work due to chronic sciatic and neck disc disorders. (AR 667.)  
20 These conclusions are not directly contradicted by his progress notes.

21 Furthermore, as the R&R points out, the ALJ’s reasoning fails to consider Dr.  
22 Fareed’s treatment notes within the context of the medical records as a whole. *See*  
23 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). Dr. Fareed referred  
24 Plaintiff to outside specialists to treat her complaints, many of whom did note  
25 confirmation of her problems. Neurologist Dr. Monis noted Plaintiff was “unable to  
26 touch her feet,” had “limited extension and lateral rotation,” “diminished reflexes”  
27 and “diminished pin prick and temperature sensation” in her lower extremities. (AR  
28 382.) Surgeon Dr. Camberos noted significant peripheral neuropathy, which led him

1 to perform carpal-tunnel surgeries on Plaintiff's hands in 2011. (AR 398-451.) Pain-  
2 management specialist Dr. Stevens reflected diagnoses pertaining to neck pain, back  
3 pain and neuropathy throughout 2013, as well as what was done to try to treat them.  
4 (AR 506-09.) The fact that Dr. Fareed deferred to these medical specialists does not  
5 make his opinion any less valid.

### 6 7 **C. The Diagnostic Tests**

8 Defendant objects that the ALJ also rejected Dr. Fareed's opinion based on  
9 three diagnostic tests.

10 On February 1, 2012, Plaintiff had an MRI of her cervical spine which showed,  
11 among other things "stable mild degenerative disc thinning at C4-t and C6-7 and  
12 moderate to moderately severe right foraminal stenosis at C6-7 that showed mild  
13 interval worsening since July 22, 2010." (AR 470.) On October 28, 2012, Plaintiff  
14 had an MRI on her lumbar spine. Impressions indicated a "symmetric disc bulge  
15 with bilateral facet anthropathy, resulting in mild bilateral lateral recess stenosis and  
16 minimal bilateral inferior neural foraminal narrowing." (AR 599-600.) Finally, on  
17 Mary 31, 2013, Plaintiff had an electromyography and nerve conduction velocity  
18 testing (EMG/NCV) which showed "mild chronic right L4-L5-Si radiculopathy."  
19 (AR 597.)

20 The ALJ apparently seizes on the words "mild" throughout these studies to  
21 conclude that the diagnostic tests do not support Dr. Fareed's conclusions that  
22 Plaintiff would have difficulty sustaining full time work. However, "[t]he ALJ must  
23 do more than offer [her] conclusions. [Sh]e must set forth [her] own interpretations  
24 and explain why [hers], rather than the doctor's, are correct." *Orn*, 495 F.3d at 632  
25 (quoting *Reddick*, 157 F.3d at 725). The ALJ's reliance on these diagnostic tests to  
26 discount Dr. Fareed's opinion is not a specific and legitimate reason for rejecting the  
27 treatment doctor's conclusion. In fact, each of the diagnostic tests support  
28 irregularities in Plaintiff's spine—"mild degenerative disc thinning," "moderate to

1 moderately severe...stenosis,” “disc bulge” resulting in stenosis and minimal neural  
2 narrowing, “mild chronic...radiculopathy.” The ALJ fails to indicate why these  
3 irregularities do not support Dr. Fareed’s ultimate conclusion.

4  
5 **D. Overall Record Does Not Establish Disabling Pain**

6 Finally, the ALJ simply concluded that the overall medical record contradicts  
7 Dr. Fareed and doesn’t “establish impairments likely to produce disabling pain or  
8 other limitations . . . for any period of 12 or more continuous months.” (AR 113.)  
9 As noted above, this Court disagrees.

10 An ALJ may not reject a treating physician’s opinion simply by questioning  
11 the credibility of a Plaintiff’s complaints where the doctor does not discredit those  
12 complaints and supports his ultimate opinion with his or other specialist’s  
13 observations. *See Ryan*, 528 F.3d at 1199-1200. Notably in this case, none of the  
14 many doctors and specialists treating or examining Plaintiff indicate any suspicion  
15 that Plaintiff may be malingering or “overstating the intensity, persistence or limiting  
16 effects” of her problems. The ALJ in this case failed to take into consideration the  
17 entire medical record, including the reports of the specialists and the fact that Dr.  
18 Fareed had a long treatment relationship with the Plaintiff and saw her frequently for  
19 her pain.


20  
21 **IV. CONCLUSION & ORDER**

22 Having conducted a *de novo* review of the R&R, the parties’ cross-motions for  
23 summary judgment, and relevant portions of the administrative record, the Court  
24 concludes that Judge Stormes’ reasoning is sound. Therefore, the Court  
25 **OVERRULES** the Defendant’s objections, and hereby approves and **ADOPTS IN**  
26 **ITS ENTIRETY** the R&R. *See* 28 U.S.C. § 636(b)(1). Accordingly, the Court  
27 **GRANTS** Plaintiff’s motion for summary judgment and **DENIES** Defendant’s cross  
28 motion for summary judgment, and **REMANDS** this case for further administrative

1 proceedings. On remand, the ALJ is directed to provide due consideration to Dr.  
2 Fareed's findings and opinions in light of the entire medical record.

3 **IT IS SO ORDERED.**

4  
5 **DATED: March 8, 2016**

  
6 **Hon. Cynthia Bashant**  
7 **United States District Judge**

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