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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 AMY MARIE BRAESCH,

8
9 Plaintiff,

10 v.

11 CAROLYN W. COLVIN,
12 Commissioner of Social Security,

13
14 Defendant.

No. 2:14-CV-00068-JTR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

15
16 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF
17 Nos. 14, 15. Attorney Dana C. Madsen represents Plaintiff, and Special Assistant
18 United States Attorney Jeffrey E. Staples represents the Commissioner of Social
19 Security (Defendant). The parties have consented to proceed before a magistrate
20 judge. ECF No. 7. After reviewing the administrative record and the briefs filed
21 by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment
22 and **DENIES** Plaintiff's Motion for Summary Judgment.

23 **JURISDICTION**

24 On January 10, 2011, Plaintiff filed both a Title II application for a period of
25 disability and disability insurance benefits and a Title XVI application for
26 supplemental security income. Tr. 15; 250. In both applications, Plaintiff alleged
27 disability beginning April 30, 2009. Tr. 15; 209. Plaintiff reported that she was
28 unable to work due to chronic pain, chronic migraines, depression, and a brain

1 aneurysm. Tr. 220. The claims were denied initially and on reconsideration, and
2 Plaintiff requested an administrative hearing. Tr. 15; 99-160.

3 On November 14, 2012, Administrative Law Judge Marie Palachuk presided
4 over a hearing and heard testimony from medical experts Alan J. Coleman, M.D.
5 and Kent Layton, Ph.D., vocational expert Scott Whitmer, and Plaintiff, who was
6 represented by counsel. Tr. 36-76. On November 29, 2012, the ALJ issued a
7 decision finding Plaintiff not disabled. Tr. 15-31. The Appeals Council declined
8 review. Tr. 1-5. The instant matter is before this court pursuant to 42 U.S.C. §
9 405(g).

10 **STATEMENT OF FACTS**

11 The facts have been presented in the administrative hearing transcript, the
12 ALJ's decision, and the briefs of the parties and thus, they are only briefly
13 summarized here. At the time of the hearing, Plaintiff was 35 years old, 5'4" tall,
14 weighed 190 pounds, and she was living in a shelter, with two of her three
15 children, ages 8 and 2. Tr. 59. Plaintiff graduated from high school and completed
16 two years of college. Tr. 60.

17 Plaintiff's worked as a caregiver, but she said she stopped working in 2009
18 because of chronic migraines. Tr. 61. Plaintiff also worked at fast food
19 restaurants, and as a telephone solicitor. Tr. 68; 71.

20 Plaintiff said she has migraines every day that last "[a]ll day long." Tr. 61.
21 Plaintiff estimated that 20 days per month, her migraines are 10 out of 10 on the
22 pain scale. Tr. 62. She said hydrocodone helped alleviate the migraines. Tr. 62.
23 Plaintiff also testified that she has pain in her lower back, neck and hip, and once a
24 month she develops a rash all over her hands, hips, and feet. Tr. 63-64.

25 In her adult disability report, Plaintiff indicated that she gets up in the
26 morning, cares for the children and drives them to school. Upon her return, she
27 lies down for much of the day, and sometimes performs household chores. Tr.
28 221. She grocery shops once a month for about an hour at a time. Tr. 223.

1 prevents him from engaging in his previous occupation. 20 C.F.R. §§
2 404.1520(a)(4), 416.920(a)(4). If a claimant cannot do his past relevant work, the
3 ALJ proceeds to step five, and the burden shifts to the Commissioner to show that
4 (1) the claimant can make an adjustment to other work; and (2) specific jobs exist
5 in the national economy that claimant can perform. *Batson v. Commissioner of*
6 *Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004). If a claimant cannot make an
7 adjustment to other work in the national economy, a finding of “disabled” is made.
8 20 C.F.R. §§ 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

9 **ALJ’S FINDINGS**

10 At step one of the sequential evaluation process, the ALJ found Plaintiff has
11 not engaged in substantial gainful activity since April 30, 2009, the alleged onset
12 date. Tr. 17. At step two, the ALJ found Plaintiff suffered from the severe
13 impairments of

14 [F]ibromyalgia versus chronic pain; headaches; obesity; mood
15 disorder versus major depressive disorder; generalized anxiety
16 disorder; personality disorder with passive aggressive features; and
17 polysubstance abuse of alcohol, marijuana and prescription drugs.

18 Tr. 17.

19 At step three, the ALJ found Plaintiff’s impairments, alone or in
20 combination, do not meet or medically equal the severity of one of the listed
21 impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§
22 416.920(d), 416.925 and 416.926). Tr. 18. The ALJ found Plaintiff has the
23 residual functional capacity to perform sedentary work. Tr. 20. She is also limited
24 to occasional public interaction, minimal coworker interaction, working
25 independently with infrequent supervision, and she needs additional time to adapt
26 to changes in the work setting/routine. Tr. 20. At step four, the ALJ found that
27 Plaintiff is unable to perform any past relevant work. Tr. 29. At step five, the ALJ
28 found that considering Plaintiff’s age, education, work experience and residual

1 functional capacity, jobs exist in significant numbers that Plaintiff can perform,
2 such as stuffer, surveillance system monitor and cashier II. Tr. 30. As a result, the
3 ALJ concluded that Plaintiff has not been disabled within the meaning of the
4 Social Security Act at any time from the date the application was filed through the
5 date of the decision. Tr. 31.

6 ISSUES

7 Plaintiff contends that the ALJ erred by (1) failing to find lupus was a severe
8 impairment at step two; (2) finding Plaintiff was not credible; and (3) improperly
9 weighing the medical evidence.

10 A. Step Two

11 Plaintiff contends that the ALJ erred by failing to find that lupus was a
12 severe impairment. ECF No. 14 at 11.

13 The ALJ noted that the record contained the mention of “lupus” but as Dr.
14 Coleman, observed that only one test was positive, and all other tests were
15 negative. Tr. 18. As a result, the ALJ concluded that insufficient evidence existed
16 to diagnose lupus, and even if the diagnosis was made, the symptoms were
17 extremely mild and thus did not qualify as a severe impairment. Tr. 18.

18 The step two inquiry is a *de minimis* screening device to dispose of
19 groundless or frivolous claims. *Bowe*, 482 U.S. at 153-154. To establish a severe
20 impairment at step two, Plaintiff must provide evidence of a medically
21 determinable impairment which can be shown to be the cause of his or her alleged
22 symptoms. 20 C.F.R. §§ 404.1529, 416.929. In claims that lack medical signs or
23 laboratory findings that substantiate the existence of a medically determinable
24 physical or mental impairment, the claimant “must be found not disabled at step 2
25 of the sequential evaluation process.” SSR 96-4p.

26 Under these standards, Plaintiff may only establish an impairment if the
27 record includes signs -- the results of "medically acceptable clinical diagnostic
28 techniques," such as tests -- as well as symptoms, i.e., Plaintiff’s representations

1 regarding her impairment. *See Ukolov v. Barnhart*, 420 F.3d 1002, 1005 (9th Cir.
2 2005). Moreover, an impairment is deemed “not severe” when the evidence
3 establishes the impairment imposes, at most, a "slight abnormality" on an
4 individual's ability to work. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988).
5 Finally, a diagnosis may be made only by an acceptable medical source. *Nguyen v.*
6 *Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) (medical diagnoses are beyond the
7 competence of other source witnesses); S.S.R. 06-03p ("other sources" cannot
8 establish the existence of a medically determinable impairment); 20 C.F.R. §§
9 404.1513(d), 416.913(d).

10 In this case Plaintiff argued, without citation to the record, that lupus “was
11 confirmed by examination by her treating physicians and objective testing.” ECF
12 No. 14 at 11. However, the record lacks a lupus diagnosis by an acceptable
13 medical source. On February 9, 2012, Debra Gore, M.D., included lupus as a
14 diagnosis, but the record contains no evidence of testing that established that
15 diagnosis. Tr. 572.

16 On April 24, 2012, Tabitha Wynecoop, LPN, examined Plaintiff. Tr. 662-
17 67. Ms. Wynecoop observed that Plaintiff’s rash on her hands seemed to be
18 resolved and noted, “she has had positive SSA and SSB antibodies and dry eyes
19 and dry mouth and may have an undifferentiated connective tissue disease.” Tr.
20 662. On August 27, 2012, Ms. Wynecoop again examined Plaintiff and noted
21 Plaintiff’s rash had migrated from Plaintiff’s hands to her thighs, and Plaintiff had
22 sores in her mouth. Tr. 668. Ms. Wynecoop’s notes comment on the lack of
23 definitive diagnosis:

24
25 I spoke with Dr. Reed today who thinks the rash is consisted with
26 erythema multiforme. Dr. Reed would like to see her and find out
27 what triggers this.

28 ...

1 2. +ANA and +SSA and SSB antibodies – it is possible her rash is
2 due to an underlying [connective tissue] disease. She has had dry
3 eyes and mouth at times in the past and it is possible she could have
4 mild Sjogren’s Syndrome. It is not typical to get rashes like this.
5 Lupus can have rashes with blisters and mouth sores.

6 Tr. 668.

7 At the administrative hearing, Alan J. Coleman, M.D., testified that “the
8 evidence that she has lupus is extremely weak. She did have one blood test ...
9 which is a test for Lupus, but it’s not diagnostic.” Tr. 46. Dr. Coleman added
10 Plaintiff’s results from diagnostic tests for lupus were negative. Tr. 46. Finally,
11 Dr. Coleman stated that if Plaintiff did in fact have lupus, it was “very, very, very
12 mild.” Tr. 47.

13 Plaintiff failed to provide evidence from an acceptable medical source that
14 definitively diagnosed her with lupus. Moreover, even if the evidence supported
15 the existence of lupus, the evidence reveals symptoms were extremely mild and
16 thus did not arise to a medically determinable impairment. Thus, the ALJ did not
17 err in determining that lupus was not a severe medical impairment at step two.

18 **B. Credibility**

19 Plaintiff argues that the ALJ erred by finding her not credible. ECF No. 14
20 at 12-13.

21 The ALJ is responsible for determining credibility. *Andrews*, 53 F.3d at
22 1039. Absent affirmative evidence that the claimant is malingering, the ALJ's
23 reasons for rejecting the claimant's testimony must be "clear and convincing."
24 *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). The ALJ's findings must be
25 supported by specific, cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231
26 (9th Cir. 1990). "General findings are insufficient; rather, the ALJ must identify
27 what testimony is not credible and what evidence undermines the claimant's
28 complaints." *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998), quoting *Lester*,

1 81 F.3d at 834. If objective medical evidence exists of an underlying impairment,
2 the ALJ may not discredit a claimant's testimony as to the severity of symptoms
3 merely because they are unsupported by objective medical evidence. *See Bunnell*
4 *v. Sullivan*, 947 F.2d 341, 347-48 (9th Cir. 1991).

5 To determine whether the claimant's testimony regarding the severity of the
6 symptoms is credible, the ALJ may consider, for example: (1) ordinary techniques
7 of credibility evaluation, such as the claimant's reputation for lying, prior
8 inconsistent statements concerning the symptoms, and other testimony by the
9 claimant that appears less than candid; (2) unexplained or inadequately explained
10 failure to seek treatment or to follow a prescribed course of treatment; and (3) the
11 claimant's daily activities. *See, e.g., Fair v. Bowen*, 885 F.2d 597, 602-04 (9th Cir.
12 1989); *Bunnell*, 947 F.2d at 346-47.

13 The ALJ's findings related to Plaintiff's credibility are scattered within the
14 opinion. Tr. 21-23. Plaintiff challenges several findings and each are addressed
15 separately. First, Plaintiff argues fibromyalgia is characterized by intermittent and
16 diffuse symptoms, and the ALJ improperly used these facts to discount Plaintiff's
17 credibility. ECF No. 14 at 12. The ALJ summarized Plaintiff's doctor visits
18 related to her pain complaints. Tr. 21-22. The ALJ observed that the "primary
19 care record consists significantly of just medication refills or visits either unrelated
20 to her fibromyalgia pains or without mention of any specific pain symptoms." Tr.
21 22. The ALJ concluded, "Overall, although the claimant alleges an extreme
22 amount and frequency of body pain secondary to fibromyalgia and chronic pain,
23 the treatment record has shown relatively diffuse and intermittent complaints." Tr.
24 22.

25 The Social Security Administration issued a ruling, effective July 25, 2012,
26 to assist factfinders in the evaluation of fibromyalgia. Social Security Ruling
27 ("SSR") 12-2p. The Ruling provides that once a person is determined to have
28 fibromyalgia her statements about symptoms and functional limitations are to be

1 evaluated according to the two-step process set forth in SSR 96-7p. These policies
2 provide that "[i]f objective medical evidence does not substantiate the person's
3 statements about the intensity, persistence, and functionally limiting effects of
4 symptoms, we consider all other evidence in the case record." SSR 12-2P.

5 In this case, Plaintiff testified that she was in extreme pain. Tr. 62-66. Yet
6 the record reveals Plaintiff only occasionally sought medical treatment for her
7 alleged extreme pain. Notwithstanding the unpredictable nature of fibromyalgia,
8 the ALJ properly found that Plaintiff's allegations of extreme pain are undermined
9 by her failure to seek treatment.

10 Second, Plaintiff argues that the ALJ's finding that Plaintiff failed to comply
11 with recommended medication and treatment for her migraine headaches was
12 erroneous. ECF No. 14 at 13. Plaintiff's argument is not entirely clear, and the
13 argument lacks citation to authority or the record. It appears Plaintiff's complaint
14 is that the record contradicts the ALJ's finding.

15 The ALJ found that Plaintiff had not been "entirely compliant with overall
16 treatment modalities." Tr. 22. As the ALJ found, in June, 2009, Plaintiff asked
17 Dr. Gores to certify she was disabled, but Dr. Gore noted that Plaintiff was not
18 making an effort to improve her symptoms and twice stated that Plaintiff was
19 capable of working. Tr. 22; 363. Also, as the ALJ found, when Plaintiff takes
20 hydrocodone, her headaches improve. Tr. 22; 363.

21 In determining credibility, the ALJ properly relies upon unexplained or
22 inadequately explained failures to seek treatment or to follow prescribed treatment.
23 *Fair*, 885 F.2d at 602-04. "Impairments that can be controlled effectively with
24 medication are not disabling for the purpose of determining eligibility for SSI
25 benefits." *Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir.
26 2006) (impairments that are effectively controlled by medication are not deemed
27 disabling). The record supports the ALJ's findings that Plaintiff failed to regularly
28 seek treatment and comply with treatment recommendations.

1 Third, Plaintiff argues, without citation to the record or authority, that the
2 ALJ erred by relying upon the differential diagnosis of possible malingering and/or
3 substance abuse to find that she lacked credibility. ECF No. 14 at 13. Plaintiff's
4 argument simply stated, "A rule-out diagnosis is merely an indication that a
5 definitive determination of the differential diagnosis cannot be made with existing
6 data." ECF No. 14 at 13. The ALJ noted that Jay Toews, Ed.D., examined
7 Plaintiff and noted Plaintiff advocated vague psychiatric symptoms, no evidence of
8 significant pain and "marginal cooperation in a possible attempt at malingering."
9 Tr. 26. The ALJ also noted "Dr. Toews diagnosed claimant with symptom
10 magnification; rule out malingering of cognitive, memory, affective, and mood
11 problems; alcohol abuse in self-reported full remission; and rule out prescription
12 medication abuse." Tr. 26.

13 The record supports the ALJ's recitation of Dr. Toews' diagnoses. Dr.
14 Toews administered the SIMS test, and Plaintiff's score was 34. Dr. Toews
15 explained that a score of 14 or more are "highly suggestive of deliberate attempts
16 to distort, deceive, or feign a wide range of cognitive, affective, memory and/or
17 psychopathological problems." Tr. 464. Moreover, Dr. Toews related that
18 Plaintiff "scored above the cutoff level on all seven categories, suggesting attempts
19 to misrepresent problems is fairly wide spread." Tr. 464. Dr. Toews observed that
20 Plaintiff's "motivation, effort and interest in testing appeared poor." Tr. 465. Dr.
21 Toews concluded that "it does not appear Plaintiff has cognitive, mood or affective
22 barriers to employability." Tr. 465.

23 Plaintiff's characterization of this issue ignores the fact that Dr. Toews' first
24 diagnosis is "symptom magnification." Tr. 465. Even if an ALJ should not rely
25 upon a differential or a rule-out diagnosis, and Plaintiff has not so established, the
26 ALJ properly relied upon Dr. Toews' diagnosis of symptom magnification in
27 finding Plaintiff had little credibility.

28 Finally, Plaintiff argues that the ALJ erred by relying upon Plaintiff's daily

1 activities to find that she was not credible. ECF No. 14 at 13. Plaintiff’s argument
2 is limited to asserting that Plaintiff “rested between childcare chores.” ECF No. 14
3 at 14. Notwithstanding Plaintiff’s rest periods, the ALJ’s findings that Plaintiff’s
4 daily activities contradict her alleged severe level of impairment are supported by
5 the record. For example, Plaintiff is the sole caregiver for a teenager and two
6 young children. Tr. 27; 59. Plaintiff asserted she can plan and prepare meals,
7 perform light housework including laundry and shop independently. Tr. 27; 223.
8 The ALJ’s findings that Plaintiff’s daily activities contradict her allegations of
9 disabling pain are supported by the record. The ALJ did not err in finding Plaintiff
10 had little credibility.

11 **C. Medical Opinions**

12 Plaintiff contends that the ALJ erred by giving little weight to the opinions
13 from Kent Layton, Psy.D., and John Arnold, Ph.D. ECF No. 14 at 14-15.

14 **1. Kent B. Layton, Psy.D.**

15 Plaintiff argues that the ALJ erred by giving little weight to Dr. Layton’s
16 opinion on the basis that the doctor ignored evidence of Plaintiff’s malingering.
17 ECF No. 14 at 14.

18 Dr. Layton was a reviewing physician who testified at the hearing. Tr. 51-
19 58. The ALJ gave “some weight” to Dr. Layton’s opinion that Plaintiff required
20 additional time to adapt to changes in the workplace, and she was limited to
21 minimal interactions with coworkers, infrequent supervision and occasional
22 contact with the general public. Tr. 28. The ALJ added “However, Dr. Layton
23 completely discounted the mention of ‘malingering,’ within the record, made by an
24 examining source, when reaching his opinions.” Tr. 28. Presumably, the ALJ
25 factored this omission when determining the weight to give Dr. Layton’s opinion.

26 The opinion of an examining physician is entitled to greater weight than the
27 opinion of a nonexamining physician. *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th
28 Cir. 1990); *Gallant v. Heckler*, 753 F.2d 1450 (9th Cir. 1984). The ALJ properly

1 gave the opinion from examining Dr. Toews more weight than the opinion of
2 reviewing Dr. Layton. Moreover, Dr. Layton's opinions about Plaintiff's
3 limitations were incorporated into Plaintiff's RFC, including occasional public
4 interaction, minimal coworker interaction and independent work with infrequent
5 supervision, and the allowance for additional time to adapt to changes in the work
6 setting or routine. Tr. 20. In light of the fact the ALJ incorporated Dr. Layton's
7 assessments of Plaintiff's non-exertional limitations into her RFC, Plaintiff failed
8 to establish error.

9 **2. John Arnold, Ph.D.**

10 Plaintiff contends that the ALJ erred by giving little weight to the opinion of
11 John Arnold, Ph.D., on the basis that his diagnosis of PTSD was not supported by a
12 recitation of the DSM-IV criteria and his diagnosis of borderline intellectual
13 functioning was not supported by testing. ECF No. 14 at 15. Plaintiff argues that
14 Dr. Arnold was not required to recite to the DSM-IV criteria for PTSD, and she
15 argues that the diagnosis was supported by the clinical interview, "MMPI, MCMI-
16 III, review of records and mental status exam." ECF No. 14 at 15.

17 On October 31, 2012, Dr. Arnold administered several objective tests. He
18 reported that the MMPI-2RF profile was invalid, due to "extremely elevated F-r/Fs
19 scales," and her MCMI-III was interpretable, but "somewhat embellished." Tr.
20 680. Dr. Arnold observed "the validity of her assessment results appear to be
21 influenced by a tendency to over emphasize her medical and psychological
22 conditions." Tr. 681. Dr. Arnold stated that Plaintiff's profile "suggested"
23 depression, PTSD and a somatoform disorder. Tr. 681.

24 The ALJ discounted Dr. Arnold's diagnosis of PTSD, because this was the
25 only instance in the record of that particular diagnosis. Tr. 18. Also, the ALJ
26 concluded that insufficient evidence existed to support the diagnoses, because Dr.
27 Arnold failed to set forth in his evaluation a description of the necessary criteria
28 and symptoms required for making the diagnosis under the DSM-IV-TR. Tr. 18.

1 The ALJ cited several other reasons for giving little weight to Dr. Arnold's
2 diagnoses.

3 Notwithstanding the ALJ's inartful wording, it appears that the ALJ rejected
4 the diagnosis of PTSD because the record failed to provide or cite medical
5 evidence – i.e., signs, symptoms and laboratory findings – supporting a diagnosis
6 of PTSD. See DSM-IV-TR 309.81 (PTSD is characterized by persistent symptoms
7 of: "hyper-vigilance," "exaggerated startle response," "difficulty concentrating,"
8 "[d]iminished responsiveness," "persistent symptoms of anxiety," and "markedly
9 reduced ability to feel emotions"). In order to establish the existence of a
10 medically determinable physical or mental impairment, a claimant must provide
11 medical evidence consisting of signs, symptoms, and laboratory findings. SSR
12 96-4p. The existence of an impairment may not be established on the basis of
13 symptoms alone. SSR 96-4p; see also 20 C.F.R. §§ 404.1508, 416.908. Symptoms
14 are "an individual's own perception or description of the impact of his or her
15 physical or mental impairment(s)." SSR 96-4p. By contrast, a medical 'sign' is an
16 anatomical, physiological, or psychological abnormality that can be shown by
17 medically acceptable clinical diagnostic techniques." SSR 96-4p; see also 20
18 C.F.R. §§ 404.1528(a)-(b), 416.928(a)-(b).

19 In this case, Dr. Arnold noted that Plaintiff declared that she had been
20 diagnosed with PTSD. Tr. 680. Dr. Arnold also stated, "her profile also suggests
21 PTSD" Tr. 681. However, Dr. Arnold fails to provide explanation or identify
22 facts that support the diagnosis. An ALJ may discredit physicians' opinions that
23 are conclusory, brief, and unsupported by the record as a whole, or by objective
24 medical findings. *Batson*, 359 F.3d at 1195.

25 It is doubtful that the ALJ would find PTSD a viable diagnosis only if Dr.
26 Arnold "recited" the criteria and symptoms as Plaintiff suggests. But in this case,
27 Dr. Arnold failed to note *any* of the criteria or symptoms as being presented by
28 Plaintiff. In the absence of correlating symptoms, signs and laboratory findings,

1 the ALJ properly gave little weight to the diagnosis of PTSD.

2 **CONCLUSION**

3 Having reviewed the record and the ALJ's conclusions, this court finds that
4 the ALJ's decision is supported by substantial evidence and free of legal error.

5 Accordingly,

6 **IT IS ORDERED:**

7 1. Defendant's Motion for Summary Judgment, **ECF No. 15**, is
8 **GRANTED.**

9 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED.**

10 **IT IS SO ORDERED.** The District Court Executive is directed to file this
11 Order, provide copies to the parties, enter judgment in favor of Defendant, and
12 **CLOSE** this file.

13 DATED January 8, 2015.



A handwritten signature in black ink, appearing to be "M" or "Rodgers".

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JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE