his agreement with the Indiana PAP and to notify the DEA should a relapse occur. I recommend these restrictions apply for three years from the date of the final order so directing this result. In this way, the Respondent may return to the full practice of medicine, and the DEA can assure itself of the Respondent's compliance with DEA regulations and of the protection of the public interest.

Date: November 2, 2011

/s/Gail A. Randall

Administrative Law Judge

[FR Doc. 2012–18750 Filed 7–31–12; 8:45 am]

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## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

**[Docket No. 12–27]**

### James William Eisenberg, M.D.; Decision and Order

On April 5, 2012, Administrative Law Judge Timothy D. Wing issued the attached recommended decision.[1] Neither party filed exceptions to the ALJ's decision.

Having reviewed the entire record, I have decided to adopt the ALJ's findings of fact and conclusions of law except as noted below.[2] Based on a recent action of the Arizona Medical Board, which is discussed more fully below, I reject the ALJ's conclusion that the Arizona Medical Board's ''action reflects a determination that Respondent, notwithstanding findings of unprofessional conduct in the recent past, can be entrusted with a medical license'' and that ''this action * * * weigh[s] against a finding that Respondent's continued registration would be inconsistent with the public interest under Factor One.'' ALJ at 21.

However, I do adopt the ALJ's findings and legal conclusions that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice when, on August 12, 2011, he prescribed both oxycodone and Xanax to an undercover officer, as well as on September 1, 2011, when he prescribed oxycodone to a second undercover officer. ALJ at 30–31. As the ALJ found, substantial evidence supports the conclusion that these were negotiated drug deals in which for an additional fee, Respondent, upon the requests of the undercover officers for the drugs, agreed to prescribe controlled substances and negotiated with the undercover officers over the quantity of the oxycodone and/or the strength of the drug.[3] *See id.* 23–27. Indeed, with respect to the second undercover officer, Respondent agreed to write a prescription for oxycodone before he had even performed a physical examination. *See id.* at 25–26. The findings with respect to the two undercover officers alone establish a *prima facie* case that Respondent has committed acts which render his registration inconsistent with the public interest. *See* 21 U.S.C. 824(a)(4); *see also MacKay* v. *DEA,* 664 F.3d 808, 821 (10th Cir. 2011); *Jayam Krishna-Iyer,* 74 FR 459, 463 (2009) (citing *Alan H. Olefsky,* 57 FR 928, 928–29 (1992)).

While I do not rely on the hearsay evidence cited by the ALJ as support for his conclusion that Respondent was engaged in drug deals, there is other evidence to support the conclusion that Respondent is a drug dealer. I take official notice[4] that on April 4, 2012, the Arizona Medical Board issued to Respondent an Order For Decree Of Censure And Practice Restriction And Consent To The Same. *See In re James W. Eisenberg, M.D.* No. MD–11–1351A (Az. Med. Bd. Apr. 4, 2012). Therein, the Board found, with respect to four patients (including the owner of the clinic where he worked), that Respondent:

> Failed to document any attempt to verify the diagnoses or to obtain medical records, imaging, diagnostic work up or specialty consultation. Respondent failed to consider any non-opioid management other than cannabis, and failed to review the Controlled Substance Prescription Monitoring Program (CSPMP); perform urine drug testing; counsel the patients regarding precaution, risks and safe opioid use; or obtain a standard opioid treating agreement.

*Id.* at 2. The Board further found with respect to these patients, that Respondent:

> Deviated from the standard of care by performing an extremely limited pain history and physical exam, by failing to perform a medical record review or risk assessment for opioid use, by failing to perform a diagnostic evaluation or consider a multidisciplinary approach outside of cannabis and daily opioid, by failing to verify a medical diagnosis appropriately treated with daily high dose opioid, and by failing to monitor for compliance by urine drug testing or review of the CSPMP.

*Id.* at 3. The Board thus concluded that Respondent had committed ''unprofessional conduct,'' by engaging in conduct ''that is or might be harmful or dangerous to the health of the patient or the public'' and by ''failing or refusing to maintain adequate records

[1] All citations to the ALJ's decision are to the slip opinion as originally issued.

[2] I do not adopt the ALJ's footnote 25. *See Kwan Bo Jin,* 77 FR 35021, 35021 n.2 (2012).

Moreover, regarding the ALJ's discussion of whether the Arizona Board's 2011 order, *see* GX 11, which provided that Respondent's admissions were ''not intended or made for any other use, such as in the context of another State or Federal government regulatory proceeding,'' is binding on this Agency, *see* ALJ at 20 n. 29, I further note that DEA has previously held that ''[s]tate officials * * * lack authority to resolve a matter pending before the [Agency] and [a] stipulated settlement [between state officials and a Registrant] cannot bind this Agency.'' *Edmund Chein,* 72 FR 6580, 6590 (2007), *pet. for rev. denied,* 533 F.3d 828 (DC Cir. 2008)). *See also Fourth Street Pharmacy v. DEA,* 836 F.2d 1137, 1139 (8th Cir. 1988) (absent proof of an agency relationship between a state Attorney General and the Agency regarding an agreement between the State and a registrant, a state Attorney General ''could not and did not have authority to bind the DEA to a promise to refrain from instituting lawful regulatory action to revoke'' a registration).

[3] While I adopt the ALJ's findings and legal conclusions that Respondent unlawfully distributed controlled substances to the undercover officers, I rely solely on the evidence regarding the circumstances of their visits with Respondent. To make clear, I reject the ALJ's legal conclusion that the hearsay statement of a former employee of AZ Go Green to the effect ''that Respondent was illegally prescribing oxycodone'' constitutes substantial evidence that Respondent was engaged in drug deals. ALJ at 27 n.35. Contrary to the ALJ's assertion, this information was initially provided by the informant to the Phoenix Police Department, which relayed it to the Arizona Attorney General's Office, which then passed it on to the DEA Special Agent, and was thus hearsay within hearsay within hearsay. Tr. 23.

While the Special Agent testified that he knew the informant had been a former employee, he offered no further evidence to support that the declarant was reliable. *See id.* Most significantly, the Government offered the testimony for the limited purpose of showing what prompted the investigation, *id.* at 69, and when on cross-examination, Respondent's counsel attempted to explore the issue of the informant's potential bias, the Government objected that the inquiry was not relevant to the issue of whether Respondent issued prescriptions for a legitimate medical purpose in the usual course of professional practice. *Id.* at 70–71. Indeed, the Government itself later objected to a further question on cross-examination contending that the informant's statements were hearsay, explaining that it had offered the statements ''just to show why the agents were at AZ Go Green.'' *Id.* at 74.

I agree with the Government and conclude that the statement does not constitute substantial evidence that Respondent was engaged in drug deals. *See Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938) (Substantial evidence * * * means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.''). Instead, I rely on the evidence pertaining to the specific undercover visits.

[4] Under the Administrative Procedure Act (APA), an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). In accordance with the APA and DEA's regulations, Respondent is ''entitled on timely request to an opportunity to show to the contrary.'' 5 U.S.C. 556(e); *see also* 21 CFR 1316.59(e). To allow Respondent the opportunity to refute the facts of which I take official notice, Respondent may file a motion for reconsideration within fifteen days of service of this order which shall commence with the mailing of the order.

on a patient.'' *Id.* at 4 (citing Ariz. Rev. Stat. § 32–1401(27)(q) &(e)). Accordingly, the Arizona Board found that ''a practice restriction is needed in order to protect the public,'' and in addition to issuing a ''Decree of Censure,'' prohibited Respondent ''from prescribing, administering, or dispensing any [c]ontrolled [s]ubstances for a period of five years.'' [5] *Id.*

Substantial evidence also supports a finding that Respondent violated federal law by prescribing controlled substances without being registered in the State of Arizona. *See* ALJ at 35–36 (citing 21 U.S.C. 822(a)(2) & (e); 21 CFR 1301.12(b)(3)); *see also Clarification of Registration Requirements for Individual Practitioners,* 71 FR 69478 (2006).[6] In addition, substantial evidence supports a finding that Respondent violated federal regulations by failing to include required information such as a patient's address on numerous controlled substance prescriptions he issued. ALJ at 31 (citing 21 CFR 1306.05(a)); *see also* GX 3.

I therefore conclude that Respondent has committed acts which render his continued registration inconsistent with the public interest and which support the revocation of his registration. *See* 21 U.S.C. 824(a)(4); *see also* ALJ at 39. Moreover, while the burden then shifted to Respondent to accept responsibility for his misconduct and demonstrate that he will not engage in future misconduct, *see Patrick W. Stodola,* 74 FR 20727, 20734 (2009); the ALJ further found that Respondent lacked ''credibility during numerous material portions of his testimony'' and ''has not accepted responsibility for his * * * misconduct.'' ALJ at 38. *See also MacKay,* 664 F.3d at 821 (''Because Dr. MacKay has not accepted responsibility for his conduct, revocation of his registration is entirely consistent with DEA policy.''). Accordingly, I adopt the ALJ's conclusion that Respondent has not rebutted the Government's *prima facie* case, *id.* at 39; and will order that his registration be revoked and that any pending applications to renew or modify his registration be denied.

[5] Had Respondent been registered in Arizona, the Board's order prohibiting him from dispensing controlled substances would have provided a separate and independent ground to revoke his registration. *See* 21 U.S.C. 824(a)(3).

[6] However, I do not adopt the ALJ's conclusion of law that Respondent violated Arizona Rev. Stat. Ann. § 36–2522(A)(2) because he was not registered in Arizona. The Government raised no such allegation in either the Show Cause Order (ALJ Ex. 1) or its pre-hearing statement (ALJ Ex. 5), and it made no such argument in its brief.

**Order**

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration AE5382724, issued to James William Eisenberg, M.D., be, and it hereby is, revoked. I further order that any pending application of James William Eisenberg, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective immediately.[7]

Dated: July 24, 2012.

**Michele M. Leonhart,**

*Administrator.*

*Carrie Bland, Esq.,* for the Government.

*David K. Demergian, Esq.,* for Respondent.

**Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge**

**I. Introduction**

This proceeding is an adjudication pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq., to determine whether the Drug Enforcement Administration (DEA, Agency or Government) should revoke a physician's DEA Certificate of Registration (COR) as a practitioner pursuant to 21 U.S.C. 824(a)(4) and deny, pursuant to 21 U.S.C. 823(f), any pending applications for renewal or modification and any applications for any other DEA registrations. Without such registration, the physician, James William Eisenberg, M.D. (Respondent), of the State of California, would be unable to lawfully prescribe, dispense or otherwise handle controlled substances in the course of his practice.

On December 14, 2011, the Administrator, DEA, issued an Order to Show Cause and Immediate Suspension of Registration (OSC/IS) to Respondent. The OSC/IS alleged that Respondent's continued registration constitutes an imminent danger to the public health and safety. The OSC/IS also provided notice to Respondent of an opportunity to show cause as to why the DEA should not revoke Respondent's DEA COR AE5382724, pursuant to 21 U.S.C. 824(a)(4), and deny any pending applications for renewal or modification of that registration and any applications for any additional registrations, pursuant to 21 U.S.C. 823(f), alleging that Respondent's continued registration is inconsistent with the public interest as that term is defined in 21 U.S.C. 823(f). (ALJ Ex. 1, at 1.)

[7] For the same reasons which led me to order the Immediate Suspension of Respondent's registration, I conclude that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67.

The OSC/IS alleged that Respondent is registered with DEA as a practitioner in Schedules II through V under DEA COR AE5382724 at 8466 Santa Monica Boulevard, West Hollywood, California 90069, with an expiration date of August 31, 2013. (*Id.*) The OSC/IS further alleged the following:

That from August to September 2011, law enforcement personnel conducted two undercover visits to AZ Go Green, a clinic where Respondent authorizes the use of marijuana, located at 426 East Southern Avenue, Suite 102, Tempe, Arizona. That Respondent issued prescriptions for oxycodone, a Schedule II controlled substance, and alprazolam, a Schedule IV controlled substance, to the undercover officers (UCs) without a legitimate medical purpose in the usual course of professional practice, (ALJ Ex. 1, at 1–2);

That Respondent is not authorized by DEA to prescribe, dispense or otherwise handle controlled substances in the State of Arizona; Respondent allowed the UCs to dictate the type and amount of controlled substances prescribed rather than prescribing based on his own medical judgment; and Respondent charged the UCs based on the type of prescriptions rather than on the medical treatment rendered, (ALJ Ex. 1, at 2); and

That Respondent authorized at least 190 controlled substance prescriptions, seventy-five percent of which were for oxycodone, in Arizona without a DEA registration for his Arizona practice location. The prescriptions were issued for other than a legitimate medical purpose in the usual course of professional practice in violation of 21 U.S.C. § 822, 829, 841(a); 21 CFR 1301.12, 1306.04, (*Id.*).

In addition to the allegations set forth in the OSC/IS, the Government also noticed and alleged in its prehearing statement and documentary evidence that Respondent issued controlled substance prescriptions to the owner and employees of AZ Go Green without documenting the prescriptions in their respective patient charts, (ALJ Ex. 5, at 2); Respondent issued prescriptions using a variety of addresses, including the address for AZ Go Green, that were not registered practice addresses with DEA, (*Id.* at 2–3); Respondent failed to include the patients' addresses on prescriptions in violation of 21 CFR 1306.05, (*Id.* at 3); Respondent issued medical marijuana authorizations and cards to the UCs (*Id.* at 3–4); and on February 3, 2012, the Arizona Medical Board (Board) issued an Order for Letter of Reprimand and Consent to the Same (February 3, 2012 Order) finding that Respondent engaged in unprofessional

conduct by knowingly making a false or fraudulent statement in the practice of medicine, (Gov't Ex. 11).[1]

Following prehearing procedures, a hearing was held in Phoenix, Arizona on February 28, 2012, with the Government and Respondent each represented by counsel. Both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties filed proposed findings of fact, conclusions of law and argument. All of the evidence and post-hearing submissions have been considered, and to the extent the parties' proposed findings of fact have been adopted, they are substantively incorporated into those set forth below.

## II. Issue

Whether the record establishes that Respondent's DEA COR AE5382724 as a practitioner should be revoked and any pending applications for renewal or modification of that registration and any applications for additional registrations should be denied on the grounds that Respondent's continued registration would be inconsistent with the public interest pursuant to 21 U.S.C. 824(a)(4) and 823(f).

## III. Evidence and Incorporated Findings of Fact [2]

I find, by a preponderance of the evidence, the following facts:

Respondent graduated with a B.A. degree from the University of Pennsylvania in 1962. He then obtained an M.D. degree in 1967 from the New Jersey College of Medicine.[3] (Tr. 154.) Respondent is licensed to practice medicine in California and Arizona, and he is board certified in internal medicine. (Tr. 154, 158.) Respondent is registered as a practitioner with DEA, with a registered practice address at 8466 Santa Monica Boulevard, West Hollywood, California 90069. (Tr. 28–29; Gov't Ex. 1.)

Respondent practiced at AZ Go Green, located at 325 East Southern Avenue, Suite 120, Tempe, Arizona,[4] from April 2011 until December 2011. (Tr. 154–55; *see* Gov't Ex. 3.) It is undisputed that Respondent did not register AZ Go Green as a practice location with DEA, nor did he register any other Arizona practice location with DEA. (Tr. 165.) Although he is still licensed to practice medicine in Arizona, Respondent no longer practices there. He now conducts medical marijuana evaluations and practices pain management in California. (Tr. 155.)

### *B. The Government's Evidence*

The Government's evidence included testimony from Special Agent (SA) Stephen Lamkin (SA Lamkin) and two UCs—Officer Dustin Melton (Officer Melton) and Officer Bradford Knights (Officer Knights). In addition to testimonial evidence, the Government also introduced various documentary evidence, including, among others: an audio recording and transcript of one undercover visit with Respondent at AZ Go Green; [5] copies of prescriptions issued by Respondent to the UCs and other patients; [6] patient files for the UCs and other patients; [7] and the February 3, 2012 Order entered by the Board.[8]

SA Lamkin [9] testified that DEA began investigating AZ Go Green and Respondent in the summer of 2011, after a former employee of AZ Go Green filed a complaint with the Phoenix Police Department that AZ Go Green was illegally distributing marijuana [10] and oxycodone. (Tr. 22–23, 69–71, 75.) Respondent was the physician at AZ Go Green, responsible for ''assessing and diagnosing patients who came in seeking medical marijuana.'' (Tr. 23.)

SA Lamkin testified that DEA set up four undercover visits, using three UCs, in an attempt to obtain marijuana or pharmaceuticals from AZ Go Green. (Tr. 23–24, 77–78.) On all four visits, the UCs obtained marijuana, and on two of the visits, the UCs obtained prescriptions for oxycodone.[11] (Tr. 26.) The first UC, Officer Melton, went to AZ Go Green on two occasions using the undercover name ''Dustin Darrow.'' (Tr. 48–49.) On his first visit, Officer Melton received prescriptions for 120 tablets of oxycodone 30 milligrams and 90 tablets of Xanax 2 milligrams. (Tr. 50; Gov't Ex. 3, at 1.) Officer Melton did not get oxycodone on his second undercover visit because J.C., the owner of AZ Go Green, told Officer Melton that he could not see Respondent. (Tr. 78–79.) The second UC, Officer Knights, conducted one undercover visit to AZ Go Green using the undercover name ''Bradley Kites.'' (Tr. 50, 77–78.) Officer Knights obtained a prescription for 150 tablets of oxycodone 15 milligrams. (Tr. 50; Gov't Ex. 3, at 6–7.) The third UC, patient L.V., was denied an oxycodone prescription. (Tr. 78.)

SA Lamkin testified that he obtained the prescription monitoring profile for Respondent through the Arizona Controlled Substances Prescription Monitoring Program (CSPMP),[12] which showed that Respondent had issued controlled substance prescriptions in the State of Arizona. (Tr. 33.) SA Lamkin explained, however, that the CSPMP report should not have shown any prescriptions issued by Respondent in Arizona because Respondent did not have a DEA registration in Arizona. (Tr. 30, 32–33.) Respondent's only DEA registration was issued for a practice address at 8466 Santa Monica Boulevard, West Hollywood, California 90069. (Tr. 28–29, 30, 32–33; *see* Gov't Ex. 1.) SA Lamkin explained that if a practitioner maintains a clinic in Arizona, the practitioner must have a DEA registration for Arizona for that practice location. (Tr. 30.)

SA Lamkin testified that he retrieved some of the prescriptions issued by Respondent in Arizona, including those issued to the UCs. (Tr. 33–34; Gov't Ex. 3.) Additionally, SA Lamkin testified that on September 29, 2011, he executed a search warrant at AZ Go Green, where he seized approximately eight patient files, as well as other documentary

[1] I find in this case that the Government's prehearing statements and documentary evidence noticed during prehearing procedures comports with the due process requirement to ''provide a Respondent with notice of those acts which the Agency intends to rely on in seeking the revocation of its registration so as to provide a full and fair opportunity to challenge the factual and legal basis for the Agency's action.'' *CBS Wholesale Distributors,* 74 Fed. Reg. 36,746 (DEA 2009) (citing *NLRB* v. *I.W.G., Inc.,* 144 F.3d 685, 688–89 (10th Cir. 1998); *Pergament United Sales, Inc.,* v. *NLRB,* 920 F.2d 130, 134 (2d Cir. 1990)).

[2] In addition to the evidence discussed in this Section, additional evidence and findings of fact are discussed in later sections of this Recommended Decision.

[3] After graduating from medical school, Respondent interned in the Columbia Division at Belleview Hospital in New York City, and then completed his residency in internal medicine in the Columbia Division at Harlem Hospital in New York City in 1970. (Tr. 154.) He worked as a senior resident and assistant chief resident at New York Hospital/Cornell Medical Center from 1970 to 1971, during which time he was a post-doctoral fellow at the Rockefeller University in New York. (*Id.*)

[4] *But see* ALJ Ex. 1, at 1 (alleging that AZ Go Green is located at 426 East Southern Avenue, Suite 102, Tempe, Arizona).

[5] Gov't Ex. 2.

[6] Gov't Ex. 3.

[7] Gov't Exs. 4–9.

[8] Gov't Ex. 11.

[9] SA Lamkin has been a special agent with DEA for sixteen years. He has been assigned to the Diversion Group, which investigates the illegal use and distribution of pharmaceutical grade controlled substances, since 2005. (Tr. 22.)

[10] SA Lamkin testified that when the investigation was initiated, ''[t]here was no medical marijuana dispensaries allowed to be operating at that time in the state. There was a hold from the Department of Health Services on medical marijuana dispensaries licensing and operating * * *.'' (Tr. 82–83.)

[11] One prescription for oxycodone was entered directly into evidence and the other was actually filled at the pharmacy by the UC. (Tr. 26.)

[12] SA Lamkin testified that the CSPMP is a prescription monitoring program set up by the Arizona Board of Pharmacy that monitors any controlled substances, as defined by Arizona statutes. (Tr. 26–27.) The prescription monitoring profile for Respondent shows ''all of the prescriptions he had written for patients * * * in Arizona that had been filled. * * * The [CS]PMP lists the patient's address as it's given on the prescription.'' (Tr. 28.)

evidence and marijuana products. (Tr. 35–37, 61; Gov't Exs. 4–9.) Although there were more patient files at AZ Go Green, SA Lamkin testified that DEA only seized the patient files ''to show what we needed to show. To marry it up with actual undercover visits or people who were employees of the clinic who probably shouldn't have been getting marijuana in any case from a doctor that worked at the clinic.'' (Tr. 62, 67–68.)

SA Lamkin testified that Respondent issued controlled substance prescriptions to patients M.F., L.H., and R.B., who were all AZ Go Green employees. (Tr. 38–45, 52–54; *see* Gov't Ex. 4, at 4.) In particular, Respondent issued a prescription for oxycodone to M.F. on June 30, 2011. (Tr. 38–40; Gov't Ex. 3, at 23.) On September 2, 2011, Respondent issued a prescription for testosterone to L.H. (Tr. 44–45, 90–91; Gov't Ex. 3, at 25.) Between April 1, 2011 and August 12, 2011, Respondent issued the following controlled substance prescriptions to R.B.: four prescriptions for oxycodone; two prescriptions for Xanax; one prescription for codeine syrup; two prescriptions for Percocet; and one prescription for Adderall. (Tr. 53; Gov't Ex. 3, at 2–3, 8–11, 16–18, 21–22.) SA Lamkin testified that none of these prescriptions were documented in the patient files for M.F., L.H., and R.B. (Tr. 43, 45, 53; Gov't Exs. 4–5, 9.) [13]

Additionally, between April 1, 2011 and October 20, 2011, Respondent issued twelve controlled substance prescriptions to J.C., the owner of AZ Go Green. Specifically, Respondent issued eight prescriptions for oxycodone, two prescriptions for Xanax, one prescription for Adderall, and one prescription for Vicodin. (Tr. 46–47; *see* Gov't Ex. 3, at 2–7, 12–15, 17–20, 24.) SA Lamkin testified that there is nothing contained within J.C.'s patient file to indicate that Respondent issued these prescriptions to J.C. (Tr. 48; *see* Gov't Ex. 6.)

Finally, SA Lamkin testified that the controlled substance prescriptions issued to the UCs were not documented in the patient files for ''Dustin Darrow'' and ''Bradley Kites.'' (Tr. 50–51; Gov't Exs. 7–8.)

Although the prescriptions issued to the UCs and AZ Go Green employees were not documented in the patient files, SA Lamkin testified the prescriptions were ''probably'' written on duplicate or triplicate prescription pads. (Tr. 85.) SA Lamkin testified that there was a prescription pad in Respondent's exam room that may have contained the carbon copies of the prescriptions. (Tr. 88–89, 93.) SA Lamkin testified that he was not medically qualified to assess the appropriateness of the prescriptions, but he is ''qualified to comment on whether [Respondent] met recordkeeping standards'' with respect to those prescriptions and patient files. (Tr. 89, 90, 92, 96, 98, 99.)

Finally, SA Lamkin testified that in the course of his investigation of Respondent and AZ Go Green, he learned that the Board entered the February 3, 2012 Order against Respondent. SA Lamkin understood that the February 3, 2012 Order was the result of Respondent's failure to query the CSPMP before issuing prescriptions. (Tr. 56–57, 84–85; Gov't Ex. 11.)

Officer Melton [14] testified that in August 2011, SA Lamkin asked him to assist with the investigation of Respondent and AZ Go Green. (Tr. 106, 120.) On August 12, 2011, Officer Melton participated in an undercover visit to AZ Go Green, where his mission was to obtain a doctor's referral for a medical marijuana card, marijuana, prescription pills and any other drugs. (Tr. 107, 120.) Officer Melton went into AZ Go Green using the alias ''Dustin Darrow.'' (Tr. 107.) When he arrived at AZ Go Green, he was told he had to leave his bag, which contained a recording device, with security. (Tr. 107–08.) He then went to the receptionist and told her that he wanted to obtain a doctor's referral for a medical marijuana card. She told him it would cost $150.00, which he paid in cash.[15] He then filled out some paperwork about his medical history, on which he indicated that he broke his back in 2010. (Tr. 108–10; Gov't Ex. 7, at 7, 9.)

Officer Melton then met with Respondent. Officer Melton told Respondent that he fell off of an ATV and broke his back at his T3 vertebrae, which Officer Melton actually did fracture. (Tr. 111, 121–23.) He told Respondent that he went to the emergency room, but stated that he did not have a regular doctor. (Tr. 122–24.) When Respondent asked Officer Melton if he had pain, Officer Melton hesitated and then Respondent asked, ''Does the pain come and go from time to time?'' Officer Melton replied ''sure.'' (Tr. 111, 122.) Despite the notation in the patient file for ''Dustin Darrow,'' Officer Melton did not tell Respondent that the pain persisted with activity in cold weather. (*Compare* Gov't Ex. 7, at 10, *with* Tr. 124.) Respondent then asked Officer Melton if marijuana would help relieve his pain and help him sleep, to which Officer Melton replied, ''Okay.'' (Tr. 111–12.) Officer Melton does not recall stating that it would help, but told Respondent that he used marijuana in the past. (Tr. 124.)

Respondent told Officer Melton about the benefits of medical marijuana and explained alternatives to smoking, such as using a vaporizer or taking edible marijuana. (Tr. 112.) Officer Melton testified that Respondent then ''put a pressure cuff on my right arm and he had a stethoscope. Those were the only pieces of medical equipment that I could see in the office.'' (Tr. 112, 127–28.) Respondent instructed Officer Melton to stand up and bend over, and Respondent pushed on the top portion of Officer Melton's spine while having Officer Melton breathe deeply. (Tr. 112, 128.) Officer Melton did not express any pain. (Tr. 128.) After the exam, Respondent told Officer Melton to go to the front desk to complete the paperwork for medical marijuana. (Tr. 113.)

At that point, Officer Melton asked Respondent if he could ''get some oxies,'' referring to oxycodone. Respondent told Officer Melton ''that was a different task'' and would be an additional $200.00. Officer Melton agreed and paid $200.00 cash, which Respondent ''kept himself.'' (Tr. 113, 125–26.) Respondent asked Officer Melton how many oxycodone tablets he would get from his doctor, and Officer Melton told him he had previously been prescribed 180 tablets of oxycodone 30 milligrams. (Tr. 114, 126.) Respondent told him that he would give him a prescription for 120 tablets of oxycodone 30 milligrams. (Tr. 114.) Officer Melton then asked for a Xanax prescription. Respondent told him it would cost another $50.00, and Officer Melton agreed and paid $50.00 cash. (Tr. 115.) Respondent asked Officer Melton how many tablets he wanted, and Officer Melton requested 90 tablets. Respondent issued prescriptions for 120 tablets of oxycodone 30 milligrams and 90 tablets of Xanax 2 milligrams.[16] (Tr. 115–16, 127; Gov't Ex. 3, at 1.)

[13] *But see* Gov't Ex. 5, at 9 (noting that L.H. takes testosterone, Xanax, and Percocet), and Gov't Ex. 9, at 15 (listing four prescriptions issued by Respondent to R.B.).

[14] Officer Melton testified that he has been in law enforcement for approximately seven years. (Tr. 105.) He has worked one year in investigations with the Arizona State University Police Department, one year on a bicycle task force with the City of Tempe, and approximately two years on a narcotics task force with the City of Tempe. (Tr. 105–06.) He has worked with DEA ''[o]n a couple of occasions.'' (Tr. 106.)

[15] Officer Melton also asked for cocaine, but he was told by ''[t]he lady at the back desk'' that it was not available. (Tr. 120–21.)

[16] Officer Melton did not fill the prescriptions. (Tr. 127.)

Officer Melton testified that he never complained of any anxiety to Respondent, but did tell him that he had difficulty sleeping. (Tr. 116, 127.) He also testified that Respondent failed to discuss the risks and benefits of oxycodone or Xanax. (Tr. 116.) Nor did Respondent ever ask Officer Melton whether he was currently taking oxycodone or whether he had ever taken or been prescribed Xanax. (Tr. 116, 127.) Officer Melton did not provide any medical records, and Respondent never requested any medical records. (Tr. 110, 112.) Officer Melton's visit lasted ''[f]ive to ten minutes.'' (Tr. 124–25.) Respondent did not set up a follow-up visit for Officer Melton and did not indicate when he would see Officer Melton again. (Tr. 116–17.)

Officer Melton went to AZ Go Green for a second undercover visit on August 25, 2011. (Tr. 117.) Officer Melton told the receptionist that he wanted to get medical marijuana and that he also wanted to see Respondent. The receptionist told Officer Melton that he would have to ask J.C. if he wanted to see Respondent, and told him to go to the back office to obtain his marijuana. (Tr. 118.) After he obtained his marijuana, Officer Melton asked J.C. if he could see Respondent, but J.C. told him that he could not. J.C. did not give him a reason. (Tr. 119.)

Officer Knights [17] testified that SA Lamkin asked him to participate in an undercover visit to AZ Go Green to attempt to obtain a medical marijuana permit and a prescription for oxycodone. (Tr. 132, 145.) On September 1, 2011, Officer Knights went to AZ Go Green using the alias ''Bradley Kites.'' (Tr. 133, 149; *see* Gov't Ex. 2.) Officer Knights testified that when he entered AZ Go Green, he went to the counter and told the employees that he wanted to be prescribed medical marijuana. He was given three or four sheets of paper to fill out and he paid $150.00 cash for the visit and the medical marijuana card. (Tr. 133–34, 143; Gov't Ex. 8, at 8–13.) [18] He also paid an additional $50.00 fee for AZ Go Green to submit his paperwork to the State of Arizona so that he could get the medical marijuana card. (Tr. 143–44.)

Officer Knights then met with Respondent. (Tr. 134.) Respondent asked Officer Knights why he was there, how much he weighed, and what medical condition he suffered from. (Tr. 137.) Officer Knights told Respondent that he had been suffering from fibromyalgia for the past six years, but that he had not seen a doctor even though his pain had gotten worse. (Tr. 137, 148.) Officer Knights told Respondent that the pain interfered with his sleep, and that smoking cannabis helped with the pain and helped him sleep. He told Respondent that he ''had always been smoking cannabis,'' but that he was not currently taking any other medication. (Tr. 137, 148.)

Officer Knights testified that after Respondent conducted a ''brief physical exam, * * * I told him that oxies helped me and if I could have some of those. And he said that that would be possible.'' (Tr. 137–38, 149.) Respondent told Officer Knights that the prescription would cost $200.00 and then ''he asked me what other prescriptions I wanted.'' (Tr. 138; *see also* Gov't Ex. 2, at 2, 5.) Officer Knights told Respondent that he only wanted ''the cannabis and the oxy,'' and Respondent then asked Officer Knights ''if 15s would be okay. * * * Because if I prescribe the 30's it will raise red flags. * * * But I can write you more of the 15s.'' (Tr. 138, 151; *see also* Gov't Ex. 2, at 5.) Officer Knights asked if the marijuana and oxycodone were $200.00 total, and Respondent replied, ''Oh yeah the $150 is for the marijuana and the $200 is for the oxy * * *.'' (Gov't Ex. 2, at 5.) Officer Knights gave Respondent $200.00 cash, and Respondent issued a prescription for 150 tablets of oxycodone 15 milligrams. (Tr. 138–39; Gov't Ex. 3, at 6.)

Officer Knights testified that during the visit, Respondent ''did talk to me about different ways to imbibe the cannabis and some different things to do for pain, such as swimming, eating correctly, a good diet and things like that.'' (Tr. 139–40; *see* Gov't Ex. 2, at 3–4.) Respondent did not discuss the risks and benefits of taking oxycodone. (Tr. 140.) Officer Knights also testified that he did not bring any medical records and Respondent never asked him for any medical records. When Officer Knights left Respondent's office, Respondent stated, '' 'I'll see you in about a year.' '' (Tr. 140; *see also* Gov't Ex. 2, at 6.)

### *C. Respondent's Evidence*

Respondent's evidence included testimony from Respondent, as well as two patient charts submitted as documentary evidence.[19]

Respondent testified that he is licensed to practice medicine in California and Arizona. (Tr. 154.) He conceded, however, that he is only registered in California, and despite practicing at AZ Go Green in Arizona, he never registered an Arizona practice address with DEA. Respondent testified that he never knew that it was a requirement to register with DEA in each state. (Tr. 165.)

Respondent testified that he has never had any of his state medical licenses suspended, revoked, or denied. (Tr. 154, 159.) He testified that he consented to the February 3, 2012 Order entered by the Board. (Tr. 159; *see* Gov't Ex. 11.) He explained that before qualifying a patient for medical marijuana in Arizona, a physician is required to certify that the physician has reviewed the patient's profile on the Arizona Board of Pharmacy's CSPMP.[20] (Tr. 160–62; *see, e.g.,* Gov't Ex. 8, at 10.) Respondent testified:

> I had no idea what this Arizona Board of Pharmacy database was or how to apply for it. There is nothing comparable in California for physicians,[21] so I was checking the boxes really based upon my reviewing the * * * patient's medical records or their statements to me * * *. As soon as I realized that—or became aware that—of how to do it, I applied for and received my ID and password and from that point onward continued to check the database on every subsequent patient.

(Tr. 162.) Respondent admitted to the Board that from the time he applied to the database until the time he received the information to access the database, he continued to represent that he had verified each patient's profile. (Tr. 164.) Respondent testified that he did not obtain the patient profiles for any of the AZ Go Green employees to whom he issued prescriptions. (Tr. 201–02.)

Respondent next testified that while the goal of a pain management practitioner is to relieve suffering, he is sensitive about addictive issues. (Tr. 156.) He explained, however, that sometimes patients do not want to take medical marijuana because they may be drug tested at work, they're worried about dosage, or they travel across state lines. Instead they prefer to take oxycodone. (Tr. 174–75.) He also testified that sometimes medical

[17] Officer Knights went to the Arizona Law Enforcement Academy in 1999, and then he worked in patrol for approximately six years. In 2006, Officer Knights became a narcotics detective with the City of Peoria, where he has worked for the past six years. He spent two-and-a-half years assigned with the DEA Diversion Task Force. (Tr. 131–32.)

[18] Officer Knights testified that although he filled out pages 8 through 13 of the patient file for ''Bradley Kites,'' pages 10 and 13 also include somebody else's writing. (Tr. 143; *see* Gov't Ex. 8, at 10, 13.)

[19] Resp't Exs. 1, 3.

[20] The patient's CSPMP profile indicates whether the patient has received any controlled substances, but it does not indicate whether the patient has received medical marijuana. (Tr. 162–63.)

[21] Respondent later clarified that California has something similar to the Arizona CSPMP, called CURE, but ''it's not a requirement for doctors to use that as opposed to'' Arizona. (Tr. 196–97.)

marijuana does not ''completely control their pain and so they require some additional medication in order to control their pain.'' (Tr. 175.)

Respondent testified that during his time practicing at AZ Go Green, from April 2011 to December 2011, he saw approximately 800 to 1,000 patients. He testified that only about one percent of the patients asked for a prescription other than marijuana. (Tr. 154–55, 166–67.) Of that one percent, Respondent declined a prescription for something other than marijuana to ''[p]robably fifty percent.'' (Tr. 167.)

Respondent testified that he refused to issue an oxycodone prescription to the third UC, patient L.V., who requested an oxycodone prescription at the end of her exam. (Tr. 167.) Likewise, L.V. asked for Xanax, which Respondent also denied, explaining that ''[a]t that point I just wasn't writing [prescriptions], other than for the people who were already under my care.'' (Tr. 168; *see* Resp't Ex. 3.) Additionally, Respondent testified that he stopped treating patient A.C., who was receiving oxycodone prescriptions, ''because it seemed that he was possibly diverting these medications. * * *'' (Tr. 174.) Respondent conceded that there is nothing in A.C.'s patient file indicating that Respondent stopped treating A.C. (Tr. 208; *see* Resp't Ex. 1.)

Respondent next testified that he is aware of a regulation that discourages physicians from issuing prescriptions to family members, but he is not aware of any similar regulation prohibiting physicians from issuing prescriptions to employees. (Tr. 166.) Respondent testified that he issued a prescription to M.F. for 120 tablets of oxycodone 30 milligrams because she had back pain and ''she felt [she] was in need of additional medication and that was corroborated by my exam. * * *'' (Tr. 177.) Before issuing the prescription, Respondent testified that he obtained her medical history and performed a physical examination. (Tr. 178.) Additionally, because M.F. worked at AZ Go Green, he ''had some idea of both the nature of her illness and her reliability.'' (Tr. 181.) Respondent testified that the prescription was issued for a legitimate medical purpose in the course of his practice, explaining that M.F.'s back pain was increasing despite using cannabis. (Tr. 177, 179.) Respondent conceded, however, that although M.F. had not taken oxycodone before, he prescribed her the highest dosage unit possible. (Tr. 200–01.)

Next, Respondent testified that he prescribed testosterone to L.H., the security guard at AZ Go Green, because he was a body builder and L.H. ''felt that he was * * * starting to have just physical weakness * * * so he requested the testosterone as a way of maintaining his energy.'' (Tr. 181–82.) Respondent testified that in his opinion, it was an appropriate prescription issued for a legitimate medical purpose in the usual course of practice. (Tr. 182.)

Respondent testified that he initially issued a prescription for Percocet to J.C., who had an MRI-documented herniated disc. Respondent determined ''it was safer'' to prescribe just oxycodone rather than Percocet, which is a combination of oxycodone and acetaminophen. (Tr. 184–85.) Respondent also prescribed Xanax to J.C., stating, ''I think he lived a complicated life. Let me just put it that way. And so he was having high levels of anxiety and asked for Xanax to help him sleep.'' (Tr. 185.) Based on J.C.'s medical history and the physical examination, Respondent opined that Xanax was an appropriate prescription. (Tr. 185–86.) Additionally, Respondent prescribed Adderall to J.C. because J.C. was ''having trouble concentrating and he was kind of a hyper guy. * * *'' (Tr. 186.) Respondent testified that all of the medications were issued for a legitimate medical purpose in the usual course of practice. Respondent followed J.C. on these medications and they were all successful. (Tr. 186.)

Respondent testified that R.B. suffered from anxiety and ''some ADD,'' and she also suffered from severe low back pain from an injury she suffered while moving. (Tr. 191.) Respondent testified that he saw R.B. on ''a more or less daily basis,'' and he observed that she was in pain. (Tr. 191–92.) Respondent prescribed oxycodone for her severe lower back pain. (Tr. 191.) Respondent testified, however, that despite issuing so many prescriptions so frequently to J.C. and R.B., he never required either patient to take a urine drug screen to confirm that they were actually taking the medication as prescribed. (Tr. 206.)

With respect to the UCs, Respondent testified that Officer Knights told Respondent that he suffered from fibromyalgia, and a physical examination corroborated Officer Knights' complaints. (Tr. 187.) Although Officer Knights told Respondent he had not seen another doctor, Respondent testified that fibromyalgia can be self-diagnosed. (Tr. 210, 213.) Respondent also testified that while there is no objective test to diagnose fibromyalgia, such as an x-ray or MRI, the ''symptom complex [is] pretty well-defined'' and Officer Knights met each of the criteria. (Tr. 188–89.) Respondent conceded though that Officer Knights never told Respondent where he had pain until Respondent asked if he had pain in his back and shoulders. (Tr. 203–04.)

Respondent testified that he told Officer Knights that oxycodone 30 milligrams would raise a red flag, explaining that

> several patients that I had had who had gone—especially those without insurance, who had gone to a pharmacy with a prescription for 30 milligrams of oxycodone and paid cash, found that the pharmacists either were unwilling to fill the prescription or made them wait while they contacted me, and since I was not here in Arizona continually, there were problems getting back to me for verification of the prescriptions.

(Tr. 211.) He testified that it was not an effort to conceal his prescription writing patterns. (*Id.*) Respondent testified that he based the prescription to Officer Knights on the patient history and the physical examination, and he ''prescribed the oxycodone because [Officer Knights] said that he had been taking it for two years.'' (Tr. 214.)

As for Officer Melton's undercover visit with Respondent, Respondent testified that Officer Melton indicated that he suffered a fracture of his T3 when he fell from an ATV. (Tr. 189.) Respondent conducted a physical examination, which was consistent with Officer Melton's complaint. (Tr. 189.) Although Officer Melton did not say ''ouch'' or verbally indicate pain during the exam, Respondent testified that Officer Melton agreed when he asked Officer Melton if the pain came and went. (Tr. 202–03.) Respondent testified that he could have further confirmed Officer Melton's complaint by ''tak[ing] another x-ray of his thoracic spine and see[ing] the fracture, but * * * [h]e had said he had gone to the emergency room and they told him he had a T3 fracture. I don't think an additional x-ray would be of any value.'' (Tr. 190.)

Respondent conceded that he charged the UCs $200.00 each for the oxycodone portion of the visit in addition to the $150.00 fee that he charged them for the office visit. (Tr. 197–98.) He explained, however, that since oxycodone can only be prescribed for a one-month supply, he charges his patients $200.00 at the initial visit, but that charge includes two additional ''follow-up prescriptions and * * * additional exam[s] at no charge because they'd already paid.'' (Tr. 156–57, 176.) He testified that he failed to tell either of the UCs that the $200.00 fee was good for three months though. (Tr. 197.)

Nonetheless, Respondent testified that in his opinion, the prescriptions to the UCs were issued for a legitimate medical purpose in the usual course of professional practice. (Tr. 187–88, 190–91.) Respondent conceded that he

issued the prescriptions without asking either of the UCs for past medical records. (Tr. 207–08.) He also testified that while he believed he kept adequate patient records, he agreed that there was nothing in the UCs' respective patient files to show that they were prescribed oxycodone. (Tr. 205.)

Respondent testified that he kept carbon copies of all prescriptions that he wrote, which would ''eventually'' get put into the patient's file. (Tr. 170–71.) He did not have a timeframe for putting the copies into the patient files and agreed that waiting five to six months was a long time. (Tr. 204, 205–06.) Respondent also testified that to his knowledge he has not issued a prescription that was not for a legitimate medical purpose in the usual course of practice. (Tr. 159.) He explained:

> I come from a prior era of medical care where * * * MRI's were not available. And so I was taught about physical diagnosis. That you took a careful history from the patient, you performed a physical examination on the patient carefully and that was more valuable than even many diagnostic tests, which could be equivocal. And so that's part of how I practice medicine over the years as I've been trying to keep cost conscious and not over utilize diagnostic testing unless it's absolutely necessary.

(Tr. 193.)

## IV. Discussion

### *A. The Applicable Statutory and Regulatory Provisions*

The Controlled Substances Act (CSA) provides that any person who dispenses (including prescribing) a controlled substance must obtain a registration issued by the DEA in accordance with applicable rules and regulations.[22] ''A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner'' with a corresponding responsibility on the pharmacist who fills the prescription.[23] It is unlawful for any person to possess a controlled substance unless that substance was obtained pursuant to a valid prescription from a practitioner acting in the course of his professional practice.[24]

### *B. The Public Interest Standard*

The CSA, at 21 U.S.C. 824(a)(4), provides, insofar as pertinent to this proceeding, that the Administrator may revoke a DEA COR if she finds that the continued registration would be inconsistent with the public interest as that term is used in 21 U.S.C. 823(f). In determining the public interest, the Administrator is required to consider the following factors:

(1) The recommendation of the appropriate state licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing or conducting research with respect to controlled substances.

(3) The applicant's conviction record under federal or state laws relating to the manufacture, distribution or dispensing of controlled substances.

(4) Compliance with applicable state, federal or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.[25]

As a threshold matter, these factors are to be considered in the disjunctive: The Administrator may properly rely on any one or a combination of those factors, and give each factor the weight she deems appropriate, in determining whether a registration should be revoked or an application for registration denied. *See David H. Gillis, M.D.,* 58 FR 37,507, 37,508 (DEA 1993); *see also D & S Sales,* 71 FR 37,607, 37,610 (DEA 2006); *Joy's Ideas,* 70 FR 33,195, 33,197 (DEA 2005); *Henry J. Schwarz, Jr., M.D.,* 54 FR 16,422, 16,424 (DEA 1989). Application of the public interest factors requires an individualized determination and assessment of prescribing and record-keeping practices that are ''tethered securely to state law * * * and federal regulations.'' *Volkman* v. *DEA,* 567 F.3d 215, 223 (6th Cir. 2009). Additionally, in an action to revoke a registrant's COR, the DEA has the burden of proving that the requirements for revocation are satisfied.[26] The burden of proof shifts to the respondent once the Government has made its prima facie case.[27]

### *C. The Factors To Be Considered*

#### Factor 1: The Recommendation of the Appropriate State Licensing Board or Professional Disciplinary Authority

In this case, regarding Factor One, it is undisputed that Respondent currently holds valid medical licenses in Arizona and California, but Respondent's Arizona medical license has been the subject of recent disciplinary action.[28] On December 21, 2011, Respondent signed a consent agreement with the Arizona Medical Board (Board), which ultimately resulted in a February 3, 2012 Order for Letter of Reprimand and Consent to the Same (February 3, 2012 Order).[29] (Gov't Ex. 11.) The February 3, 2012 Order included various factual findings to include Respondent's admission to the allegation that he ''wrote 483 Medical Marijuana Certifications in which he attested to reviewing the qualifying patient's profile on the Arizona Board of Pharmacy Controlled Substances Prescription Monitoring Program (CSPMP) database prior to ever accessing the database through the Arizona Board of Pharmacy (Pharmacy Board) Web site.'' (*Id.* at 1.) Additionally, during the relevant time period, Respondent had not registered with the database ''so he was unable to access or make queries of the CSPMP prior to that time.'' (*Id.;* Tr. 163–64.)

The Board concluded that Respondent's conduct constituted ''unprofessional conduct pursuant to A.R.S. § 32–1401(27)(t) ('[k]nowingly making any false or fraudulent statement, written or oral, in connection with the practice of medicine or if applying for privileges or renewing an application for privileges at a health care institution').'' (*Id.* at 2.) As a result of the foregoing findings of fact and conclusions of law, the Board issued Respondent a ''Letter of Reprimand.'' (*Id.*)

The Board's action reflects a determination that Respondent, notwithstanding findings of unprofessional conduct in the recent past, can be entrusted with a medical

[22] 21 U.S.C. §§ 802(1), 822(a)(2).

[23] 21 CFR 1306.04(a).

[24] 21 U.S.C. 844(a).

[25] I conclude that the reference to ''other conduct which may threaten the public health and safety'' would as a matter of statutory interpretation logically encompass the factors listed in § 824(a). *See Kuen H. Chen, M.D.,* 58 FR 65,401, 65,402 (DEA 1993).

[26] *See* 21 CFR 1301.44(e).

[27] *See Medicine Shoppe—Jonesborough,* 73 Fed. Reg. 364, 380 (DEA 2008); *see also Thomas E. Johnston,* 45 FR 72311 (DEA 1980).

[28] Respondent has never had his medical license in any state where he has held one suspended, revoked, or denied. (Tr. 159.)

[29] Respondent asserts that the February 3, 2012 Order includes a provision that his admissions to the Board for purposes of the February 3, 2012 Order were ''not intended or made for any other use, such as in the context of another State or Federal government regulatory agency proceeding, * * *'' (Resp't Br., at 9.) I do not find this argument to be persuasive, however, because the Government was not a party to those proceedings and is not bound by those terms. *Cf. Robert Raymond Reppy, D.O.,* 76 FR 61,154, 61,159–60 (DEA 2011) (refusing to apply *res judicata* where the respondent was not a party to the prior proceedings); *see also United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus., Steamfitters and Refrigeration Unit* v. *Valley Engineers,* 975 F.2d 611, 615 (9th Cir. 1992) (''The general rule is that a litigant is not bound by a prior decision in a proceeding to which it was not a party.'' (citing *Hansberry* v. *Lee,* 311 U.S. 32, 40 (1940))).

license. While not dispositive,[30] this action by the State of Arizona does weigh against a finding that Respondent's continued registration would be inconsistent with the public interest under Factor One. *Cf. Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (DEA 2003) (under Factor One, prior suspension of respondent's state medical license held not dispositive where state license currently under no restrictions).

Factor 3: Conviction Record under Federal or State Laws Relating to the Manufacture, Distribution or Dispensing of Controlled Substances

Regarding Factor Three, there is no evidence that Respondent has ever been convicted under any federal or state law relating to the manufacture, distribution or dispensing of controlled substances. (*See* Tr. 159.) I therefore find that this factor, although not dispositive, *see Leslie,* 68 FR at 15,230, weighs against a finding that Respondent's registration would be inconsistent with the public interest.

Factors 2 and 4: Respondent's Experience in Handling Controlled Substances; and Compliance with Applicable State, Federal or Local Laws Relating to Controlled Substances

In this case, the evidence demonstrates that Respondent has failed to remain in compliance with applicable federal and state law relating to controlled substances, and that his past experience in prescribing controlled substances is inconsistent with the public interest. Additionally, evidence at hearing centered on Respondent's record-keeping practices, as well as his dispensing practices from an unregistered location.

*1. Respondent's Prescribing Practices*

Evaluation of Respondent's prescribing conduct in this case is governed by applicable federal and state law. The applicable standard under federal law is whether a prescription for a controlled substance is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). The standard of care refers to that generally recognized and accepted in the medical community rather than a standard unique to the practitioner. *Robert L. Dougherty, M.D.,* 76 FR 16,823, 16,832 (DEA 2011) (citing *Brown* v. *Colm,* 11 Cal. 3d 639, 642–43 (1974)). Although it is recognized that state law is a relevant factor in determining whether a practitioner is acting in the ''usual course of professional practice,'' it is also appropriate, in the context of an inquiry under federal law, to consider ''generally recognized and accepted medical practices'' in the United States. *Bienvenido Tan, M.D.,* 76 FR 17,673, 17,681 (DEA 2011).

''Under the CSA, it is fundamental that a practitioner must establish a bona fide doctor-patient relationship in order to act 'in the usual course of * * * professional practice' and to issue a prescription for a 'legitimate medical purpose' as required by 21 CFR 1306.04(a).'' *Gilbert Eugene Johnson, M.D.,* 75 FR 65,663, 65,666 (DEA 2010) (citing *Patrick W. Stodola, M.D.,* 74 FR 20,727, 20,731 (DEA 2009) (citing *United States* v. *Moore,* 423 U.S. 122, 135, 143 (1975))). ''The CSA generally looks to state law to determine 'whether a doctor and patient have established a bona fide patient relationship.' '' *Id.; see also Kamir Garces-Mejias, M.D.,* 72 FR 54,931, 54,935 (DEA 2007); *United Prescription Services, Inc.,* 72 FR 50,397, 50,407 (DEA 2007).

Under applicable Arizona law, grounds for disciplinary action include ''[u]nprofessional conduct'' further defined as ''[v]iolating any federal or state laws, rules or regulations applicable to the practice of medicine.'' Ariz. Rev. Stat. § 32–1401(27)(a). Additionally, unprofessional conduct includes ''[a]ny conduct or practice that is or might be harmful or dangerous to the health of the patient or the public.'' Ariz. Rev. Stat. § 32–1401(27)(q).

(a) Undercover Law Enforcement Patient Visits

Turning to the evidence in the instant case, the Government alleged and presented evidence that Respondent issued prescriptions for controlled substances in Arizona to two undercover law enforcement officers (UCs) posing as patients on August 12, 2011 and September 1, 2011, that were not issued for a legitimate medical purpose and outside the usual course of professional practice.[31] (ALJ Ex. 1, at 1–2; Gov't Exs. 2–3.) The Government's evidence also credibly established through the testimony of SA Lamkin that the undercover visits with Respondent during 2011 were initiated based on information provided by a former employee of Respondent's practice location, AZ Go Green, that Respondent and the owner of the clinic ''were illegally distributing marijuana out of the clinic and prescriptions for oxycodone as well.'' (Tr. 23.) SA Lamkin further explained that the primary purpose of his investigation was the oxycodone distribution. (Tr. 75.)

With regard to the August 12, 2011 undercover patient visit with Respondent, the Government presented testimony from Officer Melton, who credibly testified in substance that he visited Respondent's Arizona practice location for the purpose of obtaining a medical marijuana card and prescription pills. (Tr. 107.) Notably, office staff informed Officer Melton that any backpacks or purses must be left by the front door of the clinic.[32] (Tr. 108.) The visit required the payment of $150.00 cash in advance to the receptionist, who informed Officer Melton the fee was required to ''obtain a referral from the doctor.'' (Tr. 109.) Prior to seeing Respondent, Officer Melton was also required to fill out forms to include a patient attestation not to divert marijuana and a form entitled Medical Marijuana Patient Summary, on which Officer Melton indicated a medical history of ''Broken Back 10/2010.'' (Tr. 108–10; Gov't Ex. 7, at 7, 9.)

The testimony from Officer Melton also reflects that Respondent neither asked for nor obtained any medical records during the visit, and was told upon inquiry that Officer Melton did not currently have a doctor. (Tr. 110–12.) Respondent nonetheless falsely indicated in the patient chart that he had reviewed the patient's medical records, including medical records from other treating physicians. (Gov't Ex. 7, at 6.) The evidence further reflects that Respondent asked Officer Melton if he had pain from his broken back, suggesting that the pain comes and goes from time to time, to which Officer Melton agreed. (Tr. 111.) After this exchange, Respondent asked if medical marijuana would help with pain and sleep, and Officer Melton replied ''Okay.'' (Tr. 111–12.) Respondent then explained the benefits of marijuana and alternative means of ingestion, followed by an examination of Officer Melton that consisted of a ''pressure cuff'' and stethoscope, along with having Officer Melton stand, bend, and take deep breaths. Additionally, Respondent pushed on the top portions of Officer

[30] *Mortimer B. Levin, D.O.,* 55 Fed. Reg. 8,209, 8,210 (DEA 1990) (finding DEA maintains separate oversight responsibility and statutory obligation to make independent determination whether to grant registration).

[31] The evidence at hearing also referenced a third UC, patient L.V., who went to Respondent's practice on September 22, 2011, but was denied oxycodone and Xanax prescriptions by Respondent. (Tr. 77–78, 169; Resp't Ex. 3.)

[32] Officer Melton was equipped with a recording device for purposes of the undercover visit, but it was not located on his person. Accordingly, the device remained with his belongings in the lobby area and no recording was made of his encounter with Respondent. (Tr. 107.)

Melton's spine, followed by a statement that the ''exam was over.'' (Tr. 112.)

Respondent then informed Officer Melton about ''edibles'' and how to obtain marijuana, and ''walked him to the door suggesting we should leave.'' (Tr. 113.) At that point Officer Melton asked Respondent if he ''could obtain some oxies'' referring to an oxycodone prescription, to which Respondent replied that was a ''different task'' and would require payment of an additional $200.00, to which Officer Melton stated ''fine'' and paid Respondent $200.00 in cash. (Tr. 114.) Officer Melton described Respondent's issuance of a prescription for 120 tablets of oxycodone 30 milligrams and 90 tablets of Xanax 2 milligrams as follows:

> He then sat down at the desk and filled out a prescription pad, which he gave to me. He asked me questions. He said, 'How many would you get from your doctor?' I said, '180.' He said he would only write it for 120. And actually before he asked that, I told him I got 30's from my doctor and he did complete the prescription for 30 milligram oxycodone at a quantity of 120.

(*Id.*)

Officer Melton testified that after Respondent handed him the prescription for oxycodone,[33] he then asked Respondent for Xanax:

> I asked him if I could get a prescription for Xanax and he said that would cost an additional $50.00. I said that was okay and I gave him $50.00 cash and he began to fill out another prescription. He asked how many I wanted. I said, '90.' And he completed a prescription for 90 2 milligram Xanax tablets and gave me the prescription for those.

(Tr. 115; Gov't Ex. 3, at 1.)

Of significance, the evidence reflected that upon Officer Melton's return to Respondent's practice on August 25, 2011, he was told that he could not see Respondent, although no reason was given. (Tr. 119.)

With regard to the September 1, 2011 undercover patient visit with Respondent, the Government presented testimony from Officer Knights, who credibly testified that he visited Respondent's Arizona practice location for the purpose of obtaining a ''medical marijuana license and a prescription for oxycodone.''[34] (Tr. 132.) Upon arrival, he indicated to AZ Go Green staff that he wanted to be prescribed marijuana and was given paperwork to fill out. He paid $150.00 cash for the visit and an additional $50.00 fee for the staff to submit his paperwork to the State of Arizona. (Tr. 143–44.)

The recording and transcript of the encounter with Respondent reflects that Officer Knights related to Respondent a six-year history of fibromyalgia with problems in the shoulders and neck, and pain becoming worse. (Tr. 137; Gov't Ex. 2, at 1.) Officer Knights also noted sleep disturbance and told Respondent that he had not treated with a doctor at the time nor had he seen one after the pain became worse. (Gov't Ex. 2, at 1.) Officer Knights indicated to Respondent that he was not taking any medications, but stated cannabis had helped in the past. Prior to any physical examination, Officer Knights inquired of Respondent if oxycodone prescriptions were possible.

> [RESPONDENT]: Do you have a regular doctor that you see now?
> KNIGHTS: Um, no not regularly. But, um I mean oxy seemed to help too, I don't know if you guys doing anything like that here or * * *?
> [RESPONDENT]: Have * * * how long have you been taking oxycodone?
> KNIGHTS: Um, when I can get it for probably about 2 years.
> [RESPONDENT]: Mm-hmm.
> KNIGHTS: On and off.
> [RESPONDENT]: Mm-hmm.
> KNIGHTS: But um that really seems to help too.
> [RESPONDENT]: Okay, that's a separate fee but we can, I can write you a prescription.
> KNIGHTS: I, that would be great that would be awesome.

(Gov't Ex. 2, at 2.)

Notably, Respondent's statement that he can write a prescription for oxycodone at the outset of the patient visit, prior to any examination and in response to a specific request by the patient, is inconsistent with a prescription being issued for a legitimate medical purpose or in the usual course of professional practice. 21 CFR 1306.04(a).

The patient visit continued with Respondent discussing diet along with alternatives to using marijuana, as well as a discussion about the appropriate amount to use to relieve symptoms. (Gov't Ex. 2, at 4.) The patient visit next turned back to the issue of oxycodone:

> [RESPONDENT]: Okay. Now it's $200 for today. I only do 15s. Is that ok?
> KNIGHTS: Oxy 15s?
> [RESPONDENT]: Yeah.
> KNIGHTS: I mean if that's all you can do I guess.
> [RESPONDENT]: Yeah that's all * * * it's just, it's such a red flag, the 30s are such a red flag, you know, but I will give you a few more, I'll give you a little bit more so that should help.
> * * * * *
> KNIGHTS: How many can you do?
> [RESPONDENT]: 150.
> KNIGHTS: Alright 15s?
> [RESPONDENT]: Yeah.
> KNIGHTS: Alright. What's a, what's a red flag? What do you mean?
> [RESPONDENT]: You know when you go to the pharmacy when you bring in (unintelligible) you know they flag it with the Board of Pharmacy and it just becomes a problem for you and for me.
> KNIGHTS: Oh really?
> [RESPONDENT]: Yeah, (unintelligible) * * * with the 15s they don't really they don't have a problem with, but when you do the 30s, that's when they get, you know, they just, they make a red flag and you know my name and your name get on to a list and you end up you know with a problem.
> KNIGHTS: Wow, I didn't know.

(Gov't Ex. 2, at 6.)

Respondent concluded the visit with Officer Knights by stating that ''we will see you in another year.'' (*Id.*) Respondent issued a prescription to Officer Knights for 150 tablets of oxycodone 15 milligrams. (Gov't Ex. 3, at 6.)

In response to the evidence regarding the two undercover visits by Officers Melton and Knights, Respondent testified in relevant part that he was of the opinion that his prescriptions in each instance were issued for a legitimate medical purpose while acting in the usual course of his professional practice. (Tr. 187–88, 190–91.) I do not find Respondent's testimony credible in various respects. As an initial matter, I find Respondent's prescribing of controlled substances to Officers Melton and Knights to reflect a cash transaction for controlled substances at the request of the UCs, to include a negotiated quantity, strength, and type, which was effectively devoid of any credible relationship to the purported medical reason for the visit. Simply put, these were transparent unlawful ''drug deals.''[35] 21 U.S.C. 841 (a)(1); *see Homayoun Homayouni, M.D.,* 61 FR 1,406, 1,408–09 (DEA 1996).

Respondent's relatively brief testimony explaining the basis for his prescribing controlled substances to Officers Melton and Knights was inconsistent with other objective and credible evidence of record. Respondent testified in relevant part that he was of the opinion after his examination of

[33] Gov't Ex. 3, at 1.

[34] Officer Knights was wearing a recording device during the visit, the results of which are reflected in an audio recording and transcript admitted at hearing. (Gov't Ex. 2.)

[35] The credible evidence at hearing is consistent with the hearsay statement from a former employee of AZ Go Green that Respondent was illegally prescribing oxycodone. For purposes of this recommended decision, I find that the foregoing hearsay statement by the former employee constitutes substantial evidence, particularly in light of the fact that the informant was known to SA Melton and corroborated by extensive credible evidence of record. *Calhoun* v. *Bailar,* 626 F.2d 145, 149 (9th Cir. 1980); *see also Richardson* v. *Perales,* 402 U.S. 389, 402–06 (1971).

Officer Knights that the results were consistent with a diagnosis of fibromyalgia, which ''sometimes is associated with chronic fatigue.'' (Tr. 187.) While the patient file for Officer Knights briefly notes ''fibromyalgia,'' the transcript of the encounter clearly demonstrates that Respondent had already agreed to issue Officer Knights a prescription for oxycodone in exchange for a separate cash fee in advance of the examination. Even more telling is Respondent's later statement to Officer Knights that he only does ''15s,'' followed by asking Officer Knights if that ''is ok'' with him, essentially deferring the strength of the prescription to the patient. Respondent's added explanation that issuance of 30s raises red flags with the pharmacy board, and that he will give Officer Knights ''a few more'' is fully inconsistent with any arguable legitimate medical purpose. Rather, it is fully consistent with an unlawful drug transaction.

Respondent's testimony explaining the controlled substance prescriptions for oxycodone and Xanax to Officer Melton is equally incredible. Respondent testified in relevant part that in his experience fractures of the type reported by Officer Melton are ''very'' painful, and found Officer Melton's symptomology consistent with that type of injury. (Tr. 189.) Respondent further explained that the examination performed for the medical marijuana evaluation encompassed many of the same things that would be examined for an oxycodone prescription, noting that he did not ''think that an additional x-ray would be of any value.'' (Tr. 190.)

Respondent's testimony is significantly at odds with the credible testimony of Officer Melton. The timing of Respondent's issuance of two prescriptions to Officer Melton significantly undermines any legitimacy to Respondent's actions, as well as the credibility of his testimony at hearing. The issue of oxycodone came up after Respondent's examination was over and Officer Melton was being escorted to the door. Only after Officer Melton raised the issue of ''oxies'' did Respondent indicate that would be a different task and fee, and immediately proceed to sit down and issue a prescription for oxycodone in a strength that Officer Melton requested. Respondent's reluctance to issue the requested quantity of 150, settling instead on a quantity of 120, is consistent with Respondent's concerns expressed to Officer Knights about ''red flags'' with the pharmacy board.

Officer Melton's patient file and evaluation is also inconsistent with Respondent's purported basis for issuing the oxycodone prescription. Respondent asked Officer Melton how many he would get from his doctor, yet Respondent's signed evaluation notes indicate ''none'' for physician and medication.[36] Respondent's own documentation reflects his actual knowledge that Officer Melton's statement of how many he would get from his doctor had no correlation to ongoing medical care.

Respondent's testimony regarding his refusal to prescribe controlled substances to undercover patient L.V. on September 22, 2011, is also inconsistent with other credible evidence of record. (Tr. 167–68; Resp't Ex. 3.) Respondent testified that he refused to issue a requested prescription for oxycodone and Xanax, explaining that ''[a]t that point I just wasn't writing * * * other than [for] the people who were, you know, in their cycle of receiving the prescriptions from previously—previous exams.'' (Tr. 168.) Respondent also testified that the $200.00 fee associated with the first examination for controlled substance prescriptions was good for two additional follow-up visits for three months.[37] (Tr. 157, 176, 197.) Respondent elaborated on the purpose of the additional examinations: ''I wanted to see how they responded to the medication and how their condition had changed in any way. And of course, I thought it was necessary to do an exam before I could prescribe the medication.'' (Tr. 176.)

While Respondent's testimony that he was no longer writing controlled substance prescriptions for new patients as of September 22, 2011 may be accurate, his assertion that he was only writing prescriptions for patients ''in their cycle of receiving'' prescriptions is wholly at odds with his prescribing practices for Officers Melton and Knights. In the case of Officer Knights, Respondent concluded the visit with a statement that ''we will see you in another year.'' (Tr. 140; Gov't Ex. 2, at 6.) No follow-up appointment was scheduled nor is one indicated in the patient chart. (Gov't Ex. 8.) Contrary to Respondent's testimony, the evidence clearly indicates no intention to follow-up with Officer Knights during the three-month period after the initial visit.

Respondent's prescribing practice with regard to Officer Melton is similar. At no time during the visit did Respondent indicate when or if he would see Officer Melton again. (Tr. 117.) Nor is there any mention of follow-up in the patient chart. (Gov't Ex. 7.) In fact, when Officer Melton returned to Respondent's Arizona office on August 25, 2011, his request to see Respondent was refused.

In light of the foregoing, I do not find Respondent's testimony that he issued controlled substances to Officers Melton and Knights for a legitimate medical purpose and in the usual course of his medical practice remotely credible. Although the Government did not present any expert testimony pertaining to the undercover visits to AZ Go Green, other credible substantial evidence of record supports a finding by a preponderance of the evidence that Respondent's prescriptions for oxycodone and Xanax to Officer Melton on August 12, 2011, and his prescription of oxycodone to Officer Knights on September 1, 2011, were unlawful. 21 U.S.C. 841(a)(1); 21 CFR 1306.04(a); Ariz. Rev. Stat. § 32–1401(27)(a). *See Cynthia M. Cadet, M.D.,* 76 FR 19,450, 19,450 n.3 (DEA 2011) (explaining that in cases of particularly flagrant conduct by a registrant ''expert testimony adds little to the proof necessary to establish a violation of Federal law''); *see also Randall L. Wolff, M.D.,* 77 FR 5,106, 5,151–52 (DEA 2012) (giving little weight to the respondent's testimony that a prescription issued to an undercover agent was appropriate, despite the lack of medical expert testimony to the contrary, in light of other record evidence).[38]

(b) Lack of Patient Address on Controlled Substance Prescriptions

The Government alleged and presented evidence at hearing that Respondent failed to include patient addresses on controlled substance prescriptions in violation of 21 CFR 1306.05(a). (*See* ALJ Ex. 5, at 3.) Although the Government did not produce any testimonial evidence regarding this allegation, it introduced approximately thirty controlled substance prescriptions issued by Respondent between April 2011 and

[36] Tr. 114; Gov't Ex. 7, at 10.

[37] Respondent acknowledged during cross-examination that he never informed the undercover patients that the fees related to oxycodone and Xanax prescriptions included follow-up visits good for three months. (Tr. 197.)

[38] Respondent argues that the prescriptions presented by the Government, including those issued to the UCs, ''were written for legitimate medical purposes in the course of Respondent's practices, *the evidence is undisputed* that they were. The government has introduced not a scintilla of evidence to the contrary.'' (Resp't Br., at 13–14.) While I acknowledge Respondent's argument, I wholly reject it with regards to the prescriptions issued to the UCs. As noted above, I find Respondent's self-serving testimony on this matter incredible, and the evidence of record demonstrates that Respondent's prescribing to the UCs were transparent unlawful drug deals.

October 2011, to patients C.C., J.C., R.B., J.B., D.B., M.F., and L.H., as well as the UCs, that do not include the patients' addresses on the prescriptions. (Gov't Ex. 3.) Respondent did not dispute that he issued these prescriptions. (*See* Tr. 177–92.)

In light of the undisputed evidence of record, I find by a preponderance of the evidence that Respondent knowingly issued numerous prescriptions between April and October 2011 in violation of 21 CFR 1306.05(a) (''All prescriptions for controlled substances shall * * * bear the full name and address of the patient, * * *.''). *See Christopher E. Castle, M.D.,* 67 Fed. Reg. 71,196, 71,198 (DEA 2002).

(c) Respondent's Positive Prescribing Practices

Respondent presented evidence to demonstrate that in other cases, he acted in accord with the public interest standard. Respondent testified that he has not, to his knowledge, ever issued a prescription that was not for a legitimate medical purpose in the usual course of his practice. (Tr. 159.) He testified that he is ''sensitive to patients increasing their usage,'' and often denies prescribing the ''amount or frequency'' that a patient requests. (Tr. 157.) He also testified that he has declined to issue controlled substance prescriptions to many patients, and he has stopped prescribing to patients who were receiving medication from other physicians. (Tr. 158, 166.) In particular, Respondent testified that he denied issuing prescriptions for oxycodone to undercover patient L.V., and he stopped treating patient A.C. after learning that A.C. was ''possibly diverting'' his oxycodone. (Tr. 167–68, 172–74.)

I do not find Respondent's testimony to credibly demonstrate positive prescribing practices. With regards to patient L.V., Respondent testified that he did not issue a controlled substance prescription to her because at the time of her undercover visit, he was not writing prescriptions for people who were not already receiving controlled substances prescriptions. (Tr. 168.) His basis for denying her a controlled substance prescription was not related in any way to his medical evaluation of L.V., or his medical judgment that a controlled substance prescription would not be appropriate for that particular patient. Regarding patient A.C., I do not find Respondent's testimony credible in light of the fact that A.C.'s patient chart contains no documentation that Respondent was either concerned with A.C. diverting medication or that Respondent ultimately terminated treatment of A.C. (*See* Resp't Ex. 1.)

Even if Respondent's testimony was credible, it is, nonetheless, unavailing. Agency precedent has held that even a single act of intentional diversion is sufficient grounds upon which to revoke a registration,[39] and ''evidence that a practitioner has properly treated thousands of patients does not negate a prima facie showing that the practitioner has committed acts inconsistent with the public interest.'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 463 (DEA 2009).

*2. Respondent's Record-Keeping Practices*

Under Arizona law, unprofessional conduct includes ''[f]ailing or refusing to maintain adequate records on a patient.'' Ariz. Rev. Stat. § 32–1401(27)(e). ''Adequate records'' is further defined as follows:

> [L]egible medical records containing, at a minimum, sufficient information to identify the patient, support the diagnosis, justify the treatment, accurately document the results, indicate advice and cautionary warnings provided to the patient and provide sufficient information for another practitioner to assume continuity of the patient's care at any point in the course of treatment.

Ariz. Rev. Stat. § 32–1401(2).

Although the Government did not allege violations of federal record-keeping regulations, it did allege that Respondent violated state law by failing to maintain adequate patient records. In particular, the Government alleged that Respondent prescribed Schedule II and IV controlled substances to various employees, as well as the owner of AZ Go Green, between April 2011 and October 2011, but made ''no reference to the controlled substances prescribed were [sic] found in the medical files seized in violation of Arizona law.'' (ALJ Ex. 5, at 2.)

Specifically, Respondent prescribed controlled substances to M.F., L.H., J.C., and R.B., however, SA Lamkin testified that there was nothing contained within each patient's chart to show that Respondent issued those prescriptions. (Gov't Exs. 3–6, 9; Tr. 38–45, 52–54.) Respondent did not dispute issuing these prescriptions, but instead testified that he is not aware of any regulation prohibiting him from writing prescriptions to employees of the clinic. (Tr. 166.) Respondent further testified, consistent with SA Lamkin's testimony, that he maintained carbon copies of prescriptions for controlled substances that he wrote on a prescription pad. (Tr. 93; 170–71.) Respondent testified that his intent was that ''[e]ventually they would get to the file.'' (Tr. 171.)

The foregoing evidence arguably supports a finding that Respondent's failure to reference prescriptions for controlled substances in the patient files is contrary to applicable Arizona law. However, the plain language of the statute does not specifically require documentation of controlled substance prescriptions,[40] and the Government offered no authority to support a finding that a patient chart must contain a carbon copy of a prescription for controlled substance. Nor did the Government produce any medical expert testimony or other qualified opinion evidence to establish that Respondent's charts for patients M.F., L.H., J.C., and R.B., were inadequately maintained under applicable Arizona law. In fact, the patient chart for R.B. does include a prescribing history for oxycodone and alprazolam on various dates in 2011.[41] (Gov't Ex. 9, at 15.)

While I do not find Respondent's testimony that carbon copies of the prescriptions for controlled substances would ''eventually'' get to the patient file particularly credible, especially in light of his testimony as a whole, I nonetheless find that the Government has not sustained its burden to establish by a preponderance of the evidence that Respondent's record-keeping for Patients M.F., L.H., J.C., and R.B. violated applicable Arizona law.[42]

*3. Respondent's Prescribing From an Unregistered Location*

Federal law requires every person who dispenses (including prescribing) any controlled substance to obtain a registration from the Attorney General.[43] ''A separate registration shall be required at each principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances or list I chemicals.[44] Federal regulations further mandate that a ''separate

[39] *See, e.g., Cynthia M. Cadet, M.D.,* 76 FR 19,450, 19,450 n.3 (DEA 2011).

[40] *See* Arizona Medical Board, *Guidelines for the Use of Controlled Substances for the Treatment of Chronic Pain* (available at *http://www.azmd.gov/Statutes-Rules/7_policy.aspx*) (stating that to maintain ''adequate records'' for a chronic pain patient, ''the documentation *should* include * * * [p]rescribed medications and treatment.'' (emphasis supplied)).

[41] While the prescribing history is not complete, notably, Respondent submits that none of the prescriptions were noted in R.B.'s patient file. (*See* Resp't Br., at 7–8.)

[42] Similarly, I do not find that the Government has adequately alleged or established a violation of Arizona law as it relates to Respondent's prescribing of controlled substances to ''employees,'' as compared to immediate family members. *See e.g.* Ariz. Rev. Stat. § 32–1401(13).

[43] 21 U.S.C. 822(a)(2).

[44] 21 U.S.C. 822(e).

registration is required for each principal place of business or professional practice at one general location where controlled substances are manufactured, distributed, imported, exported, or dispensed by a person.'' [45]

Applicable regulations exempt certain locations from the requirement of a separate registration to include ''a practitioner (who is registered at another location in the same state or jurisdiction of the United States) where controlled substances are prescribed but neither administered or dispensed as a regular part of the professional practice of the practitioner at such office * * *.''[46] On December 1, 2006, DEA amended its registration regulations to make it clear that when an individual practitioner practices in more than one state, the practitioner must obtain a separate DEA registration for each state. *Clarification of Registration Requirements for Individual Practitioners,* 71 FR 69,478 (DEA 2006.) The amended regulation makes clear that the secondary location exemption is limited to ''location[s] within the same State in which the practitioner maintains his/her registration.'' *Id.* at 69,479.

Additionally, Arizona law requires that ''[e]very person who * * * prescribes * * * any controlled substance within this state * * * *must* first * * * [b]e a registrant under the federal controlled substances act (Pub. L. 91–513; 84 Stat. 1242; 21 United States Code section 801 et seq.).'' Ariz. Rev. Stat. Ann. § 36–2522(A)(2) (emphasis supplied).

The evidence of record establishes that Respondent is licensed to practice medicine in Arizona and California, and his DEA registered practice address is 8466 Santa Monica Boulevard, West Hollywood, California 90069. (Gov't Ex. 1; *see also* Tr. 28–29, 154.) From April 2011 until December 2011, Respondent practiced at AZ Go Green, located at 325 East Southern Avenue, Suite 120, Tempe, Arizona 85282. (Tr. 154–55; *see* Gov't Ex. 3.) Respondent admits that he did not obtain a DEA registration for AZ Go Green, or any other Arizona practice location. (Tr. 165.)

Despite not having a DEA registration in the State of Arizona, SA Lamkin testified that the CSPMP showed that Respondent issued controlled substance prescriptions to patients in Arizona.[47] (Tr. 28–33.) Specifically, Respondent issued at least twenty-three controlled substance prescriptions between June 2011 and October 2011 while practicing at AZ Go Green in Arizona to patients M.F., L.H., R.B., J.C., C.C., J.B. and D.B., as well as to the UCs. (*See* Gov't Ex. 3, at 1–11, 16–20, 23–32.) Additionally, from April 2011 to May 2011, while Respondent was practicing at AZ Go Green in Arizona, he issued at least seven prescriptions to patients J.C., J.B., and R.B. using a prescription pad that listed an unregistered California address: 1017 North La Cienega Boulevard, Suite 110, West Hollywood, California 90069. (*See* Gov't Ex. 3, at 12–15, 17–18, 21–22; Tr. 28–29, 30, 154–55.) [48]

Respondent testified in relevant part that he never registered his Arizona practice location with DEA, explaining that in his over forty years of practice, he ''had never heard that that was a requirement.'' (Tr. 165.) Respondent elaborated: ''I mean, just my common sense, I'm wrong of course, but my common sense is, it's a federal drug license. So why shouldn't it be transferable from state-to-state?'' (*Id.*) As with other areas of Respondent's testimony, I do not find his testimony that he had never heard of the requirement credible. For example, a review of Respondent's DEA COR, issued on July 21, 2010, bearing a registration address in West Hollywood, California, states in bold print: ''THIS CERTIFICATE IS NOT TRANSFERABLE ON CHANGE OF OWNERSHIP, CONTROL, LOCATION, OR BUSINESS ACTIVITY, AND IS NOT VALID AFTER THE EXPIRATION DATE.'' (Gov't Ex. 1.)

Aside from the statutory and regulatory notice, Respondent was clearly on actual notice that his DEA registration was not transferable to an Arizona location.[49] Thus, I find by substantial evidence that Respondent knowingly issued prescriptions for controlled substances from an unregistered practice location on numerous occasions between April and October 2011 in violation of applicable state and federal law. 21 U.S.C. 822 (a)(2), (e); 21 CFR 1301.12 (b)(3); Ariz. Rev. Stat. Ann. § 36–2522(A)(2).

Based upon the foregoing, I find the Government has established by a preponderance of the evidence under Factors Two and Four that Respondent's prescribing practices and compliance with applicable state and federal law from April 2011 until October 2011 was inconsistent with the public interest. This weighs heavily in favor of a finding that Respondent's continued registration would be inconsistent with the public interest.

Factor 5: Such Other Conduct Which May Threaten the Public Health and Safety

Under Factor Five, the Administrator is authorized to consider ''other conduct which may threaten the public health and safety.'' 5 U.S.C. 823(f)(5). The Agency has accordingly held that ''where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for his or her actions and demonstrate that he or she will not engage in future misconduct. *Patrick W. Stodola,* 74 FR 20,727, 20,734 (DEA 2009).[50] A ''[r]espondent's lack of candor and inconsistent explanations'' may serve as a basis for denial of a registration. *John Stanford Noell, M.D.,* 59 FR 47,359, 47,361 (DEA 1994). Additionally, ''[c]onsideration of the deterrent effect of a potential sanction is supported by the CSA's purpose of protecting the public interest.'' *Joseph Gaudio, M.D.,* 74 FR 10,083, 10,094 (DEA 2009).

Turning first to ''other conduct,'' the Government alleged and presented evidence related to the illegal distribution of marijuana at Respondent's Arizona practice location. The evidence included testimony from SA Lamkin that a former employee of AZ Go Green stated Respondent and the owner of the clinic ''were illegally distributing marijuana out of the clinic and prescriptions for oxycodone as well.'' (Tr. 23.) While the evidence of record corroborated the prescribing of oxycodone by Respondent, SA Lamkin's credible testimony at hearing does not support a finding that Respondent participated in the illegal distribution of marijuana.

SA Lamkin testified that Respondent ''took it a little farther'' than just

[45] 21 CFR 1301.12(a). The term dispense includes the delivery of a controlled substance by prescribing. 21 U.S.C. § 802(10).

[46] 21 CFR 1301.12(b)(3).

[47] Despite the allegation in the OSC/IS that Respondent ''authorized at least 190 prescriptions for controlled substances, more than 75 percent of which were for oxycodone,'' in Arizona, (ALJ Ex. 1, at 1; *see also* ALJ Ex. 5, at 2) there was no evidence produced at hearing to indicate the total number of controlled substance prescriptions Respondent issued in Arizona, or what percentage of those prescriptions pertained to oxycodone. *See Gregg & Son Distributors,* 74 FR 17,517, 17,517 n.1 (DEA 2009) (noting that it is the Government's obligation, as part of its burden of proof, ''to sift through the records and highlight that information which is probative of the issues in the proceeding'').

[48] There is evidence of record that Respondent prescribed controlled substances while in Arizona using his 1017 North La Cienega Boulevard address. (*Compare* Gov't Ex. 3, at 14, *with* Gov't Ex. 6, at 5.)

[49] Although Respondent stopped practicing in Arizona in December 2011, I do not find this to be sufficient mitigating evidence, particularly in light of the fact that the OSC/IS was issued in December 2011. (*See* ALJ Ex. 1, at 1.)

[50] *See also Hoxie* v. *DEA,* 419 F.3d 477, 484 (6th Cir. 2005) (decision to revoke registration ''consistent with the DEA's view of the importance of physician candor and cooperation.'')

certifying or diagnosing a patient as needing medical marijuana, but acknowledged a lack of investigative information that Respondent ''ever handed any marijuana to anybody for cash.'' (Tr. 77–78.) The weight of the evidence demonstrates that Respondent's activities, as it relates to marijuana, were primarily limited to medical marijuana recommendations. (*See, e.g.,* Gov't Ex. 2, at 3–4.)

Accordingly, I find that the Government has not established by a preponderance of the evidence that Respondent ''distributed marijuana[,] * * * aided and abetted the distribution of marijuana[,]'' or engaged in other related conduct. *Cf. Marion ''Molly'' Fry, M.D.,* 67 Fed. Reg. 78,015 (DEA 2002) (the respondent's registration not revoked '''merely because' she recommended marijuana to a patient 'based on a sincere medical judgment' '' but primarily because she distributed marijuana and aided and abetted in distribution of marijuana).

A remaining issue in this case is whether Respondent has accepted responsibility for his past misconduct, and demonstrated that he will not engage in future misconduct. The Government argues that there ''is nothing in the record that evinces Respondent's acceptance of responsibility * * *.'' (Gov't Br., at 18.) The Government also notes that Respondent lacked candor throughout his testimony, simply claiming that he was unaware of certain regulations or attempting to justify his prescribing practices by ''fabricat[ing] a story * * *.'' (*Id.* at 18–19.) Respondent does not specifically address acceptance of responsibility in his post-hearing brief, but he instead claims that the Government did not meet its burden of proof because he did not intentionally violate any state or federal regulations, and because ''the government's case rests entirely upon a web of lies spun by two undercover agents * * *.'' (Resp't Br., at 14–15.)

As discussed above, Respondent's testimony as a whole fails to adequately accept responsibility for his past misconduct, particularly with regard to his prescribing practices to the UCs. Under Agency precedent, in the absence of a credible explanation by the practitioner, as few as two incidents of diversion are sufficient to revoke a registration. *Alan H. Olefsky, M.D.,* 57 FR 928, 929 (DEA 1992). Respondent's lack of credibility during numerous material portions of his testimony weighs heavily against a finding that Respondent has accepted responsibility, let alone demonstrated that he will not engage in future misconduct. *See Hoxie* v. *DEA,* 419 F.3d 477, 483 (6th Cir. 2005) (DEA properly considers physician's candor, forthrightness in assisting investigation, and admitting of fault as important factors in determining whether registration is consistent with public interest).

I find by a preponderance of the evidence that Respondent has not accepted responsibility for his past misconduct, nor has he credibly demonstrated that he has learned from his past mistakes and would properly handle controlled substances in the future. An ''agency rationally may conclude that past performance is the best predictor of future performance.'' *Alra Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995). I find that Factor Five weighs heavily in favor of a finding that Respondent's registration would be inconsistent with the public interest.

## VI. Conclusion and Recommendation

After balancing the foregoing public interest factors, I find that the Government has established by substantial evidence a prima facie case in support of revoking Respondent's DEA COR AE5382724, based on Factors Two, Four and Five of 21 U.S.C. 823(f). Once DEA has made its prima facie case for revocation or denial, the burden shifts to the respondent to show that, given the totality of the facts and circumstances in the record, revoking or denying the registration would not be appropriate. *See Morall* v. *DEA,* 412 F.3d 165, 174 (DC Cir. 2005); *Humphreys* v. *DEA,* 96 F.3d 658, 661 (3d Cir. 1996); *Shatz* v. *United States Dep't of Justice,* 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston,* 45 Fed. Reg. 72, 311 (DEA 1980).

The record reveals that Respondent has not sustained his burden in this regard. In fact, as discussed above, Respondent's testimony in numerous instances was not credible and reflected an overall lack of admission of past misconduct. Respondent's testimony was also effectively devoid of any credible demonstration that he has learned from his past mistakes and will not engage in future misconduct. In light of the foregoing, Respondent's evidence as a whole fails to sustain his burden to accept responsibility for his past misconduct and demonstrate that he will not engage in future misconduct.

I recommend revocation of Respondent's DEA COR AE5382724 as a practitioner, and denial of any pending applications for renewal or modification, on the grounds that Respondent's continued registration would be fully inconsistent with the public interest as that term is used in 21 U.S.C.§ 824(a)(4) and 823(f).

Dated: April 5, 2012

s/Timothy D. Wing
*Administrative Law Judge*

[FR Doc. 2012–18747 Filed 7–31–12; 8:45 am]

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## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

**[Docket No. 11–57]**

### Margy Temponeras, M.D.; Decision and Order

On December 15, 2011, Administrative Law Judge (ALJ) Timothy D. Wing issued the attached recommended decision. Neither party filed exceptions to the decision.

Having considered the entire record, I have decided to adopt the ALJ's recommended rulings, factual findings, and his legal conclusions, except as discussed below.[1] I further hold that the record establishes that Respondent engaged in acts which are sufficiently egregious to warrant the revocation of her registration and that she has not rebutted this conclusion.[2]

[1] All citations to the ALJ's recommend decision are to the slip opinion.

[2] In discussing the public interest factors of 21 U.S.C. 823(f), the ALJ ''conclude[d] that the reference in 21 U.S.C. 823(f)(5) to 'other conduct which may threaten public health and safety' would as a matter of statutory interpretation logically encompasses the factors listed in Section 824(a).'' ALJ at 19 n.24 (citing *Kuen H. Chen, M.D.,* 58 FR 65401, 65402 (1993)).

To be sure, the Agency decision in *Chen* stated that ''[t]he administrative law judge has concluded here that the reference in 21 U.S.C. 823(f)(5) to 'other conduct which may threaten the public health and safety' would as a matter of statutory interpretation logically encompass the bases listed in 21 U.S.C. 824(a).'' 58 FR at 65402. However, whether this constitutes a holding or merely dictum, *Chen* is totally devoid of any indication that the traditional tools of statutory construction (*i.e,* text, structure, statutory purpose, and legislative history) were employed in reaching this conclusion. Indeed, while factor five focuses on ''other conduct,'' several of the grounds for revocation are based on a registrant's status and do not require inquiry into the nature of the underlying conduct. *See* 21 U.S.C. 824(a)(3) (authorizing revocation where registrant ''has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized'' to engage in controlled substance activities or such sanction has been recommended by competent state authority); *id.* § 824(a)(5) (authorizing revocation where registrant has been excluded or is subject to exclusion from participating in federal healthcare programs under mandatory exclusion provisions). In addition, construing factor five in this manner renders superfluous factor one, which authorizes the Agency to consider the recommendation of the state licensing board or disciplinary authority, as well as the provision of section 823(f) stating that the ''[t]he Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.''

Continued