Patent No. 7,391,320 (''the '320 patent''), U.S. Copyright Reg. No. TX–7–226–001 (''the '001 copyright''), and U.S. Trademark Reg. No. 3,080,770 (''the 770 mark''). The complaint further alleges the existence of a domestic industry. The Commission's notice of investigation named Koko and Cyclone as the only respondents. The complaint and notice of investigation were served on respondents on March 3, 2011. No responses were received.

On April 11, 2011, Horizon moved, pursuant to 19 CFR 210.16, for: (1) An order directing respondents Koko and Cyclone to show cause why they should not be found in default for failure to respond to the complaint and notice of investigation as required by § 210.13; and (2) the issuance of an ID finding Koko and Cyclone in default upon their failure to show cause. Koko and Cyclone did not respond to the motion. On April 22, 2011, the presiding administrative law judge (''ALJ'') issued Order No. 5 which required Koko and Cyclone to show cause no later than May 12, 2011, as to why they should not be held in default and judgment rendered against them pursuant to § 210.16. No response was received from either Koko or Cyclone to the show cause order.

The ALJ issued an initial determination (''ID'') (Order No. 6) on May 16, 2011, finding both Koko and Cyclone in default, pursuant to §§ 210.13, 210.16, because both respondents did not respond to the complaint and notice of investigation, or to Order No. 5 to show cause. Also, on May 17, 2011, the ALJ issued an ID (Order No. 7) terminating the investigation because Koko and Cyclone are the only respondents in the investigation. On June 3, 2011, the Commission issued notice of its determination not to review the ALJ's IDs finding Koko and Cyclone in default and terminating the investigation. 76 FR 33362–63 (June 8, 2011). In the same notice, the Commission requested written submissions on the issues of remedy, the public interest, and bonding with respect to respondents found in default.

Horizon and the Commission investigative attorney (''IA'') submitted briefing responsive to the Commission's request on June 24, 2011, and the IA submitted a reply brief on July 1, 2011. Horizon requested both a limited exclusion order directed to Koko's and Cyclone's infringing products and a general exclusion order as well. The IA recommended a limited exclusion order and opposed Horizon's request for a general exclusion order.

Having reviewed the record in the investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined to issue relief directed solely to the defaulting respondents pursuant to Section 337(g)(1). 19 U.S.C. 1337(g)(1). The Commission found that the statutory requirements of section 337(g)(1)(A)–(E) (19 U.S.C. 1337(g)(1)(A)–(E)) were met with respect to the defaulting respondents. Pursuant to section 337(g)(1) and Commission Rule 210.16(c) (19 CFR 210.16(c)), the Commission presumed the facts alleged in the complaint to be true. Based on the record in this investigation and the written submissions of the parties, the Commission has determined that the appropriate form of relief is a limited exclusion order directed to the defaulting respondents prohibiting the unlicensed entry of radio control hobby transmitters and receivers and products containing same that are covered by one or more of claims 1–5 of the '320 patent, the '001 copyright, or the '770 mark, and that are manufactured abroad by or on behalf of, or are imported by or on behalf of, Koko or Cyclone, or any of their affiliated companies, parents, subsidiaries, licensees, contractors, or other related business entities, or its successors or assigns. 19 U.S.C. 1337(g)(1). The Commission has determined not to issue a general exclusion order because Horizon did not establish the evidentiary showing required by 19 U.S.C.1337(g)(2) and it did not declare that it sought a general exclusion order under Commission rule 210.16(c)(2) (19 CFR 210.16(c)(2)).

The Commission has further determined that the public interest factors enumerated in section 337(g)(1) (19 U.S.C. 1337(g)(1)) do not preclude issuance of the limited exclusion order. Finally, the Commission has determined that a bond of 100 percent of the entered value of the covered products is required during the period of Presidential review (19 U.S.C. 1337(j)). The Commission's order was delivered to the President and to the United States Trade Representative on the day of its issuance.

The Commission has terminated this investigation. The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in sections 210.16(c) and 210.41 of the Commission's Rules of Practice and Procedure (19 CFR 210.16(c) and 210.41).

By order of the Commission.

Issued: September 27, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–25280 Filed 9–29–11; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–69]

Jeffery M. Freesemann, M.D.; Decision and Order

On January 24, 2011, Administrative Law Judge (ALJ) John J. Mulrooney, II, issued the attached recommended decision. The Respondent did not file exceptions to the decision.

Having considered the ALJ's decision and the record in light of the parties' post-hearing briefs, I have decided to adopt the ALJ's rulings, findings of fact, and conclusions of law.[1] Accordingly, I also adopt the ALJ's recommended Order.

Order

Pursuant to the authority vested in me by 21 U.S.C. 824(a)(2) & (4), as well 28 CFR 0.100(b), I order that DEA Certificate of Registration, BF4089125, issued to Jeffery M.Freesemann, M.D., be, and it hereby is, revoked. This Order is effective October 31, 2011.

Dated: September 19, 2011.

Michele M. Leonhart,

Administrator.

Christine M. Menendez, Esq., for the Government.

Dennis R. Thelen, Esq., for the Respondent.

[1] The ALJ made extensive findings under the public interest factors. *See* ALJ Slip Op. at 32–40. While the Government cited both 21 U.S.C. 824(a)(2) & (4) as the legal authority for the proposed revocation, the factual basis—as alleged—was limited to Respondent's convictions (and the circumstances surrounding them) for a felony offense that falls within 21 U.S.C. 824(a)(2). *See* ALJ Ex. 1; *see also* ALJ Slip op. at 32. Moreover, there was no application pending at the time of the proceeding and Respondent's conviction was no longer subject to appeal.

Because a conviction for a felony offense that falls within section 824(a)(2) provides an independent and adequate ground for revoking a registration, and there was no pending appeal of the conviction or pending application for a new registration, the ALJ was not required to make findings under the public interest factors. While such a conviction satisfies the Government's *prima facie* burden, it is not a *per se* bar to registration. *Cf. The Lawsons,* 72 FR334, 74338 (2007). Accordingly, in a case brought under section 824(a)(2), the ALJ is still required (as he did here) to make findings as to whether the registrant has accepted responsibility for his misconduct and demonstrated that he will not engage in future misconduct. *Cf. Ronald Lynch, M.D.,* 75 FR 78745, 78749 (2010).

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

John J. Mulrooney, II, Administrative Law Judge. The Deputy Assistant Administrator, Drug Enforcement Administration (DEA or Government), issued an Order to Show Cause (OSC), dated August 13, 2010, seeking revocation of the Respondent's Certificate of Registration (COR), Number BF4089125, as a practitioner, pursuant to 21 U.S.C. 824(a)(2) and (a)(4) (2006), and denial of any pending applications for renewal or modification of such registration, pursuant to 21 U.S.C. 823(f), alleging that the Respondent has been convicted of three felonies involving controlled substances, and that his continued registration is otherwise inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f). On August 25, 2010, the Respondent timely requested a hearing, which was conducted in Los Angeles, California, on December 14 through December 15, 2010.

The issue ultimately to be adjudicated by the DEA Deputy Administrator, with the assistance of this recommended decision, is whether the record as a whole establishes by substantial evidence that the Respondent's registration with the DEA should be revoked as inconsistent with the public interest as that term is used in 21 U.S.C. 823(f) and 824(a)(4). The Respondent's DEA COR is set to expire by its terms on September 30, 2012.

After carefully considering the testimony elicited at the hearing, the admitted exhibits, the arguments of counsel, and the record as a whole, I have set forth my recommended findings of fact and conclusions below.

The Evidence

The OSC issued by the Government alleges that revocation of the Respondent's COR is appropriate because of the Respondent's May 8, 2009 conviction for three felony counts of transportation of controlled substances, *i.e.* methamphetamine, ecstasy, and cocaine, in violation of California state law.[1] OSC at 1.

The parties, through their respective counsel, have entered into stipulations regarding the following matters:

Stipulation A: Respondent is a licensed physician in the state of California pursuant to license number G 83122. Respondent's license status is current. ALJ Ex. 9 at 1.

Stipulation B: On May 8, 2009, Respondent pleaded no contest to, and was convicted on, three criminal felony counts of transportation of controlled substances by the Superior Court of California, County of Kern. The controlled substances were methamphetamine, ecstasy, and cocaine. The Respondent also pleaded no contest to, and was convicted on, one misdemeanor count of carrying a loaded firearm. ALJ Ex. 9 at 1.

Stipulation C: Prior to the night the Respondent was arrested, he had no adverse interaction with law enforcement authorities. Tr. vol. 1, 129, Dec. 14, 2010.

Stipulation D: That neither party would interpose any objection to the admission of any of the proposed exhibits noticed prior to the hearing. Tr. 7–10.

Stipulation E: A blue pouch depicted on page 3 of Government Exhibit 5 did not contain the firearm seized from the Respondent's motor home on the night he was stopped and detained by the police. Tr. 354–55.

Among the exhibits admitted into evidence through stipulation was a state criminal court transcript, dated May 8, 2009, wherein the Respondent entered pleas of no contest to three felony drug transportation counts and one loaded firearm misdemeanor in satisfaction of the indictment pending against him. Resp't Ex. 3 at 4–7; Gov't Ex. 11 at 4–7; Gov't Ex. 10 at 1–3. Specifically, the Respondent pleaded no contest to transporting methamphetamine in violation of Cal. Health & Safety Code § 11379 (West 2008), transporting Ecstasy or MDMA in violation of Cal. Health & Safety Code § 11379 (West 2008), transporting cocaine in violation of Cal. Health & Safety Code § 11352 (West 2008), and possession of a loaded firearm in a vehicle in violation of Cal. Penal Code § 12031(a) (West 2008). Resp't Ex. 3 at 6–7; Gov't Ex. 11 at 6–7; Gov't Ex. 10 at 1–3.

Also included among the Government's exhibits admitted into evidence is the October 20, 2010 Decision and Order (Order) of the Medical Board of California (Medical Board) following a state administrative hearing that took place on August 23, 2010.[2] Gov't Ex. 15–16. In its Order, the Medical Board, adopting the recommended decision issued by the state Administrative Law Judge, found that the Respondent was stopped by police with his wife, Mrs. Shelly Freesemann, on August 28, 2008 en route in a motor home to the ''Burning Man Festival'' in Nevada. Gov't Ex. 15 at 3. The Order indicated that at his hearing before the Medical Board, the Respondent testified that his wife, by his account, unbeknownst to him, packed the cocaine, ecstasy, and methamphetamine found by the police in the vehicle for use at the festival at which they had intended to meet friends. *Id.* However, while the Respondent, at his state Medical Board hearing, denied knowingly transporting controlled substances, the Medical Board found that under its precedent, he is nevertheless guilty of willfully transporting those drugs because he pleaded *nolo contendere* and was convicted pursuant to his plea. *Id.* at 2. At his Medical Board hearing, the Respondent testified that although his wife was by far the more culpable actor, he chose to bear the burden of incarceration so that his wife could complete a drug rehabilitation program and care for their children. Gov't Ex. 15 at 3. The Respondent apparently explained to the Medical Board that he chose this course because he had ''the greater strength to endure incarceration,'' and declared that ''children outweigh cash and income on my scale any day.'' *Id.* The Medical Board expressed some level of concern regarding the Respondent's credibility, but ultimately concluded that there was insufficient indicia of deceit to support a finding that he was ''dishonest in his testimony.'' *Id.* at 4. The Medical Board noted the Respondent's seemingly inconsistent positions of blaming his wife while simultaneously acknowledging that he is ''responsible for his crime.'' *Id.*

The Medical Board ultimately determined that although ''[c]ause exists to revoke or suspend'' the Respondent's state medical privileges, a stayed revocation accompanied by a seven-year term of probation with limitations, reporting conditions, and ethics training would ''provide adequate protection of the public health, safety and welfare.'' *Id.*

At the DEA hearing conducted in this matter, the Government presented the testimony of five police officers from Bakersfield, California who worked on the investigation that culminated in the Respondent's convictions as set forth in Stipulation B, and also called the Respondent as a witness. The first officer who testified was Detective (Det.) David Boyd, the lead case detective for the investigation. Tr. 29. Det. Boyd, a twenty-two-year veteran of the Bakersfield Police Department (Bakersfield PD), nine of which was

[1] The same day, the Respondent also pleaded no contest to a misdemeanor charge of carrying a loaded firearm. Gov't Ex. 11; *see* Cal. Penal Code 12031(a) (West 2008).

[2] Although both parties noticed the Medical Board Order, in the interest of avoiding unnecessary duplication, it was admitted as a Government exhibit. Tr. 9–10.

spent as a detective,[3] testified that he first encountered the Respondent during the course of a narcotics investigation primarily targeted at an individual named Stephen Galvan (Galvan).[4] Tr. 28. A cell phone wiretap that had been judicially authorized during the investigation revealed voice and text traffic between Galvan's cell phone and phones connected to the Respondent and his wife, Shelly Freesemann. Tr. 29–30, 50.

On August 24, 2008, the investigating officers monitored some phone traffic between Galvan and a female who was later identified as Galvan's sister, Tessa. Tr. 38–39, 41–43. During the call, Galvan was attempting to procure a ''zip,'' which, based on Det. Boyd's training and experience, he identified as referring to an ounce of illicit drugs. Tr. 43–47. Galvan told his sister that he was willing to pay $1,200.00 to $1,300.00, but needed it by the following day. Tr. 45.

At about 2 p.m. the following day (August 25th), the officers intercepted a text message from Galvan's cell phone to Shelly Freesemann[5] that read: ''Hey, back in town, can take care of that 4 U ASAP.'' Tr. 47–48. After a five-hour period without a response from Shelly Freesemann, Galvan's phone issued another text message to her phone with the message: ''???'' Tr. 49. Galvan's second text received a reply from a cell phone registered to Mrs. Freesemann within three minutes that read: ''Sorry * * * Jeff will call you later.'' Tr. 50.

Galvan called Shelly Freesemann's phone and had a conversation with a female voice the officers believed to be hers. Tr. 51. In the conversation, Mrs. Freesemann told Galvan that the following day she and her husband would be retrieving a motor home and departing the area around 7:30 p.m. Tr. 52. Galvan told her that around noon he would pick up ''paperwork'' (a term that Det. Boyd testified is commonly used in narcotics transactions to refer to cash). *Id.*

At 8:06 a.m. the next morning (August 26th), a text message emanated from Mrs. Freesemann's phone to Galvan's cell phone that advised: ''Me, not Shelley, 29th and Fth.[6] Call my work # [the Respondent's work telephone number]. Jeff.'' Tr. 54. Sometime after the text message instructing him to do so, Galvan did call the Respondent at the number provided in the text and spoke to him. Tr. 55. During their conversation the two men discussed the Respondent's plans to leave town that evening and that Galvan needed to meet with the Respondent to get money from him.[7] Tr. 55. After some discussion related to the logistics of their meeting, the pair agreed to meet at the Valley Gun Store (Valley Gun) located in Bakersfield. Tr. 55–56.

Det. Boyd testified that he and his team were able to confirm that Galvan and the Respondent did indeed meet that day at noon at the Valley Gun. Tr. 56. Surveillance units posted near the Respondent's car, Galvan's car, and Valley Gun tracked the two men driving to their rendezvous point at Valley Gun, observed them enter the store separately within two to three minutes of one another, and watched them depart separately after spending about five minutes in the store. Tr. 56–58. The Respondent drove from his office to Valley Gun, even though the two locations were diagonally across from each other on the same intersection of Bakersfield. Tr. 58–62. After the meeting, officers followed the Respondent in his car to a Barnes & Noble bookstore. Tr. 62.

Det. Boyd testified that Galvan placed numerous phone calls after his meeting with the Respondent. Tr. 63. The officers monitored phone calls from Galvan to his sister and to his father. *Id.* The object of the phone calls to both parties was to arrange to purchase methamphetamine. *Id.* Galvan also telephoned Phil Nunez (Nunez), an individual the officers had earlier identified as one of Galvan's sources of methamphetamine.[8] Tr. 63–64. At about 7:00 p.m., after Galvan and Nunez agreed to a meeting, the former placed another call to the Freesemanns. Tr. 65–66. When Mrs. Freesemann picked up the phone, Galvan asked to speak to the Respondent and informed him that he should expect him at the Freesemann residence in approximately twenty to thirty minutes. *Id.* The officers monitored several additional phone calls between Galvan and Nunez related to the logistics of locating each other for their meeting and frustration with cell phone service problems. Tr. 67. Galvan and Nunez met in a public parking lot, after which Galvan drove directly to the Freesemann residence which was being staked out by another police officer, Sergeant[9] (Sgt.) Chris Johnson, at Det. Boyd's direction. Tr. 67–68.

Sgt. Johnson, who is also a member of the Bakersfield PD narcotics unit, also testified for the Government. Sgt. Johnson testified that he participated in and provided support to Det. Boyd during his narcotics investigation of Galvan, and that during the evening hours of August 26, 2008, he was conducting a surveillance of the Respondent's home. Tr. 201. Johnson testified that he arrived at the stakeout around 7:30 pm, remained there for approximately five hours, and could see the Freesemann home and a motor home parked at the curb. Tr. 201–03. Sgt. Johnson's visual observations, made from three houses away, had the benefit of street lighting, porch lights, and motor home lights after the sun set. Tr. 202–03. He testified that the Freesemanns were loading the motor home when he observed Galvan drive up in a truck and park across the street. Tr. 203. Galvan greeted the Respondent in the front yard and followed him into the motor home carrying an oblong-sized object about the size of a grapefruit. Tr. 204. After a brief period of time, Galvan exited the motor home, encountered Mrs. Freesemann, hugged her goodbye, shook the Respondent's hand, and drove away, but without the oblong, grapefruit-sized object. Tr. 204–05. Sgt. Johnson further testified that Galvan's entire visit lasted approximately five minutes. Tr. 204, 211. He also testified that he saw Mrs. Freesemann leave the motor home and enter the residence carrying an object that was similar in size and shape to the grapefruit-sized item brought to the scene by Galvan. Tr. 205–06. Sgt. Johnson testified that he watched the Respondent and his wife continue to load the motor home for about another hour and watched as the motor home and the Freesemanns drove off. Tr. 207, 211.

Bakersfield PD Police Officer (PO) Kevin O. Hock also testified for the Government. PO Hock testified that he has worked for Bakersfield PD for the past fifteen years. Tr. 156. PO Hock testified he is assigned to the Special Enforcement Unit (SEU) at Bakersfield PD, and that in addition to working on gang crime cases and gang intelligence, SEU also provides uniformed and ''black and white'' patrol car assistance to investigations as needed. Tr. 156–57. PO Hock testified that on August 26,

[3] Tr. 23.

[4] Boyd testified that Galvan was identified to the Bakersfield PD by a paid informant. Tr. 39–40.

[5] Although Det. Boyd initially testified that he believed that the Freesemanns were identified as acquaintances of Galvan earlier in the investigation through prior surveillance, Tr. 51, he later clarified that he only became aware of the Freesemanns through this investigation and their telephonic contact with Galvan. Tr. 124–26.

[6] Det. Boyd testified that there is such an intersection in Bakersfield. Tr. 53–54.

[7] According to Det. Boyd, Galvan used the terms ''money'' and ''paperwork'' interchangeably during this phone call. Tr. 55.

[8] Nunez is also identified as a co-defendant on the felony complaint and information associated with the Respondent's criminal case. Gov't Exs. 7 at 1; Gov't Ex. 9 at 1.

[9] At the time of the Respondent's arrest, Sgt. Johnson was a detective. Tr. 198.

2008, he was working a uniformed assignment in a marked patrol car and was directed by Sgt. Tunnicliffe, a Bakersfield PD narcotics division supervisor, to conduct a vehicle stop on a white motor home that the narcotics unit was actively surveilling.[10] Tr. 159–60. When PO Hock caught up to the white motor home, he noticed that it had no license plate light [11] and initiated a vehicle stop. Tr. 162 PO Hock testified that he encountered the Respondent driving the vehicle, procured his California driver's license from him, and asked (as is his custom with all vehicle stops) whether there were any illegal substances inside the vehicle. Tr. 163–64. The Respondent responded in the negative and consented to a search of the motor home.[12] Tr. 165. Hock testified that Mrs. Freesemann and a female, named Michelle Hori,[13] were also in the motor home when it was pulled over. Tr. 163. PO Hock testified that he ordered all the occupants of the vehicle to step out and radioed a K–9 officer, Det. Cox, to respond to the scene, which he did within five minutes. Tr. 165–66. PO Hock testified that Det. Cox searched the entire vehicle and told him that his narcotics dog, ''Gracie,'' alerted to three different areas within the motor home. Tr. 167. In one of the alert areas between the front seats, Hock opened a bag that contained a pink pouch. Tr. 167–68, 171–74; Gov't Ex. 5 at 7–11, 16, 48–50. The pink pouch contained what PO Hock believed to be MDMA tablets and powder cocaine. Tr. 170. Hock testified that the motor home was driven to the Bakersfield PD station and searched more thoroughly there under the authority of the search warrant procured by Det. Hale. Tr. 174–75.

The testimony of the responding K–9 officer, Bakersfield Det. David Cox, corroborated the testimony of PO Hock. Det. Cox testified that on the night of the Respondent's arrest, he was assigned as a K–9 officer in the narcotics unit and was Gracie's handler. Tr. 182. Det. Cox testified that he responded on August 26, 2008 to PO Hock's request to sweep the Respondent's motor home with Gracie after he stopped it.[14] Tr. 185–87. As testified to by PO Hock, Cox recalled that Gracie had alerted to three different areas of the motor home. The first alert was on the area between the two front passenger seats, another was on a drawer or compartment above the motor home bed, and a third was on an area with approximately two to four bags located on the interior floor of the motor home near some bicycles. Tr. 188–93. Det. Cox then testified that he related the areas of K–9 alert to PO Hock for action, but that his part of that vehicle search evolution substantially ended at that point. Tr. 192. He testified that he did not personally see any controlled substances seized from the motor home, nor did he even see the aforementioned pink pouch containing methamphetamine and BZP tablets and powder methamphetamine, nor did he see a yellow pelican case that, per Det. Boyd's testimony, the laboratory results, and the return to search warrant, contained copious amounts of illicit substances. Tr. 195.

Det. Boyd, testified that sometime after the commencement of the search on the motor home, he directed another officer, Det. Michael Hale, to prepare an affidavit and seek a warrant to search the stopped motor home and the Respondent's residence. Tr. 72–73. The Government also presented Det. Hale's testimony at the hearing. Hale, a fourteen-year veteran Bakersfield police officer, testified that on the night of the motor home stop he was assigned to the Narcotics Unit at the Bakersfield PD and had been involved in the Galvan investigation. Tr. 217–18. He testified that he was the affiant on the supporting affidavit (PC Affidavit) which was utilized to secure a state-court-issued search warrant that was executed on the stopped motor home and on the Respondent's residence in the early hours of the next morning.[15] Tr. 218–21; Gov't Ex. 3; Gov't Ex. 4.

The PC Affidavit tracked the bones of the investigation consistently with the testimony of Det. Boyd. The PC Affidavit informs how the Bakersfield PD was led to the Respondent and his wife through its monitoring of Galvan, who was suspected of being a drug dealer. Gov't Ex. 3. The document explains that the state-court-authorized cell phone intercept (cell phone tap) resulted in the intercept of telephone calls and text messages from Galvan's cell phone to the Respondent and his wife. *Id.* at 8. The PC Affidavit sets forth the August 25th cell call from Galvan to the Respondent's wife wherein she explained to Galvan that she was leaving the next night and that a third party had inquired as to whether she wanted to bring ''that.'' *Id.* at 9. In his PC Affidavit, Det. Hale explained that, based on his training and years of experience involving narcotics investigations, it is his opinion that the word ''that'' is an expression commonly used in connection with narcotics. *Id.* at 11. Before the call ended, the Respondent's wife explained that she would be leaving the next night at 7:30 p.m. after picking up a motor home. *Id.*

The PC Affidavit progresses through August 26th, as Bakersfield PD officers intercepted a text message to Galvan's cell phone that stated ''Meet me at noon instead of shelly at 29th and Fth. if diff. plans call my work# 340–2323 jeff [sic].'' *Id.* at 9. The PC Affidavit continues that later in the day, the cell phone tap revealed that Galvan called the number provided by ''jeff'' in the text message. *Id.* The phone was answered by an individual who identified himself as ''Jeff.'' *Id.* Galvan explained to Jeff that he wanted to take care of ''all that'' today, but then indicated that they needed to meet first so he could collect money from Jeff. *Id.* After Galvan asserted that he needed a couple of hours, they agreed to meet at noon at Valley Gun where they had met previously. *Id.*

The PC Affidavit also narrates the surveillance conducted at Valley Gun wherein detectives observed the Respondent pull up in a car registered to himself and his wife at about noon and enter the store. *Id.* The document explains how, after a few minutes, Galvan arrived at Valley Gun and joined the Respondent inside. *Id.* After what Hale's affidavit characterizes as ''a short period,'' the two men concluded their meeting inside the store and the Respondent drove off. *Id.*

The PC Affidavit relates that shortly after Galvan's noon meeting at Valley Gun, detectives intercepted numerous calls between Galvan and his sister, Tessa, wherein the two unsuccessfully attempted to close a drug deal to secure a ''whole one,'' which, in Det. Hale's experience, refers to an ounce of suspected narcotics. *Id.* at 10–11. At 6:15 p.m., finding himself unable to successfully broker for illegal drugs with his sister, the cell phone tap revealed that Galvan turned to his father, explaining that he needed to provide crystal methamphetamine to a friend who was set to leave town at 7:30

[10] Det. Boyd testified that it was he who made the decision to have the motor home stopped and conveyed that decision to his supervisor, Sgt. Tunnicliffe. Tr. 68–69.

[11] A violation of Cal. Veh. Code § 24601 (West 2008).

[12] PO Hock testified that the Respondent was cooperative throughout the entire evolution on the side of the road. Tr. 178.

[13] Det. Boyd testified that police intercepted a phone conversation wherein Ms. Hori indicated that she was intending to transport six ecstasy capsules to a Tacoma, Washington surgeon by the name of Dr. Wendell Smith. Tr. 134–35, 145. According to Det. Boyd, Ms. Hori ultimately entered a guilty plea to some unspecified criminal charge and received a sentence of probation. Tr. 132.

[14] Det. Cox also testified that earlier in the day he assisted in conducting surveillance on Galvan and the Freesemanns. Tr. 185, 193–94.

[15] The search warrant and the PC Affidavit were received into evidence at the hearing by mutual stipulation of the parties. Tr. 7–10; Stipulation D; *see* Gov't Ex. 3.

(the same time the Respondent's wife had previously related to Galvan as her planned departure time). *Id.* at 9–10.

According to the PC Affidavit, approximately fifteen minutes after placing the call to his father, Galvan called Nunez, and the two agreed to meet. *Id.* at 10. During that cell phone conversation, the latter asked the former if his sister had called for ''it'' and was informed that their efforts to reach agreement had been fruitless. *Id.* Following numerous calls placed to find each other, Galvan met Nunez in a restaurant parking lot and, in the opinion of the police, conducted an illegal narcotics transaction. *Id.* Upon leaving the parking lot, Galvan called the Respondent's wife and asked to speak with ''Jeff.'' Galvan informed Jeff that he was on his way. *Id.*

The PC Affidavit further states that at the Respondent's home, another Bakersfield PD detective was observing the Respondent and his wife load items into a motor home that was parked there when Galvan drove up. *Id.* at 11. The PC Affidavit elucidates how Galvan handed a light-colored, oblong package about the size of a grapefruit to the Respondent before the two entered the motor home, and how, after a while, the Respondent's wife carried the package into their attached garage. *Id.* According to the PC Affidavit, Galvan departed after shaking the Respondent's hand and hugging Mrs. Freesemann. *Id.* The Respondent and his wife departed at 8:05 p.m. in the motor home which, as had been sworn to by Det. Hale, was stopped thirty minutes later and searched. *Id.* at 12.

Det. Hock, the officer who pulled over the motor home, testified that after he identified what he suspected to be illicitly-possessed controlled substances, he notified Sgt. Tunnicliffe, who then directed that the Respondent, his wife, and Ms. Hori be transported to the Bakersfield PD.[16] Tr. 171. Another officer drove the motor home back to the Bakersfield PD station where it was searched. Tr. 172. While Det. Hock testified that he participated in the roadside search of the motor home with other officers, as well as the search of the motor home back at the police department pursuant to the search warrant, he testified at the hearing that the only controlled substances he specifically remembered seeing during the roadside search were contained in the pink pouch. Tr. 174.

The search warrant return prepared in connection with the search of the motor home listed the seizure of seventy-seven items. Gov't Ex. 4. Among the seized items were many individually packaged containers with pills, powders, liquids, and substances that, when tested, were confirmed to be scheduled controlled substances, including methylenedioxymethamphetamine (MDMA or ecstasy), methamphetamine, cocaine, and psilocybin mushrooms (psilocybin or mushrooms). Gov't Exs. 4, 8; Tr. 99. More specifically, the controlled substances secreted in the motor home and seized were 277 pills that included various quantities of Adipex-P,[17] methamphetamine,[18] BZP,[19] zolpidem,[20] Lunesta,[21] ketamine,[22] and ecstasy; [23] 25.9 grams of powdery or rocky substances that included ketamine, cocaine,[24] and methamphetamine; liquid in multiple bottles constituting gamma-butyrolactone (GBL); [25] 2.4 grams of marijuana; [26] and 0.8 grams of psilocybin mushrooms.[27] Gov't Ex. 4. While most of the drugs that were tested yielded positive results for the same illicit nature for which they were suspected, a cross-reference of the return to search warrant with the laboratory analysis results reveals some anomalies. For instance, a portion of the suspected MDMA tablets tested positive for methamphetamine and benzylpiperazine (BZP). *Compare* Gov't Ex. 4 at 4 (see item #61), *with* Gov't Ex. 8 at 5 (see item #18). Also, some of the suspected cocaine HCl tested positive for methamphetamine. *Compare* Gov't Ex. 4 at 4 (see item #62), *with* Gov't Ex. 8 at 7 (see item #25).

As discussed earlier in this recommended decision, a separate return was prepared in connection with the items seized from the Respondent's home. Among the controlled substances seized at the residence were 258.5 tablets of suspected ecstasy, 5.3 grams of suspected cocaine, and an unspecified quantity of suspected ''liquid ecstasy.'' *Id.* A loaded handgun was seized from the motor home, and a loaded handgun and extra ammunition were seized from the Respondent's residence.[28] *Id.* at 4, 6.

Det. Boyd testified that the narcotics seized from the motor home and the residence were packaged in small dosage amounts in numerous containers. According to Det. Boyd, based on his training, this manner of packaging is consistent with the manner in which individuals commonly package illicit drugs for sale.[29] Tr. 76–77, 117.

Notwithstanding the fact that the Respondent did not contest the illicit nature of the seized contraband, Det. Boyd also provided a narration of sorts regarding numerous photographs of the items seized from the motor home that had been stipulated into evidence.[30] While the detective was able to identify a quantity of marijuana,[31] and devices he styled as ''marijuana pipes,'' [32] much of his testimony regarding the photographs constituted little more than arguably unhelpful guesses and multiple choice options of illicit drug possibilities. For example, in describing

[16] Det. Boyd testified that the occupants of the motor home were not booked for an arrest that night but were ''detained and then later released pending further investigation.'' Tr. 108. He testified that this was done to facilitate the continuing investigation of Galvan without having to disclose the existence of the cell phone tap. Tr. 131.

[17] A Schedule IV controlled substance listed under phentermine. 21 CFR 1308.14(e)(9) (2010).

[18] A Schedule II controlled substance. *Id.* § 1308.12(d)(2).

[19] A Schedule I controlled substance. *Id.* § 1308.11(f)(2).

[20] A Schedule IV controlled substance. *Id.* § 1308.14(c)(51).

[21] A Schedule IV controlled substance listed under zopiclone. *Id.* § 1308.14(c)(52).

[22] A Schedule III controlled substance. *Id.* § 1308.13(c)(7).

[23] A Schedule I controlled substance. *Id.* § 1308.11(d)(11).

[24] A Schedule II controlled substance. *Id.* § 1308.12(b)(4).

[25] A List I chemical. *Id.* § 1310.02(a)(24). Analogues of controlled substances, like GBL to gamma-hydroxybutyric acid (GHB), a Schedule I controlled substance, i*d.* § 1308.11(e)(1), can be treated under federal law as a Schedule I controlled substance if intended for human consumption. 21 U.S.C. 813 (2006).

[26] A Schedule I controlled substance. *Id.* § 1308.11(d)(22).

[27] A Schedule I controlled substance. *Id.* § 1308.11(d)(28). While 13.5 pills of Xanax, a Schedule IV controlled substance listed under alprazolam at *id.* § 1308.14(c)(1), were also seized from the motor home, they were within a vial labeled as a prescription to the Respondent. Gov't Ex. 4 at 4. The Government makes no allegation that the Xanax was invalidly prescribed, abused, or diverted. Other uncontrolled substances seized, prescription or otherwise, are not considered in this decision under the public interest factors.

[28] Hypodermic needles and a pill cutter were also seized from the Freesemann residence. Gov't Ex. 6 at 18–19; Tr. 115. On the present record, these items have not been sufficiently linked to illegal activity to adversely factor against the Respondent. There is nothing in the present record to discount the Respondent's testimony that the hypodermic needles were present in the residence for the treatment of his ailing mother, who has since passed away. Tr. 270, 279–81.

[29] Det. Boyd also testified that he is aware of other indicia of controlled substance dealing, such as particular currency denominations, scales, packaging materials, and sometimes even ''pay and owe sheets'' that actually record drug transactions, none of which were located on the Freesemanns or in their rented motor home on the night they were arrested. Tr. 78–80, 133.

[30] Four photographs depict the sum total of the contraband seized from the motor home. Gov't Ex. 5 at 55–58; Tr. 93–94.

[31] Tr. 80; Gov't Ex. 5 at 18. Interestingly, Det. Boyd testified that the suspected marijuana seized in this case was not sent out for confirmatory testing. Tr. 100.

[32] Tr. 80–81, 91; Gov't Ex. 5 at 19, 52.

one photograph [33] he stated that it showed ''a glass vial with a black lid, with a white powdery substance in it [and explained that] [f]rom the photograph, [he] would *believe* it to be either cocaine[ ] HC[l] or methamphetamine.'' Tr. 82 (emphasis supplied). Another photograph [34] was described as depicting ''three oblong pills, white in color with what looks like blue spectacles in it,'' and when asked whether he ''*believe*[*s*] [it] to be an illicit controlled substance,'' responded that he ''*believe*[*s*] it was possible it would be some type of pharmaceutical.'' Tr. 82 (emphasis supplied). Still another photo [35] was described as including a container holding ''a white powdery substance in it which [he] would *believe* to be either cocaine[] HC[l] or methamphetamine.'' Tr. 82–83 (emphasis supplied). Other photographs were described as containing ''orangish-red pills which [he] *believe*[*s*], through [his] training and experience, to be that of ecstasy or MDMA [and other material] that [he] *believe*[*s*] to contain either methamphetamine or cocaine,'' [36] and ''[s]everal gel caps or capsules with a brown material [and states that he is] not sure what they are.'' [37] The record contains multiple examples of this approach, but the following excerpt addressing two photographs [38] is representative:

> [The first photo] [w]ould be those three cylinders, open to show the contents, two of them having white powdery substances, which I believe to be either cocaine or methamphetamine, and the other is either, I can't remember which photograph it is that depicts it. It's either depicting the small amount of psilocybin that was seized or marijuana. * * * [The second photo is of] two sets of blue pills, different in size. One individual blue pill and then two yellow pills that appear to be prescription-style medication. The blue oblongy-looking one appears to be a prescription[-]style medication. The blue pills down here appear to me to be similar to ecstasy[/]MDMA.

Tr. 84–85. Although later in his testimony, Det. Boyd indicated that confirmatory testing on the seized materials yielded results consistent with his expectations that the seized items were the controlled substances he anticipated they would be,[39] this did not prove to be entirely true. For example, the laboratory analysis report relative to the material seized in the motor home, which was admitted into evidence at the hearing, indicated that the seized substance that the Bakersfield PD assigned as ''agency #10'' was not cocaine hydrochloride as had been *believed* by Det. Boyd (and submitted by the Government within its Proposed Finding of Fact 85), but ketamine.[40] Gov't Ex. 8 at 9; Gov't Ex. 5 at 20; Tr. 81–82; Gov't Br. at 13.

More helpfully, Det. Boyd described numerous containers of over-the-counter pill bottles where material that resembled illicit drugs were placed below several doses of the pills that the vials were intended for. Tr. 86–91; *see* Gov't Ex. 5 at 32–35, 38–39, 41, 43–50, 52. Boyd testified that based on his training and experience, he has observed the utilization of this technique to give the appearance of a benign over-the-counter medication or supplement to inspecting eyes that are not inclined to dig deeper, and that it is a common method used to secrete illegal drugs. Tr. 86. Pills that he considered suspect were also identified in two Starbucks tin mint containers. Tr. 88; *see* Gov't Ex. 5 at 36–37.

Sgt. Johnson testified that he participated in the execution of the search warrant on the Respondent's residence, assisted with other officers, to the extent that he helped secure the residence and the people inside of it. Tr. 209–10. He testified that he did not, however, take photographs, and because he did not conduct the actual search of the inside of the residence, he does not have any personal knowledge of the controlled substances found in the home. Tr. 210.

Det. Hale, the affiant on the PC Affidavit testified in greater detail about the search conducted in the house. According to Hale, after the children and their babysitter were located and isolated, the Respondent's home was searched. Tr. 221–23. A description litany reminiscent of Det. Boyd's account of the photographs and his opinion of the illicit substances seized from the motor home was elicited from Hale regarding the items seized from the Freesemann residence, with similar efficacy. *Id.;* Gov't Ex. 6. A safe, that Hale recalled as being unsecured, yielded a black plastic case that contained individually packaged amounts of what Hale suspected to be ecstasy and cocaine.[41] Tr. 223–27.

Det. Boyd testified that a firearm was seized from the Respondent's residence during the search. Tr. 96. According to Boyd, although the firearm was registered and there was no illegality that stemmed from the weapon's discovery at the Freesemann residence, it is standard police procedure to seize identified firearms during searches related to narcotics. *Id.*

After personally observing the police witnesses testimony and demeanor, I find the testimony of each of these witnesses to be sufficiently plausible, detailed, internally consistent, and externally consistent with other witnesses, evidence and each other, to be deemed credible.[42]

Although the Respondent noticed himself as a witness, the Government

[33] Gov't Ex. 5 at 20.

[34] Gov't Ex. 5 at 22.

[35] Gov't Ex. 5 at 24.

[36] Tr. 83; *see* Gov't Ex. 5 at 28.

[37] Tr. 84; *see* Gov't Ex. 5 at 29.

[38] Gov't Ex. 5 at 30–31.

[39] Tr. 101–02.

[40] Although Det. Boyd testified that the laboratory analysis report provided by the Government set forth the results of materials seized from the motor home as well as the residence, a comparison of the itemized materials by the agency numbers assigned in the lab report (which correspond to item numbers in the search warrant return) indicates that only the motor home contraband results may be detailed in the report submitted in evidence. *Compare* Gov't Ex. 8, *with* Gov't Ex. 4. It is possible that because the crime lab's own item numbering, the system of which appears to be assigned by test batches, begin at ''06'' that the first five item numbers corresponded to tests of substances found in the residence. When pressed on the issue at the hearing, Boyd indicated that he was ''not 100 percent'' sure that the lab report contained results from both searches. Tr. 104. Although afforded the opportunity to clarify any ambiguity regarding the report during the proceedings, neither the witness nor the Government took any steps to do so. Tr. 104–06. When pressed on whether the suspected contraband seized from the residence tested positive for controlled substances, Hale could only represent that he ''would assume they were.'' Tr. 235. Interestingly the Respondent's guilty pleas (and corresponding stipulation) relate only to the illicit substances he was transporting (in the motor home), not the items seized at his residence. Stipulation B; Gov't Exs.9–11. In any event, inasmuch as the Respondent has not contested that illicit controlled substances were seized from both locations, and in light of Mrs. Freesemann's testimony that their master bedroom closet did, in fact, contain illegal drugs, Tr. 459, the potential discrepancy is of little moment in these proceedings. Significantly, this portion of Mrs. Freesemann's testimony was included in that segment that was subject to a Government objection at the hearing, which was renewed (for emphasis?) in its closing brief. Gov't Br. at 21 n.2.

[41] Also seized in the search was a loaded firearm in the closet of the home's master bedroom and samples of medications commonly-known to be used to treat erectile dysfunction (ED) that were seized from the trunk of a vehicle parked in the home's garage. Tr. 231, 237–38. No illegality has been alleged or established regarding the ED medications or the gun found in the Respondent's bedroom. The Respondent testified that the weapon is registered to his father, Tr. 230–31, and Det. Hale did not recall whether the weapon was returned to the Respondent. The testimony about these seized items was admitted in the interest of completing the narrative connected to the search, but this evidence does not impact on the determination of whether maintaining the Respondent's COR is in the public interest.

[42] While some minor inconsistencies are noticed between Det. Hale's testimony and other witness testimony or documentary evidence, such as whether the standing safe inside the Freesemann's bedroom closet was unlocked or required him to obtain the combination from the Freesemanns, Tr. 242–43, 274, or whether the gun was registered to the Respondent or his late father, the nature of these inconsistencies are sufficiently tangential and inconsequential that they do not materially affect the credibility to be attached to the testimony.

elected to call him to testify as part of its case-in-chief. Tr. 244. The Respondent testified that he has been a physician for the last seventeen years and is presently licensed in California. Tr. 246–47. The Respondent described his rural roots, and how, after an initial, unsuccessful college experience, and following stints working as an oil-field roustabout and an apprentice electrician,[43] he returned to academia, completed his undergraduate degree at the University of California at Berkely, graduated from Georgetown Medical School, and completed his internship and residency at the Oregon Health Sciences University. Tr. 246, 282–84.

According to the Respondent, in 1996 (the same year he was admitted to practice medicine in California) he was hired by a Bakersfield physician. Tr. 248. The Respondent explained that he and several other doctors entered a joint venture to purchase his employer's practice, where he was engaged in the practice of internal medicine until the time of his current difficulties. Tr. 248, 252, 256. He described himself as having been ''a high profile physician in [his] community of Bakersfield,'' having held the position of hospital chief of staff until the adverse press generated by his legal difficulties made the continuation of his medical practice untenable and resulted in the sale of his portion of his practice back to his partners. Tr. 257. He testified that he has never been sued for medical malpractice and prior to the transgressions that are the subject of these proceedings, he had never been subject to disciplinary action by the Medical Board. Tr. 282–83.

The Respondent also described a high level of prestigious activity and achievements that he attained in the medical profession, including appointments as a local delegate to the California Medical Association for ten years, board member and former president of his county medical association, and board member at San Joaquin Hospital, as well as appointments demonstrating increasing levels of responsibility at Mercy Hospital, to include service on the credentialing board, medicine chairman, vice chief of staff, and ultimately chief of staff. Tr. 288–89.

The Respondent's testimony presented an interesting window into the extent of his perceived need for the COR that is the subject of these proceedings. The Respondent explained that the primary focus of his internal medicine practice was elder care, and although he has maintained a COR to prescribe (not dispense) controlled substances, he actually prescribes controlled substances to his patients on a ''[v]ery, very low'' basis. Tr. 251. In a bizarre exchange, the Respondent, a physician with seventeen years of internal medicine practice and former hospital chief of staff, revealed that he believed that he needed a DEA controlled substance COR to prescribe all medications, not just scheduled controlled substances.[44] Tr. 249–52. The Respondent indicated that it his (incorrect) ''understanding [that] you need a [COR] even to prescribe antihypertensive medications or cholesterol or diabetes medications.'' Tr. 250.

The Respondent denied ever doing illegal drugs at any point in his life through high school to the present day.[45] Tr. 284–85, 289.[46] According to his testimony, between building a practice and raising young children, the ten years following his arrival in California were busy ones for him and his wife. Tr. 286–88. The Respondent testified that the reintroduction of a former high-school friend of his wife into her life was the catalyst for powerful life changes for the Freesemanns. Tr. 289–91. He testified that Mrs. Freesemann's new-old friend began inviting the couple out to Los Angeles for nights of dancing, dinner, and shows. Tr. 289. Overnight trips to the city followed, as did, at least by the Respondent's estimation, a variety of relationship rekindling. Tr. 291, 294. Coincidentally at this time, the Respondent was more available to spend time with his wife, including time in Los Angeles for overnight trips away from the children, whereas during the preceding decade the Respondent worked too frequently and Mrs. Freesemann was so busy taking care of their children that the Freesemanns ''didn't have much of a relationship.'' Tr. 289–91. During this period in which the Respondent testified that ''[he] found that [they] were getting closer as a couple during that time [like when they] first started dating,'' Tr. 291, the Respondent testified that he and Mrs. Freesemann began meeting more people through successive chain introductions, much like a ''Brownian Motion,'' [47] until they had a regular group in which to socialize, Tr. 289–92.

By the Respondent's account, it was during this period of dancing, clubbing, and reconnecting that Galvan entered the picture. Tr. 258–59, 295. Apparently the favor of an introduction to Galvan was effected in December of 2007 by another physician's wife, who introduced him as a club promoter at ''The Replay'' in Bakersfield who could provide VIP table access and bottle service, as well as parking. Tr. 258. Galvan was someone with whom the Respondent admitted to moderate, intermittent contact,[48] but who would periodically visit at his home with Mrs. Freeemann while the Respondent was elsewhere. Tr. 297–99.

The Respondent further testified regarding his wife's behavior and the likelihood she was abusing illicit controlled substances during the period of their shared social boom. The Respondent admitted being suspicious that Mrs. Freesemann was using drugs, in particular because of her behavioral changes. Tr. 293–94. For instance, the Respondent noted ''infrequent episodes'' where people would go to the bathroom, including his wife, and they would come back more excited, their pupils would be more dilated which he could discern despite the low light level, or exhibited other suspicious behaviors. *Id.* The Respondent suspected enough of his wife to confront her on multiple occasions about illicit drug use, but he testified that she would either deny it or claim it was a ''one-time thing.'' Tr. 276–77. However, the Respondent also testified that his wife's drug use caused certain changes in her

[43] The Respondent testified that he attained journeyman electrician status before returning to college. Tr. 284.

[44] The Respondent also indicated that he believed that he needed to maintain his COR for other reasons, such as being able to prescribe some controlled substances on a brief basis, and because some potential employers have an interest in minimizing referrals to specialists. Tr. 255.

[45] Some conflicting evidence in this regard was produced through the testimony of Det. Boyd when the Government recalled him as a witness. Det. Boyd had previously elicited a statement from Michelle Hori to the effect that she observed the use of ecstasy sometime in 2005. Tr. 360. Boyd testified that Hori had related this information about the Respondent during a conversation with him after receiving *Miranda* warnings and that although the results of the interview may have been contained in a report, no statement signed by Ms. Hori was ever prepared. Tr. 146, 361. Even if it were conceded, *arguendo,* that Ms. Hori provided this information to Det. Boyd, the vague nature of the statement, the relative remoteness in time of the alleged drug use, and the broad time spam alleged (sometime in 2005), coupled with the inability to cross examine Ms. Hori, sufficiently undermine this evidence below a point where it can be, should be, and is useful for any fact relevant to these proceedings. Accordingly, this evidence has been afforded no weight in this recommended decision.

[46] The Respondent also testified that as a condition of his probation imposed by the Medical Board, he is drug tested a minimum of four times per month. Tr. 314.

[47] The Respondent explained a Brownian Motion to be ''the random movement of molecules that's spread out in gas, that causes all the other molecules around it to interact.'' Tr. 292.

[48] The Respondent admitted to approximately fourteen social interactions with Galvan at clubs or in the Freesemann home over a nine-month period. Tr. 297.

that he found more ''attractive,'' such as how she was more prone to stay up late and match his high energy level despite her former routine 9 p.m. bedtime, and she had more enthusiasm.[49] Tr. 294.

The Respondent testified that he loaned Galvan $1,000.00 in March of 2008 (five months prior to the night he was detained by the police) at the behest of Mrs. Freesemann. Tr. 303. It was the Respondent's understanding that he was loaning Galvan money at that time because the latter needed funds to pay his rent, and the Respondent expressed surprise that the borrower actually returned the money several weeks thereafter. Tr. 303–04, 327. The Respondent indicated that no interest was paid by Galvan for the loaned money. Tr. 327.

The Respondent acknowledged that he provided Galvan with another $1,000.00 on August 26, 2008 at Valley Gun. Tr. 260. However, (unlike the previous money which he understood to be a loan) he testified that he had no idea why Galvan was the beneficiary of this largess. Tr. 261, 323. Although the Respondent maintained that he accepted his spouse's tasking to present Galvan (whom he alternately described as ''a surly-looking guy,'' a ''scary-looking character, and a ''shady character'') [50] with $1,000.00 at a prearranged location away from his office without so much as asking her why he was doing it or for what purpose the money was being tendered, he conceded that at the time, he ''had [his] suspicions.'' Tr. 262, 324. When pressed about the nature of his ''suspicions,'' the Respondent stated that he ''suspected that, given [Galvan's] appearance, given [his] wife's behavior, given other things, that possibly there could be controlled substances involved.'' Tr. 271.

The Respondent's dual acknowledgements that he believed that his wife was likely abusing controlled substances and that Galvan was an unsavory character render his position that he assumed that he was presenting Galvan with a rent-money loan on the day that the Freesemanns were headed on vacation singularly implausible. Factoring in the Respondent's impressive educational pedigree and his impressive professional accomplishments and qualifications, his assertion that ''[a]ll I can claim is to be the stupidest doctor at the time'' [51] is unpersuasive.

The reasons for which Valley Gun was chosen as a meeting location, according to the Respondent's testimony, despite its walkability across the street from the Respondent's practice, was because Galvan looked ''surly * * * [with a] shaved head [and] tended to dress a little bit more game-looking [and] had big arms with tattoos[,] [so] he's kind of a scary-looking character [so the Respondent] didn't want him walking in the front office of [his] very conservative regular medical practice;'' Galvan and the Respondent met at Valley Gun the last time the Respondent gave him cash; and lastly because it was close. Tr. 263–64. The Respondent also testified that they chose to meet at Valley Gun rather than at the bookstore, where he drove to afterwards, because driving to the bookstore was an impromptu afterthought following his conversation setting up a meeting with Galvan. Tr. 335. If the Respondent was, as he claims, gullibly providing money to a friend of his wife for unknown, but presumably benign reasons, and was intending to shop at a bookstore, it would be more likely that their meeting, if it could not take place at the Respondent's office, would be at the bookstore. The meeting at nearby gun shop with both men (neither of whom had business to conduct at Valley Gun) arriving and departing within minutes of each other, but not together, possesses a clandestine quality that undermines the Respondent's assertion that the encounter and transaction was designed (by the Respondent) for a legitimate purpose.

Consistent with the conversations overheard by the police on the cell phone tap, the Respondent testified that on the day he was detained by police, he and Mrs. Freesemann were headed out of town in their rented motor home to the Burning Man Festival in Nevada, a twelve-hour drive. Tr. 305–06. He testified that the Burning Man Festival is an art festival that occurs annually in a desert near Reno, Nevada that attracts crowds of 45,000 people who make camp. Tr. 299. The Respondent represented that sharing and trading is a significant feature of the festival, and that he intended to make and share grilled-cheese sandwiches there. Tr. 300. He testified that he took a loaded firearm with him in case he encountered snakes. Tr. 310, 341–43. Suffice it to say that the Respondent's account of why he brought a loaded handgun to the 45,000-person strong Burning Man Festival is not among the more plausible aspects of his testimony. Regarding the illegal drugs found in the motor home, the Respondent testified that he had no actual knowledge of anything illegal in vehicle. Tr. 272. However, he also testified that he should have known there were controlled substances on board, and that any reasonable person would have known, in light of Galvan's appearance earlier in the evening, that there were drugs in the motor home. Tr. 337.

The Respondent similarly denied any knowledge of the illicit substances found in the closet of his bedroom. Tr. 273. While the drugs were found in a black Pelican case similar to valises owned by the Respondent, the case which contained the drugs was located within a home safe that is always locked, the combination for which was known only to Mrs. Freesemann (although the Respondent testified that he knew where in the house to find the combination code). Tr. 273–74.

The Respondent testified that he accepted the plea bargain offered by the prosecution in his criminal case to spare his wife the experience of incarceration and to ensure that she could remain at home to mind their children. Tr. 311. He imputed political motives to the criminal prosecutor. Tr. 336. He likewise assigned the responsibility for the decision to accept the plea bargain and enter the plea to advice he received from his criminal defense attorney. Tr. 338. The Respondent stated that he entered the no-contest plea to attain the benefit of the plea bargain. Tr. 338.

The Respondent also took pains during his testimony to point out that after conducting its own evaluation, the probation authorities established that he was not a drug-treatment candidate and determined that substance-abuse classes were not needed. Tr. 312. He further stated that the drug testing mandated by the Medical Board has been conducted thus far without adverse incident. Tr. 312, 314.

During his testimony, the Respondent acknowledged that he and his wife have discussed the night they were taken into custody and the events that led up to that unfortunate event. Tr. 328. The Respondent indicated that his wife has since informed him that the $1,000.00 that he provided to Galvan at noon on the date in question was for the purpose of purchasing mushrooms (psilocybin). Tr. 328–29, 345. Illogically, he also testified that when Galvan appeared at his motor home and residence on the evening of the day he was paid, he did so without delivering any mushrooms, and was warmly received by himself and Mrs. Freesemann. Tr. 329.

The Respondent presented both documentary and testimonial evidence on his own behalf. Included in his

[49] The Respondent also testified that Mrs. Freesemann would be ''overly excited at times, overly sad at times, and overly hyper at times,'' precipitating conversations over her suspected drug abuse. Tr. 272.

[50] Tr. 261–62, 264–65.

[51] Tr. 332.

documentary presentation, the Respondent introduced a certified letter of standing dated February 17, 2010 regarding his California medical license. Resp't Ex. 2. The letter of standing unhelpfully declares that the Respondent's state medical license is current and no disciplinary action has been taken against it. *Id.* However, this obviously dated information is squarely contradicted by the decision of the California Medical Board, effective November 19, 2010, revoking the Respondent's license, staying the revocation, and placing the Respondent on probation for seven years under certain specified terms and conditions. Gov't Ex. 15 at 6; Gov't Ex. 16; Resp't Ex. 25 at 1, 7.

The Respondent provided numerous letters of support, the overwhelming majority of which were obviously prepared for and tendered to the prosecutor in the state criminal matter in an effort to inspire leniency on the Respondent's behalf regarding the disposition of that case. Resp't Exs. 4–24; Tr. 344–45.[52] One letter, written by Tony M. Deeths, M.D., attests to the Respondent's professional success, high caliber of medical skill, intelligence, and contribution to the community during the twelve years Dr. Deeths has known the Respondent. Resp't Ex. 4. Dr. Deeths opines that the community would suffer if deprived of the Respondent's ability to continue to practice medicine. *Id.* Interestingly, in his letter, Dr. Deeths admits that he is unfamiliar with the Respondent's ''legal problems,'' but postulates (contrary to the Respondent's position that he has no substance abuse or dependence issues) that the Respondent's substance abuse issues were born from the high stress that comes with practicing medicine. *Id.* The weight that can be attached to this letter is significantly undermined by the fact that the Respondent rejects the underlying premise that he deserves clemency based on a substance abuse issue.[53] Hence the letter does not provide strong evidence opposing the revocation sought by the Government.

V. Amirpour, M.D. authored a pithy letter indicating he has practiced medicine for twenty-four years and has known the Respondent for at least twelve of those years. Resp't Ex. 6. Dr. Amirpour's stated opinion is that the Respondent has helped the community including San Joaquin Hospital, that he trusts him as a physician, that the Respondent ''did a great job treating people,'' and Dr. Amirpour hopes that the Respondent's service to the community will be considered by the criminal court in his sentencing.[54] *Id.* Like the other letters, Dr. Amirpour professes no knowledge about the misconduct that was at the root of the Respondent's criminal conviction and forms the basis of these proceedings. Although Dr. Amirpour touts the level of the Respondent's practice, there is no indication that he has formed an opinion regarding the Respondent's prescribing practices or that he has a basis to have such an opinion (such as shared patients). The letter does not provide a great deal of insight into any matter that could be helpful toward reaching a disposition of the present case.

A hand-written letter signed by Shawn C. Shambaugh, M.D. is also included in the record. Resp't Ex. 8. In his letter, Dr. Shambaugh relates that he has known the Respondent during this last decade in a variety of professional medical capacities, including the treating of common patients. Resp't Ex. 8 at 1. Dr. Shambaugh states that he has found the Respondent to be ''continuously devoted to improve the quality of care the physicians and staff delivered to patients'' and that he ''consistently exceeded the community standards in the level of quality care he delivered to his patients,'' earning frequent patient praise regarding ''his commitment to their overall health and well[-]being.'' *Id.* at 1–2. The strength of Dr. Shambaugh's letter is enhanced by the circumstances under which he interacted with the Respondent. He worked with the Respondent on several medical staff committees while Shambaugh was hospital chief of staff and the two physicians apparently shared in the care of common patients. *Id.* at 1. While there are no specific references to Dr. Shambaugh's knowledge or awareness of the Respondent's prescribing practices, this letter is generally supportive of the Respondent's competence as a physician.

A criminal clemency letter by Ricardo R. Vega, M.D. is also included in the record. Dr. Vega indicates that he and the Respondent have shared patients and that, in his view, the Respondent is a ''superior physician'' whose ''competence, compassion and ethics as a physician are exemplary.'' Resp't Ex. 15. Dr. Vega characterizes the Respondent's ''patient care to be both thorough and above the standard of care.'' *Id.* Although the letter does not specifically refer to the Respondent's prescribing practices, Dr. Vega's experience acting as a pulmonary consultant to the Respondent's patients does provide a basis for his favorable professional opinion of the Respondent's medical acumen. Interestingly, as discussed in her testimony *infra* at 37, Mrs. Freesemann testified that it was Dr. Vega's wife, Michele Vega, who introduced the Freesemanns to Galvan. Tr. vol. 2, 447, Dec. 15, 2010. Michele Vega was also present during the daytime visit to Mrs. Freesemann at her home when Galvan's cousin raised the issue of Galvin's drug-brokerage services. Tr. 448–49.

Lawrence N. Cosner, Jr., M.D. who previously worked with the Respondent on the board of the Kern County Medical Society, also supplied a letter for the Respondent for use during his criminal sentencing. Resp't Ex. 11. Of note, Dr. Cosner considers the Respondent ''honorable, sincere and worthy of trust and respect,'' while admitting he ''know[s] nothing of [the Respondent's] current troubles, and wrote the letter ''solely because [he] consider[s] [the Respondent] a friend and colleague, and because he said he needed help.'' *Id.* The letter does not address the Respondent's prescribing practices and does not provide a basis to evaluate the author's level of knowledge about the Respondent's medical skills or his handling of controlled substances, but is supportive of the Respondent as being honorable, sincere, and worthy of respect.

Tonny Tanus, M.D. also provided a criminal clemency letter on the Respondent's behalf at the Respondent's request. Resp't Ex. 13. Dr. Tanus states that he has known the Respondent for over a decade in settings ranging from professional to social. *Id.* Dr. Tanus writes that in situations where both his and the Respondent's family were present, the Respondent never behaved improperly. *Id.* Dr. Tanus expresses that he ''was shocked to learn about the charges, because [he has] never seen [the Respondent] being under the influence.'' *Id.* The letter is somewhat undermined by lack of any stated foundation for a basis to evaluate the

[52] An inspection of Respondent's exhibits four through twenty-four, including the dates of the letters and the addressees, makes it evident that every letter was prepared as a character reference on the Respondent's behalf for consideration by the criminal court or the Kern County District Attorney's Office.

[53] The state charged the Respondent with various counts of possessing and transporting controlled substances, conspiracy related to same, conspiracy to sell controlled substances, and carrying a loaded firearm in a motor vehicle. Gov't Ex. 9 at 2, 4, 7–13; Gov't Ex. 11 at 4. None of the charges or allegations against the Respondent relate to substance abuse.

[54] Although Dr. Amirpour's letter states that it is his ''hope that [the Respondent's] service to the community will be forgotten,'' Resp't Ex. 6, it is reasonable, from the context of the balance of the letter, that the word ''not'' was inadvertently omitted from the sentence.

Respondent's professional work as a physician, and more fundamentally, by its underlying subtle assumption, consistently denied by the Respondent, that substance abuse was at the root of his misconduct and resultant criminal case.[55]

James B. Grimes, M.D. authored a letter, stating that he knows the Respondent on a personal and professional basis. Resp't Ex. 14. He writes that the Respondent ''is a very good person, who apparently made a mistake,'' and who ''has suffered greatly due to negative publicity and loss of his medical practice.'' *Id.* Dr. Grimes advocates taking into consideration the ''tremendous amount of good'' that the Respondent has provided to the community and because the community ''is far better off having [the Respondent] remain among us.'' *Id.* Although Dr. Grimes opines that he ''would feel very confident having [the Respondent] as [his] personal physician,'' *id.,* the letter does not state that he and the Respondent have had patients in common or that he has any particular basis for his professional opinion. Still, the letter stands as a letter of support from a fellow member of the medical community, albeit offered for support to mitigate a criminal sanction at a different forum.

A letter, provided by area podiatrist Mark F. Miller, DPM, asserts that the author knows the Respondent and his wife for over a decade professionally and personally. Resp't Ex. 17. The letter, under the subject heading of ''character reference,'' does not provide a professional opinion regarding the Respondent's medical ability or prescribing practices, but offers support as a friend would offer regarding the Respondent's criminal case. *Id.* Accordingly, little weight can be afforded this letter under the public interest factors in consideration of whether the Respondent should retain his DEA COR to handle controlled substances.

The Respondent also provided two letters written by area dentists who supported him in his criminal case. One succinct note, provided by Peter Bae, D.D.S., characterizes the Respondent as a ''community leader in [m]edicine,'' ''very kind,'' and ''act[s] with utmost professionalism.'' Resp't Ex. 12. The Respondent knows Dr. Bae as a patient and as members together in a country club, and Dr. Bae ''hope[s] and feel[s] confident that whatever decision is handed down during [the criminal] sentencing [that the Respondent] will emerge from this ordeal to be a better citizen and physician in our community.'' *Id.*

A second dentist, Thomas A. Gordon, D.D.S., also provided a letter to the Respondent to assist him in attaining leniency in the criminal case. Resp't Ex. 7. Dr. Gordon relates that he and his wife encountered the Respondent and Mrs. Freesemann while the four volunteered together at ''Couples Against Cancer.'' *Id.* While Dr. Gordon declares knowing the Respondent for over a decade, he readily acknowledges that he has no knowledge of the Respondent's personal life. *Id.* In his carefully-worded letter, Dr. Gordon guardedly asserts that he ''never heard a negative comment regarding [the Respondent's] professional life and in fact, believed [sic] him to be an accomplished and dedicated physician and contributor to the Bakersfield community.'' *Id.* Since Dr. Gordon's written assessment of the Respondent's professional conduct stems only from an absence of negative comments, not shared patients, experience, or any other rational professional basis, and he eschews any knowledge about the Respondent's personal life, the letter sheds no light on the Respondent's prescribing practices and scarce little light on any other issue that must be decided in connection with a disposition in this case. The letters from the two dentists are supportive letters from other medical professionals who know the Respondent either personally or by reputation and generally wished him some level of leniency in the disposition of his criminal matter. However, they are of little value under the public interest factors that must be balanced in making a final determination regarding the status of the Respondent's COR.

Numerous letters penned by personal friends and acquaintances prepared in connection with the criminal case were also offered by the Respondent and received into the record. One such letter is from personal family friend and aspiring film producer, John Burgess. Resp't Ex. 18. While Mr. Burgess fully details the nature, length, and extent of his personal relationship with the Respondent for the criminal court, the letter, in its best light, is an affirmation of how good a friend the Respondent has been to Mr. Burgess. Mr. Burgess made a point to communicate his view to the criminal prosecutor that the Respondent and his wife are ''not criminals,'' that they ''contribute much to society and regularly give back to their community,'' and that the Respondent has ''a passion for healing and helping others.'' *Id.* In his letter, Burgess refers to the Respondent's ''arrest and prosecution'' as ''misunderstandings.'' *Id.* Unfortunately, the strength and length of the Respondent's friendship with Mr. Burgess is not dispositive of any issue that must be decided in this recommended decision.

Another personal and family friend, Daniel J. Pardoe, also provided a letter for the Respondent to be used in connection with the criminal case. Resp't Ex. 19. Like Mr. Burgess's letter, Mr. Pardoe's letter sets forth the nature and length of his friendship with the Respondent in considerable detail, and those personal friendship-related details are the only elements of the submission that appear to be based on the author's personal knowledge. *Id.* There is very little in this obviously well-intentioned criminal clemency letter that can be used to reach a disposition of the present case.

A letter written by Kevin Fiori, another personal friend and patient of the Respondent who knew him for over a decade, which is also similar to the letters written by Mr. Burgess and Mr. Pardoe, bears testament to the type of person the Respondent is, yet candidly admits all he knows about the Respondent's criminal case is what he read through online news articles. Resp't Ex. 20. It therefore lacks foundation and relevance to the public interest factors that must be considered in this case.

Similarly, David Harb, another personal friend of the Respondent, authored a letter in which he relates his experience with testicular cancer and the commendable emotional support that the Respondent provided him. Resp't Ex. 21. Again, this letter speaks well of the Respondent's attributes as a friend, but lacks any indication of the Respondent's prospective ability and responsibility to handle controlled substances under a DEA registration in compliance with federal and state law. Accordingly, it is of limited value in evaluating the issues in this case.

A letter drafted by Jessica Wood, another personal friend of the Respondent's family, discusses various members of the Respondent's family, extols the virtues of the family members as friends, but adds very little to the analysis here. Resp't Ex. 23.

The same observations can be made of a letter provided by long-time Freesemann family friend Toni Swanson. Resp't Ex. 24. Like other letters in the record, Ms. Swanson uses a considerable portion of her letter to plead with the district attorney to be merciful, and implicitly requests the district attorney not seek incarceration of the Respondent. *Id.* 1–4. It is

[55] *See supra* note 53.

similarly unhelpful to these proceedings.

The Respondent also provided two letters that reflected non-medical business relationships. One of these is signed by Derek Holdsworth, president of KSA Group Architects, the firm which designed the Highgrove Medical Group's building. Resp't Ex. 5. Mr. Holdsworth's letter indicates that his contact with the Respondent ran the course of a two-year building period where the two collaborated on issues related to the design and construction of the Respondent's building. *Id.* Although Mr. Holdsworth states that he ''found [the Respondent] to be the ultimate professional, fair, [and] very knowledgeable about the medical field,'' *id.,* there is nothing in the letter or the record that would supply a basis for Holdworth's opinion regarding the breadth of the Respondent's medical knowledge. Mr. Holdsworth did indicate that he thought the Respondent ''was very concerned about the impact of the proposed new building on his patients, the community and specifically downtown Bakersfield.'' *Id.* Boiled down to its essence, the letter provides commentary by a local architect on his experience with the Respondent during a mutually-beneficial business transaction. Hence, this letter is not particularly helpful to the Respondent's case.

Another non-medical business relationship letter was penned by George R. Smith, Jr., president of a general contracting company. Resp't Ex. 9. Similar to the letter by Mr. Holdsworth, the letter describes how Respondent and Smith became acquainted through a business arrangement in which the Respondent's medical practice built the Highgrove Medical Clinic. *Id.* In the letter, Mr. Smith compliments the Respondent's business acumen and ethics, but also attests to his personal experience as a patient of the Respondent. *Id.* According to Smith's letter, the Respondent spent some period of time as his general care practitioner while Mr. Smith endured some ''serious health problems'' and was helpful in assisting him to procure medical services. *Id.* Smith's letter includes his opinion that the Respondent's ''medical knowledge and compassion saved [his] life,'' and that the Respondent's ''problems'' are ''out of character for him.'' *Id.* While the opinions borne from Mr. Smith's business experience with the Respondent do not assist any in evaluating the issues in this case, and while this letter lacks observations and judgment relating to the Respondent's prescribing practices or responsibility handling controlled substances, it does generally provide support as to the Respondent's bedside manner as a health care practitioner.

Letters written by Army Feth, Lara Riccomini, and Jill White are primarily focused on supporting the Respondent's wife at her sentencing hearing and are of negligible value in reaching a disposition in the present case. Resp't Exs. 10, 16, 22.

In summary, the letters provided by the Respondent were all addressed to the district attorney who prosecuted his criminal case and all sought some form of favorable consideration related to the exercise of criminal prosecutorial discretion. The letters were all from 2009, and while some contained some limited reference to issues that arguably relate to varying extents to the issues in this administrative case, not one letter addresses the issue of whether the Respondent can or should be entrusted with a DEA COR. To the extent that any of the numerous doctors, dentists, business acquaintances, and one patient who authored letters of support had an opinion or a basis for an opinion related to whether the Respondent should continue to have authority to handle controlled substances, none of the submitted letters provided that input. The letters submitted by the Respondent, while deemed credible, are of little practical value in reaching a determination regarding whether revocation of his COR is in the public interest.

Although aspects of his defense were presented through the testimony elicited at the time he was called as witness by the Government, the Respondent's testimonial case also included the testimony of his wife, Mrs. Shelly Freesemann, who supplied details as to the duration and strength of their marriage, relationship, and family life. Tr. 424–25. She testified that she has a bachelor's degree in biological sciences from the University of California at Berkeley, is taking some nursing classes at Taft College, and has applied for admission to the nursing program at California State University at Bakersfield. Tr. 426. Mrs. Freesemann testified that she worked in various occupations during the Respondent's medical training until 1996, and that since about 2000 she has been working as a yoga instructor. Tr. 427–31.

Regarding her history of drug abuse, Mrs. Freesemann testified that she smoked marijuana in high school a couple times per week one summer with friends. Tr. 431–32. She thereafter refrained from illegal drugs through her college years and courtship-turned-marriage to the Respondent until the summer of 2006 when she became reacquainted with a high-school classmate, Karen West (Karen). Tr. 432–33, 436–37. The Respondent, according to Mrs. Freesemann, has no interest in using illegal drugs and rarely drinks alcohol. Tr. 435.

After a few lunch dates with re-discovered friend Karen, the two former schoolmates began stepping out at night. Tr. 437. While the Respondent was on a business trip, Mrs. Freesemann accepted an ecstasy pill from Karen and ''just loved it'' because it gave her a ''thrill, like wow.'' Tr. 437–38. Mrs. Freesemann testified that thereafter she was enraptured in a ''whole other underworld'' in which she would be invited to many parties, be introduced to lots of different people, attend events, and in her excitement, became perpetually preoccupied with planning the next overnight weekend to Los Angeles and meeting new people, including celebrities. Tr. 439–40. Through Karen, Mrs. Freesemann became part of a clique whose activities consisted of yoga, personal training, working out, and frequenting the night life while recreationally abusing controlled substances. Tr. 441–42.

Mrs. Freesemann testified to using ecstasy, cocaine, methamphetamine, and marijuana. Tr. 442. She also testified to experimenting with drugs to regulate the effects of her drugs of choice: Cocaine and ecstasy. She would employ marijuana to ''bring [her] down a little bit'' to counteract the hyperactivity caused by ecstasy. Tr. 450. She also used crystal meth (methamphetamine) regularly toward the end of her party sessions to ''wake [her] up if [she] had been partying too long and [she] needed to straighten up.'' Tr. 466. Mrs. Freesemann further testified that because she knew the Respondent would not approve of her drug use, if he was around she would conceal her activities by using in a bathroom or some other room out of his sight. Tr. 442–43. Other than the newfound excitement and attention borne of her drug abuse, Mrs. Freesemann testified that she liked the change in lifestyle; she enjoyed the power to resist fatigue, partying all night rather than retiring to bed early, as had been her custom. To enable access to her new habit, Mrs. Freesemann arranged overnight babysitters or had her mother, mother-in-law, or sister-in-law watch her children. Tr. 443–44.

The Respondent's wife testified that she and her new group of revelers procured illicit drugs by pooling their money and purchasing them from a drug dealer known to Karen. Tr. 451. However, in December 2007 another

friend, Michele Vega (Michele),[56] introduced Mrs. Freesemann to Galvan at The Replay nightclub in Bakersfield as a friend, promoter of the club, and one who did side jobs for Michele. Tr. 444–48. It was about six weeks after this fateful introduction, during a visit to the Freesemann home by Michele, Galvan, and his cousin, that Mrs. Freesemann learned that Galvan would be a willing provider of illegal drugs. Tr. 448–49. Thereafter, Mrs. Freesemann began purchasing drugs from Galvan, primarily ecstasy and cocaine. Tr. 450. What made Galvan an attractive seller was that she could get a lot more product for her money than her sources in Los Angeles. *Id.* Galvan also included what seemed to Mrs. Freesemann as freebies; for instance, she would furnish him some monetary amount and ask for whatever the equivalent would be in cocaine, and in turn he provided her cocaine, and some methamphetamine would tend to just ''show up'' with the order as a bonus. Tr. 466. Mrs. Freesemann testified that whether she was purchasing drugs from Galvan or other sources, she knew she could only get certain substances in certain places, so she would accumulate them and squirrel them away with a ''pack rat'' mentality, concealing them from the Respondent, keeping some and sharing some with friends. Tr. 443, 471.

Mrs. Freesemann also testified regarding the controlled substances found in the motor home. In her testimony she claimed responsibility for packing the vehicle with the drugs, and testified that the Respondent had no knowledge of them.[57] Tr. 458. Regarding their destination on the night they were detained, the Burning Man Festival, Mrs. Freesemann acknowledged that in addition to the artistic attributes of the festival that were expounded upon by her husband, it is a festival with ''a lot of drugs.'' Tr. 468.

Mrs. Freesemann admitted that she could never personally use all of the drugs found in the van over the course of the weeklong Burning Man Festival. Tr. 471. As discussed, *supra,* she indicated that the Respondent had no interest in using drugs. Tr. 435. When asked what her plan for the large quantity of contraband was, the Respondent's wife testified that it was:

> To party and do what I could do and then take it back home, and keep it a secret and just—it was beyond my control at that point, having just more than I could deal with, but not knowing quite what to do with it.
>
> Tr. 472.

Regarding the $1,000.00 that the Respondent paid to Galvan, Mrs. Freesemann testified that it was dispensed to purchase a quantity of mushrooms (psilocybin) to take with her to the Burning Man event because ''it'd be fun to do mushrooms at Burning Man'' and it would be ''[j]ust a different drug to try.'' Tr. 476–77. This version of events is difficult to reconcile with both Mrs. Freesemann's acknowledgement that the stash of illicit drugs already secreted in the motor home (with additional reserves remaining behind in her bedroom closet) was more than she (the only drug-using Freesemann) could inflict upon herself during the planned week-long sojourn,[58] and the fact that a quantity of psilocybin was located and seized in the motor home. Gov't Ex. 4 at 2. In short, Mrs. Freesemann had plenty of drugs to use at the festival and even had mushrooms.

The details of the money transaction between the Respondent and Galvan are similarly lacking in plausibility. According to Mrs. Freesemann's account, her yoga classes were only taught in the morning,[59] yet she had her husband (who was working during the day) deliver $1,000.00 to Galvan for mushrooms because she was picking up a motor home for a trip that was to commence in the evening. This occurred during a time in her life where she testified that she suddenly found herself with more time on her hands than she was used to because her children were getting older. Tr. 437, 440. Notwithstanding the flurry of text messaging that preceded the transaction and the special arrangements that the Respondent made with Galvan to get him his ''paperwork'' at noon on the date of the Freesemanns' departure, it is Mrs. Freesemann's position that the surveillance officers were incorrect in their observation that Galvan came to her home equipped with a grapefruit-sized package on the evening of the day he got his money and left without that package. Tr. 474–76. By her account, she had her husband pay Galvan $1,000.00, and when the latter visited the couple immediately prior their departure, he delivered nothing but a handshake to the Respondent and a hug to Mrs. Freesemann—no mushrooms. Tr. 476. This occurred, under Mrs. Freesemann's version, without any manner of objection or even inquiry on her part concerning the missing drugs. Tr. 475–76.

It is far more plausible that one or both of the Freesemanns possessed safety concerns associated with meeting Galvan (who Mrs. Freesemann acknowledges is a drug dealer)[60] and determined that the Respondent was better suited for the potentially dangerous task at a public place away from his medical practice. Considerations associated with safety are almost certainly the more reasonable explanation concerning the Respondent's decision to bring a handgun with him to the Burning Man Festival than his almost laughable contention that the intended purpose of the weapon was to protect himself from the sort of snakes that slither upon the desert floor. It is likewise more consistent with the evidence presented from both sides that Galvan received his money from the Respondent and delivered illicit drugs in a grapefruit-sized package to the Freesemanns just in time for their departure. Any argument that the Respondent harbored any doubt that he was engaged in an illegal transaction involving Galvan is effectively undermined by Galvan's reference to the money he was to get as ''paperwork'' in his phone call with the Respondent. Likewise, the arrangements the two men (involved in a developing relationship) made to see each other at the Respondent's home that night provided insight into the true nature of the transaction. Money tendered for legal purposes can be referred to by its true name, not a euphemism designed to evade detection, and a meeting so temporally close to a cash exchange under the circumstances presented here was most assuredly arranged and conducted to provide the merchandise purchased; in this case, more of the illicit drugs that the Respondent well knew his wife had become dependent on.

The Respondent's depiction of himself as an unwitting dupe to his wife's drug-dependent cleverness is likewise unpersuasive. He testified that he had already deemed Galvan to be a shady character and was sufficiently concerned about his physical appearance that he was unwilling to have him materialize near his medical practice. This is particularly remarkable in the context that a medical practice (which in this case was located away from the Respondent's home) is generally a location where it is commonplace for new, never-before-seen patients to appear for their first appointments on a regular basis without

[56] Michele Vega's husband, Dr. Ricardo R. Vega, authored a criminal clemency letter on the Respondent's behalf for use while his criminal case was pending. *See supra* p. 29.

[57] Mrs. Freesemann also testified to owning the pink pouch and yellow Pelican case found within the motor home. Tr. 456.

[58] Tr. 471.

[59] Tr. 473.

[60] Tr. 470.

any manner of visual vetting process. If the Respondent were to be believed in this regard, Galvan's appearance, whatever it was, was deemed by the Respondent to be sufficiently unnerving that he could not countenance the patients and employees of his practice being exposed to it. It was likely not Galvan's appearance that caused discomfiture, but the reality of who he was and the drug-related money transaction that was planned to occur. The evidence supports the conclusion that the Respondent, an experienced physician who testified to his own recognition of his spouse's drug use and distrust of Galvan, knew well that he was purchasing illicit drugs for his wife for $1,000.00 and shook Galvan's hand outside his home at the consummation of the deal prior to his wife's embrace. Each party associated with the transaction received the benefit that each had knowingly bargained for.

The manner in which the seized contraband was packaged also spoke volumes about the intent of its possessors. Det. Boyd testified that the drugs were packaged in multiple small-dose containers, many of which had benign outward labels, and some of which had several dosage units of the material described on the packages on top of the illicit substances within. According to Boyd, based on his training and experience, this manner of packaging is consistent with the manner used by those intending to sell drugs. Tr. 76–77, 117. The packaging observed in this case less resembled the work of an out-of-control drug addict than it did an individual (or individuals) who were transporting large doses of controlled substances in a manner designed for easy distribution and evasion of discovery.

While there were doubtless credible portions of the testimony offered by the Freesemanns, such as their education, background, and the lifestyle changes brought about by Mrs. Freesemann's drug use, those portions of their testimony related to the acquisition and intended purposes of the traded currency and seized illegal drugs are simply not credible.

Other evidence required for a disposition of this issue is set forth in the analysis portion of this decision.

The Analysis

The Deputy Administrator[61] is authorized to revoke a COR when convinced that the registrant has been convicted of a felony under the CSA or any state law relating to a controlled substance. 21 U.S.C. 824(a)(2) (2006). It is undisputed in this case that the Respondent has been convicted of California state felonies relating to controlled substances. Stipulation B.

Pursuant to 21 U.S.C. 824(a)(4) (2006), the Deputy Administrator is permitted to revoke a COR if persuaded that the registrant ''has committed such acts as would render * * * registration under section 823 * * * inconsistent with the public interest * * * .'' The following factors have been provided by Congress in determining ''the public interest'':

(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.

21 U.S.C. 823(f).

''[T]hese factors are considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). Any one or a combination of factors may be relied upon, and when exercising authority as an impartial adjudicator, the Deputy Administrator may properly give each factor whatever weight she deems appropriate in determining whether an application for a registration should be denied. *Morall* v. *DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005); JLB*, Inc., d/b/a Boyd Drugs,* 53 FR 43945, 43947 (1988); *David E. Trawick, D.D.S.,* 53 FR 5326, 5327 (1988); *see also David H. Gillis, M.D.,* 58 FR 37507, 37508 (1993); *Joy's Ideas,* 70 FR 33195, 33197 (2005); *Henry J. Schwarz, Jr., M.D.,* 54 FR 16422, 16424 (1989). Moreover, the Deputy Administrator is ''not required to make findings as to all of the factors * * * .'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005). The Deputy Administrator is not required to discuss consideration of each factor in equal detail, or even every factor in any given level of detail. *Trawick* v. *DEA,* 861 F.2d 72, 76 (4th Cir. 1988) (the Administrator's obligation to explain the decision rationale may be satisfied even if only minimal consideration is given to the relevant factors and remand is required only when it is unclear whether the relevant factors were considered at all). The balancing of the public interest factors ''is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest * * * .'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009).

In an action to revoke a registrant's DEA COR, the DEA has the burden of proving that the requirements for revocation are satisfied. 21 CFR 1301.44(e). Once DEA has made its *prima facie* case for revocation of the registrant's DEA Certificate of Registration, the burden of production then shifts to the Respondent to show that, given the totality of the facts and circumstances in the record, revoking the registrant's registration would not be appropriate. *Morall,* 412 F.3d at 174; *Humphreys* v. *DEA,* 96 F.3d 658, 661 (3d Cir. 1996); *Shatz* v. *U.S. Dept. of Justice,* 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston,* 45 FR 72311, 72312 (1980). Further, ''to rebut the Government's *prima facie* case, [the Respondent] is required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the reoccurrence of similar acts.'' *Jeri Hassman, M.D.,* 75 FR 8194, 8236 (2010).

Where the Government has sustained its burden and established that a registrant has committed acts inconsistent with the public interest, that registrant must present sufficient mitigating evidence to assure the Deputy Administrator that he or she can be entrusted with the responsibility commensurate with such a registration. *Steven M. Abbadessa, D.O.,* 74 FR 10077, 10078, 10081 (2009); *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008); *Samuel S. Jackson, D.D.S.,* 72 FR 23848, 23853 (2007). Normal hardships to the practitioner, and even the surrounding community, that are attendant upon the lack of registration are not a relevant consideration. *Abbadessa,* 74 FR at 10078; *see also Gregory D. Owens, D.D.S.,* 74 FR 36751, 36757 (2009).

The Agency's conclusion that past performance is the best predictor of future performance has been sustained on review in the courts, *Alra Labs.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), as has the Agency's consistent policy of strongly weighing whether a registrant who has committed acts inconsistent with the public interest has accepted responsibility and demonstrated that he or she will not engage in future misconduct. *Hoxie,* 419 F.3d at 483; *Ronald Lynch, M.D.,* 75 FR 78745, 78749 (2010) (Respondent's attempts to minimize misconduct held to

[61] This authority has been delegated pursuant to 28 CFR 0.100(b) and 0.104.

undermine acceptance of responsibility); *George Mathew, M.D.,* 75 FR 66138, 66140, 66145, 66148 (2010); *George C. Aycock, M.D.,* 74 FR 17529, 17543 (2009); *Abbadessa,* 74 FR at 10078; *Krishna-Iyer,* 74 FR at 463; *Medicine Shoppe,* 73 FR at 387.

While the burden of proof at this administrative hearing is a preponderance-of-the-evidence standard, *see Steadman* v. *SEC,* 450 U.S. 91, 100–01 (1981), the Deputy Administrator's factual findings will be sustained on review to the extent they are supported by ''substantial evidence.'' *Hoxie,* 419 F.3d at 481. While ''the possibility of drawing two inconsistent conclusions from the evidence'' does not limit the Deputy Administrator's ability to find facts on either side of the contested issues in the case, *Shatz,* 873 F.2d at 1092; *Trawick,* 861 F.2d at 77, all ''important aspect[s] of the problem,'' such as a respondent's defense or explanation that runs counter to the Government's evidence, must be considered. *Wedgewood Vill. Pharmacy* v. *DEA,* 509 F.3d 541, 549 (DC Cir. 2007); *Humphreys,* 96 F.3d at 663. The ultimate disposition of the case must be in accordance with the weight of the evidence, not simply supported by enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. *Steadman,* 450 U.S. at 99 (internal quotation marks omitted).

Regarding the exercise of discretionary authority, the courts have recognized that gross deviations from past agency precedent must be adequately supported, *Morall,* 412 F.3d at 183, but mere unevenness in application does not, standing alone, render a particular discretionary action unwarranted. *Chein* v. *DEA,* 533 F.3d 828, 835 (DC Cir. 2008) (citing *Butz* v. *Glover Livestock Comm. Co., Inc.,* 411 U.S. 182, 188 (1973)), *cert. denied,* __ U.S. __, 129 S. Ct. 1033, 1033 (2009). It is well-settled that since the Administrative Law Judge has had the opportunity to observe the demeanor and conduct of hearing witnesses, the factual findings set forth in this recommended decision are entitled to significant deference, *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 496 (1951), and that this recommended decision constitutes an important part of the record that must be considered in the Deputy Administrator's decision, *Morall,* 412 F.3d at 179. However, any recommendations set forth herein regarding the exercise of discretion are by no means binding on the Deputy Administrator and do not limit the exercise of that discretion. 5 U.S.C. 557(b); *River Forest Pharmacy, Inc.* v. *DEA,* 501 F.2d 1202, 1206 (7th Cir. 1974); *Attorney General's Manual on the Administrative Procedure Act* 8 (1947).

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

Action taken by a state medical board is an important, though not dispositive, factor in determining whether the continuation of a DEA COR is consistent with the public interest. *Patrick W. Stodola, M.D.,* 74 FR 20727, 20730 (2009); *Jayam Krishna-Iyer,* 74 FR at 461. The considerations employed by, and the public responsibilities of, a state medical board in determining whether a practitioner may continue to practice within its borders are not coextensive with those attendant upon the determination that must be made by DEA relative to continuing a registrant's authority to handle controlled substances. It is well-established Agency precedent that a ''state license is a necessary, but not a sufficient condition for registration.'' *Leslie,* 68 FR at 15230; *John H. Kennedy, M.D.,* 71 FR 35705, 35708 (2006). Even the reinstatement of a state medical license does not affect the DEA's independent responsibility to determine whether a registration is in the public interest. *Mortimer B. Levin, D.O.,* 55 FR 8209, 8210 (1990). The ultimate responsibility to determine whether a registration is consistent with the public interest has been delegated exclusively to the DEA, not to entities within state government. *Edmund Chein, M.D.,* 72 FR 6580, 6590 (2007), *aff'd, Chein* v. *DEA,* 533 F.3d 828 (DC Cir. 2008), *cert. denied,* __ U.S. __, 129 S. Ct. 1033, 1033 (2009). Congress vested authority to enforce the Controlled Substances Act (CSA) in the Attorney General and not state officials. *Stodola,* 74 FR at 20375.

Here the California Medical Board determined that the Respondent's misconduct authorized an outright revocation of his state medical privileges. Gov't Ex. 15 at 6. However, the Medical Board ultimately determined that it could discharge its responsibility to protect the ''public health, safety and welfare'' [62] by staying its revocation and imposing a probationary period with limitations, conditions, reporting requirements and ethics training. Gov't Ex. 15 at 6–11.

While the action of a state medical board must be considered under Factor 1, a state's action pertaining to the Respondent's medical license or ability to handle controlled substances, falling short of an executed revocation, is not dispositive in DEA's determination regarding the appropriateness of a sanction. *See George Mathew, M.D.,* 75 F.R. 66138, 66145 (2010) (Administrator declines to adopt as dispositive under Factor 1 the state medical board's sanction of suspending respondent's medical license, then staying the suspension, in case where respondent was prescribing controlled substances without physically examining patients or maintaining medical records). There is no evidence that the Respondent has been non-compliant with the terms imposed by the state medical board, but the relatively brief period of time that has passed since the issuance of the Medical Board's Order does not allow for a meaningful extrapolation regarding the Respondent's level of compliance with the probationary terms over the next seven years.

Thus, consideration of the evidence under this factor presents something of a mixed bag. That the California Medical Board determined that the Respondent's misdeeds justified the imposition of revocation, its most severe penalty, tends to militate in favor of the revocation sought by the Government. Contrariwise, the Board's decision that the public would be adequately protected by allowing the Respondent to practice medicine with supervision and conditions is arguably supportive of the Respondent's position that an outright, un-stayed revocation is not warranted under the circumstances. Consideration of the Medical Board's actions in this case does not militate for or against revocation.

Factor 3: The Applicant's Conviction Record Under Federal or State Laws Relating to the Manufacture, Distribution, or Dispensing of Controlled Substances

As discussed in considerable detail elsewhere in this decision, the record reflects that the Respondent was convicted [63] under California state law on three counts for the felony transportation of ecstasy, methamphetamine, and cocaine. Gov't Ex. 11 at 6–7; Gov't Ex. 10 at 2. The Government, without analysis on the point, urges that in view of the Respondent's convictions, ''factor three weighs in favor of finding that Respondent's continued registration

[62] Gov't Ex. 15 at 5.

[63] Pursuant to the terms of a plea agreement, the Respondent pleaded no contest to three counts of transportation of controlled substances and a state misdemeanor offense for carrying a loaded firearm. Gov't Ex. 10 at 2–3. Consistent with the plea agreement provisions, other counts, including numerous conspiracy and possession with intent to sell and/or transport various controlled substances were dismissed in exchange for his no contest pleas. *Id.*

would be inconsistent with the public interest.'' Gov't Br. at 20.

While the Respondent's state criminal convictions are undoubtedly related to controlled substances, Agency precedent is less clear on whether such a conviction relates to the ''manufacture, distribution, or dispensing'' of controlled substances under the third public interest factor. In *Stanley Alan Azen, M.D.,* 61 FR 57893, 57895 (1996), *aff'd, Azen* v. *DEA,* 76 F.3d 384 (9th Cir. 1996), a state felony conviction for possession of cocaine was held to be relevant to Factor 3. Likewise, in *Jeffrey Martin Ford, D.D.S.,* 68 FR 10750, 10753 (2003), a cocaine possession felony conviction was held to implicate this factor. In *Super-Rite Drugs,* 56 FR 46014, 46015 (1991), the Agency determined that a cocaine possession conviction did not implicate Factor 3 based on the reasoning that ''[a]lthough [the respondent] entered a guilty plea to a drug-related felony, *his actions did not relate to the manufacture, distribution, or dispensing* of controlled substances.'' *Id.* (emphasis supplied). Ironically, although *Super-Rite Drugs* is the more dated precedent, it is the most persuasive and should be followed. The analysis in *Azen* centered on the subsequent state court reversal of the conviction, and in *Ford,* the decision analysis actually omitted the phrase ''relating to the manufacture, distribution, or dispensing'' when addressing the issue. A contrary interpretation would eviscerate the difference between public interest Factors 3 and 4 and ignore the specific language inserted by Congress. Guidance can be found in the accepted maxims of statutory interpretation that ''a statute of specific intention takes precedence over one of general intention,'' *United States* v. *Dozier,* 555 F.3d 1136, 1140 n.7 (10th Cir. 2009) (citing *NISH* v. *Rumsfeld,* 348 F.3d 1263, 1272 (10th Cir. 2003)), and that ''words should ordinarily be given their ordinary meaning,'' *Moskal* v. *United States,* 498 U.S. 103, 108 (1990), and that ''where language is clear and unambiguous, it must be followed, except in the most extraordinary situation where the language leads to an absurd result contrary to clear legislative intent.'' *United States* v. *Plots,* 347 F.3d 873, 876 (10th Cir. 2003) (citing *United States.* v. *Tagore,* 158 F.3d 1124, 1128 (10th Cir. 1998)); *see Griffin* v. *Oceanic Contractors,* 458 U.S. 564, 572 (1982); *Comm'r* v. *Brown,* 380 U.S. 563, 571 (1965). The ordinary meaning of the clear, unambiguous, specifically limiting words ''relating to the manufacture, distribution, or dispensing of controlled substances'' set forth in 21 U.S.C. 823(f) compels the result that a conviction that is related to illegal drugs generally (transportation here), but not to manufacturing, distributing, or dispensing specifically, is not relevant to public interest Factor 3.

Accordingly, consideration of this factor does not support the Government's petition for revocation of the Respondent's COR.

Factor 2: The Respondent's Experience in Dispensing Controlled Substances

Regarding Factor 2, in cases where the quality of a registrant's prescribing practices are at issue, the qualitative manner and the quantitative volume in which that registrant has engaged in the dispensing of controlled substances, and how long he has been in the business of doing so, are significant factors to be evaluated in reaching a determination as to whether he should be entrusted with a DEA certificate. In some cases, viewing a registrant's proven acts of misconduct (such as a criminal conviction related to controlled substances) against a backdrop of how he has performed activity within the scope of the certificate can provide a contextual lens to assist in a fair adjudication of whether continued registration is in the public interest. However, the Agency has taken the reasonable position that although evidence that a practitioner may have conducted a significant level of sustained activity within the scope of the registration for a sustained period is a relevant and correct consideration, this factor can be outweighed by acts held to be inconsistent with the public interest. *Jayam Krishna-Iyer,* 74 FR at 463.

In this case, the Government has neither alleged nor produced evidence in support of prescribing malfeasance. Although the record in this case is not analytically focused on the Respondent's prescribing and dispensing practices, the nature and history of the Respondent's past prescribing practices are a proper area for consideration in reaching a determination regarding the issue of whether he can be entrusted with the responsibilities attendant upon a registrant. In these proceedings, the Respondent has offered evidence in the form of letters from colleagues, business associates, former patients, and personal family friends. Unfortunately, the letters were all focused on persuading the state prosecutor in his criminal case to exercise leniency, and none of the letters' authors engage in any discussion related to the Respondent's prescribing practices and dispensing conduct. The Respondent did not produce a single letter wherein the writer provided an opinion regarding the Respondent's past history of handling, or suitability to continue to handle, controlled substances. That being said, however, taken as a whole, the criminal clemency letters generally attest that the Respondent, consistent with his impressive credentials and prestigious professional achievements, possesses some level of acuity for practicing medicine, and is well-respected and/or liked by friends, business acquaintances, patients, and peers in the community.

There is no indication in the record that the acts that formed the basis of the Respondent's convictions were contemporaneously known to the Respondent's patients or the hospital staff where he was practicing medicine. Before his current transgressions, the Respondent had engaged in fourteen or so years of presumably uneventful practice that was apparently unmarred by proven allegations of controlled substance mishandling or prescribing misconduct. Although the authors of the letters have not been subject to cross examination, the evidence was received without Government objection and, for the limited purposes for which it can be utilized here, stands unrefuted. While true that on this record consideration of this factor is not supportive of the Government's petition to revoke the Respondent's COR, neither has the Respondent provided evidence from which his prescribing and dispensing practices can be characterized. In short, consideration of this factor militates neither for nor against revocation.

Factors 4 and 5: Compliance With Applicable State, Federal or Local Laws Relating to Controlled Substances; and Such Other Conduct Which May Threaten the Public Health and Safety

Regarding Factor 4, to effectuate the dual goals of conquering drug abuse and controlling both legitimate and illegitimate traffic in controlled substances, ''Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.'' *Gonzales* v. *Raich,* 545 U.S. 1, 13 (2005). Every DEA registrant serves as a guardian with specific obligations aimed at protecting against improper diversion. It would be difficult to imagine a more deliberate, flagrant disregard of the Respondent's obligations as a registrant than his decision to participate in the possession and transportation of illegal drugs at the

request of his wife (who he suspected to be drug-addicted) in amounts too great for her to consume herself and so copious and packaged in a manner as to make it not unlikely that they were intended for distribution to others willing, happy, and/or desperate to abuse them. Perversely contrary to his registrant-borne obligations to minimize the risks of controlled substance diversion, the evidence demonstrates that the Respondent was acting as a conduit for his wife's abuse and even possibly for illegal street drug distribution at a highly-populated arts festival conducted in the desert. Contrary to the posture assumed by the Respondent during these proceedings and at his state medical board hearing, the evidence of record here makes it clear that he was not a well-meaning, if misguided spouse ''taking the rap'' for a culpable wife, but an active planner and willing participant in an evolution to transport illegal drugs—at a minimum—for his wife's use. From the Respondent's own testimony, it is clear that on the date he was apprehended, he recognized that his wife had a drug addiction problem, he (correctly) suspected that the man he was tasked with paying $1,000.00 to was a drug dealer, he admitted that a reasonable person would have known as much, he sent and received phone calls and text messages to arrange a clandestine meeting with the drug dealer, and he received a large quantity of illegal drugs that were packaged for sale. The level of participation demonstrated by this Respondent—a supposed registrant-guardian of the closed regulatory system—is so abjectly repugnant to the integrity of the system and the Respondent's obligations under the law that consideration of this factor alone militates powerfully in favor of revocation.

Under Factor 5, the Deputy Administrator is authorized to consider ''other conduct which may threaten the public health and safety.'' 21 U.S.C. 823(f)(5). It is settled Agency precedent that, ''offenses or wrongful acts committed by a registrant outside of his professional practice, but which relate to controlled substances may constitute sufficient grounds for the revocation of a registrant's DEA Certificate of Registration.'' *David E. Trawick, D.D.S.,* 53 FR 5326, 5327 (1988); *see Jose Antonio Pla-Cisneros, M.D.,* 52 FR 42154, 42154 (1987); *Walker L. Whaley, M.D.,* 51 FR 15556, 15557 (1986). It is beyond doubt that Mrs. Freesemann was correct that the massive volume of controlled substances seized from the Respondent's motor home was too great for her to consume during the couple's planned vacation. The drugs were absolutely headed for Mrs. Freesemann's use, and judging by the testimony of the trained and experienced police officers who seized them, were packaged as if prepared for sale to the public. Whether the Respondent was transporting this abundant cache of contraband for the exclusive use of his drug-abusing spouse or whether the drugs were headed for distribution to festival attendees, the public health and safety was a guaranteed intended casualty. But for the intervention of the Bakersfield PD, the drugs the Respondent was ferrying would have been pumped into Mrs. Freesemann's likely drug-dependent body or out on the street through the Burning Man Festival, putting members of the public in all age groups in danger. The Respondent's simultaneous possession of a handgun with a readily available clip full of ammunition reinforces his own understanding of the dangers attendant upon dealing with the likes of his wife's supplier and facilitating the interstate transportation of illegal drugs for whatever purpose. Consideration of the Respondent's conduct under this factor alone would be sufficient to justify the revocation of his COR.

Consideration of Factors 4 and 5 militate powerfully and conclusively in favor of the revocation of the Respondent's COR.

Recommendation

Based on the foregoing, the evidence supports a finding that the Government has established that the Respondent has been convicted of a felony relating to controlled substances and has also committed acts that are inconsistent with the public interest. A balancing of the statutory public interest factors supports a revocation of the Respondent's Certificate of Registration. In tacit acknowledgement of this reality, the Respondent, through counsel, seeks amelioration in terms of the recommended sanction. In his Proposed Findings of Facts and Conclusions of Law (Respondent's Brief), the Respondent petitions for a stayed suspension that mirrors the order issued by the California Medical Board in terms and duration. Resp't Br. at 6.

In cases, such as the present case, where the Government has made out a *prima facie* case that the Respondent has committed acts that render his continued registration inconsistent with the public interest, Agency precedent has firmly placed acknowledgement of guilt and acceptance of responsibility as conditions precedent to merit the continued status as a registrant and avoid revocation. *Hoxie* v. *DEA,* 419 F.3d 477, 483 (6th Cir. 2005); *Ronald Lynch, M.D.,* 75 FR 78745, 78749 (Respondent's attempts to minimize misconduct held to undermine acceptance of responsibility); *George Mathew, M.D.,* 75 FR 66138, 66140, 66145, 66148 (2010); *George C. Aycock, M.D.,* 74 FR 17529, 17543 (2009); *Steven M. Abbadessa, D.O.,* 74 FR 10077, 10078 (2009); *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 463 (2009); *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008). Here, while the Respondent has acknowledged his conviction and that he was caught transporting a large shipment of illicit drugs, he has truly acknowledged very little. He accepted a no-contest guilty plea on the criminal matter, but the essence of his testimony at his DEA hearing, like his testimony at his hearing before the California Medical Board, was to assign responsibility for his convictions on the overzealous prosecutor, his defense attorney, and a desire to accept a disproportionate helping of culpability to shield his wife (whom he essentially demonizes as the truly culpable party). He did not acknowledge that he knew he was paying money for drugs, that he received drugs, or that he was a principal player in choreographing the entire event. In truth, the Respondent has not accepted responsibility for his actions, expressed remorse for anything other than the consequences of those actions at any level, or presented evidence that could reasonably support a finding that the Deputy Administrator should continue to entrust him with a Certificate of Registration. *See Mathew,* 75 FR at 66140, 66165 (failure of registrant to accept responsibility for established misconduct held fatal to his attempt to rebut the Government's establishment of a *prima facie* case for COR revocation); *George Jeri Hassman, M.D.,* 75 FR 8194, 8236 (2010) (requiring the Respondent to accept responsibility for his misconduct related to controlled substances and to demonstrate the corrective measures that he has taken to prevent similar future misconduct in order to rebut the Government's *prima facie* case). Rather than accept responsibility, the Respondent instead puts the principal blame for his current difficulties on his wife, while conveniently dismissing the uncontroverted evidence of his own pervasive entanglement (text messages, phone calls, meetings, *etc.*) in a scheme to move and distribute copious amounts of dangerous and highly controlled drugs. An illicit drug transaction like the one in which involved the

Respondent as the primary drug and money courier strikes at the heart of the CSA, the very statute that privileged the Respondent to handle controlled substances in his medical practice. The deleterious potential effect that these drugs can have on the human body, the peril in which they put human life when indiscriminately ingested by willing abusers, and the sheer volume by which the Respondent was caught delivering them cannot be overstated. The reckless danger that the Respondent's course of action posed to the public health and safety of his wife, at a minimum, and possibly even the surrounding area and community where the Burning Man Festival was to take place, would not be counterbalanced even if the Respondent had deemed to submit evidence of many years of admirably-conducted medical practice. The offensiveness of his actions, including the duty imposed by his Hippocratic oath to abstain from doing harm, as well as his lack of candor at his hearing in minimizing the extent to which he helped orchestrate this scheme, all militate strongly in favor of revocation.

Even if the Respondent's position regarding the operative facts were embraced, it would not change the outcome of this recommended decision. The Respondent acknowledged during his testimony that he (correctly) suspected that his wife was abusing illicit drugs based on a readily-available set of objective facts that he was even able to catalogue upon request during his testimony. He acknowledged that he was paying a $1,000.00 to a man who made him uneasy at the request of his (likely drug-abusing) spouse. The Respondent even conceded that any reasonable person would have realized that there were illicit drugs in the motor home he was driving that evening,[64] and that ''[a]ll [he] can claim is to be the stupidest doctor at the time'' [65] is (even if credited) wholly unpersuasive, and ''manifests a degree of irresponsibility that is incompatible with what DEA expects of a registrant.'' *Cf. Lynch,* 75 FR at 78753 (registrant's position that it was acceptable for him to prescribe controlled substances in the face of known and obvious diversion risks on the theory that he is not a lawyer or police agent characterized as ''manifest[ing] a degree of irresponsibility that is incompatible with what DEA expects of a registrant''). Reduced to its essence, the Respondent seeks relief from his actions and convictions by a claim that he stubbornly refused to acknowledge what his trained eyes and ears informed him of: that he was giving money to a drug dealer and receiving illicit drugs for his wife that were packaged as if for sale and driving those drugs to an art festival in the Nevada desert. The Respondent's odd theory that turning a blind eye to circumstances that required him to refrain from actions that were repugnant to his responsibilities as a registrant, and whistling past the graveyard of what was obviously a drug transaction where he was playing an integral role, is not a persuasive argument in favor of continuing to entrust him with the responsibilities of a DEA registrant. *Cf. Holloway Distrib.,* 72 FR 42118, 42124 (2007) (in the context of a List I distributer, a policy of ''see no evil, hear no evil'' is fundamentally inconsistent with the obligations of a DEA registrant). In short, his efforts to convince DEA that he is ''the stupidest doctor,'' [66] even if successful, would hardly have inspired sufficient confidence in his ability to continue to execute the responsibilities attendant upon a registrant to fairly merit his continued exercise of that privilege.

Accordingly, the Respondent's Certificate of Registration should be *Revoked* and any pending applications for renewal should be *Denied.*

Dated: January 24, 2011.

John J. Mulrooney, II,

U.S. Administrative Law Judge.

[FR Doc. 2011–25224 Filed 9–29–11; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 09–65]

Stephen L. Reitman, M.D.; Decision and Order

On July 20, 2010, Administrative Law Judge Gail A. Randall 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 rulings, findings of fact, conclusions of law,[2] and recommended order except as discussed below. Accordingly, while Respondent's registration will be continued, I conclude that the record requires that several conditions be placed on it to adequately protect the public interest.

At the time of the hearing, the Medical Board of California (MBC) had filed an accusation against Respondent. ALJ at 31. However, the MBC did not issue a final decision in the matter until December 20, 2010, which became effective on January 19, 2011. *In re Stephen Lee Reitman, M.D.,* Decision at 1 (Cal. Med. Bd. Dec. 20, 2010). I take official notice of the MBC's Decision and the Stipulated Settlement and Disciplinary Order.[3] Therein, the Board revoked Respondent's medical license but stayed the revocation and placed him on probation for five years subject to numerous conditions. Stipulated Settlement, at 4. The conditions include, *inter alia,* that Respondent ''maintain a record of all controlled substances ordered, prescribed, dispensed, administered, or possessed by'' him, that he abstain ''from the personal use or possession of controlled substances'' except as ''to medications lawfully prescribed to [him] by another practitioner for a bona fide illness or condition'' and that he ''notify the Board'' within fifteen calendar days of receiving any such prescription, and that he take both a prescribing practices course and an ethics course. *Id.* at 4–10.

Most significantly, the Order requires that Respondent, at his own expense, ''contract with a laboratory or service—approved in advance by the Board or its designee—that will conduct random, unannounced, observed, urine testing a maximum of four times each month.'' *Id.* at 5. Moreover, ''[t]he contract shall require results of the urine tests to be transmitted by the laboratory or service directly to [the] Board or its designee

[64] Tr. 337.

[65] Tr. 332.

[66] Tr. 332.

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

[2] The ALJ found that Respondent violated California law by obtaining controlled substances from a distributor ''while concealing the fact that he was dispensing to himself.'' ALJ at 33 (citing Cal. Health & Safety Code 11173). The ALJ did not, however, cite any decisional law holding that conduct similar to that engaged in by Respondent violates this provision. *See id.* Moreover, there is no evidence establishing that Moore Medical required Respondent to make any disclosure as to his purpose in purchasing the drugs. *Cf. Lovejoy* v. *AT&T Corp.,* 92 Cal.App.4th 85, 96 (2001) (noting that tort of concealment requires that ''the defendant must have been under a duty to disclose the fact to the plaintiff''). I therefore do not adopt this finding. However, the evidence does establish the other violations of the CSA and State law as discussed by the ALJ.

[3] 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). Respondent can dispute the facts of which I take official notice by filing a properly supported motion for reconsideration within twenty days of service of this Order, which shall begin on the date it is mailed.