By order of the Commission.

Issued: August 10, 2016.

Lisa R. Barton,

Secretary to the Commission.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 16–14]

Lawrence E. Stewart, M.D.; Decision and Order

On June 1, 2016, Administrative Law Judge (ALJ) Charles Wm. Dorman issued the attached Recommended Decision. Therein, the ALJ found that on multiple occasions, Respondent issued prescriptions outside of the usual course of professional practice and which lacked a legitimate medical purpose for schedule II controlled substances such as Norco 10/325mg (hydrocodone/acetaminophen) and Hycodan (hydrocodone/homatropine cough syrup),[1] the schedule III controlled substance phentermine, and the schedule IV controlled substance alprazolam, in violation of 21 CFR 1306.04(a). See R.D. at 34–60.[2]

More specifically, the evidence showed that Respondent prescribed the controlled substances to his girlfriend knowing that she was seeking the drugs to abuse them. The evidence also showed that while some of the prescriptions were issued in the name of Respondent's girlfriend, in multiple instances, Respondent issued prescriptions, including multiple prescriptions for Hycodan, listing his girlfriend's two children, who were then three and five years old respectively, as the patients, and that Respondent did so knowing that his girlfriend intended to use the cough syrup because she enjoyed drinking it. The evidence further showed that on multiple occasions, Respondent issued prescriptions for Norco[3] to undercover agents who posed as acquaintances of his girlfriend, knowing that the drugs would then be provided to his girlfriend and that Respondent further instructed his girlfriend as to how her purported acquaintances should present as having headaches so that he could document a reason in the their charts for having issued the prescriptions.

The ALJ also found that on multiple occasions, Respondent violated Rule 1.4 of the Mississippi State Board of Medical Licensure's Rules by failing to document in his girlfriend's chart the diagnosis or justification for issuing the prescription, as well as required information including the drug's name, the dose, strength and quantity. R.D. at 37–39 (citing Miss. Code R. § 30–17–2640:1.4; also citing *id.* § 30–17–2640:1.16; Miss. Code §§ 73–25–29(3) and (13)). The ALJ also made a similar finding with respect to four hydrocodone cough syrup prescriptions Respondent issued in the names of his girlfriend's children. R.D. at 46–47 (Rx's issued on 6/17/14, 7/23/14, 11/19/14); *id.* at 49 (Rx 11/3/14).

With respect to the phentermine prescriptions Respondent issued to his girlfriend, the ALJ found that he ''completely failed to comply'' with the Board's Rule 1.5 because he did not prescribe ''adjunctively with caloric restriction,'' ''never conducted and recorded an initial comprehensive evaluation'' including ''a thorough patient history or physical examination,'' and never recorded required histories, nor her height, weight, BMI, body measurements, and vital signs. R.D. 43. The ALJ also found that Respondent did not conduct a re-evaluation of his girlfriend every 30 days as required by Rule 1.5. *Id.* Finally, noting that Rule 1.5 generally requires that the patient have a BMI greater than 30 in order to justify prescribing phentermine, the ALJ observed that Respondent's girlfriend testified that she had gone from 135 to 121 pounds and that she presented at the hearing ''with a slender body type.'' *Id.* The ALJ thus explained that ''[a]fter observing [her] appearance,'' he found ''it difficult to comprehend . . . how Respondent could have possibly believed that [she] has a high enough BMI to justify'' prescribing weight-loss medication. *Id.* The ALJ thus found that Respondent violated 21 CFR 1306.04(a), the Board's Rule 1.5, and Mississippi Code sections 73–25–29(3) and (13) when he prescribed phentermine to his girlfriend. *Id.* at 44.

Based on these findings, the ALJ concluded that Respondent had engaged in ''an egregious level of intentional diversion'' and that the Government had satisfied its *prima facie* burden of showing that ''Respondent's continued registration would be inconsistent with the public interest.'' R.D. at 61. Because ''Respondent offered no evidence that he accepted responsibility for his misconduct or reformed his ways,'' the ALJ found that he ''failed to rebut the Government's *prima facie* case.'' *Id.* The ALJ thus recommended that I revoke Respondent's registration and deny any application to renew or modify his registration. *Id.*

Respondent filed Exceptions to the ALJ's Recommended Decision. Thereafter, the ALJ forwarded the record to me for Final Agency Action.

Having considered the record in its entirety, including Respondent's Exceptions, I have decided to adopt the ALJ findings of fact, conclusions of law, and recommended Order. However, before I address Respondent's Exceptions, I deem it necessary to address the ALJ's ruling on the admissibility of the FDA package insert for Hycodan (GX 4).

On motion of Respondent's counsel, the ALJ ruled inadmissible Government Exhibit 4, which the Government represented was the FDA package insert for Hycodan.[4] Tr. 422, 427. The basis of Respondent's objection was that the exhibit contains ''little more than generalizations and medical opinions'' and that the ALJ's prehearing statement required the parties to disclose ''the names and credentials and opinions of medical experts . . . who would be offering medical opinions in this case.'' *Id.* at 420. Respondent's counsel further argued that ''[t]he government did not identify any expert capable of being cross-examined on any of these opinions'' and that ''[t]here is no reason to believe that [the Exhibit was] authored by a physician, much less do we know whether the author had credentials to offer these opinions.'' *Id.*

After the Government argued that the document was the FDA package insert, which is included ''with every drug purchased or sold,'' *id.* at 422, Respondent argued that the copyright of the document was the manufacturer and that ''we don't know who authored it, or what their credentials were, but it's a self-interested marketing pharmaceutical company'' that is ''trying to sell their [sic] medicine'' and while the company has a ''self-interest[] to comply with a federal regulation . . . ''[i]t doesn't mean that the content is government-sanctioned.'' *Id.* at 422–23. Respondent thus asserted that the

[1] Effective October 6, 2014, combination hydrocodone products including both Norco and Hycodan were transferred from schedule III to schedule II of the Controlled Substances Act. *See Schedules of Controlled Substances: Rescheduling of Hydrocodone Combination Products from Schedule III to Schedule II,* 79 FR 49661. Thus, at the time Respondent issued some of the Norco and Hycodan prescriptions, the drug was a schedule III controlled substance. This, however, has no consequence for my decision.

[2] All citations to the Recommended Decision are to the slip opinion as issued by the ALJ.

[3] The evidence also showed that at one of the undercover agent's visits, Respondent also gave her a prescription for Hycodan cough syrup.

[4] There is no dispute that the Exhibit was what the Government represented it to be—a copy of the package insert. Nor is there any dispute as to how the document was obtained.

document was ''just not reliable enough.'' *Id.* at 426.

The ALJ sustained the objection but provided no explanation as to his reason for doing so. I conclude, however, that the Exhibit was admissible. As the FDA has explained, the package insert ''is part of the FDA-approved labeling,'' and ''[t]he FDA approved label is the official description of a drug product, which includes indication (what the drug is used for); who should take it; adverse events (side effects); instructions for uses in pregnant women, children, and other populations; and safety information for the patient.'' *See* U.S. Food and Drug Administration, *Drugs@ FDA Instructions: Health Information,* available at *www.fda.gov/Drugs/ InformationOnDrugs/ucm079450.htm* (accessed August 4, 2016). The FDA's approval of a drug label follows extensive clinical trials, including trials which examine the safety and effectiveness of a drug and are part of the process for approving the drug for marketing. *See* Food and Drug Administration, *Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products,* 71 FR 3922 (2006) (Final Rule) (''A prescription drug product's FDA-approved labeling (also known as 'professional labeling,' 'package insert,' 'direction circular,' or 'package circular') is a compilation of information about the product, approved by FDA, based on the agency's thorough analysis of the new drug application (NDA) . . . submitted by the applicant. This labeling contains information necessary for safe and effective use.'').

Under the Food, Drug and Cosmetic Act, a drug ''shall be deemed to be misbranded . . . [u]nless its labeling bears . . . such adequate warning against use . . . by children where its use may be dangerous to health.'' 21 U.S.C. 352(f). Moreover, introducing a misbranded drug into interstate commerce is a violation of 21 U.S.C. 331(a). Thus, there are ample incentives for drug manufacturers to provide reliable information in the package insert. Based on the foregoing, I find that there are sufficient indicia of reliability to support the admission of the document into evidence and make it a part of the record.[5] I further find that this evidence is probative on the issue of whether the Hycodan prescriptions issued by Respondent in the name of his girlfriend's children were for a legitimate medical purpose. *See, e.g., Medicine Shoppe-Jonesborough* v. *DEA,* 300 Fed. Appx. 409, 413 (6th Cir. 2008) (holding that dispensing contraindicated controlled substance is evidence of 21 CFR 1306.04(a) violation).

Notably, the Hycodan package insert's safety information includes the following warning: ''The use of HYCODAN is not recommended for use in children less than 6 years of age because of the risk of fatal respiratory depression.'' GX 4, at 2. Notably, Respondent's girlfriend's daughter was not even five years old when he wrote the first Hycodan prescription in her name. GE 55, at 1–2. Respondent also wrote Hycodan prescriptions in the name of his girlfriend's son who was then three years old. *Id.* at 3–4; 11–12. In short, neither of the children who were listed as the patients on the Hycodan prescriptions was six years of age when Respondent wrote the prescriptions. Thus, I consider this as additional evidence which supports the conclusion that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice when he issued the Hycodan prescriptions in the names of his girlfriend's children. 21 CFR 1306.04(a). I now turn to Respondent's Exceptions.

Exception I—The Government Failed ''to Prove Violations of State or Local Laws Sufficient to Demonstrate Danger to the Public Interest.''

Respondent argues that the ALJ failed to give proper weight to the decision of Dr. Craig, the Medical Board's Executive Director, to close the Board's investigation of his prescribing practices without recommending the initiation of a formal action against his medical license. Exceptions, at 1–2. According to Respondent, the Board reviewed ''all such clinical and prescription records'' for his girlfriend and her children, and it ''decided that there was no evidence of any breach of any medical standard of care sufficient to bring any administrative charge against [him] related to any such prescription.'' *Id.* at 2. He also asserts that Dr. Craig ''determined that there was not even sufficient professional reason to issue [him] an informal warning as to any such prescription for pain medication.'' *Id.*

Respondent then argues that ''[r]ather than . . . defer[] to the professional judgments made by [Dr. Craig as to] whether State laws were violated by [him], the ALJ['s] Recommendation proceeds to interpret and apply those State laws without the benefit of any medical evidence, or any medical opinion in any form, anywhere in the record of this case.'' *Id.* And noting the ALJ's discussion that '''DEA has not required expert testimony to establish a violation of 21 CFR 1306.04(a) in cases where a prescriber engaged in drug deals, where there were notable differences between patients' medical records and diagnoses, and where a prescriber falsified patients' charts,' '' Respondent contends that the Government did not allege that he engaged in any such conduct. *Id.* at n.1.

I reject the Exception. As for the contention that Dr. Craig reviewed the medical records and prescriptions and did not find the evidence sufficient to initiate a proceeding against his license, Respondent ignores the credited testimony that the Board terminated its investigation upon the request of the Mississippi Bureau of Narcotics (MBN) after the latter informed the Board that it was conducting a criminal investigation. Tr. 60 (testimony of MBN agent); GE 3, at 2 (Board Complaint form entry dated ''3–20–15'' stating ''MBN has asked that we hold off on doing anything to this doctor because they are working a criminal case on him'').[6] A Board investigator also testified that ''it's customary for [the Board] to back off [of an investigation] and let a criminal agency pursue their [sic] case'' and that Dr. Craig was aware of the criminal investigation. Tr. 210.

Moreover, even then the Board's letter cautioned Respondent ''that authorizing

[5] Hearsay evidence is admissible in administrative proceedings, provided it is relevant and material and supported by sufficient indicia of reliability. *See, e.g., Mireille Lalanne,* 78 FR 47750 (2013).

As further noted above, in opposing the admission of the package insert, Respondent represented that it contained expert opinions from unidentified persons whom he could not cross-examine and thus was being offered in violation of the ALJ's Prehearing Order. However, in its pre-hearing statement, the Government provided notice that it intended to offer the Exhibit and pursuant to the ALJ's Prehearing Ruling, the Government was required to provide the document to Respondent by 2 p.m. on February 12, 2016. ALJ Ex. 9, at 2. No claim is made that the Government failed to comply with the ALJ's ruling.

While Respondent asserts that he was unable to cross-examine the persons who wrote the package insert, he made no attempt to subpoena either an FDA official involved in reviewing the document or an employee from the manufacturer who was involved in preparing it. Moreover, Respondent could have sought to challenge the reliability of the document by producing evidence (whether through expert testimony or studies) disputing the package insert's statement regarding the risks of prescribing the drug to children less than six years of age. Respondent, however, produced no evidence which calls into question the reliability of the statements contained in the insert.

[6] The Board's investigation involved interviewing Respondent, as well as reviewing his girlfriend's patient file and a PMP report of her controlled substance prescriptions. GE 3, at 4–6. Notably, the Board's investigator testified that the Board did not interview Respondent's girlfriend. Tr. 196.

refills for Phentermine/Adipex without the benefit of a medical examination is strictly prohibited by the Board's Rules and Regulations'' and specifically quoted the Board's Rule 1.5(E), which states that: ''[a] patient continued on a controlled substance in schedule III, IV, V for the purpose of weight reduction or the treatment of obesity should undergo an in-person re-evaluation once every 30 days.'' GE 3, at 1. Finally, as the evidence shows, subsequent to the Board's closing of its investigation, Respondent again issued multiple controlled substance prescriptions to purported acquaintances of his girlfriend knowing that the drugs would subsequently be provided to his girlfriend. Accordingly, I reject Respondent's contention that the Board's closing of its investigation reflects its ''professional judgments'' that Respondent acted within the bounds of accepted professional practice when he prescribed to Respondent and the undercover officers.

Under both this and his subsequent exception, Respondent argues that the ALJ's decision is unprecedented because the Government put forward no expert testimony to support the conclusion that he violated 21 CFR 1306.04(a) in issuing the various prescriptions. However, contrary to Respondent's understanding, numerous decisions of both the federal courts in criminal cases and this Agency have held that expert testimony is not necessarily required to prove that a physician acted outside of the usual course of professional practice and lacked a legitimate medical purpose in issuing a controlled substance prescription. *See United States* v. *Pellman,* 668 F.3d 918, 924 (7th Cir. 2012) (quoting *United States* v. *Armstrong,* 550 F.3d 382, 388–89 (5th Cir. 2008) (''While expert testimony may be both permissible and useful, a jury can reasonably find that a doctor prescribed controlled substances not in the usual course of professional practice or for other than a legitimate medical purpose from adequate lay witness evidence surrounding the facts and circumstances of the prescriptions.'')); *Armstrong,* 550 F.3d at 389 (''Jurors have had a wide variety of their own experiences in doctors' care over their lives, thus and expert testimony is not necessarily required for jurors to rationally conclude that seeing patients for as little as two or three minutes before prescribing powerful narcotics is not in the usual course of professional conduct.'').[7] *See also T.J. McNichol,* 77 FR 57133, 57147–49 (2012), *pet. for rev. denied,* 537 Fed. Appx. 905 (11th Cir. 2013); *Morris W. Cochran,* 77 FR 17505, 17519–20 (2011) (holding, without expert testimony, that prescriptions lacked a legitimate medical purpose where physician noted in patient medical records that patients had no pain, did not document any findings to support a diagnosis, and yet diagnosed patients as having chronic pain); *Robert F. Hunt,* 75 FR 49995, 50003 (2010) (holding, without expert testimony, that physician lacked a legitimate medical purpose based on statements made during undercover visits and falsification of chart). *See also Jack A. Danton,* 76 FR 60900, 60904 (2011).

Thus, while expert testimony is typically necessary to establish a violation of 21 CFR 1306.04(a) '' 'where a physician ma[kes] some attempt to comply with various state medical practice standards and the adequacy of those efforts is at issue,' . . . the facts and circumstances surrounding the issuance of the prescription may nonetheless establish a violation even without expert testimony.'' *McNichol,* 77 FR 57147–48 (quoting *Danton,* 76 FR at 60904 & n.13). Accordingly, in *McNichol,* the Agency found a violation proved, notwithstanding that the ALJ had rejected the testimony of the Government's Expert, because while the physician had gone through the motions of a physical exam, the physician's ''comments manifest[ed] that he knew that [the patient] was an abuser of controlled substances.'' *Id.* at 57148. *See also Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (''[T]he prescription requirement . . . ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'') (citing *United States* v. *Moore,* 423 U.S. 122, 135, 143 (1975)).

Here, as the ALJ found, Respondent issued multiple prescriptions to his girlfriend while failing to document the performance of a physical exam, as well as findings and diagnoses that would support the issuance of the prescriptions. Moreover, with respect to the hydrocodone cough syrup prescriptions Respondent issued to his girlfriend which listed her children as the patients, the ALJ credited her testimony that she told Respondent that she wanted the big bottle of hydrocodone cough syrup and he ''knew I would drink it too.'' R.D. 7; 11 (citing Tr. 216, 251–52, 268, 273); *see also* Tr. 298 (girlfriend's testimony that the Norco prescriptions were ''not for a headache'' but were ''[j]ust for fun''). Likewise, with respect to the prescriptions Respondent provided in March and April 2015 to his girlfriend's purported acquaintances, the undercover recordings clearly establish that Respondent knew that the acquaintances were not seeking the prescriptions to treat legitimate medical conditions but to provide the drugs to his girlfriend. Given the evidence that clearly shows that Respondent issued the prescriptions to support his girlfriend's abuse of controlled substances, the Government was not required to put forward expert testimony to prove its case.

Exception II—The Government ''Fail[ed] to Prove 'Past Experience in the Distribution of Controlled Substances.' ''

Respondent further argues that the ALJ erred when he refused ''to allow Respondent to seek clinical evidence about [his girlfriend's] medical history through third-party document subpoenas.'' Exceptions, at 2. Prior to the hearing, Respondent requested that the ALJ issue eight subpoenas to health care providers for their medical records ''which reflect, relate to, or explain the clinical or medical basis for prescribing'' controlled substances (primarily hydrocodone with acetaminophen) to his girlfriend. *See, e.g.,* ALJ Ex. 13, at 6.

In seeking the subpoenas, Respondent maintained that ''[i]n order for the truth about [his girlfriend's] medical condition and needs to be revealed . . . the clinical findings and judgment of all such health care providers should be available to the Court in order to allow a comparison between Dr. Stewart's judgment and the judgments of a substantial number of other health care professionals in the same community.'' ALJ Ex. 13, at 3. On the various subpoenas, Respondent explained that because one of the Government's Exhibits (the PMP report, GE 49) shows that the other health care providers had also issued hydrocodone prescriptions to his girlfriend, ''[t]he presumed legitimacy of the particular clinical findings which caused [the] other health care professionals in the same community to prescribe the same medication to [her] could be strongly probative of the medical inaccuracy of the . . . core allegations against'' him. *See, e.g.,* GE 13, at 6.

The Government opposed the issuance of the subpoenas. It argued that

[7] *See also United States* v. *Word,* 806 F.2d 658, 663 (6th Cir. 1986); *United States* v. *Larson,* 507 F.2d 385, 387 (9th Cir. 1974); *United States* v. *Bartee,* 479 F.2d 484, 488–89 (10th Cir. 1973); *State* v. *Moody,* 393 So.2d 1212, 1215 (La. 1981).

the information Respondent sought was irrelevant because the only allegations it raised as to the unlawful prescribing of hydrocodone with acetaminophen to his girlfriend involved the four Norco prescriptions which were identified in paragraph 4 of the Show Cause Order.[8] ALJ Ex. 14, at 2–3. The Government also argued that ''[i]n each of those instances,'' it was ''alleg[ing] that Respondent prescribed to [her] either without conducting any examination of her or without noting those prescriptions in her chart.'' *Id.* at 3. And it further argued that none of the records would address the ''actual charges against'' Respondent. *Id.*

The ALJ agreed with the Government and denied Respondent's request. ALJ Ex. 16. The ALJ explained that having reviewed the allegations of the Show Cause Order, he agreed with ''the Government's assessment that the question of whether [Respondent' girlfriend] needed a particular medication is not an issue before me.'' *Id.* at 1. And noting that ''Respondent has not produced a summary of [his] expected testimony,'' the ALJ then reasoned that ''there is no information in the record that the Respondent based his decision to prescribe a particular medication to [his girlfriend] based upon his knowledge of what some other treating physician had prescribed for'' her. *Id.* at 1–2. Concluding that the information sought by Respondent was irrelevant, the ALJ denied the request. *Id.* at 2.

I conclude that the ALJ properly denied Respondent's request. I do not, however, read the Government's Opposition as expressing the position that his girlfriend's need for the Norco prescriptions was not at issue.

While the Government alleged that these particular prescriptions were unlawful because: (1) Respondent did not ''conduct[] an examination of'' of his girlfriend or ''document[] such in her file,'' or (2) Respondent did not note the prescriptions in her chart and thus violated the Board's Rules 1.4, 1.11(b) and 1.16, the Government also cited 21 CFR 1306.04(a)). Because ''[a] prescription for a controlled substance to be effective must be issued for a legitimate medical purpose,'' 21 CFR 1306.04(a), a patient's need for the drug is invariably at issue when a violation of this provision is alleged. *See also* Miss. Code R. § 30–17–2640:1.4 (''No physician shall prescribe, administer or dispense any controlled substance . . . without a good faith prior examination and medical indication therefore.''). Indeed, assessing whether a patient needs a controlled substance to treat a medical condition is the reason why the usual course of professional practice generally requires that a physician take a detailed history and conduct an appropriate examination of the patient to make a proper diagnosis and treatment plan.[9] *See id.*

I nonetheless agree with the ALJ's conclusion that the information sought by the subpoenas was irrelevant. Notably, Respondent made no proffer that he had obtained and reviewed the records maintained by these other providers and had based his decisions to prescribe hydrocodone to his girlfriend on those records. Nor did Respondent proffer that he was acting as a covering physician for any of these other physicians (or any other authorized prescriber) when he prescribed the hydrocodone to his girlfriend.

Respondent further contends that the prescriptions issued by the other providers ''strongly support a conclusion that [his] own prescriptions for [h]ydrocodone for use by [his girlfriend] were within the bounds of the medical standard of care practiced in that community.'' Exceptions, at 4. However, were it the case that Respondent's prescribing of hydrocodone was within the bounds of professional practice, he could have put on an expert to testify as such.[10] Yet Respondent chose not do so.

Respondent also contends that the evidence is insufficient to show that the hydrocodone prescriptions lacked a legitimate medical purpose because ''it is clear that during the months relevant to this case [his girlfriend] was in fact suffering from a chronic migraine condition and associated headache pain, and that [he] was treating her for that condition.'' Exceptions, at 3. Respondent points to the testimony of his girlfriend that she was hospitalized for migraines ''[t]hree times prior to the beginning of his treatment of her in February 2014, and a fourth time during that treatment in August of 2014.'' *Id.* He further maintains that his charts ''specified that she complained of, and in fact suffered from, a chronic migraine condition.'' *Id.*

It is true that in two of the visit notes for his girlfriend (April 21 and Sept. 2, 2014), Respondent listed Maxalt, a non-controlled drug, and Norco (hydrocodone with acetaminophen), as the drugs he prescribed to her for this condition. GE 2, at 12. Yet prior to Respondent's issuance of the first Norco prescription to her, she had ''asked him to write the big bottle'' of hydrocodone cough syrup ''so that [she] could have some too'' and ''told him I like to drink it'' because she ''like[d] the way it made [her] feel.'' Tr. 251–52; 273. Thus, Respondent already knew that his girlfriend was a drug abuser.[11]

The evidence also shows that Respondent told his girlfriend that taking hydrocodone could itself ''cause migraines.'' *Id.* at 283; *see also id.* at 299. Respondent's girlfriend testified that he told her that taking hydrocodone ''would not help'' her migraines. *Id.* at 300. She further testified that ''[t]he hydrocodone was not for a headache,'' but for ''[e]xtracurricular activities,'' *i.e.,*

[8] The Show Cause Order alleged that the prescriptions were issued on May 22, June 17, September 11, and October 29, 2014. ALJ Ex. 1, at 2.

[9] As Rule 1.4 further states:

Standards of proper medical practice require that, upon any encounter with a patient, in order to establish proper diagnosis and regimen of treatment, a physician must take three steps: (a) Take and record an appropriate medical history, (b) carry out an appropriate physical examination, and (c) record the results. The observance of these principles as a function of the ''course of legitimate professional practice'' is particularly of importance in cases in which controlled substances are to play a part in the course of treatment. It is the responsibility of the physician to dispense, prescribe or administer such drugs with proper regard for the actual and potential dangers.

Miss. Code R. § 30–17–2640:1.4.

[10] Respondent initially proposed to call a physician and professor from the University of Mississippi Medical Center who would testify that the prescriptions he issued ''were for legitimate medical purposes'' and ''were in the usual course of and consistent with [his] own standard professional practices [and] were consistent with the standard of care in the medical community in which they lived.'' ALJ Ex. 17, at 2–3. While the Government moved to exclude the proffered testimony, the ALJ denied the Government's motion and specifically ruled that the expert could testify to the above subjects. ALJ Ex. 28, 3–4. Respondent did not, however, call this witness.

Of further note, even if Respondent had put on testimony that the prescriptions were ''consistent with [his] own standard professional practices,'' that testimony would have been unavailing because the standard of professional practice is not defined by a physician's subjective belief as to the propriety of his practices but on the application of the standards of practice in the State where he practices. *United States* v. *Tobin,* 676 F.3d 1264, 1290 (11th Cir. 2012). For similar reasons, evidence as to the standard of care in the medical community in which Respondent lived would also be unavailing.

[11] Respondent points to the testimony of his girlfriend that she never told him that she was addicted to hydrocodone, dependent on the drug, or taking it ''for no reason.'' Exceptions, at 3. As discussed above, Respondent's girlfriend subsequently clarified that she took the Norco ''just for fun.'' Tr. 298.

To the extent Respondent believes that his misconduct in writing the Norco prescriptions should be excused because his girlfriend did not tell him why she was taking the Norco, the evidence is clear that she had previously asked him to prescribe the big bottle of cough syrup so that she ''could have some too'' and had told him that she ''like[d] to drink it'' because of ''the way it made [her] feel.'' Thus, Respondent clearly knew that his girlfriend was a drug abuser at the time he wrote her the first Norco prescription.

''just for fun.'' *Id.* at 298. Moreover, Respondent issued the first of the Norco prescriptions to her without even taking a history and conducting a physical examination of her. GE 2, at 12; *see* Miss. Code R. § 30–17–2640:1.4. He also failed to document several of the hydrocodone prescriptions in his girlfriend's chart.[12] *Compare* GE 2, at 12, *with* GE 3, at 9–10. Thus, the evidence strongly supports the conclusion that Respondent acted outside of the usual course of professional practice and lacked a legitimate medical purpose when he prescribed Norco to his girlfriend. 21 CFR 1306.04(a).

Respondent also appears to argue that the alprazolam prescription he issued to his girlfriend was not unlawful because she suffered from anxiety and he referred her to a psychiatrist who had prescribed the drug to her. Exceptions, at 4. While Respondent acknowledges that he did not ''diagnose [her] himself as to anxiety,'' he argues that he issued the prescription ''in reliance on that psychiatrist's independent clinical judgment'' and gave her a refill so that she could ''avoid[] further one-hour trips to the psychiatrist to obtain a refill.'' *Id.*

I am not persuaded. Notably, the psychiatrist prescribed only a seven-day supply of alprazolam extended release in the .5 mg dosage. GE 49, at 1. Respondent, however, prescribed a stronger dosage of alprazolam and greater quantity, providing her with a prescription for 40 tablets of the 1mg immediate release dosage form, with a refill for an additional 40 tablets. *Id.* This was not a refill of the psychiatrist's prescription at all, but a substantially different and stronger prescription. Yet the medical record contains no evidence that Respondent coordinated his prescribing with the psychiatrist. As for Respondent's explanation that he wrote the prescription so that his girlfriend would not have to make the one-hour trip to obtain a refill, this begs the question as to why the psychiatrist would not be willing to call in a refill. I thus reject Respondent's Exception to the extent it challenges the ALJ's findings as to the alprazolam prescription.

As for the phentermine prescriptions, Respondent again invokes Dr. Craig's letter in which he stated that the Board was closing its investigation while cautioning Respondent about the need to conduct an in-person re-evaluation every 30 days. Exceptions, at 4. Respondent revisits his argument that Dr. Craig ''determined that there was no sufficient medical basis for alleging any violation . . . of any medical standard in Mississippi.'' *Id.* However, as previously explained, the Board terminated its investigation because Respondent was the subject of a criminal investigation. Moreover, the ALJ thoroughly explained the basis for his conclusion that Respondent acted outside of the usual course of professional practice and lacked a legitimate medical purpose when he issued the phentermine prescriptions to his girlfriend.[13]

Finally, Respondent argues that ''[t]he DEA, through the CI [his girlfriend], effectively caused [him] to engage in conduct, which, according to the record . . . he apparently had never engaged in on any other occasion.'' Exceptions, at 5. Continuing, Respondent argues that his ''conduct, in issuing prescriptions for pain medications to third parties in an effort to provide the CI with continuing relief from her migraine conditions, arose from the peculiar combination of his personal relationship and familiarity with the CI and the CI's insistence that her 'friends' were seeking medication for'' her use. *Id.* Respondent thus maintains that this ''peculiar circumstance . . . provides no significant medical or other evidence sufficient to justify any conclusion that [his] conduct . . . poses, or is likely to pose in the future, any danger to the public health or safety.'' *Id.*

I disagree. To the extent Respondent's argument sounds in the entrapment defense, I reject it as there is ample evidence that he was predisposed to issue the unlawful prescriptions given the multiple unlawful prescriptions he wrote for his girlfriend in 2014, prior to the involvement of the MBN and DEA. *See United States* v. *Sumlin,* 271 F.3d 274 (D.C. Cir. 2001). As for the assertion that he wrote the prescriptions to the undercover agents to provide his girlfriend ''with continuing relief from her migraine conditions,'' this is simply counterfactual as the record abounds with evidence that Respondent knew she was seeking the drugs to abuse them. Tr. 345; GE15; 16; GE 17, at 2–4, 6–8; GE 18, at 3. I therefore reject Respondent's contention that there is no ''significant medical or other evidence'' to support the conclusion that he poses a danger to public health and safety.[14] Exceptions, at 5. To the contrary, the evidence shows that on multiple occasions, Respondent issued prescriptions outside of the usual course of professional practices and which lacked a legitimate medical purpose to feed his girlfriend's abuse of controlled substances. This conduct amply supports the conclusion that he has committed such as acts as to render his registration ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4).

Exception III—The ALJ Violated Respondent's Fifth Amendment Rights When He Denied His Request To Delay the Hearing Until the End of His Criminal Trial

Respondent's final contention is that the ALJ violated his Fifth Amendment privilege against self-incrimination when he denied his request to reschedule the hearing until after his criminal trial concluded. Exceptions, at 5–6. Notably, the Government did not call Respondent to testify and the ALJ declined to draw an adverse inference from his failure to testify on his own behalf even though doing so would have been warranted. *See Keating* v. *Office of Thrift Supervision,* 45 F.3d 322, 326 (9th Cir. 1995) (''Not only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding.'') (citing *Baxter* v. *Palmigiano,* 425 U.S. 308, 318 (1976)).

' Here, Respondent does not contend that the need to preserve his Fifth Amendment privilege prevented him

[12] Indeed, Respondent wrote the first Norco prescription for her on February 21, 2014. The note in her patient file simply states: ''2–21–14 Hc 7.5/325 (#40, 1)—may be picked up at desk.'' GE 2, at 12. Thus, Respondent issued the prescription without taking a history of his girlfriend's migraines and without conducting a physical exam.

[13] Respondent points to the evidence that on March 27, 2015, he declined to prescribe weight loss medication to one of the undercover agents. Exceptions, at 4 (citing GE 10, at 1–2). However, several weeks earlier, Respondent had been visited by a State Board Investigator who had told him that his documentation for the phentermine prescriptions that he issued to his girlfriend was inadequate and he may have already received the letter from Dr. Craig by the date of the first undercover visit. In any event, while Respondent may have taken to heart the warning he received from Dr. Craig regarding the prescribing of weight loss medications, this obviously had no impact on his prescribing of narcotics, as evidenced by his prescribing of Norco and Hycodan to the undercover agents.

[14] In arguing that he does not ''pose . . . any danger to public health or safety,'' Respondent cites 21 U.S.C. 823(e), the provision which governs the registration of distributors of schedule III through V controlled substances and not practitioners, who are registered under section 823(f). However, to the extent Respondent argues that the Government is required to put forward such proof in seeking the revocation of his registration, the Government is not required to do so even though one of the section 823(f) factors is ''such other conduct which may threaten the public health and safety.'' 21 U.S.C. 823(f). While this factor encompasses conduct which is not otherwise embraced by the other section 823(f) factors, it is indisputable that issuing prescriptions to feed a person's drug abuse is conduct which threatens public health and safety.

from providing testimony refuting the allegations that he unlawfully prescribed various controlled substances to his girlfriend and the undercover officers. Rather, he argues that ''[b]ecause he desired understandably to preserve and not to waive his Fifth Amendment privileges with respect to his criminal trial, [he] was prohibited from 'rebutting' any *prima facie* Government case through his own hearing testimony, which was the only practical way he had to 'accept responsibility'' or to affirm that he 'will not engage in future misconduct.''' *Id.* at 6.

I reject Respondent's contention. *See Grider Drug 1 & 2,* 77 FR 44069, 44104 (2012). In *Grider,* the respondents argued that the Agency should reject an ALJ's conclusions that the pharmacies had failed to rebut the Government's *prima facie* case because their owner, who was under indictment in two state criminal cases, did not testify and thus offered no evidence to show that he had accepted responsibility and implemented corrective measures. Invoking *SEC* v. *Dresser Industries, Inc.,* 628 F.2d 1368, 1375–76 (D.C. Cir.1980), the *Grider* respondents further argued that because their owner was under indictment, the ALJ should have stayed the proceeding until the state criminal cases were concluded so as not to ''undermine the party's Fifth Amendment privilege against self-incrimination.'' 77 FR at 44104.

The Agency rejected Grider's arguments. As the Agency explained, '''as a general matter, due process is not infringed merely because an accused person is subjected, without his consent, to an administrative hearing concerning matters involved in a pending criminal proceeding.''' *Id.* (quoting 628 F.2d at 1376 n.21). As *Dresser Industries* noted, ''[t]he civil and regulatory laws of the United States frequently overlap with the criminal laws creating the possibility of parallel [administrative] and criminal proceedings, either successive or simultaneous'' and that ''[i]n the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable.'' 628 F.2d at 1374. Thus, in *Dresser Industries,* the D.C. Circuit observed that ''[t]he Constitution . . . does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings.'' *Id.* at 1375.

To be sure, in *Dresser Industries,* the D.C Circuit further explained that ''the strongest case for deferring civil proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.'' *Id.* However, the court further explained that the potential harm to a party's Fifth Amendment privilege is just one of the factors to be considered in determining whether to stay the noncriminal proceeding. *Id.* at 1376. Continuing, the court explained that ''[i]f delay of the noncriminal proceedings *would not seriously injure the public interest,* a court may be justified in deferring it.'' *Id.* (emphasis added). That decision is, however, committed to the discretion of the trial court. *See, e.g., Keating,* 45 F.3d at 325 (setting forth multiple factors).

Here, I find no reason to conclude that the ALJ abused his discretion when he declined to continue the proceeding until the conclusion of Respondent's criminal trial. Notably, in his request for a continuance, Respondent provided no information to the ALJ as to when that trial would commence.[15] That trial—and a subsequent appeal were Respondent convicted of the charges—could go on for several years. The ALJ was not required to withhold conducting the hearing while Respondent litigates in other forums. *See* 45 F.3d at 325 (noting that ''convenience of the court in the management of its cases'' is a factor). So too, the Government has a strong interest in proceeding expeditiously with this litigation, and indeed, under the Constitution, the Agency has an obligation to provide prompt post-deprivation process where the Government immediately suspends a registration. *Id.; see also Barry* v. *Barchi,* 443 U.S. 56, 64 (1979).

As for the burden on Respondent, it is true that courts have held that the prejudice to a respondent's Fifth Amendment privilege may be substantial where there are parallel administrative and criminal proceedings. *Keating,* 45 F.3d at 326. However, while ''the extent to which the defendant's Fifth Amendment rights are implicated is a significant factor . . . to consider . . . it is only one consideration to be weighed against others.'' *Id.* (citation omitted).

Notably, Respondent was not otherwise foreclosed from putting on a defense. Indeed, in its pre-hearing statement, Respondent proposed to call an expert witness who would testify that the prescriptions were lawfully issued but ultimately chose not to call this witness. Notably, in his Exceptions, Respondent does not maintain that because he invoked the privilege, he was precluded from refuting the factual basis of the allegations.

Instead, Respondent now contends that my consideration of the ALJ's recommendation ''should await the disposition of the criminal case . . . following which he should be given an opportunity promptly and succinctly to tell his side of the story and express his complete remorse.'' Exceptions, at 6. However, as discussed above, in his Exceptions, Respondent continues to dispute the allegations (as well as the ALJ's factual findings and legal conclusions) that he issued prescriptions outside of the usual course of professional practice and which lacked a legitimate medical purpose for each of the different drugs (*i.e.,* the hydrocodone cough syrup, the Norco tablets, the alprazolam, and the phentermine). Thus, his argument begs the question of which allegations he now would admit to.

The Fifth Amendment privilege is not ''a sword whereby a claimant asserting the privilege [is] freed from adducing proof in support of a burden which would otherwise have been his.'' *United States* v. *Rylander,* 460 U.S. 752, 758 (1983). *See also MacKay* v. *DEA,* 664 F.3d 808, 820 (10th Cir. 2011) (quoting *Keating* v. *Office of Thrift Supervision,* 45 F.3d 322, 326 (9th Cir. 1995)). Indeed, the misconduct established on this record is so egregious and occurred over such a lengthy period, that even were I to remand to allow Respondent to express his ''complete remorse'' and the ALJ was to find this credible, I would still find his registration to be inconsistent with the public interest. *See Hatem M. Attaya,* 81 FR 8221, 8244 (2016); *Fred Samimi,* 79 FR 18698, 18714 (2014) (denying applications noting that notwithstanding ALJ's finding that physician ''credibly accept responsibility for his misconduct, this is a case where actions speak louder than words''). Thus, I find that Respondent has failed to establish that the ALJ abused his discretion when he denied Respondent's request to continue the proceeding until his criminal trial concluded.[16]

[15] In opposing the request, the Government noted that Respondent had also sought a continuance of the criminal case. ALJ Ex. 6, at 1 n.1.

[16] It is, of course, commonplace that matters involving DEA registrants will lead to both a revocation proceeding and a criminal investigation and subsequent charges at either the federal or state level. However, the very purpose of a proceeding brought under 21 U.S.C. 823(f) and 824(a)(4) is to protect the public interest, and, in the Controlled Substances Act, Congress directed that these ''proceedings shall be independent of, and not in lieu of, criminal prosecutions or other proceedings under this subchapter.'' Thus, I conclude that the fifth *Keating* factor (''the interest of the public in the pending . . . litigation'') also supports the ALJ's denial of Respondent's stay request.

Continued

Accordingly, I reject Respondent's third exception and will adopt the ALJ's recommended sanction of revocation.

ORDER

Pursuant to the authority vested in me by 21 U.S.C. 824(a) and 823(f), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration AS2286311 issued to Lawrence E. Stewart, M.D., be, and it hereby is, revoked. I further order that any application of Lawrence E. Stewart, M.D., to renew or modify the above registration, or for any additional registration be, and it hereby is, denied. This Order is effectively immediately.[17]

Dated: August 9, 2016.

Chuck Rosenberg,

Acting Administrator.

Paul A. Dean, Esq. for the Government.
J. Brad Pigott, Esq. for the Respondent.

RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Administrative Law Judge Charles Wm. Dorman. On December 9, 2015, the Drug Enforcement Administration (''DEA'' or ''Government'') served Lawrence E. Stewart, M.D. (''Respondent''), with an Order to Show Cause and Immediate Suspension of Registration (''OSC/ISO''), which immediately suspended the Respondent's DEA Certificate of Registration (''COR''), Number AS2286311. Administrative Law Judge Exhibit (''ALJ-'') 1–2. The Respondent's COR has remained suspended throughout these proceedings. In response to the OSC/ISO, the Respondent requested a hearing before an Administrative Law Judge. ALJ–3. That hearing was held in New Orleans, Louisiana on March 22 and 23, 2016. The issue currently before the Administrator is whether the Respondent's COR should be revoked, and applications for renewal or modification denied, because continued registration would be inconsistent with the public interest under 21 U.S.C. 823(f) and 824(a)(4). The following recommendations are based on my consideration of the entire administrative record, including all of the testimony, admitted exhibits, and the oral and written arguments of counsel.

ALLEGATIONS

1. From February 2014 to May 2015, the Respondent prescribed controlled substances, including hydrocodone and alprazolam, to a confidential informant (''CI'')[1] without conducting and/or documenting a physical examination, and without recording the controlled substance prescriptions in CI's chart, in violation of Mississippi Medical Board Administrative Rules Part 2640, Chapter 1, Rules 1.4, 1.11(b), and 1.16, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a). ALJ–1, at 2.

2. On four occasions, the Respondent prescribed phentermine to CI without adequate documentation, in violation of Mississippi Medical Board Administrative Rules Part 2640, Chapter 1, Rule 1.5, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a). ALJ–1, at 3.

3. From February 7, 2014 to November 19, 2014, the Respondent prescribed hydrocodone products to CI's children[2] without conducting examinations of them, and for CI's personal use, in violation of Mississippi Medical Board Administrative Rules Part 2640, Chapter 1, Rules 1.4, 1.10, 1.11(b), and 1.16, and Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a) and 1306.05(a). ALJ–1, at 2–3. The Respondent prescribed hydrocodone-homatropine syrup to these children, who were under the age of six. ALJ–1, at 3. Hydrocodone-homatropine syrup is not recommended for children under the age of six because of a risk of death. ALJ–1, at 3. The Respondent also prescribed adult dosages of hydrocodone-homatropine to these children, even though the recommended dosage for children ages six to eleven is half of the adult dosage. ALJ–1, at 2–3.

4. On five occasions between March and October 2015, the Respondent prescribed controlled substances to undercover agents when he knew or should have known that the agents' prescription requests were fraudulent, in violation of 21 U.S.C. 841(a) and 842(a), and 21 CFR § 1306.04(a). ALJ–1, at 3. In total, the Respondent wrote seven prescriptions on five occasions to undercover agents, for a total of 190 dosage units of hydrocodone tablets and 72 dosage units of hydrocodone syrup. ALJ–1, at 11. On at least four of those occasions, the Respondent knew that CI would receive a portion of the prescribed controlled substances. ALJ–1, at 3–4. The Respondent also knew that CI had attempted to commit suicide using controlled substances that the Respondent had prescribed to her. ALJ–1, at 3–4.

5. From February 2014 to October 2015, the Respondent unlawfully prescribed controlled substances in violation of 21 U.S.C. 841(a) and 842(a). ALJ–1, at 2. Specifically, the Respondent prescribed controlled substances when he knew or should have known that the prescriptions were not for legitimate medical purposes and were not made in the usual course of professional practice, in violation of 21 CFR § 1306.04(a) and Mississippi Code §§ 41–29–137(a)(1) and 41–29–141(1). ALJ–1, at 2.

6. On September 2, 2014, the Respondent prescribed meperidine to CI. ALJ–1, at 3. The Respondent was the only practitioner to prescribe meperidine to CI. ALJ–1, at 3. CI used meperidine to attempt to commit suicide in December 2014. ALJ–1, at 3.

STIPULATIONS OF FACT[3]

The Government and the Respondent stipulated to the following facts:

1. Respondent is registered with the DEA as a practitioner to handle controlled substances in Schedules II–V under DEA COR AS2286311 at 405 Marion Avenue, P.O. Box 666, McComb, Mississippi 39648–2709.

2. DEA COR AS2286311 will expire by its terms on February 28, 2018.

3. Respondent is presently licensed in Mississippi as a medical doctor (M.D.) with Medical License 11503.

4. CI is the mother of Kid 1 and Kid 2.

5. Hydrocodone-Acetaminophen 10–325 (Norco), Hydrocodone-Acetaminophen 7.5–325 (Norco), Hydrocodone-Acetaminophen 5–325 (Norco), and Hydrocodone-Homatropine Syrup (Hycodan) are all classified as Hydrocodone Combination Products.

6. Hydrocodone Combination Products are classified by DEA as Schedule II Controlled Substances and have been so classified since October 6, 2014. Before October 6, 2014, Hydrocodone Combination Products were classified by DEA as Schedule III Controlled Substances.

7. Alprazolam is classified by DEA as a Schedule IV Controlled Substance.

As for the fourth *Keating* factor, ''the interests of persons not parties to the [administrative] litigation,'' 45 F.3d at 326, Respondent puts forward no argument as to why this factor supports the requested stay or a remand at this juncture.

[17] For the same reasons that led me to immediately suspend Respondent's registration, I find that the public interest necessitates that this Order be effective immediately. *See* 21 CFR 1316.67.

[1] The Prehearing Ruling and Protective Order directed that the confidential informant would be referred to as ''CI.'' ALJ–9, at 5. Accordingly, in this Recommended Decision, the confidential informant will be referred to as ''CI.''

[2] The Prehearing Ruling and Protective Order directed that CI's children would be referred to as ''Kid 1'' and ''Kid 2.'' ALJ–9, at 5. Accordingly, in this Recommended Decision, CI's son will be referred to as ''Kid 1,'' and CI's daughter will be referred to as ''Kid 2.''

[3] *See* ALJ–9, 20; Tr. 9.

8. Phentermine (Adipex) is classified by DEA as a Schedule IV Controlled Substance.

9. Meperidine (Demerol) is classified by DEA as a Schedule II Controlled Substance.

WITNESSES

The Government presented its case through the testimony of nine [4] witnesses. First, the Government called Kendrick Lewis (''Lewis''). Tr. 24. Lewis is an employee of the Mississippi Bureau of Narcotics (''MBN''). Tr. 25. Lewis received a complaint against the Respondent on January 18, 2015. Tr. 25. Lewis spoke with CI and her husband, who had made the complaint together. Tr. 25, 29–31. Other than this conversation, Lewis had no further contact with CI. Tr. 28. Based on the nature of the complaint, Lewis contacted MBN's diversion unit, which began investigating the Respondent. Tr. 26–27, 31. During 2015, Lewis participated in the investigation by assisting with surveillance on March 27, April 8, April 29, and October 16. Tr. 27. Lewis's testimony was thorough, detailed, and internally consistent. Therefore, I merit it as credible in this Recommended Decision.

Second, the Government called Mary Flinchum (''Flinchum''). Tr. 33. Flinchum is a lieutenant for the MBN and a task force officer for the DEA's Tactical Diversion Squad. Tr. 33–34. Flinchum received an intelligence report about the Respondent from MBN. Tr. 35. Flinchum interviewed CI and her husband, separately and together, about their complaint to MBN. Tr. 36, 82. Flinchum helped decide that MBN should investigate the Respondent. Tr. 36–37. Flinchum also communicated with the Mississippi State Board of Medical Licensure (''Mississippi Board''), which was conducting an independent investigation concerning the Respondent. Tr. 58–59. Flinchum was familiar with an undercover investigation of the Respondent during March, April, and October of 2015. Tr. 77–81. Later, Flinchum was recalled to offer further testimony concerning the October 2015 undercover operation. Tr. 449–50. Through Flinchum's testimony, the Government authenticated and successfully offered into evidence Government Exhibits (''GE-'') 13 through 21, 27 through 29, 38 through 40, and 53. Tr. 38–57. I find all of these exhibits to be accurate, authentic, and meriting credibility. On cross-examination, the Respondent authenticated and successfully offered into evidence GE–2. Tr. 62–63. I find that Flinchum's testimony was thorough, detailed, and internally consistent. Therefore, I merit her testimony as credible in this Recommended Decision.

Third, the Government called Undercover Agent #1 [5] (''Agent 1''). Tr. 89. Agent 1 is a female DEA task force officer and former MBN Agent. Tr. 89–90. Agent 1 participated in an undercover investigation of the Respondent. Tr. 90–91. Agent 1 attended undercover medical appointments with the Respondent on four occasions in 2015: March 27, April 8, April 29, and October 16. Tr. 91, 102, 111, 119. Agent 1 also accompanied CI to a rendezvous with the Respondent at a Walmart before the second undercover appointment on April 8, 2015. Tr. 128–29. Through Agent 1's testimony, the Government authenticated and successfully offered into evidence GE–9 through 12, 24 through 26, 30 through 33, 42 through 47, and 54. Tr. 91–128. I find all of these exhibits to be accurate, authentic, and meriting credibility. I also find that Agent 1's testimony was thorough, detailed, and internally consistent. Therefore, I merit her testimony as credible in this Recommended Decision.

Fourth, the Government called Undercover Agent #2 (''Agent 2''). Tr. 141. Agent 2 is a female MBN agent. Tr. 141. Agent 2 participated in the undercover investigation of the Respondent. Tr. 142. Agent 2 attended an undercover medical appointment with the Respondent on April 29, 2015. Tr. 143. Through Agent 2's testimony, the Government authenticated and successfully offered into evidence GE–34 through 37. Tr. 143–51. I find these exhibits to be accurate, authentic, and meriting full credibility. I also find that Agent 2's testimony was thorough, detailed, and internally consistent. Therefore, I merit her testimony as credible in this Recommended Decision.

Fifth, the Government called MBN Agent Charles Causey (''Causey''). Tr. 159. In 2015, Causey assisted with audiovisual surveillance for the DEA and MBN's undercover investigation of the Respondent on March 27, April 8, April 29, and October 16. Tr. 162–63. Causey testified that the video recordings of these undercover operations may contain incorrect internal date/time stamps, and that the dates and times on the video recordings do not necessarily correspond to the actual dates and times on which the video recordings were made. Tr. 165–66. I find that Causey's testimony was thorough, detailed, and internally consistent. Therefore, I merit his testimony as credible in this Recommended Decision.

Sixth, the Government called Leslie Ross (''Ross''). Tr. 168. Ross is an investigations supervisor for the Mississippi Board and a task force officer for the DEA's Tactical Diversion Squad. Tr. 168–69. The Mississippi Board reviews and issues medical licenses, promulgates rules and regulations for the practice of medicine in Mississippi, investigates complaints about Mississippi licensees, and imposes disciplinary action when necessary. Tr. 170. Several days before the Mississippi Board closed its investigation concerning the Respondent, Ross received a call from Agent Flinchum, advising Ross that the DEA and the MBN were investigating the Respondent. Tr. 194–95, 210. Ross explained that the phone call influenced the Mississippi Board's decision to close its case because it was the Mississippi Board's custom ''to back off and let a criminal agency pursue their case.'' Tr. 210. Without interviewing CI, the Mississippi Board closed its investigation. Tr. 196. Ross also helped author part of Mississippi Administrative Rule 1.5, which regulates diet medication prescriptions in Mississippi. Tr. 172. Ross established the foundation for the Court to take official notice of Mississippi Administrative Rules 1.1, 1.2, 1.4, 1.10, and 1.16. Tr. 188–93. Additionally, while Ross did not conduct the Mississippi Board's investigation of the Respondent, she supervised Todd Pohnert, who conducted the investigation. Tr. 170, 173. Ross served administrative subpoenas for information about the Respondent to two Mississippi pharmacies, one in McComb and one in Brookhaven. Tr. 185. I find that Ross' testimony was thorough, detailed, and internally consistent. Therefore, I merit her testimony as credible in this Recommended Decision. Through Ross' testimony, the Government authenticated and successfully offered into evidence GE–3 and 8. Tr. 171–78. I find these exhibits to be accurate, authentic, and meriting credibility. Furthermore, through Ross' testimony, the Government established some foundation for GE–7 and 55. Tr. 185–88.

Seventh, the Government called CI. Tr. 212. CI testified about her relationship with the Respondent and

[4] Although the Government also called Antoine Battle to the stand, the Government did not elicit any testimony from Mr. Battle, and he was excused without testifying. Tr. 155–58.

[5] Pursuant to the Prehearing Ruling and Protective Order, the identities of the undercover agents are not disclosed in this Recommended Decision. ALJ–9.

how and why she obtained controlled substance prescriptions from him. Tr. 212–31.[6] Through CI's testimony, the Respondent admitted GE–49, 56, and 57. Tr. 284, 300–03, 335–38. I find these exhibits to be generally accurate, authentic, and meriting credibility. I also find that CI's testimony was generally forthright, internally consistent, and generally merited credibility[7] in this Recommended Decision.

Eighth, the Government called James Pacheco (''Pacheco''). Tr. 385. Pacheco is an agent for the MBN and a task force officer for the DEA's Tactical Diversion Squad. Tr. 386. Pacheco participated in the undercover investigation of the Respondent by coordinating the surveillance aspect of the investigation. Tr. 388. Pacheco assisted with physical surveillance of the Respondent and CI during an undercover operation at a Walmart on April 8, 2015. Tr. 388–89. Pacheco personally observed most of the operation at Walmart. Tr. 389. Pacheco also testified that he listened to the undercover operation conducted at the Respondent's clinic in October 2015. Tr. 406–07. Through Pacheco's testimony, the Government authenticated and successfully offered into evidence GE–22 and 23. Tr. 387–93. I find these exhibits to be accurate, authentic, and meriting credibility. I also find that Pacheco's testimony was thorough, detailed, and internally consistent. Therefore, I merit his testimony as credible in this Recommended Decision.

The Government's ninth witness was Maria Gilbert (''Gilbert''). Tr. 409. Gilbert is a DEA diversion investigator, and was a case agent in the investigation of the Respondent. Tr. 409–10. Gilbert helped submit the evidence acquired by the undercover agents into a DEA evidence locker. Tr. 440. Gilbert also directed DEA personnel to obtain Prescription Monitoring Program (''PMP'') reports during the investigation. Tr. 438. Gilbert created the administrative subpoenas issued to pharmacies to obtain information about the Respondent. Tr. 412. Gilbert helped conduct an administrative search of the Respondent's office. Tr. 427–28. Through Gilbert's testimony, the Government authenticated and successfully offered into evidence GE–7, 41, 48, 50 through 52, 55, and 58 through 60. Tr. 411–18, 427–39. I find these exhibits to be accurate, uncontested, and meriting credibility. I also find that Gilbert's testimony was thorough, detailed, and internally consistent. Therefore, I merit her testimony as credible in this Recommended Decision.

The Respondent did not call any witnesses or offer any of his proposed exhibits into evidence. Tr. 458.

The factual findings below are based on a preponderance of the evidence, including the detailed, credible, and competent testimony of the aforementioned witnesses, the exhibits entered into evidence, and the record before me.

FACTUAL FINDINGS

1. The Respondent has not previously been convicted of any crime related to controlled substances. GE–1, at 1. The Respondent has never had his state medical license revoked, suspended, denied, restricted, or placed on probation. GE–1, at 1.

The Respondent's Relationship with CI

2. The Respondent and CI became Facebook friends and began talking with each other in January 2014. Tr. 213, 237. CI asked the Respondent questions about the health of Kid 1.[8] Tr. 213–14, 246–47, 261–62. The Respondent performed a tonsillectomy on Kid 1 and placed tubes in his ears on January 30, 2014. GE–57, at 13, 19–20; Tr. 219, 235, 285. Following Kid 1's tonsillectomy, CI asked the Respondent for medication for Kid 1's medical condition; the Respondent was willing to write prescriptions for Kid 1. GE–57, at 5–6; Tr. 246–47, 249. Around that time, CI and the Respondent became friends and began texting and talking on the phone. Tr. 213–14, 240.

3. In the spring of 2014, CI and the Respondent began to have a consensual sexual relationship. Tr. 213, 218–19, 290–92, 296, 359. During the summer of 2014, CI and the Respondent saw each other very often. Tr. 324. CI and the Respondent communicated frequently by texting and calling each other on their cell phones. Tr. 355–56.

4. CI engaged in a sexual affair with the Respondent because she was infatuated with him and because she wanted to obtain controlled substances for her recreational use. Tr. 291–92. The controlled substances, however, were not a prerequisite for sexual relations. Tr. 289.

5. The sexual relationship between CI and the Respondent ended in November 2014. Tr. 219.

A. The Respondent's Medical Treatment of CI and Her Children

6. The Respondent provided medical treatment to CI several times, beginning in 2010. GE–2, at 12–13; Tr. 215, 277. Specifically, the Respondent treated CI for a sinus infection, vertigo, and migraines. GE–2, at 12–13; Tr. 215, 277–78, 287, 321. CI had a serious migraine condition that caused her to seek treatment in emergency rooms on four occasions. Tr. 278–80, 347. CI discussed her migraines and hospitalizations with the Respondent, who gave her information about migraines. Tr. 282, 287. The Respondent prescribed Maxalt[9] to CI to treat her migraines. GE–2, at 12; Tr. 215–16, 283.

7. The Respondent had a patient file for CI and wrote notes therein about her treatment. *See* GE–2, at 12–13. The Respondent conducted two physical examinations of CI, once when he was treating her for a sinus infection, and again when he was treating her for a migraine headache.[10] GE–2, at 12–13; Tr. 322. The Respondent also requested a CT[11] sinus scan for CI in 2014. GE–2, at 12, 14. A CT scan showed that CI's sinuses were ''clear [and] scant thickening in LNF duct.'' GE–2, at 14.

8. CI took Kid 1 and Kid 2 to appointments with the Respondent. Tr. 219, 261–62, 285–86, 335–36, 338; *see, e.g.,* GE–56, at 3–4; GE–57, at 6, 9–10. The Respondent conducted legitimate medical procedures on both children and saw the children for follow-up appointments. GE–56, at 3–4; GE–57, at 5–6; Tr. 219, 261–62.

9. CI sent the Respondent at least one message via social media requesting his medical advice about Kid 1's condition. Tr. 262–63. CI communicated with the Respondent about the physical

[6] The Respondent asked CI extensively about an exhibit, pre-marked for identification as Respondent's Exhibit (''RE-'') 1. *See generally* Tr. 231–73. However, the Respondent never offered RE–1 into evidence. Therefore, the contents of RE–1 are not considered in this Recommended Decision.

[7] There were some inconsistencies in CI's lengthy testimony. First, when asked if she paid cash for prescriptions from the Respondent, CI answered that she believed she always used insurance. Tr. 360. However, CI's Prescription Monitoring Program report shows that, in 2014, CI paid for prescriptions from the Respondent with cash 15 times, and used her insurance only 5 times. *See* GE–49, at 1–3. Second, CI suggested that it was the Respondent's idea for CI to send a friend into his office to get prescriptions for her. Tr. 345–47. However, audio recordings of the Respondent's telephone calls with CI suggest that it was CI's idea for her to send a friend into the Respondent's office to get prescriptions for CI. *See* GE–16, file 2015–03–16_18–51–48_EDT, at 20–21; GE–16, file 2015–03–18_11–03–33_EDT, at 2. Third, CI testified that the Respondent only conducted a physical examination of her one time. Tr. 322. The Respondent's patient file for CI seems to indicate, however, that the Respondent gave CI some sort of examination on both April 21 and September 2 of 2014. GE–2, at 12. In these three instances, I do not find CI's testimony credible.

[8] *See* Stipulation (''Stip.'') 4; *see also* ALJ–9, at 5.

[9] Maxalt, or rizatriptan benzoate, is not a federally controlled substance. *See generally* 21 CFR §§ 1308.11–1308.15 (2015).

[10] *See supra* note 7.

[11] Computerized tomography.

condition of her children to get his medical advice. Tr. 263–65.

10. Near a date stamp reading ''February 4, 2014,'' the Respondent recorded in Kid 1's medical file that CI had migraines, that she may call in for a prescription if needed, and that he discussed phentermine [12] with her. GE–57, at 6; *see* Tr. 286. The Respondent's patient file for CI also contains a telephone request form, dated July 18, 2014, and signed by the Respondent, which states that CI requested a phentermine refill. GE–2, at 15. CI's patient file, however, does not note any reasons that the Respondent prescribed phentermine to CI. *See* GE–2, at 12–13.

B. CI's Drug Use

11. Prior to her relationship with the Respondent, CI took controlled substances, including hydrocodone, which were prescribed by numerous other doctors to help treat pain resulting from four lithotripsies, kidney stones, a broken tailbone, a root canal, and TMJ [13]. GE–49, at 2; Tr. 214, 275–76, 304–09. CI told the Respondent about these prescriptions. Tr. 309.

12. CI occasionally used Adderall for nonmedicinal purposes. Tr. 215. CI had not used cough syrup for nonmedicinal purposes prior to her relationship with the Respondent. Tr. 215.

13. After Kid 1 had his tonsils removed on January 30, 2014, CI took some of Kid 1's pain medication. Tr. 273–74, 276. As a result of the tonsillectomy, the Respondent prescribed two different forms of hydrocodone for Kid 1. GE–51, at 1; GE–57, at 6, 14, 22.

14. The Respondent first prescribed cough syrup for Kid 2 on January 24, 2014. GE–50, at 1; GE–56, at 4. The Respondent again prescribed cough syrup for Kid 2 in February 2014. Tr. 216, 258–59; GE–50, at 1; GE–56, at 4. The Respondent did not examine Kid 2 before he prescribed cough syrup for her. Tr. 217, 251; *see* GE–56, at 4.

15. CI talked with the Respondent about prescribing a ''big bottle'' of cough syrup so that CI could drink it. Tr. 216, 251–52, 268, 273. CI thought that the Respondent knew she did not have a cough. Tr. 216, 251–52, 268. In February 2014, CI asked the Respondent to prescribe [14] a ''big bottle'' of hydrocodone cough syrup for Kid 2. Tr. 216–17, 250, 252–53, 259. At that time, CI told the Respondent that Kid 2 had a cough. Tr. 250–51, 253–55. On February 7, 2014, the Respondent doubled the size of Kid 2's prescription for cough syrup. GE–50, at 1; GE–55, at 1–2.

16. CI told the Respondent when Kid 1 or Kid 2 had a cough. Tr. 250. CI, however, did not bring her children to see the Respondent regarding a cough; she requested cough syrup from the Respondent because she liked drinking it. Tr. 220, 273; *see generally* GE–56, at 3–4; GE–57, at 5–6.

17. The Respondent prescribed Norco, Xanax, and Adipex to CI on multiple occasions. Tr. 26; GE–49. The Respondent prescribed Norco [15] to CI, which she took daily instead of as needed. Tr. 297. CI took hydrocodone ''[j]ust for fun.'' Tr. 298. CI would tell the Respondent when she ran low on a prescription, and he would give her another prescription.[16] Tr. 298–99. He advised her that hydrocodone could cause migraines. Tr. 298–99.

18. On several occasions, the Respondent provided prescriptions to CI while he was at CI's house. Tr. 217–18; *see* Tr. 26. On those occasions, the Respondent did not communicate a diagnosis to CI or perform a physical examination of CI. Tr. 218. Sometimes, CI took her children to appointments with the Respondent as an excuse to see the Respondent, who would then occasionally give prescriptions to CI. Tr. 219–20. On one occasion, the Respondent met CI in the garden section of a Walmart, where he gave her prescriptions for cough syrup and pain medication. Tr. 218.

19. At times, CI told the Respondent about her children's pain or physical conditions to get prescriptions for her own personal use. Tr. 267. CI would occasionally administer the prescribed medication to her children. Tr. 270–72.

20. CI requested that the Respondent write a prescription for Adderall for her, but he declined to do so. Tr. 223. In the spring of 2014, CI asked the Respondent to write her a prescription for Adipex, a weight loss drug. Tr. 223–24, 288–89. The Respondent wrote prescriptions and refills for Adipex to CI. GE–49, at 1–2; Tr. 223–24. CI used Adipex for approximately three months. Tr. 224. The Respondent did not conduct a physical examination of CI focused on weight issues at any point before or while CI took Adipex, and the Respondent did not discuss alternative weight loss treatments with CI. Tr. 224–25; *see* GE–2, at 12–13.

21. CI had anxiety, which she discussed with the Respondent. Tr. 322. The Respondent told her to visit a certain psychiatrist. Tr. 225, 295. CI visited that psychiatrist twice. Tr. 225. The psychiatrist prescribed a low dosage of time-release Xanax [17]. Tr. 225, 295, 304; *see* GE–49, at 1. The Respondent then prescribed [18] a stronger dosage of Xanax to CI. Tr. 226; *see* GE–49, at 1.

22. The Respondent wrote nine prescriptions [19] to CI, contained in GE–7 and 41, which are not documented in the Respondent's patient file for CI. *Compare* GE–2, at 12–13 (containing the Respondent's patient file for CI), *with* GE–7, at 1–2 (containing a prescription written by the Respondent to CI), *and* GE–41 (containing prescriptions written by the Respondent and filled by CI), *and* GE–49 (containing CI's PMP report); *see* Tr. 364–77. The Respondent's patient file for CI does not include any notes from any examinations on the dates on which the Respondent wrote these nine prescriptions. GE–2, at 12–13. CI did not have a physical examination or receive counseling before the Respondent gave her any of these prescriptions. Tr. 384; *see* GE–2, at 12–13.[20]

[12] CI denied asking the Respondent for phentermine in February 2014. Tr. 286–88. Phentermine is another name for Adipex. *See* Stip. 8; Tr. 288.

[13] Temporomandibular joint dysfunction, or lockjaw.

[14] CI later testified that this was a refill of a prescription written by the Respondent. Tr. 272–73.

[15] Norco is a hydrocodone combination product. *See* Stip. 5.

[16] Specifically, CI testified that when she ran low on a prescription, the Respondent would refill it. Tr. 298–99. Refills are not authorized for hydrocodone combination products, such as Norco. *Compare* 21 U.S.C. § 829(a), *with* Stip. 6. The record does not contain any evidence that the Respondent attempted to give CI a refill on a hydrocodone combination product. Therefore, I interpret CI's statement as meaning that whenever she ran low on a prescription, she would tell the Respondent, and he would issue another prescription to her.

[17] Xanax is a brand name for alprazolam, which is a benzodiazepine and a Schedule IV controlled substance. Stip. 7; *see* 21 CFR § 1308.14(c)(2); Tr. 304.

[18] CI testified that this prescription was a refill prescription, but that it was for a different dosage. Tr. 295–96.

[19] Seven of these prescriptions, written to CI in 2014, were as follows: May 19 for Adipex; May 22 for Norco; June 17 for Norco; July 24 for Adipex; September 8 for Adipex; September 11 for Norco; and October 6 for Xanax. *Compare* GE–2, at 12–13, *with* GE–41, at 1–7, 12–13, and 18–23, *and* GE–49. The Respondent wrote another prescription for Adipex to CI on April 9, 2014. *Compare* GE–2, at 12–13, *with* GE–7, at 1–2, *and* GE–49. The Respondent also wrote a prescription for Hycodan to CI, dated December 3, 2014, but CI's PMP report said that the prescription was written on December 4, 2014. *Compare* GE–41, at 28–29, *with* GE–49. Regardless of when this prescription was actually written, it was not documented in CI's patient file. *See* GE–2, at 12–13.

[20] CI testified about a prescription that is not in GE–41. Tr. 364, 369–70. The prescription allegedly was written in her name by the Respondent. Tr. 369–70. The prescription allegedly was dated October 29, 2014. Tr. 369–70. The Respondent's PMP report likewise lists a prescription for hydrocodone-acetaminophen (Norco) prescribed by the Respondent on October 29, 2014. GE–49, at 1. However, neither of the two copies of GE–41 submitted to me includes this prescription. Examination of both submitted copies of GE–41

Continued

23. Two prescriptions written by the Respondent to Kid 1 are not documented in Kid 1's medical chart. *Compare* GE–51 (containing Kid 1's PMP report and listing prescriptions from June 17 and November 19 of 2014), *and* GE–55, at 3–4, 11–12 (containing prescriptions from June 17 and November 19 of 2014), *with* GE–57 (containing Kid 1's medical file, which does not include any examination or prescription notes for June 17 or November 19 of 2014); *see also* Tr. 377–81. Likewise, a prescription written by the Respondent to Kid 2 is not documented in Kid 2's medical chart. *Compare* GE–50 (containing Kid 2's PMP report and listing a prescription written on July 23, 2014), *and* GE–55, at 5–6 (containing a prescription dated July 23, 2014), *with* GE–56 (containing Kid 2's medical file, which does not include any examination notes or prescription notes for July 23, 2013).

24. On one occasion in early fall of 2014, following CI's complaint of a severe migraine, the Respondent prescribed Demerol to CI. Tr. 222, 296–97, 317–18, 382. Next to the date ''September 2, 2014'' in CI's medical chart, the Respondent wrote that he refilled her prescription of phentermine, looked at her ears and nose, and counselled her. GE–2, at 12; Tr. 323. He also wrote that he prescribed Demerol and Xanax to CI. GE–2, at 12. CI did not ask the Respondent for Demerol. Tr. 296, 318.

25. CI's husband discovered that CI was having an affair with the Respondent. Tr. 26, 320. Sometime after the discovery, in December 2014, CI attempted suicide using the Demerol the Respondent prescribed to her. Tr. 222, 314–17. CI went to a mental institution for a week following her suicide attempt. Tr. 227, 309. In January 2015, CI told the Respondent that she had tried to kill herself. Tr. 226–27, 309–11.

C. The MBN Complaint

26. After CI's husband discovered the affair and CI attempted to commit suicide, CI and her husband made a complaint against the Respondent to the MBN. Tr. 25, 29–31, 71, 228–29, 339–40. CI told MBN investigators that she got medications from the Respondent for nonmedicinal purposes because she enjoyed using them. Tr. 84.

D. The Anonymous Letter

27. The Mississippi Board received an unsigned letter, allegedly from CI's husband, which complained about the extramarital affair between CI and the Respondent. GE–3, at 3; Tr. 58, 66. The Mississippi Board and MBN both received a copy of the letter. Tr. 66–67, 70–71, 398–99. Several witnesses testified that CI's husband was not the author of this letter. Tr. 67–70, 326, 394, 396. The author of the letter is unknown. Tr. 67–70, 201, 326, 394–95.

28. The letter was written in the first person, and CI's husband's name was typewritten on the bottom of the letter, along with CI's date of birth and social security number. GE–3, at 3. The letter said that the author's wife, CI, had an affair with the Respondent for over a year, and that the author did not know about it until he found a box of empty pill bottles that the Respondent had prescribed to CI, even though CI was not his patient. GE–3, at 3. The letter was stamped as received by the Mississippi Board on February 19, 2015. GE–3, at 3.

29. By the time the MBN received a copy of the letter, it had already begun its investigation of the Respondent because of the complaint made by CI and her husband. Tr. 71, 74–76. After receiving a copy of the letter, the Mississippi Board began conducting an independent investigation of the Respondent. Tr. 58, 61, 203.

E. The Mississippi Board Investigation

30. A Mississippi Board investigator met with the Respondent regarding the anonymous letter. GE–3, at 4–6. At that time, the Mississippi Board was unaware that the DEA was conducting a simultaneous investigation of the Respondent. Tr. 180.

31. In response to the investigator's inquiry, the Respondent said that he only saw CI when she or her children had appointments, and had not seen CI outside of his office. GE–3, at 5; Tr. 179, 202. The Respondent suggested that he had not engaged in sexual misconduct with CI. GE–3, at 5; Tr. 180, 207. The Respondent also suggested that he was not aware that CI had attempted to commit suicide or had been committed to a mental hospital. GE–3, at 5, 7.

32. The investigator made copies of CI's patient charts and found several shortcomings with CI's medical records. GE–3, at 4–5; Tr. 180, 197. First, the investigator found seven prescriptions in CI's PMP report that were not documented in the Respondent's patient file for CI. GE–3, at 5. The Respondent explained that he might have documented the missing prescriptions in his patient files for CI's children instead. GE–3, at 5.

33. Second, the investigator found that CI's patient file did not include any notes about CI's vitals, height/weight, BMI, or alternative weight control treatment plans, and did not indicate that CI received any counseling about other weight loss options. GE–3, at 5; Tr. 180.

34. Following the investigator's visit, the Mississippi Board sent the Respondent a copy of the anonymous letter purportedly from CI's husband.[21] *See* GE–2, at 6–8. The investigator told the Respondent that he should send a letter to the Mississippi Board as a follow-up from the investigator's visit. GE–3, at 5; Tr. 179.

35. The Respondent sent a letter to the Mississippi Board. GE–3, at 7–8; Tr. 179–80. Therein, the Respondent denied knowing that CI had overdosed.[22] GE–3, at 7; Tr. 180. The Respondent stated that he was ''appalled, outraged, and disgusted'' by the anonymous letter's allegations. GE–3, at 7; Tr. 208. The Respondent wrote that the medications CI used to overdose ''were legitimately prescribed for valid medical problems.'' GE–3, at 7. The Respondent wrote that he was unaware that CI had received controlled substances from other prescribers and that CI did not show ''any hint of drug-seeking behavior.'' GE–3, at 7. The Respondent acknowledged that he should not refill medications for a parent during a child's visit without pulling the parent's chart, and said that he would not do so in the future. GE–3, at 7. The Respondent stated that he would not refill diet drugs for patients in the future without completing the appropriate documentation. GE–3, at 7.

36. The Mississippi Board contemplated closing its investigation of the Respondent because it did not have enough evidence supporting the allegations of the Respondent's sexual misconduct. Tr. 181, 184, 194–95, 197, 209–10. Throughout the course of its investigation, however, the Mississippi Board never interviewed CI. Tr. 196.

37. On March 20, 2015, while the Mississippi Board was contemplating closing its investigation, Flinchum

reveals that no pages of GE–41 are missing. At the hearing, however, Government counsel provided CI with an excerpt of what he said was ''part of Exhibit 41,'' and he provided the Respondent and the ALJ with a copy of what was handed to the witness. Tr. 364. That excerpt has now been included in the administrative record as ALJ–29. Comparing ALJ–29 with GE–41, I have determined that the witness did, in fact, examine a prescription dated October 29, 2014. That prescription, however, was never offered into evidence. Furthermore, the witness was never asked if the prescription, dated October 29, 2014, refreshed her memory of having received the prescription. Accordingly, I decline to find that the Government presented sufficient evidence to establish that the Respondent wrote a prescription to CI on October 29, 2014. Following the hearing, the parties were provided with copies of ALJ–29.

[21] The handwritten notation on the bottom of the letter was likely added by a Mississippi Board investigator. Tr. 87; *see* GE–2, at 6.

[22] Specifically, the Respondent wrote that he was ''sorry to learn that [CI] may have deliberately taken an overdose.'' GE–3, at 7.

contacted the Mississippi Board and requested, on the DEA's behalf, that the Mississippi Board discontinue its investigation of, and communication with, the Respondent. GE–3, at 2; Tr. 60–61, 181, 209. The Mississippi Board customarily will discontinue an investigation to allow a criminal agency to pursue a case. Tr. 210.

38. The Mississippi Board closed its investigation of the Respondent on March 23, 2015. GE–3, at 1; Tr. 181. A letter from the Mississippi Board to the Respondent terminated the Board's investigation. GE–3 at 1; Tr. 183. The letter stated that the Mississippi Board concluded its investigation and that, after a thorough review of the information and facts from the investigation, it decided not to recommend any formal action. GE–3, at 1. This letter was a truthful and accurate reflection of the Board's reasons for terminating the investigation. Tr. 64–65, 86, 195–97.

39. The letter also cautioned the Respondent against ''authorizing refills for Phentermine/Adipex without benefit of a medical examination.'' GE–3, at 1 (discussing Mississippi Administrative Rule 1.5(E)).

40. The letter told the Respondent that the Mississippi Board had found some deficiencies with his medical records. Tr. 181, 183–84, 203. The letter did not exonerate the Respondent, but warned him about his inadequate documentation of weight loss prescriptions. Tr. 184, 203.

F. DEA Undercover Operations

41. The DEA began undercover operations concerning the Respondent in March 2015. Tr. 77–78.

42. CI was told that if she cooperated with law enforcement, she would not be in any trouble. Tr. 342–43. CI signed a confidential informant agreement with the DEA. Tr. 343–44, 394.

43. The DEA instructed CI not to have any contact [23] with the Respondent unless the DEA supervised the contact. Tr. 350. CI did not comply with this instruction and met the Respondent one time without DEA's supervision. Tr. 353, 358.

44. With CI's consent, the DEA gave CI a telephone number that recorded all calls and text messages exchanged between CI and the Respondent. Tr. 37–38, 84–85, 230. This telephone number operated through an application that the DEA installed on CI's cellular phone. Tr. 382. This application automatically recorded all calls, conversations, and multimedia messages exchanged between CI and the Respondent. Tr. 37–38, 85–86.

45. CI called and texted the Respondent outside of the presence of MBN and DEA agents. Tr. 85–86. The DEA did not tell CI what to say to the Respondent. Tr. 85–86.

i. Interactions Between the Respondent and CI Before the

First Undercover Appointment

46. The DEA agents asked CI to contact the Respondent by phone or by text message and ask him for Norco and cough syrup. Tr. 346, 348–49.

47. On March 16, 2015, at approximately 6:51 p.m., the Respondent and CI spoke on the phone. GE–15–16. CI asked the Respondent to meet her at Walmart and give her a prescription for something. GE–16, file 2015–03–16_18–51–48_EDT, at 19; *see* Tr. 345. The Respondent said he could not do that because the Mississippi Board was watching him and he could go to jail or lose his license. GE–16, file 2015–03–16_18–51–48_EDT, at 19–20; *see* Tr. 230, 345–47. He said that everything he had prescribed to CI was legitimate and written in her chart. GE–16, file 2015–03–16_18–51–48_EDT, at 20. After CI again asked the Respondent several times to give her a prescription, CI asked him instead to write a prescription for someone else.[24] *Id.* The Respondent said he could prescribe to anyone who came into his office, and what they did with their prescriptions was ''their business,'' but that it had ''to be a legitimate thing.'' *Id.* at 21. CI asked him multiple times to write prescriptions for her, but in different names, and the Respondent said he could not do so without someone coming for a visit and having a chart. *Id.* The Respondent said he could ''probably pilfer'' some medication from his wife for CI. *Id.* at 22. CI repeatedly asked the Respondent to get her some controlled substances, and the Respondent repeatedly said he would see what he could do. *Id.* at 24–26.

48. On March 17, 2015, at approximately 1:07 p.m., the Respondent and CI spoke on the phone. GE–15–16. CI asked the Respondent to slip ''a couple Lorcets'' into her mailbox. GE–16, file 2015–03–17_13–07–36_EDT, at 4. The Respondent joked, ''I need to learn to play the guitar so you could be getting sex, drugs and rock and roll, you know.'' *Id.* CI asked the Respondent to ''sneak [her] some meds.'' *Id.* at 7. The Respondent said, ''I've got your request and I'm telling you that is highly, highly dangerous for me.'' *Id.*

49. On March 18, 2015, at approximately 11:03 a.m., the Respondent and CI spoke on the phone. GE–15–16. CI suggested that the Respondent could write a prescription in Kid 1's name. GE–16, file 2015–03–18_11–03–33_EDT, at 1. The Respondent responded sarcastically and attempted to change the subject. *Id.* at 1–2. CI said that she really needed him to find a way to write her a prescription. *Id.* at 2. The Respondent said he did not know how to do that. *Id.* CI suggested that he could write a prescription in someone else's name. *Id.* The Respondent said he would ''have to have somebody that's legitimate'' and ''what they did with the medicine[,] that was up to them . . . somebody that's trustworthy.'' *Id.* at 3. The Respondent indicated that it was like a ''federal crime when you write medicine to—that are diverted to somebody else.'' *Id.* CI said that the Respondent used to write her prescriptions ''all the time.'' *Id.* The Respondent said, ''Yeah, but I wrote it for you.'' *Id.* CI recalled that the Respondent ''used to bring [his] prescription pad over and a bottle of vodka,'' and that she ''miss[ed] those days.'' *Id.* The Respondent replied, ''I know, me too.'' *Id.* The Respondent joked with CI that it was good to have a boyfriend with a prescription pad. *Id.* at 4.

50. On March 25, 2015, at approximately 10:36 a.m., the Respondent and CI spoke on the phone. GE–17, at 1–5.[25] CI asked the Respondent if he would write a prescription to another person. GE–17, at 2. The Respondent remarked that it was dangerous and it would have to be to an established patient; he suggested that she get another doctor to write a prescription for her. GE–17, at 2. CI insisted, and the Respondent said ''it has to be legitimate'' and for a ''legitimate patient'' because the Mississippi Board was watching him. GE–17, at 2. The Respondent said he could treat a patient for CI if the patient had headaches and anxiety. GE–17, at 3. The Respondent said, ''what he does with 'em is his business.'' GE–17, at 3. CI asked the Respondent if he would write something to her friend who came in with a headache; the Respondent said, ''Yeah, I could write him something.'' GE–17, at 3. CI clarified that the prescription would really be for her, and requested that he prescribe ''Lorcet or something;'' the Respondent said, ''Yeah, I could write him some—

[23] The DEA did not ask CI to attend an undercover appointment with the Respondent because CI had a physical relationship with the Respondent, and because CI said that she was addicted to cough syrup. Tr. 400.

[24] *Contra* Tr. 346; *see supra* note 7.

[25] *See* GE–16, file 2015–03–25_10–36–40_EDT.

yeah, some stuff like that.'' GE–17, at 3. The Respondent cautioned CI that taking too many Lorcet or Demerol would be harmful and painful to her. GE–17, at 4. CI said she just wanted ''some pain pills from [her] boyfriend.'' GE–17, at 4.

51. On March 25, 2015, at approximately 11:43 a.m., the Respondent texted CI, ''I won't be in the office tomorrow. I could see her Friday.'' GE–53, file 2015–03–25_11–43–42_EDT. CI texted back, ''Ok:) she is a real cool girl. I use [sic] to party with her.'' GE–53, file 2015–03–25_11–47–23_EDT; *see* Tr. 349.

52. On March 25, 2015, at approximately 2:36 p.m., the Respondent and CI spoke on the phone. GE–17, at 6–8.[26] The Respondent asked CI for her friend's name. GE–17, at 6–8. CI told the Respondent the alias first name of Agent 1. GE–17, at 6–7. The Respondent said, ''If she's coming in for what I think she's coming in, tell her not to tell me that. That needs to be your secret. I don't wanna know that. She needs to have a headache and I will treat her for a headache, and so [I] don't mind giving her prescriptions to treat a headache.'' GE–17, at 7. The Respondent discussed the medications he could prescribe to Agent 1 and told CI that they ''would be perfectly appropriate for you to take.'' GE–17, at 7; *see* Tr. 349 (noting that the Respondent knew that Agent 1 was not a real patient and that medication prescribed to Agent 1 would be given to CI).

53. On March 26, 2015, at approximately 11:18 a.m., the Respondent and CI spoke on the phone. GE–18.[27] CI told the Respondent that Agent 1 had an appointment with him ''tomorrow at 2:00—2:10, I think.'' GE–18, at 3. The Respondent replied, ''Okay. We'll see if we can't get my girlfriend fixed up.'' GE–18, at 3. The Respondent said CI should remind Agent 1 to ''play it straight'' and tell the Respondent what he to needed to write on a chart to ''keep the medical examiners at bay . . . .'' GE–18, at 3. CI asked him if he would prescribe Norco to Agent 1. GE–18, at 3. The Respondent said, ''Yeah, I'll write her Norco and some more Maxalt, and then you can have some Maxalt also. Just remember to hide it.'' GE–18, at 3.

54. Based on Findings of Fact 47 through 53 and the transcript at pages 91, 230, and 349, I find that, by the time the Respondent met with Agent 1 on March 27, 2015, the Respondent knew that Agent 1 was not a legitimate patient and that any medication he prescribed to her at that appointment would be given to and used by CI.

ii. Undercover Appointment #1: March 27, 2015

55. Agent 1's first appointment with the Respondent was on March 27, 2015. GE–10; Tr. 91. Upon arriving at the Respondent's clinic, Agent 1 signed in, completed paperwork, and waited in the Respondent's waiting room. GE–9; Tr. 92. The Respondent's nurse called Agent 1 back into an examination room and spoke briefly with her. GE–9; Tr. 92, 94.

56. Agent 1 met with the Respondent. GE–9–10; Tr. 91; *see* GE–59 (containing the Respondent's patient file for Agent 1). The appointment lasted approximately seven minutes. GE–9. When the Respondent asked Agent 1 what her problem was, she told him, ''Just kind of a whole head thang [sic].'' GE–10, at 1; Tr. 94. The Respondent asked Agent 1 how long her head had been bothering her, and she indicated just a few days. GE–9–10. The Respondent quickly looked into Agent 1's ears, nose, and throat. GE–9–10; Tr. 94, 132. The Respondent asked her if she was dizzy, nauseous, or taking other medication. GE–9–10. He advised her that Maxalt works well for sinus headaches and gave her instructions for taking her prescriptions. GE–9–10. The Respondent did not communicate any diagnosis to Agent 1, nor did he record a diagnosis in her patient file.[28] GE–9–10; GE–59, at 4.

57. Agent 1 asked the Respondent if he could help her with her weight loss. GE–9–10. The Respondent declined to prescribe anything for weight loss to Agent 1; he said that it was not his area of expertise and it was heavily regulated by the Mississippi Board. GE–10, at 2. He recommended that she could go to a licensed diet center for assistance. GE–10, at 3.

58. The Respondent wrote two prescriptions for Agent 1: one non-refillable prescription for Norco, and one refillable prescription for Maxalt. GE–11–12; Tr. 95. The Respondent told Agent 1 that he would give her ''lots of refills'' on the Maxalt. GE–10, at 1.

59. That same day, CI and the Respondent had a phone conversation about the Respondent's meeting with CI's ''friend,'' Agent 1. GE–13–14; GE–20, file Post Buy CI Call With STEWART 3–27–2015. The Respondent said he enjoyed meeting Agent 1 and that he was ''hopeful that that helps'' CI. GE–14, at 1. CI said that she could get through because the Respondent ''hooked'' her up. GE–14, at 1. The Respondent responded, ''absolutely that needs to be about as discreet as [unintelligible].'' GE–14, at 1. The Respondent told CI to ''not take that other stuff but one at a time.'' GE–14, at 1. He said that, during Agent 1's appointment, he ''talked about headaches and pretty much left it exactly at that.'' GE–14, at 1. The Respondent told CI, ''[s]o um you got refills on that Maxalt. Um she does,'' and noted that he could not give refills ''on the other one . . ..'' GE–14, at 2.

iii. Interactions Between the Respondent and CI Between the First and Second Undercover Appointments

60. On April 1, 2015, at approximately 8:28 p.m., the Respondent and CI spoke on the phone. GE–19.[29] CI said that she spent time with Agent 1. GE–19, at 1. The Respondent asked her, ''So that all went smooth with getting your medicine and all that?'' GE–19, at 1; *see* Tr. 230–31. CI said she might need some more. GE–19, at 1. The Respondent said he was glad he could help and that it was ''just because of'' the Mississippi Board complaint that ''it just has to be straight up and clean.'' GE–19, at 1.

61. On April 2, 2015, at approximately 2:15 p.m., the Respondent and CI spoke on the phone. GE–16, file 2015–04–02_14–15–50_EDT. CI told the Respondent that Agent 1 would come back and that she ''took all'' after CI ''halved some with her.'' *Id.* CI asked the Respondent if he could ''give her a little bit more if she'd come back in.'' *Id.* at 1. The Respondent replied, ''I can do that.'' *Id.* at 2. The Respondent asked if ''she'' really had migraines. *Id.* CI said ''no'' and laughed. *Id.* The Respondent laughed too and said he was just wondering because there were a lot of refills. *Id.* The Respondent said, ''[l]ong as we don't get outta hand. Just be sure to keep 'em really hidden.'' *Id.*

62. On April 2, 2015, at approximately 3:04 p.m., the Respondent and CI spoke on the phone. GE–16, file 2015–04–02_15–04–43_EDT. CI asked the Respondent whether he could write her ''80'' if someone came in to see him. *Id.* at 1. The Respondent said he could not because it would be a red flag, and that ''40 is a pretty substantial number.'' *Id.* at 1–2. The Respondent joked that CI should tell her husband that he messed up CI's ''drug

[26] *See* GE–16, file 2015–03–25_14–36–02_EDT.

[27] *See* GE–16, file 2015–03–26_11–18–28_EDT.

[28] The Respondent's March 27, 2015 notes in Agent 1's patient file mention photophobia. GE–59, at 4. The transcript and recording of the office visit, however, contain no mention of photophobia or any discussion of the symptoms of photophobia. GE–9–10.

[29] *See* GE–16, file 2015–04–01_20–28–54_EDT.

connection'' when he filed the complaint. *Id.* at 2.

63. On April 6, 2015, at approximately 8:59 p.m., the Respondent and CI spoke on the phone. GE–16, file 2015–04–06_20–59–35_EDT. CI told the Respondent that she had talked to Agent 1, who was coming on Wednesday. *Id.* at 2. The Respondent said, ''I'm glad to help her and take care of her.'' *Id.* He commented that he had to follow the rules when taking care of her. *Id.* CI asked the Respondent to help her out when he saw Agent 1. *Id.* at 3. The Respondent said he would take care of Agent 1's headaches ''like any other patient'' and that he had to follow the rules, treating her ''like anybody else.'' *Id.*

64. On April 7, 2015, at approximately 1:29 p.m., the Respondent and CI spoke on the phone. GE–16, file 2015–04–07_13–29–34_EDT. CI asked the Respondent if she could attend Agent 1's appointment. *Id.* at 2. The Respondent said it was ''a little bit on the risky side.'' *Id.*

65. On April 7, 2015, at approximately 6:28 p.m., the Respondent and CI spoke on the phone. GE–16, file 2015–04–07_18–28–45_EDT. CI asked the Respondent if he wanted her to come with Agent 1 to her appointment the next day. *Id.* at 7. The Respondent said that he was nervous about it and had to treat Agent 1 the way he treated everyone else. *Id.* CI thanked the Respondent and said she knew he was seeing Agent 1 for her. *Id.* at 8. The Respondent said that he was treating her as a patient, and that it was dangerous. *Id.*

66. On April 7, 2015, at approximately 7:04 p.m., CI texted the Respondent and asked if he would meet her at Walmart the next day around lunch. GE–20, file 2015–05–06_141328_601–904–1188_FROM_2015–04–01_TO_2015–04–30_ALL.[30]

67. On April 8, 2015, at approximately 8:59 a.m., CI again texted the Respondent and asked him to go to Walmart on his lunch break so that she could ''run into'' him. GE–21, at 3. CI texted the Respondent that Agent 1 would be there and that Agent 1 knew about their relationship, but was ''cool'' and would ''cover'' for CI. GE–21, at 5–6.

68. On April 8, 2015, at approximately 10:16 a.m., the Respondent and CI spoke on the phone. GE–16, file 2015–04–08_10–16–03_EDT. The Respondent said he would love to see CI at Walmart at noon that day. *Id.* at 1. CI again said Agent 1 knew that the Respondent was CI's boyfriend. *Id.* CI said she was fat because she was not taking Adipex anymore. *Id.* at 3. The Respondent said that she worried too much and that she was beautiful. *Id.*[31] The Respondent and CI agreed to meet in Walmart that day. *Id.* at 7–8.

69. On April 8, 2015, at approximately 12:31 p.m., CI texted the Respondent and said, if he wanted to save Agent 1 some money, he could bring a prescription for her with him to Walmart. GE–21, at 8. At 12:37 p.m., the Respondent replied that he ''MUST see her in the office. You know why.'' GE–21, at 9.

iv. Undercover Operation at Walmart: April 8, 2015

70. On April 8, 2015, Agent 1 accompanied CI to Walmart at approximately 12:45 p.m. GE–22–23; Tr. 128–29, 133–34. The Respondent met CI in the home furnishings department. GE–22; Tr. 389. CI wore a video and audio recording device. Tr. 347–48, 389; *see* GE–22. The Respondent spoke with CI. Tr. 129; *see* GE–22. The video recording did not capture an image of the Respondent's face, and much of the recording is inaudible. GE–22.

71. The Respondent told CI to tell Agent 1 to space out her appointments more. Tr. 129–30. The Respondent said, ''[w]e will be good now, so but you can't come back like every week for a prescription cause they keep up, it's like every 4 weeks.'' GE–23. CI asked the Respondent how she was ''supposed to last that long.'' GE–23. The Respondent told her to ''go buy a bottle of Vodka . . . .'' GE–23.

72. At approximately 3:29 p.m., CI texted the Respondent that she really felt fat and asked him to write Agent 1 ''something for that too.'' GE–21, at 13.

73. Based on Findings of Fact 47 through 53, Findings of Fact 56 through 72, and the transcript at pages 91, 230, and 349, I find that, by the time the Respondent met with Agent 1 on April 8, 2015, the Respondent knew that Agent 1 was not a legitimate patient and that at least some of the medication he prescribed at that appointment would be given to and used by CI.

v. Undercover Appointment #2: April 8, 2015

74. Agent 1 had a second appointment with the Respondent that took place on April 8, 2015. GE–24–25; Tr. 102. The Respondent's nurse asked Agent 1 why she was back so soon after her first visit and if she was taking her medication correctly. GE–24; GE–25, at 1; Tr. 103. Agent 1 said she just ''ran out'' of medication and was taking it twice a day. GE–25, at 1.

The nurse told her that she did not need to take pain medication ''every day all year long.'' GE–25, at 1.

75. The Respondent met with Agent 1 and asked her what she had going on. GE–25, at 1. Agent 1 said, ''Same thing. Same stuff.'' GE–25, at 1. The Respondent asked if the medicine had helped. GE–25, at 1. Agent 1 said it helped ''a little bit.'' GE–25, at 1. The Respondent began writing almost immediately after he entered the room without conducting any sort of examination of Agent 1. GE–24–25; Tr. 103–04, 132. The appointment lasted approximately seven minutes. GE–24.

76. The Respondent and Agent 1 talked casually about boating and skiing. GE–25, at 2–3. The Respondent took out his prescription pad and wrote prescriptions for Agent 1. GE–25, at 3. The Respondent said, ''[w]e need to kinda stretch this out [to] make it last a month.'' GE–25, at 3.

77. The Respondent wrote two prescriptions[32] to Agent 1: one for 40 Norco, and one for Maxalt. GE–24–26; Tr. 104. The Respondent told Agent 1 that he gave her refills for Maxalt but could not for ''the other.'' GE–25, at 1. The Respondent again told her to ''spread it out a little bit longer.'' GE–25, at 2. He said that ''the other ones are not really intended for . . . daily use,'' but that he would ''go ahead and give [her] a refill.'' GE–25, at 2.

vi. Interactions Between the Respondent and CI Between the Second and Third Undercover Appointments

78. On April 8, 2015, at approximately 5:01 p.m., CI texted the Respondent and said ''[t]hank u sweetheart for hooking me up again :).'' GE–20, file 2015–05–06_141328_601–904–1188_FROM_2015–04–01_TO_2015–04–30_ALL.

79. On April 8, 2015, at approximately 6:15 p.m., the Respondent and CI spoke on the phone. GE–27.[33] CI asked how things went with Agent 1. GE–27, at 1. The Respondent said he thought they went okay. GE–27, at 1. The Respondent and CI discussed their encounter in Walmart. GE–27, at 3. The Respondent asked CI what Agent 1 said to CI, and she told him that Agent 1 said that they had talked about the

[30] *Contra* Tr. 129.

[31] *See* GE–27, at 1; *contra* Tr. 225.

[32] In GE–26, the Government only provided a copy of the prescription for Norco. However, the Respondent's discussion of Maxalt, preserved in GE–24 and 25, indicates that the Respondent also prescribed Maxalt to Agent 1. Additionally, Agent 1's testimony that she received two prescriptions at this appointment was credible and uncontested. Tr. 104.

[33] *See* GE–16, file 2015–04–08_18–15–44_EDT.

Respondent's boat. GE–27, at 5. The Respondent said that he talked with Agent 1 about a boat because ''we had to be in there more than ten seconds'' so that his ''nosy nurse'' would not think, ''[d]ang, why is this appointment over with in ten seconds?'' GE–27, at 5.

80. On April 14, 2015, at approximately 3:48 p.m., CI texted the Respondent and asked him how many friends she could ''send in ur office for 'headaches' lol?'' GE–20, file 2015–04–14_15–48–52_EDT.

81. On April 14, 2015, at approximately 6:47 p.m., the Respondent and CI spoke on the phone. GE–38.[34] CI again asked the Respondent how many friends she could send to him with a headache. GE–38, at 2. The Respondent said they had to be really careful about it. *Id.* The Respondent told CI that if she had a friend who was ''willing to help'' her, she should not tell him about it and should just ask the friend to come by and ''mention that they've got headaches.'' GE–38, at 2. The Respondent said he was nervous about it because he knew he was being watched. GE–38, at 2. The Respondent said that, but for CI's husband, CI could ''have all the sex, drugs, and rock and roll'' that she needed. GE–38, at 2. CI told the Respondent that she was ''running low'' and needed ''some more pills or something.'' GE–38, at 3. The Respondent suggested she drink vodka. GE–38, at 3. CI asked if he would treat Agent 1 for a cough if Agent 1 came in for a cough, and if he would give Agent 1 cough medicine. GE–38, at 3. The Respondent said he could give her cough medicine for something legitimate, and warned CI that the state monitors drug-seeking behavior. GE–38, at 3–4. CI asked the Respondent to prescribe her a ''big bottle,'' like he used to prescribe to her. GE–38, at 4. The Respondent said he could give her about eight ounces. GE–38, at 4. The Respondent told CI that he could not prescribe Adipex to her and explained why. GE–38, at 6. The Respondent told CI that he could help her feel happier if he did not get ''busted by the . . . drug police.'' GE–38, at 8.

82. On April 14, 2015, at approximately 7:02 p.m., CI texted the Respondent and asked if he had any Adipex left over from a prescription to his wife. GE–20.

83. On April 15, 2015, at approximately 9:30 p.m., the Respondent and CI spoke on the phone. GE–20, 28. CI talked about being severely depressed. GE–28, file 2015–04–15_21–30–59_EDT, at 9. The Respondent talked about how CI's husband would not let her ''have drugs.'' *Id.* at 10.

84. On April 22, 2015, at approximately 10:28 a.m., the Respondent and CI spoke on the phone. GE–20, 28. CI told the Respondent that Agent 1 and some of her friends were coming next week to see the Respondent. GE–28, file 2015–04–22_10–28–41_EDT, at 3. The Respondent warned CI that he had to be careful because it was ''super serious.'' *Id.* CI laughed and said that they had headaches. *Id.* The Respondent told CI that prescribing frequently to people from out of town was a ''big'' red flag. *Id.* The Respondent said he could not ''do it on any kind of regular basis.'' *Id.* at 4.

85. On April 22, 2015, at approximately 12:10 p.m., the Respondent texted CI that he ''CANNOT do anything other than legitimate medical stuff'' because it was risky and CI's husband had everyone ''on high alert.'' GE–20. CI texted back and asked if he would see Agent 1 next week, and that Agent 1 and her friends would not ''tell.'' GE–20. CI asked him to ''write in their chart it's for migraines like u always do.'' GE–20. The Respondent texted back that he would see Agent 1 and treat her in a medically appropriate way. GE–20. The Respondent also texted that his usual prescription for Lorcet (40) ''should last more than a month.'' GE–20. The Respondent texted that his feelings for CI needed to be ''totally separate from [his] medical practice.'' GE–20.

86. On April 22, 2015, at approximately 1:03 p.m., the Respondent and CI spoke on the phone. GE–20, 28. The Respondent said that they had to be really careful because the Mississippi Board was watching him. GE–28, file 2015–04–22_13–03–23_EDT, at 1–2. He compared their situation to going to ''buy drugs at a crack house.'' *Id.* at 2. The Respondent said everything needed to be ''straight'' and ''above the board.'' *Id.* The Respondent said that his normal prescription dosage of headache medicine should last more than 30 days, and that it would raise alarm if he saw people more than once a month or every other month for headaches. *Id.* CI said that it had been a month since he saw Agent 1; the Respondent said he did not remember. *Id.* CI asked him how he got ''away with it'' when he was seeing her; he replied that ''they weren't watching nearly as close'' and that CI had legitimate headaches and he ''was writing it down every time.'' *Id.* at 3. The Respondent said he was not giving her prescriptions ''super often.'' *Id.* The Respondent discussed headaches, Maxalt, and Lorcet with CI. *Id.* at 3–4. CI asked the Respondent if he would see ''them'' next week. *Id.* at 4. The Respondent said that he would see anybody that came in to his office. *Id.* CI asked him to ''write 'em Lorcet.'' *Id.* The Respondent said that ''[i]t would even be better if I don't even know who they are'' and instructed CI to not tell him their names. *Id.* The Respondent said that he treats everyone the same. *Id.* at 5. The Respondent said that he liked to be nice to Agent 1, who he identified as CI's friend. *Id.*

87. On April 22, 2015, at approximately 2:32 p.m., CI texted the Respondent, ''[w]hat I wouldn't do for an aipex [sic] right now ! Omg :/.'' GE–20, file 2015–04–22_14–32–41_EDT.

88. On April 27, 2015, at approximately 2:45 p.m., the Respondent and CI spoke on the phone. GE–20, 28. CI said she spoke to Agent 1, who was going to see the Respondent that Wednesday. GE–20, file 2015–04–27_14–45–16_EDT. The Respondent said he would be glad to see her. *Id.* CI said that Agent 1 would give CI all of Agent 1's prescriptions. *Id.* CI said Agent 1 and Agent 2 would split Agent 2's prescriptions. GE–28, file 2015–04–27_14–45–16_EDT, at 1. The Respondent said he did not ''know anything about that and [did not] want to know anything about that.'' *Id.* CI discussed previously taking ''like 20'' of the Demerol that the Respondent prescribed to her. *Id.* at 7.

89. On April 28, 2015, at approximately 8:23 p.m., the Respondent and CI spoke on the phone. GE–20, 28. CI told the Respondent to not forget that Agent 1 and Agent 2 were coming tomorrow. GE–28, file 2015–04–28_20–23–38_EDT, at 1. The Respondent acknowledged that he knew they were coming and said he would see them then. *Id.* CI told the Respondent to ''[h]ook her up good. Give her some cough medicine.'' *Id.*

90. On April 29, 2015, at approximately 9:38 a.m., the Respondent and CI spoke on the phone. GE–20, 28, 29. CI told the Respondent not to forget that Agent 1 was coming that day. GE–29, at 7. The Respondent replied that he would not forget and would ''take care of her.'' GE–29, at 7. CI told him to give her cough medicine. GE–29, at 7. The Respondent said he would see what he could do, but that CI was ''really pushing [his] envelope.'' GE–29, at 7.

91. On April 29, 2015, at approximately 3:40 p.m., CI texted the Respondent that Agent 1 said that Agent 2 '' 'has a cough too' if u could hook her up with some cough med . . . Please :) .'' GE–39, at 5.

[34] *See* GE–20, file 2015–04–14_18–47–34_EDT; GE–28, file 2015–04–14_18–47–34_EDT.

92. Based on Findings of Fact 47 through 53, 56 through 72, and 75 through 91, and the transcript at pages 91, 136, 230, and 349, I find that, by the time the Respondent met with Agents 1 and 2 on April 29, 2015, the Respondent knew that Agent 1 and Agent 2 were not legitimate patients and that at least some of the medications that he prescribed to them during their appointments that day would be given to and used by CI and/or shared by the Agents.

vii. Undercover Appointment #3: April 29, 2015, with Agent 1

93. Agent 1 had a third appointment with the Respondent, which occurred on April 29, 2015. GE–30–31; Tr. 111.

94. The Respondent met with Agent 1 and asked her, ''Headaches for you?'' GE–31, at 1. Agent 1 responded, ''Yep.'' GE–31, at 1. The Respondent performed a brief examination of Agent 1, checking her ears and nose. GE–30–31; Tr. 112, 132. The Respondent observed that Agent 1 still had ''refills on the other.'' GE–31, at 1.

95. Agent 1 told the Respondent that she talked on the phone with a friend of hers, who told her that she was coughing a lot and needed to get something for her cough; Agent 1 also told the Respondent that she had not paid it much attention to it. GE–31, at 1; Tr. 133, 138–39. The Respondent immediately told Agent 1 that he would give her some cough syrup. GE–30; Tr. 133, 139–40. Agent 1 was not coughing during the appointment. GE–30; Tr. 138. Agent 1 did not tell the Respondent that she had a cough. GE–30–31; Tr. 113, 132. Agent 1 did not directly request cough syrup from the Respondent. GE–30–31; Tr. 113.

96. The Respondent wrote two prescriptions to Agent 1: one for 40 Norco 10/325, and one for eight ounces of Hycodan. GE–32–33; Tr. 113.

viii. Undercover Appointment #4: April 29, 2015, with Agent 2

97. Agent 2 also had an appointment with the Respondent on April 29, 2015. GE–34–35; Tr. 143.

98. The Respondent met with Agent 2. GE–34–35; Tr. 144; *see also* GE–58 (containing the Respondent's patient file for Agent 2). The Respondent asked her what he could do for her. Agent 2 she said she had ''a little headache,'' but noted that it had not been going on for a long time. GE–35, at 1; Tr. 144. The Respondent briefly looked into Agent 2's ears, nose, and mouth. GE–34–35; Tr. 144. The Respondent asked her a few questions about allergies, blood pressure, and smoking. GE–35, at 2. The Respondent then wrote prescriptions to Agent 2. GE–34. Meanwhile, the Respondent talked casually with Agent 2 about sports, Birmingham, and restaurants. GE–35, at 2–3.

99. The Respondent wrote two prescriptions for Agent 2: one for 40 Norco 10/325, and one for Maxalt with unlimited refills. GE–35, at 3; GE–36–37; Tr. 144.

ix. Interactions Between the Respondent and CI Between the Fourth and Fifth Undercover Appointments

100. On April 29, 2015, at approximately 1:48 p.m., the Respondent and CI spoke on the phone. GE–29, at 9. CI asked the Respondent if he had seen Agent 1. GE–29, at 9. The Respondent said he had. GE–29, at 9. CI asked him what he gave her. GE–29, at 9. The Respondent said, ''appropriate medicine,'' and laughed. GE–29, at 9. He said that he gave her something for her headache and cough. GE–29, at 9. CI thanked the Respondent. GE–29, at 9.

101. On April 30, 2015, at approximately 9:19 a.m., the Respondent and CI spoke on the phone. GE–40; *see* GE–20, 28. CI told the Respondent that she got her medication. GE–40, at 1. The Respondent said he was ''glad all that worked out.'' GE–40, at 1; *see* Tr. 230–31. The Respondent asked CI who Agent 2 was and if she was Agent 1's friend. GE–40, at 1. CI told the Respondent that Agent 1 gave all of hers to CI, and that Agent 1 and Agent 2 split Agent 2's prescription. GE–40, at 2. The Respondent said he was glad he could help, and that both agents were ''very appropriate'' because they went ''through the motions.'' GE–40, at 2. The Respondent said that during the appointment with Agent 2, he was thinking, ''I'm not mentioning [CI] and I'm not mentioning [Agent 1].'' GE–40, at 2.

102. The DEA's investigation was suspended while the Respondent campaigned for political office. Tr. 78. The DEA contacted CI in October 2015 and asked her to talk to the Respondent again to try to get him to write another prescription. Tr. 358. CI said no. Tr. 358.

x. Undercover Appointment #5: October 16, 2015

103. Agent 1 had a fourth appointment with the Respondent, which took place on October 16, 2015. Tr. 78, 119. The purpose of this appointment was to refresh the investigation concerning the Respondent. Tr. 78. Upon arriving at the Respondent's clinic, the Respondent's receptionist told Agent 1 that her chart had been misplaced,[35] so Agent 1 filled out new paperwork and sat in the Respondent's waiting room. GE–42–43; Tr. 119–20, 137.

Agent 1 waited for about an hour and twenty minutes before she was called into an exam room. GE–42; Tr. 406.

104. Agent 1 met with the Respondent. GE–42; *see* GE–60 (containing Agent 1's October 16, 2015 patient file). The Respondent examined Agent 1's ears, nose, and throat. GE–60, at 4; Tr. 120, 132.[36] The Respondent asked Agent 1 what her symptoms were and what he had treated her for in the past. GE–43, at 2; Tr. 135. Agent 1 thought the Respondent was acting as though he did not know who she was. Tr. 120, 135, 452; *see* GE–42–43.

105. The Respondent discussed the most effective medication for Agent 1 to take for headaches. GE–43, at 2–3. Agent 1 asked the Respondent if he remembered Agent 2. GE–43, at 3. The Respondent stopped, thought about it, and said he did not. GE–42, 43.

106. Agent 1's recording device partially failed and did not record the last few minutes of Agent 1's appointment with the Respondent. Tr. 79, 451.

107. While the Respondent was writing prescriptions for Agent 1, she asked the Respondent if he had spoken with CI lately. Tr. 122, 135, 452–53. The Respondent paused and looked surprised, then continued writing the prescriptions and stated that he had not heard from CI lately. Tr. 122–23.

108. The Respondent wrote Agent 1 prescriptions for 30 Norco 5/325, four ounces of Hycodan, Maxalt, Zyrtec, and dexamethasone. GE–44–47, 54; Tr. 120, 126–27, 452. The Respondent discussed these prescriptions with Agent 1 during the appointment. Tr. 452–53, 455–56.

109. During this visit, Agent 1 did not say that she had a cough. GE–42–43; Tr. 126, 138–39, 454. Agent 1 only stated at the outset of the appointment that she needed the ''same as before,'' and did not tell the Respondent that she had any specific complaints. GE–42–43; Tr. 454. The Respondent nonetheless prescribed cough syrup to Agent 1. GE–45; Tr. 139.

[35] After the Respondent was arrested, Agent 1's original file, GE–59, was found in the Respondent's desk, along with the files for CI and CI's children. Tr. 428.

[36] The audiovisual recording of Agent 1's appointment did not record any physical examination by the Respondent during this appointment. *See* GE–42. However, because the audiovisual recording was incomplete, and because Agent 1 testified that the Respondent examined her ears, nose, and throat, I find as a matter of fact that the Respondent conducted a physical examination of Agent 1 at this appointment.

G. Search of the Respondent's Office

110. The Respondent was arrested on December 9, 2015. Tr. 427, 432. That same day, the DEA searched the Respondent's office and examined his records and patient files. Tr. 427, 432. The Respondent's office kept patient files in a general population of files. Tr. 433.

111. The DEA unlocked the Respondent's desk drawer and discovered several patient files that had not been kept in the general population of patient files. Tr. 428, 432. In the Respondent's desk, the DEA found one patient file for Agent 1, one file for CI, one file for Kid 1, and one file for Kid 2. Tr. 428; *see* GE–2, 56–57, 59.

112. The DEA found a second patient file for Agent 1 within the general population of the Respondent's patient files. Tr. 433; *see* GE–60. The DEA also found a patient file for Agent 2 in the general population of the Respondent's patient files. Tr. 434; *see* GE–58.

Additional facts required to resolve the issues in this case are included below in the Analysis section of this Recommended Decision.

ANALYSIS

To revoke a respondent's registration, the Government must prove, by a preponderance of the evidence, that the regulatory requirements for revocation are satisfied. *Steadman* v. *SEC,* 450 U.S. 91, 100–02 (1981); 21 CFR § 1301.44(e) (2015). Under 21 U.S.C. § 824(a)(4), the DEA may revoke a registrant's COR if the registrant acted in a way that renders continued registration ''inconsistent with the public interest.'' The DEA considers the following five factors to determine whether continued registration is in the public interest:

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

(2) The [registrant's] experience in dispensing, or conducting research with respect to controlled substances.

(3) The [registrant'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) (2012).

These public interest factors are considered separately. *See Robert A. Leslie, M.D.,* 68 Fed. Reg. 15227, 15230 (2003). Each factor is weighed on a case-by-case basis. *Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005). Any one factor, or combination of factors, may be decisive. *David H. Gillis, M.D.,* 58 Fed. Reg. 37507, 37508 (1993). Thus, there is no need to enter findings on each of the factors. *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005). Further, there is no requirement to consider a factor in any given level of detail. *Trawick* v. *DEA,* 861 F.2d 72, 76–77 (4th Cir. 1988). When deciding whether registration is in the public interest, the totality of the circumstances must be considered. *See generally Joseph Gaudio, M.D.,* 74 Fed. Reg. 10083, 10094–95 (2009).

The Government bears the initial burden of proof, and must justify revocation by a preponderance of the evidence. *Steadman,* 450 U.S. at 100–03. If the Government makes a *prima facie* case for revocation, the burden of proof shifts to the registrant to show that revocation would be inappropriate. *Med. Shoppe–Jonesborough,* 73 Fed. Reg. 364, 387 (2008). A registrant may prevail by successfully attacking the veracity of the Government's allegations or evidence. Alternatively, a registrant may rebut the Government's *prima facie* case for revocation by accepting responsibility for wrongful behavior and by taking remedial measures to ''prevent the re-occurrence of similar acts.'' *Jeri Hassman, M.D.,* 75 Fed. Reg. 8194, 8236 (2010). In addition, when assessing the appropriateness and extent of sanctioning, the DEA considers the egregiousness of the offenses and the DEA's interest in specific and general deterrence. *David A. Ruben, M.D.,* 78 Fed. Reg. 38363, 38385 (2013).

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

Neither party directly advanced an argument under Factor One. However, a substantial portion of the Respondent's post-hearing brief (''ALJ–34'') argues that the DEA should give significant deference to the Mississippi Board's termination of its investigation against the Respondent. ALJ–34, at 3–6. Therefore, by inference, the Respondent advanced a theory under Factor One that his license should not be revoked because the Mississippi Board declined to take formal disciplinary action against him.

Although the Mississippi Board did not make a formal recommendation to the DEA in this matter, the DEA interprets a state licensing board's ''recommendation'' broadly. *See Kenneth Harold Bull, M.D.,* 78 Fed. Reg. 62666, 62672 (2013) (considering disciplinary actions taken by a state board under Factor One).[37] A state board's disciplinary actions can provide evidence of what a state licensing board would recommend. *Id.* For example, when a state board puts a registrant on probation, the DEA views the probation as a recommendation from the state board. *E.g., Tyson D. Quy, M.D.,* 78 Fed. Reg. 47412, 47417 (2013).

Here, the Mississippi Board has not revoked, suspended, or restricted the Respondent's license. GE–1, at 1; GE–3, at 1. The Mississippi Board investigated the Respondent in March 2015. *See* GE–3. This investigation was limited to reviewing an anonymous letter, interviewing the Respondent, and visiting the Respondent's office. *See* GE–3, at 1–2, 4–6. The Mississippi Board neither exonerated the Respondent nor took any formal action against him. GE–3; Tr. 184, 203. The Mississippi Board only issued a warning letter to the Respondent to conclude its investigation. GE–3, at 1. Consistent with the findings of Investigator Pohnert, the Mississippi Board warned the Respondent that doctors are only permitted to refill phentermine prescriptions if they first conduct and document medical examinations. GE–3, at 1, 5.

The fact ''that a state has not acted against a registrant's medical license is not dispositive in this administrative determination as to whether continuation of a registration is consistent with the public interest.'' *Carlos Gonzalez, M.D.,* 76 Fed. Reg. 63118, 63140 (2011) (citing *Patrick W. Stodola, M.D.,* 74 Fed. Reg. 20727, 20730 (2009); *Jayam Krishna-Iyer, M.D.,* 74 Fed. Reg. 459, 461 (2009)). Rather, the DEA, apart from the Mississippi Board, has its own independent responsibility to determine whether the Respondent's continued registration is in the public interest. *See Edmund Chein, M.D.,* 72 Fed. Reg. 6580, 6590 (2007), *aff'd, Chein* v. *DEA,* 533 F.3d 828 (D.C. Cir. 2008). Accordingly, the Mississippi Board's warning letter does not weigh either for or against the Respondent under Factor One.

Factors Two and Four: The Respondent's Experience in Dispensing Controlled Substances and Compliance with Applicable State, Federal, or Local Laws Relating to Controlled Substances

Allegations 1 through 5 all claim that the Respondent illegitimately prescribed controlled substances outside the course of his professional practice. *See supra* pp. 2–3. Regarding these allegations, the

[37] *But see George R. Smith, M.D.,* 78 FR 44972, 44979 (2013) (finding that the absence of a state licensing board's direct recommendation weighs neither for nor against a respondent); *Paul Weir Battershell, N.P.,* 76 FR 44359, 44365–66 (2011) (same); *Gilbert Eugene Johnson, M.D.,* 75 FR 65663, 65666 n.3 (2010) (same).

Government endeavored to show that the Respondent knowingly diverted, or attempted to divert, controlled substances. This evidence is properly analyzed under Factors Two and Four because ''[p]roof that a physician knowingly diverted controlled substances is the best evidence for assessing his experience in dispensing controlled substances, although it is also relevant in assessing his compliance with applicable laws related to controlled substances.'' *Syed Jawed Akhtar-Zaidi, M.D.,* 80 Fed. Reg. 42961, 42968 n.17 (2015).

Under the Controlled Substances Act (''CSA''), it is unlawful for a person to distribute controlled substances, except as authorized under the CSA. 21 U.S.C. 841(a)(1). To combat drug abuse and trafficking of 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). To maintain this closed regulatory system, controlled substances may only be prescribed if a DEA registrant writes a valid prescription. *Gonzalez,* 76 FR at 63141. As the Supreme Court explained, ''the prescription requirement . . . ensures that patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135, 143 (1975)).

A controlled substance prescription is not valid unless it is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR § 1306.04(a). Federal regulations further provide that ''[a]n order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of [21 U.S.C. § 829] and . . . the person issuing it, shall be subject to the penalties provided for violations of [controlled substance laws].'' *Id.; see* 21 U.S.C. § 842(a)(1) (establishing that, under the CSA, it is illegal for a person to distribute or dispense controlled substances without a prescription, as is required under 21 U.S.C. § 829).

Much like the federal regulations, the Mississippi Code provides that it is illegal to dispense Schedule II [38] controlled substances except upon a valid prescription written by a practitioner. Miss. Code §§ 41–29–137(a)(1), 41–29–141(1). The Mississippi Code further provides that a registrant's license may be revoked if the registrant prescribes narcotics outside of the course of legitimate professional practice, *id.* § 73–25–29(3), or if the registrant violates the Mississippi Board's administrative rules, *id.* § 73–25–29(13).

The DEA recognizes several methods to show that a registrant wrote prescriptions without a legitimate medical purpose and outside of the usual course of professional practice. *See Jack A. Danton, D.O.,* 76 FR 60900, 60901 (2011). The Respondent, however, incorrectly suggests that the Government *must* provide ''medical literature'' or a ''medical opinion'' in order to establish that a registrant acted outside the usual course of professional practice and lacked a legitimate medical purpose. ALJ–34, at 5.

Typically, the Government uses expert testimony to establish a violation of 21 CFR 1306.04(a). *T.J. McNichol, M.D.,* 77 FR 57133, 57147–48 (2012). However, ''whether expert testimony is needed is necessarily dependent on the nature of the allegations and the other evidence in the case.'' *Beau Boshers, M.D.,* 76 FR 19401, 19402 n.4 (2011). Numerous state and federal courts have found in criminal cases, which require a higher standard of proof than is required in these proceedings, that expert testimony is not required to establish a violation of 21 U.S.C. § 841 or 21 CFR § 1306.04(a). *McNichol,* 77 FR at 57147.[39] For example, the DEA has not required expert testimony to establish a violation of 21 CFR § 1306.04(a) in cases where a prescriber engaged in drug deals,[40] where there were notable differences between patients' medical records and diagnoses,[41] and where a prescriber falsified patients' charts.[42] Simply put, whether the Government must present expert testimony is dependent on the facts of each case. *McNichol,* 77 FR at 57147–48.

In the Government's post-hearing brief (''ALJ–35''), it advanced two theories regarding how the Respondent violated 21 CFR § 1306.04(a): (1) the Respondent knowingly diverted controlled substances to CI, and (2) the Respondent violated state medical practice standards. ALJ–35, at 18–24. The Government can prove that a registrant acted outside of the usual course of professional practice and lacked a legitimate medical purpose by ''providing evidence showing that [the registrant] knowingly diverted drugs.'' *Danton,* 76 Fed. Reg. at 60901. Additionally, the Government can prove that a registrant acted outside of the usual course of professional practice and lacked a legitimate medical purpose by providing evidence showing that the registrant violated a state medical practice standard ''which has a substantial relationship to the CSA's purpose of preventing substance abuse and diversion.'' *Id.* Neither of these methods of proof requires the presentation of expert testimony. *Id.*

Allegation 1: Hydrocodone and Alprazolam Prescriptions to CI

In Allegation 1, the Government claimed that the Respondent prescribed hydrocodone and alprazolam to CI from February 2014 to May 2015 [43] without conducting and/or documenting a physical examination, and without recording the prescriptions in CI's patient file, in violation of Mississippi Medical Board Administrative Rules Part 2640, Chapter 1, (''Mississippi Administrative Rules'') 1.4, 1.11(b),[44] and 1.16, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a). ALJ–1, at 2. Specifically, the Government alleged that the Respondent issued improper

[38] These sections of the Mississippi Code only apply to the Respondent's Schedule II controlled substance prescriptions. Notably, hydrocodone combination products, such as Norco and Hycodan, were re-classified by the federal government as Schedule II controlled substances on October 6, 2014. *See* Stip. 5–6. The parties made no argument, and presented no evidence, regarding the classification of hydrocodone combination products in the state of Mississippi.

[39] *E.g., United States* v. *Pellman,* 668 F.3d 918, 924 (7th Cir. 2012); *United States* v. *Armstrong,* 550 F.3d 382, 389 (5th Cir. 2008); *United States* v. *Word,* 806 F.2d 658, 663 (6th Cir. 1986); *United States* v. *Larson,* 507 F.2d 385, 387 (9th Cir. 1974); *United States* v. *Bartee,* 479 F.2d 484, 488–89 (10th Cir. 1973); *State* v. *Moody,* 393 So.2d 1212, 1215 (La. 1981).

[40] *Boshers,* 76 Fed. Reg. at 19402 n.4.

[41] *Morris W. Cochran, M.D.,* 77 Fed. Reg. 17505, 17519–20 (2011).

[42] *Robert F. Hunt, D.O.,* 75 Fed. Reg. 49995, 50003 (2010).

[43] The record does not contain any evidence that the Respondent prescribed controlled substances directly to CI in 2015. The 2015 prescriptions that the Government alluded to under Allegation 1 were the Respondent's 2015 prescriptions to Agent 1 and Agent 2. Those prescriptions are discussed at length under Allegation 4, *infra* pp. 50–58.

[44] Rule 1.11(b) requires that ''[e]very written prescription delivered to a patient, or delivered to any other person on behalf of a patient, must be manually signed on the date of issuance by the physician.'' Miss. Code R. § 30–17–2640:1.11(b). Although the Government alleged a violation of this provision in its OSC/ISO, the Government did not advance a theory or offer evidence to establish a violation of this specific rule. I therefore find that the Government's allegation that the Respondent violated Rule 1.11(b) is **NOT SUSTAINED**.

prescriptions to CI: (a) on May 22, 2014, for 40 units of a hydrocodone combination product; (b) on June 17, 2014, for 40 units of a hydrocodone combination product; (c) on September 11, 2014, for 40 units of a hydrocodone combination product; (d) on October 6, 2014, for 40 units of alprazolam with one refill for 40 units; (e) on October 29, 2014, for 40 units of a hydrocodone combination product; and (f) on December 4, 2014, for 180 units of a hydrocodone combination product. ALJ–1, at 2.

Under the Mississippi Administrative Code, the Mississippi Board requires that a prescribing physician must:

> maintain a complete record of his or her examination, evaluation and treatment of the patient which must include documentation of the diagnosis and reason for prescribing, dispensing or administering any controlled substance; the name, dose, strength, quantity of the controlled substance and the date that the controlled substance was prescribed, dispensed or administered.

Miss. Code R. § 30–17–2640:1.4.[45] This record must ''be maintained in the patient's medical records.'' *Id.*

Further, the Mississippi Board requires that a physician cannot prescribe a controlled substance ''without a good faith prior examination and medical indication therefore.'' *Id.* This obligation is a continuing one; ''upon *any encounter* with a patient, in order to establish proper diagnosis and regimen of treatment, a physician *must* take three steps: (a) take and record an appropriate medical history, (b) carry out an appropriate physical examination, and (c) record the results.'' *Id.* (emphasis added). A physician's failure to complete these three steps is conduct outside the ''course of legitimate professional practice.'' *Id.* In fact, any violation of these rules is considered conduct outside of the course of legitimate professional practice, in violation of Section 73–25–29(3) of the Mississippi Code. Miss. Code R. § 30–17–2640:1.16.

The evidence establishes that, on four occasions, the Respondent prescribed controlled substances to CI without writing any notes about any prescriptions or examinations in CI's patient file. On May 22, 2014, the Respondent prescribed 40 units of Norco 10/325 to CI. GE–41, at 4; GE–49, at 2. On June 17, 2014, the Respondent prescribed 40 units of Norco 7.5/325[46] to CI. GE–41, at 6; GE–49, at 2. On September 11, 2014, the Respondent prescribed 40 units of Norco 10/325 to CI. GE–41, at 20; GE–49, at 2. On December 4, 2014, the Respondent prescribed 180 units, or six ounces, of Hycodan to CI.[47] GE–41, at 28; GE–49, at 1. None of these four prescriptions were recorded in CI's medical file. *See* GE–2, at 12–13. The Respondent did not document a diagnosis or reason for prescribing to CI on any of these dates. The Respondent did not write the names, doses, strengths, or quantities of these prescriptions to CI in CI's medical record. The Respondent did not record the dates of these prescriptions in CI's medical record. The Respondent did not record any notes in CI's medical record about any physical examinations on these dates.

Because of the complete absence of this required information in CI's patient file, the prescriptions that the Respondent wrote to CI on these four dates were improper under Mississippi Administrative Rule 1.4. The Government's allegations that these four prescriptions to CI violated Mississippi Administrative Rule 1.4 are **SUSTAINED** by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government. Because these prescriptions violated Mississippi Administrative Rule 1.4, these prescriptions were issued outside of the course of the Respondent's legitimate professional practice under Mississippi Administrative Rule 1.16. Further, there is no evidence that the Respondent even saw CI on May 22, June 17, September 11, or December 4 of 2014. Even absent expert testimony, the DEA has held that a prescriber does not act in the usual course of professional practice if the prescriber writes prescriptions to a patient without first seeing the patient. *Armando B. Figueroa, M.D.,* 73 Fed. Reg. 40380, 40381–82 (2008). Therefore, the Government's allegations that the Respondent violated Mississippi Administrative Rule 1.16, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a) on these four occasions are **SUSTAINED** by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government.

On October 6, 2014, the Respondent prescribed 40 units of alprazolam 1 mg, with one refill, to CI. GE–41, at 22; GE–49, at 1. In CI's medical file, near a date stamp reading September 2, 2014, the Respondent noted ''Xanax 1mg (#40, 1),'' but did not write any justification for this prescription, as is required by Mississippi Administrative Rule 1.4. *See* GE–2, at 12–13. The Respondent did not write any notes anywhere in CI's patient file about a diagnosis of anxiety or any of CI's alleged symptoms. *See* GE–2, at 12–13. Additionally, CI's testimony and her PMP report indicate that, although CI's psychiatrist prescribed a smaller dosage of alprazolam to her, the Respondent increased CI's dosage without any noted justification. GE–49, at 1; Tr. 225–26, 295, 304; *see* GE–2 (failing to justify an increased dosage of alprazolam); *see also* GE–2, at 21 (documenting that another registrant prescribed 7 units of alprazolam ER 0.5 mg to CI on September 30, 2014, and that the Respondent then prescribed 40 units of alprazolam 1 mg on October 6, 2014). Because the Respondent never documented a reason for prescribing alprazolam to CI in her patient file, the Government's allegation that the October 6, 2014 prescription violated Mississippi Administrative Rule 1.4 is **SUSTAINED** by a preponderance of the evidence, and weighs in favor of the revocation sought by the Government. Because this prescription violated Mississippi Administrative Rule 1.4, this prescription was issued outside of the course of the Respondent's legitimate professional practice under Mississippi Administrative Rule 1.16. Therefore, the Government's allegations that the Respondent violated Mississippi Administrative Rule 1.16, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a) by issuing the October 6, 2014 prescription are also SUSTAINED by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government.

The Government also alleged that the Respondent prescribed 40 units of a hydrocodone product to CI on October 29, 2014. ALJ–1, at 2. Although this alleged prescription is noted on CI's PMP report, *see* GE–49, as Government counsel stated, ''PMPs are not without their flaws'' and are not ''necessarily accurate.'' Tr. 302–03. The Government offered testimony from CI related to this alleged prescription. Tr. 369–70. CI was presented with a copy of this alleged prescription, which she reviewed. Tr. 369–70. At the hearing, CI did not testify about the prescription from her

[45] I find that the documentation requirements of Mississippi Administrative Rule 1.4 share a substantial relationship with the CSA's purpose of preventing drug abuse and diversion.

[46] Originally, the Government alleged that the Respondent prescribed Norco 10/325 on June 17, 2014. *See* ALJ–1, at 2. However, as the Government correctly noted in its post-hearing brief, the Respondent prescribed Norco 7.5/325 on June 17, 2014. ALJ–35, at 6 n.1; *see* GE–41, at 6.

[47] The record reflects some confusion concerning the date of this prescription. GE–41, at 21, indicates it was written on December 3, 2014, while GE–49, at 1, indicates it was written on December 4, 2014. *See supra* note 19. Regardless of the one day variance, the analysis is the same.

personal recollection; she only looked at and read off of the copy of the prescription presented to her. Tr. 369–70. I do not find that CI's testimony proved the existence of the October 29 prescription. This copy of the prescription was not offered into evidence.[48] In sum, the Government failed to offer substantial evidence that the Respondent did, in fact, prescribe hydrocodone to CI on October 29, 2014 outside of the course of his professional practice. Therefore, the Government's allegations that the Respondent violated Mississippi Administrative Rules 1.4 and 1.16, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a) by issuing an October 29, 2014 prescription are **NOT SUSTAINED**.

Beyond the above-mentioned specific prescribing events, the Government provided ample evidence that, throughout 2014, the Respondent prescribed controlled substances to CI outside of the usual course of his professional practice and without a legitimate medical purpose. The DEA has held, even without the benefit of expert testimony, that a controlled substance prescription based on a patient's request ''rather than the result of the application of the physician's medical judgment'' lacks a medical purpose. *Robert M. Golden, M.D.,* 61 Fed. Reg. 24808, 24812 (1996) (citing *Robert L. Dougherty, Jr., M.D.,* 60 Fed. Reg. 55047 (1995); *Harland J. Borcherding, D.O.,* 60 Fed. Reg. 28796 (1995)). Likewise, the Mississippi Administrative Rules state that a prescriber lacks good faith when he ''permit[s] the patient to name the drug desired'' or ''dispens[es] drugs to patients having no medical need, when the physician knew or should have known that the patients were addicts.'' Miss. Code R. § 30–17–2640:1.4.

It is true that, at times, the Respondent intended to treat CI's medical conditions. GE–2, at 12–13; Tr. 215, 277–78, 287, 321. However, even if the Respondent subjectively intended to provide legitimate medical treatment to CI, ''[t]he appropriate focus is not on the subjective intent of the doctor, but rather . . . whether the physician prescribe[d] medicine 'in accordance with [the accepted] standard of medical practice.' '' *United States* v. *Merrill,* 513 F.3d 1293, 1306 (11th Cir. 2008) (quoting *United States* v. *Moore,* 423 U.S. 122, 139 (1975)). The Respondent's failure to perform and document physical examinations of CI, and his failure to document his prescriptions to CI, constitutes a significant failure to comply with Mississippi medical standards, regardless of the Respondent's subjective intent.

Here, CI took Norco daily and recreationally, and the Respondent gave prescriptions to CI upon her request. Tr. 297–99. The Respondent gave prescriptions to CI at her house, at her children's appointments, and in the garden section of Walmart. Tr. 26, 217–20. The Respondent did not provide CI with a diagnosis or perform physical examinations before giving these prescriptions to CI. *See* Tr. 217–18; *see also* GE–2, at 12–13.

Importantly, the Respondent only made three entries in CI's patient file in 2014, on February 21, April 21, and September 2, and he made no entries in CI's patient chart in 2015. *See* GE–2, at 12–13. Neither party presented any standard to evaluate the adequacy of the patient file entries.[49] Assuming that the file entries on those dates are adequate, under Mississippi Administrative Rule 1.4, *any* prescriptions that the Respondent issued to CI in 2014, other than on February 21, April 21, and September 2, were issued outside of the Respondent's professional practice. CI's PMP report indicates that CI may have filled prescriptions written by the Respondent on 13 dates in 2014.[50] I do not find that the PMP report, standing alone, constitutes substantial evidence that these prescriptions existed, as discussed *supra.* However, CI's credible, confident, and uncontested testimony that she simply requested prescriptions from the Respondent ''for fun,'' and that he would give them to her, considered in conjunction with the PMP report, constitutes substantial evidence that the Respondent prescribed controlled substances to CI in 2014 based on CI's request rather than in the proper exercise of sound medical judgment. On these grounds, the Government's allegations that the Respondent violated Mississippi Administrative Rules 1.4 and 1.16, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a) are also **SUSTAINED** by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government.

Allegation 2: Phentermine Prescriptions to CI

In Allegation 2, Government claimed that the Respondent prescribed phentermine[51] to CI without adequate documentation, in violation of Mississippi Administrative Rule 1.5, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a). ALJ–1, at 3. The Government specifically alleged that this inappropriate prescribing occurred on four occasions in 2014: April 9, for 30 dosage units; May 19, for 30 dosage units with one refill; July 24, for 30 dosage units; and September 8, for 30 dosage units with two refills. ALJ–1, at 3.

The administration of weight loss medication is regulated by state medical standards. *See generally Wesley G. Harline, M.D.,* 65 Fed. Reg. 5665 (2000) (discussing, at length, general practice and state medical standards for legitimately prescribing controlled substances for weight loss). The Mississippi Board has a special standard of care for practitioners who prescribe diet medication. *See* Miss. Code R. § 30–17–2640:1.5; *see also* GE–8; Tr. 171–72. Specifically, Rule 1.5 requires a doctor prescribing weight loss drugs to: (1) only prescribe adjunctively with caloric restriction; (2) conduct and thoroughly record an initial comprehensive evaluation; (3) record a thorough patient history and physical exam; (4) conduct an in-person re-evaluation of the patient once every 30 days, recording the patient's weight, BMI, blood pressure, pulse, and the results of all tests to monitor adverse effects of the medication; and (5) maintain records about the patient's weight loss efforts, dedication, responses, contraindications, and adverse effects during treatment. Miss. Code R. § 30–17–2640:1.5. The patient's history and physical exam must, *at a minimum,* document:

1. Past medical history, past surgical history, social history, family history, weight history, dietary history, gynecological (GYN) history if female, review of systems, allergies and medications.

2. Height, weight, Body Mass Index (BMI), blood pressure, pulse, % body fat or waist circumference/weight hip ratio, HEENT, chest, heart, abdomen, extremities.

[48] *See supra* note 20.

[49] CI's patient file is not entirely legible. *See* GE–2, at 12–13. The February 21, 2014 entry reads: ''HC 7.5/325 (#40, 1)—may be picked up at desk.'' GE–2, at 12. The April 21, 2014 entry reads: ''Headaches ? 'Sinuses' Motion sickness Occasional vertigo Ears clear OC/OP clear Nose mildly inflamed CT → clear and thickening in L NF duct Rx Maxalt (one given) HC 10/325 (#40) (refill).'' GE–2, at 12. The September 2, 2014 entry reads: ''Lexapro Maxalt prn has anxiety c̄ migraines Migraine—usually responsive to Maxalt, now c̄ brea[illegible] Ears clean; [illegible] in ® EAC @[illegible] Nose clear OC/OP clear Counseled [illegible] Rx Zofran Demerol 50 (#30) HC 10/325 (#40, 1) Phentermine (refilled) Xanax 1mg (#40, 1).'' GE–2, at 12. These three notations are the only entries in the Respondent's patient file for CI during 2014.

[50] Specifically, these dates are as follows: February 21, April 9, May 19, May 22, June 17, July 19, July 24, September 2, September 8, September 11, October 6, October 29, and December 4. *See* GE–2, at 21–23; GE–49, at 1–3.

[51] Phentermine, or Adipex, is a Schedule IV controlled substance. *See* Stip. 8.

3. Appropriate testing related to medical weight loss . . . .

Id.

The Government presented evidence that the Respondent wrote four prescriptions for phentermine to CI. On April 9, 2014, the Respondent prescribed 30 units of Adipex 37.5 to CI. GE–7, at 1–2; GE–49, at 2. On May 19, 2014, the Respondent prescribed 30 units of Adipex 37.5, with one refill to CI. GE–7, at 3–4; GE–41, at 2–3; GE–49, at 2. On July 24, 2014, the Respondent prescribed 30 units of Adipex 37.5 to CI. GE–7, at 5–6; GE–41, at 12–13; GE–49, at 2. On September 8, 2014, the Respondent prescribed 30 units of phentermine 37.5 with two refills to CI. GE–7, at 7–8; GE–41, at 18–19; GE–49, at 2. During 2014, CI filled these prescriptions seven times. GE–49, at 1–2.

In the administrative record, there are only four notations in the Respondent's files related to phentermine, Adipex, or weight loss prescriptions. The first mention of phentermine is in the Respondent's patient file for Kid 1 near a date stamp reading February 4, 2014. GE–57, at 6; Tr. 286. That note reads, ''Mother has migraines ? in children May call in Rx if needed. Discussed phentermine c̄ mother May consider this as well.'' GE–57, at 6. The second time phentermine was mentioned was in a March 19, 2014 entry in Kid 1's patient file. That note reads, ''Discussed [illegible] medications c̄ mother Rx [illegible] Phentermine 37.5.'' GE–57, at 5; Tr. 286. The third mention of phentermine, and the first in the Respondent's patient file for CI, is dated July 18, 2014. GE–2, at 15. This third mention is on a patient telephone request form, which indicated that CI called the Respondent to ask about a refill of ''phentermine 37.5 (#30, 2)'' for her to ''pick up at front.'' GE–2, at 15. The final mention of phentermine, and the only one contained in the Respondent's treatment notes of CI, is dated September 2, 2014. GE–2, at 12. This last entry simply reads, ''Phentermine (refilled).'' GE–2, at 12.

Accordingly, while prescribing phentermine to CI on April 9, May 19, July 24, and September 8, the Respondent completely failed to comply with the requirements of Mississippi Administrative Rule 1.5. The Respondent never prescribed phentermine adjunctively with caloric restriction. He never conducted and recorded an initial comprehensive evaluation. He never recorded a thorough patient history or physical examination. He never conducted an in-person re-evaluation of CI once every 30 days. He never recorded CI's, BMI, blood pressure, pulse, past medical history, social history, family history, dietary history, gynecological history, height, weight, or body measurements. He did not document CI's efforts to lose weight or note her response to treatment.

A prescriber lacks good faith if he prescribes controlled substances to a patient who the prescriber knew or should have known had no legitimate medical need for the controlled substances prescribed. Miss. Code R. § 30–17–2640:1.4. It is concerning that the Respondent wholly failed to document any justification whatsoever for CI's supposed need for weight loss medication. During 2014, CI went from 135 pounds down to 121 pounds. Tr. 224. At the hearing, CI presented with a slender body type. After observing CI's appearance, I find it difficult to comprehend, from even a layman's perspective, how the Respondent could have possibly believed that CI had a high enough BMI [52] to justify the administration of weight loss medication.

The Respondent displayed a complete disregard for Mississippi's weight loss prescription requirements. He prescribed weight loss drugs to CI without any documented medical justification. GE–2, at 12–13. ''[W]here a medical record contains no findings that support a diagnosis, . . . expert testimony is not necessary to conclude that a prescription lacked a legitimate medical purpose.'' *McNichol,* 77 Fed. Reg. at 57151 (citations omitted). Therefore, the Government's allegations that the Respondent violated Mississippi Administrative Rule 1.5, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a), by prescribing phentermine to CI on April 9, May 19, July 24, and September 8 of 2014 are **SUSTAINED** by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government.

The Respondent argued in his post-hearing brief that, after receiving the Mississippi Board's warning letter, he refused to prescribe weight loss medication to an undercover agent. ALJ–34, at 6. The Respondent argued that this refusal showed that he ''came promptly into conformity'' with Mississippi's weight loss medication prescribing standards. ALJ–34, at 6. However, even if the Respondent took remedial measures, those measures, standing alone, cannot rebut the Government's *prima facie* case for revocation unless the Respondent also accepted responsibility for his actions. *See Michael S. Moore, M.D.,* 76 Fed. Reg. 45867, 45868 (2011); *Hassman,* 75 Fed. Reg. at 8236. The Respondent did not testify and did not accept responsibility. Accordingly, the Respondent failed to rebut the Government's *prima facie* case for revocation based upon his violation of state regulations that detail the requirements for prescribing weight loss medication.

Allegation 3: Prescribing to CI's Children: Physical Examinations, Propriety of Prescriptions, and True Intended Recipient

In Allegation 3, the Government claimed that, from February 7 to November 19 of 2014, the Respondent prescribed hydrocodone products to CI's children without conducting examinations, and that the prescriptions were for CI's personal use, in violation of Mississippi Administrative Rules 1.4, 1.10, 1.11(b),[53] and 1.16, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a) and 1306.05(a). ALJ–1, at 2–3. Mississippi Administrative Rule 1.10 requires that a prescription for a controlled substance contain ''the complete name and address of the patient to whom the physician is prescribing the controlled substance.'' Miss. Code R. § 30–17–2640:1.10. Likewise, 21 CFR § 1306.05(a) requires that a controlled substance prescription must ''bear the full name and address of the patient.''

Additionally, the Government alleged that the Respondent prescribed hydrocodone-homatropine (''cough'') syrup, or Hycodan, to CI's children, who were under the age of six, even though cough syrup is not recommended for children under the age of six because of a risk of death. ALJ–1, at 3. The Government alleged that the Respondent prescribed adult dosages of this cough syrup to these children, even though the recommended dosage for children aged six to eleven is half of the adult dosage. ALJ–1, at 2–3.

The Government further alleged that the Respondent issued the following improper prescriptions for hydrocodone combination products to CI's children in

[52] *See* Miss. Code R. § 30–17–2640:1.5(A)(4) (requiring generally a BMI of greater than 30.0 in a normal, otherwise healthy patient to justify prescribing weight loss drugs); *see also Minnix* v. *Colvin,* No. 2:12CV00038, 2014 WL 618688, at *3 n.3 (W.D. Va. Feb. 18, 2014) (defining a BMI of 30 or higher as obesity) (citing Nat'l Inst. of Health, *Calculate Your Body Mass Index, http://www.nhlbi.nih.gov/guidelines/obesity/BMI/bmicalc.htm* (last visited May 18, 2016)).

[53] For the reasons previously discussed, *supra* note 44, the Government's allegation that the Respondent violated Mississippi Administrative Rule 1.11(b) is NOT SUSTAINED.

2014: (a) to Kid 2 on February 7, for 150 dosage units, with one refill; (b) to Kid 1 on June 17, for 180 dosage units, with one refill; (c) to Kid 2 on July 23, for 480 dosage units; (d) to Kid 2 on September 2, for 120 dosage units; (e) to Kid 2 on November 3, for 180 dosage units; and (f) to Kid 1 on November 19, for 115 dosage units. ALJ–1, at 2–3.

A. The February 7 Prescription

On February 7, 2014, the Respondent wrote a prescription for 240 units of Hycodan to Kid 2. GE–50, at 1; GE–55, at 1–2. The Respondent's medical file for Kid 2 appeared to contain a notation from 2014, possibly from February 7, documenting a Hycodan prescription. *See* GE–56, at 4. The copy of the medical file partially cut off this notation because it was at the bottom of a copied page. *See* GE–56, at 4. The only legible part of the notation appears to read, ''Hycodan (8 oz, 2 refills) to Brookhaven Walmart.'' *See* GE–56 at 4.

CI testified that the Respondent did not examine Kid 2 before prescribing cough syrup to her in February. Tr. 217, 251. The Respondent's patient file for Kid 2 does not include any notes about any physical examination on that date. The Respondent did not document a diagnosis for Kid 2 on that date. Because this required information was not recorded prior to prescribing controlled substances to Kid 2, the Government's allegation that the Respondent violated Mississippi Administrative Rule 1.4 by failing to conduct a physical examination of Kid 2 is SUSTAINED by a preponderance of the evidence, and weighs in favor of the revocation sought by the Government. Because this prescription violated Mississippi Administrative Rule 1.4, it was issued outside of the course of the Respondent's legitimate professional practice under Mississippi Administrative Rule 1.16. Therefore, the Government's allegations that the Respondent violated Mississippi Administrative Rule 1.16, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a) on February 7, 2014, are also **SUSTAINED** by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government.

Just 15 days before the February 7, 2014 prescription, the Respondent prescribed 120 units (or 24 days' worth) of Hycodan syrup to Kid 2. *See* GE–50, at 1; GE–56, at 4. Thus, Kid 2 still should have had approximately nine days of Hycodan syrup remaining from her last prescription and should not have needed additional Hycodan syrup on February 7, much less double the original dosage. *See* GE–50, at 1 (showing that the January 24, 2014 prescription was a 24-day supply). CI discussed the real reason that the Respondent wrote this prescription. CI testified that, in February 2014, the Respondent prescribed a big bottle of cough syrup to Kid 2 so that CI could drink it as well, even though the Respondent knew that CI did not have a cough. Tr. 216–17, 250–53, 259, 268, 273. While Kid 2 did have a cough at that time, Tr. 250–51, 253–55, I give full credit to CI's testimony that the Respondent knew that CI intended to consume some of Kid 2's Hycodan prescription. Considering the timing of the February 7 prescription and its large dosage, I find, based on a totality of the circumstances, that a preponderance of evidence supports the conclusion that the Respondent knew that CI would consume at least part of Kid 2's February 7, 2014 prescription. It is a violation of 21 CFR § 1306.05 for a registrant to prescribe controlled substances to a patient knowing that someone other than the patient named on the prescription would receive the medication. *Golden,* 61 FR at 24811. Therefore, the Government's allegations that the February 7, 2014 prescription violated Mississippi Administrative Rule 1.10 and 21 CFR § 1306.05(a) are **SUSTAINED** by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government.

B. The June 17, July 23, and November 19 Prescriptions

The Respondent wrote three prescriptions to CI's children without recording the prescriptions in the children's medical records. First, on June 17, 2014, the Respondent wrote a prescription for six ounces (or 180 units) of Hycodan syrup to Kid 1. GE–51, at 1; GE–55, at 3–4. The Respondent's patient file for Kid 1 does not contain any notes dated on or about [54] June 17, 2014. *See* GE–57. The Respondent did not document a diagnosis for Kid 1 at this time. Then, on July 23, 2014, the Respondent wrote a prescription for 16 ounces (or 480 units) of Hycet liquid to Kid 2. GE–50, at 1; GE–55, at 5–6. The Respondent's patient file for Kid 2 does not contain any notes dated on or about July 23, 2014. *See* GE–56. Finally, on November 19, 2014, the Respondent wrote a prescription for eight ounces (or 115 units) of Hycodan for Kid 1. GE–51, at 1; GE–55, at 11. The Respondent's patient file for Kid 1 does not contain any notes on or about November 19, 2014. *See* GE–56.

The Respondent did not write the name, dose, strength, or quantity of any of these prescriptions in the medical records of CI's children. The Respondent did not record the dates of the prescriptions or the reasons for the prescriptions. The Respondent did not record any notes about any physical examinations on these dates. There is no evidence in the record before me indicating that the Respondent ever saw CI's children on the dates that he wrote these prescriptions to them. Even absent any expert testimony, failure to see a patient before prescribing medications to the patient is outside of the legitimate practice of medicine. *Figueroa,* 73 FR at 40381. Therefore, the Government's allegations that the June 17, 2014, and November 19, 2014 prescriptions to Kid 1, and July 23, 2014 prescription to Kid 2, violated Mississippi Administrative Rule 1.4 are SUSTAINED by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government. Because these prescriptions violated Mississippi Administrative Rule 1.4, they were issued outside of the course of the Respondent's legitimate professional practice under Mississippi Administrative Rule 1.16. Therefore, the Government's allegations that the Respondent violated Mississippi Administrative Rule 1.16, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a) by issuing the June 17, July 23, and November 19 prescriptions are SUSTAINED by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government.

The Government further alleged that these prescriptions were issued for CI's personal use. The Government bears the burden of proof on this point. The administrative record in this case supports the conclusion that the Government established, by a preponderance of the evidence, that the Respondent knew that CI would consume at least part of the cough syrup he prescribed to CI's children on June 17, July 23, and November 19. In this regard, CI testified that: (1) she would tell the Respondent when her child would have a cough; (2) she never brought her children to see the Respondent regarding a cough; (3) she requested cough syrup from the Respondent because she enjoyed drinking it; and (4) she would request a big bottle of cough syrup. Tr. 220, 265–66, 273. In addition, the administrative record supports CI's testimony that she did not bring her children to see the Respondent regarding a cough, as evidenced by their medical charts. GE–

[54] Although the Respondent's patient file for Kid 1 includes notes from examinations on March 19, 2014, and June 9, 2014, the notes next to these dates do not contain any notations about a Hycodan prescription. *See* GE–57.

56, at 2–4; GE–57, at 5–6. I find that CI's testimony, when considered cumulatively and in conjunction with other evidence of record, establishes that, at the time the Respondent wrote the June 17, July 23, and November 19 prescriptions, he knew that CI would drink at least some of the cough syrup, though there was no medical reason for her to do so. Therefore, the Government's allegations that these three prescriptions violated Mississippi Administrative Rule 1.10 and 21 CFR § 1306.05(a) are SUSTAINED by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government.

C. The September 2 and November 3 Prescriptions

On September 2, 2014, the Respondent wrote a prescription for four ounces (or 120 units) of Hycodan for Kid 2. GE–50, at 1; GE–55, at 7–8. The Respondent's patient file for Kid 2 included some notes dated September 2, 2014. GE–56, at 3. These notes stated, ''URI Ears clear Nose, OC/OP mildly inflamed Lungs clear Rx [illegible] 15 Hycodan.'' GE–56, at 3. Because these notes indicate that the Respondent examined Kid 2, and because the Government did not enter any evidence contesting the accuracy of these notes, I find that the Government failed to show by substantial evidence that the Respondent did not conduct a physical examination of Kid 2 on September 2, and the Government's allegation to that effect is NOT SUSTAINED. However, Kid 2's medical record did not include any diagnosis or reason for prescribing Hycodan to Kid 2, as required by Mississippi Administrative Rule 1.4. Additionally, the medical record did not clearly include the dose, strength, or quantity of Hycodan prescribed to Kid 2, as required by Mississippi Administrative Rule 1.4. Because the medical record did not contain this information, the Government's allegation that the September 2, 2014 prescription to Kid 2 violated Mississippi Administrative Rule 1.4 is SUSTAINED by a preponderance of the evidence, and weighs in favor of the revocation sought by the Government. Because this prescription violated Mississippi Administrative Rule 1.4, it was issued outside of the course of the Respondent's legitimate professional practice under Mississippi Administrative Rule 1.16. Therefore, the Government's allegations that the Respondent violated Mississippi Administrative Rule 1.16, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a) by issuing the September 2, 2014 prescription are also SUSTAINED by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government.

Similarly, on November 3, 2014, the Respondent wrote a prescription for six ounces (or 180 units) of Hycodan for Kid 2. GE–50, at 1; GE–55, at 9–10. The Respondent wrote a note near a date stamp reading November 4, 2014, in Kid 2's file. GE–56, at 2. This note said, ''[illegible] 5 problems Rx Hycodan (6 oz) (requested).'' GE–56, at 2. The medical record did not include documentation of a diagnosis and reason for prescribing controlled substances, other than the fact that it was ''requested.'' Moreover, the medical record did not include the dosage or strength of the Hycodan prescribed, as is required by Mississippi Administrative Rule 1.4. Further, the notes near the November 3, 2014 date stamp did not indicate that the Respondent conducted any examination prior to prescribing Hycodan to Kid 2, as is required by Mississippi Administrative Rule 1.4. Therefore, the Government's allegation that the November 3, 2014 prescription to Kid 2 violated Mississippi Administrative Rule 1.4 is SUSTAINED by a preponderance of the evidence, and weighs in favor of the revocation sought by the Government. Because this prescription violated Mississippi Administrative Rule 1.4, it was issued outside of the course of the Respondent's legitimate professional practice under Mississippi Administrative Rule 1.16. Therefore, the Government's allegations that the Respondent violated Mississippi Administrative Rule 1.16, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR § 1306.04(a) by issuing the November 3, 2014 prescription are also SUSTAINED by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government.

The Government also alleged that the September 2 and November 3 prescriptions were issued for CI's personal use. The Government bears the burden of proof on this point. The administrative record in this case supports the conclusion that the Government established, by a preponderance of the evidence, that the Respondent knew that CI would consume at least part of the cough syrup he prescribed to CI's children on September 2 and November 3. In this regard, CI testified that: (1) she would tell the Respondent when her child would have a cough: (2) she never brought her children to see the Respondent regarding a cough; (3) she requested cough syrup from the Respondent because she enjoyed drinking it; and (4) she would request a big bottle of cough syrup. Tr. 220, 266, 273. In addition, the administrative record supports CI's testimony that she did not bring her children to see the Respondent regarding a cough, as evidenced by their medical charts. GE–56, at 2–4; GE–57, at 5–6. I find that CI's testimony, when considered cumulatively and in conjunction with other evidence of record, establishes that, at the time the Respondent wrote the September 2 and November 3 prescriptions, he knew that CI would drink at least some of the cough syrup, though there was no medical reason for her to do so. Therefore, the Government's allegations that these two prescriptions violated Mississippi Administrative Rule 1.10 and 21 CFR 1306.05(a) are SUSTAINED by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government.

D. Dangerous Prescriptions

The Government alleged that the Respondent prescribed cough syrup to CI's children, who were under the age of six, even though cough syrup is not recommended for children under the age of six because of a risk of death. ALJ–1, at 3. The Government also alleged that the Respondent prescribed adult dosages of cough syrup to these children, even though the recommended dosage for children aged six to eleven is half of the adult dosage. ALJ–1, at 2–3.

There is no evidence on the record before me [55] that indicates that it is improper to prescribe cough syrup to children. There is no evidence on the record before me that indicates that the dosages of cough syrup that the Respondent prescribed to CI's children were improper dosages. The Government did not offer an authentic, well-founded medical opinion that the quantities and types of prescriptions to CI's children were improper. The Government had the burden of proving that the prescriptions were unlawful. *See Ruben,* 78 FR at 38384. The Government failed to meet this burden. Accordingly, the Government's allegations regarding the propriety of the Respondent's prescriptions to CI's children are **NOT SUSTAINED**.

[55] The Government offered into evidence three printouts from Web sites, allegedly obtained from the FDA's Web site, WebMD, and Drugs.com. *See* Gov't Proposed Exs. 4–6. Upon the Respondent's timely objection, I rejected these three exhibits because they were improper opinion testimony, lacked adequate foundation, and were not properly authenticated. *See* Tr. 418–26.

Allegation 4: Fraudulent Prescriptions for CI through Undercover Agents [56]

In Allegation 4, the Government claimed that, on five occasions between March and October 2015, the Respondent prescribed controlled substances to undercover agents when he knew or should have known that the agents' prescription requests were fraudulent, in violation of 21 U.S.C. §§ 841(a) and 842(a) and 21 CFR § 1306.04(a). ALJ–1, at 3. The Government alleged that the Respondent wrote seven hydrocodone prescriptions on five occasions to undercover agents, for 190 total dosage units of hydrocodone tablets and 72 total dosage units of hydrocodone syrup. ALJ–1, at 11. The Government alleged that, on four of those occasions, the Respondent knew that CI would receive a portion of the prescribed medications. ALJ–1, at 3–4.

A. Undercover Appointments 1 through 4

The evidence against the Respondent regarding the first four undercover appointments is significant, conclusive, and uncontested.

The Respondent compared his diversion of drugs to CI with going to ''buy drugs at a crack house.'' GE–28, file 2015–04–22_13–03–23_EDT, at 2. In some sense, this was an apt description. Whenever CI asked the Respondent for drugs, he would attempt to convey them to her. Prior to each of the first four undercover appointments, CI clearly and repeatedly asked the Respondent for controlled substances.[57] CI specifically named certain controlled substances that she wanted the Respondent to prescribe to Agent 1 and Agent 2 to divert to her.[58] Although the Respondent wanted to be ignorant about the identities of CI's ''friends,'' [59] the Respondent knew that Agent 1 and Agent 2 were ''friends'' of CI [60] and that they would give CI at least some of the drugs he prescribed to them.[61] The Respondent had reason to know that Agent 1 and Agent 2 did not legitimately need medication for themselves.[62] The Respondent had reason to know that Agent 1, Agent 2, and CI were splitting their prescriptions.[63] Therefore, based on the communications exchanged between the Respondent and CI, I find that the Respondent knew that Agent 1 and Agent 2 were ''not seeking treatment for a legitimate medical condition but [were] engaged in . . . diversion.'' *See McNichol,* 77 FR at 57148. Despite circumstances that plainly and unambiguously indicated diversion, the Respondent nonetheless prescribed drugs to Agent 1 and Agent 2 during the first four undercover appointments.

Even beyond this, the Respondent took extra efforts to facilitate the diversion of drugs to CI. The Respondent discussed the scheduling of Agent 1 and Agent 2's appointments with CI, and CI reminded him about the timing of those appointments.[64] The Respondent asked CI to tell her friends to pretend they had headaches and act like legitimate patients.[65] After the third and fourth undercover appointments, the Respondent praised Agent 1 and Agent 2 for acting very appropriately by going ''through the motions.'' GE–40, at 2. After each of the first four appointments, CI told the Respondent that she had received the drugs prescribed to Agent 1 and Agent 2; in response, the Respondent stated that he was happy to help get drugs to CI.[66]

It is true that the Respondent conducted appointments with Agents 1 and 2, and wrote notes in their medical files. In that aspect, this case is similar to *Robert F. Hunt, D.O.,* 75 FR 49995 (2010). Dr. Hunt had said that he wrote information on a patient's chart ''just to cover [his] ass.'' *Id.* at 50003. The DEA held that this statement made it ''clear that [Dr. Hunt] knew that he lacked a legitimate medical purpose for prescribing'' controlled substances. *Id.* Similarly, although the Respondent

[56] In its post-hearing brief, the Government argued that this conduct should be analyzed under Factor Five. ALJ–35, at 21–24. However, in the Government's OSC/ISO and its presentation of evidence at the hearing, the Government made a strong argument that the Respondent's prescriptions to the undercover agents violated state and federal laws, and were acts of knowing diversion which reflected poorly on the Respondent's experience in dispensing controlled substances. Therefore, analysis of this conduct under Factors Two and Four is appropriate.

[57] GE–16, file 2015–03–16_18–51–48_EDT, at 20–21, 24–26 (expressing that CI was seeking drugs before the first undercover appointment); GE–16, file 2015–03–18_11–03–33_EDT, at 2 (same); GE–17, at 4 (same); *see* GE–16, file 2015–04–02_14–15–50_EDT, at 1 (expressing that CI was seeking drugs before the second undercover appointment, and indicating that she had taken all of the drugs from the first appointment too quickly); *see also* GE–28, file 2015–04–13_20–26–31_EDT, at 7 (expressing that CI was seeking more drugs before the third and fourth undercover appointments); GE–28, file 2015–04–28_20–23–38_EDT, at 1 (same); GE–38, at 2–3 (same).

[58] GE–16, file 2015–03–17_13–07–36_EDT, at 4 (asking for Lorcet/Norco before the first undercover appointment); GE–17, at 3 (same); GE–18, at 3 (asking for Norco before the first undercover appointment); *see* GE–16, file 2015–04–02_15–04–43_EDT, at 1–2 (asking for a double dosage, presumably of Norco, before the second undercover appointment); *see also* GE–28, file 2015–04–28_20–23–38_EDT, at 1 (asking for cough medicine before the third and fourth undercover appointments); GE–29, at 7 (same); GE–38, at 3–4 (asking for a ''big bottle'' of cough syrup before the third and fourth undercover appointments); GE–39, at 5 (asking for cough medicine before the third and fourth undercover appointments).

[59] GE–28, file 2015–04–22_13–03–23_EDT, at 4–5 (expressing his desire to remain ignorant before the third and fourth undercover appointments); GE–28, file 2015–04–27_14–45–16_EDT, at 1 (same); GE–38, at 2 (same). The Respondent even stated at one point, ''if [Agent 1 is] coming in for what I think she's coming in, tell her not to tell me that. That needs to be your secret. I don't wanna know that. She needs to have a headache and I will treat her for a headache, and so don't mind giving her prescriptions to treat a headache.'' GE–17, at 7.

[60] GE–16, file 2015–04–07_13–29–34_EDT, at 2 (discussing CI accompanying Agent 1 to her appointment); GE–16, file 2015–04–07_18–28–45_EDT, at 7–8 (same); GE–16, file 2015–04–08_10–16–03_EDT, at 1 (saying that Agent 1 knew about their relationship); GE–17, at 6–7 (identifying Agent 1 before the first undercover appointment); GE–21, at 5–6 (identifying Agent 1 before the second undercover appointment); *see* GE–21, at 8 (asking the Respondent to bring Agent 1's prescriptions to his rendezvous with CI at Walmart to save her money); *see also* GE–28, file 2015–04–22_13–03–23_EDT, at 4–5 (recognizing Agent 1 as CI's friend before the third and fourth undercover appointments); GE–28, file 2015–04–28_20–23–38_EDT, at 1 (identifying Agent 1 and Agent 2 as CI's friends before the third and fourth undercover appointments); GE–40, at 2 (recognizing that, at the time of Agent 2's appointment, the Respondent knew that Agent 2 was affiliated with CI and Agent 1).

[61] GE–16, file 2015–03–18_11–03–33_EDT, at 2–4 (suggesting that CI could send a friend in to get prescriptions before the first undercover appointment); GE–17, at 3 (same, and acknowledging, before the first undercover appointment, that any prescriptions to CI's friends would be diverted to CI); GE–17, at 7 (advising that the prescriptions he gave to Agent 1 would be fine for CI to take); GE–18, at 3 (stating, before the first undercover appointment, that the Respondent would write prescriptions for Agent 1 so CI could have the medication); *see* GE–14, at 1 (identifying Agent 1 as CI's friend, and discussing how the Respondent ''hooked [CI] up,'' before the second undercover appointment); GE–16, file 2015–04–02_14–15–50_EDT, at 1–2 (same); GE–21, at 13 (thanking the Respondent for ''hooking'' her up before the second undercover appointment); GE–28, file 2015–04–28_20–23–38_EDT, at 1 (asking the Respondent to ''[h]ook'' up CI's friend before the third and fourth undercover appointments).

[62] *E.g.,* GE–16, file 2015–04–02_14–15–50_EDT, at 2; GE–16, file 2015–04–02_15–04–43_EDT, at 1–2.

[63] GE–28, file 2015–04–27_14–45–16_EDT, at 1.

[64] GE–18, at 3 (discussing the first undercover appointment); GE–23 (discussing, before the second undercover appointment, the need to space out the appointments more); *see* GE–16, file 2015–04–06_20–59–35_EDT, at 2 (discussing the second undercover appointment); *see also* GE–28, file 2015–04–22_10–28–41_EDT, at 3–4 (discussing the third and fourth undercover appointments); GE–28, file 2015–04–22_13–03–23_EDT, at 4 (same); GE–28, file 2015–04–28_20–23–38_EDT, at 1 (same); GE–29, at 7 (same).

[65] GE–18, at 3 (instructing CI to tell Agent 1 to ''play it straight'' and tell him what he needed to write in his chart at the first undercover appointment).

[66] GE–14, at 1 (telling CI, after the first undercover appointment, that he was happy to meet Agent 1 and hoped it helped, and receiving thanks from CI for ''hooking'' her up); GE–14, at 2 (acknowledging that the prescriptions that he gave to Agent 1 went to CI); GE–19, at 1 (asking CI if everything ''went smooth with getting your medication'' and expressing that he was happy to help); GE–40, at 1–2 (asking CI if she got the medication and expressing that he was ''glad all that worked out'').

conducted appointments with Agents 1 and 2 and wrote notes in their medical files, the Respondent's statements to CI before and after each of the first four appointments made it clear that the Respondent was unquestionably prescribing controlled substances to Agents 1 and 2 to intentionally divert drugs to CI. His statements also make clear that the records he was keeping concerning Agents 1 and 2 were merely to keep the Mississippi Board investigators at bay. *E.g.,* GE–18, at 3.

Moreover, the fact that a registrant conducted a medical appointment before prescribing controlled substances does not, standing by itself, validate the prescriptions issued; rather, an appointment may be used by a prescriber as ''a sham justification to support an unlawful prescription.'' *McNichol,* 77 Fed. Reg. at 57148. An appointment can constitute a perfunctory, sham examination if the registrant ''already agreed to issue'' certain prescriptions to a patient. *Darryl J. Mohr, M.D.,* 77 Fed. Reg. 34998, 35000 (2012).

This is precisely what happened here. Before each of the first four undercover appointments, the record unambiguously shows that the Respondent knew exactly what he would prescribe to Agents 1 and 2 before they ever walked through his door, because he knew what drugs CI had requested. For example, the Respondent prescribed Hycodan to Agent 1, even though she was not coughing during her appointment, because he had told CI that he would get eight ounces of cough syrup to her. GE–33, at 1; GE–38, at 3–4, 8; Tr. 113. Following the second appointment, the Respondent himself acknowledged the sham nature of the appointment; he stated that he had made small talk with Agent 1 because ''we had to be in there more than ten seconds'' so that his ''nosy nurse'' would not think, ''[d]ang, why is this appointment over with in ten seconds?'' GE–27, at 1, 5. It is not surprising that, during Agent 1's second appointment, the Respondent did not bother to conduct even a sham physical examination. *See* GE–24–25; Tr. 103–04, 132.

The facts of this case present an appalling and flagrant disregard of a registrant's duty to prescribe controlled substances only to legitimate patients. While the Respondent told CI that his feelings for her needed to be ''totally separate from [his] medical practice,'' GE–20, he was unable to follow his own internal guidance. In fact, the size of the Respondent's diversion was significant: during the first four undercover appointments, the Respondent prescribed a total of 160 units of Norco and eight ounces of Hycodan to the undercover agents, who he believed would divert those drugs to CI.[67] The Respondent repeatedly joked about providing CI access to all the drugs that she wanted.[68] Even though the Respondent did not take his responsibilities as a registrant seriously, he did understand the potential legal consequences of his actions. The Respondent repeatedly expressed a fear of getting in trouble for diverting drugs to CI.[69] This reflects that the Respondent undoubtedly knew that his actions were wrong.[70]

I find that, during the first four undercover appointments, the Respondent knew that Agent 1 and Agent 2 were not real patients and that at least some of the medications he prescribed to them would be given to CI. I find that the Respondent prescribed medications to Agent 1 and Agent 2 upon CI's request for those medications. I further find that, when the Respondent wrote prescriptions to Agent 1 and Agent 2 during those four appointments, the Respondent intended to divert drugs to CI. Thus, by ''providing evidence showing that [the Respondent] knowingly diverted drugs,'' the Government proved that the Respondent acted outside of the usual course of his professional practice and lacked a legitimate medical purpose. *See Danton,* 76 Fed. Reg. at 60901. Therefore, the Government's allegations that the first four undercover appointments violated 21 U.S.C. §§ 841(a) and 842(a), and 21 CFR § 1306.04(a) are **SUSTAINED** by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government.

To the extent that the Respondent's actions are interpreted as prescribing controlled substances to CI indirectly,[71] his prescriptions are grave violations of 21 CFR 1306.04(a). On this point, this case bears a striking similarity to *Annicol Marrocco, M.D.,* 80 FR 28695 (2015). In that case, Dr. Marrocco prescribed controlled substances to her lover, but did not physically see her lover for three to six months while he was using those prescriptions. *Id.* at 28703. The DEA found that Dr. Marrocco lacked a legitimate purpose for her prescriptions because she was unable to supervise her lover's use of his medication, which reflected ''a stunning disregard for [Dr. Marrocco's] obligations as a prescriber of controlled substances.'' *Id.; see Figueroa,* 73 FR at 40381 (noting that failure to see a patient before prescribing medication deviates from the legitimate practice of medicine). Similarly, other than two brief interactions in public places, the Respondent never saw CI while he was prescribing controlled substances to Agent 1 and Agent 2 to divert to CI. Therefore, the Respondent could not monitor CI's use of controlled substances.

Additionally, prescribing controlled substances based on a patient's request, ''rather than the result of the application of the physician's medical judgment,'' lacks a legitimate medical purpose. *Golden,* 61 FR at 24812 (citing *Dougherty,* 60 FR 55047; *Borcherding,* 60 FR 28796). The Respondent's prescriptions to Agent 1 and Agent 2 were based only on CI's request for certain controlled substances, not on any physical examination or medical evaluation. Under Mississippi Administrative Rule 1.4(a), such prescribing establishes that the Respondent lacked good faith in issuing these prescriptions.

For these reasons, to the extent that the Respondent's 2015 prescriptions to Agent 1 and Agent 2 are perceived as indirect prescriptions to CI, they clearly violate Mississippi Administrative Rules 1.4 and 1.16, Mississippi Code §§ 73–25–29(3) and (13), and 21 CFR 1306.04(a), and the Government's allegations to that effect are

[67] GE–11, at 1 (prescribing 40 units of Norco 10/325 to Agent 1 at the first undercover appointment); GE–26, at 1 (prescribing 40 units of Norco 10/325 to Agent 1 at the second undercover appointment); GE–32 (prescribing 40 units of Norco 10/325 to Agent 1 at the third undercover appointment); GE–33, at 1 (prescribing eight ounces of Hycodan to Agent 1 at the third undercover appointment); GE–36, at 1 (prescribing 40 units of Norco 10/325 to Agent 2 at the fourth undercover appointment).

[68] GE–16, file 2015–03–17_13–07–36_EDT, at 7 (joking before the first undercover appointment); GE–16, file 2015–03–18_11–03–33_EDT, at 4 (same); GE–16, file 2015–04–02_15–04–43_EDT, at 1–2 (joking before the second undercover appointment); GE–29, at 9 (joking after the third and fourth undercover appointments); GE–38, at 2 (joking before the third and fourth undercover appointments).

[69] GE–16, file 2015–03–17_13–07–36_EDT, at 7 (admitting fear before the first undercover appointment); GE–16, file 2015–04–02_14–15–50_EDT, at 2 (instructing CI to keep things hidden); GE–17, at 2 (expressing fear before the first undercover appointment); *see* GE–14, at 1 (expressing fear after the first undercover appointment); GE–16, file 2015–04–02_15–04–43_EDT, at 2 (discussing avoiding detection before the second undercover appointment); GE–16, file 2015–04–07_13–29–34_EDT, at 2 (same); GE–16, file 2015–04–07_18–28–45_EDT, at 7–8 (same); *see also* GE–28, file 2015–04–22_10–28–41_EDT, at 3–4 (expressing concern about getting caught before the third and fourth undercover appointments); GE–28, file 2015–04–22_13–03–23_EDT, at 4 (same); GE–38, at 2 (same).

[70] *See* GE–16, file 2015–03–18_11–03–33_EDT, at 2–3 (reflecting his knowledge that his actions were wrongful before the first undercover appointment); GE–38, at 8 (expressing his fear that he might be ''busted'' by the ''drug police'').

[71] *See supra* note 43.

SUSTAINED by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government.

In addition, the Respondent diverted controlled substances to CI through the undercover agents after he knew that CI attempted to commit suicide. Such actions reflect an astonishing level of irresponsibility in the Respondent's prescribing activity. In *McNichol,* the DEA held under Factors Two and Four that a prescriber's statement, which reflected concern about putting a patient potentially ''in jeopardy of overdose,'' made it ''clear that [the prescriber] believed that [the patient] was a drug abuser.'' 77 FR at 57149. Similarly, in *Jayam Krishna-Iyer,* the DEA held that ''[a] practitioner who ignores the warning signs that [his] patients are either personally abusing or diverting controlled substances commits 'acts inconsistent with the public interest,' 21 U.S.C. 824(a)(4), even if [he] is merely gullible or naïve.'' 74 FR at 460 n.3. Additionally, it is ''relevant that [a registrant], knowing that the CI had been treated for drug abuse, facilitated her access to controlled substances.'' *Golden,* 61 FR at 24812.

Here, the facts indicate that the Respondent knew his prescribing actions put CI's health in danger. The Respondent knew that CI previously had attempted to commit suicide using drugs he prescribed to her. He knew she was still depressed. GE–28, file 2015–04–15_21–30–59_EDT, at 9. He expressed fear and concern that she would take too many pills, resulting in ''unfixably bad'' damage and a ''long, agonizing, painful way to go.'' GE–14, at 1; GE–17, at 4. In spite of all of this, the Respondent continued to divert controlled substances to CI and said he was ''glad'' to do so. GE–19, at 1; GE–40, at 1; Tr. 230–31. Under these circumstances, the Respondent's continued prescribing controlled of substances to CI reflects negatively on the Respondent's experience in dispensing controlled substances.

B. Undercover Appointment #5

Although the Government did not allege that the Respondent's prescriptions to Agent 1 during the fifth undercover appointment were knowing attempts to divert drugs to CI, the Government alleged that the October 2015 prescriptions violated 21 U.S.C. 841(a) and 842(a) and 21 CFR 1306.04(a) because the Respondent knew or should have known that Agent 1's prescription requests were fraudulent. *See* ALJ–1, at 3–4.

The Government presented no evidence of any communications between the Respondent and CI or Agent 1 immediately preceding Agent 1's October 2015 appointment. At the appointment, Agent 1 met with the Respondent, who examined her ears, nose, and throat. Tr. 120, 132. The Respondent appeared to not remember Agent 1. Tr. 120, 135, 452; *see* GE–42–43.

Only the first portion of the appointment was recorded, and no witnesses were able to confidently recall the whole conversation between Agent 1 and the Respondent. In response to Agent 1's inquiry, the Respondent indicated during the appointment that he did not remember Agent 2. GE–42–43. When Agent 1 asked the Respondent if he had heard from CI lately, the Respondent paused, and looked surprised, before saying that he had not. Tr. 122–23, 135, 452–53. Agent 1 said that she needed the ''same as before,'' but did not tell the Respondent that she had any specific complaints. GE–42–43; Tr. 454. The Respondent discussed the efficacy of medication with Agent 1. GE–43, at 2–3. Agent 1 never said she had a cough. GE–42–43; Tr. 126, 454. Nonetheless, the Respondent prescribed cough syrup, among other things, to Agent 1. GE–45; Tr. 139.

The Respondent's medical file for Agent 1 indicated that Agent 1 had ''migraine headaches, as before Weather changes may make it worse Maxalt helps most of the time Norco works okay as a backup Dry [illegible] cough; no [illegible] to be allergy related Allergy symptoms Ears clear OC/OP clear Nose c̄ somewhat [illegible] Lungs clear.'' GE–60, at 4. The Respondent also recorded that he wrote five prescriptions to CI, including 30 units of Norco 5/325 and four ounces of Hycodan. GE–60, at 4.

These facts summarize the totality of the evidence before me concerning the October 2015 undercover appointment. Based on these facts, I find that there is not substantial evidence that the Respondent knew or should have known that Agent 1's prescription requests were fraudulent. The recordings and testimony do not clearly indicate that Agent 1 was presenting sham symptoms to the Respondent. Agent 1's patient file indicated that the Respondent examined Agent 1, recorded her complaints, and recorded the prescriptions he gave to her. Importantly, the Government did *not* allege that the Respondent's medical record for Agent 1 from the October appointment was deficient; it only alleged that he *knew or should have known* that Agent 1's prescription requests were fraudulent. The Government bears the burden of proof on this point. ''[U]nder the substantial evidence test, the evidence must 'do more than create a suspicion of the existence of the fact to be established.''' *Alvin Darby, M.D.,* 75 FR 26993, 26999 n.31 (2010) (citing *NLRB* v. *Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300 (1939)). The Government failed to meet this burden. The Government offered insufficient evidence to support a conclusion that the Respondent knew or should have known that, five and a half months after last seeing Agent 1, and while reviewing a new medical chart, her requests during the October 2015 appointment were fraudulent. Therefore, the Government's allegations that the fifth undercover appointment violated 21 U.S.C. 841(a) and 842(a), and 21 CFR 1306.04(a), because the Respondent knew or should have known that Agent 1's prescription requests were fraudulent are NOT SUSTAINED.

Allegation 5: Prescriptions Issued in 2014 and 2015

The Government alleged that, from February 2014 to October 2015, the Respondent unlawfully prescribed controlled substances in violation of 21 U.S.C. 841(a) and 842(a). ALJ–1, at 2. Specifically, the Government alleged that the Respondent prescribed controlled substances when he knew or should have known that they were not prescribed for legitimate medical purposes, and were not written in the usual course of professional practice, in violation of 21 CFR 1306.04(a) and Mississippi Code §§ 41–29–137(a)(1) and 41–29–141(1). ALJ–1, at 2. Those sections of the Mississippi Code provide that it is illegal for practitioners to dispense Schedule II controlled substances without a valid written prescription. Miss. Code §§ 41–29–137(a)(1), 41–29–141(1).

Under Allegation 1, I sustained the Government's allegations that the Respondent's 2014 prescriptions to CI on May 22, June 17, September 11, October 6, and December 4 were outside the usual course of his professional practice and were illegitimate prescriptions that violated 21 CFR 1306.04(a). Under Allegation 2, I sustained the Government's allegations that the Respondent's 2014 prescriptions to CI on April 9, May 19, July 24, and September 8 were outside the usual course of his professional practice and were illegitimate prescriptions that violated 21 CFR 1306.04(a). Under Allegation 3, I sustained the Government's allegations that the Respondent's 2014 prescriptions to Kid 2 on February 7, July 23, September 2, and November 3, and the Respondent's prescriptions to

Kid 1 on June 17 and November 19, were outside the usual course of his professional practice and were illegitimate prescriptions that violated 21 CFR 1306.04(a). Finally, under Allegation 4, I sustained the Government's allegations that the Respondent's prescriptions written during the first four undercover appointments in 2015 were fraudulent and violated 21 CFR 1306.04(a).

I have held that all of these prescriptions were issued outside of the Respondent's usual course of professional practice and were not issued for legitimate medical purposes. Therefore, the Government's allegation that the Respondent violated 21 CFR 1306.04(a) is SUSTAINED by a preponderance of the evidence, and weighs in favor of the revocation sought by the Government. The Government also established that some prescriptions were invalid because CI, rather than the named patient, was the actual intended recipient of several prescriptions. The Government's allegations that the Respondent's six prescriptions to CI's children, identified *supra,* and 2015 hydrocodone combination product prescriptions to the undercover agents at the first four undercover appointments violated Mississippi Code §§ 41–29–137(a)(1) and 41–29–141(1) are SUSTAINED.[72] Because the Respondent issued illegitimate prescriptions, the Government's allegations that the Respondent violated 21 U.S.C. 841(a) and 842(a) are SUSTAINED by a preponderance of the evidence, and weigh in favor of the revocation sought by the Government.

Allegation 6: Meperidine Used in Suicide Attempt

The Government alleged that the Respondent prescribed 30 dosage units of meperidine 50 mg to CI, which she used to try to kill herself. ALJ–1, at 3. The evidence shows that the Respondent prescribed Demerol to CI on September 2, 2014. GE–2, at 12; GE–49, at 2; Tr. 222, 296–97, 317–18, 382. The Respondent appears to have been the only person to prescribe Demerol to CI. *See* GE–49. CI used the Demerol to attempt to commit suicide in December 2014. Tr. 222, 315–17. The Government, however, did not specify or argue why this Demerol prescription was improper. The Government did not allege or argue that the Respondent failed to conduct a physical examination of CI, or failed to maintain proper medical charts, when he prescribed Demerol to CI. The Government did not allege or argue that the Respondent knew or anticipated that CI would attempt to commit suicide using the Demerol he prescribed to her. The Government did not even allege or argue that the Respondent possessed anything other than a legitimate intent to treat CI's physical symptoms when he prescribed Demerol to her. Therefore, to the extent that the Government alleged that the Respondent's Demerol prescription to CI merits revocation of his COR, the Government's allegation is NOT SUSTAINED.

Under Factors Two and Four,[73] the Respondent's prescribing conduct indicates that his continued registration is not in the public interest. Therefore, Factors Two and Four militate strongly in favor of revocation of the Respondent's COR.

RECOMMENDATION

Even if the Respondent had knowingly attempted to divert controlled substances to CI only one time, that alone would have been sufficient to make a *prima facie* case for revocation of the Respondent's license. *See MacKay* v. *DEA,* 664 F.3d 808, 819 (10th Cir. 2011). ''[P]roof of a single act of intentional or knowing diversion is sufficient to satisfy the Government's *prima facie* burden of showing that a practitioner's continued registration is inconsistent with the public interest, and if unrebutted by a showing that the practitioner accepts responsibility for his misconduct and will not engage in future misconduct, warrants the revocation of a registration.'' *McNichol,* 77 FR at 57145 (internal citations omitted); *see also Krishna-Iyer,* 74 FR at 462–64; *Alan H. Olefsky,* 57 FR 928, 928–29 (1992). In cases of knowing diversion, ''the [DEA] has an interest in deterring [the Respondent] and others from engaging in similar egregious behavior.'' *Michael A. White, M.D.,* 79 FR 62957, 62967 (2014).

Here, the Government has proven far more than one act of knowing diversion. The Government has proven that the Respondent repeatedly and continually issued illegitimate prescriptions to CI and others for multiple types of drugs based solely on CI's request. The Government has proven that, on multiple occasions, the Respondent knowingly issued fraudulent prescriptions with the intent to divert drugs to CI. The Respondent's improper prescribing constituted an egregious level of intentional diversion. Accordingly, Factors Two and Four weigh heavily against the Respondent, and the Government has established a *prima facie* case supporting revocation of the Respondent's registration. Further, after evaluating all of the above established facts, I find that considerations of both specific and general deterrence also weigh in favor of revocation in this case.

Because the Government has made a *prima facie* case that the Respondent's continued registration would be inconsistent with the public interest, the Respondent had the burden of production to ''present[] sufficient mitigating evidence'' to show why he can be entrusted with a registration. *See Med. Shoppe—Jonesborough,* 73 FR at 387 (quoting *Samuel S. Jackson, D.D.S.,* 72 FR 23848, 23853 (2007)). Specifically, to rebut the Government's *prima facie* case, the Respondent must have both accepted responsibility for his actions and demonstrated that he would not engage in future misconduct. *Stodola,* 74 FR at 20734–35. However, the Respondent offered no evidence[74] that he accepted responsibility for his misconduct or reformed his ways. Therefore, the Respondent failed to rebut the Government's *prima facie* case.

Because the Government proved that the Respondent's registration is inconsistent with the public interest, and because the Respondent failed to rebut the Government's *prima facie* case, I RECOMMEND that the Respondent's DEA Certificate of Registration be REVOKED and any applications for renewal or modification of his license be DENIED.

Dated: June 1, 2016

s/Charles Wm. Dorman

Administrative Law Judge

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[72] Hydrocodone combination products were reclassified by the federal government as Schedule II controlled substances as of October 6, 2014. Stip. 6. The Government has not shown how hydrocodone combination products are scheduled in the state of Mississippi. The Government's allegations that the Respondent's prescriptions predating October 6, 2014, violated Mississippi Code §§ 41–29–137(a)(1) and 41–29–141(1), which only address Schedule II controlled substances, are NOT SUSTAINED.

[73] Both parties specifically discussed Factor Five in their post-hearing briefs. Factor Five considers conduct not otherwise addressed under Factors One through Four. 21 U.S.C. 823(f)(5). As discussed *supra,* the Respondent's actions in this case are most appropriately analyzed under Factors Two and Four. Therefore, consideration of this conduct under Factor Five, the ''catch-all'' factor, is inappropriate.

[74] The Government requested that I draw an adverse inference against the Respondent because of his failure to testify at the hearing. ALJ–35, at 27–28. However, I decline to do so because an adverse inference is unnecessary in light of the overwhelming evidence against the Respondent.