

find that there is clear, convincing, and unequivocal evidence in the record supporting denial of Applicant's application based on his material falsification of his application. 21 U.S.C. 824(a)(1).

C. Sanction

Here, there is no dispute in the record that Applicant is mandatorily excluded pursuant to Section 1320a-7(a) of Title 42, and, further that Applicant materially falsified his application for a controlled substance registration, and therefore, that grounds for the denial of Applicant's application exist. Where, as here, the Government has met its *prima facie* burden of showing that grounds for denial exist, the burden shifts to the Applicant to show why he can be entrusted with a registration. *Garrett Howard Smith, M.D.*, 83 FR 18,882, 18,910 (2018) (collecting cases).

In this case, Applicant failed to respond to the Government's Order to Show Cause and did not avail himself of the opportunity to refute the Government's case. *See* RFAA, at 2. Therefore, Applicant has not provided any remorse or assurances that he would implement remedial measures to ensure such conduct is not repeated. Such silence weighs against the Applicant's registration. *Zvi H. Perper, M.D.*, 77 FR at 64,142, citing *Medicine Shoppe*, 73 FR at 387; *see also Samuel S. Jackson*, 72 FR at 23,853. Further, due to the lack of a statement or testimony from Applicant, it is unclear whether Applicant can be entrusted with a DEA registration; and therefore, I find that sanction is appropriate to protect the public from a recurrence of Applicant's unlawful actions in the context of his CSA registration. *See Leo R. Miller, M.D.*, 53 FR 21,931, 21,932 (1988).

Consequently, I find that the factors weigh in favor of sanction and I shall order the sanctions the Government requested, as contained in the Order below.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f) and 21 U.S.C. 824(a), I hereby deny the pending application for a Certificate of Registration, Control Number H21079595C, submitted by Daniel R. Nevarre, M.D., as well as any other pending application of Daniel R. Nevarre, M.D. for additional registration in Utah. This Order is effective [insert

Date Thirty Days From the Date of Publication in the **Federal Register**].

Anne Milgram,
Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 21-5]

Stephen E. Owusu, D.P.M.; Decision and Order

On October 22, 2020, a former Assistant Administrator, Diversion Control Division, of the Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Stephen E. Owusu, D.P.M. (hereinafter, Respondent) of Brooklyn, New York. Administrative Law Judge Exhibit (hereinafter, ALJX) 1 (OSC), at 1. The OSC proposed the denial of Respondent's application for DEA Certificate of Registration No. W19061136C (hereinafter, COR or registration) and the denial of any applications for any other DEA registrations pursuant to 21 U.S.C. 824(a)(2) and 824(a)(5) because Respondent was convicted of a felony related to controlled substances and because Respondent has been excluded from participation in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. 1320a-7(a). *Id.*

On November 23, 2020, the Respondent timely requested a hearing, which commenced (and ended) on February 17, 2021, at the DEA Hearing Facility in Arlington, Virginia with the parties, counsel, and witnesses participating via video teleconference (VTC). On April 9, 2021, Administrative Law Judge Teresa A. Wallbaum (hereinafter, the ALJ) issued her Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge (hereinafter, Recommended Decision or RD). By letter dated May 4, 2021, the ALJ certified and transmitted the record to me for final Agency action. In the letter, the ALJ advised that neither party filed exceptions. Having reviewed the entire record, I adopt the ALJ's rulings, findings of fact, as modified, conclusions of law and recommended sanction with minor modifications, where noted herein.*^A

*^A I have made minor modifications to the RD. I have substituted initials or titles for the names of witnesses and patients to protect their privacy and

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

Teresa A. Wallbaum; Administrative Law Judge

April 9, 2021

*^B Respondent proceeded *pro se* throughout the entire case.¹ Respondent timely filed a Request for Hearing. A Prehearing Conference was conducted on January 12, 2021, via VTC. ²A hearing on the merits of the OSC allegations was conducted on February 17, 2021, via VTC at the DEA Hearing Facility in Arlington, Virginia. The Government filed a Post-Hearing Brief on March 26, 2021.

The issue to be ultimately decided by the Acting Administrator, with the assistance of this Recommended Decision, is whether Respondent's application should be denied based

I have made minor, nonsubstantive, grammatical changes and nonsubstantive, conforming edits. Where I have made substantive changes, omitted language for brevity or relevance, or where I have added to or modified the ALJ's opinion, I have noted the edits with an asterisk, and I have included specific descriptions of the modifications in brackets following the asterisk or in footnotes marked with a letter and an asterisk. Within those brackets and footnotes, the use of the personal pronoun "I" refers to myself—the Administrator.

*^B I have omitted a section of the RD's discussion of the procedural history to avoid repetition with my introduction.

¹ Respondent was advised during the Prehearing Conference that, under 21 CFR 1316.50, he had the right to seek representation by a qualified attorney at his own expense. Respondent was also advised that, if he continued to represent himself, he would be held to the same standards and procedural requirements of an attorney, including adherence to the procedural orders and rulings of this tribunal and to the procedural rules set forth in 21 CFR 1316.41–1316.68. ALJ Ex. 13 at 2, n.3. During the merits hearing, Respondent acknowledged that he had been so advised and confirmed that he wanted to proceed *pro se*. Tr. 7–8.

² Respondent failed to submit a Prehearing Statement by the December 29, 2020, deadline set out in this tribunal's Order for Prehearing Statements. ALJ Ex. 3. The tribunal then issued an Order Directing Compliance, which gave Respondent until January 4, 2021, to show good cause as to why he did not comply with the Order for Prehearing Statements. ALJ Ex. 7. Respondent then filed a Prehearing Statement on January 4, 2021, but did not offer any attempt to show good cause for his late filing. ALJ Ex. 8. The tribunal issued a Second Order Directing Compliance on January 4, 2021, requiring Respondent to show good cause. ALJ Ex. 9. Respondent then filed a document styled "Requisite Good Cause for Late Filing," in which he purported to show good cause. ALJ Ex. 10. Thereafter, the tribunal issued an Order Regarding Respondent's Late Filed Prehearing Statement, which set out several of Respondent's failures to comply with the Order for Prehearing Statements, including late filings and at least two failures to serve pleadings on opposing counsel. ALJ Ex. 11. The Order also directed Respondent to file a Prehearing Statement in compliance with the Order for Prehearing Statements by January 11, 2021. *Id.* Respondent finally did file a compliant Prehearing Statement on January 10, 2021. ALJ Ex. 12.

upon his felony conviction related to controlled substances and/or his exclusion from participation in a federal health care program pursuant to 42 U.S.C. 1320a-7(a).

After carefully considering the testimony elicited at the hearing, the admitted exhibits, the arguments of counsel, and the record as a whole, I have set forth my recommended findings of fact and conclusions of law below.³

I. Findings of Fact

A. Allegations

The Government alleges that the denial of Respondent's application is supported by incontrovertible record evidence that he has been both convicted of a felony related to controlled substances and excluded from participation in a federal health care program. ALJ Ex. 1. The Government further alleges that judgment was entered against Respondent in the United States District Court for the Eastern District of New York after pleading guilty to one count of Conspiracy to Distribute Oxycodone, a Class C Felony, in violation of 21 U.S.C. 841(a), (b)(1)(C), and 846.⁴ The Government also alleges that the U.S. Department of Health and Human Services, Office of Inspector General (HHS/OIG) mandatorily excluded Respondent from participation in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. 1320a-7(a).⁵ According to the Government, this exclusion was effective as of October 19, 2017, and runs for a period of five years.⁶ ALJ Ex. 1.

B. Stipulations

The following stipulations were mutually agreed upon by the parties and are conclusively accepted as fact in these proceedings:

1. On or about June 12, 2019, Respondent filed with the DEA an application for registration as a practitioner in Schedules II through V pursuant to DEA control number W19061136C, with a proposed registered

³ After conducting the merits hearing in this case, the tribunal mailed a hard copy of the transcript of the hearing to both parties. Despite two separate delivery attempts, the hard copy could not be delivered to Respondent's address. Chambers reached out to Respondent to confirm his address, but delivery was never effectuated. Respondent was, however, provided with an electronic version of the transcript and had an opportunity to submit corrections to the transcript.

⁴ *United States v. Stephen Owusu*, No. 2:11-CR-0709-001 (LDW) (E.D.N.Y. June 13, 2017).

⁵ Respondent has stipulated to the factual basis underlying this allegation. See Stip. 5.

⁶ Respondent has stipulated to the factual basis underlying this allegation. See Stip. 5.

address of 106 Pennsylvania Ave., Suite 1, Brooklyn, NY 11207-2427.

2. On or about July 19, 2011, Respondent surrendered for cause his previous DEA registration, No. BO3613331.

3. On June 13, 2017, Judgment was entered against Respondent in the United States District Court for the Eastern District of New York after Respondent pleaded guilty to one count of "Conspiracy to Distribute Oxycodone, a Class C Felony," in violation of 21 U.S.C. 841(a), (b)(1)(C), and 846. *United States v. Stephen Owusu*, No. 2:11-CR-0709-001 (LDW) (E.D.N.Y. June 13, 2017).

4. Based on Respondent's conviction, the New York State Office of the Medicaid Inspector General excluded Respondent from participation in the New York Medicaid program. The exclusion was effective August 30, 2017.

5. Based on Respondent's conviction, the U.S. Department of Health and Human Services, Office of Inspector General (HHS/OIG), mandatorily excluded Respondent from participation in Medicare, Medicaid, and all federal health care programs pursuant to 42 U.S.C. 1320a-7(a). The exclusion was effective on October 19, 2017, and runs for a period of five years.

6. Reinstatement of eligibility to participate in Medicare, Medicaid, and all federal health care programs after exclusion by HHS/OIG is not automatic.

7. Respondent is currently excluded from participation in Medicare, Medicaid, and all federal health care programs.

C. Government's Case-in-Chief

The Government's case-in-chief consisted of the testimony of a single witness, a DEA Diversion Group Supervisor (hereinafter, the GS). The GS testified that her duty station is the New York Field Division, located in New York City, where she has served in her capacity as a group supervisor for approximately one year. Tr. 21-22. Before the GS was promoted to group supervisor, she worked as a Diversion Investigator for approximately 24 Years. Tr. 22. In her position as a group supervisor, the GS is required to undergo periodic training as a part of her duties. Tr. 23. Further, she has been involved in over 200 DEA investigations throughout her career. *Id.*

Respondent came to the attention of the GS when she was assigned his application for DEA registration. Tr. 24. The GS also testified that she interviewed Respondent on two occasions. *Id.* Through the testimony of the GS, the Government laid the foundation for the introduction of multiple exhibits in support of its allegations.⁷

The parties agree, and the evidence demonstrates, that, on June 13, 2017,

⁷ Specifically, the testimony from the GS laid the foundation for Government Exhibits 1, 4, 5, 6, 7, 8, and 9. Tr. 24-26, 28-29, 31-33, 34-35, 36-39, 40-41, 42-43.

Respondent pleaded guilty to one count of Conspiracy to Distribute Oxycodone, a Class C Felony, in violation of 21 U.S.C. 841(a), (b)(1)(C), and 846. Gov. Ex. 5, 6.⁸ The Department of Health and Human Services, Office of Inspector General sent Respondent a letter, informing him that he had been excluded from Medicare, Medicaid, and all federal health care programs for a period beginning on October 19, 2017, and lasting a minimum of five years. Gov. Ex. 8; Tr. 40. The GS also testified that the New York State Office of the Medicaid Inspector General had sent Respondent a letter informing him that he had been excluded from the state's Medicaid program. Gov. Ex. 7; Tr. 36-37.

Respondent's exclusion from Medicare, Medicaid, and all federal health care programs, along with Respondent's conviction of Conspiracy to Distribute Oxycodone, are the bases of the Government's present case opposing Respondent's application for a new COR. The GS testified that, on February 16, 2021, she ran a new search on a web page of the U.S. Department of Health and Human Services, Office of Inspector General, and confirmed through that search that Respondent was still excluded from all federal health care programs. Tr. 43.

The GS came across as an objective investigator, with no discernable motive to mislead, fabricate, or exaggerate. The testimony of this witness was primarily focused on the uncontroversial⁹ introduction of documentary evidence and her contact with this case, and was sufficiently detailed, plausible, and internally consistent to be afforded full credibility.

D. Respondent's Case

Respondent, proceeding *pro se*, presented his own testimony and offered four exhibits in support of his case. According to Respondent, he received a Bachelor's degree from the University of New York and thereafter studied genetic engineering in a Ph.D. program. Tr. 51. He departed that program with a Master's Degree and entered Temple University Medical School, where he studied Podiatric Medicine. *Id.* Respondent graduated from Temple University in 1992 and completed his residence at a Veterans' Affairs hospital in Brooklyn, New York. Tr. 52. He obtained medical licenses in both New York and Pennsylvania and

⁸ Respondent also stipulated to this conviction. See Stip. 3, *infra*.

⁹ Respondent did not object to the admission of any exhibit offered by the Government. Tr. 26, 30, 33, 35, 39, 42, 43-44.

began practicing medicine in New York in 1994. Tr. 53; 57.

Respondent has worked both as a solo practitioner and a clinic physician, specializing in wound care at two different clinics. Tr. 54; 57–59. In one of those clinics, Respondent served as the director, specializing in baric neuropathy, supervising three to four nurses and nurse practitioners, and seeing 50 patients a day. Tr. 54–56. For nearly ten years, starting in 1998, he also worked in a dialysis clinic specializing in treating patients in “end-stage renal dialysis” who suffered lower extremity problems. Tr. 61–63.

Respondent testified that, prior to 2011, he never had any disciplinary problems in either New York or Pennsylvania and had no arrests or convictions. Tr. 60; 64; 87.

Respondent admitted that he pleaded guilty to one count of Conspiracy to Distribute Oxycodone on June 13, 2017, in violation of 21 U.S.C. 841(a), (b)(1)(C), and 846. Stip. 3; *United States v. Stephen Owusu*, No. 2:11–CR–0709–001 (LDW) (E.D.N.Y. June 13, 2017). But Respondent’s description of the events behind that conviction evolved over the course of these proceedings. In his second Prehearing Statement,¹⁰ Respondent referenced “2 falsified prescriptions in [his] name to which [he] was called to cooperate with the police for prosecution [and] lost prescription pads that a pharmacist attested to but which [his] lawyers would not allow court trial.” ALJ Ex. 12 at 3; *see also* Tr. 131–32 (affirming statement as accurate). In his Supplemental Prehearing Statement, Respondent stated that he “never conspired to sell or distribute oxycodone and [he] will never conspire to sell or distribute oxycodone or any controlled substance(s).” ALJ Ex. 14 at 5.

During the hearing, Respondent testified that he had prescribed oxycodone for one patient (who had been referred to him by another, trusted patient) on the patient’s third visit. Tr. 67–70. Specifically, he prescribed the oxycodone because the patient had brought oxycodone in with him, told the Respondent he had taken it from his brother, and it was the only medication that reduced his pain. Tr. 69–70. Respondent refilled the oxycodone prescription approximately once a month or once every two months for two years. Tr. 74. The same patient brought in a couple of friends on the

same construction site where he worked and Respondent likewise prescribed those patients oxycodone. Tr. 75.

Respondent explained that he prescribed oxycodone because he was “very naïve” and sometimes “too helpful” or “too kind.” Tr. 64 and 76.

He also testified that two prescription pads were lost from his office and “a lot of guys” had come to the pharmacy and written prescriptions from his pad. Tr. 76. According to Respondent, someone from the pharmacy would have testified for him. Tr. 76; Tr. 108. Respondent’s lawyers, however, declined to investigate his defense and DEA produced only 20 of the 200 it alleged were illegal. Tr. 108–109; *see also* Tr. 126 (he stated that DEA never showed him the other 180 prescriptions).

On cross-examination, Respondent admitted that, on one occasion, he delivered multiple oxycodone prescriptions to a patient in a parking lot at 8:30 p.m. or 9:00 p.m. Tr. 113–115. He did so “from the kindness of [his] heart” because the patient was taking his son to a football practice or game and could not make it to the medical office in time. Tr. 109–110. At the time, Respondent did not realize it was a “setup,” and that it was “staged.” *Id.*; *see also* Tr. 113 (“I would call it staged. Why? Because I had no idea what was going on.”). The patient was, in fact, an informant or, as Respondent testified: “the very person who they accused [Respondent] [of] conspiring to distribute oxycodone with was somebody . . . [Respondent] didn’t know was already a criminal [and] who had already been incriminated. And then the Court used him . . . as an informant, sent him to [Respondent], [he] asked [Respondent] for the medication, and this is how it began.” Tr. 65 (cleaned up).

Respondent insisted that he charged the patient \$70, even though the patient paid him \$300 for the prescriptions, and testified that “why [the patient] gave [him] \$300, [he doesn’t] know.” Tr. 115. When interviewed by DEA agents, he admitted that he made approximately \$30,000 over the course of two years for these patients. Tr. 111–112. He viewed the cash payment in the parking lot as “almost like a technicality” because the patient would have paid him the same amount had he come into the office. Tr. 126.

When asked whether he had examined his patients before prescribing, Respondent provided an evasive answer:

Q: Dr. Owusu, isn’t it true that you issued multiple prescriptions for oxycodone without examining the patients?

A: I examined them, Your Honor. Counsellor, I examined them.

Q: All of them?

A: Well, the—the initial—the initial patients, all of them were examined.

Tr. 117.

Respondent emphasized that he was hesitant to explain his prior convictions because he did not “want it to be misconstrued as a lack of penitence and a lack of repentance.” Tr. 50; *see also* Tr. 133. Ultimately, however, Respondent testified repeatedly that—despite his guilty plea—he did not, in fact, conspire to distribute oxycodone. *See, e.g.*, Tr. 64 (“I was not a co-conspirator, and I did not conspire at all.”); *id.* (“this so-called conspiracy case”); Tr. 65. (“the record will show I never had—never was involved in any—any infraction of the law. Never, never.”); Tr. 66 (“I was never, myself, never, and I would say—I would say until my dying day, never conspired to distribute drugs. Never. And I never will, Your Honor.”); Tr. 78 (attorney believed he was innocent); Tr. 80 (“But all those conspiratorial charges that they added on, no.”); Tr. 116 (“I was innocent, okay?”); Tr. 125 (affirming statement made in his Prehearing Statement that he had accepted responsibility “despite the fact I never conspired to sell or distribute oxycodone”); Tr. 134 (at plea hearing, under oath, he admitted that he had pleaded guilty even though many of his statements were “not only just not true . . . I just didn’t feel like a lot of them were right.”).

Rather, Respondent claimed that he was forced, and indeed tricked, into pleading guilty by his lawyers. *See, e.g.*, Tr. 78 (“I thought I was going for [the lawyer] to take me to a DEA office. I went to him that day with the understanding that we were going to the DEA office to help me get my DEA license back. And I went to the courtroom, and that was the day he made me plead guilty.”); Tr. 79–80 (“I had to say yes because my lawyer told me to just say yes—yes, yes, and I . . . went all along like that”); Tr. 76 (attorney forced him to plead guilty because he feared a racially unjust trial); Tr. 116 (attorney forced him to plead guilty because of “the circumstances, the location of the Court, the selection of the jury”). At one point, however, Respondent also acknowledged that his attorney told him to plead guilty because of the incriminating video recording. Tr. 112.

Respondent admitted that he was guilty, but just for the “two prescriptions I wrote . . . [T]hat’s what . . . my guilt is about.” Tr. 80. He acknowledged that he had appeared

¹⁰ Given Respondent’s failure to summarize his testimony in his initial Prehearing Statement, this tribunal directed that he file a revised Prehearing Statement, which he did on January 10, 2021. ALJ Ex. 12.

before a federal district court judge for his plea hearing, signed his plea agreement, pleaded guilty under oath, was sentenced based on the facts he admitted, and told the district court judge that his guilty plea was voluntary. Tr. 130–134. Respondent was sentenced to three years' probation (Tr. 81), which he completed early without any infractions (Tr. 97–98; Resp't Ex. 3).

Indeed, Respondent often cast himself as the victim—repeatedly stating that he “suffered” because of the conviction. For example, after recounting the facts behind his conviction, Respondent stated: “They were the things I have suffered in the past, okay? Some of the things I look back on, and I—I’ve suffered for the last ten years because.” Tr. 132; see also Tr. 161 (“I have suffered a lot, and I have learned a lot.”). In other instances, Respondent described himself as a victim (Tr. 64) who had been “punished enough” (Tr. 105). Indeed, Respondent’s primary argument for obtaining his registration was “it’s been enough time for punishment. It’s been enough time that I have . . . paid the penalty.” Tr. 163. [Respondent also stated, “So, I am trustworthy. I’ve never been in a situation where my credibility ever, ever was in question until this situation . . . I can promise you, I can, you know, that definitely I have learnt my lesson and very, very, well. And this will never again be repeated, never. Tr. 106]

According to Respondent, he has not earned his living from the practice of medicine since his arrest, since it is impossible to practice without a DEA registration. Tr. 61; Tr. 82–83. He admitted, however, that it was possible to practice without a DEA registration, although such practice would be limited. Tr. 119–121.

As for remedial measures, Respondent testified that he had taken four classes regarding opioid addiction—one in September 2011, one in 2019, one in July 2020, and one in February 2021. Tr. 83–86.¹¹ Three of those classes were mandated by the New York licensing board; the 2019 training was a day of specialized training at a general medical conference. Tr. 84–85. Respondent still

has a current medical license in New York, valid until September 30, 2023. Tr. 86–91; Resp't Ex. 1.

Finally, Respondent submitted a letter from Dr. B.-A. (doctor of Public Administration) regarding Respondent’s current work at his clinic supporting his character. Resp't Ex. 2; Tr. 96; 123.¹²

As noted in more detail in the Analysis section, *infra*, Respondent’s testimony did not present as credible on the key issue of his culpability because he contradicted his representations under oath in the federal prosecution, his description of events was not plausible, and he minimized his own responsibility.

E. Government’s Rebuttal Case

The Government offered one rebuttal witness—a Special Agent of the Drug Enforcement Administration (hereinafter, the SA). The SA testified that he is assigned to the Long Island District Office in Central Islip, New York. Tr. 138. The Special Agent also testified that he has been a Special Agent with DEA since 1996, and that his job duties include conducting investigations, some of which are undercover. Tr. 139. In approximately 2011, The Special Agent became familiar with Respondent during an investigation involving oxycodone distribution. Tr. 139–140. During that investigation, Respondent was identified and arrested. Tr. 140.

An individual named B. C.—a patient of Dr. Owusu’s—cooperated with the Government in this 2011 investigation. *Id.* B.C. specifically provided the SA and other agents at DEA with information regarding his illegal purchase of prescription narcotics from Respondent. *Id.* At the direction of DEA, B.C. met with Respondent while wearing a concealed video recording device. Tr. 140–141. The SA, along with several other DEA agents, observed the meeting between Respondent and B.C. Tr. 142. The SA also later retrieved the video recording device from B.C. and observed the video recording of the meeting. Tr. 143. Respondent and B.C. met in the Mercy Hospital parking lot in Rockville Center, New York. Tr. 141.

During the meeting, B.C. purchased prescriptions for narcotics from Respondent. *Id.* Initially, when asked how many prescriptions B.C. had purchased during the meeting, the SA testified that he did not remember. *Id.*

The SA, relying upon a post-arrest report, testified that Respondent had issued numerous prescriptions during the recorded transaction with B.C., but that the report did not specify how many.¹³ Tr. 147–48. The SA also testified that Respondent had admitted that he had met several times with B.C. over a several-year period, and that he had sold B.C. oxycodone pills for \$300 cash per prescription. Tr. 144–45. The SA testified that, after being read his *Miranda* warning in the SA’s presence, Respondent stated that he had made approximately \$40,000 from selling illegal prescriptions to B.C. Tr. 145, 153.

The SA testified that, after his arrest, Respondent stated that he did conduct a physical examination of B.C. before selling the prescription narcotics, but that, once confronted with the video of the transaction, Respondent admitted that was a lie—that, in fact, no examination was conducted—and apologized for lying. *Id.* The SA, when asked to summarize the content of the video, stated that he had not reviewed the video recently, but that he thought it showed B.C. getting into Respondent’s vehicle for a short period of time, paying for the prescriptions for narcotics, and then exiting the vehicle. Tr. 146. Later, when asked about the video recording, The SA testified that he was mistaken, and then corrected himself and stated that, in fact, B.C. and Respondent stayed in their respective cars throughout the transaction, and that B.C. did not enter Respondent’s vehicle. Tr. 154.

On cross-examination, the SA testified that he recalled seeing the meeting between Respondent and B.C. Tr. 149. He also testified that he was not sure if he ever had to move his vehicle to get a better view of the transaction, and he could not remember if his view was obstructed at any time. *Id.* The SA did, however, recall that there were multiple DEA agents conducting surveillance in the area in order to observe the transaction, and he stated that he was in constant radio communication with those agents. *Id.* He also testified that at least one of

¹¹ In his revised Prehearing Statement, Respondent described his training as: “One whole day OPIOID CRISIS class I attended around Fall 2011; several other continuing medical educational SEMINARS attended in the years; A requisite pre-certifying OPIOID crisis, addiction and treatment course for all NY State Practitioners taken in 2018.” ALJ Ex. 12 at 4. Although there is some discrepancy between this description and Respondent’s testimony at trial, I do not question that Respondent has taken multiple courses over the years, especially as many of those courses were mandatory for his continued licensure.

¹² This tribunal sustained the Government’s objection regarding Respondent’s Exhibit 4, which was a “Certificate of Relief from Disabilities” from the New York Department of Corrections and Supervision. Tr. 104. That document was excluded for two reasons. First, this tribunal could not ascertain its authenticity given numerous inconsistencies, including a docket number that did not match the docket number on Respondent’s federal conviction. Tr. 99–104. Second, it was not relevant because it did not specifically relate to Respondent’s medical license. Tr.100. [I agree with the ALJ and find that this document is not legally relevant to the current matter.]

¹³ This post-arrest report is also known as a DEA–6, which is a report of investigation. Tr. 143. The SA testified that this specific DEA–6 was titled, “Post Arrest Statements of Dr. Stephen Owusu on July 19, 2011, at 175 Pine Lawn Road, Melville, New York.” *Id.* At the time the report was made, this was the address of the Long Island DEA office. *Id.*

those agents would have had a good view of the transaction at any given time. *Id.* The SA also could not recall how much money B.C. had given Respondent during the transaction, but testified that any money B.C. had given Respondent would have been provided by DEA. Tr. 149–150. The SA further testified that the interrogation of Respondent took place in Melville, New York, where the Long Island DEA field office was located at the time. Tr. 151.

The SA came across as an objective investigator, with no discernible motive to mislead, fabricate, or exaggerate. Though at times, the SA did struggle to remember certain details, he readily admitted what he did not remember, and when his recollection was refreshed, his testimony was sufficiently detailed, plausible, and internally consistent to be afforded full credibility.

II. Discussion

The Government opposes Respondent's COR application under the dual bases that he has been convicted of a controlled-substance-related felony and that he has been excluded from participating in a specified federal health care program. ALJ Ex. 1.^{*C}[In its OSC, the Government relies upon grounds Congress provided to support revocation/suspension, not denial of an application. Prior Agency decisions have addressed whether it is appropriate to consider a provision of 21 U.S.C. 824(a) when determining whether or not to grant a practitioner registration application. For over forty-five years, Agency decisions have concluded that it is. *Robert Wayne Locklear, M.D.*, 86 FR at 33744–45 (collecting cases); *see also, William Ralph Kincaid*. In *Robert Wayne Locklear, M.D.*, the former Acting Administrator stated his agreement with the results of these past decisions and reaffirmed that a provision of section 824 may be the basis for the denial of a practitioner registration application. 86 FR at 33745. He also clarified that allegations related to section 823 remain relevant to the adjudication of a practitioner registration application when a provision of section 824 is involved. *Id.*

Accordingly, when considering an application for a registration, I will consider any actionable allegations related to the grounds for denial of an application under 823 and will also consider any allegations that the applicant meets one of the five grounds

for revocation or suspension of a registration under section 824. *Id.* *See also Dinorah Drug Store, Inc.*, 61 FR 15972, 15973–74 (1996).

A. 21 U.S.C. 823(f): The Five Public Interest Factors

Pursuant to section 303(f) of the CSA, “[t]he Attorney General shall register practitioners . . . to dispense . . . controlled substances . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.” 21 U.S.C. 823(f). Section 303(f) further provides that an application for a practitioner's registration may be denied upon a determination that “the issuance of such registration . . . would be inconsistent with the public interest.” *Id.* In making the public interest determination, the CSA requires consideration of the following factors:

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

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

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

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

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

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

In this case, it is undisputed that Respondent holds a valid state medical license and is authorized to dispense controlled substances in the State of New York where he practices.

Because the Government has not alleged that Respondent's registration is inconsistent with the public interest under section 823, and although I have considered 823, I will not analyze Respondent's application under the public interest factors. Therefore, in accordance with prior agency decisions, I will move to assess whether the Government has proven by substantial evidence that a ground for revocation exists under 21 U.S.C. 824(a.)

Regarding the two revocation/suspension grounds the Government specifically relied on in this case, the CSA, in pertinent part, states the following:

A registration pursuant to section 824 of this title to . . . dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant:

(2) has been convicted of a felony under this subchapter or subchapter II or any other law of the United States, or of any State,

relating to any substance defined in this subchapter as a controlled substance . . . [or]

(5) has been excluded (or directed to be excluded) from participation in a program pursuant to section 1320a–7(a) of Title 42.

21 U.S.C. 824(a)(2) and (5). Each ground is herein addressed *in seriatim*.

B. Exclusion From Participation in a Federal Health Care Program

The Government seeks denial of Respondent's COR application under 21 U.S.C. 824(a)(5) because he has been excluded from participation in a federal health care program (Mandatory Medicare Exclusion or MME). [The Agency has] discretion to deny a respondent's application for a COR if Respondent “has been excluded (or directed to be excluded) from participation in a program pursuant to [42 U.S.C. 1320a–7(a)].” 21 U.S.C. 824(a)(5) (2012). *See supra* II. Section 1320a–7 comprises the exclusion of individuals or entities by the Secretary of the U.S. Department of Health and Human Services (HHS) from participating in federal health care programs. 42 U.S.C. 1320a–7 (2012). A federal health care program is (1) a plan or program providing health benefits and which is funded in some way by the U.S. government;¹⁴ or (2) a state health care program or plan receiving certain approval or funding from the U.S. government.¹⁵ DEA decisions clearly establish that Medicare and Medicaid programs are among those federal health care programs in which exclusion from one of them can constitute a basis for denial of a COR application. *See, e.g., Daniel Ortiz-Vargas, M.D.*, 69 FR 62095, 62095–96 (2004); *Joseph M. Piacentile, M.D.*, 62 FR 35527, 35527–28 (1997); *Anibal P. Herrera, M.D.*, 61 FR 65075, 65077 (1996); *Suresh Gandotra, M.D.*, 58 FR 64781, 64782 (1993); *George D. Osafo, M.D.*, 58 FR 37508, 37509 (1993).

Specifically, subsection (a) of § 1320a–7, the part of the statute referenced by 21 U.S.C. 824(a)(5), dictates when HHS is required to exclude individuals or entities.¹⁶ *Id.* § 1320a–7(a) (“The Secretary *shall* exclude the following individuals and entities from participation in any [f]ederal health care program”) (emphasis added). There are four instances requiring mandatory exclusion: (1) conviction of a criminal offense “related to the delivery of an item or services under [42 U.S.C. 1395 *et seq.*] or under any [s]tate health care

¹⁴ 42 U.S.C. 1320a–7b(f).

¹⁵ 42 U.S.C. 1320a–7(h).

¹⁶ In contrast to subsection (a), subsection (b) of 42 U.S.C. 1320a–7 provides sixteen discretionary grounds of exclusion from health care programs. 42 U.S.C. 1320a–7(b) (2012).

^{*C}I have substituted the RD's language assessing the application of the revocation grounds to my assessment of an application under 21 U.S.C. 823(f) in accordance with recent decisions.

program”; (2) conviction, “under [f]ederal or [s]tate law,” related to patient “neglect or abuse” connected “with the delivery of a health care item or service[.]” (3) [f]elony conviction related to health care fraud”; and “(4) [f]elony conviction related to . . . the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.” *Id.* The unambiguous words of the CSA in 21 U.S.C. 824(a)(5) provide that a practitioner’s registration “may be suspended or revoked” if the practitioner “has been excluded” from participating in a program pursuant to 42 U.S.C. 1320a–7(a). 21 U.S.C. 824(a)(5). DEA has strictly interpreted this provision and acknowledged that the Administrator has discretionary power to suspend or revoke a registration only when the practitioner has been mandatorily excluded from a federal health care program under subsection (a) of 42 U.S.C. 1320a–7. *See, e.g., Terese, Inc., d/b/a Peach Orchard Drugs*, 76 FR 46843, 46847 (2011); *Herrera*, 61 FR at 65077; *Gandotra*, 58 FR at 64782; *Nelson Ramirez-Gonzalez, M.D.*, 58 FR 52787, 52788 (1993). As specified by the CSA, the misconduct mandating exclusion does not need to relate to controlled substances in order to provide the Administrator with the power to suspend or revoke (or in this case deny an application for) a COR. *Jeffrey Stein, M.D.*, 84 FR 46968, 46973 (2019); *Ortiz-Vargas*, 69 FR at 62095–96; *Melvin N. Seglin, M.D.*, 63 FR 70431, 70433 (1998); *Osafo*, 58 FR at 37509. [Omitted for brevity.]

When DEA alleges that a practitioner has been mandatorily excluded from a federal health care program under 42 U.S.C. 1320a–7a, and thus seeks to impose a COR sanction, the Government bears the burden to prove that such an exclusion occurred. *Jin*, 77 FR at 35023; *see also*, 21 CFR 1301.44(d) (2018) (“At [a] hearing for the denial of a [COR], the [Government] shall have the burden of proving that the requirements for such registration . . . are not satisfied.”). However, even a mandatory exclusion does not curtail the authority of DEA to independently weigh the evidence presented and exercise discretion. *Stein*, 84 FR at 46970 [omitted parenthetical.] Accordingly, DEA is not required to deny Respondent’s COR application merely because he is subject to a mandatory exclusion. *Id.*

*D In the instant case, it is undisputed that Respondent was excluded from

*D Per the usual format of Agency decisions, I have removed the discussion of the legal standard for a respondent’s acceptance of responsibility from the *prima facie* analysis to the Sanction section

participation in federal health care programs under the mandatory authority of 42 U.S.C. 1320a–7a. Stip. 4; Gov’t Ex. 5. Consequently, under § 824(a)(5), it is within the discretion of the Agency to determine, based on the entire record, whether Respondent’s exclusion from federal health care programs renders granting his application for a COR inappropriate. *See Narcisco A. Reyes, M.D.*, 83 FR 61678, 61681 (2018) (holding that where the Government has demonstrated the requisite mandatory federal health care program exclusion(s) it has satisfied its *prima facie* case, shifting the burden to the respondent[.]). Inasmuch as the parties have stipulated to Respondent’s exclusion and the record contains evidence establishing as much, the Government has met its burden in this regard. Stip. 4, 5, 7; *See* 21 CFR 1301.44(d) (2018).

*E Accordingly, in review of the evidence of record, including the stipulations of the parties, OSC Allegation 3 is *sustained*.

C. Controlled-Substance-Related Felony Conviction

The Government also alleges that Respondent’s application should be denied because he has been convicted of a felony related to controlled substances, pursuant to 21 U.S.C. 824(a)(2). Under that provision, the Attorney General *may* suspend or revoke a registration issued under 21 U.S.C. 823 “upon a finding that the registrant . . . has been convicted of a felony under this subchapter or subchapter II or any other law of the United States, or of any State, relating to any substance defined in this subchapter as a controlled substance or a list I chemical.” 21 U.S.C. 824(a)(2)(emphasis added).

*F The fact of Respondent’s conviction in this case has been conclusively established. Stip 3. There is no question that Respondent pleaded guilty to one count of “Conspiracy to Distribute Oxycodone, a Class C

below. Further, in the Sanction section below, I have combined the ALJ’s analysis of Respondent’s acceptance of responsibility pertaining to the mandatory exclusion allegation with the ALJ’s analysis of Respondent’s acceptance of responsibility pertaining to the controlled substance felony conviction allegation. I have also combined the former two analysis sections with the brief summary regarding the Respondent’s acceptance of responsibility that the ALJ had originally included in the Sanction section. I have not made substantive changes except where noted in brackets. *See infra*.

*E Analysis of Respondent’s acceptance of responsibility moved to Sanction section. *See supra* n.*D.

*F Discussion of the legal standard for a respondent’s acceptance of responsibility moved to Sanction section. *See supra* n.*D.

Felony,” in violation of 21 U.S.C. 841(a), (b)(1)(C) and 846,¹⁷ which is a felony related to a controlled substance. It is thus beyond argument that the Government met its *prima facie* burden of proving that Respondent has been convicted of a felony related to controlled substances.

*G Accordingly, in review of the evidence of record, including the stipulations of the parties, OSC Allegation 2 is *sustained*.

III. Sanction

Inasmuch as Congress has determined that a mandatory health care program exclusion constitutes an adequate basis for sanction, once the Government has demonstrated that a respondent has been so excluded, the burden shifts to the respondent to show that registration should be granted as a matter of discretion. *See Jin*, 77 FR at 35023. This burden may be carried by establishing an unequivocal acceptance of responsibility for the misconduct that formed the basis of the exclusion and by adequately demonstrating remedial measures to ensure against repetition. *Id.*; *Stein*, 84 FR at 46972–73 (respondent’s assertion that his misdeeds had no effect on his patients held to indicate a minimization of his acceptance of responsibility rendering it less than unequivocal). This acceptance of responsibility must be *unequivocal*; a registrant’s dishonesty under oath undermines the registrant’s acceptance of responsibility and shows that the registrant “cannot be entrusted with a registration.” *Rose Mary Jacinta Lewis, M.D.*, 72 FR 4035, 4042 (2007). Mere stipulation to facts without admitting to misconduct does not amount to an acceptance of responsibility. *Ajay S. Ahuja, M.D.*, 84 FR 5479, 5498 n.32 (2019). Moreover, a respondent’s own statements minimizing his or her misconduct weigh against any acceptance of responsibility. *Arvinder Singh, M.D.*, 81 FR 8247, 8249–51 (2016).

In *Jin*, the Agency relied, in part upon *Melvin N. Seglin, M.D.*, 63 FR 70431 (1998), a case in which the Agency found that the respondent “accepted responsibility for his misconduct which was not likely to recur.” *Id.* at 35026. In evaluating the reasonableness of sanctions generally, the Agency has also required an evaluation of the egregiousness of the proven misconduct as well as an analysis of considerations

¹⁷ *United States v. Stephen Owusu*, No. 2:11–CR–0709–001 (LDW) (E.D.N.Y. June 13, 2017).

*G Analysis of Respondent’s acceptance of responsibility moved to Sanction section. *See supra* n.*D.

of specific and general deterrence,¹⁸ and these factors have been specifically applied by the Agency in the MME context. *Arvinder Singh, M.D.*, 81 FR 8247, 8248 (2016). The egregiousness of the conduct is also considered in the MME context, even when a controlled-substance-related crime does not form the basis of the exclusion. *Stein*, 84 FR at 46973.

Further, the Agency has stated that “ordinarily[,] a respondent who has been convicted of a felony subject to § 824(a)(2) is entitled to present a case as to why his registration should not be revoked (or his application denied)” because conviction of a felony under the CSA is not a *per se* bar to registration. *William J. O’Brien, III, D.O.*, 82 FR 46527, 46529 (2017). As is the case with other DEA administrative enforcement cases seeking a sanction, once the Government has met its *prima facie* case, under § 824(a)(2) by merely establishing the existence of the requisite conviction,¹⁹ a respondent can avoid sanction only to the extent he/she/it is able to demonstrate an unequivocal acceptance of responsibility and remedial steps that are tailored to preventing recurrence. *Singh*, 81 FR at 8250 (“[The respondent] was required to acknowledge the full scope of his criminal behavior and the risk of diversion it created”); *Hassman*, 75 FR at 8236; *Ronald Lynch, M.D.*, 75 FR 78745, 78753 (2010) (holding that the respondent’s attempts to minimize misconduct undermined purported acceptance of responsibility); see also *Michael A. White, M.D.*, 79 FR 62957, 62967 (2014); *Steven M. Abbadessa, M.D.*, 74 FR 10077, 10081 (2009).

There can be no debate that the Government has met its *prima facie* burden of proving that the requirements for a sanction pursuant to 21 U.S.C. 824(a)(2) and (5) are satisfied. It is well established that, in cases involving Medicare exclusion and prior convictions, a respondent must show that he unequivocally accepts responsibility for his past misconduct if he wishes this tribunal to exercise its discretionary authority to grant a COR. See, e.g., *Stein*, 84 FR at 46972. Accordingly, unequivocal acceptance of responsibility for both bases of

established misconduct stands as a condition precedent for Respondent to prevail.

The purpose of this process is to determine whether the applicant can and should be entrusted with responsibly discharging the life and death duties of a DEA registrant. For this purpose, acceptance of responsibility is critical. The Agency’s interpretation of its statutory mandate on the exercise of its discretionary function under the CSA has been sustained on review. *Jones Total Health Care, L.L.C. v. DEA*, 881 F.3d 823, 830–31 (11th Cir. 2018); *MacKay v. DEA*, 664 F.3d 808, 822 (10th Cir. 2011); see also, *Hoxie v. DEA*, 419 F.3d 477, 483 (6th Cir. 2005) (holding that admitting fault and candor with investigators are both important factors in determining whether a physician is fit to hold a COR). Agency prior decisions are clear that a Respondent must “unequivocally admit fault” as opposed to demonstrate a “generalized acceptance of responsibility.” *The Medicine Shoppe*, 79 FR 59504, 59510 (2014); see also, *Lon F. Alexander, M.D.*, 82 FR 49704, 49728 (2017). To satisfy this burden, Respondent must “show true remorse” or an “acknowledgement of wrongdoing.” *Robert A. Leslie*, 68 FR 15227, 15228 (2003). The Agency has made it clear that unequivocal acceptance of responsibility is paramount for avoiding sanction. *Robert L. Dougherty, M.D.*, 76 FR 16823, 16834 (2011) (citing *Jayam Krishna-Iyer*, 74 FR 459, 464 (2009)). However, no legal authority holds that such acceptance, standing alone, guarantees a favorable result for every applicant or registrant.

A. Acceptance of Responsibility

To avoid sanction, it is incumbent upon Respondent to demonstrate acceptance of responsibility for his actions and remedial measures taken, and Respondent fails to persuade the tribunal that granting his application for a COR would be consistent with the public interest. To begin, Respondent’s testimony was not candid. Candor to the court is of paramount importance. The issue of trust is necessarily a fact-dependent determination based on the circumstances presented by the individual respondent; therefore, the Agency looks at factors, such as the acceptance of responsibility and the credibility of that acceptance as it relates to the probability of repeat violations. A registrant’s candor during the investigation and hearing is an important factor in determining acceptance of responsibility and the appropriate sanction; as is whether the registrant’s acceptance of responsibility

is unequivocal. *Heavenly Care Pharmacy*, 85 FR 53402, 53420 (2020); see also *Fred Samimi, M.D.*, 79 FR 18698, 18713 (2014); *Robert F. Hunt, D.O.*, 75 FR 49995, 50004 (2010).

Moreover, throughout his testimony, Respondent had ample opportunity to take full and unequivocal responsibility for his misconduct. Yet repeatedly, when pressed on the details of his conviction, Respondent failed to do so, often deflecting blame to his lawyers, who, he says, forced him to accept a plea deal. Tr. 76–80; 116; ALJ Ex. 14 at 2 (referring to “unscrupulous lawyers whose solutions were worse than the problem”). This refusal to accept blame is compounded by the inescapable conclusion that Respondent’s testimony was not credible on the key facts surrounding his federal conviction for conspiracy to distribute oxycodone. For example, when asked about the surrender of his previous DEA registration, Respondent made a point to “clarify” by stating, “I pleaded guilty . . . that I wrote those medications. I wrote them without . . . an attending. But all those conspiratorial charges that they added on, no. . . . [I]n the . . . two pads I wrote—the two prescriptions I wrote, I pleaded guilty for that. . . . [T]hat’s what . . . my guilt is about.” Tr. 80. This is far from true. As outlined by the stipulations in these proceedings, Respondent pleaded guilty in federal court to Conspiracy to Distribute Oxycodone. Stip. 3. Although part of the indictment against him included allegations that Respondent had left prescription pads unattended, and those pads ended up the source of falsified prescriptions, Respondent’s guilt is about much more than that. Respondent was arrested after an undercover operation, detailed by the testimony of the SA. Tr. 138–155. This transaction amounted to an illegal sale of narcotics and had nothing to do with Respondent’s lost prescription pads. Respondent’s attempt, therefore, to direct focus in these proceedings to the lost pads, rather than the sale of oxycodone prescriptions in a parking lot, amounts to a failure to accept responsibility for the entirety of his criminal conduct. As if that were not a poor enough reflection of his credibility, Respondent repeatedly and explicitly insisted that he never conspired to distribute oxycodone—the very conduct to which he pleaded guilty before a federal judge. Tr. 64–66; 78; 116; 125; ALJ 14 at 5.

Respondent’s failure to acknowledge the full scope of his criminal liability presents a more significant problem—although Respondent admitted that he had appeared before a federal district

¹⁸ *David A. Ruben*, 78 FR 38363, 38364, 38385 (2013).

¹⁹ *Dan Hale, D.O.*, 69 FR 69402, 69406 (2004) (“. . . facts established by criminal convictions are *res judicata* and cannot be re-litigated in a DEA administrative forum.”); *Raymond A. Carlson, M.D.*, 53 FR 7425, 7426 (1988) (“the conviction alone provides sufficient statutory authority to support the revocation of Respondent’s DEA Certificate of Registration.”).

court judge for his plea hearing, signed his plea agreement, pleaded guilty under oath, was sentenced based on the facts he admitted, and told the district court judge that his guilty plea was voluntary (Tr. 130–134), Respondent also disavowed those proceedings. For example, Respondent took the implausible position that, on the day he pleaded guilty, he showed up to his lawyer's office thinking the two of them were going to speak to the prosecutor in his case about getting his DEA license back. Tr. 78–79.

Indeed, Respondent testified in this hearing that his attorney told him to just “follow his orders” and “made [him] plead guilty.” Tr. 79. Even more disturbing, Respondent testified that he had to say yes because “my lawyer told me to just say yes—yes, yes, and I—and I went all along like that.” Tr. 80. Later, in these proceedings, Respondent admitted that his statements under oath at his plea hearing, before a federal district court judge, were “not only just not true . . . I just didn't feel like a lot of them were right.” Tr. 134.

Respondent's claims that he was forced or tricked into pleading guilty are simply not believable. Respondent's late-night delivery of *multiple* oxycodone prescriptions in a parking lot in exchange for \$300 in cash was captured on video-tape. Tr. 113–115. As even Respondent admitted, his attorney told him he would have to plead guilty because of that incriminating recording. Tr. 112. Even when faced with this fact, Respondent again diverted blame to his lawyers, stating that they discouraged him from going to trial because the federal court in which he would be tried was a “white Court” and that Respondent's race would be a disadvantage at trial. *Id.* See also Tr. 131–32; ALJ Ex. 12 at 3.

Ultimately, this tribunal cannot ignore that Respondent has changed his version of events—under oath—in two different judicial proceedings. By pleading guilty, Respondent obtained a benefit of acceptance of responsibility and, ultimately, a sentence of probation despite facing a Guideline Sentence of 57 to 71 months. Tr. 130; Govt Ex. 5. Before this tribunal, when faced with the consequences of that plea, Respondent repeatedly proclaimed his innocence of the conspiracy to distribute oxycodone, minimizing his involvement to two prescriptions. Tr. 64–66, 80, 125; ALJ Ex. 14. It is hard to see how Respondent's testimony in this tribunal, when held up against his plea agreement, amounts to anything more than Respondent's attempt to have his proverbial cake and eat it too. His guilty plea in federal court saved him from

significant prison time. But now, when faced with the consequences of that plea, he has changed the story in an effort to obtain a DEA registration. Either he was dishonest in federal court, or he was dishonest in these proceedings. Either way, Respondent was dishonest and has failed to accept full responsibility for his actions.

Other implausible aspects of Respondent's testimony certainly do not assist his request for a COR as they demonstrate a lack of candor. For example, Respondent's first instinct when speaking with DEA was to lie about whether he had performed an evaluation of the patient in the car—retracting that statement only when confronted with the existence of a video-recording and apologizing to DEA for his lie. Tr. 145. Significantly, Respondent's lie demonstrated clear consciousness of guilt—he stated he had examined his patient because he knew delivering prescriptions at night in a parking lot was wrong. Similarly unbelievable is Respondent's statement that he only charged his patient \$70 for the parking lot prescriptions and had no idea why he was given \$300 in cash. Tr. 115. This statement is inconsistent with the post-arrest statement, in which he admitted that he charged his patients \$300 for the prescriptions. Tr. 142. Nor is it plausible that a pharmacy representative would have testified that multiple people filled out Respondent's prescription pads in front of pharmacy staff (Tr. 76, 108)—activity that would certainly have imperiled the pharmacy's DEA registration.²⁰

All these inconsistencies are accompanied by a final troubling truth about Respondent's testimony: In the end, he saw himself as a victim. Respondent consistently referred to the undercover operation resulting in his arrest as “staged” or a “set-up.” Tr. 109–110, 113–115. Additionally, Respondent repeatedly contended that he had “suffered a lot” (Tr. 161) and had been “punished enough.” Tr. 105, 163; ALJ Ex. 12 at 3 (“I will acknowledge that the length of my punishment has been excessive and therefore demands a judicial reprieve.”); ALJ Ex. 14 at 4–5 (describing the “windfall repercussions from this catastrophe. . . .”). In his

²⁰ These examples of inconsistencies are merely the most egregious. There were others. For example, Respondent insisted he earned only \$30,000 from the patients to whom he prescribed Oxycodone (Tr. 111), whereas the SA testified that Respondent told DEA he had made \$40,000 from these patients (Tr. 142). [I agree with the ALJ that this statement was not as egregious as the other inconsistencies, because after SA's testimony, Respondent appeared to admit that he had memory problems; however, I do note that the inconsistency further served to downplay the egregiousness of his crime. Tr. 155.]

Supplemental Prehearing Statement, he even asked, “How much more damage/harm do you suppose is enough to satisfy/pacify the arm of the law?” ALJ Ex 14 at 3. And when Respondent claimed that he had accepted responsibility for his misconduct, he did so only with a caveat that his lawyers forced him to plead guilty. Tr. 161–62 (claiming that he accepts responsibility even though that some things in the Government's criminal case against him “were not true”). This conditional acceptance of responsibility is a far cry from *unequivocal* acceptance required to be entrusted with a DEA registration. See *Rose Mary Jacinta Lewis*, 72 FR at 4042 (affirming an immediate suspension when the respondent lied under oath to downplay her misconduct); see also *Singh*, 81 FR at 8249–51 (denying an application for a COR when the respondent repeatedly disputed the extent of his misconduct). Nor did Respondent's testimony at any point express true remorse for his wrongful conduct. See *Michael S. Moore, M.D.*, 76 FR 45867, 45868 (2011) (requiring a registrant to show “true remorse” for wrongful conduct in order to find an acceptance of responsibility).

Having concluded that Respondent has failed to prove an unequivocal acceptance of responsibility, I need not address remedial measures. *Ajay S. Ahuja, M.D.*, 84 FR 5479, 5498 n.33 (2019); *Daniel A. Glick, D.D.S.*, 80 FR 74800, 74801, 74810 (2015). Nevertheless, even if remedial measures were considered, they would not change the result.

The burden is on the respondent to present sufficient evidence of his remedial measures. See *Scott D. Fedosky, M.D.*, 76 FR 71375, 71378 (2011) (declining to give weight to remedial measures where the respondent testified about them but did not present any corroborating evidence to support his claim). And even if a respondent does introduce specific evidence of remedial measures, registration will not be granted unless such measures demonstrate that he or she can be entrusted with a COR. *Jeri Hassman, M.D.*, 75 FR 8194, 8237 (2010) (denying a COR where the Agency found that the respondent had learned nothing from the remedial steps she had taken).

Respondent claims that, prior to his arrest, he had “no idea” of the severity of the opioid epidemic. Tr. 83. He testified that he attended a mandatory class on opioids, which every prescriber must take. Tr. 84. Respondent also testified that he would take another class on February 28, 2021, but he did not provide any level of detail as to the

curriculum of the class. *Id.* According to Respondent, these classes are required of prescribers every year, and the upcoming February 28 class will be his fourth class. *Id.* Respondent also testified that he had attended a conference in July 2019 on the topic of General Medicine, and that the last class in the conference focused on the opioid pandemic. Tr. 85–86.

To begin, it is of course troubling that a medical professional with a COR would not appreciate the severity of the opioid drug crisis in this country. *See Hassman*, 75 FR at 8237. And while Respondent testified as to several classes he has taken on the subject, most of those were mandatory. Furthermore, Respondent's testimony does not provide a level of detail sufficient for this tribunal to evaluate the classes and whether they constitute remedial measures. On its face, a mandatory class that all prescribers are required to take does not present as remedial in nature. Nor does mere compliance with mandatory requirements inspire confidence that Respondent has learned from his past misconduct and can now be entrusted with a COR. *See id.* Simply put, Respondent has not made an adequate showing of remedial measures [such that I could entrust him with a registration.]

Overall, as Respondent faces the hurdle of demonstrating an adequate acceptance of responsibility, his testimony was just not credible. Certainly, it would strain all bounds of reasonable jurisprudence to find that Respondent has accepted responsibility for his actions, despite his trivialization of his misconduct, his disavowal of his statements under oath in his plea hearing in federal district court, his implausible testimony, and his own view of himself as a victim.²¹ Here, it

²¹ Respondent did, at times, testify as to his love of the medical profession and desire to help people. Tr. 62–63, 65. In addition, Respondent's Exhibit 2 is a letter from Dr. B.-A., the CEO of the American Medical Center, which is a clinic that Respondent has volunteered at. Resp't Ex. 2. The letter espouses the virtues of Respondent, and details the difficulties of finding medical professionals to work for clinics in impoverished areas, such as the one where Respondent volunteers. [Omitted. The letter can be of limited weight in this proceeding, however, because I have limited ability to assess the actual credibility of the reference given its written form. *See Michael S. Moore, M.D.*, 76 FR 45867, 45873 (2011) (evaluating the weight to be attached to letters provided by the respondent's hospital administrators and peers in light of the fact that the authors were not subjected to the rigors of cross examination). Further, it offers little value in assessing the Respondent's suitability to discharge the duties of a DEA registrant. Finally, absent Respondent's unequivocal acceptance of responsibility, what little value the letter might have offered me in evaluating my ability to trust Respondent is nullified by the fact that he himself has not shown me that he can be so entrusted. *See*

bears repeating that Respondent did not accept responsibility unequivocally. In fact, it is hard to imagine a purported acceptance more equivocal than the one he offered. Respondent's own testimony is riddled with inconsistencies, statements that are inconsistent with admissions he made under oath in a federal criminal proceeding, implausible statements, and numerous examples of Respondent portraying himself as the victim. Indeed, there was no real expression of remorse, but a view that he had been unfairly targeted and "set up" by DEA and accusations of impropriety in the criminal proceedings. *See, e.g.*, Tr. 109–10 (describing parking lot transaction as a "setup"); Tr. 126 (suggesting DEA improperly withheld 180 of the 200 prescriptions written on his allegedly stolen prescription pads). Respondent's lack of any meaningful acceptance of responsibility presents an insurmountable barrier to his application for a COR.

In any event, given the limited scope of Respondent's remedial measures, those measures do not change the outcome. His limited efforts do not establish a plan of remedial measures that assure the tribunal that he will not repeat the established transgressions. *See Hassman*, 75 FR at 8236. This case must be decided not merely upon what he says, but what he says and does. *C.f. Alra Laboratories v. DEA*, 54 F.3d 450, 452 (7th Cir. 1995) (sustaining the Agency's conclusion that past performance is the best predictor of future performance).

Although he testified that he has taken several classes on the opioid epidemic, Respondent provided no information about these classes. Nor does completion of one mandatory class per year tend to show that Respondent has taken sufficient remedial measures to address his past misconduct—or to even appreciate the egregiousness of this conduct. While Respondent claimed that he was naïve (Tr. 55, 76), and did not appreciate the full extent of the pandemic, he failed to articulate what specific steps he would take to ensure that his misconduct resulting in diversion would not be repeated.

William Ralph Kincaid, 86 FR 40636, 40641 (2021). Respondent's past service—even his volunteer service—is simply not enough to outweigh his lack of acceptance of responsibility in these proceedings. The letter has no other relevance, as the Agency has consistently held that community impact is not a relevant consideration under the public interest factors. *Linda Sue Cheek, M.D.*, 76 FR at 66972; *see also Gregory D. Owens, D.D.S.*, 74 FR 36751, 36757 (2009). Here, the evidence of community impact offered by Respondent does nothing to explain the issues of credibility his testimony presents.

Accordingly, I find that, in the face of the Government's *prima facie* case, Respondent has failed to unequivocally accept responsibility for his past misconduct; therefore, he cannot be trusted with a DEA COR. *See Singh*, 81 FR at 8250.

B. Specific and General Deterrence

In determining whether and to what extent imposing a sanction is appropriate, consideration must be given to the Agency's interest in both specific and general deterrence as well as the egregiousness of the offenses established by the Government's evidence. *David A. Ruben*, 78 FR 38363, 38384, 38385 (2013). The Agency has previously found [based on specific circumstances] that criminal convictions and sanctions by state licensing authorities can sufficiently deter physicians from engaging in misconduct, making the denial of an application for, or revocation of, a COR unnecessary to achieve the goal of general deterrence. *Kansky J. Delisma, M.D.*, 85 FR 23845, 23854 (2020). Likewise, such punitive measures can suffice to deter the registrant or applicant from future misconduct, making revocation or denial of an application unnecessary to achieve specific deterrence. *Id.*

With respect to specific deterrence, Respondent failed in these proceedings to portray a registrant who is remorseful, and who has worked hard to change for the better. Rather, Respondent came across as a person who says the right thing in order to get what he wants, and, when pressed, does not own up to his mistakes. Without a better indication of remorse, the tribunal can only conclude that granting Respondent a COR would put the public at risk of Respondent's previous diversionary behavior. Moreover, with respect to general deterrence, the Agency bears the responsibility to deter conduct similar to Respondent's past misconduct. *Ruben*, 78 FR at 38385. Granting a COR to an applicant who has neither unequivocally taken responsibility for his misconduct, nor demonstrated sufficient remedial measures to ensure such conduct will not happen again, would send a message to all that, so long as one completes a mandatory class or two per year, there will be few consequences to diverting controlled substances.

C. Egregiousness

Finally, this tribunal finds that Dr. Owusu's behavior was egregious. Dr. Owusu conducted a transaction that differs in no material respect from a drug deal. He sold multiple

prescriptions for powerful controlled substances at night, in a parking lot, in a manner designed to avoid detection. Both then and now, Respondent has responded with calculated, inconsistent statements designed to escape culpability. In *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006), the Supreme Court made clear that DEA has authority under the Controlled Substances Act to bar illicit drug dealing and trafficking as traditionally understood. Respondent, in this case, engaged in conduct that constitutes drug trafficking as traditionally understood, and, accordingly, the appropriate sanction is denial of his application for a DEA registration.

Accordingly, it is herein respectfully recommended that Respondent's application for a DEA registration be denied.

Dated: April 9, 2021.
Teresa A. Wallbaum,
Administrative Law Judge.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f), I hereby deny the pending application for a Certificate of Registration, Control Number W19061136C, submitted by Stephen E. Owusu, D.P.M., as well as any other pending application of Stephen E. Owusu, D.P.M., for additional registration in New York. This Order is effective February 22, 2022.

Anne Milgram,
Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 22-1]

Alex E. Torres, M.D.; Decision and Order

On August 11, 2021, the Acting Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (hereinafter, OSC) to Alex E. Torres, M.D. (hereinafter, Respondent) of San Diego, California. OSC, at 1 and 3. The OSC proposed the revocation of Respondent's Certificate of Registration No. BT1734943. *Id.* at 1. It alleged that Respondent is "without authority to handle controlled substances in California, the state in which [Respondent is] registered with DEA." *Id.* at 2 (citing 21 U.S.C. 824(a)(3)).

Specifically, the OSC alleged that on March 18, 2021, Respondent entered into a Stipulated Surrender of License and Order (hereinafter, Stipulated Surrender) with the Medical Board of California (hereinafter, the Board) "whereby [Respondent] agreed to surrender [his] California state medical license." *Id.* According to the OSC, Respondent agreed to the Stipulated Surrender after the Board alleged, *inter alia*, that "[Respondent] negligently treated three patients, failed to maintain adequate and accurate records, and [was] impaired due to mental illness." *Id.* The OSC stated that the Board issued its Decision adopting the Stipulated Surrender on March 22, 2021, with the Decision becoming effective on March 29, 2021. *Id.*

The OSC notified Respondent of the right to request a hearing on the allegations or to submit a written statement, while waiving the right to a hearing, the procedures for electing each option, and the consequences for failing to elect either option. *Id.* at 2-3 (citing 21 CFR 1301.43). The OSC also notified Respondent of the opportunity to submit a corrective action plan. *Id.* at 3 (citing 21 U.S.C. 824(c)(2)(C)).

By letter dated October 12, 2021, Respondent timely requested a hearing.¹ Administrative Law Judge Exhibit (hereinafter, ALJX) 4 (Request for Hearing), at 1. According to the Request for Hearing, "[Respondent] never agreed to surrender his California DEA license . . . [and] the [Board] didn't make any claim against [Respondent's] DEA license." *Id.* at 2. Further, the Request for Hearing states that "[d]uring [the Board] process [Respondent] denied the allegations against him." *Id.* According to the Request for Hearing, "[n]one of the allegations against [Respondent] were related to drug prescription [sic]" and "the patient's [sic] allegations against [Respondent] were made because he refused to prescribe them controlled pain medications." *Id.* Finally, the Request for Hearing states that, "[t]he mental illness claimed by [the Board] was refuted and proved wrong with a psychiatric evaluation performed to [Respondent] after the Board alleged [that] he was mentally ill." *Id.*

The Office of Administrative Law Judges put the matter on the docket and assigned it to Administrative Law Judge

Paul E. Soeffing (hereinafter, the ALJ). The ALJ issued the Briefing Schedule on October 13, 2021. On October 21, 2021, the Government timely filed its Notice of Filing of Evidence and Motion for Summary Disposition (hereinafter, Government's Motion). Order Granting the Government's Motion for Summary Disposition, and Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge (hereinafter, Recommended Decision or RD), at 2. In its Motion, the Government "request[ed] summary disposition and a recommendation that Respondent's DEA Certificate of Registration as a practitioner be revoked based on his lack of authority to handle controlled substances in the State of California, the state in which he is registered with the DEA." Government's Motion, at 5. Respondent did not answer the Government's Motion.² He did, however, address the OSC and the Government's allegations in his Request for Hearing. Request for Hearing, at 1-2. I have reviewed and considered the Request for Hearing as part of, and along with, the entire record before me.

The ALJ issued his Recommended Decision on November 2, 2021, granting the Government's Motion and finding that "[a]s the Respondent does not have authority as a practitioner in California, there is no other fact of consequence for [the] tribunal to decide in order to determine whether or not he is entitled to hold a [DEA registration]." RD, at 6. Further, the ALJ recommended that Respondent's DEA registration be revoked and that any application to renew or modify his registration and any applications for any other DEA registrations in California be denied "based on [Respondent's] lack of state authority to practice medicine or handle controlled substances in California." *Id.* at 6-7. By letter dated November 29, 2021, the ALJ certified and transmitted the record to me for final Agency action. In the letter, the ALJ advised that no exceptions were filed by either party. Transmittal Letter, at 1.

I issue this Decision and Order based on the entire record before me. 21 CFR 1301.43(e). I make the following findings of fact.

¹ The Request for Hearing was filed on October 13, 2021. Order for Evidence of Lack of State Authority and Directing the Government to File Evidence Regarding the Service of the Order to Show Cause (hereinafter, Briefing Schedule), at 1. I find that the Government's service of the OSC was adequate and that the Request for Hearing was timely filed on October 13, 2021. *See* RD, at n.1.

² I find that the Office of Administrative Law Judges properly served Respondent on all occasions. The Certificate of Service for the Government's Motion certifies that the Government served Respondent's counsel at the email address provided in Respondent's Request for Hearing. Request for Hearing, at 1-2.