The ALJ found that ''respondent took prompt action to remedy'' the labeling violations, that he ''implemented new security procedures'' and that ''he also began a procedure whereby he kept a daily running inventory log of his controlled substances on hand.'' R.D. at 23. She also found that ''Respondent credibly expressed his remorse for his past misconduct.'' *Id.*

Yet the ALJ also found that ''the record demonstrates that he was never able to dispense controlled substances and remain in compliance with the Board's and the DEA's regulations.'' *Id.* Remarkably, the ALJ then concluded that ''Respondent has sustained his burden to accept responsibility for his past misconduct and has successfully demonstrated that he will not engage in future misconduct related to his handling of controlled substances.'' *Id.* at 24. While characterizing Respondent's various violations as ''mistakes in his dispensing of controlled substances,'' which she nonetheless deemed to be sufficiently ''egregious'' to warrant placing restrictions on his registration, the ALJ concluded ''that the outright denial of his application is too severe a resolution.'' *Id.* She therefore recommended that I grant Respondent a restricted registration, pursuant to which he would be authorized only to prescribe controlled substances. *Id.*

I reject the ALJ's recommended sanction, because even assuming, without deciding, that Respondent has credibly accepted responsibility for his misconduct, this is a case where actions speak louder than words. Indeed, as the ALJ herself noted, ''the record demonstrates that [Respondent] *was never able to dispense controlled substances and remain in compliance with the Board's and [this Agency's] regulations.*'' R.D. at 23 (emphasis added). As the Seventh Circuit has noted, ''past performance is the best predictor of future performance,'' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d at 452, and the evidence here shows that even when Respondent was provided information—on the proverbial silver platter—as to how to comply with various state requirements (*i.e.,* by not allowing unlicensed employees to dispense, by correcting all improperly labeled controlled-substance vials, by properly securing controlled substances, and by maintaining a daily inventory log which listed the drugs by their strengths), he still frequently failed to comply. Moreover, even when he did eventually start maintaining a daily inventory log which listed each drug by its strength, the DI found major discrepancies between the amounts which the logs stated as his inventories and the actual amounts Respondent had on hand.

Most significantly, the DI's audit found that Respondent had shortages of 40,000 dosage units over a six-month period. While there is no evidence in the record that the controlled substances were being diverted, as the ALJ also noted, Respondent's ''inability to account for this significant number of dosage units creates a grave risk of diversion.'' R.D. at 21. And even if the shortages are only attributable to Respondent's poor recordkeeping, '' '[r]ecordkeeping is one of the CSA's central features; a registrant's accurate and diligent adherence to this obligation is absolutely essential to protect against the diversion of controlled substances.' '' *Ideal Pharmacy Care, Inc., d/b/a Esplanade Pharmacy,* 76 FR 51415, 51416 (2011) (quoting *Paul H. Volkman,* 73 FR 30630, 30644 (2008)).

These shortages are substantial and reflect a massive failure on Respondent's part to comply with the CSA's requirements that he maintain complete and accurate records of the controlled substances he received and dispensed in his practice. *See* 21 U.S.C. 827(a). And while Respondent maintained that ''it is very difficult'' for him to understand the various statutes, the CSA's recordkeeping provisions clearly provided Respondent with fair notice that he was required to maintain complete and accurate records of the controlled substances he handled. *See id.* Indeed, no court has ever held that the CSA's recordkeeping provisions fail to provide clear notice as to what records must be maintained and that those records must be complete and accurate.

Thus, while Respondent testified that this proceeding had been ''a very humbling experience'' and promised he was ''going to commit myself to a better process,'' that he was ''uninformed'' about the rules but that he was at fault, and that he would ''take every measure to make sure [he is] in compliance'' with the MBC's and DEA's rules, this is a refrain which he previously sung for the MBC's Investigators. *See* Tr. 584–85, 592; *see also* GX 3, at 4 & 6 (agreeing to comply with the terms of the MBC's 2003 Order, including that he ''obey all federal, state and local laws, [and] all rules governing the practice of medicine in California''); GX 8, at 6 & 10 (May 2011 order).[41] And when asked if he had taken any courses on the proper handling of controlled substances, Respondent answered that he had not because ''it was not required.'' Tr. 796–97.

Accordingly, notwithstanding his expressions of remorse, I conclude that Respondent's record of substantial non-compliance with both State and Federal laws and regulations related to the dispensing of controlled substances, (along with his failure to take any courses on the handling of controlled substances) leaves me with no confidence that he will responsibly handle controlled substances in the future. *See ALRA Labs,* 54 F.3d at 452. As for the ALJ's recommended sanction that I grant Respondent a registration which restricts his activities to prescribing, while there is no evidence establishing that Respondent issued prescriptions which violated 21 CFR 1306.04(a), his conduct is sufficiently egregious as to warrant the outright denial of his applications. Moreover, the ALJ's recommendation fails to consider the Agency's need to deter similar misconduct on the part of other registrants. Accordingly, I reject the ALJ's recommended sanction and will deny Respondent's applications.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b), I order that the applications of Fred Samimi, M.D., for DEA Certificates of Registration as a practitioner be, and they hereby are, denied. This Order is effective immediately.

Dated: March 25, 2014.

Michele M. Leonhart,

Administrator.

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of factors four and five suggest that these factors are not limited to assessing the applicant's compliance with applicable laws and whether he has engaged in ''such other conduct,'' but rather authorizes the Agency to also consider the effect of a sanction on inducing compliance with federal law by other practitioners.

[41] While the MBC did not adopt the Stipulated Settlement and Disciplinary Order until April 8, 2011, notably, Respondent agreed to the Order's terms and conditions on December 10, 2010. GX 8, at 1 & 10. Yet as found during the May 2011 DEA Inspection, Respondent was still failing to comply with the State's recordkeeping rules.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 13–14]

Mark P. Koch, D.O.; Decision and Order

On July 18, 2013, Administrative Law Judge Gail A. Randall issued the attached Recommended Decision (R.D.). Therein, the ALJ found that while Respondent had previously abused

cocaine, he had successfully demonstrated his sobriety since 2005. R.D. at 60, 62. However, the ALJ also found that Respondent had been convicted of conspiring to dispense, and possess with intent to distribute and dispense, testosterone and primobolan depot, which are schedule III controlled substances, in violation of 21 U.S.C. 846, *id.* at 29–30, and that his conviction ''strongly supports a finding that continuing his registration and granting his renewal applications would be inconsistent with the public interest.'' *Id.* at 57.

The ALJ further found that Respondent ''failed to testify credibly about his handling of anabolic steroids,'' that he ''blamed his ex-wife for [the] conduct to which he pled guilty, thereby undermining the circumstances where he had had actually accepted responsibility for his actions,'' as well as ''demonstrate[d] a lack of candor.'' *Id.* at 62. The ALJ also found that while ''Respondent has been granted numerous opportunities to act as a responsible DEA registrant [he] has failed each time'' and that he ''has not shown that he has learned from his past mistakes in a way that will prevent future misconduct.'' *Id.* at 64. The ALJ thus concluded that Respondent's registration is inconsistent with the public interest and recommended that I revoke his existing registrations and deny his renewal application. *Id.* at 65.

Respondent filed exceptions to the Recommended Decision. Having reviewed the record in its entirety, I reject the ALJ's conclusion that Respondent violated federal law because he was not registered at his principal place of professional practice in Minnesota as unsupported by substantial evidence. *See* R.D. at 53. While I also reject the ALJ's legal conclusion that a registrant is not required to notify the Agency if he changes the address of his principal place of professional practice, I find that there is insufficient evidence to prove a violation. *See id.* at 52. I also find several of Respondent's exceptions to be well taken. However, I nonetheless conclude that the ALJ's ultimate finding that Respondent's registration is inconsistent with the public interest is supported by substantial evidence.

Accordingly, I will adopt the ALJ's recommended order. Before proceeding to discuss Respondent's exceptions, I will address the ALJ's conclusions regarding Respondent's Minnesota registration.

On cross-examination of Respondent, the Government raised for the first time the issue of whether he violated DEA regulations because he was not practicing at the address which was his registered location in Minnesota.[1] Tr. 187. According to Respondent, the address he listed was a location of the company he worked for as a *locum tenens* practitioner, but he was not practicing at this address. *Id.* When asked whether any mail that was sent to this address would be given to him, Respondent initially answered ''yes'' but then added that his mailing address for this registration was in Alabama. *Id.* Moreover, when questioned by the ALJ as to whether the Minnesota Board had placed any restrictions on his medical license, Respondent testified that he had listed his ''practice address with'' the Board and that ''the lion share of [his] work'' was at an emergency room in Thief Rivers Fall, Minnesota. Tr. 200.

In its rebuttal case, and over the objection of Respondent who claimed inadequate foundation but not a lack of notice, the Government, through the testimony of a DI, was allowed to admit into evidence an envelope which was mailed to him from the DEA Office of Chief Counsel and addressed to Respondent at his Minnesota registered location. *See* GX 44. The mailing was returned unclaimed and marked: ''UNDELIVERABLE AS ADDRESSED FORWARDING ORDER EXPIRED'' and ''RETURN TO SENDER UNABLE TO FORWARD.'' *Id.*[2] Subsequently, the ALJ found that ''Respondent was not registered at his principal place of business while working in a *locum tenens* capacity in Minnesota, in violation of 21 CFR 1301.12.'' R.D. at 53.

Under 21 U.S.C. 822(e), ''[a] separate registration [is] required at each principal place of business or professional practice *where the applicant . . . dispenses controlled substances.*'' (emphasis added). But while it may seem obvious that an emergency room physician would have dispensed controlled substances in the course of his employment, the Government never asked Respondent if he dispensed controlled substances at any of the emergency rooms he worked at in Minnesota, nor produced any other evidence to show that he did.[3] Because there is no evidence in the record that Respondent dispensed controlled substances in Minnesota, and the registration requirement only applies to a ''principal place of . . . professional practice where the applicant . . . dispenses controlled substances,'' I reject the ALJ's finding as unsupported by substantial evidence.

In her discussion of the registration requirements, the ALJ also rejected the Government's contention that ''Respondent violated a duty to notify DEA of a change in his registered address[,]'' reasoning that ''no such duty exits under the statute or regulations.'' *Id.* While I agree that the Government did not establish a violation, I reject the ALJ's reasoning that there is no such duty under federal law.

In reaching her conclusion, the ALJ relied entirely on 21 CFR 1301.51 and reasoned that the Agency's ''regulations do not explicitly define a registrant's duty to notify the DEA of a change in address.'' R.D. at 52. This regulation provides that ''[a]ny registrant may apply to modify his/her registration . . . or change his/her name or address, by submitting a letter of request to the'' Agency. 21 CFR 1301.51. Reasoning that if the Agency ''wanted to create a responsibility to notify the agency of a change in address, it could have used 'shall' instead of 'may' in the regulation,'' the ALJ concluded that the regulation does not create ''an affirmative responsibility . . . to provide such notice.'' R.D. at 52.

The ALJ did not, however, acknowledge 21 U.S.C. 827(g), which provides that ''[e]very registrant under this subchapter *shall be required to report any change of professional or business address* in such manner as the Attorney General shall by regulation require.'' (emphasis added). Thus, the CSA itself imposes a mandatory duty on the part of a registrant to report to DEA that he has changed his registered address.

Moreover, in *Anthony E. Wicks,* 78 FR 62676 (2013), the Agency held that ''[b]ecause section 827(g) clearly creates a substantive obligation on the part of a registrant to notify the Agency if he changes his professional address, the regulation's use of the words 'may apply to modify' cannot alter (and cannot reasonably be read as altering) the binding nature of a registrant's

[1] The Government did not allege a violation of the registration provisions in the Show Cause Order, nor raised the issue in either of its pre-hearing statements. Indeed, it did not even raise the issue in its case in chief and Respondent did not open the door during his testimony on direct examination. I need not decide, however, whether the issue was litigated by consent because I find that the Government failed to prove an element of the violation.

[2] While I conclude that the Government did not lay an adequate foundation to admit the document, I conclude that the error was not prejudicial because Respondent's testimony established that he was not practicing at his registered location in Minnesota.

[3] While the director of the emergency room at one of the Minnesota hospitals where Respondent worked testified that he and the nursing staff had not had any problems with Respondent's prescriptions, the Government did not clarify whether his prescriptions included controlled substances. Tr. 115.

obligation to notify the Agency.'' *Id.* at 62678; *cf. Chevron, U.S.A., Inc.* v. *NRDC,* 467 U.S. 837, 842–43 & n.9 (1984); *United States* v. *Rodgers,* 461 U.S. 677, 706 (1983) (while ''[t]he word 'may' . . . usually implies some degree of discretion,'' this meaning ''can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute'') (other citations omitted); *see also United States* v. *Marte,* 356 F.3d 1336, 1341 (11th Cir. 2004) (''When a regulation implements a statute, the regulation must be construed in light of the statute[.]'') (citation omitted).

In *Wicks,* the Agency also noted that the regulation further provides that a modification is ''handled in the same manner as an application for registration,'' 78 FR at 62678, and under another DEA regulation, a registrant may ''not engage in any activity for which registration is required until the application . . . is granted and a . . .[r]egistration is issued.'' 21 CFR 1301.13(a). Thus, in *Wicks,* the Agency held that notwithstanding its use of the words ''may apply to modify his/her registration,'' the regulation is properly construed as imposing on a registrant who changes his professional address, the binding obligation to both: (1) notify the Agency of an address change, and (2) refrain from dispensing activities at his new address until his request is approved.[4] *Id.*

To make clear to the regulated community, I reject the ALJ's reasoning that a registrant has no duty ''under the statute or regulations'' to notify the Agency that he has changed his registered address. Rather, that duty is imposed by 21 U.S.C. 827(g). However, because there is no evidence that Respondent dispensed any controlled substance while working in Minnesota, I do not find a violation proved on this record.

Respondent's Exceptions

Exception 1

Respondent argues that the ALJ's reference to count II of the indictment filed against him should not have been given any weight in the Recommended Decision because the count was dismissed. Exceptions, at 2–3. I reject the exception because while, in her factual findings, the ALJ discussed both counts of the indictment, she also acknowledged that count II was dismissed, and in her discussion of the public interest factors, the ALJ relied only on the count to which he pled guilty. Thus, the ALJ did not give any weight to the dismissed count in concluding that Respondent's registration is inconsistent with the public interest. I therefore reject the exception.

Exception 2

Next, Respondent argues that the ALJ allowed the Government ''to relitigate [his] guilty plea while [he] was not allowed to provide an accounting of the circumstances related to it and the actions leading to said plea, which would have been favorable toward'' him. Exceptions, at 3 (citing Tr. 176–78). This exception is frivolous, as the record clearly shows that Respondent, on direct examination by his counsel, was allowed to testify extensively regarding the circumstances surrounding his guilty plea:

> Resp. Counsel: Did you enter a guilty plea in the Lower District of Alabama to one count of conspiracy to possess and intent to distribute anabolic steroids?
>
> Resp: Yes.
>
> Resp. Counsel: Tell the Court what your involvement was as far as any purchase that was made.
>
> Resp: My wife was going up to north Alabama to purchase steroids for herself and apparently for two other people. And my involvement was to buy some Viagra and Cialis.
>
> Resp. Counsel: Were you aware that she was purchasing steroids in north Alabama?
>
> Resp: Yes, I was aware of it.
>
> Resp. Counsel: Where is your wife originally—excuse me, your former wife originally from?
>
> Resp: From north Alabama.
>
> Resp. Counsel: Do you have knowledge whether—personal knowledge yourself as to whether or not your wife—how she knew these individuals?
>
> Resp: It was actually a friend of my wife's.

Tr. 126–27.[5]

Still later in his testimony, Respondent was allowed to provide an even more extensive explanation of the events which led to the indictment and his conviction. *See id.* at 194–97.[6] This concluded with Respondent providing the following testimony:

> I definitely used poor judgment and I accept responsibility for that and that's why I pled guilty. But as far as using them [steroids] or soliciting them, I did not do that. But I am guilty of giving her [his estranged wife] money to buy Cialis and did know about it.

Id. at 197.

Thus, contrary to Respondent's contention, he was allowed ''to provide an accounting of the circumstances related to'' his guilty plea. However, for reasons more fully below, I agree with the ALJ's finding that that Respondent's testimony regarding his role in the conspiracy was disingenuous, *see* R.D. at 62, and that he ''has not taken full responsibility for his mistakes and genuinely expressed remorse.'' *Id.* at 65. Indeed, Respondent's testimony suggests that he is only remorseful for having been caught.

Exceptions 3 & 4

Next, Respondent takes exception to the ALJ's finding that he lacked candor when he testified that ''he had never missed a random drug screening.'' Exceptions, at 4 (citing R.D. at 11 (citing Tr.122 & 138)). More specifically, the ALJ found: ''He testified that he had never missed a random drug screening. This testimony, however, was squarely refuted by Respondent's drug-testing results, which showed he missed twelve drug tests from July 2002 to February 2005.'' R.D. at 11 (citing Tr. 122 & 138; GX 17, at 53–55).

Respondent contends that the ALJ took his testimony out of context because he was questioned only about his participation in the Alabama Physicians Health Program, which he entered on May 12, 2005 after undergoing inpatient treatment at Talbot Recovery Center. Exceptions, at 4. Respondent further challenges the ALJ's findings as to the number of drug tests he missed, arguing that ''[a] closer look at the documentary evidence . . . shows that while he missed some 'check-in' calls with the Pennsylvania PHP, *he only missed six scheduled screenings, all of which were set during his stay at Talbot.*'' *Id.* (citing GX 17, at 46, 52–56).

As for the latter contention, the evidence showed that Respondent was treated at Talbot from February 1, 2005

[4] *Wicks* did not, however, raise the question of whether a practitioner could prescribe at his new address if he was otherwise registered in the same State. *See* 78 FR at 62676–78; *see also* 21 CFR 1301.12(a)(3).

[5] As for Respondent's assertion that ''testimony was taken regarding the plea, at length, from Government witnesses,'' Exceptions, at 3 (citing Tr. 82–84); the cited testimony was provided by a Diversion Investigator who simply explained that after receiving notification from the Alabama State Board of Medical Examiners that it had suspended Respondent's medical license, he determined that Respondent ''had pled guilty to a criminal case involving anabolic steroids and had been sentenced . . . to five years probation and a $10,000 fine,'' that the plea had been ''to conspiracy to obtain and distribute anabolic steroids,'' and that Respondent ''was supposed to be self-using the anabolic steroids.'' Tr. 82–84.

[6] During this portion of his testimony, Respondent claimed that: (1) His ''wife had been on steroids for the past six years'' because she is ''a fitness buff''; (2) that he had never actually spoken with any of the three indicted co-conspirators (whether the person who sold the steroids to him or the two persons he was selling them to); (3) that he gave his ex-wife money to buy only Viagra and Cialis; and (4) that because he ''knew what [his estranged wife] was doing,'' his lawyer advised him that ''he thought that I was guilty.'' Tr. 194–96.

through approximately May 10, 2005. Tr. 121–22. While it is true that the evidence does not support the ALJ's finding as to the number of missed drugs tests, the evidence nonetheless shows that Respondent missed scheduled tests on January 1, 2003 and August 13, 2004, well before he entered Talbot. In addition, the evidence shows that Respondent missed eleven calls before he entered Talbot, as well as eight calls after May 10, 2005, including six calls after he entered the Alabama Physicians Health Program. *See* GX 17.

However, a review of the record supports Respondent's contention that when he denied missing tests, he was being questioned only about his participation in the Alabama Physicians Health Program. *See* Tr. 122–23; 136–38. Accordingly, I reject the ALJ's finding that Respondent lacked candor when he testified that he had never missed a random drug screening.

Respondent also takes exception to the ALJ's finding that ''Respondent failed to show genuine remorse for'' his abuse of both cocaine and alcohol, that this could ''have had very devastating personal and professional consequences,'' and that ''his conduct and lack of remorse weighs against [his] maintenance of a DEA registration.'' [7] Exceptions, at 6 (quoting R.D. at 60). Respondent then contends that ''[h]is 'history' of drug use prior to the summer of 2005 was held against him while little, if any, credit was given for his eight years of total sobriety.'' *Id.*

I need not decide whether Respondent's more recent period of sobriety outweighs his years of substance abuse, nor whether to adopt the ALJ's finding that Respondent lacked remorse with respect to his substance abuse, because I reject Respondent's exceptions to the ALJ's findings regarding his conviction on the conspiracy charge. I further hold that this conviction provides reason alone to revoke his registration given the recentness of his misconduct and Respondent's utterly disingenuous attempt to blame his wife for it.

In his exceptions, Respondent contends that ''*every fact entered into evidence supports*'' his statement ''that the criminal charge against him never would have occurred if not for his estranged wife.'' Exceptions, at 6. He then sets forth a litany of assertions to the effect that he was set up by his ex-wife and that the FBI's investigation was inadequate because it failed to drug test his estranged wife to determine if she was the one who was actually using the steroids.[8] *Id.* at 7.

The evidence showed that Respondent pled guilty to count one of the indictment, which alleged that he conspired with at least two other persons, to dispense and possess with intent to distribute and dispense, testosterone and primobolan depot, which are schedule III controlled substances and anabolic steroids. GX 23, at 1; *see also* GX 26, at 1 (Judgment). Moreover, count one alleged that the conspiracy began ''on or about August 2005 and continu[ed] through on or about July 8, 2011.'' GX 23, at 1. Also, in the factual resume, which was incorporated into the plea agreement, *see* GX 25, at 3, Respondent admitted to the allegations of count one, as well as that he that he ''purchased, consumed,[9] and trafficked anabolic steroids.'' *Id.* at 14. He also admitted that ''[o]n or about June 24, 2011, a recording showed him ''discussing the pending purchase of anabolic steroids from'' a co-defendant by a cooperating source; that ''[o]n or about June 28, 2011, the cooperating individual traveled'' to the co-defendant and purchased various ''forms of anabolic steroids''; and that ''the cooperating individual paid [the codefendant] approximately $2000 which was given to'' the cooperating individual by Respondent and two other co-defendants ''to purchase the steroids.'' *Id.* at 15.

As for the contention that ''that the criminal charge against him never would have occurred if not for his estranged wife,'' it may be true that absent his estranged wife's involvement, Respondent's criminal conduct would not have come to the attention of the FBI. However, Respondent cannot claim entrapment given that he pled guilty to participating in a conspiracy to possess with intent to distribute and to distribute anabolic steroids, which, at the time of his arrest, had been ongoing for six years. *See Jacobson* v. *United States,* 503 U.S. 540, 548–49 (1992).

Moreover, the record also includes the sworn affidavit of the FBI Special Agent who conducted the investigation which led to Respondent's indictment and conviction. Therein, the Agent stated that recordings (which were done on June 24, 2011) of Respondent showed him ''discuss[ing] the pending purchase of anabolic steroids from'' a supplier in North Alabama, as well as ''the amounts of money [two of the co-conspirators] owe him for their steroids.'' GX 22, at 2. The Agent further stated that a June 24, 2011 consensual video recording ''showed [Respondent] opening a portable safe and removing a vial of liquid which resembled vials of the anabolic steroids, which were subsequently sold to him by a co-conspirator four days later, and that Respondent ''injected the anabolic steroids into his person.'' *Id.* at 3. While in his testimony Respondent asserted that his ''involvement'' was limited to buying Viagra and Cialis, I find the Agent's statements to be sufficiently reliable to constitute substantial evidence.[10] *See, e.g., J.A.M. Builders* v. *Herman,* 233 F.3d 1350, 1354 (11th Cir. 2000); *Hoska* v. *United States Dep't of the Army,* 677 F.2d 131, 138–39 (D.C. Cir. 1982).

Accordingly, consistent with his guilty plea, I conclude that Respondent's involvement in the conspiracy included purchasing anabolic steroids and distributing them to others. As did the ALJ, I also find incredible Respondent's testimony that his involvement in the conspiracy was limited to buying the aforesaid non-

[7] Prior to stating her finding that Respondent failed to show genuine remorse, the ALJ explained that:

Here, Respondent credibly testified that he struggled with his addiction from 1985 to 2005. Respondent openly admitted that he abused both drugs and alcohol, during this time period. Respondent said he used cocaine several times a year while on vacation in the Caribbean. He also used to drink alcohol three times a week, consuming up to eight to ten cans of beers each episode.

R.D. at 60.

[8] There is no support in the record for this assertion, and in any event, Respondent's admissions in the factual resume establish that the assertion is frivolous.

[9] The ALJ found that while there was ''some evidence that Respondent consumed anabolic steroids,'' the Government did not prove his ''consumption was *unlawful''* because the indictment did not mention his ''unlawful consumption'' and did not cite ''a specific statute that Respondent had violated by such consumption.'' R.D. at 51. The ALJ's reasoning ignores that Respondent's admission was part of the ''offense conduct'' described in the factual resume. *See* GX 25, at 14. In addition, while consuming a controlled substance is not itself an offense under the CSA, the simple knowing possession of a controlled substance is an offense even in the absence of intent to distribute, *see* 21 U.S.C. 844(a), and generally, one cannot consume a controlled substance without first possessing it.

Furthermore, Respondent offered no evidence that he obtained the steroids either ''directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice,'' or in a manner ''otherwise authorized by'' the CSA (*i.e.,* by purchasing them from a registered distributor for dispensing in the course of his professional practice). *Id.; see also* 21 U.S.C. 885 (providing that the Government is not required ''to negative any exemption or exceptions set forth in [the CSA] in any . . . pleading or in any . . . hearing, or other proceeding under'' the CSA).

[10] In concluding that the FBI Agent's statements are reliable notwithstanding that they are hearsay, I note that the statements were sworn and disclosed to Respondent in advance of the hearing, that the Agent was available to testify (in fact, he was even called as a witness), and that they were corroborated to some degree by Respondent's admissions as set forth in the factual resume which was incorporated into the plea agreement.

controlled drugs and conclude that he does not accept responsibility for his misconduct.[11] I therefore reject Respondent's exception that the ALJ failed to properly weigh the evidence.

Exception 5

Respondent also takes exception to the ALJ's finding that he violated the terms of the 2003 Memorandum of Agreement (MOA) he entered into with DEA, pursuant to which he was granted a new registration. Exceptions, at 10. According to Respondent, the ALJ erred in finding that he failed to comply with the MOA when she observed that he ''credibly testified that he failed to meet the restrictions concerning the purchasing of controlled substances and the prescribing, dispensing, and administering of controlled substances to family members.'' *Id.* (quoting R.D. at 48–49).

It is true (as Respondent argues) that there is no evidence that he violated the MOA provision that he ''not prescribe, dispense, or administer controlled substances to any relative.'' GX 9, at 2. However, the MOA also required that he ''obey all federal and state laws concerning controlled substances,'' as well as that he ''not possess any controlled substances not prescribed for him for a legitimate medical condition by a physician or other health care professional other'' than himself. *Id.* at 1. Moreover, the evidence also showed (and it is undisputed) that on December 21, 2004, Respondent was subjected to a drug test and tested positive for cocaine.[12] GX 13, at 1; GX 17, at 53. Thus, while the ALJ erred in referring to the MOA's provision which prohibited him from dispensing to his relatives, her finding that Respondent tested positive for cocaine when the MOA was in effect, *see* R.D. at 49, establishes that he violated the MOA, as well as the CSA,[13] and the order of the Pennsylvania Board. Thus, the ALJ's error was not prejudicial.

Exception 6

Next, Respondent argues that the ALJ erred because he was not ''allowed to discuss and/or explain his understanding of the plea agreement regarding steroid use and [sic] his testimony regarding steroid use.'' Exceptions, at 11. Respondent asserts that while he ''understood that there was a statement in his written plea agreement that he had use steroids, but since his steroid use was prior to his treatment at Talbot Recovery in 2005, and the plea he entered was only to Count I,'' the other count being dismissed, he entered the plea. *Id.* Respondent also asserts that the ALJ improperly allowed the FBI Agent to testify that he (Respondent) ''was supposed to be self-using the anabolic steroids.'' *Id.* (citing Tr. 84).[14] Respondent argues that this was a violation of the ALJ's pre-hearing ruling that the factual circumstances surrounding his guilty plea were not subject to relitigation in this proceeding and that the plea and plea agreement ''speak for themselves.'' *Id.* Finally, Respondent asserts that ''[t]here is nothing to show that Respondent used steroids since his treatment in 2005.'' *Id.*

As for Respondent's understanding of the plea agreement, Respondent signed the factual resume in which he ''admit[ted] in open court and under oath'' that the statement that he ''purchased, consumed, and trafficked anabolic steroids'' was ''true and correct and constitute[d] evidence in the case.'' GX 25, at 14. Moreover, in the plea agreement, Respondent acknowledged that he had ''discussed the facts of the case with his attorney, and [that] his attorney has explained to [him] the essential legal elements of the . . . charges which ha[d] been brought against him.'' *Id.* at 2.

Moreover, upon signing the plea agreement, Respondent ''stipulate[d] that the Factual Resume, incorporated herein, is true and accurate in every respect, and that had the matter proceeded to trial, the United States could have proved the same beyond a reasonable doubt.'' *Id.* at 13. He also stated that he understood the agreement and he had ''voluntarily agree[d] to it.'' *Id.* Finally, the plea agreement provided that it ''is the complete statement of the agreement between the defendant and the United States and may not be altered unless done so in writing and signed by all the parties.'' *Id.* at 12. Accordingly, the ALJ properly ruled that the plea agreement spoke for itself and that Respondent could not testify as to his understanding of it. However, as explained previously, Respondent was allowed to testify regarding the events which led to his arrest, the indictment, and conviction.

As for Respondent's contention that the ALJ improperly allowed the testimony that he ''was supposed to be self-using the anabolic steroids,'' Respondent's counsel did not object to the testimony. Tr. 84. Accordingly, I hold that Respondent has waived his objection.

Finally, Respondent contends that there is no evidence to show that he has used steroids since he completed inpatient treatment in 2005. Indeed, at the hearing, he repeatedly denied that he had purchased, consumed and trafficked in anabolic steroids. Tr. 178. However, Respondent admitted to the contrary when he ''stipulate[d] that the Factual Resume . . . is true and accurate in every respect'' and that Government ''could have proved the same beyond a reasonable doubt'' had he gone to trial. GX 25, at 13. By itself, Respondent's admission in the plea agreement provides sufficient evidence to find his denial of having used steroids incredible. Moreover, as explained previously, as ultimate factfinder, I find that the FBI Agent's affidavit is sufficiently reliable to constitute substantial evidence which further supports a finding that Respondent engaged in all three actions as set forth in the factual resume. Thus, I also reject Respondent's contention that there is no evidence that he has ''used steroids since his treatment in 2005.'' Exceptions, at 11.

Exception 7

Next, Respondent takes exception to the ALJ finding, *sua sponte,* ''that Respondent should have notified the DEA when he decided in 2004 that he no longer had any intention of practicing medicine in Alabama.'' R.D. at 55 (quoted in Exceptions, at 11–12). As support for her finding, the ALJ

[11] As noted in his Exceptions, Respondent asserts that he accepted responsibility for his criminal conduct when testified that ''I used very poor judgment and I accepted responsibility—I knew my wife was doing something illegal and I should not have gotten involved with it.'' Exceptions, at 6–7 (quoting Tr. 140). However, given that Respondent pled guilty to participating in a criminal conspiracy that went on for six years, and that the reliable evidence shows that he was engaged in the distribution of anabolic steroids, his testimony suggests that what he regrets is not his criminal conduct but having gotten caught.

[12] While cocaine has recognized medical uses, Respondent does not maintain that he used cocaine in the course of receiving medical treatment. Moreover, in his testimony, he admitted that he did not ''stay away from illegal drugs'' and failed to abide by the MOA. Tr. 161.

[13] While the ALJ found that Respondent's use of cocaine violated Alabama law, it is unclear where he was located when he used the cocaine that gave rise to the positive drug test in December 2004. Nor, given that this use of cocaine violated the CSA, is it necessary to determine what State he was in when he used cocaine.

[14] Notably, the testimony cited by Respondent was given by a DEA Investigator who merely discussed the scope of the investigation he conducted upon being notified that the Alabama Board of Medical Examiners had suspended his medical license. *See* Tr. 82–86. While the FBI Agent also testified for the Government, he was not asked a single question about the steroid investigation, his testimony being limited to an allegation that Respondent had traded controlled substance prescriptions for sex or cash and was apparently doing so at the time he was arrested. *Id.* at 100, 104–05. Upon the objection of Respondent's counsel, the ALJ barred this testimony because the Agent did not personally observe the alleged acts and because it was ''uncharged misconduct.'' *Id.* at 105.

relied on Respondent's testimony that ''in 2004 he notified both his attorney and the Alabama [Board] that he would not pursue'' the reinstatement of his medical license, and the Board then ''rescinded its offer to reinstate his'' license. *Id.* The ALJ thus found that because Respondent ''expressed a clear intent to cease professional practice,'' under DEA's regulations, he had ''the duty to notify'' the Agency of this. *Id.* (citing 21 CFR 1301.52(a)).

Respondent contends, however, that at the time he informed the Alabama Board that he did not intend to pursue reinstatement, he was not then registered in Alabama. Exceptions, at 12. On this issue, the evidence is limited to a Certification of Registration History, which was submitted by the Chief of DEA's Registration and Program Support Section, and which sets forth, *inter alia,* the date Respondent was assigned a DEA registration, as well as the dates and addresses for various changes of his registered location. *See* GX 33.

Relevant here, the Certification lists an address change on January 27, 1994 from one location to another in Russellville, Alabama and an address change on November 16, 2005 from a location in Erie, Pennsylvania [15] to a location in Jacobus, Pennsylvania. *Id.* at 1. Notably, the Certification contains no information as to when Respondent changed his registered location from Russellville, Alabama to Erie, Pennsylvania. *See id.* Moreover, Respondent testified that he switched his registration back to Pennsylvania in either 1997 or 2000, *see* Tr. 155–56, and the 2003 Memorandum of Agreement was issued by the DEA Pittsburgh Office and was addressed to Respondent at an address in Erie, thus suggesting that he was then registered in Pennsylvania. There being no evidence that Respondent changed his registered location to a place in Alabama between the time he entered the Memorandum of Agreement and the 2005 address change, I find Respondent's exception well taken.

Thus, I reject the ALJ's finding that Respondent had a duty to notify DEA when, in 2004, he decided not to pursue the reinstatement of his Alabama medical license. However, given the evidence of Respondent's criminal conduct and his failure to accept responsibility for it, I conclude that the ALJ's error was not prejudicial.

[15] While the certification does not list the State that Erie is located in, using the Web site of the U.S. Postal Service, I have taken official notice that the listed zip code of 16504 is for Erie, Pennsylvania.

Exception 8

Finally, Respondent takes exception to the ALJ's conclusions that ''Respondent has been granted numerous opportunities to act as a responsible DEA registrant and has failed each time'' and that there are no ''conditions that could be placed on [his] registration . . . that would ensure that [he] would be a responsible DEA registrant.'' Exceptions, at 12. While ''Respondent acknowledges [having] made several personal and professional mistakes,'' he asserts that ''since his recovery from drug and alcohol addiction . . . [he] has made every effort to remain a responsible DEA registrant.'' *Id.* He further argues that ''[d]espite his felony conviction, the State Licensing Boards of Minnesota and Alabama both agree that Respondent should be allowed to remain medically licensed in their state.'' *Id.*

I reject the exception. Even acknowledging Respondent's successful efforts to address his abuse of cocaine, the record fully supports the ALJ's conclusion that Respondent's registration is ''inconsistent with the public interest.'' 21 U.S.C. 823(f) & 824(a)(4). Contrary to Respondent's understanding of his obligations as the holder of a DEA registration, a ''responsible DEA registrant'' does not engage in criminal activity, let alone a six-year long conspiracy to distribute controlled substances. Nor does a ''responsible DEA registrant'' proceed to lie under oath in either an administrative or judicial proceeding.[16]

Here, even assuming that Respondent told the same disingenuous story regarding his involvement in the criminal conspiracy to the medical boards of Alabama and Minnesota as he told in this proceeding, their decisions to allow him to practice medicine do not persuade me that he should be allowed to retain his DEA registration. *Cf. David A. Ruben,* 78 FR 38363, 38387 n.54 (2013) (holding that while a State can adopt a policy which favors improving the performance of a physician over preventing him from practicing, Congress has directed the Agency to protect the public interest and is not bound by a State's policy). Indeed, DEA has repeatedly held that while the possession of authority to dispense controlled substances under the laws of the State in which a physician practices is a prerequisite for obtaining and maintaining a registration, ''it 'is not dispositive of the public interest inquiry.' '' *Id.* at 38379 n.35 (quoting *George Mathew,* 75 FR 66138, 66145 (2010), *pet for rev. denied, Mathew* v. *DEA,* No. 10–73480, slip. op. at 5 (9th Cir., Mar. 16, 2012) (internal quotations and other citations omitted)). Rather, the Controlled Substances Act requires the Agency to make an independent determination from that made by state officials as to whether the granting or continuation of controlled substance dispensing authority is consistent with the public interest. *Id.* at n.35; *see also Mortimer Levin,* 57 FR 8680, 8681 (1992).

Here, notwithstanding Respondent's previous issues with controlled substances, he entered into a conspiracy to violate the Controlled Substances Act and further violated the CSA by unlawfully possessing and distributing anabolic steroids. Because Congress did not limit the Agency's authority to protect the public interest to those instances in which a DEA registrant has used his registration to commit criminal acts, it is of no consequence that Respondent did not need to use his registration to acquire and distribute the steroids. *See Michael S. Moore,* 76 FR 45867, 45868 (2011) (suspending registration based on physician's manufacturing of marijuana); *Tony T. Bui,* 75 FR 49979, 49989 (2010) (revoking registration based, in part, on physician's abuse of cocaine); *David E. Trawick,* 53 FR 5326 (1988) (revoking registration based on conviction for cocaine possession; ''[a]lthough [physician's] unlawful activities relating to controlled substances occurred outside of his professional practice, the Administrator finds that such activities are of a sufficient magnitude to warrant the revocation of his'' registration).

Respondent's criminal conduct went on for six years and constitutes a felony offense. Moreover, at the hearing, he offered the disingenuous claims that he was entrapped or set up by his estranged wife and that his involvement was limited to purchasing non-controlled drugs. Accordingly, I find the ALJ's conclusion that Respondent does not accept responsibility for his criminal conduct to be supported by substantial evidence. I therefore reject Respondent's exception.

Summary

Notwithstanding my conclusion that several of Respondents' exceptions are

[16] Were it the case that Respondent told the truth in this proceeding regarding his involvement in the conspiracy—which, of course, is totally contrary to the reliable evidence—I would then have to conclude that he provided a false statement in the criminal proceeding when he ''stipulate[d] that the Factual Resume . . . is true and accurate in every respect.'' GX 25, at13. In either case, it is clear that a DEA registration cannot be entrusted to a person who views his obligation to tell the truth with such disregard.

well taken, I adopt the ALJ's findings that Respondent participated in a six-year long conspiracy to violate the CSA by purchasing and distributing anabolic steroids, that he lacked candor, and that he has not accepted responsibility for his misconduct. I further adopt the ALJ's ultimate finding that Respondent's registration is ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). Because Respondent's misconduct is egregious and he has failed to fully acknowledge his misconduct, I conclude that the issuance of a registration with conditions would not adequately protect the public interest. Accordingly, I will adopt the ALJ's recommended order.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a)(2) & (4), as well as 28 CFR 0.100(b), I order that DEA Certificates of Registration BK1391729 and FK1953327 issued to Mark P. Koch, D.O., be, and they hereby are, revoked. I further order that any application of Mark P. Koch, D.O., to renew or modify either of the above registrations, be, and it hereby is, denied. This Order is effective May 5, 2014.

Dated: March 25, 2014.

Michele M. Leonhart,

Administrator.

Theresa Krause, Esq., for the Government.

Elizabeth McAdory Borg, Esq., for the Respondent.

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

I. Introduction

Gail A. Randall, Administrative Law Judge. This proceeding is an adjudication pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.,* to determine whether the Drug Enforcement Administration (''DEA'' or ''Government'') should revoke a physician's DEA Certificates of Registration and deny any pending applications to renew or modify such registrations, pursuant to 21 U.S.C. 823(f) and 824(a)(2), (a)(4) (2011). Without his registrations, the physician, Mark P. Koch, D.O. (''Respondent'' or ''Dr. Koch''), would be unable to lawfully prescribe, dispense or otherwise handle controlled substances in the course of his medical practice.

II. Procedural Background

The Deputy Assistant Administrator of the DEA, issued an Order to Show Cause (''Order'') dated January 16, 2013, proposing to revoke two DEA Certificates of Registration (''COR''), pursuant to 21 U.S.C. 824(a)(2) and 824(a)(4), and deny any pending renewal or modification applications, pursuant to 21 U.S.C. 823(f), because the Respondent's continued registration is inconsistent with the public interest, as that term is defined in 21 U.S.C. 823(f). [Administrative Law Judge Exhibit (''ALJ Exh.'') 1, at 1].[17] The Order stated that the Respondent was registered as a practitioner in Schedules II through V, pursuant to his DEA COR No. BK1391729,[18] in Monroeville, Alabama. This registration expires by its own terms on December 31, 2014. The Respondent is also registered as a practitioner in Schedules II through V, pursuant to his DEA COR No. FK1953327,[19] in Virginia, Minnesota. This registration expired by its own terms on December 31, 2012, but the Respondent submitted a timely request to renew the registration. [*Id.* at 1].

The Order outlined the past disciplinary actions taken by the Alabama, Pennsylvania, and Minnesota medical boards, which resulted from Respondent's long history of substance abuse involving cocaine and alcohol. [*Id.* at 2]. Additionally, the Order described Respondent's Memorandum of Agreement (''MOA'') with the DEA, which he entered into on July 15, 2003. [*Id.*]. Most importantly, the Order asserted that Respondent failed to comply with federal law relating to controlled substances, as evidenced by his recent drug-related felony conviction in 2012. [*Id.*].[20]

In summary, the Deputy Assistant Administrator alleged that Respondent's conduct from September 1997 to February 2012 violated multiple state and federal laws. [*Id.*]. As a result, Respondent was given the opportunity to show cause as to why his renewal application should not be denied and why his existing registration should not be revoked on the basis of such allegations. [*Id.*]. Respondent was personally served with the Order to Show Cause on January 18, 2013. [ALJ Exh. 2].

On February 5, 2013, Respondent, through counsel, timely filed a request for a hearing in the above-captioned matter. [ALJ Exh. 3].

On May 14, 2013 through May 15, 2013, the hearing was held at the U.S. Bankruptcy Court in Montgomery, Alabama, with the Government and Respondent each represented by counsel. [ALJ Exh. 3–4, 6–7]. At the hearing, counsel for the Government called five witnesses[21] to testify and introduced documentary evidence. [Transcript (''Tr.'') 3]. Counsel for the Respondent called eight witnesses to testify, including the Respondent, and introduced documentary evidence. [Tr. 3, 216].

At the beginning of the hearing, I allowed Mr. Jim Hoover[22] (''Mr. Hoover'') to present his arguments on the Motion to Quash Subpoena Duces Tecum, which his colleague filed on behalf of Fay McDonnell, the Government's first witness, and the APHP. [Tr. 9]. Mr. Hoover argued that under Alabama Code §§ 34–24–404 and 540–X–13–.06, APHP must hold physician participation in the program ''absolutely confidential'' since it is protected by ''a privilege.'' [Tr. 11]. Thus, without a participating physician's consent to release the information, APHP ''is prohibited from disclosing'' the physician's records. [*Id.*]. Government counsel argued that federal law, specifically HIPAA, applies to the physician's records. [Tr. 16]. Government counsel explained that, under HIPAA, there is a law enforcement exception that would allow for disclosure of the protected records. [*Id.*]. Mr. Hoover responded by explaining that before you can consider the exceptions to HIPAA, it is necessary to consider the relevant rules under preemption. [Tr. 18]. Mr. Hoover explained that HIPAA sets a minimum floor of health information privacy

[17] Administrative Law Judge (''ALJ'') Exhibits 1–6 were admitted into the record, not for the truth of the factual matters asserted therein, but to the extent that they represent the procedural history of this case. [Tr. 5–7]. ALJ Exhibits 7 and 8 were similarly admitted into the record following the testimony of Ms. McDonnell. [Tr. 54–55].

[18] A copy of Respondent's DEA COR No. BK1391729 was admitted into evidence without objection through the testimony of Diversion Investigator, Martin Craig Riley. [Tr. 92; Gov't Ex. 33].

[19] A copy of Respondent's DEA COR No. FK1953327 was admitted into evidence without objection through the testimony of Diversion Investigator, Martin Craig Riley. [Tr. 93–94; Gov't Ex. 34].

[20] In his plea agreement, Respondent admitted that for six years, from on or about August 2005 through on or about July 8, 2011, he willfully, knowingly, and unlawfully conspired with others to dispense testosterone and Primobolan Depot (methenolone), both of which are Schedule III controlled substances, in violation of 21 U.S.C. 841 (a)(1) and 846. [ALJ Exh. 1, at 2]. Pursuant to a plea agreement, the Respondent was found guilty in the District Court for the Southern District of Alabama, of one count of conspiring to dispense and possession with intent to distribute anabolic steroids. [*Id.* at 1–2].

[21] At the outset of the hearing, Respondent requested sequestration of all of the witnesses. [Tr. 7–8]. I granted the request and ordered sequestration of the witnesses, with the exception of Mr. Martin Craig Riley and the Respondent. [*Id.*]

[22] Mr. Hoover is associated with the law firm of Burr & Forman. [Tr. 9]. He appeared on behalf of Cheairs Porter, who serves as legal counsel to the Alabama Physician Health Program. [*Id.*].

protections, but defaults to state laws that are more restrictive than the federal law. [Tr. 18–19]. Mr. Hoover added that the Alabama law can be analogized to a privilege, which can be waived with a physician's consent. [Tr. 19–20]. Mr. Hoover then produced a written consent form that was signed by Respondent and accompanied by a cover letter. [Tr. 25–26; ALJ Exh. 8]. The letter granted consent for the release of all drug test results. [Tr. 28–29].

Ultimately, I ruled on the subpoena, finding that: (1) Alabama Administrative Code establishes a privilege concerning ''[a]ll information, interviews, reports, statements, memoranda or other documents furnished to or produced by the Alabama Physician Wellness Committee. . . .''; (2) the privileged information may only be disclosed ''when its release is authorized in writing by the physician''; and (3) testimony and documents from APHP ''will be considered within the scope of the release only.'' [Tr. 29–31].

On May 17, 2013, a Protective Order was issued to protect testimony and documentary evidence concerning Respondent's participation in APHP and his corresponding drug results. [ALJ Exh. 9; *see* Tr. 27].

After the hearing, the Government and the Respondent submitted Proposed Findings of Fact, Conclusions of Law and Argument (''Gov't Brief'' and ''Resp't Brief'').

III. Issue

The issue in this proceeding is whether or not the record as a whole establishes by a preponderance of the evidence that the Drug Enforcement Administration should revoke DEA COR Nos. BK1391729 and FK1953327, of Mark P. Koch, D.O., as practitioner, pursuant to 21 U.S.C. 824(a)(4), and deny any pending applications to renew or modify these registrations, pursuant to 21 U.S.C. 823(f), because to continue Dr. Koch's registration would be inconsistent with the public interest, as that term is defined in 21 U.S.C. 823(f). [ALJ Exh. 4; Tr. 5].

IV. Findings of Fact

A. Stipulated Facts

The parties have stipulated to the following facts:

1. The Respondent is registered with the DEA as a practitioner in Schedules II through V pursuant to DEA registration number BK1391729 at 336 Barnes Road, Monroeville, AL 36460. DEA registration number BK1391729 expires by its terms on December 31, 2014.

2. The Respondent is registered with the DEA as a practitioner in Schedules II through V pursuant to DEA registration number FK1953327 at 815 12th Street North, Virginia, MN 55792. DEA registration number FK1953327 expired by its terms on December 31, 2012. On or about November 21, 2012, Dr. Koch submitted a timely request to renew the registration, the registration continues in effect until final action is taken by the DEA on the renewal application.

3. On or about February 24, 2012, the Respondent pled guilty to one felony count of conspiracy to dispense and possess with intent to distribute anabolic steroids. Government exhibits 22 through 26 refer to this criminal case, that is, *United States* v. *Mark Peter Koch,* United States District Court for the Southern District of Alabama, criminal case number 11–00191–001–WS.

4. On or about July 7, 2011, a federal arrest warrant was executed for the Respondent at 336 Barnes Road, Monroeville, Alabama.

5. The parties stipulate to the prior disciplinary history of Respondent in the states of Alabama, Minnesota and Pennsylvania as submitted in written form to the ALJ without testimony by any third party not involved in those actions, to include:

Government Exhibits 1 through 8; 10 through 12; 14 through 21; 27 through 30; 35 and 43.

[ALJ Exh. 6; Tr. 6].

B. Respondent's Licensure and Employment

Dr. Koch holds an active, conditional license [23] as a doctor of osteopathy in the state of Alabama, as well as a state certificate of registration to handle controlled substances in Schedules II through V. [Gov't Ex. 31, at 1]. Respondent has maintained DEA COR No. BK1391729 with a registered address of 336 Barnes Road, Monroeville, Alabama 36460.[24] [Tr. 184–85].

Respondent also holds an active license [25] as a physician and surgeon in Minnesota. [Gov't Ex. 32, at 1]. Respondent has maintained DEA COR No. FK1953327 with a registered address of 815 12th Street North, Virginia, Minnesota 55792. [Tr. 186–87]. On January 31, 2013, Respondent was not available at his registered address to accept mail.[26] During his testimony, Respondent explained that he uses Monroeville, Alabama as a mailing address for both of his DEA CORs because it remains his permanent address. [*Id.*].

Dr. Koch is currently employed by Wapiti Medical Center (''WMC''). [Tr. 120]. Although WMC is based in South Dakota, Respondent physically works in Minnesota, taking shifts in the emergency room. [*Id.*]. Respondent has previously worked in several emergency rooms in Minnesota, as well as emergency rooms located in Thomasville, Camden, Brooke, and Luverne Hospital in Alabama. [Tr. 127–28]. After Respondent's Alabama medical license was temporarily reinstated in 2010, he became responsible for the emergency room and for an outpatient clinic. [Tr. 128]. He was also the director of a nursing home. [*Id.*]. However, in January 2013, the hospital that owned the clinic went bankrupt. [*Id.*]. Since the end of February 2013, Respondent has primarily worked as a ''locum tenens'' in Minnesota. [*Id.*].

C. Respondent's History of Drug Abuse

Dr. Koch testified that he has had ''a long history of substance abuse.'' [Tr. 120]. He estimated that this addiction lasted from 1985 to 2005. [Tr. 120]. Dr. Koch admitted on cross-examination that the primary drugs he abused were cocaine and alcohol. [Tr. 144]. Specifically, he testified that he used cocaine four or five times a year when he was out of the country in the Caribbean. [Tr. 144]. He admitted to

[23] The details of Respondent's Alabama medical license and state registration to handle controlled substances were admitted into the record without objection. [Tr. 95; Gov't Ex. 31].

[24] After Respondent's divorce, this address became a location where he would see patients a few days a week. [Tr. 184]. Respondent explained he has since returned to using this address as his permanent residence. [Tr. 185].

[25] The details of Respondent's Minnesota medical license and state registration to handle controlled substances were admitted into the record without objection. [Tr. 95–96; Gov't Ex. 32].

[26] DI Riley was called back to testify about an envelope, which DEA sent to Respondent's registered address, but which was returned as ''undeliverable as addressed, forwarding order expired'' on January 31, 2013. [Tr. 269]. On cross-examination, DI Riley admitted he first saw the envelope one day earlier when Government counsel gave it to him. [Tr. 270]. DI Riley also acknowledged that the physical address and mailing address for a registration can be different. [*Id.*]. DI Riley clarified that the significance of the ''undeliverable'' stamp is that there should be someone at the physical address, who recognizes Respondent and can deliver the mail. [Tr. 271]. DI Riley agreed with Respondent's counsel, however, that the purpose of a mailing address is to identify where mail should be sent. [Tr. 272]. On the other hand, DI Riley asserted that it is the duty of a DEA registrant to be located at a registered address. [Tr. 273]. No legal basis was offered in support of this duty. [*See* Gov't Brief, at 7]. Respondent's counsel objected to admission of the envelope into evidence. [Tr. 275]. The envelope was ultimately admitted into the record over Respondent's objection and labeled as Government Exhibit 44. [Tr. 276; Gov't Ex. 44].

consuming a few grams of cocaine on each occasion. [Tr. 145]. He also used to drink alcohol approximately three times a week, drinking up to eight or ten cans of beer during each episode. [*Id.*].

D. Respondent's Participation in Drug Monitoring Programs

Respondent has participated in mandatory and voluntary drug monitoring programs for several years in two different states. Respondent specifically testified that he was continuously monitored for drug use in Pennsylvania from 1997 to 2005.[27] [Tr. 186]. He has also been monitored in Alabama from 2005 [28] to the present. [*Id.*]. In 2007, when Respondent's Alabama license to practice medicine was restored, Respondent testified that he was required to participate in the Alabama Physician Health Program (''APHP'') until the medical board's order expired in July 2010. [Tr. 121]. After the order expired, Dr. Koch said he voluntarily remained in APHP. [*Id.*]. Respondent recalled that from 2010 to 2012, he voluntarily participated in drug screening by urine analysis. [Tr. 123–24].

Under the APHP monitoring program, Respondent explained that he could not select the type of testing conducted, since this decision was made by the supervising physician, Dr. Skipper. [Tr. 168]. Respondent added that he similarly lacked control over when the testing occurred because the date on which he had to submit urine samples was randomly generated by a computer. [Tr. 125, 137]. In the past, the Respondent said he had to ''make arrangements'' while working a shift in order to ensure that his urine sample made it to the clinic for testing by the deadline of four o'clock in the afternoon. [Tr. 138]. He testified that he had never missed a random drug screening. [Tr. 122, 138]. This testimony, however, was squarely refuted by Respondent's drug-testing results, which showed he missed twelve drug tests from July 2002 to February 2005. [Gov't Ex. 17, at 53–55]. Respondent also testified that he had submitted all of the quarterly reports required by worksite monitors. [Tr. 137]. No documentary evidence in the record refutes this claim. During his testimony, Respondent added that he generally did not know the results of each test, but explained that he would have been notified by APHP, if the results of the test were positive. [Tr. 124].

Fay Donnell (''Ms. McDonnell'') [29] confirmed that Respondent participated in APHP drug-testing both voluntarily and in response to the conditions of state licensing board orders. Ms. McDonnell specifically testified that Respondent came under agreement with APHP to participate in random drug-testing in 2005. [Tr. 39]. Records associated with Respondent's participation in APHP have been maintained by the program coordinator.[30] [Tr. 34]. The APHP records include the results of any positive or negative drug tests, as well as any missed drug tests or ''no-show[s].'' [Tr. 38]. However, Ms. McDonnell explained that APHP only has complete records from 2008 to the present. [Tr. 39]. The records presently available to APHP from 2005 to 2008 are only positive test results due to a change in the drug-testing contract. [Tr. 40]. According to the records, Respondent does not have any positive results in his file for this time period. [*Id.*].

Ms. McDonnell recalled that Respondent consented to the release of records from 2005 to the present. [Tr. 44].[31] Ms. McDonnell testified that the date entered into the computer to fulfill the subpoena request was 1994, but the first record that appeared in Respondent's file was January 25, 2008. [*Id.*]. Ms. McDonnell credibly testified that in anticipation of this hearing, she made two certifications of documents from Respondent's APHP file. The first certification [32] occurred on June 1, 2012 and the second certification [33] occurred on May 1, 2013. [Tr. 41]. The second certification corrected a previous error where Ms. McDonnell had incorrectly stated that Respondent's first anabolic steroid test [34] on July 18, 2011 [35] test was a hair test, not a urine analysis. [Tr. 46; *see also* Resp't Ex. 1(A), at 3]. The error was brought to Ms. McDonnell's attention by Government counsel. [Tr. 46]. Ms. McDonnell testified that she did not decide what type of test should be ordered for each physician. [Tr. 47–48]. She explained, however, that she could determine what test had been administered from the documentation in the case file. [Tr. 48]. When commenting specifically on Respondent's test for steroids, which she initially mischaracterized as a hair sample, Ms. McDonnell explained that Respondent had not been able to provide a sufficient hair sample for the anabolic steroid test, so it was reordered [36] as a urine analysis. [Tr. 49–50; *see also* Resp't Ex. 1(B), at 3, 7].[37] Ms. McDonnell's testimony was sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision.

[27] For purposes of clarification, documentary evidence of Respondent's drug-testing through PHM in Pennsylvania actually indicate the results of drug tests as late as June 2006. [Gov't Ex. 17, at 56].

[28] When Respondent consented to the release of all drug-testing records at APHP, Respondent said he consented to all results from 2005 to 2011, since it was his impression that these were the only test results APHP has on him. Government counsel tried to show that Respondent did not consent to release of *all* of the records [*see* ALJ Exh. 8], however, Respondent credibly testified that he did not participate in APHP prior to 2005. [Tr. 189]. Respondent clarified that he has continuously participated in APHP from 2005 to the present, sometimes voluntarily. [Tr. 190].

[29] As the program coordinator of APHP, Ms. McDonnell maintained physician records, scanned documents for case files, took phone calls, and coordinated the physicians' schedules around their drug-testing requirements. [Tr. 34–35].

[30] Fay McDonnell is the former program coordinator of APHP. [Tr. 34]. She served in this role from March 2007 to January 2013. [Tr. 36]. She retrieved Respondent's record in response to the subpoena duces tecum. Ms. McDonnell currently works as a case manager of individual physicians in APHP. [Tr. 35].

[31] The release requested ''all drug screens that [the Respondent] has passed since voluntarily enrolling into the program.'' [ALJ Exh. 8]. However, the record demonstrates that the Respondent had a positive drug test in December of 2004. [Gov't Ex. 17, at 48]. Also, positive test results from 2001 to 2005 and missed urine tests were documented. [*Id.* at 49–56].

[32] The original certification was admitted into evidence without objection. [Tr. 51; Resp't Ex. 1(A)]. Respondent's Exhibit 1(A) is the original copy of Respondent's records from APHP that Ms. McDonnell certified. Ms. McDonnell admitted during her testimony that this was the certification the Alabama Commission relied on in 2012 when hearing Respondent's case. [Tr. 47]. I will deny the Government's motion to exclude this exhibit from evidence, since I find Ms. McDonnell's testimony on the document, her error, and the correction credible. [Gov't Brief, at 36, 38].

[33] The revised certification was admitted into evidence without objection. [Tr. 51; Resp't Ex. 1(B)]. Respondent's Exhibit 1(B) is the updated copy of Respondent's records from APHP that Ms. McDonnell certified. Ms. McDonnell testified that she certified the second set of documents, even though she no longer served as the program coordinator, since she made the error on the first certification. [Tr. 42–43]. I will deny the Government's motion to exclude this exhibit from evidence, since I find Ms. McDonnell's testimony on the document, her error, and the correction credible. [Gov't Brief, at 36, 38].

[34] From the record and Ms. McDonnell's testimony, July 18, 2011 appears to be the first date that Respondent was tested for anabolic steroids. [Tr. 52; *see also* Resp't Ex. 1(B), at 7]. This occurred just over a week after Respondent was arrested on drug-related felony charges.

[35] Respondent incorrectly recalled that he was first tested for steroids through a hair sample in January or February of 2013 by APHP. [Tr. 123–24].

[36] Respondent incorrectly testified that he provided a hair sample on two occasions for the steroid test, explaining that the first test resulted in an insufficient sample and the second test to his knowledge was negative. [Tr. 124].

[37] Respondent clarified on recross-examination that in January of 2012, while he was under voluntary contract with the physician monitoring program, he was asked to give a hair sample. [Tr. 202]. Respondent maintains that he had shaved his whole body since at least 1998, but as long ago as the 1980's. [Tr. 204]. Furthermore, there was not a lab nearby that would do the fingernail testing as an alternative. [Tr. 202–03]. Respondent says he has since grown chest hair in order to comply with the January 2012 Alabama Board Order. [Tr. 203].

E. Federal Investigations of Respondent

1. Drug Enforcement Administration (DEA)

In February 2000, Kurt Dittmer (''Supervisor Dittmer'') [38] investigated Respondent's renewal application for his Pennsylvania registration, since Respondent had checked ''yes'' to whether the applicant had previous ''liability issues'' with licensing organizations or law enforcement. [Tr. 58]. Dr. Koch's positive response to the liability question on his application concerned his use of cocaine while on vacation in the Caribbean. [Tr. 59]. During a phone conversation, Respondent told Supervisor Dittmer that he had tested positive for his cocaine use through a urine analysis. [Tr. 60]. Respondent told Supervisor Dittmer that his state of Pennsylvania medical license was subsequently put under active suspension. [*Id.*] [39] Once Respondent indicated he was represented by an attorney, Supervisor Dittmer said he contacted the attorney, Grant Palmer, for further questioning. [Tr. 60–61].

Supervisor Dittmer credibly testified that at the time of the investigation, Respondent had a valid medical license in Pennsylvania, but explained that the license was subject to probationary conditions. [Tr. 61].[40] At this point in the investigation, Supervisor Dittmer said that he memorialized his findings in a report and renewed Respondent's registration. [Tr. 64]. DEA was satisfied that the probationary conditions, which involved monitoring through drug-testing, were sufficient protections to support renewal of Respondent's registration. [Tr. 65]. Supervisor Dittmer's testimony was sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision.

In 2003, Frank Younker (''Supervisor Younker'') [41] came into contact with Respondent when he was asked by the Philadelphia office to investigate an application filed by the Respondent for renewal of his Pennsylvania registration. [Tr. 68]. Similar to Supervisor Dittmer's testimony, Younker's investigation began when Respondent checked ''yes'' to the liability question on the application. [*Id.*]. Respondent indicated on the application that he had a history of drug abuse and was currently participating in a monitoring agreement with the board of medicine in Pennsylvania. [*Id.*].

As part of the investigation, Supervisor Younker contacted the Pennsylvania State Board of Osteopathic Medicine (''SBOM''). [Tr. 69]. The SBOM indicated that they were ''acting on behalf of something that was done in Alabama.'' [Tr. 70]. Specifically, Younker added that it concerned Respondent's cocaine and alcohol abuse. [*Id.*]. Since Supervisor Younker was aware of Supervisor Dittmer's prior investigation, Younker testified that he decided to offer Respondent the opportunity to enter into a memorandum of agreement (''MOA'') [42] with the DEA concerning his application. [*Id.*].

Supervisor Younker explained that his decision to draft an MOA was prompted by Respondent's past history of drug use and non-compliance. [*See* Tr. 70–71]. In drafting the MOA, Younker credibly testified that he took into account Dr. Koch's past history of drug use, non-compliance with monitoring, adverse actions by state medical boards, and current employment status. [Tr. 72]. Supervisor Younker said of the MOA, ''[i]t's not like a cookie cutter document.'' [*Id.*].

Under the MOA, Respondent was not only required to abide by all federal and state laws, he was also required to abide by monitoring and treatment programs in Pennsylvania and maintain logs of all controlled substances he prescribed for two years, which would allow DEA to identify any unusual prescribing habits.[43] [Tr. 72, 77–78]. Additionally, Respondent was prohibited under the MOA from possessing any controlled substances, unless he had a legitimate medical prescription. [Tr. 73]. He was also prohibited from prescribing, dispensing or administering controlled substances to a family member and prohibited from purchasing or prescribing controlled substances for himself. [*Id.*].

While the MOA was in effect, from July 15, 2003 through July 15, 2005, Supervisor Younker was not aware of any violations committed by Respondent when Younker left the office in November 2004. [Tr. 75, 78; Gov't Ex. 9, at 2]. However, during his testimony, Respondent was shown the MOA written by Supervisor Younker in 2003. [Gov't Ex. 9; Tr. 161]. Respondent admitted that he, prior to 2005, failed to comply with the conditions of the MOA that prohibited him from possessing or purchasing controlled substances for personal or office use and that also prohibited him from prescribing, dispensing, or administering controlled substances to relatives. [Gov't Ex. 9, at 1–2; Tr. 161]. Supervisor Younker's testimony was sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision.

In April 2012, Martin Craig Riley (''DI Riley'') [44] began an investigation of Respondent on the basis of a notice he received from the Alabama State Board of Medical Examiners, Medical Licensure Commission (''SBME''), which indicated that Respondent's Alabama medical license [45] had been temporarily suspended. [Tr. 82.]. The suspension was in response to Respondent having pled guilty to a ''conspiracy to distribute and possess with intent to distribute anabolic steroids'' [46] DI Riley confirmed this information from public records on the board of medical examiner's Web site

[38] Supervisor Dittmer has been employed by the DEA for 18 years. [Tr. 56]. He was initially trained as a Diversion Investigator for the DEA, but returned to Quantico, Virginia in 2005 to train as a Group Supervisor. [Tr. 57]. Supervisor Dittmer is responsible for overseeing 20,000 registrants in 27 counties of western Pennsylvania. [*Id.*]. The registrants include methadone clinics, physicians, dentists, and pharmacies. [*Id.*].

[39] Respondent's attorney at the time of the investigation helped confirm that Respondent did not write any prescriptions for controlled substances while his medical license was under suspension. [Tr. 64].

[40] Supervisor Dittmer testified that he told Respondent's attorney during the investigation that while Respondent's medical license had been suspended, Respondent should have surrendered his registration. [Tr. 62]. Supervisor Dittmer did not provide the legal basis for such testimony. I find it noteworthy that neither the statutes, nor DEA regulations define such a responsibility, as described by Supervisor Dittmer, which requires a registrant to surrender their registration in the event that their medical license is suspended.

[41] Supervisor Younker has been employed with DEA for 28 years. [Tr. 67]. He has worked as a Senior Investigator and Group Supervisor out of the Cincinnati Resident Office. [*Id.*]. His responsibilities include attending training sessions at Quantico, Virginia, conducting investigations, and interviewing registrants. [Tr. 68].

[42] Government Exhibit 9 was identified by Supervisor Younker during his testimony as the Memorandum of Agreement. [Tr. 71]. The MOA was signed by Dr. Koch on June 30, 2003 and signed by Diversion Program Manager for the Philadelphia Field Division, Ann L. Carter, on July 15, 2003. [Gov't Ex. 9; Tr. 74, 77]. Government Exhibit 9 was admitted into evidence without objection. [Tr. 76].

[43] Supervisor Younker testified that he would not actively seek out information concerning Respondent's unusual prescribing habits. [Tr. 79]. He would only rely on information that was provided to him by Respondent, the required log, or the prescription monitoring program (''PMP''). [Tr. 80].

[44] DI Riley has spent 25 years as a Diversion Investigator with DEA. [Tr. 81–82]. His responsibilities include conducting regulatory, civil and criminal investigations arising out of individuals and corporations who are registered with the DEA. [Tr. 82].

[45] Government Exhibit 31 contains the details of Respondent's Alabama medical license. [Tr. 94]. This exhibit was identified by DI Riley and admitted into evidence. [Tr. 94–95].

[46] [Gov't Ex. 25, at 1]. Government Exhibits 22–26 are stipulated to and admitted into evidence. [Tr. 90].

and from its investigator, William Perkins. [Tr. 83].

During the investigation, DI Riley testified that he also discovered Respondent held DEA registrations in Alabama and Minnesota.[47] [Tr. 84]. DI Riley clarified that Respondent no longer had a DEA registration in Pennsylvania, even though he maintained an active medical license in Pennsylvania. [Tr. 84, 96]. Additionally, DI Riley explained that he had obtained orders from the Pennsylvania Medical Board [48] concerning Respondent's cocaine use, orders from the Alabama Medical Board [49] concerning Respondent's cocaine and alcohol abuse, and an order from the Minnesota Medical Board [50] concerning Respondent's felony conviction involving anabolic steroids.[51] Attached to one of the orders in Pennsylvania was a letter [52] from Dr. Koch to Kevin Knight, program director, at the Bureau of Professional and Occupational Affairs in Pennsylvania. [Tr. 87]. In the letter, Respondent admitted to a positive drug screen in December 2004. [Gov't Ex. 13; Tr. 87]. DI Riley credibily testified that the monitoring required by the state medical board orders involved random drug-testing, and the Alabama Order required testing through hair samples. [Tr. 85]. DI Riley's testimony was sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision.

2. Federal Bureau of Investigation (FBI)

Jeffrey Young (''Agent Young'') [53] credibly testified that he was involved in Dr. Koch's arrest for drug-related felony charges. On July 7, 2011, Agent Young was at the Mobile, Alabama headquarters communicating with both management and the arrest team by telephone when Respondent was arrested for felony charges related to anabolic steroids. [Tr. 101].[54] Agent Young's testimony was sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision.

F. Respondent's State Disciplinary Actions

1. Alabama State Board of Medical Examiners; Licensure Commission

In 1997, Respondent voluntarily agreed to abstain from alcohol and drugs, as well as participate in a drug-testing program that complied with the aftercare requirements of Talbot Recovery Campus (''Talbot''). [Gov't Ex. 1, at 1–2]. The Alabama State Board of Medical Examiners (''SBME'') maintained the discretion to remove these restrictions from Respondent's license, if he demonstrated compliance. [*Id.* at 1]. However, in the following years, he failed to do so. [Tr. 146].

On January 25, 2000, the SBME filed an administrative complaint [55] against Dr. Koch in response to disciplinary actions taken against him in Pennsylvania and evidence indicating Respondent had violated the voluntary restrictions placed against his medical license in Alabama. [Gov't Ex. 5, at 1]. In the complaint, the SBME requested revocation of Respondent's medical license. [*Id.* at 4].

In June of 2000, the SBME made factual findings and legal conclusions, which supported the revocation of Respondent's medical license.[56] [Gov't Ex. 6, at 3; Tr. 155]. As a result, Respondent lost his license to practice medicine in the state of Alabama.

Then, in March 2004, the Alabama SBME issued the Respondent an Order to Show Cause,[57] which asked Respondent to ''show cause, if any he has, why [his] request for reinstatement [of his medical license] should not be denied.'' [Gov't Ex. 10; Tr. 162]. Respondent testified that at the time of this Order and corresponding hearing, his DEA COR was in Pennsylvania and he had no intention of maintaining an Alabama medical license for purposes of a DEA COR registered in Alabama. [Tr. 162–63].[58]

Later, in May 2004, the Alabama SBME ordered [59] reinstatement of his medical license. However, conditions were ordered, to include that the Respondent is to participate in APHP, which included drug-testing for controlled substances and alcohol using hair samples. [Gov't Ex. 11, at 1]. Respondent explained that he did not comply with this Order since he decided not to pursue an Alabama medical license. [Tr. 164]. Respondent also explained that he never filled out the paperwork in order to obtain a license in Alabama. [*Id.*]. He alleged that he told both his attorney and the Alabama SBME that he was not going to pursue a license at that time. [Tr. 165]. Consequently, Respondent's privilege to have an Alabama license was withdrawn [60] as a result of Respondent's failure to comply with the May 2004 Order. [Gov't Ex. 12; Tr. 165].

When testifying on this issue, Respondent admitted that prior to 2005 he was in a ''power struggle with the Alabama Physician Recovery Network and the Board of Medicine'' because he was not cooperative and not willing to acknowledge he had a drug problem. [Gov't Ex. 8, at 5 ¶ 13; Tr. 158]. During this time, the Alabama SBME remarked that Respondent did not see his ''use of

[47] Dr. Koch had explained to DI Riley he wanted to obtain a DEA registration in Minnesota so that he could work as a locum tenens physician in Minnesota. [Tr. 86].

[48] Government Exhibits 2–4, 7–8, 17, 20, 30 are Pennsylvania Medical Board orders that were stipulated to by the parties and admitted into evidence. [Tr. 89].

[49] Government Exhibits 1, 5, 6, 12, 14–16, 18–19, 21, 27–29 are Alabama Medical Board orders that were stipulated to by the parties and admitted into evidence. [Tr. 89]. Similarly, Government Exhibits 10 and 11 are additional orders stipulated to and admitted into evidence. [Tr. 91–92].

[50] Government Exhibit 43 is a Minnesota Medical Board order stipulated to by the parties and admitted into evidence. [Tr. 89]. A professional profile of Respondent is available on the Minnesota Board of Medical Practice's Web site, which includes the status of his license. This information was proposed Government Exhibit 32. [Tr. 95–96]. It was identified by DI Riley through his testimony and admitted into evidence without objection. [*Id.;* Gov't Ex. 32].

[51] DI Riley indicated that part of the charge, which Respondent pled guilty to, was ''self-using the anabolic steroids.'' [Tr. 84]. Even though Count I of the indictment makes no mention of consumption of anabolic steroids [Gov't Ex. 23, at 1], such conduct is included in the factual resume of the indictment [Gov't Ex. 25, at 14]. ''Mark Peter Koch, a physician practicing in Camden, Alabama and Monroeville, Alabama, purchased, consumed, and trafficked anabolic steroids.'' [Gov't Ex. 25, at 14]. The factual resume also reveals that Respondent: (1) discussed pending purchases of anabolic steroids with co-defendants; (2) contributed money to purchases of steroids; (3) acquired drugs that appeared to be manufactured in ''underground labs''; and (4) acquired drugs that exceeded 300 grams. [*Id.*].

[52] During his testimony, DI Riley identified Government Exhibit 13 as a letter sent by Dr. Koch. [Tr. 87]. This exhibit was admitted into evidence, without objection. [*Id.;* Gov't Ex. 13].

[53] Agent Young has worked for the Federal Bureau of Investigation (FBI) for over nine years as a special agent. [Tr. 98]. His responsibilities include investigating crimes involving white collar, violent crime, and crimes with national security issues. [Tr. 99].

[54] I ruled that any testimony concerning the uncharged misconduct at the time of the arrest is inadmissible because the witness has no personal knowledge of the conduct. [Tr. 102–03, 105].

[55] This Administrative Complaint was admitted into the record without objection. [Tr. 89; Gov't Ex. 5].

[56] Government counsel asked Respondent whether he notified DEA that he no longer had state authority to handle controlled substances in Alabama. [Tr. 155]. Respondent said he had not, because his DEA registration was in Pennsylvania at the time. [*Id.*]. Respondent believes he switched his DEA registration to Alabama most recently in 2000. [*Id.*]. Again, Government has not provided the legal basis for a registrant's responsibility to notify the DEA of his loss of state authority to prescribe controlled substances.

[57] The Order to Show Cause was admitted into the record without objection. [Tr. 92; Gov't Ex. 10].

[58] Respondent added that his DEA registration was in Pennsylvania from 1997 until 2007. [Tr. 163]. However, in previous testimony, he said he had reassigned his DEA registration to Alabama as recent as 2000. [Tr. 155]. I have noted the inconsistency in Respondent's testimony, but I do not find that it affects his credibility.

[59] This Order was admitted into the record without objection. [Tr. 92; Gov't Ex. 11].

[60] This Order was admitted into the record without objection. [Tr. 89; Gov't Ex. 12].

illegal drugs and other mood altering substances as inappropriate.'' [Gov't Ex. 8, at 9]. Respondent credibly admitted in his testimony that he was told multiple times to stop using illegal drugs prior to 2005, but he failed to comply. [Tr. 160].

When Respondent was released from a rehabilitation program in 2005, he sought reinstatement of his medical license in Alabama. [Gov't Ex. 14; Tr. 167]. The state of Alabama again issued an Order to Show Cause [61] on May 26, 2005 for Respondent to appear and explain why his reinstatement should not be denied. [Gov't Ex. 14, at 1; Tr. 167]. Respondent attended the administrative hearing, which took place on September 28, 2005. [Gov't Ex. 15; Tr. 167]. In an order [62] issued October 4, 2005, the Alabama SBME concluded that Dr. Koch had ''failed to present sufficient evidence to warrant the reinstatement of his license.'' [Gov't Ex. 15, at 1].

Nonetheless, on October 2, 2006, an order [63] reinstated Respondent's medical license on the condition that Respondent maintain an indefinite contract with APHP. [Gov't Ex. 16; Tr. 168]. According to the October 2006 Order, Respondent was to provide hair samples, although Respondent testified that in reality the method of drug-testing was up to Dr. Skipper at APHP. [Gov't Ex. 16, at 1; Tr. 168, 200].[64]

On June 28, 2007, the Alabama SBME issued an order [65] indicating that an administrative hearing took place and Respondent had been in attendance. [Gov't Ex. 18, at 1]. Furthermore, the SBME found that Respondent's request for amendment of his license ''is due to be granted.'' [*Id.*]. Respondent was conditionally permitted to practice medicine in Frisco City, Alabama for Tri County Medical Center. [*Id.*].

On July 30, 2008, all restrictions were removed from Respondent's Alabama medical license through an order.[66] [Gov't Ex. 19]. However, the order clarified that Respondent was nonetheless required to maintain a contract with APHP. [*Id.*]. The order also required random drug-testing through the use of hair samples. [*Id.*].

On July 13, 2010, the Alabama SBME issued an order [67] that lifted all restrictions from Respondent's license. [Gov't Ex. 21; Tr. 175]. Most noteworthy was the condition to participate in APHP indefinitely, which was removed so that Respondent held a ''full unrestricted licenses to practice medicine in Alabama.'' [Gov't Ex. 21; Tr. 175].

However, on April 18, 2012, the Alabama SBME ''immediately suspended'' [68] Dr. Koch's license to practice medicine and osteopathy as a result of his felony conviction. [Gov't Ex. 27, at 1; Tr. 179–80]. The Alabama SBME subsequently placed Respondent on ''indefinite probation,'' which required Respondent to once again ''maintain, indefinitely, a contract with the Alabama Physicians Health Program.'' [Gov't Ex. 29, at 4; Tr. 180–81]. The order [69] specified that ''[i]f, at any time, Dr. Koch shall have insufficient hair and/or nails to perform a valid test, he will, in such event, be considered to have had a positive test and he will be referred to the Medical Licensure Commission for appropriate action.'' [Gov't Ex. 29, at 4]. After the Respondent's arrest on July 7, 2011, he voluntarily called the APHP and requested a drug test for steroids. [Tr. 190–91]. This test was negative. [Resp't Ex. 1(B), at 3; Tr. 124].

Before returning to the practice of medicine, the April 2012 Order also required Respondent to seek ''prior approval'' for ''a detailed plan of practice'' from the Alabama SBME. [*Id.*]. Respondent testified that he submitted such plan and it was approved. [Tr. 181–82]. Respondent indicated that the plan involved him practicing family and emergency medicine in Mobile, Alabama and practicing as a locum tenens for emergency rooms in Minnesota. [*Id.*].

2. Pennsylvania State Board of Osteopathic Medicine

In 1998, the Pennsylvania State Board of Osteopathic Medicine (''SBOM'') issued a consent agreement and order [70] acknowledging the voluntary restrictions Respondent had agreed to in Alabama as a result of his cocaine use. [Gov't Ex. 2, at 2]. Even though Respondent's license could have been suspended for three years because of disciplinary actions against his license in Alabama, the SBOM of Pennsylvania ruled that the suspension would be ''stayed in favor of probation.'' [*Id.*].

However, in 1999, the stay was ''VACATED'' and the probationary period ''TERMINATED'' in an order [71] concerning Dr. Koch's medical license in Pennsylvania.[72] [Tr. 148–49; Gov't Ex. 3]. Respondent was ordered to ''immediately cease practicing the profession'' for a duration of three years. [Gov't Ex. 3, at 1]. When asked about the order during his testimony, Respondent did not recall the details of the suspension, explaining that he was never even informed of the details regarding the positive drug test that he believes triggered the suspension. [Gov't Ex. 3, at 6; Tr. 150]. Respondent said he thought the positive drug was caused by an injection of pain medication [73] into his back during a visit to the emergency room. [Tr. 149]. Respondent's confusion is easily resolved by the factual findings in a subsequent Consent Agreement and Order,[74] which indicated that Respondent tested positive for cocaine on September 29, 1999 in violation of the SBOM's 1998 Order. [Gov't Ex. 3, at 6; Gov't Ex. 4, at 3; Tr. 150]. The Consent Agreement and Order also indicated that Respondent was required to enroll in the Talbot for a minimum of 96 hours of assessment. [Gov't Ex. 4, at 3–4]. Also, he was again ordered to stop using controlled substances. [Gov't Ex. 4, at 10]. Respondent credibly admitted during his testimony that he failed to comply. [Tr. 153–54]. The

[61] The Order to Show Cause was admitted into the record without objection. [Tr. 89; Gov't Ex. 14].

[62] The Order was admitted into the record without objection. [Tr. 89; Gov't Ex. 15].

[63] The Order was admitted into the record without objection. [Tr. 89; Gov't Ex. 16].

[64] During this part of the testimony, Government counsel tried to prove Respondent's non-compliance with the Board Order since he did not provide hair samples for drug-testing. [*See* Tr. 168–70]. However, I find this line of inquiry carries little weight since Respondent provided urine samples in accordance with the requirements of Dr. Skipper's program at APHP and the Alabama SBME mandated Respondent's participation in APHP. [Gov't Ex. 16, at 1; Tr. 168, 200].

[65] The Order was admitted into the record without objection. [Tr. 89; Gov't Ex. 18].

[66] The Order was admitted into the record without objection. [Tr. 89; Gov't Ex. 19].

[67] This Order was admitted into the record without objection. [Tr. 89; Gov't Ex. 21].

[68] The Order was admitted into the record without objection. [Tr. 89; Gov't Ex. 27]. Respondent testified that he did not report the suspension to the DEA. [Tr. 180]. Respondent's initial hearing date of June 20, 2012 was extended to July 25, 2012, through an Order of Continuance, which was admitted into the record. [Tr. 89; Gov't Ex. 28].

[69] This Order was admitted into the record without objection. [Tr. 89; Gov't Ex. 29]. Under this Order Respondent was fined $10,000.00 and required to pay the administrative fees associated with the hearing. [Gov't Ex. 29, at 4].

[70] This Order was admitted into evidence without objection. [Tr. 89; Gov't Ex. 2].

[71] This Order was admitted into evidence without objection. [Tr. 89; Gov't Ex. 3].

[72] Government counsel asked Respondent whether he notified DEA of the suspension. [Tr. 149]. Respondent replied in the negative. [*Id.*]. Government has not provided the legal basis for a registrant's responsibility to notify the DEA of a suspended medical license. Thus, the relevance of this question is unclear.

[73] The Order indicates that the ''completely synthetic drugs,'' which Respondent said were injected into his back for pain, ''would not register as cocaine metabolites on a urine screen test.'' [Gov't Ex. 3, at 7].

[74] This Order was admitted into evidence without objection. [Tr. 89; Gov't Ex. 7].

Respondent did not report this suspension to the DEA. [Tr. 148–49].

On July 3, 2001, an adjudication [75] and order [76] by the Pennsylvania SBOM suspended Respondent's medical license indefinitely, with the possibility of it being restored should Respondent comply with the terms and conditions of the Consent Agreement and Order. [Gov't Ex. 7, at 8; Gov't Ex. 4; Tr. 156]. Respondent explained during his testimony that his attorney at the time had negotiated with the Pennsylvania SBOM and it was his understanding that his stay at Talbot was a sufficient program to satisfy the probationary terms. [Tr. 156–57]. In other words, he did not believe he had to participate in further drug-monitoring after his assessment at Talbot, even though it was described in detail throughout the terms of the Consent Agreement and Order. [*See* Gov't Ex. 4, at 6].

As a result, in December 2001, after Respondent failed to comply with the extent of the probationary terms outlined in the Consent Agreement and Order,[77] the Pennsylvania SBOM ordered [78] that Respondent's ''license to practice osteopathic medicine and surgery'' be ''indefinitely suspended,'' but indicated that ''[s]uch suspension is to be immediately stayed in favor of not less than five years probation. . . .'' [Gov't Ex. 8, at 11]. The terms of the probation required Respondent to: (1) abide by state and federal laws; (2) cooperate with professional organizations; (3) submit truthful information to the SBOM; (4) avoid leaving the Commonwealth of Pennsylvania for more than 20 days at a time; (5) enroll in a new monitoring program or notify the local medical board if Respondent moves jurisdictions; (6) notify the PHMP of criminal charges against him; and (7) notify the PHMP of changes to his address or contact information. [*Id.* at 11–13]. The Order indicated that upon successful completion of the probationary term, Respondent could petition the SBOM to obtain an unrestricted license to practice medicine in Pennsylvania. [Gov't Ex. 8, at 23].

Several years later, Dr. Koch wrote a letter dated May 19, 2005 to the Pennsylvania Bureau of Professional and Occupational Affairs, of the PHMP Unit II. [Gov't Ex. 13; Tr. 166]. In the letter Dr. Koch admitted to a ''long standing problem with substance abuse (alcohol and cocaine)'' and explained that for years he had ''been in denial of this problem.'' [Gov't Ex. 13, at 1]. Respondent further indicated that he ''recently realized'' the problem and that he ''need[s] professional help.'' [*Id.*]. Respondent associated this turning point with a positive drug screen in December 2004.[79] [*Id.*]. Based on the advice of an APHP physician, Respondent said he entered Talbot Recovery Campus in Atlanta, Georgia on February 1, 2005, and completed treatment on May 7, 2005. [*Id.*].

In November 2006, the Pennsylvania SBOM issued a Consent Agreement and Order.[80] [Gov't Ex. 17; Tr. 171]. The Order indicated that Respondent failed to submit to six [81] drug screens. [Gov't Ex. 17, at 2]. While Respondent testified that the missed drug tests occurred while he was in rehabilitation at Talbot in 2005, the drug-testing results indicate that there were twelve missed calls before he entered the rehabilitation program on February 1, 2005 and eight missed calls after he left Talbot on approximately May 10, 2005. [Gov't Ex. 17, at 2, 53–55; Tr. 171].[82] Government counsel also called Respondent's attention to a condition of the Consent Agreement and Order, which prohibited Respondent from using controlled substances. [Gov't Ex. 17, at 9; Tr. 172]. Respondent credibly responded ''I've actually complied with'' this order.[83] [Tr. 172]. Yet, the Respondent was not randomly drug-tested for steroids while in the Pennsylvania monitoring program. [Tr. 174].

On February 4, 2010, Respondent's medical license was reinstated as unrestricted in Pennsylvania through an order [84] issued by the SBOM. [Gov't Ex. 20, at 1; Tr. 175]. However, there is currently an unresolved action against Respondent's license concerning Respondent's felony conviction in 2012. [Tr. 175]. Thus, Pennsylvania is in the process of reacting [85] to Respondent's recent drug-related felony conviction. As of the time of the hearing in this case, the Respondent had not had a hearing before the Pennsylvania SBOM. [Gov't Ex. 30, at 1; Tr. 182–83].

3. Minnesota Board of Medical Practice

Since Respondent is employed in Minnesota, the Minnesota Board of Medical Practice (''BMP'') has also investigated Respondent's case and plan to ''mirror'' Alabama's action. [Gov't Ex. 43; Tr. 183, 199]. An Order [86] from August 30, 2012 indicates that when Alabama releases Respondent from probation, Minnesota intends to grant Respondent an ''unconditional license.'' [Gov't Ex. 43, at 4; *see* Tr. 183, 199–200]. The Order also served as a formal reprimand. [Gov't Ex. 43, at 3].

G. Respondent's Felony Conviction

On July 7, 2011,[87] Respondent was arrested for felony charges related to anabolic steroids. [Gov't Ex. 22]. The arrest was made at Respondent's home, which he had access to on certain days of the week as a result of his divorce proceedings. [Tr. 141]. Respondent testified that Jim Hewette, an investigator for the Alabama SBME, said he was permitted to see patients in his home so long as his address was registered with the Board. [Tr. 142]. On the day of the arrest, Respondent was locked out of his house, with six patients waiting in the driveway. [*Id.*].

The basis for the charges [88] against Respondent was a violation of 21 U.S.C.

[75] An administrative hearing was held on April 4, 2001. [Gov't Ex. 7, at 2].

[76] Government counsel asked Respondent if he had notified DEA of the indefinite suspension of his medical license, to which the Respondent said he did not recall providing the notification. [Tr. 157]. Again, the basis for such a responsibility is unclear.

[77] [Gov't Ex. 4].

[78] This was contained in an adjudication and order, which was admitted into the record without objection. [Tr. 89; Gov't Ex. 8].

[79] During his testimony, Respondent could not remember if he had a positive drug screen in December 2004. He responded, however, ''[i]t's possible.'' [Tr. 166]. According to Government's documentary evidence, the positive drug screen occurred December 21, 2004. [Gov't Ex. 17, at 53].

[80] This Order was admitted to the record without objection. [Tr. 89; Gov't Ex. 17].

[81] Documentary evidence contained in Government Exhibit 17 indicates that Respondent actually missed eight drug tests after he was discharged from Talbot in 2005. [Gov't Ex. 17, at 55]. The dates of the missed drug tests are 5/11/2005, 5/12/2005, 5/13/2005, 5/16/2005, 5/17/2005, 5/18/2005, 5/19/2005, and 5/20/2005.

[82] On redirect examination, Respondent testified that he submitted a few drug tests every week at Talbot and assumed that Pennsylvania had access to these drug results. [Tr. 198]. Furthermore, Respondent added that he signed releases for Pennsylvania and Alabama to receive his records from Talbot. [Tr. 199].

[83] As previously mentioned, Government counsel tried again to show Respondent's non-compliance with a Board Order by having Respondent admit he never provided hair samples. [*See* Tr. 174–75]. However, I find this testimony similarly insignificant since Respondent provided the type of sample requested by the physician coordinator the PHP monitoring. Therefore, I will disregard similar questioning by the Government attorney concerning Government Exhibits 18 and 19. [*Id.*].

[84] The ''Final Order Reinstating Respondent's License'' was admitted into the record without objection. [Tr. 89; Gov't Ex. 20].

[85] An Order to Show Cause filed on November 14, 2012 was admitted into the record without objection. [Tr. 89; Gov't Ex. 30]. Respondent was asked to respond to ''why the State Board of Osteopathic Medicine . . . should not suspend, revoke, or otherwise restrict Respondent's license, impose a civil penalty, or impose the costs of investigation.'' [Gov't Ex. 30, at 2].

[86] This Order was admitted into the record without objection. [Tr. 89; Gov't Ex. 43].

[87] Respondent had been asked to provide a urine sample earlier that day for drug-testing. [Tr. 126]. Respondent believes the results were negative. [Tr. 126].

[88] The criminal complaint filed against Respondent was admitted into the record without objection. [Tr. 91; Gov't Ex. 22].

841(a)(1), which prohibits ''possession with [the] intent to distribute anabolic steroids,'' as well as 21 U.S.C. 846, which prohibits a ''conspiracy'' to distribute anabolic steroids. [Gov't Ex. 22].

During his testimony, Respondent explained that his wife had purchased steroids for herself and two other people from someone in northern Alabama. [Tr. 126, 195–96]. He had requested that his wife buy him some Viagra and Cialis. [Tr. 126, 129–30, 196]. Respondent admits that he was aware of his wife's drug purchases. [Tr. 127, 196]. Respondent testified that he just wanted to ''get some cheap Viagra and Cialis and wound up getting drug (sic) into a steroid charge.'' [Tr. 129–30].

On his applications to renew his DEA registration, Respondent described the situation that gave rise to the charges:

> Going thru a contentious divorce and my wife set me up and entrapped me in a scheme to purchase and distribute steriods (sic). On advice of my attorney I plead guilty to a felony of conspiracy to possess and distribute steriods (sic) in order to minimize the consequences. This had nothing to do with my medical practice. I have and continue to maintain compliance with the Alabama Physicians Health Program for 6 ½ years. [Gov't Ex. 33, at 2].

Respondent wrote a similar description of the events on the renewal application for his Minnesota DEA COR. [*See* Gov't Ex. 34, at 1–2]. While Respondent failed to accept responsibility and repeatedly blamed his ex-wife for the felony charges, he also repeatedly testified that he too ''us[ed] poor judgment.'' [Tr. 140, 196, 197, 199.][89] Respondent reflected on the conviction saying, ''I mean I used very poor judgment and I accepted responsibility—I knew my wife was doing something illegal and I should not have gotten involved with it.'' [Tr. 140].[90]

On July 28, 2011, Respondent was indicted[91] on Count I: ''willfully, knowingly, and unlawfully'' conspiring with co-defendants to ''dispense and possess with the intent to distribute and dispense testosterone[92] and primobolan depot[93] from about August 2005[94] to approximately July 8, 2011; and Count II: ''knowingly and intentionally unlawfully dispens[ing] and possess[ing] with intent to distribute and dispense testosterone and primobolan depot'' on or about June 28, 2011. [Gov't Ex. 23, at 1–2; *see also* Gov't Ex. 24]. Respondent testified that he pled guilty to Count I concerning the conspiracy. [Tr. 177].

On September 20, 2011, in the Southern District Court of Alabama, Respondent entered into a plea agreement[95] and pled guilty to the first count of the indictment, which ''charg[ed] a violation of Title 21, United States Code, Section 846—conspiracy to distribute and possess with intent to distribute anabolic steroids.'' [Gov't Ex. 25, at 1; Tr. 126, 178].[96] When Respondent signed the plea agreement, he agreed to the statements contained therein, including: ''[t]he plea of guilty is freely and voluntarily made and is not the result of force, threats, promises, or representations, apart from those representations set forth in the Plea Agreement. . . . [and] [t]he defendant is pleading guilty because he is guilty.'' [Gov't Ex. 25, at 3 ¶ 10].

On November 15, 2011, a magistrate made findings[97] regarding Respondent's compliance with his order of release while he was awaiting sentencing for his felony charges. [Resp't Ex. 2]. The magistrate wrote in an order, which denied the Government's motion to revoke his order of release, that ''[w]ithout question, the defendant has violated the Court's release order by contacting his wife by phone, te[x]t messaging, and at least one personal visit.'' [*Id.* at 12]. However, the magistrate found that the violations were ''an insufficient reason to revoke and detain the defendant.'' [*Id.* at 13].[98]

On February 24, 2012, Respondent was sentenced[99] to five years of probation, which he is currently still serving. [Gov't Ex. 26, at 2; Tr. 132, 178–79]. As a result of his guilty plea, Respondent must also serve two hundred hours[100] of community service and pay a $10,000 fine. [Tr. 132]. The second count, on which Respondent had been indicted, was dismissed. [Gov't Ex. 26, at 1]. The Respondent denied ever purchasing, consuming, or trafficking anabolic steroids. [Tr. 178; Gov't Ex. 25, at 14]. The Respondent did not take responsibility for these acts as presented in the Factual Resume provided to the Court. [Gov't Ex. 25].

H. Respondent's Reputation

Jawad Khan (''Dr. Khan'')[101] testified about Respondent's reputation, in addition to offering a signed and notarized affidavit.[102] [Tr. 113]. Dr. Khan admitted during his testimony that Respondent ''had some problems in Alabama'' and ''has a conditional license both in Alabama and in

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[89] Respondent also offered evidence of his acceptance of responsibility through an Order Denying Motion to Revoke Conditions of Release. The order was admitted in to the record as Respondent Exhibit 2, over Government's objection. [Resp't Ex. 2, at 11; Tr. 209–10]. I deny Government's motion to exclude this exhibit, since it is relevant and material evidence relating to Respondent's willingness and unwillingness to comply with court orders. [Gov't Brief, at 36, 38].

[90] Respondent's statements during his sentencing hearing, a transcript of which was admitted into evidence as Respondent Exhibit 3, indicate that he accepted responsibility for the drug-related conviction. [Resp't Ex. 3]. Respondent said, ''I'd just like to apologize to the Court. I made a mistake. I used poor judgment. I accept full responsibility for my behavior. And I wish that you would have leniency on me so I can continue to serve my patients and the community.'' [*Id.* at 6–7]. I note that a similar apology was not offered by the Respondent to this Court.

[91] A copy of the indictment was admitted into the record without objection. [Tr. 91; Gov't Ex. 23]. A copy of a document styled as a ''Penalty Page'' was similarly admitted into evidence. [Tr. 91; Gov't Ex. 24].

[92] Testosterone is a steroid regulated under Schedule III of the Controlled Substances Act. 21 U.S.C. 812; 21 CFR 1308.13; *see also* 21 CFR 1300.01 (b)(60).

[93] Primobolan Depot is an injectable steroid that is generically known as, methenolone. It is regulated under Schedule III of the Controlled Substances Act. 21 U.S.C. 812; 21 CFR 1308.13.

[94] Government counsel brought to Respondent's attention that the criminal conduct began just one month after Respondent's MOA with the DEA ended in July 2005. [Tr. 177].

[95] Respondent's plea agreement was admitted into the record without objection. [Tr. 90; Gov't Ex. 25].

[96] Even when Respondent testified about this issue on direct examination, he maintained that he did not consume and traffic anabolic steroids, but his ex-wife had. [Tr. 178].

[97] After I deferred ruling on its admissibility, an order dated November 15, 2011 regarding Respondent's violation of a previous release order was admitted into evidence. [Tr. 264–65]. Government's objection to admission of the exhibit will go to the weight I afford to the document. [Tr. 265; Resp't Ex. 2].

[98] In arriving at this conclusion, the magistrate found that Respondent has ''appeared at all times when his presence was required, and admitted his guilt without a guarantee that the district judge would agree to his continued release.'' [Resp't Ex. 2, at 11]. This statement about Respondent's admission of guilt was made pursuant to a determination of flight risk and not a determination of guilt or innocence. Thus, I weigh the statement accordingly.

[99] Respondent's Exhibit 3, the transcript of Respondent's sentencing hearing, was admitted into the record. [Resp't Ex. 3; Tr. 130, 133, 264]. The court's judgment concerning Respondent's plea was admitted into the record. [Tr. 91; Gov't Ex. 26]. I deny Government's motion to exclude this exhibit from the record, since the exhibit contains relevant and material evidence concerning Respondent's sentencing for pleading guilty to a drug-related felony. [Gov't Brief, at 36, 38].

[100] Dr. Koch testified that he has already paid the fine and served 256 hours of community service. [Tr. 132]. Respondent identified proposed Respondent Exhibit 6 as containing information about the two places he conducted community service: Habitat for Humanity and Elba Hospital. [Tr. 133–34; *see also* Resp't Ex. 6, at 1–2]. Respondent's Exhibit 6 was admitted into the record without objection. [Tr. 134].

[101] Dr. Khan is the Director of the Emergency Room at Sanford Health in Thief River Falls, Minnesota. [Tr. 111].

[102] Dr. Jawad Khan's affidavit, which was identified as Respondent's Exhibit 9, was admitted into the record over Government's objection. [Tr. 118; Resp't Ex. 9]. His affidavit was signed and notarized. [Resp't Ex. 9, at 1–2].

Minnesota.'' [Tr. 114]. Prior to hiring Respondent, Dr. Khan testified that he conducted an internal investigation. [*Id.*]. Dr. Khan mentioned he was aware Respondent had ''at one time pled guilty to some drug related offense.'' [*Id.*]. However, he added that he did not know any of the facts about Respondent's substance abuse. [*Id.*].

Dr. Khan concluded that Minnesota has not said Respondent cannot work in the state. [*Id.*]. He added that ''as long as the state Board allows him to practice and we don't have any personal concerns about him, we don't have any problems with him practicing with us.'' [Tr. 116]. Dr. Khan emphasized that his primary concern with regards to Respondent's employment is whether he has a valid state license to practice medicine. [Tr. 117].

Furthermore, Dr. Khan explained that his personal opinion of the Respondent is based on his ''personal contact with him.'' [Tr. 115]. He stated generally that Respondent ''has done a good job and we have not had any problems with him.'' [*Id.*]. Specifically, with regards to prescription drugs, Dr. Khan credibly testified that ''we have never had any concerns about him'' working in the emergency room where there are ''a lot of people who have problems with drugs.'' [*Id.*]. Dr. Khan's affidavit similarly noted that, ''during his tenure at the [Thief River Falls Emergency Room], there has never been any issue regarding any prescriptions that he has written nor has there been any misuse of his DEA certificate.'' [Resp't Ex. 9, at 1].

Also testifying regarding Respondent's reputation was Gladys Luker (''Ms. Luker''), who is a registered nurse at J. Paul Jones Hospital in Camden, Alabama. [Tr. 218]. Ms. Luker first met Respondent in approximately 2008 when he began taking shifts at the hospital. [Tr. 219]. Ms. Luker said she has had the opportunity to observe him taking care of patients. [*Id.*]. She has accompanied him to see patients in the emergency room, assist while he does procedures, and carried out his medical orders. [Tr. 220]. Overall, Ms. Luker credibly testified that Respondent's professional reputation is ''[e]xcellent.'' [Tr. 219–20].

Ms. Luker admitted that she is aware of Respondent's guilty plea, but maintained that this does not affect her opinion of him. [Tr. 220]. However, she testified that she is not really sure what the drug conviction was for. [Tr. 221]. Ms. Luker has also not discussed Respondent's long history with drug use and abuse, prior disciplinary actions, and news articles about Respondent's conviction. [Tr. 221–22].

Respondent then called Shirley Candies (''Ms. Candies'') to testify. Ms. Candies is a registered nurse and the assistant director of nursing at J. Paul Jones Hospital in Camden, Alabama. [Tr. 223–24]. Ms. Candies worked with Respondent from approximately 2009 to 2012. [Tr. 224, 227]. Ms. Candies credibility testified that she has ''observed him to be a very professional doctor'' with ''good bedside manner.'' [Tr. 224].

Ms. Candies admitted that she is aware of Dr. Koch's history of substance abuse, but has not discussed it with other people. [Tr. 225]. She also testified that she is aware Respondent ''pled guilty to some type of steroid charge,'' but maintains that it does not have an impact on her impression of Respondent. [Tr. 225–26]. Finally, Ms. Candies admitted there have been disciplinary actions taken against Respondent by three medical boards, but testified that it does not change her impression of him. [Tr. 226].

Next, Sheila Roe (''Ms. Roe'') testified about Respondent's reputation. She is a registered nurse at J. Paul Jones Hospital, in Camden, Alabama. [Tr. 228]. Ms. Roe last worked with Respondent in approximately 2012. [Tr. 233]. In total, she worked with Respondent for over four years. [*Id.*]. She testified that Dr. Koch ''is a very excellent, thorough and intelligent physician.'' [Tr. 229]. She testified that she has never questioned a written or verbal order from the Respondent with regards to patient care. [*Id.*]. Specifically, she credibly testified that she has never questioned Respondent when writing prescriptions for patients. [Tr. 230].

Ms. Roe testified, however, that she is not aware of Respondent's history of drug abuse, or the specific details concerning Respondent's felony conviction. [Tr. 231–32]. She also testified that she has not read any newspaper articles about him, nor was she aware of the administrative proceedings against him. [Tr. 232]. The witness has not discussed any of these subjects with other employees, patients or Respondent. [Tr. 232–33]. The witness explained, she just wants to work with a physician who ''know[s] what he's doing,'' even if they have a few ''issue[s].'' [*Id.*].

Then, Respondent called Jan Wicker (''Ms. Wicker'') to testify. [Tr. 237]. She is a registered nurse, director of nurses, and assistant administrator. [Tr. 238, 240]. Ms. Wicker worked with Respondent in the emergency room as locum tenens in early 2011 and then in a clinic from October 2011 to October 2012. [Tr. 240]. Then she worked with him on a daily basis, Monday through Friday, until February 28, 2013. [Tr. 243].

Ms. Wicker testified that she was aware of Respondent's drug use and abuse, specifically with regards to steroids. [*Id.*]. She learned this from court documents when the hospital was considering whether to hire Respondent. [*Id.*]. She credibly testified that this does not concern her as long as he is rehabilitated and being monitored. [Tr. 245]. She further testified that she was not aware, however, that he had previously abused cocaine and alcohol. [Tr. 241]. The witness was familiar with the disciplinary actions in Alabama, but not Pennsylvania and Minnesota. [*Id.*]. The witness added that she was aware Respondent's Medicare and Medicaid numbers were ''denied.'' [Tr. 242]. Ms. Wicker testified that she had privately discussed some of Respondent's issues with the administrator, specifically Respondent's recent guilty plea. [Tr. 244–45]. However, she added that it had not impacted the administrator's hiring decision. [*Id.*]. The witness later clarified that she, personally, does not make decisions on hiring and firing physicians, or whether a physician should be credentialed. [Tr. 246].

During her testimony, Ms. Wicker laid the foundation for Respondent Exhibit 8,[103] which is a quarterly report of Respondent's conduct by a worksite monitor. [Tr. 238–39; Gov't Ex. 8]. The report was completed on April 5, 2013. [Tr. 243]. The report covers Respondent's conduct up until the facility closed on February 28, 2013. [*Id.*]. Ms. Wicker credibly testified that the report was written at the request of the Physician Health Program on April 4th or 5th of this year. [*Id.*]. The Program provided Ms. Wicker with the form. [Tr. 247]. The witness had completed similar reports in the past. [Tr. 244]. Ms. Wicker testified that Respondent's decision to leave the area and the clinic was the result of ''the closing of the hospital and clinic due to financial decline.'' [*Id.; see also* Resp't Ex. 8, at 1]. Ms. Wicker also wrote that ''[w]e were looking forward to a long and mutually beneficial relationship with Dr. Koch.'' [Resp't Ex. 8, at 1].

Judy Holloway (''Ms. Holloway'') followed with testimony concerning the Respondent. She has been licensed as a registered nurse for thirty years. [Tr. 250]. She testified that she has worked with the Respondent as an emergency

[103] The Quarterly Report completed by worksite monitor, Jan Wicker, was admitted into the record without objection as Respondent's Exhibit 8. [Resp't Ex. 8; Tr. 247].

room nurse at Elba General Hospital for approximately 300 hours, most recently in February 2012. [Tr. 251, 252, 254]. Ms. Holloway credibly testified that Dr. Koch's work is ''excellent.'' [Tr. 251]. She added that ''all [of] the patients liked him.'' [*Id.*].

Ms. Holloway said she was not aware of Respondent's drug abuse problem, but knew he had an issue with steroids. [Tr. 253]. Ms. Holloway added that her opinion of him did not change even knowing he had been disciplined by multiple state medical boards. [Tr. 253–54].

Thereafter, Rosanne Cook (''Dr. Cook'') testified telephonically. [Tr. 256–63]. Dr. Cook is a primary care physician in a community health center located in Pineapple, Alabama and staff member at J. Paul Jones Hospital in Camden, Alabama. [Tr. 257–58]. The witness testified that she has had an opportunity to work with him and has ''no complaints about his clinical skills, his diagnostic skills, and his ability to provide the right care for patients, both coming in to the emergency room and also in the in-patients in our little hospital. He took care of my patients quite well when I was not available, and I could trust his judgment.'' [Tr. 258]. Dr. Cook clarified that she does not know Dr. Koch socially. [Tr. 259]. She last worked with Dr. Koch approximately two years ago. [Tr. 263].

Dr. Cook said she was aware Respondent had a drug problem and had talked with him about it briefly. [Tr. 260–61]. She was aware of his drug-related felony conviction and five-year probationary term. [Tr. 261]. She was also aware of the disciplinary actions against Respondent's medical license. [*Id.*]. However, Dr. Cook offered credible testimony clarifying that when Dr. Koch has been at work in the hospital he had ''never in any way act[ed] like he was under any influences, other than just good judgment.'' [Tr. 262]. Dr. Cook admitted that she had never drug-tested him. [*Id.*].

Dr. Cook concluded that her impression of Dr. Koch's reputation was based on his ''clinical judgment.'' [Tr. 262]. Dr. Cook's affidavit [104] also noted that ''there has never been any complaint or problem with the care that he has given nor any misuse of his DEA certificate. I have never seen him impaired in any way.'' [Resp't Ex. 10, at 1].

Finally, although Jana Wyatt (''Ms. Wyatt'') was not able to testify, she noted in her affidavit [105] that as CEO of Mizell Memorial Hospital in Opp, Alabama she was ''familiar with Dr. Koch through the physician recruitment process.'' [Resp't Ex. 11, at 1; Tr. 207]. Ms. Wyatt said ''he could be a welcome addition to our staff,'' however, Ms. Wyatt admitted her opinion is only based on ''brief discussions'' with him. [Resp't Ex. 11, at 1].[106] Ms. Wyatt did not provide any insight into Respondent's experience handling controlled substances.

Generally, I find that the witnesses, who testified regarding Respondent's reputation, are credible. However, I will take into account the fact that the witnesses did not rely on Respondent's past misuse and abuse of controlled substances or his steroid conviction when forming their opinions. This consideration will affect the weight I afford to the witnesses' testimony.

I. Respondent's Remedial Actions

During his testimony, the Respondent said ''I'd been in denial of my problem,'' but ''once I realized I did have a problem, I accepted responsibility for it.'' [Tr. 120]. On February 1, 2005, he entered Talbot Recovery Center (''Talbot'') in Atlanta, Georgia and spent 14 weeks in rehabilitation.[107] [Tr. 120–21]. After being ''discharged with advocacy'' from Talbot, he signed an agreement with the Alabama Physician Health Program (''APHP''). [Tr. 121]. Respondent testified that ''since 2005 [he has] been compliant.'' [Tr. 197].

Dr. Koch credibly testified that he has not used cocaine since January 2005. [Tr. 121]. As a result, he has not had a positive drug test result since then. [Tr. 123]. Respondent also maintained that he has been drug-free since he completed the Talbot Program and alcohol-free since January 2005. [Tr. 139]. Respondent cited that the biggest change from pre-2005 to post-2005 was ''recogniz[ing] [he] had a problem'' and ''needed help with it.'' [*Id.*]. To this point, Respondent added that he has ''been compliant with everything that the State Board plus the Alabama Physician Health Program has asked me to do.'' [*Id.*]. Respondent also said ''[s]ince the day I've taken responsibility for [his] actions, [he has] not had any relapses. Nor [has he] used any alcohol or drugs.'' [*Id.*]. Throughout his testimony, Respondent did not deny that he violated past board orders as a result of using illegal drugs prior to 2005. [Tr. 160]. However, in accepting responsibility, he also failed to show genuine remorse for the risks associated with his previous actions. [*See* Tr. 160–61].

I find Respondent generally credible, with the exception of specific areas of Respondent's testimony that I do not find sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision. First, I do not find the Respondent credible with respect to his testimony that he never missed a drug test. [Tr. 122, 138]. It is inconsistent with documentary evidence in the record that he missed twelve drug tests from July 2002 to February 2005. [Gov't Ex. 17, at 53–55]. It is also inconsistent with documentary evidence indicating he missed eight drug tests after his release from Talbot in May 2005. [*Id.*].

Secondly, when Government counsel asked Respondent if he had purchased, consumed or trafficked anabolic steroids, Respondent lacked credibility when he responded, ''[t]hat I did not do that.'' [Tr. 178]. Respondent's statement is contradictory to evidence contained in the factual resume of his indictment, which states: ''Mark Peter Koch, a physician practicing in Camden, Alabama and Monroeville, Alabama, purchased, consumed, and trafficked anabolic steroids.'' [Gov't Ex. 25, at 14]. The factual resume was incorporated into his plea agreement by reference. [Gov't Ex. 25, at 3].

Finally, I do not find that Respondent was credible when he testified that he has been ''compliant'' since 2005. [Tr. 197]. In 2012, Respondent was in violation of 21 U.S.C. 841(a)(1), which prohibits ''possession with [the] intent to distribute anabolic steroids,'' as well as 21 U.S.C. 846, which prohibits a ''conspiracy'' to distribute anabolic steroids. [Gov't Ex. 22]. While awaiting his sentencing for the conviction, a magistrate wrote in an order, which denied the Government's motion to revoke Respondent's order of release, that ''[w]ithout question, the defendant has violated the Court's release order by contacting his wife by phone, te[x]t messaging, and at least one personal visit.'' [Resp't Ex. 2, at 12]. This

[104] Dr. Cook's affidavit was admitted into evidence without objection. [Resp't Ex. 10; Tr. 265]. Dr. Cook's affidavit was signed and notarized. [Resp't Ex. 10, 1–2].

[105] Jana Wyatt's affidavit was admitted into evidence without objection. [Resp't Ex. 11; Tr. 207]. Her affidavit is signed and notarized. [Resp't Ex. 11, at 1–2].

[106] Wyatt also mentions that she has heard Dr. Koch has ''billing issues with Medicare and Medicaid,'' but does not go into detail about them. [Resp't Ex. 11, at 1].

[107] Dr. Koch said he entered Talbot on February 1, 2005 and was discharged on or about May 8 or May 10, 2005. [Tr. 122]. During this time period, he was being monitored in Pennsylvania. [Tr. 143–44]. Assuming Respondent was discharged on May 10, 2005, results from the Pennsylvania monitoring program indicate that Respondent missed eight drug tests, none of which can be attributed to Respondent's participation in the rehabilitation program. [Gov't Ex. 17, at 53–55]. Respondent added that he was not monitored by Alabama until May 2005. [Tr. 143].

evidence is contrary to Respondent's testimony about compliance with state and federal laws, which I do not find credible.

V. Statement of Law and Discussion

A. Positions of the Parties

1. Government's Position

The Government timely filed its closing brief (''Government's Brief'') with this Court on June 26, 2013. [Gov't Brief, at 1]. The Government offered proposed findings of fact and conclusions of law that support the denial of Respondent's renewal application and the revocation of Respondent's existing registrations. [Gov't Brief, at 2]. Government addressed its proposed factual findings and conclusions of law within the framework of the public interest analysis.

Concerning Respondent's conviction related to controlled substances, the Government proposed I find that Respondent pled guilty to a drug-related felony involving a conspiracy to distribute anabolic steroids. [Gov't Brief, at 21–22]. Government suggested I conclude that this conviction, on its own, is sufficient justification to revoke Respondent's registration. [*Id.*].

Additionally, with regards to Respondent's experience handling controlled substances, the Government suggested I find that Respondent had a long history of controlled substance abuse, which led to various violations of both state and federal law. [*Id.* at 23]. Specifically, the Government proposed I find that the various administrative board orders demonstrate a general pattern of Respondent's noncompliance with state law. [*See id.* at 13, 23–26]. The Government also proposed that I make factual findings concerning the various DEA investigations that arose when Respondent applied for DEA CORs, as well as the Memorandum of Agreement (''MOA'') that DEA entered into with Respondent, because they show a pattern of non-compliance with federal laws. [*Id.* at 4–5, 23–27].

Government further suggested that I find Respondent failed to take complete responsibility for his actions. [*Id.* at 14–16]. In support, the Government noted that the Respondent denied he had purchased, consumed, or trafficked anabolic steroids and instead testified that his ex-wife purchased the steroids, which he had neither consumed, nor trafficked. [*Id.*]. Government added that on other occasions, when Respondent took partial responsibility, I should find that he did so without remorse and without an apology. [*Id.* at 13, 29].

Government also pointed to evidence supporting their contention that the Respondent failed to take corrective actions concerning his future intentions to handle controlled substances. [*Id.* at 32–33]. The Government asserted that the Respondent failed to present a plan demonstrating that his past illegal conduct would not be repeated. [*Id.* at 33].

Government then proposed that I give limited weight to the testimony offered concerning Respondent's reputation, since it was based on general opinions of Respondent's patient care, and not his ability to handle controlled substances. [*Id.* at 9]. Government also suggested I find that the testimony from Respondent's colleagues carries little weight because they are not well-informed of Respondent's history of drug abuse and recent drug-related conviction. [*See id.* at 17–19, 34].

In conclusion, the Government urged that I find it has satisfied its prima facie case, but Respondent has failed to properly rebut it. [*Id.* at 29–30]. In reaching this result, Government requested that I exclude documentary evidence contained in Respondent's Exhibits 2 and 3, on the basis that they are irrelevant and immaterial, as well as exclude documentary evidence in Respondent's Exhibits 1(A) and 1(B) because they are inaccurate and unreliable. [*Id.* at 36, 38].

2. Respondent's Position

The Respondent filed a timely closing brief (''Respondent's Brief'') with this Court on June 27, 2013. [Resp't Brief, at 1]. The brief proposed several factual findings and legal conclusions.

First, Respondent suggested that I find he has not abused the discretionary authority granted to him pursuant to DEA CORs No. BK1391729 and FK1953327. [*Id.* at 2]. Second, he asserted I should find that he provided excellent medical care to his patients and further has never been subject of any complaint from his patients, peers, or employers. [*Id.* at 4]. Third, Respondent asserted that contrary to his drug convictions, there is no evidence he ever actually obtained or distributed the steroids alluded to in the criminal matter. [*Id.* at 5]. Fourth, Respondent proposed I find that he has not consumed any illegal substances since entering Talbot Recovery Campus in 2005, nor has he tested positive for any controlled substances since he has been enrolled in the APHP in May 2005. [*Id.* at 6–7].

Finally, Respondent suggested I find that the Government has not presented any evidence that shows his continued registration would be inconsistent with the public interest. [*Id.* at 6]. Respondent urged me to find that Government failed to meet its prima facie case to revoke Respondent's existing registrations and deny any applications for renewal or modification. [*Id.* at 8]. In conclusion, Respondent requested I issue an order denying Government's motion to revoke or suspend the DEA CORs of Dr. Koch, or in the alternative, continue the DEA CORs of Dr. Koch, subject to ''any conditions the ALJ might deem proper while Respondent's medical license is on a probationary basis.'' [*Id.* at 9].

B. Statement of Law and Analysis

Pursuant to 21 U.S.C. 823(f) (2011), the Deputy Administrator may deny an application for a DEA COR, if he determines that such registration would be inconsistent with the public interest.[108] Similarly, pursuant to 21 U.S.C. 824(a)(4), the Deputy Administrator may revoke a DEA COR, if he determines that such registration would be inconsistent with the public interest. In determining the public interest, the following factors are considered:

(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) (2011).

These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight he deems appropriate in determining whether a registration should be revoked or an application for registration be denied. *See Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (DEA 2003) (citing *Henry J. Schwartz, Jr. M.D.,* 54 FR 16,422, 16,424 (DEA 1989)). Moreover, the Deputy Administrator is ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005). Thus, ''this is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and

[108] The Deputy Administrator has the authority to make such a determination pursuant to 28 CFR 0.100(b), 0.104 (2012).

determine how many favor'' each party. *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (DEA 2009). ''Rather, it is an inquiry which focuses on protecting the public interest[.]'' *Id.*

The Government bears the ultimate burden of proving that the requirements for registration are not satisfied. 21 CFR § 1301.44(d) (2012). Specifically, the Government must show that Respondent has committed acts that are inconsistent with the public interest. 21 U.S.C. 823(f); *Jeri Hassman, M.D.,* 75 FR 8,194, 8,227 (DEA 2010) (citing *Paul J. Caragine, Jr.,* 63 FR 51,592, 51,601 (DEA 1998)). However, where the Government has made out a *prima facie* case that Respondent's application would be ''inconsistent with the public interest,'' the burden of production shifts to the applicant to ''present[] sufficient mitigating evidence'' to show why he can be trusted with a new registration. *See Medicine Shoppe—Jonesborough,* 73 FR 364, 387 (DEA 2008). To this point, the Agency has repeatedly held that the ''registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Id.; see also Samuel S. Jackson, D.D.S.,* 72 FR 23,848, 23,853 (DEA 2007). The Respondent must produce sufficient evidence that he can be trusted with the authority that a registration provides by demonstrating that he accepts responsibility for his misconduct and that the misconduct will not reoccur. *See id.; see also, Samuel S. Jackson, D.D.S.,* 72 FR at 23,853. The DEA has consistently held the view that ''past performance is the best predictor of future performance.'' *Alra Laboratories,* 59 FR 50,620 (DEA 1994), *aff'd Alra Laboratories, Inc.* v. *DEA,* 54 F.3d 450, 451 (7th Cir 1995).

On review, the Deputy Administrator must ''examine the relevant data'' and demonstrate in the record ''a rational connection between the facts found and the [decision] made.'' *Hoxie* v. *DEA,* 419 F.3d at 482. The Deputy Administrator's factual findings ''are conclusive if supported by substantial evidence.'' *Hoxie* v. *DEA,* 419 F.3d at 482; 21 U.S.C. § 877. Substantial evidence is ''more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established.'' *Hoxie* v. *DEA,* 419 F.3d at 482; *Morall* v. *DEA,* 412 F.3d at 176 (quoting *NLRB* v. *Columbian Enameling & Stamping Co.,* 306 U.S. 292, 299–300, 59 S.Ct. 501, 505 (1939)). Even if there is a ''possibility of drawing two inconsistent conclusions from the evidence,'' an agency's findings may nonetheless be ''supported by substantial evidence.'' *Shatz* v. *U.S. Dep't of Justice,* 873 F.2d 1089, 1092 (8th Cir. 1989) (citing *Trawick* v. *DEA,* 861 F.2d at 77 (internal citations omitted)). The Deputy Administrator's decision will be considered ''less substantial,'' however, when the Administrative Law Judge (ALJ) ''who has observed the witnesses and lived with the case has drawn [different] conclusions. . . . '' *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 496, 71 S.Ct. 456, 469 (1951); 5 U.S.C. § 557 (b) (explaining that an ALJ's decisions are part of the record, but they are not binding on the Deputy Administrator). Thus, the ALJ's factual findings in this decision ''are entitled to significant deference.'' *Roni Dreszer, M.D.,* 76 FR 19,434, 19,444 (DEA 2011) (citing *Universal Camera Corp.* v. *NLRB,* 340 U.S. at 496).

On appeal, the Administrator's decision will be ''set aside if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' '' *Hoxie* v. *DEA,* 419 F.3d at 482; 5 U.S.C. 706(2)(A); *Morall* v. *DEA,* 412 F.3d at 181 (vacating the DEA's decision to revoke a physician's registration because the agency had departed from its precedent without explanation); *cf. Chein* v. *DEA,* 533 F.3d 828, 835 (D.C. Cir. 2008) (finding that ''mere unevenness in the application of a sanction will not render [it] . . . 'unwarranted in law' '') (internal citations omitted).

Factor One: Recommendation of Appropriate State Licensing Board

Recommendations of state licensing boards are relevant, but not dispositive, in determining whether a respondent should be permitted to maintain a registration. *See Gregory D. Owens, D.D.S.,* 74 FR 36,751, 36,755 (DEA 2009); *see also Martha Hernandez, M.D.,* 62 FR 61,145, 61,147 (DEA 1997). According to clear agency precedent, a ''state license is a necessary, but not a sufficient condition for registration.'' *Robert A. Leslie, M.D.,* 68 FR at 15,230; *John H. Kennedy, M.D.,* 71 FR 35,705, 35,708 (DEA 2006).

DEA possesses ''a separate oversight responsibility with respect to the handling of controlled substances,'' which requires the Agency to make an ''independent determination as to whether the granting of [a registration] would be in the public interest.'' *Mortimer B. Levin D.O.,* 55 FR 8,209, 8,210 (1990); *see also Jayam Krishna-Iyer, M.D.,* 74 FR at 461. Even the reinstatement of a state medical license does not affect this Agency's independent responsibility to determine whether a DEA registration is in the public interest. *Mortimer B. Levin,* 55 FR at 8,210. The ultimate responsibility to determine whether a registration is consistent with the public interest has been delegated exclusively to the DEA, not to entities within a state government. *Edmund Chein, M.D.,* 72 FR 6,580, 6,590 (DEA 2007), *aff'd Chein* v. *DEA,* 533 F.3d 828 (D.C. Cir. 2008).

Here, records from the Alabama SBME demonstrate that Respondent satisfies the state license and registration requirements for purposes of maintaining his DEA COR No. BK1391729 in Alabama. [Gov't Ex. 31, 33]. Documentary evidence confirms that Respondent currently has a probationary license to practice medicine in the state of Alabama. [Gov't Ex. 29, at 4; *see also* Gov't Ex. 31]. His probationary license is subject to the condition that Respondent ''maintain, indefinitely, a contract with the Alabama Physicians Health Program.'' [Gov't Ex. 29, at 4; Tr. 180–81]. Additionally, Respondent has been permitted to retain a full and unrestricted Alabama registration to handle controlled substances in Schedules II–V. [Gov't Ex. 31].

Likewise, records from the Minnesota BMP indicate that Respondent also has a state medical license for purposes of maintaining DEA COR No. FK1953327 in Minnesota. [Gov't Ex. 32, 34]. Respondent currently holds an active license as a physician and surgeon in the state of Minnesota. [Gov't Ex. 32]. At this time, there are no disciplinary actions pending against the Respondent in Minnesota. [*Id.*]. Although, Minnesota has indicated it will be deferential to any disciplinary actions taken by Alabama. [Gov't Ex. 43, at 3–4; Tr. 183, 199].

With regards to Respondent's Minnesota registration to handle controlled substances, the documentary evidence does not explicitly support the fact that Respondent maintains a valid state controlled substances certificate of registration. However, I find that Respondent has the authority to prescribe, administer, and dispense controlled substances within Schedules II through V, simply by having a valid license to practice osteopathic medicine in the state of Minnesota. According to state statutes, ''[a] doctor of osteopathy . . . in the course of professional practice only, may prescribe, administer, and dispense a controlled substance included in Schedules II through V. . . .'' Minn. Stat. Ann. § 152.12 (West 2013). Therefore, in accordance with 5 U.S.C. § 556(e), I take official notice that, pursuant to Minn. Stat. Ann. § 152.12, Respondent has state authority to handle controlled substances in Minnesota, by the very nature of his valid state license to

practice osteopathic medicine.[109] [Gov't Ex. 25].

While I find Respondent currently holds valid state medical licenses and registrations in Alabama and Minnesota, which satisfy the prerequisites for his DEA CORs under the first factor of the public interest analysis, this is not the end of the inquiry. This Agency is nonetheless required to make an independent determination of whether Respondent's continued registration is within the public interest. *See Mortimer B. Levin,* 55 FR at 8,210. I find that the plethora of state administrative actions against Respondent's license in the past sixteen years diminishes the weight I can give to the current state license status.

Specifically, in 2000, Alabama SBME revoked Respondent's medical license for cocaine use. [Gov't Ex. 6, at 3; Tr. 155]. A year later, Respondent's Pennsylvania medical license was suspended, the suspension was stayed, and his medical license was placed on probation. [Gov't Ex. 8, at 11]. It took Respondent nearly ten years to once again receive an unrestricted medical license. [*See* Gov't Ex. 21; Tr. 175]. However, no sooner had his license been fully reinstated, than he pled guilty to a drug-related felony. [Gov't Ex. 25, at 1; Tr. 126, 178]. As a result of this conviction, Respondent's Alabama license was again placed on indefinite probation and Minnesota [110] responded in a similar fashion. [Gov't Ex. 29, 43]. I find that the history of state administrative orders, which ranged in effect from revocation to complete reinstatement, to probation, diminishes the weight of the current state medical license status, which permits Respondent to practice medicine and handle controlled substances.

Thus, I conclude that the evidence offered under this public interest factor satisfies the state prerequisite for a DEA COR, but does not weigh in favor of permitting Respondent to maintain his DEA CORs.

Factors Two and Four: Registrant's Experience With Controlled Substances and Registrant's Compliance With Applicable State, Federal, or Local Laws Relating to Controlled Substances

Respondent's experiences with handling controlled substances, as well as his compliance with laws related to controlled substances, are relevant considerations under the public interest analysis. Pursuant to 21 U.S.C. § 822(b), ''[p]ersons registered by the Attorney General under this subchapter to . . . dispense controlled substances . . . are authorized to possess . . . or dispense such substances . . . to the extent authorized by their registration and in conformity with the other provisions of this subchapter.'' *Leonard E. Reaves, III, M.D.,* 63 FR 44,471, 44,473 (DEA 1998); *see also* 21 CFR 1301.13(a) (providing that ''[n]o person required to be registered shall engage in any activity for which registration is required until the application for registration is granted and a Certificate of Registration is issued by the Administrator to such person.'').

DEA regulations that apply to practitioner registrants address how to modify a registration,[111] maintain records and inventories,[112] and issue prescriptions.[113] This Agency examines a ''registrant's actions against a backdrop of how she has performed activity within the scope of the certificate.'' *Cynthia M. Cadet, M.D.,* 76 FR 19,450, 19,460 (DEA 2011). Specifically, the Agency considers the ''qualitative manner'' and ''quantitative volume'' of a respondent's handling of controlled substances. *Id.*

In the absence of authorization to handle controlled substances, it is ''unlawful for any person knowingly or intentionally to . . . dispense, or possess with intent to . . . dispense a controlled substance.'' 21 U.S.C. 841(a)(1); *see* 21 U.S.C. 802(10) (''the 'dispense' means to deliver a controlled substance to an ultimate user . . . pursuant to the lawful order of, a practitioner, including the prescribing . . . of a controlled substance'').

1. Respondent's Use of Cocaine Violated State and Federal Law

Respondent's ability to prescribe controlled substances as a registered practitioner, while briefly mentioned by Respondent's colleagues during their testimony, is not the basis for any of the allegations in this case. Rather, the relevant experience I must consider is Respondent's addiction to cocaine and illegal handling of anabolic steroids. [Tr. 144]. In order to follow agency precedent, I will take into consideration evidence of Respondent's drug abuse under the fifth public interest factor. *Tony T. Bui, M.D.,* 75 FR 49,979, 49,989 (DEA 2010). To this point, however, the violations of state and federal law between September 1997 and January 2005, which arose from Respondent's cocaine addiction and unlawful conspiracy to handle steroids, are relevant considerations under this public interest factor.

The manner in which the Respondent used cocaine was a violation of federal law.[114] Specifically, Respondent's use of cocaine [115] violated 21 U.S.C. 844(a), which provides that it is ''unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice . . . .'' No one disputes that Respondent did not have such a prescription.

Further, Respondent failed to comply with the MOA he entered into with the DEA. [Gov't Ex. 9]. Even though Supervisor Younker, the author of the document, testified that he was not aware of any violations [116] Respondent committed under the MOA, Respondent credibly testified that he failed to meet the restrictions concerning the purchasing of controlled substances and the prescribing, dispensing, and administering of controlled substances to family members. [Gov't Ex. 9, at 1–2; Tr. 161]. Evidence in the record also indicates that Respondent had a positive drug test on December 21, 2004, which fell squarely between the July 2003 and July 2005 term of the MOA. [Gov't Ex. 13; Tr. 87; Gov't Ex. 9, at 1–2].

Respondent's cocaine use also violated Alabama law and administrative orders. Under Alabama law, Respondent's use of cocaine was a violation of Ala. Code 1975 §§ 20–2–1, 13A–12–210, and specifically 13A–12–212, which provides that ''[a] person commits a crime of unlawful possession of controlled substance if: (1) [e]xcept as

[109] ''Under the Administrative Procedure Act, '[a]gencies may take official notice of facts at any stage in a proceeding-even in the final decision.' '' *Attorney General's Manual on the Administrative Procedure* Act 80 (1946) (Wm. W. Gaunt & Sons, Inc., reprint 1979). In accordance with the Act, Respondent may ''show to the contrary' by filing a request for reconsideration which includes supporting documentation within fifteen days of receipt of this order.'' *Id.*

[110] At this time, Respondent no longer maintains a DEA COR in Pennsylvania. [Tr. 84].

[111] 21 CFR 1301.51 (stating that a registrant ''may apply to modify his/her registration . . . or to change his/her name or address . . . by submitting a letter'' to the DEA).

[112] 21 CFR 1304.04.

[113] 21 CFR 1306.04.

[114] Respondent's involvement in a conspiracy to purchase anabolic steroids violated 21 U.S.C. 846 and 841(a)(1), which resulted in a felony conviction. [*See* Gov't Ex. 23, 26]. This is discussed in more detail under Factor 3 of the public interest analysis.

[115] Cocaine is regulated under Schedule II of the Controlled Substances Act. 21 U.S.C. 812; 21 CFR 1308.12(b)(4).

[116] [Tr. 75, 78; Gov't Ex. 9, at 2].

otherwise authorized, he or she possesses a controlled substance enumerated in Schedules I through V.'' Ala. Code 1975 § 13A–12–212. Such behavior also caused Respondent to lose his Alabama license to practice medicine in 2000 for failing to comply with the voluntary restrictions placed on his license, in violation of Ala. Code §§ 34–24–360 (2), (3), (15) and (19). [Gov't Ex. 6, at 2–3; Tr. 155]. Then, in 2004, after requesting reinstatement of his medical license, he failed to comply with drug-monitoring requirements and his Alabama medical license was once again suspended. [Gov't Ex. 12; Tr. 165]. Eventually, in 2006, Respondent successfully had his medical license reinstated subject to an indefinite contract with APHP. [Gov't Ex. 16, at 1]. In 2010, all restrictions were lifted from Respondent's medical license. [Gov't Ex. 21; Tr. 175]. However, in 2012, all of his progress quickly unraveled when his license was immediately suspended as a result of his drug-related felony conviction. [Gov't Ex. 27, at 1].

Respondent has a similar pattern of non-compliance with Pennsylvania laws and administrative orders. In 1998, Respondent agreed to voluntary restrictions on his medical license after he was found to be in violation of section 63 P.S. § 271.15(a)(4) of the Osteopathic Medical Practice Act as a result of his cocaine use. [Gov't Ex. 2, at 2]. But, he demonstrated his inability to comply with the restrictions when he later tested positive for cocaine. [Gov't Ex. 4, at 3]. Thus, in 1999, he was suspended from practicing medicine and entered into a consent agreement, which required him to stop using controlled substances. [*Id.* at 10, 21]. However, Respondent admitted during his testimony that he once again did not comply. [Tr. 153–54]. In 2001, Respondent's Pennsylvania license was put on probation for not less than five years for failing to comply with previous administrative orders, in violation of 63 P.S. § 271.15(a)(6). [Gov't Ex. 8, at 2, 11]. In 2007, Respondent entered into another consent agreement subject to licensing restrictions because, pursuant to 63 P.S. § 271.5(a)(5), Respondent was ''unable to practice the profession with reasonable skill and safety to patients by reason of illness, addiction to drugs or alcohol. . . .'' [Gov't Ex. 17, at 3]. While Respondent ultimately received an unrestricted medical license in 2010, Pennsylvania has issued an Order to Show Cause concerning Respondent's felony conviction. [Gov't Ex. 20, at 1; Gov't Ex. 30, at 1].

2. There Is Insufficient Evidence That Respondent's Use of Anabolic Steroids Violated Federal Law

As for Respondent's use of anabolic steroids, the Government asserted that Respondent unlawfully consumed anabolic steroids. Specifically, the Government stated that Respondent's use of anabolic steroids: (1) Violated 21 U.S.C. 844, which prohibits illegal possession of anabolic steroids; (2) violated 21 U.S.C. 841(a)(1), which prohibits distribution of anabolic steroids; and (3) violated 21 U.S.C. 846, which penalizes participation in a conspiracy related to the possession or distribution of controlled substances. [Gov't Brief, at 23].

During his testimony, Respondent said that he did not purchase or consume anabolic steroids. [Tr.178]. However, Respondent admitted that he pled guilty to ''self-using the anabolic steroids.'' [Tr. 84]. Additionally, the factual resume of his indictment states that Respondent ''purchased, consumed, and trafficked anabolic steroids'' and Respondent ''admits in open court and under oath that [this] . . . statement is true and correct and constitutes evidence in the case.'' [Gov't Ex. 25, at 14].[117]

While the record contains some evidence that Respondent consumed anabolic steroids, I find that the Government has not met its burden of proving such consumption was *unlawful*. None of the counts in the indictment mentioned Respondent's unlawful consumption of steroids or offered a specific statute that Respondent had violated by such consumption. [*See generally* Gov't Ex. 23]. Furthermore, the only count from the indictment to which Respondent pled guilty was conspiracy to distribute anabolic steroids. [Gov't Ex. 23; Gov't Ex. 26]. Thus, the guilty plea made no mention of illegal consumption. [Gov't Ex. 25]. As a result, I find that since Respondent did not plead guilty to unlawful consumption and the evidence in the record does not support such consumption,[118] the record failed to prove that Respondent violated state or federal law with regards to the unlawful consumption of anabolic steroids.

3. Respondent's Failure to Maintain a DEA COR at his Principal Place of Business Violated a Duty of Registrants Under the CSA and Agency Regulations

a. Change of Address

The Government incorrectly asserted that Respondent's failure to notify the DEA of his change in address for his DEA COR in Minnesota demonstrated that Respondent violated a duty arising under agency regulations. [Gov't Brief, at 7]. Government grounded the existence of Respondent's duty to notify the DEA of a change in address in DI Riley's testimony, where he answered in the affirmative to Government counsel's question, ''Investigator Riley, is it the duty and responsibility of the DEA registrant to be able to be located at their registered address?'' [*Id.;* Tr. 273]. Government then offered as proof of Respondent's violation an envelope sent to Respondent's registered address in Virginia, Minnesota, which was returned to the DEA with stamps saying ''Undeliverable as Addressed,'' ''Return to Sender,'' and ''Unable to Forward.'' [Gov't Ex. 44].

DEA regulations do not explicitly define a registrant's duty to notify the DEA of a change in address. Under 21 CFR 1301.51, a ''[r]egistrant may apply to modify his/her registration . . . or change his/her name or address, by submitting a letter of request'' to the DEA. However, Respondent's ability to change the registered address, as indicated by ''may'' in the regulatory language, should not be confused with an affirmative responsibility of the Respondent to provide such notice under the regulations. If the DEA wanted to create a responsibility to notify the agency of a change in address, it could have used ''shall'' instead of ''may'' in the language of the regulation. Thus, pursuant to § 1301.51, a Respondent does not have a duty to notify the DEA of his change in address. Consequently, Government incorrectly asserted that Respondent violated such duty in an effort to prove Respondent has a history of non-compliance.

b. Principal Place of Business

Sua sponte, however, I find that the envelope,[119] which was returned to the DEA, is evidence that Respondent violated 21 CFR 1301.12. Under both the CSA and agency regulations, a registrant is required to obtain a ''separate registration . . . at each principal place of business or professional practice.'' 21 U.S.C. 822(e);

[117] The factual resume of the indictment was incorporated into Respondent's plea agreement by reference. [Gov't Ex. 25, at 3].

[118] The Administrator has explained that ''in the absence of probative and reliable evidence'' of a charge, ''Respondent ha[s] no obligation to refute the charge.'' *David A. Ruben, M.D.,* 78 FR 38,363, 38,384 n.45 (DEA 2013). Here, since the record did not contain probative and reliable evidence that Respondent unlawfully consumed anabolic steroids, the Respondent is not required to refute it according to agency precedent.

[119] [Gov't Ex. 44].

21 CFR 1301.12.[120] Published guidance from the DEA concerning the ''Registration Requirements for Individual Practitioners Operating in a 'Locum Tenens' Capacity'' instructs that the location where a practitioner will work in a locum tenens capacity is considered his ''principal place of business or professional practice'' for purposes of a DEA registration. *Registration Requirements for Individual Practitioners Operating in a ''Locum Tenens'' Capacity,* 74 FR 55,499, 55,501 (DEA 2009).

Here, Respondent testified that he was working in a locum tenens capacity in Minnesota. [Tr. 128]. The envelope sent by the DEA to Respondent, which was returned to DEA as undeliverable, listed the following address: 815 12th Street North, Virginia, Minnesota 55792. [Gov't Ex. 44]. Such address is the Respondent's registered address. [Gov't Ex. 34, at 1]. Because the envelope was returned to DEA having been marked as undeliverable, I find that Respondent was not registered at his principal place of business while working in a locum tenens capacity in Minnesota, in violation of 21 CFR 1301.12 (requiring any person to have a separate registration to handle controlled substances for each principal place of business or professional practice).

In conclusion, I find that Government incorrectly asserted that Respondent violated a duty to notify DEA of a change in his registered address. I do not find that such duty exists under the statute or regulations. However, I find that Respondent, by failing to maintain his registration at his principal place of business, violated 21 CFR 1301.12. Therefore, Respondent failed to obtain a separate registration for his principal place of business in Minnesota where he was working in a locum tenens capacity. Thus, Respondent's violation of § 1301.12 weighs in favor of finding that Respondent's continued registration is inconsistent with the public interest.

4. Respondent's Failure To Notify DEA of His Intention to Cease Medical Practice in Alabama Violated His Duties as a Registrant

Government argued that Respondent failed to comply with agency regulations when he failed to notify DEA that his Alabama medical license and certificate of registration were suspended in 2012. [Gov't Brief, at 15; Tr. 180; Gov't Ex. 27]. Government added that Respondent violated agency regulations when he failed to surrender his DEA COR during periods of time when he did not have a valid medical license or state registration. Specifically, Supervisor Dittmer indicated during his testimony that he believed Respondent had a responsibility to surrender his registration upon losing his Pennsylvania medical license in 2001. [Gov't Brief, at 4; Tr. 62; Gov't Ex. 3, at 7].

The Government offered as a legal basis for such duties, 21 CFR 1307.02, which provides that ''[n]othing in [the regulations] shall be construed as authorizing or permitting any person to do any act which such person is not authorized or permitted to do under other Federal laws . . . or under the law of the State in which he/she desires to do such act. . . .'' It also cited to 21 U.S.C. 824(a)(3), which indicates that a DEA COR may be revoked or suspended if the registrant ''has had his State license or registration suspended, revoked, or denied by competent State authority. . . .'' I find that the Government incorrectly inferred a duty to notify and surrender a DEA COR from these broad provisions.

''[T]he registration of any person . . . shall terminate . . . if and when such person dies, ceases legal existence or discontinues business or professional practice.'' 21 CFR 1301.52(a). Agency precedent has interpreted this language to mean that such duty to notify arises when a registrant establishes that ''he intends to permanently cease the practice of medicine.'' *William R. Lockridge, M.D.,* 71 FR 77,791, 77,797 (DEA 2006). A registrant may also demonstrate his intent through returning his DEA COR for cancellation. *See* 21 CFR 1301.52(c); *John B. Freitas, D.O.,* 74 FR 17,524, 17,525 (DEA 2009). Here, Respondent never testified that he intended to cease the practice of medicine in 2001 when his Pennsylvania license was suspended or in 2012 when his Alabama license was suspended. *See Wayne D. Longmore, M.D.,* 77 FR 67,669, 67,671 (DEA 2012). Thus, Respondent did not violate a duty of notice under the agency regulations with respect to these circumstances.

Sua sponte, however, I find that Respondent should have notified the DEA when he decided in 2004 that he no longer had any intention of practicing medicine in Alabama. [Tr. 165]. Respondent testified that in 2004 he notified both his attorney and the Alabama SBME that he would not pursue an Alabama license. [Tr. 165]. As a result, the Alabama SBME rescinded its offer to reinstate his medical license. [Gov't Ex. 12]. Under these circumstances, Respondent expressed a clear intent to cease professional practice, which triggered 21 CFR § 1301.52(a) and the duty to notify DEA.

Even so, this does not mean that Respondent was also required to surrender his or her DEA COR. Surrendering a registration is a voluntary decision under agency regulations. *See* 21 CFR 1301.52(a); *Voluntary Surrender of Certificate of Registration,* 76 FR 61,563, 61,563 (DEA 2011). Upon receiving notice, DEA can decide whether to institute proceedings against a registrant to revoke his registration, but the registrant is not obligated to surrender his registration. Consequently, I find that Respondent violated the regulations and failed to notify the DEA in 2004 of his intentions to cease the practice of medicine in Alabama. However, I do not find that the other circumstances described by the Government in 2001 and 2012 constituted non-compliance with agency regulations.

In conclusion, I find that the evidence offered in support of Factors 2 and 4 proves several violations of federal and state laws, as well as administrative orders, which illustrate a pattern of non-compliance that heavily weighs in favor of finding that Respondent's maintenance of a DEA COR would be inconsistent with the public interest.

Factor Three: Registrant's Conviction Record Relating to Controlled Substances

Pursuant to 21 U.S.C. 823(f)(3), the Deputy Administrator may deny a pending application for a certificate of registration upon a finding that the applicant has been convicted [121] of a felony related to controlled substances under state or federal law. *See Thomas G. Easter II, M.D.,* 69 FR 5,579, 5,580 (DEA 2004); *Barry H. Brooks, M.D.,* 66 FR 18,305, 18,307 (DEA 2001); *John S. Noell, M.D.,* 56 FR 12,038, 12,039 (DEA 1991).

The Deputy Administrator may revoke a respondent's certificate of registration on a similar basis. Pursuant to 21 U.S.C. § 824(a)(4), a registration may be suspended or revoked by the [Deputy Administrator] upon a finding that the registrant . . . has been convicted of a felony . . . relating to any substance defined . . . as a controlled substance.'' *See Algirdas J.*

[120] I find Government's citation to 21 CFR 1301.52, which discusses the conditions that may terminate registrations, and the citation to 21 CFR 1301.11, which addresses who is required to obtain a registration, are equally unhelpful. [Gov't Brief, at 26–27].

[121] The Administrator interprets the term ''conviction'' by affording it the ''broadest possible meaning.'' *Donald Patsy Rocco, D.D.S.,* 50 FR 34,210, 34,211 (DEA 1985). Thus, evidence of a guilty plea is probative under the third factor of the public interest analysis. *See e.g., Farmacia Ortiz,* 61 FR 726, 728 (DEA 1996); *Roger Pharmacy,* 61 FR 65,079, 65,080 (DEA 1996).

Krisciunas, M.D., 76 FR 4,940, 4,944 (DEA 2011); *Ivan D. Garcia-Ramirez, M.D.,* 69 FR 62,092, 62,093 (DEA 2004); *William C. Potter, D.V.M.,* 65 FR 50,569, 50,569 (DEA 2000). The drug-related activity that gives rise to the convictions does not have to involve the registrant's DEA COR in order to justify the revocation. *See e.g., Paul Stepak, M.D.,* 51 FR 17,556, 17,556–57 (DEA 1986) (revocation of registration for distributing LSD); *William H. Carranza, M.D.,* 51 FR 2,771, 2,771–72 (DEA 1986) (denial of registration application for possessing heroin and cocaine); *Aaron Moss, D.D.S.,* 45 FR 72,850, 72,851 (DEA 1980) (denial of registration application for smuggling cocaine).

It is important to note that the doctrine of *res judicata* precludes a respondent from re-litigating previous criminal convictions in a DEA administrative proceeding. *See Robert L. Dougherty, M.D.,* 76 FR 16,823, 16,830 (DEA 2011); *Dan E. Hale, D.O.,* 69 FR 69,402, 69,406 (DEA 2004) (citing *Robert A. Leslie, M.D.,* 64 Fed Reg. at 25,908–25,910). Likewise, collateral estoppel precludes a respondent from re-litigating the underlying factual findings of his criminal convictions in a DEA administrative hearing. *Shahid Musus Siddiqui, M.D.,* 61 FR 14,818, 14,818–19 (DEA 1996). The purpose of both doctrines is to ''protect[t] the litigants from the burden of relitigating'' and ''promot[e] judicial economy.'' *Jose G. Zavaleta, M.D.,* 78 FR 27,431, 27,434 (DEA 2013) (citing *Parklane Hosiery Co. Inc.* v. *Shore,* 439 U.S. 322, 326 (1979)).

In this case, Respondent's September 2011 guilty plea is considered a conviction for purposes of this factor of the public interest analysis. *See Farmacia Ortiz,* 61 FR at 728. Thus, Respondent has a recent drug-related felony conviction that strongly supports a finding that continuing his registration and granting his renewal application would be inconsistent with the public interest. [Gov't Ex. 25].

Furthermore, I find that since Respondent has already pled guilty to the charges, he has waived his ability to defend his actions. I will not reconsider Respondent's conviction, or the underlying facts of his case, in accordance with the doctrines of *res judicata* and collateral estoppel. *See Dan E. Hale, D.O.,* 69 FR at 69,406 (citing *Robert A. Leslie, M.D.,* 64 FR at 25,908–25,910). I will simply adopt the findings in the factual resume of Respondent's plea agreement. [*See* Gov't Ex. 25, at 14–16]. By signing the plea agreement, Respondent agreed that he entered into it freely and he ''plea[d] guilty because he is guilty.'' [Gov't Ex. 25, at 3 ¶ 10]. This conviction weighs heavily in favor of revoking Respondent's registration and denying Respondent's renewal application because it is related to controlled substances. It carries even greater weight because the conviction is in close proximity to this adjudication. Additionally, the events that gave rise to the conviction began within a month [122] or so of the expiration of the Respondent's DEA MOA. [Gov't Brief, at 3].

Despite significant documentary evidence regarding the conviction, Respondent nevertheless attempted to downplay his involvement in the events that gave rise to the conviction. Respondent tried to pass blame for the conviction to his ex-wife because she was allegedly the one purchasing steroids from individuals in northern Alabama. [Tr. 126, 195–96]. He explained that he ''wound up getting drug (sic) into a steroid charge'' because he gave his ex-wife money to buy Viagra and Cialis during the same transaction. [Tr. 130]. I find that this testimony in no way mitigates the weight of Respondent's conviction. If anything, Respondent's failure to apologize or show remorse for such actions is an aggravating circumstance under this factor of the public interest analysis.

Finally, in its closing brief, the Government identified agency precedent that permits the Deputy Administrator to revoke a respondent's registration solely based on a felony conviction, even if the drug-related activity did not specifically involve the registration. [Gov't Brief, at 21–22]. While I acknowledge that a drug-related felony conviction could provide sufficient basis to recommend revocation of the Respondent's registration or denial of his renewal application, I will still make findings as to the other public interest factors. However, the findings under this factor weigh heavily in favor of revoking Respondent's registration and denying his renewal application since a drug-related felony conviction is extremely inconsistent with the public interest.

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

Under the fifth public interest factor, the Agency considers ''[s]uch *other conduct* which may threaten the public health and safety.'' 21 U.S.C. § 823(f)(5) (emphasis added). The Administrator has clarified this language by reasoning that since Congress used the word ''may,'' factor five includes consideration of conduct, ''which creates a probable or possible threat (and not an actual) threat to public health and safety.'' *Roni Dreszer, M.D.,* 76 FR at 19,434; *Michael J. Aruta,* 76 FR 19,420, 19,420 (DEA 2011); *Beau Boshers, M.D.,* 76 FR 19,401, 19,403 (DEA 2011); *Jacobo Dreszer, M.D.,* 76 FR 19,386, 19,386 (DEA 2011).

Taking into consideration Congress's clear statutory language and legislative intent under the CSA, misconduct considered under factor five also ''must be related to controlled substances.'' *Terese, Inc. D/B/A Peach Orchard Drugs,* 76 FR 46,843, 46,848 n.11 (DEA 2011); *Tony T. Bui, M.D.,* 75 FR at 49,989 (finding that prescribing practices related to a non-controlled substance, such as human growth hormone, may not provide an independent basis for concluding that a registrant has engaged in conduct, which may threaten public health and safety); *cf., Paul Weir Battershell, N.P.,* 76 FR 44,359, 44,360, 44,368 n.27 (DEA 2011) (reasoning that while respondent's violation of the Food, Drug, and Cosmetic Act for improperly dispensing Human Growth Hormone does not relate to a controlled substance, such violation is relevant in assessing respondent's future compliance with the CSA).

Long-standing agency precedent indicates that a ''practitioner's self-abuse of a controlled substance is a relevant consideration under factor five.'' *Tony T. Bui, M.D.,* 75 FR at 49,989; *Allan L. Gant, D.O.,* 59 FR 10,826, 10,827 (DEA 1994); *David E. Trawick, D.D.S,* 53 FR 5,326 (DEA 1988). This Agency has upheld such a position, ''even when there [was] no evidence that the registrant abused his prescription writing authority'' or when there was ''no evidence that the practitioner committed acts involving unlawful distribution to others.'' *Tony T. Bui, M.D.,* 75 FR at 49,989.

Here, Respondent credibly testified that he struggled with his addiction from 1985 to 2005. [Tr. 120]. Respondent openly admitted that he abused both drugs and alcohol, during this time period. [Tr. 144]. Respondent said he used cocaine several times a year while on vacation in the Caribbean. [Tr. 145]. He also used to drink alcohol three times a week, consuming up to eight or ten cans of beers each episode. [*Id.*]. I find that Respondent failed to show genuine remorse for these actions that could have had very devastating personal and professional consequences. [Tr. 160–61]. Thus, his conduct and lack of remorse weighs

[122] Respondent's MOA with DEA expired July 15, 2005. [Gov't Ex. 9, at 2]. Count I of the indictment indicates that Respondent became involved with the conspiracy in approximately August 2005. [Gov't Ex. 23, at 1].

against Respondent's maintenance of a DEA registration.

As previously explained by the Deputy Administrator, ''[t]he paramount issue is not how much time has elapsed since [the Respondent's] unlawful conduct, but rather, whether during that time [the] Respondent has learned from past mistakes and has demonstrated that he would handle controlled substances properly if entrusted with a DEA registration.'' *Leonardo V. Lopez, M.D.,* 54 FR 36,915, 36,915 (DEA 1989). Nonetheless, time is certainly an appropriate factor to be considered. *See Robert G. Hallermeier, M.D.,* 62 FR 26,818, 26,821 (DEA 1997) (four years); *John Porter Richards, D.O.,* 61 FR 13,878, 13,879 (DEA 1996) (ten years); *Norman Alpert, M.D.,* 58 FR 67,420, 67,421 (DEA 1993) (seven years).

In this case, the record demonstrates that the Respondent's cocaine abuse occurred from 1985 to January 2005. [Tr. 120]. The record contains no other use evidence of cocaine abuse. I find that Respondent's sobriety since 2005 weighs in Respondent's favor.

However, an issue arises concerning the Respondent's handling of steroids. Respondent denied purchasing, consuming, and trafficking anabolic steroids,[123] even though contradictory evidence was contained in the factual resume [124] of his indictment, which stated: ''Mark Peter Koch, a physician practicing in Camden, Alabama and Monroeville, Alabama, purchased, consumed, and trafficked anabolic steroids.'' [Gov't Ex. 25, at 14]. Since I determined that Respondent's testimony on this issue was not credible, I find that his recent conduct of purchasing and trafficking anabolic steroids, as documented in the factual resume, demonstrates he has not learned from his past mistakes concerning the handling of controlled substances. Thus, his conduct weighs against the Respondent's maintenance of a DEA registration.

Overall, I conclude that the evidence under factor five weighs against a finding that Respondent's continued registration and renewal application are consistent with the public interest.

1. Mitigating Evidence

a. Respondent's Candor

Once the Government has proved that Respondent has ''committed acts inconsistent with the public interest'' the Respondent must ''present sufficient mitigating evidence to assure the Deputy Administrator that it can be entrusted with the responsibility carried by such a registration.'' *Medicine Shoppe—Jonesborough,* 73 FR at 387 (internal citations omitted). DEA has consistently held that ''[c]andor during DEA investigations, regardless of the severity of the violations alleged, is considered by the DEA to be an important factor when assessing whether a . . . registration is consistent with the public interest'' and noting that a registrant's ''lack of candor and failure to take responsibility for his past legal troubles . . . provide substantial evidence that his registration is inconsistent with the public interest.'' *Jeri Hassman, M.D.,* 75 FR at 8,236; *see also Prince George Daniels, D.D.S.,* 60 FR 62,884, 62,887 (DEA 1995); *see also Ronald Lynch, M.D.,* 75 FR 78,745, 78,749–750 (DEA 2010) (Respondent's attempts to minimize misconduct held to undermine acceptance of responsibility).

During the hearing, Respondent discussed his sincere efforts to rehabilitate. He described how he experienced a major turning point in 2005, which enabled him to recognize that he had a substance abuse problem. [*See* Tr. 139]. He further explained that in February of 2005 he entered Talbot Recovery Center. [Tr. 120–21]. With the help of this treatment, Respondent testified he has been drug-free since February 2005 and alcohol-free since January 2005. [Tr. 139]. From his demeanor, I find that Respondent's testimony on his rehabilitation was credible. His ability to completely abstain from drugs and alcohol for eight years certainly weighs in Respondent's favor.

However, while I find that Respondent's candor during this testimony was very open and honest about his addiction, he failed to testify credibly about his handling of anabolic steroids. Respondent blamed his ex-wife for conduct to which he pled guilty, thereby undermining the circumstances where he had actually accepted responsibility for his actions. This demonstrates a lack of candor and weighs against the Respondent's continued registration.

b. Evidence of Respondent's Community Impact and Professional Reputation

The Agency does not ''consider community impact evidence in exercising its authority . . .'' to either deny an application for registration or revoke an existing registration. *Linda Sue Cheek, M.D.,* 76 FR 66,972, 66,973 (DEA 2011); *see also Steven M. Abbadessa, D.O.,* 74 FR 10,077, 10,078 (DEA 2009) (the hardship imposed because Respondent lacks a registration is not a relevant consideration under the Controlled Substances Act).

With regards to evidence offered in support of Respondent's professional reputation, I find such testimony supportive, as far as it goes. The Government never challenged Respondent's practice of medicine. Therefore, the Respondent's professional reputation does not mitigate the Respondent's misconduct in this case.

However, I have considered the Respondent's evidence, specifically the testimony from his colleagues concerning Respondent's ability to practice medicine. For example, Ms. Luker and Ms. Holloway described his professional reputation as ''[e]xcellent.'' [Tr. 219–20, 251]. Ms. Candies commented that she ''observed [Dr. Koch] to be a very professional doctor'' with ''good bedside manner.'' [Tr. 224]. Dr. Khan testified that ''as long as the state Board allows him to practice and we don't have any personal concerns about him, we don't have any problems with him practicing with us.'' [Tr. 116]. I find this testimony carries little value under the public interest analysis because it does not bear a connection to Respondent's ability to handle controlled substances. *Terese, Inc. D/B/A Peach Orchard Drugs,* 76 FR at 46848 n.11. The fundamental issue in this case is *not* Respondent's ability to practice medicine, but rather Respondent's ability to handle controlled substances. Whether Respondent is qualified to maintain a medical license is for the state medical boards to decide. As a result, I find that any general testimony offered in support of Respondent's reputation to practice medicine is of little value for purposes of the public interest analysis in this case.

On the other hand, I acknowledge that Respondent's colleagues offered a few general comments about Respondent's reputation related to drugs, which deserve some consideration. Dr. Khan credibly testified that ''we have never had any concerns about [Dr. Koch]'' working in the emergency room where there are ''a lot of people who have problems with drugs.'' [Tr. 115]. Ms. Roe said she has never questioned Respondent when he wrote prescriptions for patients. [Tr. 230]. Dr. Cook said she never thought he was acting under the influence of drugs or alcohol while on the job. [Tr. 262]. While this testimony is more probative than the testimony on Respondent's ability to practice medicine, it still does not carry significant weight for purposes

[123] [*See* Tr. 178].

[124] The factual resume was incorporated into his plea agreement by reference. [Gov't Ex. 25, at 3]. However, I have found that Government failed to prove that the Respondent unlawfully consumed steroids.

of this public interest factor because: (1) The witnesses did not specifically mention controlled substances; (2) they were not asked follow-up questions that would have given context to these comments; and (3) they were not well-informed about the facts involved in the Respondent's history of drug abuse or his drug-related conviction.

Finally, I am not persuaded by Respondent's testimony that his registration is in the ''best interest of the community,'' [125] because long-standing agency precedent indicates this is not a relevant consideration. *See e.g., Linda Sue Cheek, M.D.,* 76 FR at 66973.

C. Conclusion and Recommendation

I conclude that the Government has proven, by a preponderance of the evidence, that Respondent's renewal application for DEA COR No. FK1953327 in Minnesota should be denied and Respondent's DEA COR No. BK1391729 in Alabama should be revoked. Respondent has been granted numerous opportunities to act as a responsible DEA registrant and has failed each time. I do not see any conditions that could be placed on Respondent's registration now that would ensure that Respondent would be a responsible DEA registrant, especially considering that Respondent has been the subject of numerous state medical board orders that imposed probationary periods, that Respondent violated his DEA MOA, and that Respondent recently pled guilty to a felony concerning controlled substances. Furthermore, Respondent has not shown that he has learned from his past mistakes in a way that will prevent future misconduct.

Although Respondent offered ample testimony concerning his reputation as a practicing physician and his impact on the medical community, the only probative mitigating evidence offered was generalized testimony about his ability to handle prescription drugs. Because Respondent has not taken full responsibility for his mistakes and genuinely expressed remorse, I find that granting Respondent's renewal application for the DEA COR in Minnesota is against the public interest and revoking Respondent's DEA COR in Alabama is appropriate. Consequently, I recommend that Dr. Koch's renewal application for DEA COR No. FK1953327 be denied and DEA Registration No. BK1391729 be revoked.

Dated: July 18, 2013.
Gail A. Randall,
Administrative Law Judge.

[125] [Tr. 229; Resp't Brief, at 4].

[FR Doc. 2014–07450 Filed 4–2–14; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Wage and Hour Division

Presidential Memorandum of March 13, 2014; Updating and Modernizing Overtime Regulations

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice.

On March 13, 2014, President Barack Obama issued a memorandum to the Secretary of Labor, directing him to modernize and streamline the existing overtime regulations for executive, administrative and professional employees. The last change to these overtime regulations was in 2004.

The text of this memorandum reads—

The Fair Labor Standards Act (the ''Act''), 29 U.S.C. 201 *et seq.,* provides basic rights and wage protections for American workers, including Federal minimum wage and overtime requirements. Most workers covered under the Act must receive overtime pay of at least 1.5 times their regular pay rate for hours worked in excess of 40 hours per week.

However, regulations regarding exemptions from the Act's overtime requirement, particularly for executive, administrative, and professional employees (often referred to as ''white collar'' exemptions) have not kept up with our modern economy. Because these regulations are outdated, millions of Americans lack the protections of overtime and even the right to the minimum wage.

Therefore, I hereby direct you to propose revisions to modernize and streamline the existing overtime regulations. In doing so, you shall consider how the regulations could be revised to update existing protections consistent with the intent of the Act; address the changing nature of the workplace; and simplify the regulations to make them easier for both workers and businesses to understand and apply.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Nothing in this memorandum shall be construed to impair or otherwise affect the authority granted by law to a department or agency, or the head thereof.

You are hereby authorized and directed to publish this memorandum in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this notice may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693–0023 (not a toll-free number). TTY/TTD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

Dated: March 21, 2014.

Laura A. Fortman,

Principal Deputy Administrator, Wage and Hour Division.

[FR Doc. 2014–07379 Filed 4–2–14; 8:45 am]

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NATIONAL SCIENCE FOUNDATION

Advisory Committee Business and Operations; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Business and Operations Advisory Committee (9556).

Date/Time: April 30, 2014; 1:00 p.m. to 5:30 p.m. (EST); May 1, 2014; 8:00 a.m. to 12:00 p.m. (EST).

Place: National Science Foundation, 4201 Wilson Boulevard, Stafford I, Room 1235.

Type of Meeting: OPEN.

Contact Person: Joan Miller, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, (703) 292–8200.

Purpose of Meeting: To provide advice concerning issues related to the oversight, integrity, development and enhancement of NSF's business operations.

Agenda:

Wednesday, April 30, 2014 1:00 p.m.–5:30 p.m.: Welcome/Introductions; BFA/OIRM/CIO Updates; OMB Publication of Uniform Guidance; Report from Working Group to Consider the Issue of Linking NSF Organizational Goals and Objectives with Employee Performance Plans; Virtual Panels.

Thursday, May 1, 2014 8:00 a.m.–12:00 p.m.: Business Systems Review (BSR)