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Drug and Enforcement Administration
Perry County Food & Drug Decision and Order; Notice

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 15–10]

Perry County Food & Drug Decision and Order

On May 13, 2015, Chief Administrative Law Judge (CALJ) John J. Mulrooney, Jr., issued the attached Recommended Decision (hereinafter, cited as R.D.[1]). Thereafter, on June 15, 2015, the CALJ forwarded the record to this Office for Final Agency Action noting that neither party had filed exceptions to the Recommended Decision. *See* 21 CFR 1316.66 (providing a party with the right to file exceptions to an ALJ's decision ''[w]ithin twenty days after the date upon which [it] is served [with] a copy'').

Subsequently, on July 8, 2015, Respondent filed with this Office a pleading entitled as its ''Closing Brief.'' In a letter accompanying the filing, Respondent's counsel explained that the Recommended Decision had been mailed to his former address and that he had recently changed his address and had ''only recently received'' the CALJ's Recommended Decision. Letter of Respondent's Counsel to Acting Deputy Administrator, DEA (July 8, 2015).

Upon reviewing the letter, I noted that while Respondent's Counsel had explained that he had only recently received the Recommended Decision because it had been mailed to his former address, his filing was nonetheless untimely. Order of the Acting Administrator, at 1 (July 13, 2015). I therefore directed Respondent's Counsel to explain why ''this constitute[d] good cause''; I also directed Respondent's Counsel to address why he did not notify the Office of Administrative Law Judges (OALJ) of his new address, as well set forth the date on which he received the decision. *Id.*

In response, Respondent's Counsel explained that he was ''not now attempting to add exceptions to the record,'' that he had previously received the decision on May 13, 2015, and that he ''had not filed any exceptions to it due to [his] understanding that exceptions are not necessary under the regulations.'' Letter of Respondent's Counsel to Acting Administrator, at 1 (July 14, 2015). Respondent's Counsel further explained that he had sent his previous letter to the Acting Deputy Administrator because he had received a copy of the CALJ's letter transmitting the record, and that he sent his letter ''in an abundance of caution due to [his] misunderstanding of the purpose of'' the CALJ's letter, as he ''did not want the fact that [he] had not filed any exceptions . . . to preclude'' this Office from ''perform[ing] an independent review of the record and Decision.'' *Id.* at 1–2.

Taking Respondent's Counsel at his word, I do not consider the filing submitted on July 8, 2015. However, in reviewing the record, I have considered the ''Closing Brief'' Respondent's Counsel submitted on April 27, 2015, following the conclusion of the evidentiary phase of the proceeding.

Having considered the entire record in this matter, I have decided to adopt the factual findings of the Recommended Decision except as discussed below.[2] I also adopt but modify the CALJ's legal conclusions as discussed below.[3] Because I agree with the CALJ's conclusion that Respondent's evidence as to its acceptance of responsibility and remedial measures is not persuasive, I further adopt the CALJ's Recommendation to the extent that it recommends that I deny any pending application to renew its registration.[4]

In this matter Respondent stipulated (and other evidence shows) that its Pharmacist-in-Charge, Chris Watson, who is also the son of its owner Tom Watson, committed multiple acts resulting in the diversion of controlled substances. These include:

(1) Dispensing controlled substances including hydrocodone (a schedule II drug) to A.R. without a prescription. Stipulation 13. Additional record evidence shows that on nine occasions between June 18, 2014 and December 29, 2014, Respondent dispensed controlled substances including hydrocodone and oxycodone (also a schedule II drug) to A.R. listing a dentist (Dr. Hambuchen) as the prescriber. GX 4. However, Dr. Hambuchen denied knowing A.R. (GX 3) and testified to this in the proceeding. Tr. 23. The parties further stipulated that Dr. Hambuchen never issued a prescription for A.R. ALJ Ex. 15, at 4. Each of these acts constitutes an outright drug deal in violation of 21 U.S.C. 841(a)(1), which provides that ''[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to distribute[ ] or dispense . . . a controlled substance[.]''). *See also id.* § 842(a)(1) (''It shall be unlawful for any person . . . who is subject to the requirements of part C to distribute or dispense a controlled substance in violation of section 829 of this title[.]''); *id.* § 829(a).[5]

(2) A. Dispensing hydrocodone and alprazolam to Ms. Samantha Pemberton, who the evidence shows was Chris Watson's girlfriend, on November 19, 2014, without a prescription for either drug. Stipulation 19. For the same reasons as described above, these dispensings also constitute violations of 21 U.S.C. 841(a)(1). *See also* 21 U.S.C. 842(a)(1); *id.* § 829(b).[6]

B. The evidence also shows that on November 19, 2014, Ms. Pemberton was stopped for driving a vehicle without a license plate. ALJ Ex. 20, at 9. During a consensual search of Ms. Pemberton's purse, a police officer found both Xanax (in an unmarked vial) and hydrocodone, and took Ms. Pemberton into custody. *Id.* at 10. During several interviews, Ms. Pemberton claimed that she had a prescription for both drugs. *Id.* She also stated that she had just filled prescriptions for the drugs at

[1] All citations to the Recommended Decision are to the slip opinion as issued by the CALJ.

[2] The United States Supreme Court has explained my obligations under the Administrative Procedure Act, as well as the role of the ALJ's recommended decision, in reviewing the record and making factual findings. *See Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 496 (1951) (''The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. . . . The findings of the examiner are to be considered along *with the consistency and inherent probability of testimony*. The significance of his report, of course, depends largely on the importance of credibility in the particular case.'') (emphasis added). The standard of review of an agency decision is also well settled. Accordingly, I decline to publish the ALJ's discussion of the substantial evidence test and the standard of review.

[3] I do not adopt the ALJ's statement (at R.D. 49) that ''Regarding Factor 2, in requiring an examination of a registrant's experience in dispensing controlled substances, Congress manifested an acknowledgement that . . . the quantitative volume in which an applicant has engaged in the dispensing of controlled substances may be [a] significant factor[ ] to be evaluated'' in the public interest determination. *See JM Pharmacy Group, Inc., d/b/a Farmacia Nueva and Best Pharma Corp.,* 80 FR 28667, 28667–68 n.2 (2015); *see also Syed Jawed Akhtar-Zaidi, M.D.,* 80 FR 42962, 42967–68 (2015).

[4] Because I find that Respondent's registration has expired, *see infra* note 16, I do not adopt the ALJ's recommendation that I revoke its registration.

[5] 21 U.S.C. 829(a) sets forth the prescription requirement applicable to the dispensing of a schedule II drug. It provides, in relevant part, that: ''[e]xcept when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug . . . may be dispensed without the written prescription of a practitioner, except [for] in emergency situations, as prescribed . . . by regulation,'' allowing for an oral prescription. *See also* 21 CFR 1306.11(a).

[6] 21 U.S.C. 829 (b) sets forth the prescription requirement applicable to the dispensing of a schedule III or IV drug. It provides that ''[e]xcept for when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substances in schedule III or IV, which is a prescription drug . . . may be dispensed without a written or oral prescription.'' *See also* 21 CFR 1306.21(a).

Respondent and had received them in unmarked bottles; however, she could not name the prescriber. *Id.*

C. The evidence further shows that during the course of the police investigation of how Ms. Pemberton had obtained the controlled substances, Chris Watson admitted to a Detective that Pemberton had been in Respondent that morning and that he provided the drugs without prescriptions. *Id.* at 11. Watson then stated that he had '' 'loaned' her some pills . . . 'because she was out,' '' but then asserted that ''we are just waiting on [the doctor's office] to call back because that office is notoriously slow.' '' *Id.* However, according to the credited testimony of the Detective who interviewed Watson, Watson gave him ''conflicting information about the identity of Ms. Pemberton's prescribing physician,'' initially stating that it was a Dr. Humbard. *Id.* at 12. While Watson agreed to provide the Detective with a copy of the prescriptions, the next day, he faxed over copies of the dispensing labels (but not the actual prescriptions), which indicated that the prescriptions had been filled on October 9, 2014 (and not November 19, 2014), and the labels indicated that the prescriber was a different doctor (Dr. Arnold) than reported by Watson. *Id.* Moreover, the labels for both drugs showed that no refills were authorized. *Id.*

D. The next day, the Detective again called Respondent and spoke with Chris Watson seeking the prescriptions. *Id.* After Watson stated that he had faxed over the labels, the Detective told Watson that he needed the prescriptions. *Id.* Watson stated that he would have one of the pharmacy technicians look up the prescriptions and send it to the Detective; later that day, the Detective received a fax which appeared to list called-in prescriptions. *Id.* at 13. While the document listed a prescription for Ms. Pemberton, the date appeared to be either October 4 or October 9, 2014 and not November 19, 2014. *Id.*

E. Subsequently, Ms. Pemberton provided the Detective with copies of two prescriptions; the prescriptions listed the date of issuance as October 9, 2014 and Dr. Arnold as the prescriber. *Id.* However, according to the stipulated testimony of a DEA Task Force Officer who interviewed Dr. Arnold, Arnold ''stated that he had never prescribed any controlled substances for Ms. Pemberton.'' ALJ Ex. 20, at 19. Thus, even the October prescriptions were fraudulent.[7]

(3)A. Distributing controlled substances, including one 1,000-count bottle of hydrocodone 10/325 mg and two bottles of 100-count methadone 10 mg methadone, to one Eric Horton, on or about January 20, 2015, who was arrested following a traffic stop. Respondent stipulated that each of the bottles had Respondent's pharmacy stock stickers on it. Stipulation 21.

B. The evidence also includes snapshots from Respondent's surveillance video camera which show that on January 20, 2015, both Chris Watson and Eric Horton were inside the pharmacy, in the area where it stored its drugs. GX 36. The evidence shows Watson taking a stock bottle, which appears to be of 1,000-count size from the shelves and handing it to Horton, who then went to a counter and proceeded to fill an amber prescription bottle with some of the contents of the 1,000-count bottle. *Id.* The evidence further shows Horton then placing items in a blue tote, after which he proceeded to the pharmacy's shelves, took a stock bottle off a shelf, and showed it to Chris Watson before placing it in a pharmacy bag. *Id.* Thereafter, the evidence shows Horton going into a back room with the pharmacy bag, before returning and then placing the pharmacy bag in the tote. *Id.*

C. Horton then went back to another shelf, and returned with another stock bottle which he showed to Chris Watson. *Id.* Horton then took out an amber prescription bottle before disappearing from the camera frame; however, upon reappearing, Horton did not have the stock bottle but appeared to place something in his jacket pocket. *Id.* Horton then took the tote and left the pharmacy. *Id.*

D. About ten minutes later, Horton returned to the pharmacy without the blue tote. *Id.* A short while later, Chris Watson pulled a stock bottle from a shelf and placed it on the counter, after which Horton walked to the counter, counted pills, removed several amber pill bottles from under the counter and proceeded to fill them. *Id.* After handing a bottle to Watson, Horton placed one of the bottles in his pocket. *Id.* Horton then obtained a pharmacy bag and placed multiple amber bottles into the bag before leaving the pharmacy. *Id.* The video then shows Horton carrying a blue tote and leaving the store, followed by his placing the tote in the bed of his pick-up truck, before driving away.

E. Later that evening, Horton was arrested by an Arkansas State Trooper on an outstanding warrant following a traffic stop. During an inventory search of Horton's vehicle, the officer found the blue tote along with one 1,000-count bottle of hydrocodone 10/325 mg, two 100-count bottles of methadone 10 mg, and one 100-count bottle of oxycodone 30. Tr. 83; Stipulation 21; GX 36, at 12. Notably, the oxycodone 30 bottle also had Respondent's stock sticker on it. GX 36, at 12.

F. In addition to the above, Respondent stipulated to Ms. Pemberton's testimony that on two occasions she ''witnessed [Chris Watson] providing stock bottles of controlled substances to Eric Horton'' while attending parties at Watson's home. ALJ Ex. 20, at 9.

I therefore conclude that the evidence shows that on multiple occasions, Chris Watson (and Respondent) unlawfully distributed controlled substances to include hydrocodone, methadone, and oxycodone to Eric Horton.[8] *See* 21 U.S.C. 841(a)(1).

(4) The evidence also shows that on or about September 14, 2014, the Arkansas State Police arrested one Joseph Jackson who had been involved in a motor vehicle accident. Tr. 68–70. According to the unrefuted testimony, local police officers observed a bottle of prescription liquid codeine (with the label scratched off) in the front seat of Jackson's vehicle and the State Trooper testified that Jackson smelled of marijuana. Tr. 70–71. During a search of

[7] I decline, however, to adopt the CALJ's further finding that Chris Watson's actions in ''generating false documents and supplying them to law enforcement to cover his tracks in supplying Samantha Pemberton with drugs . . . stand[s] out as worthy of separate consideration under Factor 5.'' R.D. at 58. At no point did the Government argue that Watson's actions with respect to the creation and provision of these documents to the local police constitute actionable misconduct under factor five, and while Respondent stipulated to the testimony, I conclude that the issue was ''incidental'' to the principal issues in the case. *See, e.g., Yellow Freight System, Inc.* v. *Martin,* 954 F.2d 353, 358 (6th Cir. 1992) (An ''agency may not base its decision upon an issue the parties tried inadvertently. Implied consent is not established merely because one party introduced evidence relevant to an unpleaded issue and the opposing party failed to object to its introduction. It must appear that the parties understood the evidence to be aimed at the unpleaded issue. Also, evidence introduced at a hearing that is relevant to a pleaded issue as well as an unpleaded issue cannot serve to give the opposing party fair notice that the new, unpleaded issue is entering the case.'') (citations omitted); *see also NLRB* v. *Majestic Weaving Co.,* 355 F.2d 854, 861–62 (2d Cir. 1966) (where Government's case focuses on other issues and evidence of uncharged violations is ''at most incidental,'' the incidental issue cannot support a sanction); 5 U.S.C. 554(b) (''Persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact *and law* asserted.'') (emphasis added).

[8] The State Trooper further testified that he found pills in bottles that were mislabeled, as well as pills that were mixed in bottles. Tr. 83. He also found a coke bottle with a lid that could be unscrewed to access a container; inside the container was ''a bunch of mixed pills.'' *Id.* He also found other coke cans with lids that could be unscrewed and used to hide drugs. *Id.* at 84.

the vehicle, the Officer found a black bag which contained ''a baggie of marijuana, prescription bottles of drugs, and two handguns,'' as well as a 500-count bottle of alprazolam 2 mg which bore Respondent's stock sticker. Tr. 71; Stipulation 22; ALJ Ex. 15, at 16. Because the evidence further shows that Respondent had not filed a controlled substance theft or loss report with DEA ''since at least 2012,'' I conclude that Respondent unlawfully distributed the 500-count bottle of alprazolam 2 mg. Stipulation 23; *see* 21 U.S.C. 841(a)(1).

(5) Other evidence establishes that Chris Watson removed stock bottles of controlled substances from Respondent. Specifically, one of Respondent's employees provided stipulated testimony that she had seen Chris Watson remove stock bottles of hydrocodone and Xanax (alprazolam) from Respondent. ALJ Ex. 20, at 20–21. Still another employee testified that on two occasions he witnessed Chris Watson take 1,000 count bottles of hydrocodone off the shelf and place them in his backpack. Tr. 278–79.

(6) The evidence further shows that on four occasions beginning on November 7, 2014 and ending on December 4, 2014, a DEA Special Agent (S/A) made undercover visits to Respondent during which he presented fictitious controlled substance prescriptions to Chris Watson. ALJ Ex. 15, at 5.

A. On the first occasion, the S/A presented prescriptions for 120 Norco (hydrocodone/acetaminophen) 10/325 mg and 60 Xanax (alprazolam) 2 mg.[9] at 5–6. According to the S/A, he asked Chris Watson if he ''create[d] the script right?''; Watson then told the S/A to add a certain letter to the DEA number he had created and to change the last number of the prescription ''to create a more realistic-looking prescription.'' *Id.* at 6. Notwithstanding that Watson knew the two prescriptions were fraudulent, he filled them. *Id.; see also* GXs 6, 7, 8.

B. On November 13, 2014, the S/A returned to Respondent and presented prescriptions for both hydrocodone and alprazolam to Chris Watson. ALJ Ex. 15, at 6. However, Watson told the S/A that he was out of both drugs but would have more the next week. *Id.* The S/A then asked Watson if the letters he had used on the prescriptions for the prescriber's DEA registration number (RF) ''were correct?'' *Id.* Watson told him to use ''RA'' instead and wrote the letters down on a piece of paper. *Id.* After the S/A looked at the paper, Watson ''scratched out the letters with a pen.'' *Id.*

C. On November 19, 2014, the S/A returned to Respondent with prescriptions for 240 Norco 10/325 mg (hydrocodone/apap) and 60 Xanax 2 mg which he presented to Watson. *Id.; see also* GX 15, at 1. However, Watson stated that he could not fill the Norco prescription because he had run out ''two days earlier'' and ''would not get any more tablets until the first of the month.'' *Id.* The S/A then asked Watson if the DEA number on the prescription ''was correct.'' *Id.* at 7. Watson told him to change the last digit on the number and then ''described how to formulate a DEA number.'' *Id.* Watson then told the S/A that ''the prescription . . . looked better than most he sees at the pharmacy.'' *Id.*

The S/A then asked Watson how much it would cost to buy a 1,000-count bottle of hydrocodone; Watson stated: ''I don't usually do that.'' *Id.* After the S/A told Watson that he was trying to make some extra money, Watson replied that what the S/A did with the pills after the prescriptions had been filled [was] ''none of his business.'' *Id.* Watson then told the S/A to return to Respondent on the first of the month when the pharmacy would be resupplied with hydrocodone. *Id.* However, there is no evidence that Watson filled the Xanax prescription on this date.

D. On December 4, 2014, the S/A presented fictitious prescriptions for 240 tablets of hydrocodone 10/325 mg and 60 tablets of alprazolam 2 mg to Chris Watson. ALJ EX. 15, at 7. Watson dispensed the prescriptions to the S/A. *Id.; see also* GX 29–30.

E. The evidence thus shows that Watson knowingly distributed both hydrocodone/acetaminophen (a schedule II narcotic) and alprazolam (a schedule IV benzodiazepine) on two occasions, based on fraudulent prescriptions, for a total of four separate acts of unlawful distribution. *See* 21 U.S.C. 841(a)(1); *see also id.* § 843(a)(2) (''It shall be unlawful for any person knowingly or intentionally . . . to use in the course of the . . . distribution[ ] or dispensing of a controlled substance . . . a registration number which is fictitious[.])''; *Cf.* 21 CFR 1306.04(a) (''An order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of section 309 (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.'').

Moreover, I agree with the Government and CALJ that Watson's actions in instructing the S/A, who, in his undercover capacity presented as a drug-seeking patient, as to how to create fraudulent prescriptions which were ''more realistic,'' constitutes conduct ''inconsistent with the public interest,'' regardless of whether it is considered under factor two (experience in dispensing controlled substances) or factor five (''[s]uch other conduct which may threaten the public health and safety''). 21 U.S.C. 823(f).[10]

(7)A. Other evidence shows that during a search of Chris Watson's home, paper controlled substance prescriptions for both schedule II drugs OxyContin (oxycodone) and combination hydrocodone (with acetaminophen), and schedule IV drugs, including alprazolam, clonazepam, and Soma (carisoprodol), were found in violation of DEA regulations. ALJ EX. 15, at 2. More specifically, DEA regulations require that paper prescriptions be maintained at the registered location. *See* 21 CFR 1304.04(h)(2) (''Paper prescriptions for Schedule II controlled substances shall be maintained at the registered location in a separate prescription file.''); *id.* § 1304.04(h)(4) (''Paper prescriptions for Schedules III, IV, and V controlled substances shall be maintained at the registered location either in a separate prescription file for Schedules III, IV, and V controlled substances only or in such form that they are readily retrievable from the other prescription records of the pharmacy.'').

B. Still other evidence shows that during the execution of a search warrant at Respondent, the pharmacy only had

[9] Both prescriptions were written on a single form. GX 6.

[10] As found above, Chris Watson clearly knew that the S/A was presenting fraudulent prescriptions when he filled them. In other circumstances, a pharmacist's counseling of a person who he knows to be presenting a fraudulent prescription as to how to create ''more realistic'' prescriptions (*i.e.,* one which would avoid detection by another pharmacist to whom it was presented) could constitute criminal conduct actionable under factor four even without a conviction. *See* 21 U.S.C. 843(a)(3) (''It shall be unlawful for any person knowingly or intentionally . . . to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge[.]''); 18 U.S.C. 2(a) (''Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.''). So too, in other circumstances (*i.e.,* where the person creating the prescriptions is not an agent for the Government), Watson's conduct in filling a prescription, which he knew bore a fictitious registration number, could support a charge of conspiracy to use a fictitious registration number in the course of the distribution or dispensing of a controlled substance. *See* 21 U.S.C. 846; *id.* § 843(a)(2).

''partial invoices'' for the controlled substances it purchased in December 2014 and January 2015 because Eric Horton ''had removed all of the other invoices at PIC Watson's request in early December 2014.'' ALJ Ex. 20, at 22. However, under 21 U.S.C. 827(a)(3), ''every registrant . . . distributing[ ] or dispensing a controlled substance or substances shall maintain, on a current basis, a complete and accurate record of each such substance received . . . by him.'' Moreover, under DEA regulations, these records ''must be kept by the registrant and be available, for at least 2 years from the date of such inventory or records, for inspection and copying by authorized employees of'' DEA and must be kept at the registered location unless ''the registrant has notified the Administration of his intention to keep'' the records ''at a central location, rather than at the registered location.'' 21 CFR 1304.04(a). Likewise, Respondent could not produce its most recent inventory, which apparently had been removed by its PIC notwithstanding that a DEA regulation requires that the inventory be maintained at the registered location. ALJ Ex. 20, at 23; *see also* 21 CFR 1304.04(b)(1) (requiring that inventories ''be maintained at each registered location'').

(8) Finally, the evidence shows that Respondent would receive shipments of controlled substances such as oxycodone and that the drugs would ''frequently disappear overnight.'' ALJ Ex. 20, at 20–21. The evidence also shows that ''in either August or October 2013, two 1,000-count bottles of carisoprodol were stolen'' from Respondent. *Id.* at 22. Yet the evidence also shows that as of January 22, 2015, Respondent had not filed any theft or loss reports (DEA Form 106) with DEA since January 1, 2012.[11] ALJ Ex. 20, at 17; Tr. 175–76; GX 63.

While Respondent stipulated to most of these acts, this is not the only evidence of misconduct on the part of Respondent's principals. More specifically, the evidence shows that on various occasions, Tom Watson, Respondent's owner and the father of Chris Watson, was provided information by employees and a business partner that Chris Watson was likely diverting controlled substances and failed to take appropriate action.

Mr. Tracy Swaim testified that he had worked at Respondent for 26 years and had served as its PIC from June 1997 until January 2012, when he resigned. Tr. 233, 251. Mr. Swaim further testified that after Chris Watson began working at Respondent as a staff pharmacist (in July 2011), he noticed that Chris Watson ''was not being completely legal on some refills'' and that he saw this over the course of a month. *Id.* at 251, 253, 263. Mr. Swaim decided that he was not going to remain as the PIC and told Tom Watson that he was not going to remain as the PIC because Chris was ''bending the rules'' and he (Mr. Swaim) did not ''want to go to jail.'' *Id.* at 253. Thereafter, Swaim then completed the drug inventory and Chris Watson became Respondent's PIC. *Id.* at 254.

Mr. Swaim, who stayed on as a staff pharmacist with the same hours, further testified that in September 2014, a pharmacy technician (who had worked at Respondent for 31 years, *see* ALJ Ex. 20, at 21), ''was having a conversation with Tom [Watson]'' during which she told Watson that Chris Watson was ''giving stuff away.'' Tr. 256–57. Mr. Swaim joined the conversation and told Tom Watson, ''Tom, he's handing pills out the window,'' and that he was going to give his notice if Watson did not stop Chris's misconduct. *Id.* at 257. Tom Watson replied that he would ''put a stop to it'' and to ''trust me.'' *Id.* However, when Mr. Swaim returned to Respondent after several days off, he ''asked the girls [the pharmacy techs] if Chris had changed'' his behavior and was told ''no.'' *Id.* Mr. Swaim then gave notice and retired. *Id.*

Grant Goode, who was Tom Watson's nephew, worked as a staff pharmacist at Respondent from December 12, 2014 through February 18, 2015.[12] Tr. 271; 273. Mr. Goode testified that he worked approximately 25 hours a week during December 2014, and that in January, he gradually increased his hours until after the middle of January, he was working most of the hours that the pharmacy was open. *Id.* at 271. Mr. Goode testified that when he was not working at Respondent, Chris Watson was the pharmacist. *Id.* at 273.

Mr. Goode testified that while working at Respondent, he received phone calls from a couple of doctors inquiring about whether their patients had picked up prescriptions written by them, and that after he would inform the doctors that the patients had picked up the prescriptions, the doctors would ask if their patients had filled any other prescriptions. Tr. 275. Goode testified that when he would tell the doctors about the other prescriptions listed in the patients' profiles, the doctors stated that they had not written ''any prescriptions for those days.'' *Id.* Goode further testified that there were ''dozens'' of instances in which he looked for the hard copies of controlled substance prescriptions which were listed on the patient profiles but was unable to find them. *Id.* at 274–75.

Mr. Goode testified that he told Tom Watson that he had ''talked to a couple of doctors, and that [he] couldn't find any hard copies for those prescriptions.'' *Id.* at 276. According to Goode, Watson's reaction was that the prescriptions may have been placed in the wrong file by the pharmacy technicians. *Id.* at 276–78. Mr. Goode further testified that he discovered that Respondent was missing prescriptions and reported this to Tom Watson during the first week of his employment (following December 12, 2014). *Id.* Goode testified that after the conversation he asked the pharmacy technicians about the prescriptions and was told that they ''should be in the file.'' *Id.*at 278.

Mr. Goode testified to another incident, during which Tom Watson was present at Respondent and ''sitting at the desk'' when Chris Watson took a 1,000-count bottle of hydrocodone off the pharmacy's shelves and placed it in his backpack. *Id.* at 278–80. Mr. Goode testified that ''[i]t appeared to'' him that Tom Watson saw what Chris was doing. *Id.* at 280.

Mr. Goode testified to a further incident, which occurred on January 2, 2015. *Id.* at 282. According to Mr. Goode, one of Respondent's pharmacy technicians brought to his attention ''several'' prescriptions for schedule II drugs that were ''just made up'' and which listed Goode as the dispensing pharmacist on the label. *Id.* at 282–83. Mr. Goode testified that Tom Watson was at Respondent that morning and so Mr. Goode laid out six or eight prescriptions and told Watson that while his initials were on the prescriptions he had not filled any of them. *Id.* Tom Watson responded that one of the pharmacy technicians (one who had worked for him for 31 years) ''must be doing that.'' *Id.* at 283. Goode then told Tom Watson that Chris ''was logging in and printing prescriptions from his laptop.'' *Id.* Goode further testified that Tom Watson did not take any action in response to the allegation.[13] *Id.* at 284.

[11] While Respondent reported a theft incident in August 2013 which involved oxycodone, hydrocodone, alprazolam, clonazepam, and phenergan with codeine to the Arkansas Board of Pharmacy on a DEA Form 106, the report was never filed with DEA as required by 21 CFR 1301.74(c). Tr. 120.

[12] Grant Goode testified that he also worked at Respondent on November 24, 2014. Tr. 271.

[13] In its closing brief, Respondent argues that in a proceeding brought to revoke Chis Watson's bond, based on the unsuitability of his third-party custodian, a federal magistrate judge found that ''Mr. [Grant] Goode lacks credibility when testifying

Continued

The Government also elicited testimony from Steve Goode, who, between 2001 and 2012, was a business partner of Tom Watson in four supermarkets (including Respondent), three of which had pharmacies. *Id.* at 485–86. While Steve Goode testified that his responsibilities involved managing the grocery side of the stores and that Tom and Chris Watson oversaw the pharmacies, he would see the daily and weekly sales reports for the stores. *Id.* at 487. Steve Goode further testified that its grocery wholesaler (AWG) allowed McKesson (the drug distributor used by the stores' pharmacies) to invoice through it, and thus, even though Steve Goode's responsibilities were limited to the grocery side of the stores, he could see the pharmacies' purchases on the ''weekly AWG statement.'' *Id.* at 487–88. According to Steve Goode, the daily sales report showed the sales of both the grocery side and the pharmacies. *Id.*

Steve Goode further testified that in the summer of 2010, he noticed that one of the stores (Mayflower Food and Drug) ''didn't have any money in [its] accounts.'' *Id.* at 490. Goode looked into the situation and determined that while the pharmacy's purchases of medications ''were up,'' it ''sales were flat.'' *Id.; see also id.* at 491. Of note, Chris Watson was the Pharmacist in Charge at the Mayflower store. *Id.* at 490.

Steve Goode told Tom Watson about the issue; Watson's response was that ''we would get together and . . . have a talk with Chris.'' *Id.* at 491. However, when the conversation did occur, Goode was told that he ''needed just to take care of the grocery department [and] that Chris would take care of the pharmacy department.'' *Id.* at 492–93.

At some point, Chris Watson started working at Respondent. *Id.* at 495. According to Steve Goode, in the ''late spring of 2012'' he was on vacation when he received a phone call from another employee who told him that Chris Watson had allowed a former employee from the Mayflower pharmacy to go into Respondent on a Sunday afternoon when the pharmacy was closed and fill prescriptions ''for her family members and friends.'' *Id.* at 496, 498. When Goode returned from vacation, he spoke with Tom Watson about the incident and told him that he needed to ''get a handle on Chris.'' *Id.* at 496. While Tom Watson said that he would ''take care of it,'' Goode testified that ''[n]othing happened.'' *Id.* However, Goode did not know whether the prescriptions were for controlled substances. *Id.* at 500.

Regarding Mr. Swaim's testimony as to the reason he resigned as Respondent's PIC, Tom Watson testified that ''I remember some of what he talked about but I don't remember all of what he talked about.'' Tr. 326. Watson then added that he had talked to his son ''about some things, too, so I was hoping . . . everything was in good shape.'' *Id.* Mr. Watson also denied having had a conversation with his long-standing pharmacy technician (as Mr. Swaim testified) that Chris was diverting drugs. *Id.* at 347.

However, Tom Watson later acknowledged that Mr. Swaim is ''a good guy,'' who had been with him for ''a long time,'' before attributing the disparity between Mr. Swaim's testimony and his recollection as being the result of ''some health problems.'' *Id.* at 333. Watson then maintained that ''some of the stuff he said I just didn't remember like the conversations that he said we had. That don't mean we didn't have them. It just means that I just don't remember them.'' *Id.* at 333–34. As between the testimony of Mr. Swaim and Mr. Watson, the CALJ found Mr. Swaim's testimony more credible than Mr. Watson's. *See* R.D. 23, 41. I agree with the CALJ.

As for Grant Goode's testimony that he told Tom Watson about the issues he found (the missing hard copy prescriptions, the doctors denying having written various prescriptions, the dispensings which were attributed to him which he did not fill), Watson asserted that ''I haven't talked to Grant about any concerns,'' that Grant ''didn't mention a word about anything he talks about here,'' and ''didn't mention misconduct . . . about anybody.'' *Id.* at 348–49.

Watson also faulted Grant Goode for having called the State Board and the DEA, testifying that: ''Well, he seems like he's talked to everybody else. He's called the state board. He's called the DEA, and all this stuff, but he hasn't talked to me about it.'' *Id.* at 348.[14] Still later, Watson reiterated that Grant Goode had ''never come directly to'' him about the issues he encountered. *Id.* at 351. While Watson maintained that Grant Goode also had the same medical issue which affected Watson's memory, Tr. 349, the CALJ found that ''Watson's assertion that . . . Grant Goode never brought concerns about his son's actions to his attention is simply not credible.'' R.D. at 41. I agree with the CALJ.[15]

Mr. Watson further testified that he trusted his son, and that this ''really'' shocked him. Tr. 326. When then asked whether he had any idea that his son ''had a substance abuse issue or was diverting,'' Watson maintained that he ''had no idea [Chris] had any kind of drug problem.'' *Id.*

When further asked what he would have done if he ''had known that [his] son had a substance abuse problem or was diverting controlled substances,'' Watson asserted that he would have ''[g]ot it stopped,'' that he would have gone ''to the state board,'' and that he

in court under oath.'' Resp. Post-Hrng. Br. 8.; *see also* RX 14 (denying motion, reasoning that ''[t]he evidence revealed a number of conflicting family dynamics casting considerable doubt upon the reliability of the witness describing the alleged behavior that the Government presented to disqualify the current third-party custodian''). Apparently, this was in response to Mr. Goode's testimony in the criminal proceeding against Chris Watson that Tom Watson said ''he would like to kill a couple of DEA agents,'' a statement which he reported to DEA and which prompted the U.S. Attorney to file the motion. Tr. 302; *see also* RX 14.

The CALJ nonetheless found Grant Goode's testimony to be ''sufficiently detailed, plausible, and internally consistent to be fully credited in this decision.'' R.D. 25. The CALJ further explained that ''[b]ecause the Government did not offer the purported threat in its case-in-chief, a disposition of this case does not require that a credibility issue on this statement be rendered, and it forms no basis of this recommended decision.'' *Id.* at n.69.

Respondent, however, offered the magistrate judge's findings to attack Grant Goode's credibility with respect to his testimony that he had brought his concerns about Chris Watson to Tom Watson's attention and sought to have the CALJ give Goode's testimony ''no weight.'' Resp. Post-Hrng. Br. 8 (''It is not known if the attention the DEA gave to Mr. Goode made him have delusions of grandeur that motivated his testimony, but he did take a keen interest in this case when he, unlike other lay witnesses, was at the hearing every day, even after his testimony had been given. On the other hand, unlike his reaction to Mr. Swaim's testimony, Tom Watson flatly denied that Mr. Goode ever brought any concerns about Chris to his attention.'' (citations omitted)).

However, while Respondent offered the magistrate judge's finding to impeach Mr. Goode's testimony, I nonetheless adopt the CALJ's credibility finding because in assessing the credibility of Mr. Goode's testimony, I am entitled to consider ''the consistency and inherent probability of [his] testimony.'' *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 496 (1951). Here, consistent with Mr. Goode's testimony, other witnesses testified that they brought their concerns with Chris Watson to Tom Watson's attention but that the latter ignored them. Accordingly, I find Goode's testimony credible notwithstanding the magistrate judge's finding.

[14] Later, Watson testified that:

[F]amily is family. You know, if you've got a problem go see them about it, and talk about the problem. You don't know you got a problem until you at least talk about it. And you know, don't start with the state board, don't start with the DEA and all that. Start by calling your uncle or whatever or tell your mom and have her talk to your uncle if that—you know.

Tr. 350.

[15] As for the incidents related by Steve Goode, Tom Watson also denied that Steve Goode had ever complained about the performance of the Mayflower pharmacy when Chris Watson was working there. Tr. 374–75. Notwithstanding that there is an ongoing dispute over the proceeds from dissolution of their partnership, *id.* at 505, the CALJ found that Steve Goode's testimony was fully credible as do I. R.D. 44.

''would have halted that immediately.'' *Id.* at 328. However, shortly thereafter, Watson admitted that he did not ''know exactly how [he] would have handled it,'' but that ''at some point'' the state board would have had to ''become involved'' because he had scheduled an inventory for early February and ''would have found out'' that drugs were missing.[16] *Id.* at 330. The CALJ did not find Mr. Watson's testimony on these issues credible. R.D. at 41. Nor do I.

Thus, even putting aside the 2010 incident in which his business partner complained about the cash shortage at the Mayflower store, the evidence shows that on multiple occasions, Tom Watson, Respondent's owner, was provided with information that Chris Watson was likely engaged in the diversion of controlled substances. Notably, in his testimony, Tom Watson claimed only that he talked to his son (although it is unclear which incident prompted this) and offered no testimony that he took any other measures (other than to schedule an inventory long after he had received credible reports of a problem) to investigate the allegations. This is especially remarkable in light of the complaints raised by Mr. Swaim and the pharmacy technician, both of whom had worked for Mr. Watson for decades. I therefore hold that Mr. Watson's failure to investigate the allegations that his son and PIC was diverting controlled substances constitutes ''other conduct which may threaten public health and safety.'' 21 U.S.C. 823(f)(5); *see also Rose Mary Jacinta Lewis,* 72 FR 4035, 4042 (2007) (holding physician liable under factor five for failing to investigate the misuse of her registration; ''every registrant has a duty to conduct a reasonable investigation upon receiving credible information to suspect a theft or diversion has occurred'' as an investigation ''is essential to preventing the continuation of criminal activity'').

The record in this matter thus establishes that Chris Watson, Respondent's PIC, committed egregious and extensive misconduct which ranged from regulatory violations to criminal acts. In short, Chris Watson used Respondent's DEA registration as a license to engage in drug dealing. Notably, in its post-hearing brief, Respondent does not dispute the evidence of its PIC's misconduct. Resp. Post-Hrng. Br. 2.

Thus, Respondent acknowledges that ''the Government has met its burden of proving its Section 824(a) claim, placing the burden on [Respondent] to show that despite Chris Watson's conduct, granting [it] a [Registration] would not be contrary to the public interest.'' *Id.* at 3. I agree and hold that the evidence conclusively establishes that Respondent, through both its PIC and owner, has committed numerous acts ''inconsistent with the public interest,'' which support both the prior Administrator's issuance of the Immediate Suspension Order, as well as the denial of Respondent's pending application.[17] *See* U.S.C. 823(f); 824(a)(4); 824(d).

Notwithstanding its egregious and extensive misconduct, Respondent nonetheless argues that the denial of its renewal application ''on this ground is a matter of discretion.'' Resp. Post-Hearing Br. 2 (citing *Dinorah Drug Store, Inc.,* 61 FR 15972, 15973 (1996)). As a statement of the law, that is true. However, as set forth in numerous decisions, where, as here, ''the Government has proved that a registrant [or applicant] has committed acts inconsistent with the public interest, a registrant [or applicant] must 'present sufficient mitigating evidence to assure the Administrator that it can be entrusted with the responsibility carried by such a registration.' '' *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (1988))). ''Moreover, because 'past performance is the best predictor of future performance,' *ALRA Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for its actions and demonstrate that it will not engage in future misconduct.'' *Medicine Shoppe,* 73 FR at 387; *see also Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006);

[16] While Mr. Watson testified that an inventory would have determined that Respondent was missing drugs, short of doing an audit in which Respondent's receipts of controlled drugs were added to the results of a previous inventory and its dispensings (as well as disposals, thefts or losses) were subtracted, it is not likely that this would have uncovered the problem. In any event, given the evidence that Mr. Swaim and Ms. Gilbert, his longstanding pharmacy technician, (not to mention his former business partner), had told Mr. Watson about his son's activities, I am left to wonder why the inventory was not scheduled months earlier.

[17] The CALJ found that ''[t]he most recent renewal of the Respondent's registration occurred on February 7, 2012, with a scheduled expiration date of March 31, 2015.'' R.D. at 2 n.2. The CALJ then explained that ''[d]uring a March 19, 2015 status conference, the Respondent, through counsel, represented that a renewal application had been timely filed, and the Government represented that it will not contest the timeliness of the renewal application. Thus, the Respondent's [Registration] remains in full force and effect.'' *Id.* (citing 21 CFR 1301.36(i)).

Here, however, the prior Administrator ordered that Respondent's registration be immediately suspended, thus prohibiting Respondent from exercising the authority granted by its registration. Thus, Respondent's registration did not ''remain[ ] in full force and effect.''

Moreover, according to the Agency's registration records, of which I take official notice, Respondent did not file its renewal application until March 3, 2015. *See* 5 U.S.C. 556(e); 21 CFR 1316.59(e). Significantly, at the time Respondent filed its renewal application, it had previously been served with the Order to Show Cause and Immediate Suspension of Registration. By regulation, DEA has set forth the conditions for the continuation of a registration past its expiration date where a registrant has been served with an Order Show Cause. *See* 21 CFR 1301.36(i); *see also* 5 U.S.C. 558(c) (''When [a] licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.''). This regulation provides that:

[i]n the event that an applicant for reregistration (who is doing business under a registration previously granted and not revoked or suspended) has applied for reregistration at least 45 days before the date on which the existing registration is due to expire, and the Administrator has issued no order on the application on the date on which the existing registration is due to expire, the existing registration of the applicant shall automatically be extended and continue in effect until the date on which the Administrator so issues his/her order. The Administrator may extend any other existing registration under the circumstances contemplated in this section even though the Applicant failed to apply for reregistration at least 45 days before expiration of the existing registration, with or without request by the Applicant, if the Administrator finds that such extension is not inconsistent with the public health and safety.

Id.

Thus, where a Registrant, which has been served with an Order to Show Cause, fails to file its renewal application at least 45 days before the expiration of its registration, the registration expires absent a showing that the extension of its registration is not inconsistent with the public health and safety. *See Ralph J. Chambers,* 79 FR 4962, 4962 (2014). The Agency has also applied the 45 day rule in cases where a registrant has been issued an Immediate Suspension Order, recognizing that while a timely renewal application may result in the extension of a registration, the Immediate Suspension Order precludes the registration from remaining in effect. *See Paul H. Volkman,* 73 FR 30630, 30641 (2008). However, the Agency has further held that where an untimely renewal application has been filed and the Registrant's Registration has expired, the application remains pending before the Agency. *Id.*

In this matter, I am not bound by the Government's agreement not to contest the timeliness of Respondent's renewal application. Accordingly, I find that Respondent did not file its renewal application until 28 days before its registration expired and was thus untimely. Moreover, I further find that because Respondent's registration was immediately suspended based on the prior Administrator's finding, which is amply supported by the record, that its ''continued registration during the pendency of these proceedings would constitute an imminent danger to the public health or safety,'' ALJ Ex. 1, at 5; and there is no evidence that the prior Administrator found that the extension of its registration would not be ''inconsistent with the public health and safety,'' 21 CFR 1301.36(i), its registration has expired. However, I also find that Respondent's application is before the Agency. *See Volkman,* 73 FR at 30641.

Prince George Daniels, 60 FR 62884, 62887 (1995). *See also Hoxie* v. *DEA,* 419 F.3d at 483 (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor[ ]'' in the public interest determination). So too, an applicant's candor during the proceeding is an important consideration in the public interest determination. *See Hoxie,* 419 F.3d at 483.

While a registrant must accept responsibility and demonstrate that it will not engage in future misconduct in order to establish that its registration is consistent with the public interest, DEA has repeatedly held that these are not the only factors that are relevant in determining the appropriate sanction. *See, e.g., Joseph Gaudio,* 74 FR 10083, 10094 (2009); *Southwood Pharmaceuticals, Inc.,* 72 FR 36487, 36504 (2007). Obviously, the egregiousness and extent of a registrant's misconduct are significant factors in determining the appropriate sanction. *See Jacobo Dreszer,* 76 FR 19386, 19387–88 (2011) (explaining that a respondent can ''argue that even though the Government has made out a *prima facie* case, his conduct was not so egregious as to warrant revocation''); *Volkman,* 73 FR at 30644; *see also Paul Weir Battershell,* 76 FR 44359, 44369 (2010) (imposing six-month suspension, noting that the evidence was not limited to security and recordkeeping violations found at first inspection and ''manifested a disturbing pattern of indifference on the part of [r]espondent to his obligations as a registrant''); *Gregory D. Owens,* 74 FR 36751, 36757 n.22 (2009). So too, the Agency can consider the need to deter similar acts, both with respect to the respondent in a particular case and the community of registrants. *See Gaudio,* 74 FR at 10095 (quoting *Southwood,* 72 FR at 36504). *Cf. McCarthy* v. *SEC,* 406 F.3d 179, 188–89 (2d Cir. 2005) (upholding SEC's express adoptions of ''deterrence, both specific and general, as a component in analyzing the remedial efficacy of sanctions'').

Having considered the relevant factors, I conclude that Respondent has not produced sufficient evidence to show why it can be entrusted with a new registration. As for whether Respondent accepted responsibility for its misconduct, based on the record as a whole, I agree with the CALJ's finding that it ''has not accepted responsibility.'' R.D. at 60.

I acknowledge that Respondent stipulated to many of the allegations. However, on the whole, Tom Watson's testimony on the issue was equivocal and unpersuasive as he repeatedly denied that he and Respondent were responsible for his son's misconduct.

For example, Tom Watson initially testified that ''I didn't do enough. That was the problem.'' Tr. 335. However, Watson then amended his testimony, stating: ''Well, not that I didn't do enough, I didn't do it fast enough. I would have found out in a week what was—you know, where we stood on everything, so within a week I would have had to have made a decision on where I went from there because I would have known . . . exactly what we were missing.'' *Id.* However, even crediting Watson's testimony that he had scheduled an inventory to be conducted in early February (one week after the ISO was served), the evidence shows that Watson was told of his son's misconduct on multiple occasions by three different persons (Mr. Swaim, Ms. Gilbert, his longstanding pharmacy tech, and his former business partner), well before his nephew Grant Goode also complained. Watson offered no explanation for why he failed to do anything more that talk to his son in response to the earlier reports he received.[18]

The record contains other examples of Tom Watson providing equivocal testimony or outright denying responsibility for Respondent's various violations of federal law. For example, when asked whether he accepted responsibility for the violations Respondent committed when Chris Watson removed the controlled substance prescriptions from the pharmacy to his house, Tom Watson testified that Chris ''failed to provided [sic] with the law,'' before adding that while ''[t]he owner have [sic] to take some responsibility . . . this is not—that's not my fault, I don't think. I think the pharmacist-in-charge should be responsible for that.'' Tr. 354.

When then asked whether he was admitting that Respondent failed to comply with federal law when Chris Watson distributed controlled substance without a prescription, Tom Watson replied: ''I don't think [Respondent] did. I think my son did.'' *Id.* at 355. Upon further questioning as to whether he was accepting responsibility for these violations, Watson explained: ''I accept some responsibility because I probably should have replaced Chris with somebody else, but . . . it's past tense so now so I can't, so I'll have to take responsibility for that, yes.'' *Id.*

Turning to the multiple instances in which the undercover Agent presented clearly fraudulent prescriptions which Chris Watson filled, Tom Watson testified that he did not accept responsibility. *Id.* at 356. Watson then explained that ''[w]hoever filled is responsible for those prescriptions. I didn't fill them.'' *Id.*

Tom Watson acknowledged that his son violated federal law when he distributed the stock bottles of controlled substances that were found on Eric Horton and Joseph Jackson when they were arrested. Tr. 357. However, when asked whether he bore any responsibility for these acts, Watson testified: ''I don't think so.'' *Id.* at 358. Continuing, Watson added: ''Whoever filled the prescriptions and whoever give [*sic*] the medication away, that's who is responsible, I think. They will have to take responsibility for that they do, I mean it's part of life.'' *Id.*

Also, as found above, Mr. Watson's nephew testified that Tom Watson was present on one occasion during which Chris Watson placed a 1,000-count bottle of hydrocodone in his back pack and that Tom Watson observed this. Tom Watson did not address this incident either to deny that it had occurred or to acknowledge that it had occurred and accept responsibility for his misconducting in failing to intervene to prevent his son from diverting the drugs.

Still later, when asked whether under Respondent's new Policies and Procedures, Tom Watson could even be affiliated with Respondent, Watson testified that ''[i]t would right now, yes. The only problem is I have done nothing wrong.'' Tr. 368. Continuing, Watson explained that ''[w]hen they come and took my DEA license, yes, that's a possibility, but I have—I mean, I have done nothing wrong. I mean, I can't help what other people have done, but me personally I have done nothing wrong . . . I might be a little slow to act on some things that's all I'm guilty of.'' Tr. 368.

Accordingly, I agree with the CALJ's findings that Respondent has failed to accept responsibility for its misconduct. This alone is sufficient to conclude that Respondent has not rebutted the Government's *prima facie* showing that granting Respondent's application ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f); *see also Liddy's Pharmacy, L.L.C.,* 76 FR 48887, 48897 (2011). Given the egregiousness and extent of its misconduct, I need not consider whether Respondent has put forward sufficient evidence of remedial

[18] Even then, short of conducting an audit (of which an inventory is only a part), it is unlikely that Tom Watson would have discovered the full scope of Respondent's diversion.

measures to support its burden of production on this issue.[19]

Respondent nonetheless argues that it should be granted a new registration because ''[t]he community impact'' of not granting its application ''is significant.'' Resp. Post-Hrng. Br. 12. As support for its contention, it relies on *Pettigrew Rexall Drugs,* 64 FR 8855, 8860 (1999), a case in which the Agency found that revocation of a pharmacy's registration was justified by the proven misconduct (*i.e.,* dispensing controlled substances without a physician's authorization but for which the patients appeared to have medical needs), but then ''recognize[d] that [it was] one of two pharmacies in a relatively poor, medically underserved community, and . . . would most likely close if its DEA registration [was] revoked.'' However, the Agency also noted that in addition to having changed its procedures, there was ''no evidence of any wrongdoing since the events at issue'' which had occurred five or more years before the proceeding was even initiated (and eight years before the issuance of the decision). *Id.*

Based on *Pettigrew Rexall Drugs,* Respondent argues that the community impact would be substantial because Respondent ''is located in ''a rural and underserved area,'' and that ''[a] large percentage of [its] patients are indigent.'' Resp. Post-Hrng. Br. 13–14. Respondent further argues that without a registration, Respondent would not be viable concern because patients will not go to two different pharmacies to fill their prescriptions and that the only ''other pharmacy in the area'' ''would have a monopoly.'' *Id.* at 14–15.

While the Agency has now in multiple cases rejected the contention that community impact is a relevant consideration in assessing whether a *prescribing* practitioner's registration ''would be consistent with the public interest,'' and the reasoning of these decisions calls into question the continuing vitality of *Pettigrew Rexall Drugs* even as applied to a pharmacy, contrary to the discussion in the Recommended Decision, R.D. at 60, the Agency has not formally overruled the case.[20] However, the Agency's reasons for rejecting consideration of community impact evidence in cases involving prescribing practitioners apply with equal force to pharmacies.

In *Gregory Owens,* 74 FR 36751, 36757 (2009), the Agency explained that ''whether a practitioner treats patients who come from a medically underserved community or who have limited incomes has no bearing on whether he has accepted responsibility and undertaken adequate corrective measures.'' The Agency further explained that ''[t]he diversion of prescription drugs has become an increasingly serious societal problem, which is particularly significant in poorer communities whether they are located in rural or urban areas,'' and that ''[t]he residents of this Nation's poorer areas are as deserving of protection from diverters as are the citizens of its wealthier communities.'' *Id.*

The Agency also noted that there are no workable standards for determining when a practitioner should be entitled to a reduced sanction based on community impact evidence. *Id.* Thus, in *Owens,* the Agency rejected the ALJ's recommendation that the Agency should decline to impose either a suspension or revocation of the practitioner's registration because 10 percent of his patients came from underserved counties and a majority of his patients had limited finances.

As the Agency explained:

> The ALJ's reasoning begs the question of how many patients from underserved areas would a practitioner have to treat to claim the benefit of the rule. As for her reliance on the fact that a majority of Respondent's patients have limited incomes, determining what constitutes a patient with a limited income or finances (or what percentage of patients) a practitioner must have [who meet the criteria] to claim entitlement to this rule,

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[19] On the issue of its remedial measures, Respondent argued that Tom Watson testified that if its application is granted, ''he will be more actively involved in its operations'' to ''ensure its proper operations, accountability, and viability.'' Resp. Post-Hrng. Br. 16. However, given the multiple instances in which Mr. Watson was made aware of his son's misconduct and did nothing more than talk to his son, his promise to do better in the future rings hollow.

On this issue, Respondent also presented the testimony of Glenn Wood, its prospective new Pharmacist in Charge. R.D. at 60. Finding Wood's testimony unpersuasive, the CALJ explained that:

> Wood's testimony concerning all the extra security measure [sic] he intends to take suffers from the same fundamental defect that [Tom] Watson's representations regarding his anticipated increased pharmacy involvement and implementation of his Proposed Policy do: both men were present and did nothing when the Respondent's PIC Chris [Watson], ran wild. These men are a major part of the problem, not the champions of a solution that can be afforded any genuine credence.

Id.

I do not find adequate support in the record for the CALJ's assertion that Glenn Wood was ''present and did nothing when'' Chris Watson ''ran wild.'' While Glenn Wood testified that he had done a one-month internship under Chris Watson while he was in pharmacy school, Tr. 477, 479; and that during the period 2006 through 2007, when he was working at both the Mayflower and Perryville stores, he worked alongside of Chris Watson one day a week, *id.* 454, 479; there is no evidence that Chris Watson was diverting controlled substances during this time period, let alone evidence that Glenn Wood observed this.

Thereafter, Wood went to Utah for a brief period before returning to Arkansas and becoming the PIC at Morrilton Food and Drug for approximately three years up until the sale of the pharmacy in 2013. Tr. 395–96. Here again, there is no evidence that Chris Watson was diverting drugs in this period, let alone evidence that Glenn Wood observed this.

After the sale of Morrilton Food and Drug, Wood worked for a pharmacy that is not affiliated with the Watsons, before agreeing in December 2014 with Chris Watson to work several days a week at Respondent. *Id.* at 396. Wood, however, did not start work at Respondent until January 28, 2015, the day after the search warrant and Immediate Suspension Order were served. *Id.* at 398.

To be sure, Wood acknowledged that he had met Eric Horton at a birthday party for Chris Watson's daughter and there were occasions on which Chris Watson and Horton would show up at the pharmacy. *Id.* at 464–68. This, however, is too thin a reed to support the conclusion that Wood was ''present and did nothing when [Chris Watson] ran wild,'' R.D. at 60, especially given that there is no evidence that Watson was diverting drugs during this period. Ultimately, because Wood testified primarily on the issue of whether Respondent has instituted adequate remedial measures, an issue which I need not resolve given Respondent's failure to accept responsibility, I deem it unnecessary to consider the issues surrounding the February 25, 2015 phone call (nearly one month after the ISO was served and the search warrant executed) between Wood and Grant Goode regarding the latter's employment status, or Wood's involvement in the Redneck Remedy business venture, and decline to adopt that portion of the Recommended Decision which discusses these issues. R.D. 29–36.

[20] Each of the cases cited by the ALJ involved prescribers. The closest the Agency has come to overruling *Pettigrew Rexall Drugs* is *Physicians Pharmacy, L.L.C.,* 77 FR 47096 (2012). Therein, the Agency agreed ''with the ALJ's rejection of the Government's contention that 'in assessing the public interest, the nature and amount of diversion of controlled substances in a geographical area is a legitimate area of inquiry and concern when determining whether an applicant should be granted a DEA registration.' '' *Id.* at 47096 n.2. As the Agency explained, ''[n]othing in the texts of any of the five [public interest] factors set forth in section 823(f) remotely suggests that Congress granted the Agency authority to deny an application based on its assessment of 'the nature and amount of diversion of controlled substances in a geographical area.' '' *Id.* (quoting Gov. Br. 4).

In dicta, the Agency also noted that the Government's argument is ''simply the other side of the community impact coin'' and ''that a rule which takes into account the impact on the community caused by not registering (or de-registering through a revocation proceeding) a particular practitioner is completely unworkable.'' *Id.* (citations omitted). Moreover, the Agency cited only cases involving prescribing practitioners and did not discuss *Pettigrew Rexall Drugs.* Accordingly, *Physicians Pharmacy* cannot be read as overruling *Pettigrew Rexall Drugs. See, e.g., Drug Plastics & Glass Co., Inc.,* v. *NLRB,* 44 F.3d 1017, 1022 (D.C. Cir. 1995) (''In order to diverge from agency precedent, the Board must 'suppl[y] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.' '') (citations omitted); *Shaw's Supermarkets, Inc.,* v. *NLRB,* 884 F.2d 34, 37 (1st Cir. 1989) (quoting *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800, 808–09 (1973) (plurality op.) (''It is, of course, true that the Board is free to adopt new rules of decision and that the new rules of law can be given retroactive application. Nevertheless the Board may not depart sub silentio, from its usual rules of decision to reach a different, unexplained result in a single case.'')).

would inject a new level of complexity into already complex proceedings and take the Agency far afield of the purpose of the CSA's registration provisions, which is to prevent diversion.

Id.

Notwithstanding that Respondent provided notice that it intended to argue that the Agency should consider the community impact of denying its application, the Government does not address whether *Pettigrew Rexall Drugs* remains viable as precedent. *See generally* Gov. Post-Hrng. Br. Accordingly, I address whether Respondent has produced sufficient evidence to support such a claim.

Respondent's evidence on the issue was limited to the testimony of Mr. Wood that Perry County is ''an extremely rural area'' and that ''[a] large percent of our customers are what I would describe as being indigent probably somewhat.'' Tr. 404. Mr. Wood further testified that without Respondent, there would only be one pharmacy in the county which would have a monopoly. *Id.* at 405. Finally, Mr. Wood testified that in Arkansas, a pharmacist can provide disease state management and give immunizations. *Id.* at 404–05.

Mr. Wood's testimony is too insubstantial to support the conclusion that a sanction less than denial of its application is warranted because of the adverse community impact resulting from its inability to dispense controlled substances. Notably, Mr. Wood did not specify the percentage of Respondent's customers that is indigent, nor the income level he used to support his conclusion.

As for the contention that without a DEA registration, Respondent will lose many of its customers because they will not want to go to two pharmacies to fill their prescriptions, controlled substances constitute only 11 percent of all prescriptions issued nationally. *See* Electronic Prescriptions for Controlled Substances, 75 FR 16236, 16237 (2010) (Interim Final Rule). This suggests that the majority of pharmacy patients do not even fill controlled substance prescriptions.

Moreover, even if the lack of a registration will eventually render Respondent financially unviable, I do not find persuasive its contention that this will have an adverse community impact. While Respondent maintains that this will result in the creation of a monopoly because there is only one other pharmacy in Perryville, Mr. Watson and his partner formerly owned a pharmacy in Morrilton, Arkansas, which is only fourteen miles from Perryville, and the results of a Mapquest search for pharmacies in the Perryville area (of which I take official notice) show that there are six pharmacies located in Morrilton.[21] Tr. 395. Moreover, since *Pettigrew Rexall Drugs,* there has been an increase in the availability of legitimate mail order pharmacies. Thus, I reject Respondent's suggestion that denying its application will allow the remaining pharmacy to engage in monopolistic pricing.

Of further note with respect to Mr. Wood's testimony that a large percentage of Respondent's customers are indigent (and presumably less able to travel to Morrilton), Respondent produced no evidence as to the number of patients it deems to be indigent who are not enrolled in the Arkansas Medicaid program. However, the Arkansas Medicaid program covers the cost of most prescription drugs. *See* Arkansas Dept. of Human Services, Arkansas Medicaid, ARKids First & You—Arkansas Medical Beneficiary Handbook 56 (Rev. 2010). And Respondent produced no evidence that the other Perryville pharmacy does not accept Medicaid patients.[22] Finally, as for Respondent's contention that pharmacists in Arkansas can provide disease state management and immunizations, it has offered no evidence that there is a shortage of medical professionals in the Perryville area who can provide these services.[23]

Thus, I conclude that Respondent's evidentiary showing on community impact is insufficient to rebut the Government's *prima facie* showing that granting its application ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f). Nor do I consider its evidence sufficient to support a lesser sanction than what is warranted on the facts of this case.

In short, I agree with the CALJ that the misconduct engaged in by both Chris Watson (Respondent's PIC) and Tom Watson (its owner) was egregious. *See* R.D. at 61. And I further agree with the CALJ's conclusion that ''a sanction that falls short of [denial] would undermine the Agency's legitimate interests in both specific and general deterrence.'' *Id.* Accordingly, I will affirm the Order of Immediate Suspension, as well as order the denial of Respondent's pending application to renew its registration.

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 application of Perry County Food & Drug for a DEA Certificate of Registration as a retail pharmacy be, and it hereby is, denied. Pursuant to the authority vested in me by 21 U.S.C. 824(a)(4) & (d), as well as 28 CFR 0.100(b), I affirm the Order of Immediate Suspension of DEA Certificate of Registration AP2331851 issued to Perry County Food & Drug. Pursuant to the authority vested in me by 21 U.S.C. 824(f), I further order that all right, title, and interest in any controlled substances seized by the Government during the execution of the

[21] Pursuant to 5 U.S.C. 556(e), Respondent may show to the contrary, by filing a properly supported motion, no later than 15 days from the date of service of this order, which shall commence on the date of mailing.

[22] Because Respondent seeks to rebut the Government's *prima facie* showing, it has the burden of production on this issue.

[23] While I decline to overrule *Pettigrew Rexall Drugs,* I find its reasoning to be problematic as it appears to have given more weight to community impact than was warranted by the minimal evidence discussed in the decision and set forth no principle for when such evidence could overcome other relevant factors.

For example, the decision noted the Agency's agreement with the ALJ's finding that the pharmacy owner ''did not appear candid or forthright and his testimony appeared to be tailored to Respondent's defense in this proceeding.'' 64 FR at 8858. The decision also noted the ''[r]espondent's failure to acknowledge or accept responsibility for any wrongdoing.'' *Id.* at 8860.

Notably, since *Pettigrew Rexall Drugs,* the Agency has made clear that where the Government has proved that a registrant/applicant has engaged in intentional or knowing diversion, the registrant/applicant must acknowledge its misconduct to rebut the conclusion that its registration is inconsistent with the public interest. *See Holiday CVS, L.L.C., d/b/a CVS/Pharmacy Nos. 219 and 5195,* 77 FR 62315, 62323 (2012) (revoking pharmacy registration notwithstanding that company had replaced each pharmacy PIC because company failed to acknowledge its misconduct); *Jayam Krishna-Iyer,* 74 FR 459, 463 (2009) (holding on remand that had physician not ''acknowledged wrongdoing with respect to both her prescribing to the undercover operatives, as well as'' other misconduct, the Agency ''would [have] again revoke[d] her registration''); *see also MacKay* v. *DEA,* 664 F.3d 808, 820 (10th Cir. 2011) (''The DEA may properly consider whether a physician admits fault in determining if the physician's registration should be revoked.'') (citation omitted); *Chein* v. *DEA,* 533 F.3d 828, 837 (D.C. Cir. 2008) (upholding revocation order, noting in part that physician had not ''accepted responsibility for his misconduct''); *Hoxie* v. *DEA,* 419 F.3d 477, 483 (6th Cir. 2005) (DEA properly considers a registrant's admission of fault in determining whether registration should be revoked).

Since *Pettigrew Rexall Drugs,* the Agency has also made clear that it ''places great weight on a registrant's/applicant's candor, both during an investigation and in any subsequent proceeding.'' *Robert F. Hunt,* 75 FR 49995, 50004 (2010); *see also The Lawsons, Inc., t/a The Medicine Shoppe Pharmacy,* 72 FR 74334, 74338 (2007) (quoting *Hoxie,* 419 F.3d at 483) (''Candor during DEA investigations properly is considered by the DEA to be an important factor when assessing whether a . . . registration is consistent with the public interest.''); *Rose Mary Jacinta Lewis,* 72 FR at 4042 (holding that lying under oath in proceeding to downplay responsibility supports conclusion that physician ''cannot be entrusted with a registration'').

Thus, were a case to come before me with similar facts to those of *Pettigrew Rexall Drugs,* I would deny its application and/or revoke its registration.

Order of Immediate Suspension issued to Perry County Food & Drug be, and it hereby is, vested in the United States. This Order is effective immediately.[24]

Dated: October 29, 2015.

Chuck Rosenberg,

Acting Administrator.

Paul A. Dean, Esq., for the Government.

M. Darren O'Quinn, Esq., for the Respondent.

RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION OF THE ADMINISTRATIVE LAW JUDGE

John J. Mulrooney, II, Chief Administrative Law Judge. On January 26, 2015, the Administrator of the Drug Enforcement Administration (DEA) issued an Order to Show Cause and Immediate Suspension of Registration (OSC/ISO) [25] suspending the DEA Certificate of Registration (COR), number AP2331851,[26] of Perry County Food & Drug (Respondent), pursuant to 21 U.S.C. 824(d), on the grounds that the Respondent's continued registration constitutes an immediate danger to the public health and safety. The OSC/ISO also proposes to revoke the Respondent's COR pursuant to 21 U.S.C. 824(a)(4), deny any pending applications for renewal or modification of such registration, or deny any applications for additional DEA registration, on the grounds that the Respondent's continued registration is inconsistent with the public interest as that term is defined in 21 U.S.C. 823(f). On February 6, 2015, the Respondent, through counsel, filed a timely request for a hearing.[27] A hearing was conducted in this matter on March 31–April 1, 2015, in Little Rock, Arkansas.

The issue ultimately to be adjudicated by the Administrator, with the assistance of this recommended decision, is whether the record as a whole establishes by substantial evidence that the Respondent's registration with the DEA should be revoked pursuant to 21 U.S.C. 824(a).

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

The Allegations

In the OSC/ISO, the Government contends that several bases exist upon which the Agency should revoke the Respondent's COR. The Government alleges that revocation of the Respondent's COR is appropriate because the Respondent unlawfully distributed controlled substances in violation of 21 U.S.C. 841(a) and 21 U.S.C. 842(a). Specifically, the Government contends that from August 2014 through January 2015, the Respondent (1) ''on several occasions . . . distributed and dispensed controlled substances to individuals either without a prescription, as required by 21 U.S.C. 829(a), (b) and 21 CFR 1306.11(a) and 1306.21(a), or pursuant to prescriptions that [the Respondent's] pharmacist knew or should have known had not been issued for a legitimate medical purpose in the usual course of the practitioner's professional practice'' and (2) failed to ''provide effective controls against theft and diversion of controlled substances.'' [28]

In support of its allegations, the Government asserts that on several occasions, the Respondent's pharmacist-in-charge (PIC) Chris Watson (Chris W) (1) dispensed controlled substances (hydrocodone and alprazolam) without a prescription and (2) dispensed controlled substances (hydrocodone and alprazolam) pursuant to prescriptions that Chris W knew were fictitious or fraudulent.[29] Additionally, the Government alleges that Chris W advised an undercover DEA agent on how to modify a scrip by hand to ''create a more realistic looking prescription'' and deliberately ignored the agent's reference to intentional diversion of controlled substances filled at the Respondent.[30] The Government also asserts that state law enforcement discovered the Respondent's stock bottles of controlled substances in vehicles of non-pharmacy personnel, and that the Respondent failed to inform DEA of the loss or theft of controlled substances as required by 21 CFR 1301.74(c).[31]

The Stipulations of Fact

The Government and the Respondent, through counsel, have entered into stipulations [32] regarding the following matters:

(1) The Respondent pharmacy is registered with the DEA as a retail pharmacy in Schedules II–V under DEA COR AP2331851 at 112 Houston Avenue, P.O. Box 327, Perryville, Arkansas 72126.

(2) The scheduled expiration date of DEA COR AP2331851, which has been issued to the Respondent, and is the subject of these proceedings, is March 31, 2015.

(3) During the time period of August 15, 2014 through January 28, 2015, Chris W was the Vice-President and Controller of the Respondent pharmacy.

(4) During the time period of August 15, 2014 through January 28, 2015, Chris W was the pharmacist-in-charge (PIC) of the Respondent pharmacy.

(5) The only registered address for the Respondent pharmacy under DEA COR AP2331851 is: 112 Houston Avenue, P.O. Box 327, Perryville, Arkansas 72126.

(6) Patient D.J.[33] had a prescription for Xanax, a controlled substance,[34] filled at the Respondent pharmacy on September 17, 2013. The hard copy of this prescription was discovered at Chris W's residence during the execution of a federal search warrant on January 27, 2015.

(7) Patient J.I. had a prescription for Clonazepam, a controlled substance,[35] filled at the Respondent pharmacy on September 17, 2013. The hard copy of this prescription was discovered at Chris W's residence during the execution of a federal search warrant on January 27, 2015.

(8) Patient A.Q. had a prescription for Hydrocodone, a controlled substance,[36]

[24] For the same reasons that led the former Administrator to conclude that an Immediate Suspension was warranted, I conclude that the public interest necessitates that this Order be effective immediately. *See* 21 CFR 1316.67.

[25] ALJ Ex. 1.

[26] Gov't Ex. 1. The Respondent was issued DEA COR AP2331851 prior to April 2, 1986. *Id.* at 1. The most recent renewal of the Respondent's registration occurred on February 7, 2012, with a scheduled expiration date of March 31, 2015. *Id.* During a March 19, 2015 status conference, the Respondent, through counsel, represented that a renewal application had been timely filed, and the Government represented that it will not contest the timeliness of the renewal application. Thus, the Respondent's COR remains in full force and effect. 21 CFR 1301.36(i) (2015).

[27] ALJ Ex. 3.

[28] ALJ Ex. 1 at 1–3.

[29] *Id.* at 1–2.

[30] *Id.* at 2–3.

[31] *Id.* at 4.

[32] The parties have also entered into stipulations of credible testimony regarding twenty-three witnesses. All stipulations of fact and testimony are set forth in ALJ Ex. 20.

[33] Consistent with the terms of the Protective Order issued in this matter (ALJ Ex. 15), initials have been substituted for patient name identifiers. Copies of each of the prescriptions found at Chris W's house were received into evidence. Gov't Exs. 41, 54–63; Tr. 204.

[34] Xanax (alprazolam) is a Schedule IV controlled substance. 21 CFR 1308.14 (2015); Office of Diversion Control, *Benzodiazepines,* Drug Enforcement Admin. (Jan. 2013), *available at http://www.deadiversion.usdoj.gov/drug_chem_info/benzo.pdf.*

[35] Clonazepam is a Schedule IV controlled substance. 21 CFR 1308.14.

[36] Hydrocodone is a Schedule II controlled substance. 21 CFR 1308.12 (2015).

filled at the Respondent pharmacy on September 17, 2013. The hard copy of this prescription was discovered at Chris W's residence during the execution of a federal search warrant on January 27, 2015.

(9) Patient N.R. had a prescription for Hydrocodone, a controlled substance, filled at the Respondent pharmacy on May 25, 2011. The hard copy of this prescription was discovered at Chris W's residence during the execution of a federal search warrant on January 27, 2015.

(10) Patient M.B. had a prescription for Oxycontin, a controlled substance,[37] filled at the Respondent pharmacy on September 17, 2013. The hard copy of this prescription was discovered at Chris W's residence during the execution of a federal search warrant on January 27, 2015.

(11) Patient DC had a prescription for Soma, a controlled substance,[38] filled at the Respondent pharmacy on September 16, 2013. The hard copy of this prescription was discovered at Chris W's residence during the execution of a federal search warrant on January 27, 2015.

(12) Patient D.C. had a prescription for Hydrocodone, a controlled substance, filled at the Respondent pharmacy on September 16, 2013. The hard copy of this prescription was discovered at Chris W's residence during the execution of a federal search warrant on January 27, 2015.

(13) On or about August 15, 2014, Chris W dispensed 42 tablets of hydrocodone 10/325 mg to one A.R. without a prescription.

(14) On November 7, 2014, Chris W dispensed 120 tablets of hydrocodone 10/325 mg and 60 tablets of alprazolam 2 mg to an undercover DEA Special Agent pursuant to a prescription that Chris W knew or should have known was fraudulent.

(15) On November 7, 2014, Chris W instructed an undercover DEA Special Agent to add the letter ''R'' to the DEA registration number on a prescription, and to change the last digit of the number to seven to create a more realistic-looking prescription.

(16) On November 13, 2014, Chris W instructed an undercover DEA Special Agent to use the letters ''RA'' instead of ''RF'' on the DEA registration number of a prescription that was presented to Chris W.

(17) On November 19, 2014, Chris W instructed an undercover DEA Special Agent to change the last digit of a DEA registration number to six on a prescription that was presented to Chris W.

(18) On November 19, 2014, Chris W instructed an undercover DEA Special Agent on how to create a fictitious DEA registration number.

(19) On or about November 19, 2014, Chris W distributed 30 tablets of hydrocodone and 30 tablets of Xanax to Samantha Pemberton without a prescription.

(20) On December 4, 2014, Chris W distributed 240 tablets of hydrocodone 10/325 mg and 60 tablets of alprazolam 2 mg to an undercover DEA Special Agent pursuant to a prescription that Chris W knew or should have known was fraudulent.

(21) The stock bottle of 1,000-count hydrocodone 10/325 mg and two stock bottles of 100-count methadone[39] 10 mg that were in Eric Horton's possession at the time of Horton's arrest on or about January 20, 2015 all had the Respondent pharmacy's stock stickers on them.

(22) The stock bottle of 500-count alprazolam 2 mg that was in Joe Jackson's possession at the time of Joe Jackson's arrest on or about September 14, 2014 had the Respondent pharmacy's stock sticker on it.

(23) The Respondent pharmacy has not filed a theft or loss report with DEA since at least 2012.

The Evidence

In addition to its reliance on the factual stipulations reached by the parties, *supra,* the Government presented its case through the live and/or stipulated testimony[40] of twenty-six witnesses.[41]

Arkansas State Trooper Corporal (Cpl.) Richard Whitley testified that he was on patrol on September 14, 2014 when he was dispatched to a one-vehicle accident where an individual named Joseph Jackson was being detained for leaving the scene. Stipulation of Testimony (SOT) 13(b); Tr. 67–68. Upon his arrival, Cpl. Whitley was advised that another police officer had noticed a bottle of liquid codeine[42] in the front seat of the vehicle. SOT 13(b); Tr. 69–71. Cpl. Whitley started a conversation with Jackson and although Jackson denied any drug use, Cpl. Whitley noticed that his speech was slurred and detected the odor of marijuana. SOT 13(b); Tr. 71. Cpl. Whitley then secured Jackson in handcuffs in a police vehicle, and he and the other officers searched Jackson's car.[43] SOT 13(b). The troopers smelled marijuana in Jackson's car and observed a bottle of codeine on the seat. SOT 13(c). Also discovered during the car search was a black bag containing a baggie of marijuana,[44] prescription bottles of drugs, and two handguns. *Id.* Jackson denied any knowledge of the drugs and told Cpl. Whitley that the weapons were not his. SOT 13(c); Tr. 74. Cpl. Whitley searched Jackson for additional weapons, and discovered three large bundles of cash in his pockets totaling $2,820. SOT 13(c), (d). Among other things, the seized evidence included 74 carisoprodol tablets, 12 alprazolam bars, one bag of suspected marijuana, one bottle of codeine, and two 500-count stock bottles of alprazolam, one of which bore a sticker from the Respondent.[45] SOT 13(d). Interestingly, the materials seized from Jackson's vehicle also contained a handwritten note bearing the following phrases: ''no standing out''; ''your people go in as a group and if you leave plz [sic] leave your number''; ''please have A–C in your car''; ''what to say''; ''you have lower back pain and you take hydrocodone 10.325 four time [sic] a day''; ''xanx [sic] 2 mg twice a day''; ''and your last visit to a doctor 2 to 3 months ago.'' Gov't Ex. 39 at 3. The seized note bore the obvious hallmarks of crib notes that were apparently contrived to coach others successfully to lie persuasively to obtain controlled substances illegally from DEA practitioner registrants.

The Government also presented the testimony of Dr. Raymond E. Hambuchen, D.D.S., a dentist practicing in Conway, Arkansas, and an acquaintance of the Respondent's (then) PIC, Chris W. Dr. Hambuchen testified that he has known Chris W for years and that they occasionally exchanged text

[37] Oxycontin (oxycodone) is a Schedule II controlled substance. *Id.;* Office of Diversion Control, *Oxycodone,* Drug Enforcement Admin. (Mar. 2014), *available at http://www.deadiversion.usdoj.gov/drug_chem_info/oxycodone/oxycodone.pdf.*

[38] Soma (carisoprodol) is a Schedule IV controlled substance. 21 CFR 1308.14; Office of Diversion Control, *Carisoprodol,* Drug Enforcement Admin. (March 2014), *available at http://www.deadiversion.usdoj.gov/drug_chem_info/carisoprodol/carisoprodol.pdf.*

[39] Methadone is a Schedule II controlled substance. 21 CFR 1308.12.

[40] The parties stipulated to the credibility of the stipulated testimony. ALJ Ex. 20. Where applicable, individual credibility determinations regarding live testimony are set forth in the body of this recommended decision.

[41] Two of the Government's witnesses were presented in rebuttal.

[42] Codeine is a Schedule II controlled substance. 21 CFR 1308.12.

[43] A copy of a photograph of Jackson was received into evidence. Gov't Ex. 38; Tr. 70–71.

[44] Marijuana is a Schedule I controlled substance. 21 CFR 1308.11.

[45] Photographs of the controlled substances, weapons, and note found in Jackson's car at the time of his arrest were received into evidence. Gov't Ex. 39; Tr. 75–76.

messages. SOT 1(a).[46] On September 29, 2014, Dr. Hambuchen exchanged a series of text messages with Chris W wherein Chris W stated that he had dispensed controlled substances to one A.R. using Dr. Hambuchen's name as the prescriber and without a prescription. SOT 1(b); Gov't Ex. 2; Tr. 20–21. Dr. Hambuchen testified that he did not know A.R.,[47] has never issued a prescription for her, and that he wrote a letter to the DEA (Hambuchen Letter), at the request of DEA personnel, on November 12, 2014 memorializing that fact. SOT 1(c); Gov't Ex. 3; Tr. 22–24. The Government acquired and introduced a patient profile on file at the Respondent regarding A.R. that lists Dr. Hambuchen as having authorized eleven prescriptions in her name. Gov't Ex. 4; SOT 20(d), (e); Tr. 185–86. These eleven prescriptions were dispensed at the Respondent between June and December 2014 [48] and included the controlled substances Hydroco/APAP and oxycodone. Gov't Ex. 4.

DEA Task Force Officer (TFO) Chad Wilson testified that he is currently stationed at the DEA Little Rock District Office (Little Rock DO) and that he received and reviewed the Hambuchen Letter. SOT 15(b). After reading the letter, TFO Wilson interviewed Dr. Hambuchen, who confirmed its contents,[49] forwarded him a copy, and reiterated that he did not know an A.R. *Id.* TFO Wilson generated a report from the Arkansas prescription monitoring program (PMP) on A.R. *Id.*

DEA Special Agent (SA) Mark Mitchell testified that he is also an agent assigned to the Little Rock DO. SOT 3(a). He testified that on four occasions (specifically, November 7, 2014; November 13, 2014; November 19, 2014; and December 4, 2014), he made undercover visits to the Respondent. SOT 3(b). On each occasion, he presented fictitious controlled substance prescriptions to the pharmacist on duty, Chris W.[50] *Id.* On November 7, 2014 (Undercover Visit 1), SA Mitchell met with Chris W and presented him with a fraudulent prescription for hydrocodone and alprazolam. SOT 3(c). According to SA Mitchell, during this visit, Chris W instructed him to add the letter ''R'' to the DEA registration number on the scrip and to change the last number to a ''7'' to make the false document appear more realistic. *Id.* In SA Mitchell's estimation, Chris W's tutelage on the subject of making better fraudulent scrips demonstrated that Chris W well knew the presented scrip was fictitious. *Id.* The Government introduced a copy of the fraudulent scrip that SA Mitchell presented to Chris W at the Respondent. Gov't Ex. 6; Tr. 106. The scrip, dated November 7, 2014, is made out for ''Brian Jackson'' (the name SA Mitchell used in his undercover visits) and specifies 120 tablets of Norco and 60 tablets of Xanax. Gov't Ex. 6. During Undercover Visit 1, SA Mitchell was wearing audio and video recording equipment, but due to an equipment failure,[51] nothing was recorded. SOT 3(c). Chris W filled the fraudulent prescription and dispensed the controlled substances to SA Mitchell.[52] Id.

On November 13, 2014 (Undercover Visit 2), SA Mitchell attempted to fill another fictitious prescription for hydrocodone and alprazolam at the Respondent.[53] SOT 3(d). SA Mitchell stated that he presented the prescription to Chris W, who informed him that the pharmacy was out of hydrocodone and benzodiazepines, but that he would have more during the first of the following week. *Id.* SA Mitchell recalled that Chris W was mumbling, but that when SA Mitchell asked Chris W if he ''did the prescription right,'' Chris W recommended that he use the letters ''RA'' instead of ''RF,'' which once again, in SA Mitchell's view, demonstrated that Chris W was well aware that the scrip was a fake. *Id.;* Tr. 145–50. When SA Mitchell asked Chris W again which letters to use, Chris W wrote the letters ''RA'' down on a piece of paper. SOT 3(d). SA Mitchell testified that after he looked at what Chris W wrote, Chris W scratched out the letters with a pen. *Id.*

On November 19, 2014 (Undercover Visit 3), SA Mitchell returned to the Respondent and attempted to fill another fictitious prescription for hydrocodone and alprazolam.[54] SOT 3(e). Once again, SA Mitchell encountered Chris W and handed him another fictitious scrip. *Id.* Chris W told Mitchell that he ran out of hydrocodone tablets two days earlier, and that more were not expected until the first of the month, because his supplier had placed limits on how much he could order. *Id.;* Gov't Ex. 18 at 1–2. When SA Mitchell asked Chris W if the fictitious DEA number on the prescription SA Mitchell presented was correct, Chris W instructed him to change the last digit of the DEA number of the prescription to a ''6.'' SOT 3(e). Chris W started counting, described the methodology in creating a DEA COR number to the undercover agent, and volunteered that the prescription that SA Mitchell just handed him looked better than most he sees as the pharmacy.[55] *Id.;* Gov't Ex. 18 at 4. Chris W also volunteered that he believed that multiple law enforcement agencies were scrutinizing his pharmacy, but the record contains no objective indication that he felt particularly inhibited by this revelation. Gov't Ex. 18 at 2. This crash course in the finer points of creating phony scrips reinforced SA Mitchell's view that Chris W was well aware that the scrip he

[46] Dr. Hambuchen testified that although he and Chris W had ''in the past'' texted each other a lot because they were friends, it was unusual in the last few years for him to receive a text message from Chris W. Tr. 24–25.

[47] The record reflects some confusion regarding A.R.'s first name; however, it is undisputed that Dr. Hambuchen does not know A.R. and did not prescribe any controlled substances to her. Tr. 23; SOT 1(b), (c); 10(d).

[48] The patient profile report for A.R. submitted by the Government spans the time period of January 2012 through January 2015. Gov't Ex. 4.

[49] DEA SA Thomas Fisher, another agent stationed at the Little Rock DO, testified that he was also present with TFO Wilson during his interview of Dr. Hambuchen, and corroborated TFO Wilson's account of the interview. SOT 10(c), (d).

[50] SA Mitchell testified that the patient name he used on all of his undercover visits was ''Brian Jackson.'' Tr. 154.

[51] DEA SA Michael Willett testified that he is assigned to the Little Rock DO. SOT 4(a). SA Willett's area of responsibilities includes technical surveillance issues, and he is familiar with the video equipment that was used in SA Mitchell's undercover visits to the Respondent. SOT 4(b). SA Willett explained that the video equipment utilized during the four undercover visits has an internal battery that needs to be recharged in order for the video recording device to work properly. *Id.* Although none of the audio/video recordings or transcripts made regarding the four undercover visits were the subject of objection by the Respondent, it is worth noting that some of the tapes contained time/date stamp anomalies. The anomalies were persuasively explained by the combined testimony of SA Willett and TFO Wilson. SOTs 4, 15. Regarding date/time discrepancies encountered in the recording of other undercover visits in this case, SA Willett testified that when an internal battery has been allowed to go completely dead, the device loses track of the actual time. SOT 4(b). If the device's battery was not checked prior to use, the recording will reflect whatever time value is stored in the unit. *Id.* In SA Willett's opinion, this is what happened with some of the video recording devices operated by SA Mitchell on some of the undercover visits to the Respondent. *Id.* Additionally, TFO Wilson provided credible corroborating testimony. SOT 15(e)–(g).

[52] Photographs of the controlled substances and corresponding receipts received by SA Mitchell during Undercover Visit 1 were received into evidence. Gov't Exs. 7–8; Tr. 129, 131.

[53] Audio and video recordings contemporaneously made by SA Mitchell and a corresponding transcript of Undercover Visit 2 were received into evidence. Gov't Exs. 11–14; Tr. 139–40, 145.

[54] Audio and video recordings contemporaneously made by SA Mitchell and a corresponding transcript of Undercover Visit 3 were received into evidence. Gov't Exs. 16–18, Tr. 141.

[55] Chris W told SA Mitchell that his fraudulent scrip ''looks a lot better than any of the other damn things [he's] seen.'' Gov't Ex. 18 at 3.

presented was fraudulent. SOT 3(e). When SA Mitchell asked Chris W for his cell phone number so that he could ''call you directly [so that] me and you [could] do business,'' Chris W took the undercover agent's cell phone number instead. Gov't Ex. 18 at 3.

A copy of the fraudulent scrip that SA Mitchell presented to Chris W during Undercover Visit 3 was received into evidence.[56] Gov't Ex. 6, 15; Tr. 110. This scrip, dated November 19, 2014, specified a prescription for 240 tablets of Norco and 60 tablets of Xanax. Gov't Ex. 6. During the course of Undercover Visit 3, SA Mitchell asked Chris W how much it would cost to buy a 1,000-count bottle of hydrocodone. SOT 3(e). Chris W replied, ''I don't usually do that.'' *Id.* When the undercover agent told Chris W that he was trying to make some extra money, Chris W responded that what the agent does with the pills after the prescription is filled is none of his business. *Id.*

On December 4, 2014 (Undercover Visit 4), SA Mitchell returned to the Respondent, presented another phony scrip to Chris W, and was dispensed 240 tablets of hydrocodone 10/325 mg and 60 tablets of alprazolam 2 mg.[57] SOT 3(f). During Chris W's interaction with SA Mitchell during this visit the two men discussed a possible handgun sale. Over the course of discussion, the undercover agent volunteered to Chris W that he was a ''convicted felon.'' Gov't Ex. 33 at 8. Chris W told the agent, ''I can't sell [a gun] to you because I know you're a convicted felon.'' *Id.* Chris W's reservations concerning the undercover agent's felony conviction revelation did not apparently awaken in him any sense of heightened scrutiny regarding the wisdom of dispensing powerful controlled substances to him.

Diversion Investigator (DI) Shelli Chupik testified that she is stationed at the Little Rock DO. SOT 2(a); Tr. 107. According to DI Chupik, it was she who created the four fake controlled substances scrips that SA Mitchell used during his undercover visits to the Respondent. Chupik explained that each fake prescription contained the following fictitious information: a doctor's name, the name and phone number of a clinic, and a DEA COR number. SOT 2(b).

On January 12, 2015, the Arkansas Board of Pharmacy (Arkansas Pharmacy Board or APB) supplied DI Chupik with a compact disc (APB CD) that contained reports that APB personnel prepared in connection with the pharmacy. SOT 2(e); Tr. 117–19. Included in the materials provided in the APB CD was a completed DEA Report of Theft or Loss of Controlled Substances (DEA–106), signed by Chris W, as the ''Owner/Pharmacist-in-Charge.'' [58] SOT 2(e); Gov't Ex. 53. The DEA–106 that was filed with the Arkansas Pharmacy Board on January 9, 2014 reflects (and purports to report to DEA) that on August 5, 2013, the Respondent was burglarized and that there was a theft of controlled substances. Gov't Ex. 53. DI Chupik testified that a DEA–106 is a form that, once prepared, must be filed with DEA.[59] Tr. 120. On January 22, 2015, based on the information contained in the DEA–106, DI Chupik queried the DEA electronic DEA–106 Theft or Loss database and discovered that no DEA–106 forms had been submitted to the DEA by the Respondent in either 2013 or 2014. SOT 2(f); Tr. 120–22. Thus, although the DEA–106 filed by the Respondent with the Arkansas Pharmacy Board ordinarily would/should/does indicate that the document had been filed with DEA to supply DEA with notice of the loss,[60] this was not the case with this purported burglary.

Conway Police Officer Matthew Edgmon testified that on November 19, 2014, he initiated a traffic stop with a white Tahoe that had no license plate. SOT 8(b); Tr. 29. After some conversation with the driver, Samantha Pemberton, he ascertained that she had a suspended driver's license and that the (plateless) vehicle she was driving was owned by Chris W, whom she described to Officer Edgmon as the pharmacist/owner of the Respondent as well as her boyfriend.[61] SOT 8(b). Pemberton consented to a search of Chris W's car. A search of her purse yielded numerous pill bottles, many of which were unlabeled.[62] SOT 8(c), (d); Tr. 29–32; Govt. Ex. 19. One of these unlabeled bottles had pills that Officer Edgmon recognized as likely being alprazolam. SOT 8(d). Pemberton's purse also contained bottles with labels bearing her name, as well as other labeled bottles containing non-controlled pills. *Id.* Officer Edgmon subsequently took Pemberton into custody for possession of a controlled substance, advised her of her *Miranda* rights (which Pemberton acknowledged she understood) and then questioned her about the pills he found in her purse. SOT 8(e). Pemberton told Officer Edgmon that she had Xanax and ''hydros'' (hydrocodone) and claimed that she had prescriptions for these. *Id.* Pemberton was transported to the Conway Police Department (CPD) for processing, and Officer Edgmon secured the contraband. *Id.*

In addition to corroborating many of the details of her arrest, Samantha Pemberton testified that she was Chris W's girlfriend, and that it is her understanding that he is an owner of the Respondent pharmacy. SOT 7(a). According to Pemberton, prior to the traffic stop, Chris W had given her controlled substances (specifically, 30 hydrocodone 10/325 mg and 30 Xanax 2 mg) in unmarked bottles and without a prescription, and at the time of her arrest, those medications were still in her possession. SOT 7(b).

CPD narcotics investigator Thomas Kennedy testified that he interviewed Pemberton at CPD after her arrest on November 19 and that this interview was recorded.[63] SOT 9(b); Tr. 33. During the interview, Pemberton stated that: (1) she received at least some of the controlled substances that were in her purse from Chris W; (2) she had prescriptions for the controlled

[56] DI Shelli Chupik, the creator of the fictitious scrip, explained that she deliberately included an authorization for an amount of medication that was inconsistent with the dosage instructions. Tr. 111–13. The discrepancy is highlighted by a text note added by DI Chupik on the copy of the exhibit received (without objection) into evidence. *Id.;* Gov't Ex. 16.

[57] Audio and video recordings contemporaneously made by SA Mitchell and a corresponding transcript of Undercover Visit 4 were received into evidence. Gov't Exs. 31–33; Tr. 142–43, 158–59.

[58] A copy of this DEA–106 was received into evidence. Gov't Ex. 53; Tr. 119.

[59] Former Respondent PIC Terry Swaim testified that the Respondent had a burglary in August of 2013 that resulted in the theft of approximately two thousand Soma (carisoprodol) pills and some Xanax (alprazolam), and that both Tom Watson and Chris W were aware of the incident. Tr. 259–60.

[60] DI Chupik clarified that the duty to file a DEA–106 occurs ''pretty much immediately'' after discovery of a theft or loss of controlled substances and is not related to the dates when a pharmacy registrant is required to conduct a biennial inventory. Tr. 122–24. Although DI Chupik testified that she believed that the DEA–106 must be filed within seven days (Tr. 124), the DEA regulations actually provide that a ''registrant shall notify [the local DEA Field Division Office], in writing, of [a] theft or significant loss of any controlled substances within one business day of discovery of such loss or theft [and] shall also complete, and submit to the Field Division Office in his area, [a DEA–106] regarding the loss or theft.'' 21 CFR 1301.76(b) (2015).

[61] The Government introduced a copy of an insurance claim letter issued to ''Jennifer Watson and Christopher Watson'' on November 4, 2014, stating that on October 28, 2014, Pemberton was involved in a loss with a vehicle (a ''2013 Infinity'') on their policy. Gov't Ex. 27; Tr. 214–18. Additionally, Pemberton told Investigator Kennedy in the course of the interview at CPD that Chris W was her boyfriend and her pharmacist. Tr. 38.

[62] Photographs of the controlled substances found in Pemberton's car at the time of her November 19, 2014 arrest were received into evidence. Gov't Ex. 19; Tr. 31–32.

[63] A recording and corresponding transcript of the interview of Pemberton conducted by Investigator Kennedy on November 19, 2014 were received into evidence. Gov't Exs. 25–26; Tr. 36, 38.

substances in unmarked bottles, and that she had received those controlled substances from the Respondent where her boyfriend, Chris W, was the pharmacist; (3) she had just filled prescriptions for hydrocodone and Xanax at the Respondent, and that she received the controlled substances from Chris W in unmarked bottles; and (4) she was prescribed 30 hydrocodone 10/325 mg and 30 Xanax 2 mg, but was not able to name the doctor who prescribed the pills. SOT 9(c); Gov't Ex. 26 at 6–7.

Investigator Kennedy telephoned Chris W during the afternoon of the day Pemberton was apprehended and recorded that conversation.[64] SOT 9(d). When Investigator Kennedy informed Chris W that Pemberton had been arrested, Chris W replied that he only vaguely knew her. Specifically, Chris W said ''I think I know who she is,'' and amorphously described her as ''blonde'' and ''kinda cute.'' SOT 9(e). Chris W told Investigator Kennedy that he thought he recalled that Pemberton may have come into the Respondent that morning, and he admitted that on or about November 19 he allowed her to ''borrow'' some hydrocodone and Xanax without a prescription, and that the pharmacy had ''loaned'' her some pills. *Id.* During the call, Chris W allowed that ''we let her borrow a few because she was out,'' and ''I know we loaned her some hydrocodone and seemed like Xanax, maybe 2 mg.'' *Id.* When Investigator Kennedy asked Chris W how much he had dispensed to Pemberton, he responded, ''I want to say like 30 of each'' ''just because she gets like 90 at a time.'' *Id.* Chris W assured Investigator Kennedy that the pharmacy was ''just waiting on [the doctor's office] to call back because that office is notoriously slow.'' *Id.*

Investigator Kennedy made repeated requests to Chris W and Pemberton to provide scrips for the 30 hydrocodone pills and 30 Xanax pills that Chris W admitted he had dispensed to Pemberton on or about November 19, but neither supplied any documentation. SOT 9(f). Chris W also provided Investigator Kennedy with conflicting information about the identity of Pemberton's prescribing physician. SOT 9(g). Initially, Chris W told him that the prescribing physician was a Dr. Humbard and agreed to fax a copy of the prescription. *Id.*

On November 20, the day following the arrest and phone call, Investigator Kennedy did receive a fax (Fax 1) from the Respondent, but contrary to Chris W's representations on the phone, Fax 1 contained no scrips, but only a copy of two prescription labels (*i.e.,* pharmacy fill stickers) from the Respondent.[65] *Id.;* Tr. 52–53. Further, not only did Fax 1 contain labels instead of scrips, but in Investigator Kennedy's review of those prescription labels, he determined that the labels did not even correspond to the information Chris W had provided him during their phone conversation about the controlled substances he said he had dispensed to Pemberton the previous day. SOT 9(g). Instead, the labels with Fax 1 reflected prescriptions that had been filled on October 9, 2014 (not November 19, 2014), and had been issued for 75 alprazolam 2 mg tablets and 75 Hydroco/APAP tablets 10/325 mg (not 30 tablets of each drug as Chris W had stated during the previous day's phone call). *Id.* Moreover, the labels stated that the prescriptions had been issued by a ''Dr. Arnold'', not a ''Dr. Humbard.'' *Id.* Furthermore, an examination of the labels that were provided indicated that both directed that no refills remained on the prescriptions. *Id.* Thus, even on their face, the prescriptions supplied by Chris W in Fax 1 that were purportedly used for the October 9, 2014 dispensing to Pemberton were no longer valid for refilling anything on November 19, 2014 and could not have been properly used for that purpose. *Id.*

On November 21, three days following Pemberton's arrest, Investigator Kennedy contacted Pemberton and notified her that he had not received scrips for the drugs she received on November 19 from the Respondent.[66] SOT 9(h). In response, Pemberton told Kennedy that she believed that Chris W had sent them. *Id.* When Investigator Kennedy explained that he had not received the scrips, Pemberton assured him that she would take care of it. *Id.* Pemberton called Investigator Kennedy back later in the day and told him that Chris W would fax the scrips. *Id.* Sometime later in the day, following his phone call with Pemberton, Investigator Kennedy telephoned Chris W at the Respondent and recorded the call.[67] SOT 9(i). Chris W insisted that he had faxed over the labels the other day, but Investigator Kennedy again explained that he still needed to see the scrip. *Id.;* Tr. 55–56. Chris W then clarified that he did not give the scrip to Pemberton because she did not want her to try to take it somewhere else, but that he would have one of his technicians look up the scrip and send it over. SOT 9(i).

Later in the day, Investigator Kennedy did receive another fax (Fax 2) from the Respondent but once again, the fax had was not a scrip, but merely a page of lined paper covered in scribbles, which, based on the investigator's experience, appeared to him to be a page from a notepad customarily used for call-in type prescriptions.[68] SOT 9(j); Tr. 55, 58–59. The Fax 2 notepad page did not contain any reference to a prescription issued to dispense medication to Pemberton on November 19. SOT 9(j). Instead, the only reference to Pemberton on the notepad page appeared in the upper right-hand corner of the fax, which included a handwritten date that appeared to be either ''10–4–14'' or ''10–9–14''; beneath that date appeared to be the name ''Samantha Pemberton,'' the text ''Xanax 2mg, TID, #75'', ''Narco 10/325'', some additional writing that Investigator Kennedy was unable to decipher, and then ''#75''. *Id.* The name ''James Arnold'' is written at the bottom of the notation. Gov't Ex. 49. Investigator Kennedy was quite clear that he had plainly articulated that he needed to see the scrips. Tr. 57–58.

Investigator Kennedy testified that on January 2, 2015, he called Pemberton again to remind her that he had still not received a scrip. SOT 9(k). In response, she stated that she would try to get the prescription and deliver it to him. *Id.* Four days later, on January 6, 2015, Pemberton brought Investigator Kennedy two scrips, both of which bore the date October 9, 2014, and a signature from a Dr. James Arnold.[69] Tr. 61–63. The Government also introduced a copy of Pemberton's patient profile from the Respondent, which indicates that two prescriptions (alprazolam and hydroco/APAP) were dispensed to Pemberton on October 9, 2014. Gov't Ex. 24. According to the patient profile, James Arnold, M.D. is listed as the prescriber for both prescriptions. *Id.*

In her testimony, Pemberton indicates that on January 6, 2015, approximately two months after her arrest, she did give Investigator Kennedy scrips that corresponded to the controlled

[64] A recording and corresponding transcript of Investigator Kennedy's November 19, 2014 phone call with Chris W were received into evidence. Gov't Exs. 20–21; Tr. 41, 43.

[65] A copy of Fax 1 was received into evidence. Gov't Ex. 48; Tr. 54.

[66] A recording and corresponding transcript of Investigator Kennedy's phone call with Pemberton were received into evidence. Gov't Exs. 66–67; Tr. 47–50.

[67] A recording and corresponding transcript of Investigator Kennedy's phone call with Chris W were received into evidence. Gov't Exs. 22–23; Tr. 44–46.

[68] A copy of Fax 2 was received into evidence. Gov't Ex. 49; Tr. 59–60.

[69] Copies of these scrips were received into evidence. Gov't Exs. 51, 52; Tr. 64–66.

substances in her possession on the day she was arrested. SOT 7(d). The scrips Pemberton gave Investigator Kennedy were dated October 9, 2014 and were issued for 75 tablets of hydrocodone 10/325 mg and 75 tablets of alprazolam 2 mg, and bore the purported signature of Dr. James Arnold of the Baptist Emergency Medicine Clinic. *Id.*

Dr. James Arnold, M.D., testified that he is a doctor practicing at the Baptist Springhill Clinic in North Little Rock, Arkansas. SOT 22(a). He stated that by virtue of the fact that he practices in an emergency room, he does not prescribe more than twenty hydrocodone tablets at one time. SOT 22(b). Dr. Arnold also indicated that he has checked his records and determined that he has not treated and does not know a person named Samantha Pemberton.[70] SOT 22(c). On January 7, 2015, Investigator Kennedy turned over to TFO Wilson the two scrips bearing Dr. Arnold's name that Samantha Pemberton had given him. SOT 15(c). Both prescriptions had stickers on them indicating that they were filled on October 9, 2014, and both were marked ''no refills.'' *Id.*

DEA Task Force Officer (TFO) Robert Puckett testified that he is a member of the Beebe, Arkansas Police Department, is cross-designated as a DEA TFO, and is currently stationed at the Little Rock DO. SOT 5(a); Tr. 91. TFO Puckett reviewed surveillance videos of the interior and exterior of the Respondent that were recorded on January 20, 2015, and testified that he isolated screen captures from the video. SOT 5(c); Gov't Ex. 36. Chris W and his friend, Eric Horton, are depicted in the video footage. The Government introduced the screen captures of the surveillance videos created by TFO Puckett, as well as TFO Puckett's written narrative describing the actions of Horton and Chris W. Tr. 98; Gov't Ex. 36.[71]

According to TFO Puckett's (unchallenged) account, the surveillance tapes show Chris W handing Horton a bottle of medication, some of the contents of which Horton pours into an amber prescription bottle. Gov't Ex. 36 at 1–2. Horton can then be seen placing items into a blue tote bag on the floor. Horton then pulls a stock bottle of medication from the shelf, shows the bottle to Chris W, puts it into a pharmacy bag, and drops the pharmacy bag with some other items into a blue tote bag. *Id.* at 2. Horton takes another stock medication bottle from a pharmacy shelf, the bottle disappears from view, and Horton can be seen shoving something into his jacket pocket and walking out of the pharmacy. *Id.* at 2–6. A camera outside the pharmacy picks up Horton throwing something into a dumpster and placing the aforementioned blue tote[72] into a white pickup truck. *Id.* at 10.

Upon Horton's return to the pharmacy, Chris W can be seen placing a stock medication bottle on the counter for Horton to count out into multiple amber prescription bottles, one of which he hands to Chris W, and one of which he places in his own pocket. *Id.* at 7–13. Horton then fills a pharmacy bag with the amber prescription bottles and again leaves the pharmacy. *Id.* at 13. A camera outside the pharmacy captures Horton pulling away from the pharmacy in the white pickup truck. *Id.* at 11. Other photographs depict controlled substances that were in the blue tote upon its subsequent seizure and inventory. *Id.* at 11–13.

Shortly after Horton departed the Respondent, he was pulled over by Arkansas State Trooper First Class (Trooper) Kevin Growns. Trooper Growns testified that when he observed Horton's white truck change lanes twice without the benefit of a turn signal,[73] he initiated a traffic stop. SOT 11(b); Tr. 77–78. At the time of the stop, Horton handed the trooper Chris W's driver's license, eventually explaining that he had the license so he could use Chris W's credit card. SOT 11(b); Tr. 78–79. Horton ultimately did present his own driver's license,[74] a run of which through the Arkansas Crime Information Center (ACIC) database[75] revealed two outstanding warrants, one of which was active. SOT 11(c). In response to a question from Trooper Growns, Horton indicated that he was not armed, but that there were two pistols in the truck he was driving. *Id.;* Tr. 81. Horton was searched for weapons, handcuffed, and placed into the trooper's vehicle.[76] SOT 11(c). Trooper Growns found two handguns sitting on the rear floorboard (one of which had a chambered round). Tr. 83. When asked if there was anything else illegal in his vehicle, Horton gave no response, but an inventory search of the truck revealed a blue tote bag that contained a stock bottle of hydrocodone[77] and two 100-count methadone 10 mg stock bottles.[78] SOT 11(d); Tr. 83–84. Horton also had $1,529 in cash on his person, and the methadone stock bottles seized had the Respondent's pharmacy stickers on them. SOT 11(d), (e). Additionally, Trooper Growns testified:

> We found a pair of tennis shoes that also had another bottle of pills that were mixed in. We also found a meth pipe and a baggie of stuff that appeared to be meth as well, and there was a couple of other [C]oke cans as well that you could unscrew the lid and had false compartments in them.

Tr. 84.

DI Inez Davis testified that she is currently assigned to the Little Rock DO. SOT 12(a); Tr. 213. The certified copy of the Respondent's incorporation from the State of Arkansas that DI Davis procured reflects that Chris W is listed among the Respondent pharmacy's officers, and specifically is listed as vice-president, controller, and board member of the Respondent. Gov't Ex. 50; SOT 12(b); Tr. 218–19.

On January 27, 2015, a federal search warrant was executed on the Respondent simultaneously with the service of the OSC/ISO that initiated these proceedings (pharmacy search warrant execution). Little Rock DO Group Supervisor (GS) Lisa Barnhill testified that during the pharmacy search warrant execution, it was she who coordinated and supervised the search of the pharmacy's records. SOT 14(c). DEA and other law enforcement personnel associated with the search were able to locate patient profiles for Eric Horton, Brian Jackson (the undercover identity used by SA Mitchell), Samantha Pemberton, and A.R. However, although the vehicle he was driving on the night of his arrest contained stock bottles of controlled substances adorned with labels from the Respondent pharmacy, there was no patient profile for Joseph Jackson at the pharmacy.[79] *Id.* GS Barnhill also related that she conducted an audit of Respondent pharmacy records obtained during the pharmacy search warrant

[70] TFO Wilson ascertained from Dr. Arnold that he is not Pemberton's doctor and did not issue the scrips. SOT 15(d).

[71] A clearer version of this exhibit was subsequently substituted in the record with the assent of the Respondent. Tr. 387–88.

[72] A blue tote filled with controlled medications was seized from the white pickup truck Horton was driving at the time of his arrest later that evening. Tr. 83.

[73] Trooper Growns testified that a traffic citation was issued regarding the failure to signal violation as well as driving without insurance. Tr. 85.

[74] Tr. 79–80.

[75] In his live testimony, Trooper Growns stated that the license check was initiated through the Federal Bureau of Investigation's National Crime Information Center (NCIC) database. Tr. 79. The variance is not material.

[76] A copy of Horton's arrest photograph was received into evidence. Gov't Ex. 34; Tr. 86–87.

[77] In Trooper Growns's estimation, it was a ''like [a] thousand count bottle of hydrocodone[ ] . . .'' Tr. 83.

[78] Photographs of the controlled substances found in Horton's vehicle were received into evidence. Gov't Ex. 35; Tr. 87–89.

[79] This testimony is consistent with the recollection of DI Pamela Lee and DI Davis, who were also present. SOTs 20, 12(c), (d). The patient profiles seized that day were received into evidence. Gov't Exs. 4, 24, 37; Tr. 187, 188–89, 191–92; *see also* SOT 18.

execution, focusing on varying strengths of ''oxycodone, hydrocodone, alprazolam and generic Dilaudid.'' [80] Tr. 181. According to GS Barnhill, her audit of just those medications yielded a ''shortage of close to a quarter million pills.'' *Id.* Barnhill also testified that the search she conducted of all of relevant paper and electronic records at the Little Rock DO reflects no report of theft or loss of controlled substances filed with DEA by the Respondent between January 1, 2012 and January 22, 2014. SOT 14(a), (b); Gov't Ex. 63; Tr. 161, 175–76.

DI Carolina Vazquez-Lopez testified that she is assigned to the Little Rock DO, that she was present at the pharmacy search warrant execution, and that, as she was directed to do, she gathered all pertinent required DEA records from the Respondent, including DEA Order Form 222s, Controlled Substance Ordering System (CSOS) records, purchase invoices, DEA Form 41/Registrants Inventory of Drugs Surrendered, DEA Form 106/Theft or Loss of Controlled Substances, Power of Attorney, and Inventory Records. SOT 19(a)–(c). DI Vazquez-Lopez testified that during the pharmacy search warrant execution she was assisted in gathering records by Bettie Wood, a pharmacy technician (Pharm. Tech.) employed at the Respondent. SOT 19(d). DI Vazquez-Lopez testified that Pharm. Tech. Wood told her that the Respondent only had partial invoices for December 2014 and January 2015 because Chris W's friend, Eric Horton (a non-employee), had removed all of the other invoices at Chris W's request in early December 2014. SOT 19(e).

DI Vazquez-Lopez asked Pharm. Tech. Wood whether the Respondent had any reported thefts or losses in the last two years. SOT 19(f). Pharm. Tech. Wood stated that there had been an incident in either August or October 2013 when two 1,000-count bottles of carisoprodol were stolen. *Id.* When DI Vazquez-Lopez asked Pharm. Tech. Wood for a copy of the DEA Form 106/Theft or Loss Form, she stated that Chris W would have it. *Id.* When DI Vazquez-Lopez asked Pharm. Tech. Wood where the controlled substance prescriptions were stored, she explained that the prescriptions were stored in the back office, but only as far back as April 2014 because prescriptions prior to 2012 were lost in a fire, and the balance had been taken away by another friend of Chris W's, Eric Horton, who was also not employed at the pharmacy. SOT 19(f). When DI Vazquez-Lopez asked Pharm. Tech. Wood for the Respondent's most recent physical inventory records, Pharm. Tech. Wood stated that Chris W had taken the Respondent's last inventory records after a state inspection the previous year, and that there were no other copies in the Respondent pharmacy. SOT 19(i).

Pharm. Tech. June Gilbert testified that she has been a pharmacy technician at the Respondent for approximately thirty-one years, and that it has been her experience that controlled substances frequently disappear from the Respondent overnight. SOT 17(a), (c). Pharm. Tech. Gilbert also related that she has seen Chris W repeatedly give out pills without a prescription, and that Eric Horton and Joseph Jackson are not employees of the Respondent. SOT 17(b), (c).

Pharm. Tech. Alyssa Burns testified that she has been a pharmacy technician at the Respondent for approximately one year. SOT 16(a). Similar to Pharm. Tech. Gilbert's experience, Pharm. Tech. Burns testified to her observation that items delivered in medication shipments to the Respondent—mostly oxycodone—regularly turn up missing the morning after delivery. SOT 16(b). It is Pharm. Tech. Burns's opinion that orders for controlled substances placed by the Respondent are excessive in light of the number of prescriptions that are actually filled there. *Id.* According to Pharm. Tech. Burns, the Respondent usually reaches its controlled substance limit with McKesson—one of its pharmaceutical suppliers—on the ninth day of each month.[81] *Id.*

Pharm. Tech. Burns also stated that Chris W has ordered her to fill prescriptions for hydrocodone, Xanax, Soma, and promethazine cough syrup without a hard copy of a prescription, and that he once directed her to fill four identical prescriptions for Xanax, hydrocodone, and Soma for a customer (B.E.) in a single week.[82] SOT 16(e). Pharm. Tech. Burns has seen Chris W leave the pharmacy with drugs in his backpack, and has actually seen a stock bottle of hydrocodone with tablets in Chris W's open backpack. SOT 16(f). Like Pharm. Tech. Gilbert, Pharm. Tech. Burns affirmed that neither Eric Horton nor Joseph Jackson is an employee of the Respondent.[83] SOT 16(c). She believes that Horton is a friend [84] of Chris W's, and she has seen Horton take bottles of controlled substances off of shelves at the Respondent and place them in his pockets. *Id.* Pharm. Tech. Burns further testified that several weeks before the pharmacy search warrant execution, Chris W and Horton removed a large number of invoices and hard copies of prescriptions that were previously filled from the pharmacy, but she does not know what became of the documents they took. SOT 16(g).

TFO Eli Fowlkes testified that he is a detective with the Benton, Arkansas Police Department and is cross-designated as a DEA Task Force Officer stationed at the Little Rock DO. SOT 21(a); Tr. 197–98. TFO Fowlkes testified that on January 27, 2015, he participated in the execution of a search warrant at Chris W's residence (Chris W residence search warrant execution). SOT 21(b); Tr. 199–200. During the search of Chris W's house, TFO Fowlkes discovered numerous controlled substance scrips, which he photographed and inventoried into DEA custody. SOT 21(c), (d); Gov't Exs. 41, 54–62; Tr. 200–07.

The Government also presented the testimony of pharmacist Tracy Swaim. Swaim testified that he is currently employed as a part-time [85] pharmacist at the Respondent, but up until October 10, 2014, he had worked there as a full-time pharmacist for twenty-six years, and was the Respondent's pharmacist-in-charge (PIC) until January of 2012. Tr. 232–33.

Swaim explained that controlled drug purchases at the Respondent are conducted through the DEA Controlled Substance Ordering System (CSOS) program, and that a single password, issued in Swaim's name, is and has been used by all Respondent employees who order controlled medications. Tr. 245–48; *see also* Tr. 365–66. According to Swaim, the Respondent purchased controlled substances from the McKesson Drug Company (McKesson), Top Rx, and The Harvard Drug Group. Tr. 248; *see also* Gov't Exs. 42–47, 68. Swaim explained that prior to the commencement of Chris W's involvement with the Respondent, McKesson was able to provide an adequate supply to keep up with

[80] Dilaudid (hydromorphone) is a Schedule II controlled substance. 21 CFR 1308.12; Office of Diversion Control, *Hydromorphone,* Drug Enforcement Admin. (July 2013), *available at http://www.deadiversion.usdoj.gov/drug_chem_info/hydromorphone.pdf.*

[81] The Government introduced into evidence copies of lists generated by the Respondent's distributors indicating the products sold to the Respondent between 2013 and 2015. Gov't Exs. 42–43, 68 (McKesson); 44–45 (Harvard); 46–47 (Top Rx); Tr. 167, 169, 172–73.

[82] A copy of B.E.'s patient profile at the Respondent, as well as copies of prescriptions issued to B.E., were introduced into evidence. Gov't Ex. 65; Tr. 194. B.E.'s patient profile does indicate that this was the case from January 2–8, 2014. Gov't Ex. 65 at 9.

[83] Long-time Respondent PIC Tracy Swaim also testified that Jackson was never an employee at the Respondent. Tr. 235; Gov't Ex. 38.

[84] Samantha Pemberton testified that has seen Chris W supply Horton with controlled substances at parties at Chris W's residence. SOT 7(c).

[85] Tr. 266.

demand, but that resort was had to the other two suppliers when the amount of controlled drugs ordered by the Respondent increased by one-third [86] and rose to a level exceeding McKesson's quantity limits. Tr. 248–51.

In the course of the hearing, Swaim was shown photographs of Joseph Jackson and Eric Horton and affirmed that neither man had ever been an employee of the Respondent. Tr. 235–36; Gov't Ex. 38, 34. Swaim testified that although he did not know Jackson at all, he did recognize Horton as a man that periodically came to the store to pick up cream that the pharmacy regularly ordered to manufacture Redneck Remedy, a cream produced by a company called Matlon, Incorporated (Matlon).[87] Tr. 236–40; *see also* Gov't Ex. 69. According to Swaim, although Horton was not an employee and not a pharmacist, he was routinely permitted into the restricted pharmacy area, and he regularly made deliveries of prescriptions (including controlled substances) to customers in the Mayflower area for the Respondent. Tr. 237–39. Swaim testified that to his knowledge, Horton worked with Chris W in connection with Chris W's Matlon business. Tr. 236.

Swaim also related that the Respondent was burglarized in August of 2013, resulting in the theft of approximately two thousand carisoprodol pills and some Xanax. Tr. 259–60. The police were notified, and both Chris W and the Respondent's owner, Tom Watson, were aware of the incident. Tr. 260.

Swaim explained that since his retirement approximately ten to twelve years ago, the Respondent's owner, Tom Watson, would visit the business (which included the Big Star grocery store in which the pharmacy was located) approximately once a week. Tr. 240–41. According to Swaim, prior to his retirement, Watson worked two days per week part-time as a relief pharmacist while Swaim served as the full-time PIC. Tr. 241–44.

Swaim testified that in January of 2012, he informed Watson that his observation of improper controlled substance refills approved by Watson's son, Chris W, sufficiently troubled him that he was resigning as the PIC. Tr. 251–56. Swaim recounted the conversation in this manner:

> I just told him I was not going to be pharmacist-in-charge. . . . I said that I can't sleep at night, and I'm not—I don't want to go to jail over something. And Tom [Watson] said don't worry, nobody's going to jail. If anybody does, I will.

Tr. 253. Swaim testified that he completed the paperwork and inventory required to hand over PIC control and accountability of the pharmacy to Chris W, and that notwithstanding this diminution in his responsibilities, neither his compensation nor his hours were reduced. Tr. 254–55, 266–67.

Swaim also recounted a conversation he overheard between long-term Respondent Pharm. Tech. June Gilbert [88] and Watson that occurred in September of 2014,[89] approximately two years and nine months after surrendering his PIC responsibilities. Swaim testified that he heard Pharm. Tech. Gilbert tell Watson that his son, Chris W, was ''giving away'' medication. Tr. 256–57. In response to what he heard, Swaim told Watson that he (Swaim) ''just can't take this anymore [and that he was] going to give notice . . . if you don't stop [Chris W].'' Tr. 257. In reply, Tom Watson asked Swaim not to leave and assured him that he would ''put a stop to it.'' *Id.* According to Swaim, ''he looked me in the eye and said 'trust me,' and I said 'okay, I will.' '' *Id.; see also* Tr. 265. Swaim testified that four days later, upon ascertaining from the pharmacy staff that, notwithstanding Watson's assurances to the contrary, nothing had changed about the improper manner in which (now PIC) Chris W was executing his responsibilities as a pharmacist, he called Watson and gave two weeks' notice.[90] Tr. 257.

Swaim's testimony (which was not the subject of a stipulation regarding content or credibility) was detailed, internally consistent, plausible, and presented no objective factual basis upon which to challenge it for bias. Simply put, Swaim has nothing to gain or lose based on the outcome of this case. The fact that he served the Respondent for twenty-six years as its PIC and was even hired back after the pharmacy search warrant execution, is powerful evidence that even Watson knows that Swaim is a man who can be trusted. The witness's testimony presented as thoughtful, coherent, and unbiased, and is fully credited in this recommended decision.

The Government also presented the testimony of Grant Goode, Tom Watson's nephew [91] and a former staff pharmacist at the Respondent. Tr. 270–71. Goode testified that he started at the Respondent working one day in November 2014 and then for approximately two months, starting in mid-December 2014, working on a schedule that increased from about twenty-five hours per week to ninety-six hours per two weeks. Tr. 271. Goode recalled that during this time, his cousin Chris W would enter the pharmacy for varying amounts of time, generally less than twenty-five hours per week, and do non-pharmacist work. Tr. 273–74.

Goode testified that while working at the Respondent, he fielded several telephonic inquiries from prescribing physicians that led him to discover that pharmacy patient profiles described numerous Schedule II controlled substance dispensing events where no hard copy of the scrip was present in the file and where the purported prescribing doctor had no recollection of authorizing the medication. Tr. 274–75. According to Goode, when he examined the pharmacy files, he discovered other occasions where controlled substances had been dispensed but no scrip hard copy was retained. Tr. 275–76. Based on what he discovered, Goode began contacting prescribing doctors on his own and discovered ''dozens'' of cases were controlled substances were dispensed and no hard copy scrip was present. Tr. 276. Goode testified that when he brought this issue to the attention of Watson, his response was that the scrips ''must have been put in the wrong place in the files. Maybe the girls, maybe the technicians misplaced the prescriptions.'' Tr. 277. Goode kept checking pharmacy files and made inquiry of the technicians. Tr. 278.

Goode also related that on two occasions he observed Chris W take thousand-count stock bottles [92] of hydrocodone and place them into his backpack. Tr. 278. Further, Goode stated that on one occasion, Tom Watson was present and observed Chris W pack the stock bottle into his backpack. Tr. 280.

Goode testified that he called the Pharmacy Board on December 17, 2014 and related his suspicions regarding diversion as well as some concerns he had about whether Chris W had an

[86] Tr. 262–63.

[87] As discussed in greater detail *infra,* Matlon is a company that is jointly owned and managed by Chris W and Glenn Wood, a pharmacist who now works at the Respondent and previously worked at a another pharmacy owned by Tom Watson in Mayflower, Arkansas. Gov't Exs. 69, 70.

[88] *See* SOT 17.

[89] Tr. 265. Although Swaim initially indicated that the date was in September of 2015 (a date in the future), he subsequently corrected the date to 2014.

[90] The record does not reflect any other area of contention between Swaim and Watson and in fact, Watson hired Swaim back to work part-time at the Respondent after the pharmacy search warrant execution. Tr. 266.

[91] Tr. 274.

[92] Goode testified that this size bottle of medication was used to contain stock and fill prescriptions, but would never be a quantity that would be dispensed to an individual patient. Tr. 279–80.

addiction problem. Tr. 281. According to Goode, personnel at the Pharmacy Board advised him that they would be dispatching someone to investigate the pharmacy, and that in the meantime, he should ''just stay put.'' Tr. 282. Goode explained that on January 2, 2015, in the midst of ''staying put,'' one of the Respondent's pharmacy technicians brought to his attention forged Schedule II scrips that had been dispensed with Goode's initials on the label. Tr. 282–83. When Goode showed the forged scrips to Watson, the latter suggested that (long-time pharmacy technician) ''June [Gilbert] must be doing that.'' Tr. 283. Goode pressed him on the issue and reminded him that his son, Chris W, had access to a laptop that allowed him to log in and print out pharmacy paperwork. Tr. 283. That day, Goode faxed copies of the fraudulent scrips to the Pharmacy Board, and followed up with a phone call to both the Pharmacy Board and DEA. Tr. 284–85.

On February 5, 2015, several days after the (January 27) pharmacy search warrant execution, Goode confronted his cousin, Chris W, with his suspicions. Tr. 286. By Chris W's demeanor, Goode got the sense that his cousin had identified him as DEA's source, and shortly thereafter, Chris W informed him that he would be substituting Goode with a pharmacist named Glenn Wood. Tr. 287. Goode also recalled being approached by Tom Watson near the end of January 2015 and told that customers had registered complaints about his unwillingness to dispense scrips they had presented, and that one customer was even concerned that Goode would ''turn [him] into DEA.'' Tr. 288. Goode got the sense that Watson was disappointed in him for declining to fill the scrips as presented. Tr. 289.

Pharmacist Glenn Wood and Goode communicated by text and phone a few days later. Tr. 291–92. When Goode asked Wood about his hours for the week, Wood related his understanding that Watson had planned to let Goode know that his services would no longer be required at the pharmacy. *Id.* The conversation turned somewhat heated, and Goode essentially accused Wood of looking the other way in the face of misconduct being committed by Chris W at the Respondent as well as the Mayflower pharmacy, where Wood and Chris W previously worked together.[93] Tr. 291–92. Watson did eventually let Goode know that Glenn Wood would be taking his hours. Tr. 290. Watson subsequently telephoned Goode and told him he was ''upset'' about statements Goode had made to DEA, and that he felt Goode ''had hung him out to dry.'' Tr. 291.

Goode's testimony was not the subject of a stipulation regarding content or credibility, but the testimony was sufficiently detailed, plausible, and internally consistent to be fully credited in this decision. Although there were vague references to some unrelated, historical family acrimony that did not specifically involve the Watsons, there was no evidence that would support any level of bias that impacts on this witness's credibility, and his testimony is fully credited in this recommended decision.

The Respondent called three witnesses in its case-in-chief: Tom Watson, the pharmacist-majority-owner[94] of the Respondent; Glenn Wood, the pharmacist Watson selected to succeed his son as the PIC; and Brenda McCrady,[95] an official from the Pharmacy Board, who attested to the fact that neither of these professional pharmacists has been subject to discipline before that body.

Glenn Wood is the pharmacist who supplanted the hours worked by Grant Goode at the Respondent after Grant Goode registered concerns about diversion there to the Pharmacy Board,[96] and the individual who has been selected by the Respondent to assume the duties of its PIC permanently. Tr. 313. Wood testified that he has his Pharm. D. degree, has been a licensed pharmacist in Arkansas for approximately nine years, and is a member of the Arkansas Pharmacists Association. Tr. 391, 393. Wood stated that he has never been aware of a diversion issue in any pharmacy where he has been employed, and that he has never been subject to disciplinary action. Tr. 393, 424–25, 430, 443; *see also* SOF 23(b); Gov't Ex. 12.

Wood testified to a relatively lengthy history of working on and off for the Watsons over the course of his nine years[97] as a pharmacist. When he was in school at the University of Arkansas for Medical Sciences, he completed a one-month pharmacy internship working for Chris W. Tr. 391, 478. After graduating in 2006, Wood worked as a pharmacist in several Watson-owned pharmacies, rotating between his Mayflower, Morrilton, and Perryville (the Respondent) pharmacies. Tr. 392–94, 453, 475.

Wood testified that in 2008 or 2009 he briefly moved to Utah to accept a pharmacist position there, but the adventure was short-lived, and he returned to Arkansas. Tr. 395. Upon his return, he resumed employment for Tom Watson as the PIC of his Morrilton Food and Drug pharmacy (Morrilton) for three years. Tr. 394–95. When Watson sold the Morrilton pharmacy to a rival chain, Wood spent three years with a pharmacy unaffiliated with the Watsons. Tr. 396. Wood explained that in December 2014 he made arrangements with Chris W to return to the Respondent on a part-time basis,[98] but that he did not report for work until the day after the pharmacy search warrant execution. Tr. 396, 398. Wood testified that although the final paperwork is still pending at the Pharmacy Board,[99] he is currently acting as the PIC at the Respondent. Tr. 398. According to Wood, the appropriate application was filed at the Pharmacy Board days prior to the hearing. Tr. 399, 443.

Wood opined that where a pharmacy is operating without an involved and active owner, diversion control responsibility ''starts with the PIC.'' Tr. 415. Wood testified that he believes that it would be difficult to discover a PIC engaging in unethical or illegal behavior unless the PIC ''was doing it obviously in front of everyone that worked there.'' *Id.* He stated that because the PIC is in charge of diversion control at a pharmacy, he doesn't know a way to ''safeguard'' against such behavior except by having another employee (for

[93] Goode also testified that Tom Watson told him that ''he would like to kill a couple of DEA agents.'' Tr. 302. Even assuming that Watson could have been speaking during a time of some agitation, such a statement demonstrates a deplorable and dangerous lack of judgment on his part. The Government did not offer this not-too-veiled threat against law enforcement officers on its case-in-chief, and in an exercise of commendable candor, notified the tribunal at the outset of the case that in proceedings unrelated to this case, a United States Magistrate Judge had declined to credit this testimony from Goode. Tr. 11; ALJ Ex. 21. The parties acquiesced in official notice (*see* 5 U.S.C. 556(e) (2012)) that this testimony had previously been found unsupported by a United States Magistrate Judge in an unrelated proceeding (Tr. 304), and the order issued by the Magistrate Judge, which denied the Government's motion to revoke Chris W's bond based on these comments purportedly uttered by his sponsor (and father) Watson, was received into evidence. Resp't Ex. 14; Tr. 306. Because the Government did not offer the purported threat in its case-in-chief, a disposition of this case does not require that a credibility issue on this statement be rendered, and it forms no basis of this recommended decision.

[94] Tom Watson testified that he owned fifty-eight and one half percent of the Respondent. Tr. 314.

[95] SOT 23; Gov't Ex. 12; Tr. 320.

[96] Tr. 281, 291–92.

[97] Tr. 392.

[98] Wood testified that he only desired part-time employment at the Respondent because he wanted additional time to pursue a career in professional bass fishing. Tr. 397–98.

[99] Wood had previously been approved by the Arkansas Board as a PIC at Morrilton. Tr. 399. He testified that he had taken an examination when he was initially designated as a PIC. Tr. 475.

example, a pharmacy technician) also signing off on checking drugs in and conducting an inventory (a measure which he stated he would implement should the Respondent again dispense controlled substances). Tr. 416–18, 448. Wood testified has reviewed a written (unsigned) proposed controlled substance policy document (Proposed Policy) provided to him by Watson, and represented he would implement its provisions if the pharmacy gets its COR back. Tr. 417; Resp't Ex. 1. Wood described the Proposed Policy as an outline of policies and procedure, a ''working document,'' and stated that he would recommend that all future PICs be required to review the policy with Watson and sign off that they had done so.[100] Tr. at 418. Wood proposed the implementation of diversion controls beyond the requirement of the already mandatory biennial inventory,[101] such as a requirement that the PIC personally insure that all controlled substance inventory is checked in properly in the inventory database, and the maintenance of a ''perpetual inventory'' of controlled substances,[102] and several other measures aimed at increased security and accountability. Tr. 415–19, 444.

Wood testified that electronic keypad door locks,[103] lockable roll-down windows, and a host of pharmacy security cameras [104] trained on the windows, doors, and cashiers supply additional layers of diversion control. Tr. 401, 419.[105] However, he stated that he does not believe anyone watches the tape in real time or reviews the tape regularly. Tr. 423–24. He did not know how long the loop of the tape was or how long the tape preserved the images before recording over itself. Tr. 423. In fact, Wood stated that he never had a circumstance in which to review any video monitor tape himself in any pharmacy where he has ever worked, and as far as he knows, no one ever reviews the footage at the Respondent. Tr. 424.

Wood also explained the role of Arkansas's prescription monitoring program (PMP), in which pharmacies are required to submit a weekly report to the state to disclose what and how many controlled substances have been dispensed at the pharmacy that week.[106] Tr. 419–20. The database into which that information is incorporated then permits doctors and pharmacists to search for a particular patient and see that patient's prescription history to investigate whether a patient has been using multiple pharmacies or doctor-shopping. Tr. 420. Wood testified that he does not have a ''magical number'' of how often he checks the PMP when filling a prescription but that such a decision relies upon whether ''something doesn't feel right'' or if a patient shows up multiple times in a short period of time with scrips from different practitioners. Tr. 422–23.

Wood stated that he believes that as PIC, he could administer the Proposed Policy should the Respondent retain its COR. Tr. 430. He has been working at the Respondent since January 2015 and intends to remain and assume the duties as the PIC, but indicated that he deferred the submission of his Pharmacy Board paperwork until April due to lingering uncertainty as to the pharmacy's future. Tr. 470. Wood allowed that even at the time he accepted the offer to become the next PIC, he harbored concerns about what the future holds for the pharmacy. Tr. 471.

Wood testified that his efforts to allay his concerns extended to sending emails to the Pharmacy Board.[107] Tr. 472. However, an examination of the email exchange [108] between Wood and the Pharmacy Board reflects a level of urgency that exceeded the impression conveyed by Wood on the witness stand. In his initial email to the Board he explained:

> We have not applied for a PIC status because of the fact that we're not sure what direction the store is going in. There's rumors that it's up for sale and the fact that the owner, Tom Watson, will probably not get his DEA registration back . . . I really don't feel comfortable, right now, putting my name down as PIC of this place . . . I'm not even sure I'll be here in another month.

Gov't Ex. 71 at 3. A subsequent email sent by Wood reads:

> [D]o I need to put my name down as PIC to make [the Respondent] compliant? I really don't want to associate my name with it right now, but I seem to be the only pharmacist they can get to work here for now. I seriously doubt I will be here much longer, however.

Id. at 2.

Wood also explained that the Respondent is located in an ''extremely rural'' area, and that the pharmacy serves a largely indigent population. Tr. 404. Wood described the Respondent's customer base as ''extremely loyal'', and he explained that customers rely upon pharmacists much as they would rely upon doctors. *Id.* Wood also stated that because of the small-town nature of the community, doctors and pharmacists have a unique relationship such that doctors ''trust'' and ''utilize'' pharmacists differently than in other, more cosmopolitan communities, and that the Respondent participates in state-authorized ''disease state management,'' counsels patients, and administers immunizations.[109] Tr. 430. According to Wood, although there is another pharmacy in the county, the grocery store owned by Tom Watson in which the Respondent is located is the only grocery store located in the county. Tr. 404. Wood opined that without the Respondent present, the other pharmacy in the county would have a ''monopoly'' on business. Tr. 405.

Wood also testified about his recollections about his interactions with pharmacist Grant Goode, which diverge significantly from Goode's account. According to Wood, he met Grant Goode for the first time upon returning to work at the Respondent, and while the relationship between the two men was cordial enough at the outset, it culminated in a rather testy telephone exchange regarding Goode's continued employment at the pharmacy. Tr. 425. By Wood's account, he and Watson had come to the conclusion that there was insufficient business [110] at the pharmacy to merit Goode's continued employment

[100] However, in describing the framework created by the Proposed Policy, he also stated, ''Common sense tells you what you need to be doing in this regard and what you don't need to be doing.'' Tr. 419.

[101] Tr. 416–17.

[102] Wood explained that the institution of a perpetual inventory would require pharmacy personnel to count the contents of stock controlled substance bottles whenever the bottle was nearing depletion and reconcile the bottle count inventory reflected in the system. Tr. 419.

[103] Wood conceded that the keypad lock combination remains the same and that he did not know whether it was changed after Chris W's arrest. Tr. 445.

[104] Presumably, this is the same closed-circuit system that Watson did not know how to access. Tr. 365–67.

[105] Photographs depicting the Respondent were admitted into evidence. Tr. 403; Resp't Exs. 2–11.

[106] Wood testified that software developed by McKesson and used by the Respondent automatically submits these dispensing reports to the state. Tr. at 420–21.

[107] As part of the Government's rebuttal case, it presented the testimony of John Kirtley, the Executive Director of the Pharmacy Board. Tr. at 509. Kirtley testified that he recalled the email exchange with Wood, and although he was not surprised that a prospective PIC would inquire about becoming a PIC in a recently-raided pharmacy, he did recall being surprised that Wood, who had already served as a PIC, was unfamiliar with the procedural aspects of becoming a PIC. Tr. 517–19.

[108] Gov't Ex. 71.

[109] Wood admitted that these services do not involve the dispensing of controlled substances and thus are not dependent on the status of the Respondent's COR. Tr. 442.

[110] Although Tracy Swaim testified that pharmacy business had grown by one-third (Tr. 262–63), Wood was apparently was not aware of that growth. Tr. 435. He attributed the diminishment in business to the impact of the immediate suspension order. Tr. 438.

there.[111] Tr. 426. Wood stated that he communicated the substance of this discussion to Goode and suggested that the two of them share the weekly schedule, with Wood working full-time (three to four days per week) and Goode working part-time (two to three days per week).[112] Tr. 427. It was Wood's recollection that upon hearing this disagreeable news, Goode became irate, complained that the Watsons had been lying for years, and even marveled that Wood himself had not yet been indicted based on his experiences with Chris W at the Watsons' Mayflower pharmacy.[113] Tr. 427–29. It is apparent from Wood's testimony that he was offended on behalf of the Watsons. Tr. 427, 429. In his words, it ''struck me as kind of odd [that t]he guy was asking me to work for the Watsons, at the same time bashing them.'' Tr. 427. Interestingly, offended as Wood may have been at the implications of his own culpability and that of his employer, the conversation apparently did not result in any heightened level of suspicion on his part that diversion issues could be afoot at the pharmacy where he was working. Tr. 431–34.

Glenn Wood's testimony was problematic from a credibility standpoint. In fact, the Respondent's position regarding the security and integrity to future operations that will follow based on the appointment of Wood as the PIC were actually undermined by Wood's testimony. Although Wood testified that Goode raised issues regarding the pharmacy and even implied that Wood could have been indicted based on his time working with Chris W, no sense of professional responsibility as a pharmacist awakened in him even the slightest curiosity as to what Goode (a fellow pharmacist that he said he barely knew) was talking about. Tr. 427–29. When pressed on the issue, Wood countered that Goode had merely accused the Watsons of lying, not diversion,[114] but in view of the fact that this conversation was occurring two-to-three weeks after the pharmacy search warrant execution, and revelations of misconduct, which, by Wood's own account, made him ''sick,'' ''mad,'' and ''upset,'' this explanation strains credulity. Evaluating this conversation in the context of recent events, the Respondent had just been searched and served with a DEA immediate suspension order and a former pharmacist who worked there just told him that the owners were liars and he was fortunate not to be laboring under an indictment himself. It is in this backdrop that, Wood (an experienced pharmacist) now claims that he never connected Goode's statements to any possible pharmacy misconduct. To put it mildly, this is implausible and damages this witness's credibility. The fact that he did not pursue the matter further with Goode speaks volumes about his level of professional vigilance, and the fact that he testified that he never realized that Goode was referring to pharmacy misconduct is equally telling on the subject of this witness's credibility.

The divergence between Wood's recollection of this phone conversation and the recollection of Grant Goode is striking. Goode was clear that Wood told him that all of his hours at the pharmacy were being taken by Wood, and that it was Wood's understanding that Watson would have told him so already. Tr. 291. Wood's version of the conversation is internally inconsistent and illogical. In Wood's account, when Goode reached out to him to pin down the hours he would be working, this is what occurred:

> So, when I returned [Goode's] call that evening, I told him, I said, Grant, I hate to be the one to tell you this, you know, I hate it because I don't want to put anybody out of work, I was like there's not room for both of us, bud, and I need full-time, but what I'd like to happen, I don't want to work six days a week. I only want to work three to four days a week. And I suggested to Grant that evening, I said what I'd like to happen is if you could work at [the Respondent] two or three days and then find another pharmacy that will let you work a couple days there. You know, that would be great.

Tr. 426–47; *see also* Tr. 435–37. Wood's testimony about this phone conversation strengthens Goode's account and weakens his own. If Goode was calling to find out which days he was working, it is reasonable to assume he knew already that he was not working all days. If Wood was really only telling Goode which days he would be working, it is illogical that he would ''hate to be the one to tell [him] . . . because [he does not] want to put anyone out of work.'' Tr. 426–27. It makes even less sense that Wood, even by his own recollection, would remember telling Goode that ''there's just not room for both of us, bud, and I need full-time . . . .'' Tr. 427. Goode's testimony that he was essentially informed of his own termination during this phone call is rendered light-years more credible by Wood's self-admitted reluctance to tell him about Watson's decision, and his explanation to Goode that his need for full-time pharmacist work obviated the need to have Goode employed there at all. In short, Wood's account is less credible than Goode's, and Wood's version of this interaction significantly diminishes his credibility.

Wood testified that in the approximately ten years that he has worked ''on and off'' for pharmacies owned by Tom Watson, including the one-month internship under Chris W and the two years he worked with Chris W at the Mayflower pharmacy, he never saw Chris W engage in any strange, suspicious, or illegal behavior. Tr. 406, 478. He stated that when he heard about Chris W's arrest, he assumed that the authorities ''got [Chris W] for putting refills on blood pressure meds and diabetes meds,'' which he describes as ''about the only thing that [he] ever saw [Chris W] do'' and which he had seen other pharmacists do as well. Tr. 406. Wood added that when working as a relief pharmacist at the Respondent, none of the pharmacy technicians ever complained to him about missing controlled substances or issues with Chris W, nor did he ever notice missing inventory himself. Tr. 447. Wood testified that upon learning of the allegations against Chris W, he was shocked, sickened, in disbelief, sad, and angry with Chris W. Tr. 406. He stated that this was not the Chris W that he knew from working with him. Tr. 407.

On the issue of Wood and Chris W working together, Wood's testimony was also confusing. At one point in his testimony, Wood said he ''can't recall a time when [he and Chris W] ever worked side by side'' as pharmacists during the same shift. Tr. 451. After some significant equivocation, Wood answered the direct question of whether they worked together this way:

> Just on occasion. You know, vacation issues or sickness issues if me or . . . my other part-time pharmacist, again I can't recall an instance, but I'm almost certain that there probably was over the course of three years in which Chris had come over to relieve us.

Tr. 452. Wood then described how, because Mondays or the first day of each month could be high traffic times, that pharmacists ''would often double up,'' but that he could not recall doubling up with Chris W at Morrilton. Tr. 453. Since Morrilton was not predicated in the question, it was only upon follow-up that Wood finally admitted that he and Chris W worked together at the Watson's Mayflower pharmacy once a week for two years. Tr. 453–54; *see also* Tr. 479. This equivocation made even less sense in light of the fact that Wood

[111] Tr. 262–63.

[112] According to Wood, Goode wanted to work six days per week at the Respondent. Tr. 436.

[113] Goode's statements as reported by Wood were received for the limited purpose of demonstrating Goode's state of mind during the conversation, not for the truth of the matters asserted. Tr. 428.

[114] Tr. 434.

had testified earlier to working together regularly with Chris W. Tr. 392. The relevance of Wood's testimony on the point is less about how often the two pharmacists were dispensing in the same room that it is about how reluctant Wood was to confirm it. Wood's equivocation detracted from the credibility of his testimony.

In a similar vein, at one point in his testimony, Wood indicated that he did not know Eric Horton ''personally.'' Tr. 465. Eventually Wood allowed that he ''know[s] who Eric Horton is'' because he would encounter him at times with Chris W. Tr. 466. Then Wood indicated that he attended ''some birthday parties'' for Chris W's daughter where Horton was present, and that he sometimes saw Horton ''riding around in the truck.'' Tr. 466–67. When pressed about what ''riding around in the truck'' means, Wood clarified that he would see him in the Watsons' grocery store (which is not really in any truck), and that it was not really that he did not know Horton, but that he did not know him *well.* Tr. 466–69. Equivocation on this point did not enhance Wood's credibility.

Wood also testified about a separate business relationship he has maintained with Chris W in a corporation they started together and named Matlon, Incorporated (Matlon).[115] Matlon produced and distributed a product known as ''Redneck Remedy.'' Tr. 407. Wood stated that shortly after graduating from pharmacy school, he developed a formula for sunburn cream and began compounding it for sale. *Id.* According to Wood, Redneck Remedy was initially sold only to frequent pharmacy customers, friends, and family, but that the success of the product grew so steadily that after two years ''it got so big it went from my third bedroom in my home to my garage. . . .'' Tr. 408. Wood recounted how he felt that demand for the product had swelled sufficiently that he needed a partner, and enlisted Chris W to supply the business acumen for the enterprise. *Id.*

Redneck Remedy was bottled, labeled,[116] and shelved for retail sale at the Respondent and another (non-Watson) pharmacy. Tr. 440–41. Wood maintained that he had scant contact with Chris W throughout the course of their Matlon partnership, and the two mostly communicated by text message and phone calls, especially in recent years. Tr. 450. Wood testified that the corporation never hired employees, ''had no one on the payroll,'' but occasionally utilized the services of independent contractors (generally Wood's friends)[117] to help mix the product and market it at trade shows. Tr. 411–12, 464–65. Chris W procured supplies for the product from Watson family pharmacies. Tr. 463–64.

Wood stated that ''the product worked'' and that the business was ''somewhat successful'' for a few years, but instead of investing time and money, he just let the business go. Tr. 408–09. In his words, ''[i]t was one of those deals that it grew too fast almost and then for whatever reason from there it just—I lost interest in it, got burned out, and—.'' Tr. 408. Wood testified that in the past two years, the business has been ''pretty much defunct,'' for essentially no other reason than Wood's interest in professional bass fishing. Tr. 408–10, 454–55. According to his testimony, he has not actively supplied bottles of Redneck Remedy for the past year-and-a-half to two years.[118] Tr. 412. In fact, he testified that he removed the remaining bottles off the shelf at the Respondent when he began working there again in January 2015. Tr. 440–41, 461–63. Thus, the three remaining jars of the product were removed to shelves in the restricted pharmacy area where potential customers or anyone else outside Respondent's pharmacy staff could not see it. This was done shortly after Wood returned to the pharmacy (the day after the pharmacy search warrant execution), and just after the diversion allegations surrounding Chris W came to light. Tr. 441–42, 461–63. Wood said the remaining cream is ''off of the counter at the point of sale in the pharmacy, and it's basically just put back out of sight, out of mind.'' Tr. 441. Wood insisted that Matlon is currently worth nothing and still continues to exist as a hollow legal entity merely because he and Chris W never got around to dissolving it. Tr. 454–55.

Much of Wood's testimony regarding Matlon makes no sense. The Redneck Remedy Web site remains active, and charges to maintain it continue to accrue. Tr. 455–57; Gov't Ex. 70. Upon learning that Matlon was in arrears in its payments for the Web site account, Wood informed the hosting company that he should take the matter up with Chris W, inasmuch as he is the majority shareholder and the partner charged with responsibility for handling bills. Tr. 457. If the business was truly bereft of any potential benefit and awaited only its paperwork *coup de grace,* it is difficult to imagine why the two partners would suffer the continued expense of a Web site. At one point in his testimony, Wood said that the enterprise failed only because he became distracted with bass fishing and other interests,[119] and at another point, when pressed about the timing of the venture's demise, Wood declared that ''the business began dropping off way before last year.'' Tr. 413. Similarly, Wood testified that he only wanted to return to pharmacy work part-time because of his bass fishing and family responsibilities, but testified that he told Grant Goode that there was no room for him at the Respondent because ''there's just not room for both of us, bud, and I need full time. . . .'' Tr. 427.

To the extent that Matlon served no purpose beyond a (successful) profit venture, it is difficult to reconcile the partners' decision to kill it so unceremoniously. Wood was unable to supply an answer that made any sense. Tr. 409–10. Wood stated that he was not in a position to be able to quit his full-time position as a pharmacist to devote to the business and that his priorities shifted from marketing the business to starting his professional fishing career and raising his family. Tr. 409–11. Despite describing himself as the corporation's hands-on, ''go-to guy'' (compared to Chris W, whom he described as the ''silent partner''), Wood was unable to explain how or why the corporation went from successful to floundering. Tr. 408. In addressing the question of what how Matlon's outstanding financial issues would be handled, Wood was only able to unconvincingly offer that he had ''stepped away'' from the responsibility of managing the corporation last year and had informed Chris W of that fact. Tr. 458–59. Inconsistently, Wood conceded that he was the last person to file corporate income taxes on the entity in 2013 and anticipates doing so for 2014. Tr. 459, 465. Confounding matters further in this regard, Wood's email auto signature still imbues him with the moniker ''President and CEO of Matlon, Inc.'' Tr. 460–61. Wood offered a variety of verbal shrug, citing ''[i]gnorance on [his] part.'' Tr. 461. Wood indicated that he did not know why he continued to sign all his emails as the president and CEO of Matlon, and once again stressed

[115] Wood testified that the name is a combination of the letters starting the first names of their respective daughters. Tr. 409.

[116] Tr. 414.

[117] Wood testified that he was unaware that Chris W's friend, Eric Horton, had been enlisted to pick up supplies for the enterprise. Tr. 464, 469.

[118] Wood likewise testified that he anticipated that the company made $600 in sales in 2014, and most of that was from friends and family in the early part of the year. Tr. 413. Assuming, as Wood testified, that each bottle of Redneck Remedy has a value of $8 (Tr. 480), Matlon sold approximately 75 bottles of the cream during this period of alleged decline.

[119] Tr. 408–09, 454–55.

his self-described status as a poor businessman (a characterization which is belied by the fact that Redneck Remedy made money for Matlon until company operations were abruptly abandoned). Tr. 461–63. Matlon's Web site still lists Wood at its president and CEO. SOT 12(g); Gov't Ex. 70.

Although it would be naïve to conclude that Matlon is the simply the failed business enterprise described by Wood, teasing out its intricacies is likewise a task unrequired to resolve the principal issues in this case. Matlon was a business venture that sold a product whose overhead and production costs were amorphous, to say the least. The materials were purchased and or otherwise obtained by Chris W and compounded by Wood. Likewise, its manpower largely came from non-employee friends and associates whose compensation was almost certainly variable and unclear. The business was not driven out of business by lack of success so much as it was suppressed by its owners at about the time that law enforcement scrutiny focused on Chris W and the Respondent. Inexplicably, by Wood's account, the last three bottles of Redneck Remedy were removed from retail shelves where they could be sold, and secreted on a shelf within the enclosed pharmacy spaces away from potential customers. Tr. 462. While Matlon was almost certainly structured (and abandoned) in a manner that belies the simplistic explanations tendered by Wood, it is not necessary here to draw any conclusions in this regard. The principal relevance of Matlon in these proceedings is that Wood's implausible testimony regarding its operations detracts considerably from the credibility of his testimony.

Suffice it to say that Wood's presentation was sufficiently punctuated with inconsistencies, equivocations, and implausibility that is cannot be fully credited in this recommended decision. Thus, his assertions that he had never had any reason to believe that Chris W demonstrated addiction signs or suspicious activity,[120] that no staff member ever brought diversion concerns to his attention,[121] or that he had never noticed controlled stock missing,[122] are of limited value here.

Respondent's majority shareholder, Tom Watson, testified that he is and has been a licensed pharmacist for about forty years,[123] that he received his pharmacy degree from the University of Oklahoma in 1974, and after working as a staff pharmacist in a few establishments, opened a grocery store/pharmacy with his brother-in-law, Duane Goode,[124] in West Conway, Arkansas. Tr. 315–16. Watson and his father-in-law subsequently built the Respondent in Perryville, operating as part of a grocery store (Big Star Perryville), and he later created two additional stores in the nearby rural communities of Morrilton and Mayflower. Tr. 318. He stated that he has divested himself of all pharmacies with the exception of the Respondent in the Big Star Perryville grocery store. Tr. 321.

Watson testified that he retired four years ago, at age sixty-two, and has encountered Lyme disease and some back issues. Tr. 320–21. According to Watson, Big Star Perryville was destroyed by a fire about three years prior to the hearing and the pharmacy was victimized by a burglary while the store was located in a temporary location. Tr. 323.

Watson explained that after working as a pharmacist at a rival pharmacy chain, and then his (now closed) Mayflower store, his son Chris W came to work at the Respondent, and ''inherited'' the job of pharmacy PIC ''when Tracy [Swaim] quit.'' Tr. 324–25, 375–76. Watson also testified that his son Chris W also served as the vice president, controller, and part owner[125] of the business. Tr. 318, 377–78. When asked about Tracy Swaim's account of why he stepped down as the PIC, the elder Watson had this to say:

> Yeah. I—I don't—I remember some of what [Swaim] talked about but I don't remember all of what he talked about, you know. And I talked to Chris [W] about some things, too, so I was hoping everything was, I was hoping everything was in good shape.

Tr. 326. Watson emphasized that he held Swaim in high regard, stating that the two have been together for a long time and still are. Tr. 333.

Watson was clear that he was ''shocked'' to learn that his son had an addiction problem, and opined that the younger Watson's chronically bloodshot eyes were the result of a longstanding medical condition. Tr. 236. He offered that during the 2013–2014 timeframe, notwithstanding the fact that he and his son lived ''a little over a quarter of a mile'' from each other, they only saw each other once every two weeks or so, because their ''paths didn't cross.'' Tr. 327–28.

Watson's position at the hearing regarding the steps he took based on what he was believed and what he was told was less than clear. On the one hand, he indicated that had he learned that his son, a pharmacist (and later the PIC) at his store, had indications of an addiction problem or was engaged in suspicious behavior, he would have referred his son for treatment and advised the Pharmacy Board. Tr. 328–29, 331. But Watson also testified that he would be unwilling to ''fire somebody 'cause they tell me so and so is doing this or that. . . .'' Tr. 332. In Watson's words:

> It's hard. I mean, you know, 'cause I've talked to [Chris W], well, several times, and he'd usually blame it on something else or, you know, this or that, and I didn't know how much was gone.

Tr. 332. Thus, Watson testified that he would involve the Pharmacy Board and put his son into treatment if he learned that addiction and/or diversion were occurring,[126] but then conceded that he actually had been so informed and was dissuaded from any action by conversations with his son, who, even by his own account, did no more than ''usually blame it on something else,'' or ''this or that.'' *Id.* Watson even acknowledged that he ''didn't do enough [and] didn't do it fast enough,'' but asserted that all would have been corrected with a scheduled audit that was scheduled to occur a week after the pharmacy search warrant execution,[127] and that an inventory was essentially the only real option he had based on what Swaim told him. Tr. 335–36. However, in view of the fact that he (even still) holds Tracy Swaim in high esteem, and did so at the time Swaim raised the alarm, it is difficult to

[120] Tr. 414.

[121] Tr. 447–48

[122] Tr. 447.

[123] Tr. 352.

[124] Duane Goode is Grant Goode's father. Tr. 316.

[125] Although this testimony is consonant with a stipulation of fact regarding Chris W's ownership that was reached by the parties (SOF 24; Tr. 389), a post-hearing motion by the Respondent sought to ''correct the record'' by the addition of an affidavit by Tom Watson's wife (Teresa Watson) that challenges that assertion. ALJ Ex. 21. The Government validly opposed the Respondent's post-hearing motion to include Mrs. Watson's affidavit. ALJ Ex. 22. Although the Respondent's motion to include the affidavit was styled as a ''Motion to Correct the Record,'' it could do no such thing, and was granted only to the extent that Mrs. Watson's affidavit is now included in the record, and considered in accordance with 21 CFR 1316.58(b) (''Affidavits admitted into evidence shall be considered in light of the lack of opportunity for cross-examination in determining the weight to be attached to statements made therein.''). ALJ Ex. 23. Inasmuch as the affidavit is inconsistent with the prior stipulation of the parties, and must be considered in light of the absence of cross-examination, it has been afforded little weight in this recommended decision. Additionally, as explained *infra,* under current Agency precedent, Chris W's status as a part owner of the Respondent is of negligible significance to a resolution of the present case.

[126] Tr. 328.

[127] Tr. 345–46.

understand how the addition of an inventory to confirm the warning tendered by a trusted employee would have altered his reluctance to act. Stated differently, he trusted Swaim and Swaim warned him; he had every reason, based on his decades of experience with Swaim to rely on what he related to him; an inventory would have added nothing to the equation. To suggest that an inventory that never occurred would have been the final, deciding factor in motivating him to act is simply not persuasive and undermines his credibility.

To add to the confusion, at another point in his testimony, Watson testified that he has actually encountered employees using and diverting controlled substances, but has never reported any misconduct to the Pharmacy Board in his life. Tr. 344–45. It is difficult to place credence in his testimony that he would refer all diversion issues to the Pharmacy Board when he also says that he has actually seen diversion issues in his career and has never referred anything to the Pharmacy Board. The two points seem irreconcilable.

Watson's testimony regarding security measures that have been in place at the pharmacy was also somewhat disquieting. He admitted that the entire staff had access to the controlled substance ordering password, and acknowledged that although his pharmacy had security cameras, he did not know how to access any of the footage to review it. Tr. 365–67.

Watson also offered a document that purportedly sets forth a new written set of policies and procedures that he intends to implement at the Respondent to address some of the security shortcomings and reduce the risk of future diversion (Proposed Policy).[128] Tr. 336–39, 341; Resp't Ex. 1. Regrettably, the document was unsigned,[129] and although he testified that the Proposed Policy had been circulated to two pharmacy employees and his prospective PIC,[130] it was clear from Watson's testimony that he did not know who drafted the document and was not too familiar with its substantive contents. Tr. 337–38, 368–71. All in all, the Proposed Policy did not add much to the discussion of the Respondent's future.

In discussing his nephew, Grant Goode, Watson initially was unequivocal in his denial that Goode had raised any concerns about the pharmacy or Chris W, but subsequently retreated somewhat from that position, indicating that he had been ill from Lyme Disease, slipped in the bathtub, had to take his granddaughter to the doctor, and eventually allowed that if there was such a warning from Goode, that he simply did not remember it. Tr. 348–50. In an astonishingly telling statement, Watson related the distaste with which he viewed Goode's decision to alert the authorities without sufficiently vetting his concerns through Watson family first. In Watson's own words:

> You know—family is family. You know, if you've got a problem go see them about it, and talk about the problem. You don't know you got a problem until you at least talk about it. And you know, don't start with the state board, don't start with the DEA and all that. Start by calling your uncle or whatever or tell your mom and have her talk to your uncle if that—you know. But get it there where you can get it in front of you instead of, you know. . . . Be sure you know what you're talking about before you start that stuff, I mean.

Tr. 350–51.

Watson testified that Pharm. Tech. June Gilbert has been his friend and employee for over thirty-three years,[131] and has been with him since the first day he opened the Respondent. Tr. 347. Even in the face of the (credible) testimony of his trusted employee, Tracy Swaim, that Pharm. Tech. Gilbert's direct warning to Watson (in Swaim's presence) that Chris W was ''giving away'' medication,[132] was the tipping point that precipitated his resignation, Watson adamantly maintained that Pharm. Tech. Gilbert never alerted him to problems at the pharmacy,[133] and that he was not aware of any complaints from those who worked with Chris W at his (former) pharmacy in Mayflower. Tr. 373–74.

Watson's consistent point of view throughout the proceedings was that the PIC is the focal point of diversion control in any pharmacy, and that diversion occurring by the hand of the PIC is a difficult phenomenon to address. Tr. 332, 336. When pressed on his perception of his own responsibility, the elder Watson steadfastly maintained that he is not accountable for the actions of his PIC/son, Chris W. Tr. 354–56. Watson insisted that the blame was not on the Respondent or its owner, but rather exclusively on his son. Tr. 355. The only possible responsibility Watson was willing to acknowledge (albeit grudgingly) was not replacing his son as the PIC earlier. *Id.* Specifically, on the issue of Chris W's wrongful dispensing, Watson declared that ''[w]hoever filled is responsible for those prescriptions. I didn't fill them.'' [134] and regarding the failure to file a DEA–106 regarding medications that were taken from the pharmacy, Watson said ''[t]hat should have been taken care of by the [PIC] when they [sic] found out they were missing.'' Tr. 357.

It was clear from the tenor and text of his testimony that Watson is strongly possessed of the view that his authority to delegate extends not only to authority, but also to responsibility. Watson explained it in this unequivocal manner:

> That's the reason you delegate jobs to people; have somebody that [sic] is responsible. If I had been the pharmacist-in-control [sic] I would have taken care of that myself. I wish now I had of been [sic]. I'll admit that mistake.

Tr. 358. When asked about the scope of his theft reporting responsibilities as the pharmacy owner, Watson tellingly put it this way:

> Well, in the long run, yeah, that's my responsibility, but it's really the responsibility of the store manager, [PIC], and all that. I try to delegate authority as much as I can because I can't be there every day.

Tr. 362.

Tom Watson's testimony was certainly not without its believable aspects. That said, even apart from the obvious reality that Watson has the most at stake at the hearing, there were internal inconsistencies, inconsistencies with other credible evidence, and implausible aspects that preclude his version of events from being fully credited in this recommended decision. The biographical information Watson supplied during his testimony as well as his subjective estimation (contrary as it is to Agency precedent) that delegation of authority can yield immunity from responsibility, are credible. However, his dual assertions that he was never warned of pharmacy problems by his nephew, Grant Goode, is compromised by his alternate position that he just may not remember all of Goode's warnings because he fell in a bathtub and has a history of once contracting Lyme disease. Tr. 348–50. The veracity of Watson's account is even further diminished by his assertion that he could only act upon the concerns expressed by his trusted, long-time PIC

[128] Gov't Ex. 1.

[129] Watson offered to sign the document on the witness stand. Tr. 341.

[130] Tr. 338–39.

[131] However strong he felt the bonds of his friendship were with his long-time employee Pharm. Tech. Gilbert, they apparently did not inhibit him from blaming her to Grant Goode for the diversion being perpetrated by his son, Chris W. Tr. 283.

[132] Tr. 256–57.

[133] Tr. 347.

[134] Tr. 356.

Tracy Swaim once an inventory (that never occurred) had corroborated it. Tr. 335–36. Similarly, Watson's assertion that his long-time pharmacy technician and friend June Gilbert never raised pharmacy concerns with him is belied by credible testimony of Swaim that he quit when he overheard Pharm. Tech. Gilbert telling Watson that his son was giving away pills. Tr. 256–57.

Likewise, Watson's position that if he had received information regarding addiction and diversion he would have brought in the Pharmacy Board and sought treatment for Chris W is belied by his subsequent assertions that although he has encountered diversion over the course of his career, he has never made such a report to the Pharmacy Board. Tr. 328, 344–45.

Even beyond the bathtub and Lyme disease issues, Watson's assertion that his pharmacist/nephew Grant Goode never brought concerns about his son's actions to his attention is simply not credible. Tr. 348–50. Although Watson expressed exasperation over his nephew's decision to alert the authorities before sufficiently exhausting attempts to resolve issues through the intercession of family members, he raised no issue that impacted on Grant Goode's credibility or that would supply a motive to fabricate misconduct.

After Watson testified, the Government presented (in its rebuttal case) the testimony of Steve Goode (Goode.1),[135] a former employee and business partner of Tom Watson. Tr. 485. Goode.1 testified that he began working for Tom Watson in 1993 in the capacity of overall store manager for Big Star Perryville. Tr. 486. He worked in that position for approximately six years, and then also assumed management responsibilities over Watson's new Mayflower pharmacy/grocery store for the next year and a half. *Id.* Goode.1 testified that he left Watson's employ for a year and a half, but in 2001 rejoined him as a business partner. *Id.* Goode.1 explained that over the course of their ten-year partnership, in addition to Big Star Perryville and Mayflower, the two men bought several grocery stores, all but one of which included a pharmacy. Tr. 486–87.

Goode.1 stated that his role in the partnership was to oversee the grocery side of the business, and that he was responsible for inventory, invoicing, sales, and purchases, and had access to the bank accounts in all of the stores. Tr. 487. According to Goode.1, although his responsibilities did not include the management of the pharmacy aspects of the businesses, a unified ordering, sales, and inventory reporting system[136] linked to all store cash registers gave him access to all sales, billing, ordering, and inventory figures, including transactions in the pharmacies. Tr. 487–89. In 2009, Goode.1 had noticed that the Mayflower pharmacy was paying three full-time pharmacists, one of whom was Chris W, who had eased his actual hours into part-time work (at a full-time salary). Tr. 494. When Goode.1 raised the issue that this salary output was not sustainable, Chris W told him that he would ''make it work'' and that Goode.1 should ''take care of grocery.'' Tr. 494.

Goode.1 recounted that overall the business partnership enterprise had been ''pretty successful'' in the 2000s, but during the summer of 2010 he became aware that a new store the two men had opened in Russellville was struggling financially. During this period, Goode.1 and Watson would generally see each other about twice a week, but Goode.1 was sufficiently concerned about the Russellville operation and some other issues that he made arrangements to see Watson at his house. Tr. 489–90. Among other things discussed at the meeting, Goode.1 testified that he told the elder Watson that ''all of a sudden'' there was no money in the Mayflower store bank accounts, and that when he examined the records, pharmacy purchases were up, but pharmacy sales were ''flat.'' Tr. 490. Watson, whose son Chris W was the Mayflower PIC, told Goode.1 that he would look at the issue and ''take care of it.'' Tr. 490–91. Goode.1 testified that until the summer of 2010, he had not really paid a lot of attention to pharmacy numbers at the Mayflower store because his primary focus was always the grocery end of the business, but that he turned his attention in that direction as part of his efforts to ascertain why two stores, Mayflower and Russellville, were underperforming. Tr. 494–95. It was his conclusion that they had merely underestimated demand at Russellville, but the issue at Mayflower was different; pharmacy sales were level, but the pharmacy was buying more drugs.[137]

The upshot of Goode.1's meeting with Watson was that the men agreed to meet with Chris W, and did so two weeks later. Tr. 491–92. However, according to Goode.1, his takeaway from the meeting was that ''it was evident that nothing was going to change.'' *Id.* Goode.1 was told to mind the grocery side of the business and that Chris W would take care of the pharmacy department. Tr. 493–93. Goode.1 stated that the conversation devolved into a discussion focused on the personal relationship between Goode.1 and the Watsons, and he was told that since because Goode.1 was permitted to use Watson land for hunting and a Watson truck for hauling, that he should mind the grocery side of the house and let Chris W manage the pharmacy end. Tr. 493. Goode.1 testified that Chris W (who was doing most of the talking) did not supply any business-related reason for the drug-sales versus drug-ordering anomaly at the Mayflower pharmacy. Tr. 493–95.

Goode.1 stated that after the Mayflower store was sold to a large pharmacy chain,[138] Chris W began to work at some hours at the Respondent at Big Star Perryville. Tr. 495. Goode.1 testified that in late 2012, while he and his wife were on vacation, he received a call from a mid-level multi-store department manager[139] (T.G.), who told him that Chris W had given a former Mayflower pharmacy technician (C.J.D.) access to the Respondent pharmacy at a time when the Respondent was closed. Tr. 496–99. T.G. told Goode.1 that while the pharmacy was closed, C.J.D., using the keypad access code to enter the restricted pharmacy area, prepared and dispensed medications to her friends and family. Although Goode.1 believes that entries were made in the store computer to reflect the distribution of the drugs, none of the transactions were rung up on any store cash registers.[140] Tr. 498. Goode.1 testified that he met with Watson about the situation and warned him that if he didn't ''get a handle'' on Chris W, the business would encounter the same problem as the Mayflower pharmacy did. Tr. 496. According to Goode.1, Watson said

[135] Steve Goode has no relation to Grant Goode, and pronounces his (identically-spelled) name differently. Tr. 484.

[136] Goode.1 testified that the system was provided by the grocery wholesaler, Associated Wholesale Grocers (AWG). Tr. 487–88. The AWG system accommodated and tracked the ordering of pharmaceuticals through McKesson, who at the time was the Respondent's pharmacy supplier. Tr. 488. Goode.1 explained that a unified system allowed an overview of all Big Star Perryville transactions such that he could conduct an examination to determine which aspects of the business were doing well or poorly. Tr. 489.

[137] Goode.1 testified that he had heard rumors of controlled substance discrepancies at the Mayflower pharmacy, but as he was not a pharmacist, he could not verify them. Tr. at 502–03.

[138] Goode.1 testified that his share of the sale price (from his 20 percent ownership interest) totaled approximately $90,000. Tr. at 502.

[139] Goode.1 testified that the manager, T.G., supervised bakery and deli operation. Tr. 500.

[140] Goode.1 did not know whether the prescriptions prepared by the former employee were controlled substances. *Id.*

''he'd take care of it'' but nothing happened. *Id.*

Goode.1 reckoned that Tom Watson ''was the only one that had any influence over [Chris W],'' and that by bringing the issues to Watson's attention, he expected him to ''get involved in the business'' and acknowledge that there was a problem. Tr. 504. His partner's aspirations notwithstanding, Watson made no discernible effort to intervene. *Id.* Goode.1 and Watson sold the Mayflower and Morrilton stores and dissolved their partnership in 2012 shortly after the C.J.D. incident came to light. Tr. 486.

Goode.1 presented testimony that was sufficiently even, detailed, plausible, and internally consistent to be afforded full credibility in these proceedings. Goode.1 readily acknowledged that dissolution of their partnership was ''not totally amicable'' because the two men still harbor some dispute about the financial aspects of the dissolution. Tr. 505. Still, there is nothing about the outcome of these proceedings that would enhance or detract from Goode.1's status in their unrelated monetary dispute, and there was no indication of malice or bias in the tenor or his words or demeanor. Watson's former business partner provided credible testimony.

Any additional facts required for a resolution of this case are set forth in the Analysis portion of this recommended decision.

The Analysis

Under 21 U.S.C. 824(a)(4), the Agency may revoke the COR of a registrant if the registrant ''has committed such acts as would render [its] registration . . . inconsistent with the public interest.'' 21 U.S.C. 824(a)(4) (2012). The following factors have been provided by Congress in determining ''the public interest'':

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

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

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

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

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

21 U.S.C. 823(f) (2012).

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

In the adjudication of a revocation of a DEA COR, the DEA has the burden of proving that the requirements for continued registration are not satisfied. 21 CFR 1301.44(d) (2015). Where the Government has met this burden by making a *prima facie* case for revocation of a registrant's DEA COR, the burden of production then shifts to the registrant to show that, given the totality of the facts and circumstances in the record, revoking the registrant's registration would not be appropriate. *Med. Shoppe-Jonesborough,* 73 FR 364, 387 (2008); *Samuel S. Jackson, D.D.S.,* 72 FR 23848, 23853 (2007). Further, ''to rebut the Government's *prima facie* case, [the Respondent] is required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the reoccurrence of similar acts.'' *Jeri Hassman, M.D.,* 75 FR 8194, 8236 (2010); *accord Krishna-Iyer,* 74 FR at 464 & n.8. In determining whether and to what extent a sanction is appropriate, consideration must be given to both the egregiousness of the offense established by the Government's evidence and the Agency's interest in both specific and general deterrence. *David A. Ruben, M.D.,* 78 FR 38363, 38364, 38385 (2013).

Normal hardships to the registrant, and even the surrounding community, which are attendant upon the revocation of a registration, are not a relevant consideration. *Linda Sue Cheek, M.D.,* 76 FR 66972, 66972–73 (2011); *Gregory D. Owens, D.D.S.,* 74 FR 36751, 36757 (2009). The Agency's conclusion that past performance is the best predictor of future performance has been sustained on review in the courts, *Alra Labs., Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), as has the Agency's consistent policy of strongly weighing whether a registrant who has committed acts inconsistent with the public interest has accepted responsibility and demonstrated that he or she will not engage in future misconduct, *Hoxie,* 419 F.3d at 483; *see also Ronald Lynch, M.D.,* 75 FR 78745, 78754 (2010) (holding that the Respondent's attempts to minimize misconduct undermined acceptance of responsibility); *George Mathew, M.D.,* 75 FR 66138, 66140, 66145, 66148 (2010); *George C. Aycock, M.D.,* 74 FR 17529, 17543 (2009); *Steven M. Abbadessa, D.O.,* 74 FR 10077, 10078 (2009); *Krishna-Iyer,* 74 FR at 463; *Med. Shoppe-Jonesborough,* 73 FR at 387.

[Omitted Material]

Factors 1 and 3: The Recommendation of the Appropriate State Licensing Board or Professional Disciplinary Authority Conviction Record Under Federal or State Laws Relating to the Manufacture, Distribution, or Dispensing of Controlled Substances

Consideration of the evidence of record under Factors 1 and 3 does not support or undermine the sanction sought by the Government in this case. Under Factor 1, the recommendation of state medical licensing authorities is an important but not dispositive factor in determining whether maintaining a DEA COR is consistent with the public interest. *Patrick W. Stodola, M.D.,* 74 FR 20727, 20730 (2009); *Krishna-Iyer,* 74 FR at 461. It is beyond argument that beyond the absence of any evidence that Arkansas state officials have taken any action (or have even considered the matter), the present record contains no recommendation of any kind from any licensing or disciplinary authorities in Arkansas.

Regarding the third factor (convictions relating to the manufacture, distribution, or dispensing of controlled substances), the record in this case does not contain evidence that the Respondent, its owner(s), or any pharmacist or key employee of the

pharmacy has been convicted [141] of a crime related to any of the controlled substance activities designated in the CSA. The standard of proof in a criminal case is more stringent than the standard required at an administrative proceeding, and the elements of both federal and state crimes relating to controlled substances are not always coextensive with conduct that is relevant to a determination of whether maintaining registration is within the public interest. Still, where present, evidence that a registrant has been convicted of crimes related to controlled substances is a factor to be evaluated in reaching a determination as to whether the registrant should continue to be entrusted with a DEA certificate. The probative value of an absence of any evidence of criminal prosecution is somewhat diminished by the myriad of considerations that are factored into a decision to initiate, pursue, and dispose of criminal proceedings by federal, state, and local prosecution authorities. *See Robert L. Dougherty, M.D.,* 76 FR 16823, 16833 n.13 (2011); *Dewey C. MacKay, M.D.,* 75 FR 49956, 49973 (2010) (''[W]hile a history of criminal convictions for offenses involving the distribution or dispensing of controlled substances is a highly relevant consideration, there are any number of reasons why a registrant may not have been convicted of such an offense, and thus, the absence of such a conviction is of considerably less consequence in the public interest inquiry.''), *aff'd, MacKay* v. *DEA,* 664 F.3d 808 (10th Cir. 2011); *Ladapo O. Shyngle, M.D.,* 74 FR 6056, 6057 n.2 (2009).

Therefore, on the present record, the absence of criminal convictions of the Respondent's owner, pharmacists, or key employees (Factor 3), like the absence of any state recommendation regarding the Respondent's COR (Factor 1), militates neither for nor against the COR revocation sought by the Government.

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

Much of the Government's public-interest-factors case seeking a COR revocation for the Respondent is based on conduct most aptly considered under Factors 2 and 4. The Government alleges and relies on intentional diversion activity conducted primarily by Chris W, the Respondent's PIC, and the failure on the part of the Respondent to act or have safeguards in place to protect the controlled substances in its care against Chris W's malfeasance. Specifically, the Government argues that based on what the Respondent (through its owner, Tom Watson) knew or should have known, insufficient care was exercised in preventing controlled substance diversion. The Government argues that the information in the Respondent's possession compelled it to act, and it failed to do so. Agency precedent has consistently held that the registration of a pharmacy may be revoked as the result of the unlawful activity of the pharmacy's owners, majority shareholders, officers, managing pharmacist, or other key employee. *EZRX, LLC,* 69 FR 63178, 63181 (1988); *Plaza Pharmacy,* 53 FR 36910 (1988).

Regarding Factor 2, in requiring an examination of a registrant's experience in dispensing controlled substances, Congress manifested an acknowledgement that the qualitative manner and the quantitative volume in which an applicant has engaged in the dispensing of controlled substances may be significant factors to be evaluated in reaching a determination as to whether an applicant should be (or continue to be) entrusted with a DEA COR. In some (but not all) cases, viewing an registrant's actions against a backdrop of how its regulated activities have been performed within the scope of its registration can provide a contextual lens to assist in a fair adjudication of whether continued registration is in the public interest. Agency precedent has placed some limitations on the weight to be accorded to evidence considered under this factor. For example, the Agency has taken the position that this factor can be readily outweighed by acts held to be inconsistent with the public interest, and evidence analyzed under this factor will be afforded scant weight by the Agency in the face of proven allegations of intentional diversion. *Krishna-Iyer,* 74 FR at 463; *see also Hassman,* 75 FR at 8235 (acknowledging Agency precedential rejection of the concept that conduct inconsistent with the public interest is rendered less so by comparing it with a respondent's legitimate activities that occurred in substantially higher numbers); *Paul J. Cargine, Jr.,* 63 FR 51592, 51560 (1998) (''[E]ven though the patients at issue are only a small portion of Respondent's patient population, his prescribing of controlled substances to these individuals raises serious concerns regarding [his] ability to responsibly handle controlled substances in the future.''). Similarly, in *Cynthia M. Cadet, M.D.,* the Agency determined that existing List I precedent [142] clarifying that experience related to conduct within the scope of the COR sheds light on a practitioner's knowledge of applicable rules and regulations would not be applied to cases where intentional diversion allegations were sustained. 76 FR 19450, 19450 n.3 (2011). The Agency's approach in this regard has been sustained on review. *MacKay,* 664 F.3d at 819.

There is no question that the Respondent has been conducting regulated activity under a DEA-issued COR since 1986 without any indication on the present record of reported misconduct that predates the facts that gave rise to these proceedings. Gov't Ex. 1. That said, as discussed in greater detail *infra,* there is no question that the actions of the Respondent's PIC, for which the Respondent is accountable, *see EZRX, LLC,* 69 FR at 63181; *Plaza Pharmacy,* 53 FR at 36910, were plainly calculated to facilitate intentional diversion. Thus, even if it were assumed, *arguendo,* that the regulated activity conducted by the Respondent over the past three decades was exclusively benign, under Agency precedent, the intentional nature of the diversion established by the evidence of record would deprive that assumption of its ability to mitigate a sanction.

In addition to Factor 2 (experience in dispensing), Factor 4 (compliance with laws related to controlled substances) is also germane to a correct resolution of the instant case. Regarding Factor 4, to effectuate the dual goals of conquering drug abuse and controlling both legitimate and illegitimate traffic in controlled substances, ''Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.'' *Gonzales* v. *Raich,* 545 U.S. 1, 13 (2005). Under the regulations, ''[t]he responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription.'' 21 CFR 1306.04(a) (2015). Under this language, a pharmacist has a duty ''to fill only those prescriptions that conform in all respects with the requirements of the [CSA] and DEA regulations. . . .'' *Electronic*

[141] It is undisputed that Chris W has been arrested in connection with facts related to this case (Tr. 433, 437–38, 445) and equally undisputed that the record contains no evidence that anyone associated with the Respondent (including Chris W) has been convicted in connection with the misconduct alleged by the Government.

[142] *See, e.g., Volusia Wholesale,* 69 FR 69409, 69410 (2004).

Prescriptions for Controlled Substances, 75 FR 16236, 16266 (2010).

In short, a pharmacist has a ''corresponding responsibility under Federal law'' to dispense only lawful prescriptions. *Liddy's Pharmacy, L.L.C.,* 76 FR 48887, 48895 (2011). ''The corresponding responsibility to ensure the dispensing of valid prescriptions extends to the pharmacy itself.'' *Holiday CVS, L.L.C., d/b/a CVS/Pharmacy Nos. 219 & 5195,* 77 FR 62315, 62341 (2012) (citing *Med. Shoppe-Jonesborough,* 73 FR at 384; *United Prescription Servs., Inc.,* 72 FR 50397, 50407–08 (2007); *EZRX, LLC,* 69 FR at 63181; *Role of Authorized Agents in Communicating Controlled Substance Prescriptions to Pharmacies,* 75 FR 61613, 61617 (Oct. 16, 2010); *Issuance of Multiple Prescriptions for Schedule II Controlled Substances,* 72 FR 64921, 69424 (Nov. 19, 2007)). Settled Agency precedent has interpreted this corresponding responsibility as prohibiting the filling of a prescription where the pharmacy, through its pharmacist, ''knows or has reason to know'' that the prescription is invalid. *E. Main St. Pharmacy,* 75 FR 66149, 66163 (2010); *Bob's Pharmacy & Diabetic Supplies,* 74 FR 19599, 19601 (2009) (citing *Med. Shoppe–Jonesborough,* 73 FR at 381).

The Agency has interpreted this ''legitimate medical purpose'' feature of the corresponding responsibility duty ''as prohibiting a pharmacist from filling a prescription for a controlled substance when he either knows or has reason to know that the prescription was not written for a legitimate medical purpose,'' and has been equally consistent in its admonishment that ''[w]hen prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescription.'' *Sun & Lake Pharmacy, Inc.,* 76 FR 24523, 24530 (2011); *Liddy's Pharmacy,* 76 FR at 48895; *E. Main St. Pharmacy,* 75 FR at 66163; *Lincoln Pharmacy,* 75 FR 65667, 65668 (2010); *Bob's Pharmacy,* 74 FR at 19601.

When considering whether a pharmacy has violated its corresponding responsibility, the Agency considers whether the *entity,* not the pharmacist, can be charged with the requisite knowledge. *See United Prescription Servs.,* 72 FR at 50407 (finding that the Respondent pharmacy violated its corresponding responsibility because ''an *entity* which voluntarily engages in commerce [to] other States is properly charged with knowledge of the laws regarding the practice of medicine in those States'' (emphasis added)); *see also Pharmboy Ventures Unlimited, Inc.,* 77 FR 33770, 33771 n.2 (2012) (''DEA has long held that it can look behind a pharmacy's ownership structure 'to determine who makes decisions concerning the controlled substance business of a pharmacy.' '' (quoting *Carriage Apothecary,* 52 FR 27599, 27599 (1987)); *S & S Pharmacy, Inc.,* 46 FR 13051, 13052 (1981) (holding that the corporate pharmacy acts through the agency of its PIC). Knowledge obtained by the pharmacists and other employees acting within the scope of their employment may be imputed to the pharmacy itself. *See United States* v. *7326 Highway 45 N.,* 965 F.2d 311, 316 (7th Cir. 1992) (''Only knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation.''). Agency precedent has consistently held that the registration of a pharmacy may be revoked as the result of the unlawful activity of the pharmacy's owners, majority shareholders, officers, managing pharmacists, or other key employees. *Holiday CVS,* 77 FR at 62340; *EZRX,* 69 FR at 63181; *Plaza Pharmacy,* 53 FR at 36911.

The evidence of record preponderantly establishes that while acting as the Respondent's PIC, Chris W twice [143] dispensed controlled substances to a DEA undercover agent on scrips that he knew were bogus. SOFs 14–18, 20; SOT 3. It was clear that he knew the scrips were fakes because he had been actively engaged in schooling the undercover agent on how to improve his forging skills for future scrips. SOFs 14–18, 20; SOT 3; Tr. 146–50. In a palpable display of arrogance and disregard for his responsibilities, Chris W told the undercover agent that the agent's fake scrip ''looks a lot better than any of the other damn things [he's] seen.'' Gov't Ex. 18 at 3. He also assured the undercover agent that what he did with the drugs after the drugs left his pharmacy was none of his business. SOT 3(e).

The evidence of record establishes that Chris W engaged in a wild pattern of abusing his authority as a pharmacist while serving as a pharmacist and PIC at the Respondent. Staff members at the pharmacy have been directed by Chris W to dispense controlled substances in the absence of the requisite scrips and in the face of blatant red flags of diversion, and were aware that large quantities of controlled substance shipments delivered to the pharmacy routinely disappear by the following morning. SOTs 16(b), (e), 17(c). Staff members have also seen Chris W load his backpack with controlled medications and walk out the pharmacy door. SOT 16(f). With the assistance of his friend Eric Horton, he has also taken large amounts of pharmacy documentation out of the pharmacy and secreted it in his home. SOFs 6–12; SOTs 16(g), 19(e), (g), 21. This was done with the knowledge of the Respondent's staff and in violation of the regulations, which require that the records be maintained by the pharmacy. 21 CFR 1306.15(a)(3) (2015).

Chris W also supplied his girlfriend, Samantha Pemberton, with controlled substances in unmarked bottles without a prescription and created a paper trail at the pharmacy that fraudulently reflected prescriptions from Dr. James Arnold, M.D., an emergency room physician who never treated Pemberton. SOTs 7, 22. When, following a traffic stop, local police officers attempted to ascertain the facts about how Pemberton came into possession of drugs found with her, Chris W misled them on numerous phone calls and provided fabricated documentation that falsely created the impression that Dr. Arnold was her prescriber and that she was legitimately dispensed the drugs. SOT 9; Gov't Exs. 19, 48, 49; Tr. 52–53.

The record also establishes that Chris W dispensed controlled substances to an individual named A.R. with no prescription whatsoever. SOF 13. Not only did Chris W supply A.R. with controlled substances, but to cover his tracks, he reached out by text message to a dentist acquaintance, Dr. Raymond Hambuchen, who did not know A.R., and asked Dr. Hambuchen to vouch for his criminality. SOTs 1, 15(b)–(d), 10(d); Tr. 20–21; Gov't Exs. 2, 3. Fortunately, Dr. Hambuchen was not complicit. Records seized at the Respondent demonstrate that Chris W fraudulently dispensed controlled substances to A.R. eleven times under Dr. Hambuchen's name. SOF 13; SOT 20(d), (e); Gov't Ex. 4Tr. 185–86.

Chris W spent an evening in the restricted area of the Respondent identifying and assisting his friend, Eric Horton, in liberating copious amounts of controlled substances from the pharmacy. A search incident to an arrest based on a traffic stop of Horton's truck shortly thereafter yielded a virtual cornucopia of controlled substances from the Respondent that Chris W helped him identify, gather, and pack up at the pharmacy, none of which had a label with Horton's name on it. SOTs 5(c), 11(e), 12(c); Gov't Ex. 36; Tr. 98. Chris W also gave controlled substances

[143] Controlled substances were dispensed to the undercover agent by Chris W on November 7, 2014 (Undercover Visit 1) and December 4, 2014 (Undercover Visit 4). SOFs 14, 20.

to Horton at his (Chris W's) home. SOT 7(c).

Joe Jackson, another of Chris W's friends, was arrested while in possession of a large quantity of controlled substances in Respondent-labeled stock bottles. SOT 13; Gov't Ex. 39. A search of the Respondent's pharmacy records revealed that no patient profile was maintained on Jackson at the pharmacy; thus, the controlled medications he was transporting at the time of his traffic stop were not legally dispensed to him. SOTs 14(c), 20(e).

A search warrant executed at Chris W's home yielded, *inter alia,* hard copies of scrips for five patients who were dispensed controlled substances at the Respondent. SOFs 6–12. Under the regulations, these documents were required to be maintained at the pharmacy. 21 CFR 1306.15(a)(3) (2015).

There is thus no question that Chris W was a bad actor, and less question under Agency precedent that because he was a pharmacist, the PIC, the vice president, and the controller of the Respondent, the Respondent is accountable for every bit of Chris W's misconduct.[144] *Holiday CVS,* 77 FR at 62340; *EZRX,* 69 FR at 63181; *Plaza Pharmacy,* 53 FR at 36911. The seminal question here is not whether a sanction is authorized (it clearly is), but whether the Respondent should be sanctioned. For the reasons that follow, that question must be answered in the affirmative.

Notwithstanding the stunning level of controlled substance shortages[145] revealed by the DEA audit,[146] the awareness by pharmacy staff that controlled medications shipped to the pharmacy routinely disappear by the next morning,[147] the burglary with controlled substance losses reported to the local police,[148] and the large quantities of controlled substances found in the possession of Horton and Jackson (neither of whom were Respondent employees, and Jackson was not even a pharmacy customer), the Respondent has not filed a report of theft or loss (DEA–106) as required by the regulations.[149] SOT 14(b). That the staff has noticed that the pharmacy regularly runs out of controlled medications by the ninth day of each month is clearly evidence that the Respondent was well aware that controlled medications were routinely going missing. SOT 16(b). The repeated failure to report the thefts/losses to DEA constitutes a violation of DEA regulations. 21 CFR 1301.76(b).

It is likewise beyond argument that the owner of the Respondent, Tom Watson, had unequivocal notice from multiple sources over the course of several years that his son, Chris W, approached the disregard of his obligations as a pharmacist as if it were an art form. Tracy Swaim worked for Tom Watson at the Respondent, most of that time as its PIC, for over a quarter of a century. Tr. 232–33. In January of 2012, Swaim told Watson that he was sufficiently troubled by Chris W's illegal hijinks that he intended to resign as the PIC. Tr. 251–56. Unconsoled by Watson's assurances, Swaim conducted a close-out inventory, completed the necessary paperwork to step down, and did so. The fact that Swaim's salary remained unaffected and his hours were not reduced is strong evidence that the demotion was in no way punitive, and that the long-term PIC was making a powerful statement to his employer. Tr. 254–55, 266–67. Tom Watson's reaction was to effect no discernible change in the organization—other than having Chris W replace Swaim as the Respondent's PIC.

Two years and nine months later, when Swaim overheard Pharmacy Technician June Gilbert (a twenty-five-year veteran of the Respondent) tell Watson that Chris W was ''giving away'' medication, it was more than Swaim could endure, and he warned Watson that he was considering leaving the pharmacy altogether. Tr. 257. Four days later, when Swaim learned from the staff that Chris W's misconduct had not abated, notwithstanding the fact that Swaim had no job prospects and lived in a rural area, he gave his two weeks' notice and quit. Tr. 257. It would be difficult to conceive of more sincerely-rendered, credible warnings from more trusted employees than those tendered by Tracy Swaim and June Gilbert. Still, Watson was unmoved and left Chris W as the Respondent's PIC.

Tom Watson was also warned of Chris W's blatant misconduct by his nephew, Grant Goode, who briefly worked at the Respondent as a staff pharmacist. When Goode alerted Watson that dozens of dispensing events lacked hard-copy scrips, the owner dismissed it as benign filing errors made by pharmacy staff members. Tr. 277. In view of the fact that Goode was present when Chris W loaded medications in his backpack in plain view of his father,[150] the elder Watson's unwillingness to act likely came as no surprise to Goode. When Watson became suspicious that Grant Goode had brought his concerns to the Pharmacy Board, he had another pharmacist (and business partner of Chris W) dismiss him from the job. Tr. 291. The reaction of this pharmacist, Glenn Wood (also a key employee and supervisory pharmacist), to Goode's concerns was not to elevate the issue or to investigate the allegations; his response was merely to take offense on behalf of the Watsons and defend them. Tr. 427, 429.

Tom Watson also disregarded concerns expressed by his former long-time store manager and partner, Steve Goode (Goode.1). While co-owning the Mayflower store with Watson, Goode.1 had determined that while Chris W was the PIC, pharmacy ordering was going through the roof while sales were static. Tr. 490–92. When he brought this concern to Watson's attention, the two men met with Chris W, and Goode.1 was essentially told to keep his nose out of the pharmacy side of the house. Tr. 493.

Goode.1 also informed Watson that Chris W had granted access to the pharmacy to a former employee while the pharmacy was closed and enabled her to dispense medications to her friends and relatives free of charge. Tr. 496–99. Consistent with his custom in such matters, Watson assured Goode.1 that he would take care of the issue and proceeded to do nothing. Tr. 496–97. The partnership between the two men was subsequently dissolved. *Id.*

The Respondent also ran afoul of state controlled substance laws. The Arkansas Uniform Controlled Substances Act specifies that no controlled substance is to be dispensed without a prescription issued in compliance with federal laws and

[144] Although the Respondent has stipulated that Chris W is and was a part-owner of the Respondent (SOF 20), it subsequently sought to challenge the basis of that stipulation with an affidavit from Chris W's mother offered after the hearing was completed. ALJ Ex. 21. The motion was granted over the Government's objection. ALJ Exs. 22, 23. However, inasmuch as Agency precedent does not distinguish between the responsibility imputed to a Respondent from an owner and the responsibility imputed from a managing pharmacist, officer, or other key employee, *Holiday CVS,* 77 FR at 62340; *EZRX,* 69 FR at 63181; *Plaza Pharmacy,* 53 FR at 36911, the admission of the affidavit (Resp't Ex. 15), especially when considered with the diminished weight accorded by the regulations, 21 CFR 1316.58(b) (2015), adds virtually nothing to the equation.

[145] Inasmuch as the shortages based on a DEA audit were not noticed in the OSC or the prehearing statements, the audit results, standing alone, cannot form an independent basis for sanction. *CBS Wholesale Distribs.,* 74 FR 36746, 36750 (2009) (citing *Darrel Risner, D.M.D.,* 61 FR 728, 730 (1996)); *see also Roy E. Berkowitz, M.D.,* 74 FR 36758, 36759–60 (2009). However, the Government did sufficiently notice the Respondent's failure to file a report of theft or loss of controlled substances. ALJ Ex. 1 at 4.

[146] Tr. 181.

[147] SOTs 16(b), 17(c).

[148] SOTs 2(e), 19(f); Tr. 259–60, 323.

[149] 21 CFR 1301.76(b) (2015).

[150] Tr. 280.

regulations. Ark. Code Ann. § 5–64–308 (2013). Thus, Chris W's practice of dispensing controlled substances without scrips to his girlfriend, friends, and associates, and his facilitation of a former employee's weekend drug dispensing event to her friends and family, clearly violated state laws related to controlled substances, and was passively endured by the Respondent. As discussed *supra,* the Respondent was credibly informed by numerous sources, was well aware of Chris W's misconduct, and chose to do nothing.

When Chris W dispensed controlled substances twice to an undercover DEA agent where he knew that the presented scrips were fraudulent, he also violated his state ''corresponding responsibility'' to ensure that the prescribing and dispensing of a controlled substance is proper. Ark. Admin. Code § 007.07.2–II–VIII(B)(1) (2014); *see also* Ark. Admin. Code § 070.00.4–04–00–0009 (2014) (''Any pharmacist . . . participating in the preparation of orders or dispensing of prescriptions . . . is responsible for the validity and legality of the order or prescription.''). Prescriptions can only be issued for ''legitimate medical purposes'' by ''an individual practitioner who is legally authorized to prescribe . . . controlled substances in the State of Arkansas and who holds a current [DEA COR].'' Ark. Admin. Code § 007.07.2–II–VIII. Chris W knew the scrips were frauds, and even sought to improve the caliber of the undercover agent's future forgeries. Chris W's actions as pharmacist and later PIC violated Arkansas laws and under the circumstances, the Respondent is fully responsible with knowledge of his malfeasance.

Arkansas regulations delineate a number of responsibilities for supervisory pharmacists; those persons responsible for supervising pharmacy personnel are ''responsible for the validity and legality'' of the prescriptions dispensed and also ''responsible for any shortage of drugs classified as controlled substances . . . which occurs under their supervision.'' Ark. Admin. Code § 070.00.4–04–00–0009 (2014). Likewise, state regulations outline the responsibilities unique to those individuals designated as pharmacists-in-charge: ''The [PIC] is responsible for the security and accountability of all drugs stored in a pharmacy and is responsible for the validity and legality of all prescriptions and/or orders upon which drugs are dispensed in a pharmacy. The [PIC] is responsible for ensuring that pharmacy staff has been appropriately trained to follow the pharmacy's policies and procedures.'' Ark. Admin. Code § 070.00.4–04–00–0010 (2014).

Under Arkansas law, ''[t]he permit holder and the [PIC] are jointly responsible for the security and accountability of all controlled drugs stored in and/or ordered by a pharmacy.'' Ark. Admin. Code § 070.00.4–04–00–0015 (2014). As such, the permit holder is required to ''provide diversion prevention and detection tools appropriate for the particular pharmacy setting and the pharmacist in charge shall implement and monitor the diversion control and detection tools provided by the permit holder.'' *Id.* Such policies and procedures developed by the permit holder and the PIC to prevent and detect diversion may include ''limiting access to by non-pharmacists to controlled drug shipments'', ''confirming pill count before opening a new bottle of high risk drugs'', and ''tracking pill count on stock bottles.'' *Id.* As discussed *supra,* Respondent's lack of any meaningful measures of checks and balances to guard against diversion by a pharmacist, the sharing of the CSOS password, and its owner's obdurate refusal to act on credible warning after warning placed the Respondent in violation of the Arkansas security and accountability provisions.

Chris W served as a staff pharmacist and PIC at the Respondent. He is the son of the majority owner of the business, and diverted controlled substances with equal measures of wild abandon and complete impunity. The Respondent knew its pharmacist was violating federal and state laws and diverting copious amounts of controlled substances and elected to take no action. Consideration of the record evidence under Factors 2 and 4 militate powerfully and conclusively in favor of the COR revocation sought by the Government.

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

The fifth statutory public interest factor directs consideration of ''[s]uch *other conduct* which may threaten the public health and safety.'' 21 U.S.C. 823(f)(5) (2012) (emphasis added). To qualify for consideration under this factor, the evidence must constitute: (1) Conduct [151] (2) not covered by application of the other four public interest factors (3) which has the potential to threaten the public health and safety.[152] Agency precedent has generally embraced the principle that any conduct that is properly the subject of Factor 5 must have a nexus to controlled substances and the underlying purposes of the CSA. *Terese, Inc.,* 76 FR 46843, 46848 (2011); *Tony T. Bui, M.D.,* 75 FR 49979, 49989 (2010) (stating 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 44359, 44368 n.27 (2011) (noting that although a registrant's non-compliance with the Food, Drug, and Cosmetic Act is not relevant under Factor 5, consideration of such conduct may properly be considered on the narrow issue of assessing a respondent's future compliance with the CSA). Only conduct that has ''a nexus to controlled substances and the underlying purposes of the CSA'' may be considered under this factor. *Joe W. Morgan, D.O.,* 78 FR 61961, 61977 (2013); *accord Holiday CVS,* 77 FR at 62345.

Even the Respondent seems to agree that the depth and breadth of Chris W's arrogance and imagination in his extended efforts to flout the CSA is remarkable by any standard. During his enthusiastic campaign of diversion for profit, there were certainly acts he committed that were both inside and outside the other public interest factors considered here. However, there were two ''other conduct'' undertakings [153] that stood out from the rest as deserving of separate consideration: Providing advice to the DEA undercover agent on how to improve his scrip forgery efforts [154] and generating false documents and supplying them to law enforcement to cover his tracks in supplying Samantha Pemberton with drugs. Both stand out as worthy of separate consideration under Factor 5.[155]

There is little doubt that on the present record, where the Respondent's owner stubbornly ignored every warning sign that Chris W, his PIC and his son, was essentially on a campaign to abuse his authority and divert drugs on an unprecedented level, that the Respondent should be and is wholly accountable Chris W's Factor 5 conduct.

[151] *See Holloway Distrib.,* 72 FR 42118, 42126 n.16 (2007).

[152] *Jacobo Dreszer,* 76 FR 19386, 19386 n.3, 19434 (2011); *Michael J. Aruta, M.D.,* 76 FR 19420, 19420 n.3 (2011); *Beau Boshers, M.D.,* 76 FR 19401, 19402 n.4 (2011).

[153] This is certainly not offered as an exhaustive list of all Chris W's Factor 5-eligible actions.

[154] SOFs 15–18, 20; SOT 3; Tr. 146–50.

[155] SOT 9(e)–(g); Gov't Exs. 48, 49.

Holiday CVS, 77 FR at 62340; *EZRX,* 69 FR at 63181; *Plaza Pharmacy,* 53 FR at 36911. There is equally little question that consideration of the record evidence under Factor 5 militates powerfully in favor of the revocation of the Respondent's COR.

Recommendation

Inasmuch as the Government has preponderantly established that the Respondent's PIC engaged in behavior that is violative of Federal and state law regarding controlled substances dispensing practices and a pharmacist's corresponding responsibility, that the Respondent treated the misconduct with deliberate indifference, and that the Respondent systemically failed to maintain adequate controls to protect against theft or loss of controlled substances, the Government has supplied sufficient evidence to make out a *prima facie* case that maintaining the Respondent's COR would be contrary to the requirements of 21 U.S.C. 823 and 824. As the Government has sustained its burden to show that the Respondent committed acts inconsistent with the public interest, the burden shifts to the Respondent to show that it can be entrusted with a DEA registration. ''[T]o rebut the Government's *prima facie* case, [the Respondent is] required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the reoccurrence of similar acts.'' *Hassman,* 75 FR at 8236; *Hoxie,* 419 F.3d at 483; *Lynch,* 75 FR at 78749 (Respondent's attempts to minimize misconduct held to undermine acceptance of responsibility); *Mathew,* 75 FR at 66140, 66145, 66148; *Aycock,* 74 FR at 17543; *Abbadessa,* 74 FR at 10078; *Krishna-Iyer,* 74 FR at 463; *Med. Shoppe-Jonesborough,* 73 FR at 387. Both prongs are required, and one is irrelevant without the other.

The Government's *prima facie* burden having been met,[156] an unequivocal acceptance of responsibility stands as a condition precedent for the Respondent to prevail. *Mathew,* 75 FR at 66148. This feature of the Agency's interpretation of its statutory mandate on the exercise of its discretionary function under the CSA has been sustained on review. *MacKay,* 664 F.3d at 822. While it is true that the Respondent, through counsel, commendably entered into an extensive and reasonable array of evidentiary and testimonial stipulations in this case, no amount of prudent legal advice could save the Respondent from itself. During his testimony, Tom Watson, the majority owner of the Respondent, doggedly maintained that the responsibility for every bit of horrendous misconduct committed by his son/PIC was his son's responsibility to bear. Tr. 354–56, 358, 362. Watson obdurately clung to the (false) notion that delegation of his authority equates with absolution from his responsibility. Tr. 358. He is mistaken, and his position in this regard is made even more unreasonable by the fact that he has spent years turning a blind eye to warning after warning. Under longstanding Agency precedent, Watson's failure to accept any level of responsibility has virtually precluded the Respondent's ability to avoid a sanction in this case.

Inasmuch as the Respondent has not accepted responsibility, evidence of remedial steps is irrelevant. *Hassman,* 75 FR at 8236. However, even if the remedial steps offered by the Respondent were considered, they would not alter the result. Prospective PIC Glenn Wood's testimony concerning all the extra security measure he intends to take[157] suffers from the same fundamental defect that Watson's representations regarding his anticipated increased pharmacy involvement[158] and implementation of his Proposed Policy[159] do: both men were present and did nothing when the Respondent's PIC, Chris W, ran wild. These men are a major part of the problem, not the champions of a solution that can be afforded any genuine credence.

Although there was no cognizable acceptance of responsibility, the Respondent took the position that consideration should be given to the fact that its pharmacy serves an underserved, primarily indigent, rural community. Resp't Brf. at 114; Tr. 404, 429–30. Even apart from the potential irony in concluding that a rural, indigent community would garner significant benefit from a COR holder who has consistently refused to take even the smallest step to mitigate his son's wholesale diversion of dangerous drugs, Agency precedent is clear that normal hardships to the practitioner, and even the surrounding community, which are attendant upon the denial of a registration, are not a relevant consideration. *Cheek,* 76 FR at 66972–73; *Abbadessa,* 74 FR at 10078; *Owens,* 74 FR at 36757. Suffice it to say that the Respondent's community impact argument, even if it were not rendered irrelevant by Agency precedent (which it is), is not persuasive on the present record.

That a sanction is authorized does not end the inquiry. In determining whether and to what extent imposing a sanction is appropriate, consideration must be given to both the egregiousness of the offenses established by the Government's evidence and the Agency's interest in both specific and general deterrence. *Ruben,* 78 FR at 38364, 38385. As discussed *supra,* the conduct of the Respondent, through its PIC, and as ignored by its owner, was stunning. Not only were dangerous controlled drugs being doled out to friends, love interests, and customers, but the apparatus of the Respondent was actively employed by Chris W to accomplish his misconduct. Chris W used the Respondent's privileges to order and store controlled substances as if he were running a big-box retailer specializing in drug dealing. No amount of security measures, cameras, documents, or safety protocols could defend the public against his father's deliberate indifference. Chris W even once loaned out the store so that a former employee could mete out drugs to her friends and family. There is no question that a thoughtful consideration of the egregiousness of the established misconduct compels the revocation sought by the Government.

Regarding the issue of deterrence, there is no question that a sanction that falls short of revocation would undermine the Agency's legitimate interests in both specific and general deterrence. On the issue of specific deterrence, there is nothing in the record that lends any support to the proposition that Tom Watson's future behavior will be any different from his past behavior. Although the Respondent represents that (the retired) Watson intends to become more active in the business in the future,[160] his level of activity was never the issue. He had his closest associates, managers, business partners, employees, pharmacists, and relatives engaged in a consistent chorus implicating Chris W as a persistent and criminal diverter, yet Watson was unmoved. It strains credulity to think that the exercise of successfully defending an ISO at administrative proceedings before the DEA will be the catalyst of change. There is no reason to believe that Tom Watson intends to manage his pharmacy differently than he has for decades, and every reason to believe that escaping consequences here

[156] The Respondent concedes that the Government has met its *prima facie* burden. Resp't Brf. at 2–3.

[157] Tr. 416–19, 444.

[158] Resp't Brf. at 16; Tr. 320, 346–47.

[159] Gov't Ex. 1.

[160] Resp't Brf. at 16; Tr. 320, 346–47.

will be as destructive as the impunity with which he ignored every warning sign that his pharmacy was a mess, and rendered so at the hands of his son.

Regarding general deterrence, as the regulator in this field, the Agency bears the responsibility to deter similar misconduct on the part of others for the protection of the public at large. *Ruben,* 78 FR at 38385. The ubiquitous nature of the drug diversion taking place within plain sight of the COR holder, the Respondent's employees, law enforcement, and the public at large would render anything less than a revocation as an invitation to others in the regulated community to ignore trouble in their own operations. The inescapable lesson to other COR holders would be that delegation of authority does equate to delegation of responsibility. The Agency's interests in general deterrence are served best by revoking the Respondent's COR.

A balancing of the statutory public interest factors, coupled with consideration of the Respondent's failure to accept responsibility and the Agency's interests in deterrence, supports the conclusion that the Respondent should not continue to be entrusted with a registration.

Accordingly, the Respondent's DEA COR should be REVOKED, and any pending applications for renewal should be DENIED.

Dated: May 13, 2015.

John J. Mulrooney, II,

Chief Administrative Law Judge.

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