(1984); *United States* v. *Waste Management, Inc.*, 1985–2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985). In conducting this inquiry, ''the Court is nowhere compelled to go to trail or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' [1] Rather,

[a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. *Mid-America Dairymen, Inc.*, 1997–1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a Court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United State* v. *BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) *quoting United States* v. *Bechtel Corp.*, 648 F.2d 660,666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981). See also, *Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that:

The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is''*within the reaches of the public interest*.'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree. [2]

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. *Armour & Co.*, 402 U.S. 673, 681 (1971).

The proposed Final Judgment therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' (citations omitted.'' [3]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Executed on: May 25, 1999.

Respectfully submitted,

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 98–13]

Jimmy H. Conway, Jr., M.D.; Grant of Restricted Registration

On January 28, 1998, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Jimmy Harold Conway, Jr., M.D. (Respondent) of Oklahoma City, Oklahoma, notifying him of an opportunity to show cause as to why DEA should not deny his application for registration as a practitioner pursuant to 21 U.S.C. 823(f) and 824(a)(2) and (a)(4), for reason that he was convicted of a felony relating to controlled substances and that his registration would be inconsistent with the public interest.

By letter dated February 23, 1998, Respondent, through counsel, requested a hearing on the issues raised by the Order to Show Cause. Following prehearing procedures, a hearing was held in Oklahoma City, Oklahoma on July 14 and 15, 1998, before Administrative Law Judge Gail A. Randall. At the hearing, both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties submitted proposed findings of fact, conclusions of law and argument. On December 21, 1998, Judge Randall issued her Recommended Rulings, Findings of Fact, Conclusions of Law and Decision, recommending that Respondent's application for registration be granted without restrictions. Neither party filed exceptions to Judge Randall's opinion, and on January 26, 1999, Judge Randall transmitted the record of these proceedings to the Deputy Administrator.

The Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Deputy Administrator adopts in full the recommended rulings, findings of fact and conclusions of law of the Administrative Law Judge, and adopts in part Judge Randall's recommended decision in this matter. His adoption is in no manner diminished by any recitation of facts, issues and conclusions herein, or of any failure to mention a matter of fact or law.

The Deputy Administrator finds that Respondent graduated from medical school in 1983, and has been in private practice since 1989. He is an orthopedic surgeon specializing primarily in the treatment of shoulder and knee juries, general orthopedics, and sports medicine.

On February 27, 1996, an agent with the Oklahoma Bureau of Narcotics and Dangerous Drugs Control (OBN) received a complaint from a pharmacist concerning Respondent. The pharmacist had become suspicious of several prescriptions filled at the pharmacy for patient ''Jim Conway'' for Lorcet, a Schedule III control substance, and Soma, a non-controlled substance

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[1] 119 Cong. Rec. 24598 (1973). *See United States* v. *Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975) A ''public interest'' determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See*, H.R. 93–1463, 93rd Cong. 2d Sess. 8–9, *reprinted in* (1974) U.S. Code Cong. & Ad. News 6535, 6538.

[2] *United States* v. *Bechtel*, 648 F.2d at 666 (citations omitted) (emphasis added); *see United States* v. *BNS, Inc.*, 858 F.2d at 463; *United States* v. *National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States* v. *Gillette Co.*, 406 F. Supp. at 716. *See also United States* v. *American Cynamid Co.* 719 F.2d at 565.

[3] *United States* v. *American Tel. and Tel Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, *460* U.S. 1001 (1983) *quoting United States* v. *Gillette Co., supra*, 406 F. Supp. at 716; *United States* v. *Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky 1985).

Federally but a Schedule IV controlled substance in Oklahoma. The pharmacist was having trouble verifying the prescriptions with the alleged prescribing physician, and indicated that she had learned that ''Jim Conway'' was a physician in the Oklahoma City area. A printout from the pharmacy revealed that between June 1, 1995 and February 26, 1996, ''Jim Conway'' had 13 prescriptions filled at the pharmacy. It was later discovered that the address listed on these prescriptions was the same as Respondent's residence.

Subsequently, the OBN agent visited a number of pharmacies in the Oklahoma City area and seized prescriptions allegedly issued to Respondent by various physicians for approximately 5,973 dosage units of controlled substances.

On March 4, 1996, the OBN agent met with a physician whose name appeared as the prescribing physician on a number of the prescriptions. This physician had been a medical partner with Respondent at Respondent's then-current practice, and had known Respondent socially and professionally since 1979. After reviewing the prescriptions he alleged wrote for Respondent, the physician indicated that he did not write or authorize any of the prescriptions.

That same day, the OBN agent met with another physician whose name appeared as the prescribing physician on a number of the prescriptions. This physician was a then-current partner at Respondent's practice. After reviewing the prescriptions he allegedly wrote for Respondent, the physician also indicated that he did not write or authorize any of the prescriptions. This physician further indicated to the agent that in approximately March 1995, he was told by a pharmacist that Respondent was using his prescription pad to acquire controlled substances. The physician confronted Respondent who admitted forging prescriptions, but told the physician that it was poor judgment on his part; that it was a ''one-time'' occurrence; and that he would never forge prescriptions again. The physician never reported this incident to any law enforcement authorities.

Also on March 4, 1996, the OBN agent met with Respondent at which time Respondent candidly admitted to the agent that he had forged the prescriptions by using the names and DEA registration numbers of his partners without their knowledge. Respondent attributed his addiction to ''frustration over his practice and workload.'' At that time Respondent was dissatisfied with his medical practice which according to him was mainly a group of doctors that associated with each other professionally, but practiced as individuals. This dissatisfaction caused his stress level to increase.

In the past, Respondent relieved stress by drinking alcohol. In late 1992 or 1993, Respondent began using controlled substances first on the weekends and then also at night. Initially he consumed samples of Lortab and Soma taken from his medical practice. Respondent then began forging prescriptions for drugs such as Lorcet, Ambien, Soma, Xanax and Restoril, by signing the names of his medical partners on the prescriptions. Ultimately, Respondent became addicted to these substances.

While he was addicted to these drugs, Respondent was physically and emotionally withdrawn from the people around him. Although Respondent admitted his addiction to the OBN agent, he stated that ''he did not feel the addiction had impaired him in any way during surgery.'' A colleague testified at the hearing that he did not feel that Respondent was impaired when they would perform surgery together.

At the conclusion of the meeting with the OBN agent on March 4, 1996, Respondent surrendered his state and DEA controlled substance registrations. On March 8, 1996, the Oklahoma Board of State Medical Licensure and Supervision (Board) held an emergency hearing, and on March 29, 1996, issued an Emergency Order immediately suspending Respondent's medical license.

According to Respondent, he felt relieved when confronted by the OBN agent because he knew that at that point he would be able to receive help for his addiction. Within two hours of meeting the OBN agent on March 4, 1996, Respondent admitted himself to a local hospital for detoxification. Respondent readily admitted his addiction to his doctor at the hospital. After five days at the local hospital, Respondent entered a treatment center in a suburb of Chicago. Most patients spend about 12 weeks at the treatment center, however Respondent was released from in-patient treatment after only 8½ weeks. Respondent's success at the treatment center is attributable to the fact that he had already admitted his drug addiction and had accepted that he had a problem before he entered the center.

While at the treatment center, Respondent learned about what constitutes an addiction; how to control and treat his dependence; what causes relapse; and how to prevent it from happening to him. Respondent credibly testified at the hearing that ''I have absolutely no desire to return to that lifestyle.''

Respondent left the treatment center in May 1996. The treatment center requires program participants to undergo further drug treatment monitoring for at least two years following release from in-patient treatment, since the likelihood of relapse is extremely low after two years. Therefore, Respondent committed to a two-year ''contract'' with the treatment center which required Respondent to attend Alcoholics Anonymous (AA) meetings and to participate in the Oklahoma Physicians Recovery Program (PRP). This contract expired in May 1998.

After returning to Oklahoma from the treatment center, Respondent entered into a five-year contract with the PRP, which is aimed at supporting the recovery of physicians with addictions. This contract required drug screening two times a week for the first six months, and then weekly random testing for up to two years. After two years, drug screening is completely at random, but once a person is called for a test, he must give a urine sample within four hours. In addition, participants must attend at least three weekly twelve-step meetings, such as AA, and must have a physician to monitor their physical well-being, and a different physician sponsor to help them overcome their addiction. Respondent has compiled with the program requirements and is committed to continuing his participation in the PRP and AA.

In late September 1996, the Board issued an order granting Respondent a medical license subject a five-year probationary term beginning on March 8, 1996. Respondent is required to maintain duplicate, serially numbered controlled substance prescriptions and to make them available to the Board upon request. He is prohibited from authorizing any personnel under his supervisor to issue a prescription, and he may not handle any amphetamines, amphetamine-like substances, aneroxic drugs and/or anabolic steroids. During his probation with the Board, Respondent is required to submit biological fluid specimens upon request, and he is prohibited from prescribing, administering or dispensing any medications for personal use. Respondent is further prohibited from taking any medication unless it is authorized by a physician treating him for a legitimate medical need. Finally, he is required to continue his contract with the treatment center in Chicago.

Subsequently, on October 31, 1996, Respondent pled guilty to two counts of

an eleven-count criminal information charging him with obtaining controlled substances by forged or altered prescriptions, with the remaining counts dismissed pursuant to a plea agreement. Respondent received a four-year deferred sentence and as part of the sentence, Respondent agreed to participate in ''drug testing [and] treatment as required by [the] Medical Board,'' and to participate in 120 hours of community service programs with Alcoholics Anonymous and/or the Fellowship of Christian Athletes.

In November 1996, the OBN granted Respondent a state controlled substance license which was also placed on probation for five years, effective March 8, 1996. The OBN license is subject to the same terms as those imposed by the Board on Respondent's medical license.

Respondent cooperated with authorities throughout the investigation and the subsequent criminal and regulatory proceedings. As of the date of the hearing, Respondent has willingly compiled with all of the terms of his probation and his contracts with the PRP and the treatment center. Respondent's urine screens have all been negative, and he has been ''clean'' since March 4, 1996.

Respondent is currently a member of a different group medical practice than he was during his addiction. In this practice, Respondent has supportive relationships with the other partners in the practice. The physicians in this practice attend regular ''accountability meetings'' and the partners are vigilant in monitoring Respondent's behavior. According to Respondent, his stress level is reduced and his job satisfaction is higher, due in part, to his professional support system.

The physician who treated Respondent at the local hospital and is now the medical director of the PRP, testified that a person's active involvement in the recovery process is the best predicator of future performance. Specifically he testified that, ''[a]s long as that person is actively involved in an ongoing recovery process, relapse is seldom.'' According to this physician, the recovery rate for physicians participating in the PRP is approximately 90–95%.

Respondent's wife, the Chief Executive Operating officer of his current practice, and several of his colleagues and friends all testified that if Respondent were to begin abusing controlled substances again, they would recognize the abuse.

At some point during his addiction recovery period, Respondent legitimately ingested narcotics following knee surgery. According to Respondent he had no desire to use additional medication, and he did not relapse as a result of the lawfully prescribed use of this medication.

Respondent's current and potential patients are inconvenienced because Respondent does not have a DEA registration. Patients must wait until another physician is available to prescribe them narcotics to control their pain. Respondent is unable to obtain privileges at a number of hospitals and he cannot participate in many insurance plans without a DEA registration. According to one of the physicians whose name was used by Respondent to forge prescriptions, without a DEA Certificate of Registration, Respondent's ''talents * * * cannot be adequately utilized.''

As Respondent pointed out, the lack of a DEA registration does not affect his ability to abuse controlled substances, if he chooses to do so. Respondent candidly acknowledged that ''[m]y ability to prescribe medicine in no way affects my recovery from addiction in terms of me actually writing a prescription. The way I obtained the medication prior to my treatment was by forgery and I could do that regardless of whether or not I had a DEA number.''

Judge Randall found that Respondent exhibited genuine remorse for his actions and has accepted responsibility for his prior conduct.

Pursuant to 21 U.S.C. 823(f), the Deputy Administrator may deny an application for a DEA Certificate of Registration, if he determines that the registration would be inconsistent with the public interest. Section 823(f) requires that the following factors be considered in determining the public interest:

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

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

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

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

(5) Such other conduct which may threaten the public health and safety. These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight he deems appropriate in determining whether a registration should be revoked or an application for registration denied. *See Henry J. Schwarz, Jr., M.D.,* 54 FR 16422 (1989).

Both parties argue that all five factors are relevant in this case in determining the public interest. The Government contends that Respondent's application should be denied in light of the actions by the Board and OBN; Respondent's forging of controlled substance prescriptions for several years; his conviction of two felonies relating to controlled substances; and his untruthful behavior. Respondent, on the other hand, argues that despite his unlawful conduct, he should be granted a DEA Certificate of Registration. In support of his contention, Respondent points out that he is currently authorized to practice medicine and handle controlled substances in Oklahoma; he did not illegally dispense controlled substances to anyone but himself; his deferred sentence is not considered a conviction under state law; he has complied with applicable laws except regarding his own addition; and those in regular contact with him have indicated that he is not a threat to the public health and safety.

As to factor one, it is undisputed that in March 1996, Respondent voluntarily surrendered his state controlled substance license and his medical license was suspended. However it is also undisputed that in September 1996, the Board reinstated Respondent's medical license and in November 1996, the OBN granted Respondent a license to handle controlled substances. Both of these licenses were granted subject to a five-year probationary period and Respondent is therefore still on probation with the Board and OBN. Although state licensure is a prerequisite for a DEA registration, it is not the only factor to be considered.

Factors two and four, Respondent's experience in dispensing controlled substances and his compliance with laws related to controlled substances, are clearly relevant in determining the public interest in this matter. While it is true that Respondent did not illegally dispense controlled substances to anyone but himself, his conduct was nonetheless egregious. He abused his position as a physician beginning in 1992 or 1993 by taking samples of controlled substances from his medical office for his own personal use. When that was no longer effective, he began forging his medical partners' signatures, and thereby using their DEA registrations, to issue unauthorized prescriptions for his own personal use. There is no question that Respondent violated 21 U.S.C. 843(a)(2) and (a)(3). However, it is also undisputed that Respondent's illegal actions were caused by his addiction to controlled

substances for which he has received extensive treatment.

As to factor three, there is some dispute as to whether Respondent has been convicted of controlled substance related offenses. Respondent pled guilty to two felony charges related to the illegal obtaining of controlled substances, and as a result received a four-year deferred sentence. Respondent argues that this deferred sentence may not be considered a conviction under Oklahoma state law, citing *White* v. *State*, 702 P.2d 1058, 1062 (Okla. Crim. App. 1985). However, DEA has consistently held that a deferred adjudication, following the entry of a guilty plea, is considered a ''conviction'' for purposes of the Controlled Substances Act. *See Yu–To Hsu, M.D.*, 62 FR 12840 (1997), *Harlan J. Borcherding, D.O.*, 60 FR 28796 (1995); *Mukand Lal Arora, M.D.*, 60 FR 4447 (1995); *Clinton D. Nutt, D.O.*, 55 FR 30992 (1990). Thus for purposes of this factor, Respondent has been convicted of two felony counts relating to controlled substances. However, the Deputy Administrator also recognizes that these convictions were a result of Respondent's addiction to controlled substances, and that he is in the midst of successful recovery efforts from this addition. As Judge Randall noted, ''[at]t the present time, the Respondent is halfway through the term of his deferred adjudication and has shown no signs of relapse.''

As to factor five, during his addiction, Respondent lied to his colleagues and family about his drug abuse. The Deputy Administrator agrees with Judge Randall that ''[a]bsent rehabilitation, such behavior supports the Government's position that the Respondent could pose a threat to the public health and safety of the citizens of Oklahoma.''

Judge Randall concluded that the Government made a prima facie case for the denial of Respondent's application for registration. However, she further concluded that it would not be in the public interest to deny the application. The Deputy Administrator agrees. Respondent has accepted responsibility for his prior actions and has shown remorse. He cooperated with law enforcement authorities from the moment he was questioned about the forged prescriptions. He is no longer affiliated with the medical practice that caused the stress which led to his addiction. He has taken affirmative steps toward rehabilitation and is being closely monitored by the Board, the OBN, the PRP, the treatment center, his family and his colleagues. As Judge Randall noted. ''the Respondent lives and works in a community dedicated to his recovery and personal growth. This external support system ensures to a high probability that the Respondent will remain free of narcotic and alcoholic substances.'' Of even greater significance to the Deputy Administrator than this external support system is Respondent's apparent commitment to continuing with his rehabilitative efforts and to living a drug-free life.

Judge Randall recommended that Respondent be granted a DEA registration without restrictions since ''[t]he State of Oklahoma and the OBN have implemented substantial and aggressive monitoring procedures to ensure that the Respondent continues to comply with his licensing conditions and to ensure that any possible relapse is immediately detected.'' Judge Randall further recommended that should the deputy Administrator find that additional monitoring by DEA is necessary, Respondent should be required to file with DEA duplicate copies of the documents being filed with the State of Oklahoma.

The Deputy Administrator agrees with Judge Randall that denial of Respondent's application is not warranted. However, the Deputy Administrator believes that some restrictions on Respondent's registration are necessary to protect the public health and safety in light of Respondent's fairly recent abuse of controlled substances, his forging of prescriptions and his felony convictions.

Therefore, the Deputy Administrator concludes that Respondent's application for registration should granted subject to the following restrictions for three years from the date of issuance of the DEA Certificate of Registration:

1. Respondent must maintain his contractual relationship with the Oklahoma Physicians Recovery Program and abide by its recommendations.

2. Respondent shall continue to undergo random urinalysis at his own expense on at least a monthly basis regardless of whether he is released from his probation with the Oklahoma Board and the OBN. He shall forward copies of the results of these tests to the DEA Oklahoma City office.

3. Respondent shall make copies of his prescriptions available to DEA personnel upon request for inspection and copying.

4. Respondent shall notify the DEA Oklahoma City office within 30 days of any change in his employment.

5. Respondent shall consent to periodic inspections by DEA personnel based on a Notice of Inspection rather than an Administrative Inspection Warrant.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that the November 20, 1996 application for registration submitted by Jimmy Harold Conway, Jr., M.D., be, and it hereby is, granted subject to the above described restrictions. This order is effective upon the issuance of the DEA Certificate of Registration, but no later than July 16, 1999.

Dated: June 7, 1999.

Donnie R. Marshall,

Deputy Administrator.

[FR Doc. 99–15189 Filed 6–15–99; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–34,985 and TA–W–34,985A]

Bernstein & Sons Shirt Corp., UTICA, MS, and Crystal Springs, MS; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade At of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on November 9, 1998, applicable to all workers of Bernstein & Sons Shirt Corporation, Utica, Mississippi. The notice was published in the **Federal Register** on December 4, 1998 (63 FR 16140).

At the request of the company, the Department reviewed the certification for workers of the subject firm. New information shows that worker separations occurred at Bernstein & Sons' Crystal Springs, Mississippi facility. The workers are engaged in employment related to the production of men's and women's sport shirts.

Accordingly, the Department is amending the certification to cover workers of Bernstein & Sons Shirt Corporation, Crystal Springs, Mississippi.

The intent of the Department's certification is to include all workers of Bernstein & Sons Shirt Corporation adversely affected by increased imports.

The amended notice applicable to TA–W–34,985 is hereby issued as follows: