DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR912000–L63100000.DD0000]

Notice of Reestablishment of the Secure Rural Schools Resource Advisory Committees

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This notice is published in accordance with Section 9(a)(2) of the Federal Advisory Committee Act of 1972. Notice is hereby given that the Secretary of the Interior (Secretary) has reestablished the Bureau of Land Management's Secure Rural Schools Resource Advisory Committees.

FOR FURTHER INFORMATION CONTACT: Allison Sandoval, Legislative Affairs and Correspondence (600), Bureau of Land Management, 1620 L Street, NW., MS–LS–401, Washington, DC 20036, telephone (202) 912–7434.

SUPPLEMENTARY INFORMATION: The purpose of the Committees is to provide recommendations to the Secretary for project funding, as required by the Secure Rural Schools and Community Self-Determination Act of 2000, Public Law 106–393, as amended by Public Law 110–343, Title VI (2008).

Certification Statement

I hereby certify that the reestablishment of the Secure Rural Schools Resource Advisory Committees is necessary and in the public interest in connection with the Secretary of the Interior's responsibilities to manage the lands, resources, and facilities administered by the Bureau of Land Management.

Dated: January 21, 2010.

Ken Salazar,

Secretary of the Interior.

[FR Doc. 2010–1624 Filed 1–26–10; 8:45 am]

BILLING CODE 4310–33–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–677]

In the Matter of: Certain Course Management System Software Products; Notice of Commission Determination Not To Review an Initial Determination Terminating the Investigation on the Basis of a Settlement Agreement

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination ("ID") (Order No. 6) terminating the investigation of the basis of a settlement agreement.

FOR FURTHER INFORMATION CONTACT: James A. Worth, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3065. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: This investigation was instituted on June 9, 2009, based upon a complaint filed on behalf of Blackboard Inc. of Washington, DC ("Blackboard") on April 17, 2009, and supplemented on May 6 and May 14, 2009. 74 FR 27345 (June 9, 2009). The complaint alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain course management system software products that infringe certain claims of United States Patent No. 6,988,138. The notice of investigation named Desire2Learn, Inc. of Ontario, Canada ("D2L") as respondent.

On December 17, 2009, Blackboard and D2L filed a joint motion pursuant to Commission Rule 210.21(b) to terminate the investigation based upon a settlement agreement. On December 24, 2009, the Commission investigative attorney filed a response in support of the motion. On December 28, 2009, the ALJ issued Order No. 6, granting the motion. No petitions for review were filed.

The Commission has determined not to review the subject ID.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of section 210.42(h) of the Commission's Rules of Practice and Procedure (19 CFR 210.42(h)).

By order of the Commission.

Issued: January 21, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–1489 Filed 1–26–10; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 07–47]

Mr. Checkout North Texas; Admonition of Registrant

On August 14, 2007, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA or "the Government"), issued an Order to Show Cause to Mr. Checkout North Texas (Respondent), of Grand Prairie, Texas. The Order to Show Cause proposed the revocation of Respondent's DEA Certificate of Registration as a distributor of list I chemicals on the ground that its continued registration was "inconsistent with the public interest, as that term is used in 21 U.S.C. 823(h)." Show Cause Order at 1.

The Show Cause Order specifically alleged that Respondent was distributing certain list I chemical products containing pseudoephedrine and ephedrine, which are precursor chemicals used in the illicit manufacture of methamphetamine, a schedule II controlled substance, to convenience stores and truck stops, and that these stores traditionally sell only very small quantities of non-prescriptions drugs. *Id.* at 2. The Order further alleged that the specific list I chemical products Respondent distributes "are rarely found in any retail store serving the traditional therapeutic market," and have "a history of being diverted into the illicit production of methamphetamine." *Id.* The Order thus alleged that Respondent "continues to be primarily involved in the list I chemical business and is continuing to sell these products with high diversion potential to retailers who have minimal expectation of sales of products of these kinds." *Id.* at 3. Finally, the Order alleged that Respondent "has been involved in the distribution of listed chemical products out of an unregistered location in violation of the registration requirements of 21 U.S.C. 822." *Id.* at 2.

On September 17, 2007, Respondent timely requested a hearing on the allegations and the matter was placed

on the docket of the Agency's Administrative Law Judges (ALJ). Thereafter, on February 5, 2008, a hearing was held in Dallas, Texas. ALJ Ex. 2; ALJ at 4. At the hearing, both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties filed briefs.

On June 10, 2009, the ALJ issued her recommended decision (ALJ). Therein, the ALJ concluded that the Government had failed to show that Respondent's continued registration is inconsistent with the public interest. ALJ at 36. As to the first factor—the maintenance of effective controls against diversion—the ALJ noted that, during an inspection in April 2006, Respondent's owner, Mr. Thomas Naulty, told an Agency Diversion Investigator (DI) "that he had stored and distributed some listed chemical products from another storage facility"; however, when the DI advised Mr. Naulty that such distribution constituted a violation of DEA regulations, he "took corrective action by moving the listed chemical products to the approved storage facility and inform[ed the DI] of this later that same day." *Id.* at 26.

Because the record contained "no evidence of inadequate recordkeeping" or "evidence that the Respondent sold controlled substances [1] over the regulatory threshold amounts," the ALJ concluded that "Mr. Naulty's immediate response" to the DI's notification that Respondent was violating the regulations "demonstrates the Respondent's commitment to compliance." *Id.* at 27. The ALJ thus concluded that this factor supports Respondent's continued registration. *Id.*

As to the second and fourth factors—Respondent's compliance with applicable laws and its past experience in the distribution of listed chemicals—the ALJ again noted that Mr. Naulty had taken prompt corrective action upon being told that Respondent was violating DEA regulations by distributing from the unregistered location. *Id.* The ALJ also found significant that "Respondent's owners personally deliver the listed chemical products to its customers" and "require their listed chemical customers to comply with the sales limits of the [Combat Methamphetamine Epidemic Act]." *Id.* at 27–28. Based on "Respondent's sincere commitment to compliance over a 10 year time period," the ALJ concluded that the evidence "heavily weighs in favor of continuing Respondent's DEA registration." *Id.* at 28.

As to factor three—Respondent's record of convictions under Federal or State laws relating to controlled substances or listed chemicals—the ALJ observed that the record contained no evidence of such convictions by either Mr. Naulty or his son, Mr. Anthony Naulty, owner of Mr. Checkout & Son, a subsidiary of Respondent. *Id.* at 5, 28. The ALJ also noted that the record contained no evidence that any of "Respondent's customers had been convicted of a crime related to the handling of listed chemical products or methamphetamine." *Id.* at 28.

Finally, as to factor five—other factors that are relevant to and consistent with the public health and safety—the ALJ noted that "[i]n the past, the DEA has revoked the registrations of listed chemical product distributors because it found the listed chemical products had been sold in quantities that exceeded the amount that could be expected to be sold to customers with legitimate need for such products." *Id.* (citations omitted). The ALJ then reasoned that "[i]mplicit in this issue * * * is the necessity for the Government to establish an expected monthly sales amount—the quantity consistent with 'legitimate demand'— that can be compared against the Respondent's actual sales." *Id.* at 29 (citation omitted). While noting that in past cases, "the Government attempted to establish this baseline by entering the declarations of its expert witness, Jonathan Robbin," the ALJ observed that "[m]ore recently * * * the validity of Mr. Robbin's methodology and the applicability of the underlying data he uses have been sharply called into question," and that I "ha[ve] declined to rely on [his] figures in reaching her decisions." *Id.* at 29–30 (citing *Novelty Distributors, Inc.,* 73 FR 52589, 52693–95 (2008); *Gregg & Son Distributors,* 74 FR 17517, 17519–20 (2009); *Sunny Wholesale, Inc.,* 73 FR 57655, 57658–59 (2008)).

Accordingly, although Respondent did not challenge the statistical evidence contained in the affidavit which the Government entered into evidence, the ALJ concluded that she could not "simply close [her] eyes to the reduced credibility of Mr. Robbins methods and analysis." *Id.* at 30–31. Based on the decisions cited above, as well as because "Mr. Robbin's analysis was clearly not tailored to this Respondent," the ALJ concluded that the Government had not "established by a preponderance of the evidence that these figures accurately represent[ed] the average dollar amount of expected sales." *Id.* at 31.

The ALJ further noted that the Government did not establish Respondent's own average monthly sale, per customer, of listed chemical products. *Id.* Because there was no "baseline average sales figure to compare" Respondent's sales to, the ALJ concluded that the Government had failed to prove by a preponderance of the evidence that "this Respondent sold listed chemical products in such excessive quantities" as to support the inference that the products were being diverted into the illicit manufacture of methamphetamine. *Id.* at 33.

The ALJ also noted that the evidence showed that "at one time, the Respondent distributed a rose in a glass container," and that "[c]redible evidence establishes that the packaging of this product is sometimes used as drug paraphernalia." *Id.* The ALJ further remarked that "the record contains no evidence that the roses sold by the Respondent were ever sold at retail in conjunction with other products that would lead the seller of the roses to believe this product would be used as drug paraphernalia," that "there are no regulations or other guidance provided by DEA * * * to indicate that the Respondent was on notice of the potential misuse of this product," and that "there is no evidence that Respondent had any actual knowledge of such potential misuse of the product." *Id.* at 33. The ALJ thus found that "the evidence relevant to the fifth factor does not lead to the conclusion that this Respondent's DEA registration should be revoked." *Id.* at 33–34.

Having found that "the Government has failed to prove by a preponderance of the evidence that the Respondent engaged in excessive sales or created a serious risk of diversion," the ALJ ultimately found that "the evidence in this case supports a conclusion that the continued registration of the Respondent would not be inconsistent with the public interest." *Id.* at 36. Accordingly, she recommended that "the Respondent's DEA registration should be continued and its renewal application should be granted without restrictions." *Id.*

Neither party filed exceptions to the ALJ's Decision. On July 29, 2009, the ALJ forwarded the matter to me for final agency action.

Having reviewed the record in its entirety, I adopt the ALJ's conclusion that the Government did not prove by a preponderance of the evidence that Respondent engaged in sales in excess of legitimate demand or otherwise has failed to maintain effective controls against diversion. I also agree with the ALJ's conclusion that Respondent

[1] The Respondent's registration does not entitle him to distribute controlled substances, but rather only listed chemicals. I presume that the ALJ meant the latter.

violated Federal law by distributing from an unregistered location, but that because Respondent immediately discontinued this practice upon learning that it was a violation, this conduct does not warrant the revocation of its registration. Finally, I agree with the ALJ's conclusion that the Government has not established that Respondent violated the drug paraphernalia statute (21 U.S.C. 863) when it sold glass roses. I therefore also adopt her conclusion that Respondent's continued registration is not inconsistent with the public interest. However, based on Respondent's conduct in distributing from an unregistered location, I conclude that it should be admonished. I make the following findings of fact.

Findings

Respondent, which is owned by Mr. Thomas Naulty as a sole proprietorship, is a wholesale distributor of various products including non-prescription drug products, as well as sunglasses, ball caps, candies, batteries, condoms "and whatever you can find around the checkout area of a convenience store." Tr. 105–06. Among the non-prescription drugs distributed by Respondent are products which contain the list I chemicals pseudoephedrine and ephedrine. GX 29. Respondent distributes list I chemical products to convenience stores, gas stations, and similar establishments in the Dallas, Texas metropolitan area. *Id.* at 63; GX 31.

Both pseudoephedrine and ephedrine have FDA-approved therapeutic uses. Ephedrine is lawfully marketed under the Food, Drug and Cosmetic Act for over-the-counter use as a bronchodilator to treat asthma, and pseudoephedrine is lawfully marketed for over-the-counter use as a decongestant. *See* GX 15, at 3–4. Both substances are, however, regulated as list I chemicals under the Controlled Substances Act because they are precursor chemicals which are easily extracted from over-the-counter drug products and frequently diverted into the illicit manufacture of methamphetamine, a schedule II controlled substance. See 21 U.S.C. 802(34); *id.* 812(c); 21 CFR 1308.12(d). *See also* GX 15, at 8.

Respondent has held a DEA registration to distribute list I chemicals since November 1997. GX 1. While the expiration date of its most recent registration certificate is January 31, 2007, on January 5, 2007, Respondent submitted a renewal application. GX 1; Tr. 65. Accordingly, I find that Respondent's registration has remained in effect pending the issuance of this Decision and Final Order.[2] *See* 5 U.S.C. 558(c).

Mr. Anthony Naulty is Thomas Naulty's son. *Id.* at 4. Anthony Naulty is the owner of Mr. Checkout & Sons, which, pursuant to a partnership agreement executed in October 2005 and still in effect on the date of the hearing, was a subsidiary of Respondent. *Id.* at 112; RX 12. Under the agreement, Thomas Naulty handles the responsibilities of maintaining inventory and setting distribution schedules for Respondent and Mr. Checkout & Sons; Anthony Naulty manages sales, physical distribution, and the accounts receivable for both businesses. RX 12. Anthony Naulty planned to take over Respondent upon Thomas Naulty's retirement and so applied for his own registration. Tr. 48. Sometime in 2007, Anthony Naulty was served with an Order to Show Cause which proposed the denial of his application; he then withdrew his application. *Id.* at 55. However, the record does not disclose the basis of the Agency's decision to deny the application.

The 2006 Inspection

In April 2006, two DEA Diversion Investigators (DIs) visited Respondent to conduct a cyclic investigation.[3] *Id.* at 61. The DIs went to Respondent's registered location, which is Mr. Naulty's residence in Grand Prairie, Texas, and reviewed its recordkeeping, security, and business practices. *Id.* at 61–62. The DIs determined, however, that Respondent stores its listed chemical products in a unit of a storage facility located at 3150 East Pioneer Parkway, Arlington, Texas, some five or six miles from its registered location.[4] *Id.* at 61–62, 102, 111–12.

The DIs also determined that Respondent was storing listed chemicals in a second storage unit located in McKinney, Texas, which is an estimated 40 miles from Respondent's registered location. *Id.* at 62–64. According to Mr. Naulty, his son was distributing listed chemicals from this storage unit. *Id.* at 116. However, upon being informed by the DIs that this was a violation of DEA regulations (because the products were not being returned to the registered location prior to being distributed), Respondent immediately ceased doing so. *Id.* at 63 & 116; *see also* 21 CFR 1309.23(b)(1).

The DIs also determined that Respondent distributed Max Brand, a pseudoephedrine product, as well as seven ephedrine products including Mini-Thin, Twin Tabs, Mini-Two Way, and Rapid Action. Tr. 74; GX 25. The DI testified that none of the eight products were available at chain pharmacies or supermarkets, which are considered to be the "traditional" market where consumers purchase over-the-counter drugs containing list I chemicals to treat cough, cold, and asthma.[5] Tr. 75. Moreover, other evidence in the record shows that at least two of the products distributed by Respondent (Max Brand and Mini-Two Way) have been found in numerous seizures conducted by law enforcement.[6] *See* GXs 2 & 3.

During the inspection, Mr. Naulty provided the DIs with Respondent's

[2] Respondent also holds a State of Texas permit as a Wholesale Distributor of Drugs. GX 30; RX 11; *see also* Tr. 105–06.

[3] DEA Investigators had previously inspected Respondent prior to granting its initial registration, as well as in 2001. Tr. 37–38, 89–90, 93.

[4] At the hearing, an Agency Diversion Investigator (DI) testified that under DEA regulations, the use of such a storage facility is permissible and expected for small, independent registrants like Respondent. *Id.* at 90. Apparently, the DI had not read any of the Agency decisions which have held that the use of public storage units to store listed chemicals does not provide an acceptable level of security. *See Stephen J. Heldman,* 72 FR 4032, 4034 (2007); *Sujak Distributors,* 71 FR 50102, 50104 (2006).

The ALJ credited the DI's testimony "that, pursuant to DEA regulations, the Respondent is required to move the listed chemical products to the registered location before distributing them." ALJ at 10; *see also* Tr. 62, 83, 90; *see also* 21 CFR 1309.23(b)(1).

[5] According to a Diversion Investigator, DEA considers the "traditional" market for cough, asthma and cold remedies containing list I chemicals to include large chain grocery stores, nationally recognized pharmacy chains, larger convenience stores (*e.g.,* 7–11), and large retail stores (*e.g.,* Wal-Mart). GX 16, at 5. It considers the "non-traditional," or "gray," market for these products to include smaller-chain and non-chain convenience stores and other smaller retail establishments "where consumers would not normally purchase over the counter medications." *Id.* at 6. Such "non-traditional" outlets typically carry listed chemical products in higher strengths and packaged in bottles or blister packs in larger quantities. *Id.* Convenience store sales of such products are a major source of the ephedrine and pseudoephedrine used in the illicit manufacture of methamphetamine. Tr. 19; GX 16, at 8–9.

According to a DEA Special Agent, methamphetamine traffickers use people who engage in a practice known as "smurfing." GX 16, at 6; Tr. 18. This practice involves going to multiple stores and buying the maximum number of packages possible of ephedrine and/or pseudoephedrine at each store. Tr. 18. Smurfers typically avoid larger retail stores such as "Target or Wal-Mart," because such chains have loss-prevention personnel dedicated to detecting shoplifting and suspicious buying practices. *Id.* at 18–19. As a result, smurfers target convenience stores and gas stations, which generally lack these security practices; these stores have thus become a large and consistent source of precursor chemicals for the illicit manufacturers of methamphetamine. *Id.* at 19.

[6] At the time of the hearing in February 2008, Respondent carried one pseudoephedrine product and two ephedrine products, Mini-Thin and BronchEase. Tr. 103–05. The ALJ found that Thomas Naulty "credibly testified the Respondent would cease handling the pseudoephedrine product" in mid-2008. ALJ at 7; *see also* Tr. 104.

customer list for list I chemical products; the list contained contact information for 49 businesses and was comprised of convenience stores, small markets, and gas stations. Tr. 93–94; GX 31. Thomas Naulty indicated that Respondent made deliveries to customers approximately once every two weeks. Tr. 84, 122. According to Thomas Naulty's testimony, his customers generally buy three to four dozen packages of list I chemical products at a time. *Id.* at 122. Mr. Naulty further indicated that, of those stores that sell both ephedrine and pseudoephedrine products, "one [product] outsells the other, so they buy minimally and averagely" such that if a customer purchased four dozen of one type of product, it would purchase only one dozen of the other type. *Id.* at 122–23.

During the inspection, Thomas Naulty told the DI that list I chemical product sales constituted approximately 20 percent of his overall dollar sales. *Id.* at 88. Moreover, at the hearing, Thomas Naulty testified that list I chemical products constituted approximately 23 percent of his total dollar sales and thus represented the inventory item which generated the largest sales volume. *Id.* at 104, 118–20.

During the inspection, the DI reviewed Respondent's purchase and sales invoices for the seven months prior to April 10, 2006. *Id.* at 84. To show some of Respondent's purchases and sales of list I chemical products, the Government entered into evidence two purchase invoices from December 2005, one sales invoice from March 2006, and one sales invoice from April 2006. *See* GXs 32 & 33. However, the DI only made copies of the two sales invoices which were entered into evidence. Tr. 84–85.

One of the sales invoices shows that a customer purchased 120 bottles of 36-count Max Brand pseudoephedrine (60-mg. strength) for $288 as well as twelve 48-count blister packs of Mini Thin ephedrine for $36. GX 33, at 2; *see also* Tr. 74–76, 78–80. In testimony, the DI asserted that, from the invoices he had reviewed, while some stores might receive a delivery of half a case (72 bottles); no store received a full case (144 bottles). *Id.* at 85.

The DIs did not, however, prepare a compilation of the sales invoices they reviewed. Nor did the Government produce any other evidence to show what Respondent's average monthly sale of list I products was to its various customers.[7]

Moreover, the Government apparently did not conduct an audit of Respondent's handling of list I products and produced no evidence showing that Respondent had violated any provisions of the CSA or Agency regulations or that its recordkeeping was inadequate. At the conclusion of the inspection, the DIs informed Thomas Naulty that they had found no violations of DEA regulations.[8] *Id.* at 98–99.

After the inspection, one of the DIs conducted customer verifications at the two stores whose sales invoices he had copied. *Id.* at 87. The customers verified that they had purchased and received the quantities listed in the invoices. *Id.*

At the time of the hearing, Respondent distributed list I chemical products to twenty-four customers, all of whom had self-certified as required by the Combat Methamphetamine Epidemic Act ("CMEA"). *Id.* at 127–28; RX 7. Respondent also required that its customers enter into a written stipulation that they cannot purchase only list I chemical products. Tr. 129.

At its own expense, Respondent provided its list I chemical product customers with logbooks outlining the sales restrictions of the CMEA. *Id.* at 105. Thomas Naulty further indicated his belief that Respondent's customers were satisfying the statutory requirements for the logbook. *Id.* at 129–30. As the ALJ further found, there is "no evidence that any of the stores that purchase listed chemical products from the Respondent have failed to abide by the self-certification requirements, the behind-the-counter placement requirements, the regulated transaction limits, or any other provisions of the CMEA or the Texas methamphetamine precursor legislation." ALJ at 7.

At the hearing, the Government also pointed to a sales invoice, which showed that on April 3, 2006, Respondent sold 72 glass roses to a store in Arlington, Texas. GX 33, at 2. Government Counsel then asked the DI if he knew "what a glass rose is?" Tr. 79. The DI replied: "Not particularly. I've heard it's also used in clan[destine methamphetamine] labs." *Id.* However, the DI did not know what this item is specifically used for. *Id.* Moreover, on cross-examination, the Government did not ask Mr. Naulty any questions regarding his sales of glass roses.

The record contains no evidence that Respondent or Thomas or Anthony Naulty has been convicted of a State or Federal crime related to the use or distribution of controlled substances or listed chemical products. *See also* ALJ at 9. Similarly, the record contains no evidence that any of Respondent's customers or individuals related to those businesses has been convicted of a crime involving the manufacture, distribution or use of methamphetamine. *See also id.* Finally, the record contains no evidence that any of the listed chemical products actually distributed by Respondent has been discovered in a methamphetamine laboratory. *See also id.*

Finally, the ALJ found that Thomas Naulty "credibly testified that he is committed to handling listed chemical products in a manner that would prevent them from being diverted into illegitimate channels." ALJ at 19 (citing Tr. 106). She also found that he "credibly testified that his company 'will continue to follow the DEA rules and regulations as we have in the past. Whatever compliance is necessary, we will do.'" *Id.* (citing Tr. 107–08).

Discussion

Section 304(a) of the Controlled Substances Act (CSA) provides that a registration to distribute a list I chemical "may be suspended or revoked * * * upon a finding that the registrant * * * has committed such acts as would render [its] registration under section 823 of this title inconsistent with the public interest as determined under such section." 21 U.S.C. 824(a)(4). Moreover, under section 303(h), "[t]he Attorney General shall register an applicant to distribute a list I chemical unless the Attorney General determines that registration of the applicant is inconsistent with the public interest." *Id.* § 823(h). In making the public interest determination, Congress

[7] The Government also introduced into evidence a declaration prepared by an expert in statistical analysis of "demographic, economic, geographic, survey and sales data." GX 25 (affidavit of Jonathan Robbin, President of Ricercar, Inc). Therein, the Government's Expert opined that "the expected sale of ephedrine (Hcl) tablets in a convenience store ranges between $0 and $25, with an average of $12.58," and that "[a] monthly retail sale * * * of $60 of ephedrine (Hcl) tablets would be expected to occur about once in a million times in random sampling." *Id.* at 7–8.

In her discussion of this evidence, the ALJ noted that in several cases, the Expert's "methodology and the applicability of the underlying data he uses have been sharply called into question," and that more recently, I had "declined to rely on [Robbin's] figures in reaching her decisions." ALJ at 30 (citing *Novelty Distributors, Inc.,* 73 FR 52689, 52693–95 (2008)). For this reason, as well as because the Expert "analysis was clearly not tailored to this Respondent," the ALJ declined "to rely on his figures." *Id.* at 31.

As the Expert's affidavit indicates that he used the same methodology which I found wanting in *Novelty,* I am again compelled to reject this evidence as not probative of either the average expected sales levels of these products to meet legitimate demand at convenience stores, or of the probability of various sales levels occurring in normal commerce. I therefore do not make any findings regarding these issues.

[8] Of course, the DIs had found a violation because Respondent had distributed products through the McKinney, Texas storage unit.

directed that the following factors be considered:

(1) maintenance by the [registrant] of effective controls against diversion of listed chemicals into other than legitimate channels;

(2) compliance by the [registrant] with applicable Federal, State, and local law;

(3) any prior conviction record of the [registrant] under Federal or State laws relating to controlled substances or to chemicals controlled under Federal or State law;

(4) any past experience of the [registrant] in the manufacture and distribution of chemicals; and

(5) such other factors as are relevant to and consistent with the public health and safety.

Id.

"These factors are considered in the disjunctive." *Gregg & Son Distributors,* 74 FR at 17520; *see also Joy's Ideas,* 70 FR 33195, 33197 (2005). I may rely on any one or a combination of factors, and I may give each factor the weight I deem appropriate in determining whether to revoke an existing registration or to deny an application for renewal of a registration. *Gregg & Son,* 74 FR at 17520; *Jacqueline Lee Pierson Energy Outlet,* 64 FR 14269, 14271 (1999). Moreover, I am not required to make findings as to all of the factors. *Volkman* v. *DEA,* 567 F.3d 215, 222 (6th Cir. 2009); *Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005).

The Government bears the burden of proof. 21 CFR 1309.54. Having considered all of the factors, I conclude that while the Government has proved a single violation of Federal law, the evidence does not support the conclusion that Respondent's continued registration is inconsistent with the public interest.

During the hearing, the Government appeared to raise three principal allegations: (1) That Respondent was selling excessive quantities of listed chemical products to non-traditional retailers, (2) that Respondent sold an item which is used as drug paraphernalia, and (3) that Respondent distributed products directly from a storage facility which was located forty miles from its registered location without first returning them to its registered location. The first two allegations require no more than token discussion because they fail for lack of substantial evidence. While the third allegation was proved, Respondent quickly corrected the violation.

As for the first allegation, having previously found that the Government Expert's methodology is unreliable and it being apparent that the expert's affidavit relies on the same methodology, once again I conclude that his findings as to both the monthly expected sales range and the statistical improbability of certain sales levels of listed chemical products in legitimate commerce at convenience stores are not supported by substantial evidence. *See Novelty Distributors,* 73 FR at 52693–94; *see also CBS Wholesale Distributors,* 74 FR 36746, 36748 (2009); *Gregg & Son,* 74 FR at 17520. While this provides reason alone to find the allegation unproven, the deficiency in the Government's case is compounded by its failure to show what Respondent's average monthly sales were to its various customers. The allegation is therefore rejected.

The Government also failed to prove that Respondent violated Federal law by selling drug paraphernalia. *See* 21 U.S.C. 863. While I have now held in several cases that glass roses constitute drug paraphernalia, *see, e.g., Gregg & Son,* 74 FR at 17521, the Supreme Court has held that the statute imposes a scienter requirement. *See Posters 'N' Things, Ltd.* v. *United States,* 511 U.S. 513, 524 (1994). ("It is sufficient that the defendant be aware that customers in general are likely to use the merchandise with drugs. Therefore, the Government must establish that the defendant knew that the items at issue are likely to be used with illegal drugs.") (citing *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 444 (1978) ("knowledge of 'probable consequences' sufficient for conviction")).

The Government produced absolutely no evidence that Mr. Naulty was aware that the glass roses' likely use is as drug paraphernalia. Nor did it even pose this obvious question to Mr. Naulty when it cross-examined him. The allegation therefore also fails for lack of substantial evidence.

The only allegation that was proved was that Respondent distributed list I chemical products directly from a storage facility which was not a registered location (and which was located approximately forty miles from its registered location). Under Federal law, "[a] separate registration is required for each principal place of business at one general physical location where List I chemicals are distributed * * * by a person." 21 CFR 1309.23(a). However, a registration is not required for "[a] warehouse where List I chemicals are stored by or on behalf of a registered person, unless such chemicals are distributed directly from such warehouse to locations other than the registered location from which the chemicals were originally delivered." *Id.* § 1309.23(b)(1).

Respondent did not dispute that it distributed list I chemicals from its McKinney storage unit without first returning them to its registered location. In doing so, Respondent violated Federal law. 21 U.S.C. 843(a)(9) ("It shall be unlawful for any person knowingly or intentionally * * * to distribute * * * a list I chemical without registration required by this subchapter[.]"). However, the Government did not establish the extent of the violations and Mr. Naulty immediately ceased doing so upon being told by the DIs that this was a violation. The Government's evidence therefore does not establish that Respondent's continued registration is inconsistent with the public interest. Respondent's violation does, however, warrant an admonition, which shall be made a part of Respondent's record.[9]

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(h) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I hereby order that Mr. Checkout North Texas, be, and it hereby is, admonished. I further order that the application of Mr. Checkout North Texas for renewal of its DEA Certificate of Registration be, and it hereby is, granted. This order is effective immediately.

Dated: January 18, 2010.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 2010–1634 Filed 1–26–10; 8:45 am]

BILLING CODE 4410–09–P

[9] As found above, Respondent is currently using a rental storage unit to store list I products. In several cases, DEA has held that the use of such units does not provide adequate security. More specifically, I have noted a number of "security concerns which are raised by these facilities including the inadequacy of their construction, the lack of alarm systems, the lack of 24 hour on-site monitoring, the ability of unauthorized persons to gain access to the facility and the storage units, and the fact that the tenant does not control what other tenants the landlord rents to." *Novelty Distributors,* 73 FR at 52698; *see also Heldman,* 72 FR at 4034; *Sujak Distributors,* 71 FR at 50104.

While it seems unlikely that Respondent's storage unit provides adequate security, the Government did not raise this as an issue at any time in this proceeding. Consistent with the Due Process Clause and Administrative Procedure Act, because Respondent has had no opportunity to contest whether his storage unit provides adequate security, I do not consider the issue. *See CBS Wholesale,* 74 FR at 36749–50.

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to The National Cooperative Research and Production Act of 1993—Cooperative Research Group on Clean Diesel V

Notice is hereby given that, on December 10, 2009, pursuant to Section