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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 UNITED STATES OF AMERICA,

7 Plaintiff,

8 v.

9 BARTON BUTTERBAUGH,

10 Defendants.

C14-515 TSZ

ORDER

11 THIS MATTER comes before the Court on a motion for summary judgment,
12 docket no. 20, brought by plaintiff United States of America (the “Government”). In this
13 action, the Government seeks a substantial civil penalty from defendant Barton
14 Butterbaugh, M.D. for prescribing controlled substances to individuals in Washington
15 without first obtaining from the Drug Enforcement Administration (“DEA”) a registration
16 for Washington. Having reviewed all papers filed in support of, and in opposition to, the
17 Government’s motion,¹ including the supplemental briefs submitted upon the Court’s
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20 ¹ Butterbaugh moved to strike portions of the Government’s reply and the materials submitted with it.
21 *See* Surreply (docket no. 29). The motion to strike was DENIED, *see* Minute Order (docket no. 31), for
22 the following reasons. First, the Government’s discussion concerning the different versions of 21 C.F.R.
23 § 1301.12(b)(3) addressed an issue raised by Butterbaugh in his response to the motion for summary
judgment, which is an appropriate use of a reply. Second, the DEA website, which articulates the
agency’s current policy concerning *locum tenens*, is publicly available; it is not “new evidence” about
which Butterbaugh lacked constructive notice before the Government filed its reply. Butterbaugh has

1 request, and having considered the oral arguments of counsel during the hearing held on
2 July 23, 2015, the Court enters the following order.

3 **Background**

4 Butterbaugh resides in Arizona. Butterbaugh Aff. at ¶ 1 (docket no. 25-2). He is
5 licensed to practice medicine in Arizona and Washington, and he has a DEA registration
6 for Arizona. Compl. at ¶¶ 3-4 (docket no. 1). He does not have a DEA registration for
7 Washington. *Id.* at ¶ 4; Butterbaugh Aff. at ¶ 18. During the period from October 2010
8 to November 2012, Butterbaugh treated individuals in Washington who were patients of
9 eClinicMD, a Florida-based company. Butterbaugh Aff. at ¶¶ 8, 17, & 23. According to
10 Butterbaugh, in August 2010, the physician employed by eClinicMD to service patients
11 in Washington “suddenly moved” to California, leaving approximately 80 individuals
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13 now had an opportunity to respond to the Government’s allegedly late submission, and the Court has
14 considered his argument that the obscurity of the relevant page of the DEA website, evidenced by the
15 Government’s failure to cite to it in the opening brief, undermines the Government’s position that
16 Butterbaugh should have known about and heeded the advice on the website. Third, the travel records
17 that the Government provided with its reply need not be stricken because they do not assist the
18 Government. The flight information does not support any assertion that Butterbaugh misrepresented the
19 frequency of his visits to Seattle, *compare* Butterbaugh Aff. at ¶ 20 (docket no. 25-2) *with* Ex. A to
20 Zennan Decl. (docket no. 28-1), but rather contradicts the statement in the Government’s motion that,
21 between 2010 and 2012, Butterbaugh “traveled to Washington from Arizona approximately once per
22 month,” Mtn. at 1 (docket no. 20). Finally, the excerpt from Butterbaugh’s deposition in a case for which
23 he served as an expert witness likewise need not be stricken because it does not serve the Government’s
purpose of impeaching him. In the 1999 deposition, Butterbaugh explained that two individuals had
made complaints against him to the Arizona Board of Medical Examiners; the first was a patient who
claimed he had missed a tubal ovarian problem, but no lawsuit was ever filed, and the second was a
woman who falsely alleged a romantic relationship in retaliation for his noting on a form that she was on
psychotropic medication, which prevented her from getting a job at a hospital. Butterbaugh Dep. at 20-
22, *Carmack v. Hoelscher*, D. Okla. Case No. CJ-97-7074-67, 1999 Depo. Trans. LEXIS 7250, Ex. B to
Fogg Decl. (docket no. 27-2 at 4-5). Neither of these complaints contradicts Butterbaugh’s representation
that, until now, he had never been “accused of an administrative licensing infraction by any medical board
and/or the Federal Governmental regulating agencies” and had “never been cited by a State Board of
Pharmacy or the DEA.” Butterbaugh Aff. at ¶ 3 (docket no. 25-2).

1 without a treatment provider. *Id.* at ¶ 17. Butterbaugh agreed to “fill in” until eClinicMD
2 hired a permanent local physician. *Id.*

3 Over the course of the 25 months at issue, Butterbaugh made several trips to
4 Seattle to see patients, and he consulted with patients in Washington via telephone from
5 his office in Arizona. *Id.* at ¶¶ 20-21. He estimates that approximately 85-90% of the
6 refills for his Washington patients were authorized from his Arizona office. *Id.* at ¶ 21.
7 Butterbaugh also states that over 60% of the medications he prescribed during the period
8 at issue for individuals in Washington were not controlled substances. *See id.* & Ex. I to
9 Resp. (docket no. 25-1 at 26). According to data compiled by Washington’s Prescription
10 Monitoring Program, Butterbaugh has written over 1,300 prescriptions for controlled
11 substances, spread among over 200 people. *See* Garrety Decl. at ¶ 7(a) & Ex. A (docket
12 no. 23).

13 Although Butterbaugh applied for and obtained a medical license in Washington
14 before he began to treat patients in Washington, he did not apply for a Washington DEA
15 registration. Butterbaugh Aff. at ¶ 18. Butterbaugh contends that he relied on advice
16 provided by an employee of the Washington Department of Health, who allegedly
17 indicated that, because he was temporarily substituting for a recently-departed physician
18 (*i.e.*, operating *locum tenens*²), Butterbaugh was not required to obtain a separate DEA
19 registration for Washington. *Id.*; *see* Ex. F to Resp. (docket no. 25-1 at 18-19).

21 ² *Locum tenens* is a Latin phrase that means “holding the place,” and it connotes “a deputy; a substitute; a
22 representative.” Black’s Law Dictionary 1025 (9th ed. 2009).

1 The prescriptions Butterbaugh issued to Washington patients contained an address
2 in Seattle, an “866” telephone number, a Washington medical license number, and a DEA
3 registration number for Arizona. See Zennan Decl. at ¶ 4 & Ex. A (docket no. 22). The
4 “866” telephone number on a prescription issued by Butterbaugh made a pharmacist
5 suspicious, and after the pharmacist contacted the DEA, an investigation commenced in
6 February 2011. Id. at ¶ 3. Other pharmacists reported concerns in December 2011 and
7 May 2012, and Alan Zend, DO (an osteopath who treats opiate addiction) called the DEA
8 in July 2012 after a patient who had received prescriptions from Butterbaugh admitted to
9 Zend that he was an addict. See Ex. D to Zennan Decl. (docket no. 22-5).

10 In late November 2012, Assistant United States Attorney (“AUSA”) Christina
11 Fogg (née Dimock) wrote to Butterbaugh and informed him that the DEA had been
12 monitoring him and found him to be “routinely out of compliance” with the requirement
13 that he have a DEA registration for Washington. Ex. N to Fogg Decl. (docket no. 21-2).
14 Butterbaugh was told that the Government was “considering initiating civil litigation”
15 against him, and that he should contact AUSA Fogg to discuss the possibility of pre-
16 litigation settlement. Id. After receiving AUSA Fogg’s letter, Butterbaugh immediately
17 ceased treating patients in Washington and issued no further prescriptions to individuals
18 in Washington. Butterbaugh Aff. at ¶ 23. In April 2014, the Government commenced
19 this action, pleading one claim for relief under 21 U.S.C. § 842(c), see Compl. (docket
20 no. 1), and it has now moved for summary judgment on both liability and the amount of
21 any civil penalty.

1 **Discussion**

2 To obtain summary judgment, the Government must demonstrate the absence of
3 any genuine issue of material fact and an entitlement to judgment as a matter of law. *See*
4 Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact
5 is material if it might affect the outcome of the suit under the governing law. *E.g.*,
6 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To survive a motion for
7 summary judgment, the adverse party must present “affirmative evidence,” which “is to
8 be believed” and from which all “justifiable inferences” are to be favorably drawn. *Id.* at
9 255, 257. When the record, however, taken as a whole, could not lead a rational trier of
10 fact to find for the non-moving party, summary judgment is warranted. *See Danner v.*
11 *Himmelfarb*, 858 F.2d 515, 517 (9th Cir. 1988) (citing *Matsushita Elec. Indus. Co. v.*
12 *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The Court is satisfied that the questions
13 before it are not factual, but rather legal, in nature. The issues for decision are (i) whether
14 the Government has stated and proven a cognizable claim for a civil penalty; and (ii) if
15 so, what amount of civil penalty is appropriate.

16 **A. Liability**

17 The Government seeks to impose a civil penalty against Butterbaugh under a
18 provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970, also
19 known as the Controlled Substances Act (“CSA”), indicating that “any person who
20 violates *this section* shall, with respect to any such violation, be subject to a civil penalty
21 of not more than \$25,000.” 21 U.S.C. § 842(c)(1)(A) (emphasis added). As is clear from
22 the statute, a person is subject to a civil penalty under § 842(c) only if the person violated
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1 § 842. Section 842(a) contains 16 subsections defining different unlawful acts. In its
2 Complaint, the Government did not indicate which of these 16 subsections, if any, it
3 alleged Butterbaugh violated. In its motion for summary judgment and its supplemental
4 brief, however, the Government relies solely on § 842(a)(1), which prohibits any person
5 subject to registration requirements from distributing or dispensing³ a controlled
6 substance in violation of 21 U.S.C. § 829. See 21 U.S.C. § 842(a)(1).

7 To establish a violation of § 842(a)(1), the Government must prove that
8 Butterbaugh (i) was subject to registration requirements, and (ii) either distributed or
9 dispensed controlled substances in violation of § 829. With respect to the latter element,
10 the Government contends that dispensing controlled substances without a “valid”
11 prescription constitutes a violation of § 829. The relevant subsections of § 829, however,
12 do not contain the word “valid,” but rather make a distinction between schedule II
13 controlled substances (which may be dispensed by a practitioner directly to an ultimate
14 user or upon a “written” prescription that may not be refilled) and schedule III and IV
15 substances (which may be dispensed directly or upon either a “written” or an “oral”
16 prescription that may be refilled up to five times within six months of the prescription).
17 21 U.S.C. §§ 829(a) & (b); see also *United States v. Moore*, 423 U.S. 122, 137 n.13
18 (1975) (“On its face § 829 addresses only the form that a prescription must take.”).

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20 ³ The term “dispense” means “to deliver a controlled substance to an ultimate user . . . by, or pursuant to
21 the lawful order of, a practitioner, including the prescribing and administering of a controlled substance.”
22 21 U.S.C. § 802(10). The term “distribute” means “to deliver (other than by administering or dispensing)
23 a controlled substance or a listed chemical.” *Id.* at § 802(11). The terms “deliver” or “delivery” mean
“the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or
not there exists an agency relationship.” *Id.* at § 802(8).

1 When viewed, however, in the context of the applicable statutes and regulations,
2 the question presented is not whether the prescriptions that Butterbaugh issued were
3 valid,⁴ but rather whether they were, in fact, “prescriptions.” If the slips of papers that
4 Butterbaugh gave to his patients in Washington were not “prescriptions,” then regardless
5 of whether controlled substances were thereby obtained by these individuals, Butterbaugh
6 distributed (as opposed to dispensed) controlled substances without a prescription, which
7 constitutes a violation of § 829, and in turn, a violation of § 842(a)(1). *See* 21 U.S.C.
8 §§ 802(8) & (11) (together defining “distribute” to mean “the actual, constructive, or
9 attempted transfer of a controlled substance” other than by administering or dispensing
10 it).

11 The parties have not cited any cases directly on point.⁵ Although “prescription” is
12 not statutorily defined, a regulation provides that a prescription may be issued only by

14 ⁴ The Government does not allege that Butterbaugh dispensed controlled substances by means of the
15 Internet, which is governed by the only subsection of § 829 in which the term “valid” appears. See 21
16 U.S.C. § 829(e)(1). Dispensing via the Internet requires a “valid” prescription, defined as one issued for
17 “a legitimate medical purpose” and “in the usual course of professional practice” by a practitioner who
18 has conducted at least one in-person medical evaluation of the patient. 21 U.S.C. §§ 829(e)(1) & (2). The
Government has offered no evidence that Butterbaugh issued any prescription for other than “a legitimate
medical purpose,” outside “the usual course of professional practice,” or without having first examined
the patient. Thus, the Government’s contention that the prescriptions written by Butterbaugh were not
“valid,” as statutorily defined, lacks merit.

19 ⁵ The Government relies on *Advance Pharm., Inc. v. United States*, 391 F.3d 377 (2d Cir. 2004), and
20 *United States v. Poulin*, 926 F. Supp. 246 (D. Mass. 1996). In *Advance Pharm.*, a corporation and its
21 president and vice-president unsuccessfully appealed a \$2 million civil penalty for violating 21 U.S.C.
22 § 842(a)(10), which renders unlawful the negligent failure to “keep a record or make a report” or “self-
23 certify,” as required by 21 U.S.C. § 830. *See* 391 F.3d at 382-83. A jury found that the defendants had
violated § 842(a)(10) by failing to notify the DEA with respect to 141 of their 159 pseudoephedrine
shipments to new customers. *Id.* at 389. In *Poulin*, the proprietor of a pharmacy was ordered, following a
bench trial, to pay civil penalties for multiple violations of 21 U.S.C. § 842(a)(5), which defines as
unlawful the refusal or negligent failure to “make, keep, or furnish” a required record. 926 F. Supp. at
252 & 255. The defendant was found to have committed 36 recordkeeping violations, for which he was

1 “an individual practitioner” who is “[a]uthorized to prescribe controlled substances by the
2 jurisdiction in which he [or she] is licensed to practice” and is either registered with the
3 DEA or exempt from registration. *See* 21 C.F.R. § 1306.03(a); *see also* 21 U.S.C. § 821
4 (authorizing the Attorney General to promulgate regulations relating to the registration
5 and control of the distribution and dispensing of controlled substances). A different
6 regulation mandates that every prescription for a controlled substance bear “the name,
7 address and registration number of the practitioner.” 21 C.F.R. § 1306.05(a). The crux
8 of the dispute in this case is whether Butterbaugh was “registered” and had inscribed on
9 his forms a “registration number” within the meaning of §§ 1306.03(a) & 1306.05(a).

10 The Court concludes that Butterbaugh was required to, but undisputedly failed to,
11 obtain a registration in Washington. The CSA requires every person who dispenses
12 controlled substances to obtain a registration from the Attorney General. 21 U.S.C.
13 § 822(a)(2). A separate registration is required “at each principal place of business or
14 professional practice” where the person dispenses controlled substances. *Id.* at
15 § 822(e)(1). The DEA has, by regulation, defined various locations that are *not* places
16 where controlled substances are dispensed, including an office “used by a practitioner
17 (who is registered at another location in the same State or jurisdiction of the United
18 States) where controlled substances are prescribed but neither administered nor otherwise
19 dispensed . . . and where no supplies of controlled substances are maintained.” 21 C.F.R.

21 fined a total of \$50,000, representing penalties ranging from \$1,000 to \$25,000, depending on the type of
22 violation. *Id.* at 255. In both *Advanced Pharm.* and *Poulin*, the sanctioned parties were found in violation
23 of a provision other than the one at issue here, *i.e.*, § 842(a)(1).

1 § 1301.12(b)(3).⁶ Because Butterbaugh was not registered at any location in Washington,
2 this regulation does not remove the Seattle offices used by Butterbaugh from the ambit of
3 places where controlled substances were dispensed.

4 Because controlled substances were dispensed in the Seattle offices, Butterbaugh
5 needed a registration in Washington if the Seattle offices were, for him, a “principal place
6 of business or professional practice.” *See* 21 U.S.C. § 822(e)(1). The phrase “principal
7 place of business or professional practice” is not defined by statute or regulation. The
8 DEA has, however, issued a “Dear Applicant” letter indicating that “[a] practitioner who
9 *maintains* professional practices in multiple states is deemed to have established a
10 principal place of business or professional practice in each state.” Ex. H to Resp. (docket
11 no. 25-1 at 24) (emphasis added). According to the DEA, the term “maintains” connotes
12 “a continuing, ongoing place of business or professional practice as opposed to a one-
13 time or temporary one,” and “[a]ny location in separate states” at which “a practitioner
14 distributes or dispenses controlled substances is a ‘principal place of business or
15 professional practice’ requiring separate DEA registration.” *Id.* The DEA, however, has
16 acknowledged that a physician “who *occasionally* prescribes in another state and who
17 does not maintain a practice there is not required to be registered in that state,” allowing
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19 ⁶ This regulation was amended in 2006 to narrow the scope of locations deemed not to be places where
20 controlled substances are dispensed. Section 1301.12(b)(3) previously excluded an office “used by a
21 practitioner (who is registered at another location).” The regulation was modified to exempt only an
22 office “used by a practitioner (who is registered at another location *in the same State or jurisdiction of the*
23 *United States*).” (Emphasis added.) This change did not affect the portion of the regulation (or the CSA)
requiring a separate registration for only principal places of business or professional practice, and the
2006 revision to § 1301.12(b)(3) has little relevance to the issues before the Court.

1 for a physician to “work in a locum tenens capacity in multiple states without having to
2 obtain a DEA registration in each state.” *Id.* (emphasis added). The term “occasionally”
3 was understood by the DEA to mean “on occasion,” and not “permanent” or “regular.”
4 *Id.*

5 The Court is satisfied that the DEA’s interpretation with respect to the phrase
6 “principal place of business or professional practice” is a reasonable construction of
7 § 822(e) of the CSA. *See Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*,
8 467 U.S. 837, 843-44 (1984) (if a statute “is silent or ambiguous with respect to the
9 specific issue, the question for the court is whether the agency’s answer is based on a
10 permissible construction of the statute” and, when a particular question has been
11 implicitly delegated to an agency, “a court may not substitute its own construction of a
12 statutory provision for a reasonable interpretation made by the administrator of an
13 agency”). Butterbaugh distributed or dispensed controlled substances at the two Seattle
14 offices he used, and each of these locations constituted a “principal place of business or
15 professional practice.” Butterbaugh’s activities in Washington were conducted far more
16 frequently than “on occasion.” Although Butterbaugh might have initially intended
17 merely to temporarily “fill in” for the departed physician, his role became more
18 “permanent.” Over the course of 25 months, Butterbaugh engaged in a “continuing,
19 ongoing,” and “regular” practice in Washington, which he might to this day still
20 “maintain” but for the November 2012 cease-and-desist letter. The Court rules, as a
21 matter of law, that Butterbaugh did not have the requisite registration in Washington,
22 improperly used his Arizona registration number on the forms he gave to patients in
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1 Washington, and distributed controlled substances in Washington, between October 2010
2 and November 2012, without a prescription, in violation of §§ 829 & 842(a)(1).⁷

3 **B. Civil Penalty**

4 Having concluded that the Government has established, as a matter of law, that
5 Butterbaugh violated § 842(a)(1), the Court turns to an assessment of the appropriate
6 amount for a civil penalty. The Ninth Circuit has not yet had occasion to consider how a
7 civil penalty under § 842(c) should be calculated. The cases cited by the Government,
8 however, recite the same four factors for determining the amount of such civil penalty,
9 namely (1) the level of the defendant’s culpability; (2) whether and to what extent the
10 defendant profited from the unlawful conduct; (3) the harm to the public; and (4) the
11 defendant’s financial capacity to pay a penalty. *Advance Pharm.*, 391 F.3d at 399;
12 *Poulin*, 926 F. Supp. at 253. During oral argument, the Government acknowledged that it
13 has no further evidence to present concerning the size of a civil penalty. The Court is
14 persuaded that the factors outlined in *Advance Pharm.* and *Poulin* and the current record
15 support only a relatively small civil penalty.

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17 ⁷ *United States v. Clinical Leasing Serv., Inc.*, 930 F.2d 394 (5th Cir. 1991), which was cited by the
18 Government, is not controlling. Contrary to the Government’s assertion, *Clinical Leasing* did not define
19 “principal place of business or professional practice,” but rather rejected the individual defendants’
20 argument that the regulation concerning locations “deemed not to be places where controlled substances
21 are . . . dispensed” was unconstitutionally vague. *Id.* at 395-96. The Fifth Circuit held that the
22 registration regulations, which exempted an office at which *inter alia* “controlled substances are
23 prescribed but neither administered nor otherwise dispensed as a *regular part* of the professional practice
of the practitioner at such office,” *id.* at 395 (emphasis added), might “in some cases” be “unclear,” but
they were not “impermissibly vague in *all* of their applications” or with respect to the individual
defendants in the case, *id.* at 395-96 (emphasis in original). In using the example of a physician who
“intends to dispense controlled substances from a particular location several times a week or month,” *id.*
at 395, the Fifth Circuit was addressing the meaning of the clause “regular part of the professional
practice of the practitioner,” which is a similar concept, but is not the statutory phrase at issue in this case.

1 **1. Culpability**

2 The Government asserts that Butterbaugh’s conduct was willful because (i) he was
3 aware of the “separate registration” requirement, having previously registered in New
4 Mexico, Nevada, and Texas, as well as Arizona, see Zennan Decl. at ¶ 4 (docket no. 22),
5 and (ii) he continued to violate the CSA after receiving AUSA Fogg’s cease-and-desist
6 letter. The Government’s evidence does not establish any willfulness on Butterbaugh’s
7 part. With respect to his previous, now expired, registrations for states other than
8 Arizona, the Government provides no dates or other details. Such registrations might
9 have been for different periods over the course of Butterbaugh’s 34-year medical career,
10 demonstrating an awareness that he needed to have a DEA registration for the state in
11 which he resided, as opposed to another state in which he also treated patients.

12 Indeed, in his affidavit, Butterbaugh indicates that, from 1983 until 1986, he was
13 an Army Medical Corps Officer stationed in El Paso, Texas, see Butterbaugh Aff. at ¶ 2
14 (docket no. 25-2), and his defunct registration in Texas might have related to his duties
15 for the Army, before he established a practice in Arizona. In 1986, Butterbaugh practiced
16 emergency medicine in Grants, New Mexico, which would explain why he once had a
17 DEA registration for New Mexico. See Butterbaugh Dep. at 23, Ex. B to Fogg Decl.
18 (docket no. 27-2 at 5). Thus, contrary to the Government’s suggestion, any “justifiable
19 inferences” from Butterbaugh’s prior registrations in New Mexico, Nevada, and Texas
20 do not support a finding of willfulness.

21 For the proposition that Butterbaugh’s unlawful conduct persisted after receipt of
22 AUSA Fogg’s letter, the Government cites only an announcement apparently posted on
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1 eClinicMD’s website in January 2013, stating that Butterbaugh “will no longer travel to
2 Seattle” and “will focus on his Arizona and Texas practices.” Ex. C to Zennan Decl.
3 (docket no. 22-5). Because Butterbaugh did not at that time have a registration in Texas,
4 the Government contends that Butterbaugh continued to issue prescriptions for controlled
5 substances without having the requisite registration. The Government, however, has
6 provided no evidence that Butterbaugh wrote any prescriptions for controlled substances
7 after November 2012 in either Washington or Texas. In contrast, Butterbaugh has
8 averred that he restricted his practice to Arizona and “did not so much as set foot in the
9 State of Texas” after receiving AUSA Fogg’s letter. Butterbaugh Aff. at ¶ 24 (docket
10 no. 25-2).

11 The Government has offered no evidence that Butterbaugh manifested a belief in,
12 adopted, or authorized the eClinicMD announcement, so as to render it non-hearsay. *See*
13 Fed. R. Evid. 801(d)(2). The Government also has not demonstrated that the eClinicMD
14 notice would be admissible under any exception to the hearsay rule. *See* Fed. R. Civ.
15 P. 56(c)(4). The eClinicMD announcement was received by a DEA investigator in an
16 e-mail from an unidentified undercover agent, *see* Zennan Decl. at ¶ 7 (docket no. 22),
17 and it is therefore not a business record, *see* Fed. R. Evid. 803(6), but rather is the type of
18 unreliable evidence that the hearsay rule was designed to exclude. The statement by
19 eClinicMD with respect to a “Texas practice” might simply have been erroneous, and it
20 does not support the Government’s assertion that Butterbaugh continued to engage in
21 offending conduct after November 2012.

1 Not only has the Government failed to present evidence of willfulness, but
2 Butterbaugh has also raised doubts about his level of culpability. Butterbaugh has
3 essentially invoked the defense of entrapment by estoppel,⁸ which requires a showing that
4 (1) an authorized government official empowered to render the advice at issue, (2) who
5 was made aware of all the relevant historical facts, (3) affirmatively told Butterbaugh the
6 allegedly proscribed conduct was permissible, (4) he relied on the advice, and (5) his
7 reliance was reasonable. *See United States v. Schafer*, 625 F.3d 629, 637 (9th Cir. 2010);
8 *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004). Reliance is reasonable
9 when a person “sincerely desirous of obeying the law would have accepted the
10 information as true, and would not have been put on notice to make further inquiries.”
11 *Batterjee*, 361 F.3d at 1216-17.

12 Butterbaugh contends he was told by an employee of Washington’s Department of
13 Health that he qualified for the *locum tenens* “exception” to the requirement of separate
14 registrations for each state in which a practice is maintained. The Government replies
15 that a state employee’s interpretation of a federal regulation has no legal impact, but it
16 cites no authority for such proposition. Individuals who are not even government
17 employees can have the requisite authority for purposes of the entrapment-by-estoppel

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20 ⁸ Butterbaugh did not plead entrapment by estoppel as an affirmative defense in his answer. *See* Answer
21 at ¶¶ 19-22 (docket no. 8). Even if Butterbaugh were deemed to have waived this defense, *see* Fed. R.
22 Civ. P. 8(c)(1) (requiring that affirmative defenses be affirmatively pleaded), the elements of entrapment
23 by estoppel would still be relevant to Butterbaugh’s level of culpability, which is a factor in the penalty,
as opposed to the liability, stage.

1 doctrine,⁹ and whether the state employee at issue was authorized or empowered to
2 advise Butterbaugh that a DEA registration for Washington was not required cannot be
3 determined on this record.¹⁰ For purposes of the Government’s motion for summary
4 judgment, the Court draws all reasonable inferences in favor of Butterbaugh and
5 concludes that the Government has not proven that his violations of §§ 829 and 842(a)(1)
6 were willful.

7 **2. Profit**

8 The Government asserts Butterbaugh’s profit from his activities in Washington
9 was at least \$81,170. The Government has computed this figure from the following
10 information. Butterbaugh received from eClinicMD \$125 for each initial face-to-face
11 examination, \$90 for each follow-up examination, and \$45 for each telephonic
12 consultation. Ex. G to Fogg Decl. (docket no. 21-1 at 65). The Government estimates
13 that Butterbaugh saw at least 136 patients in Washington. Mtn. at 8 (docket no. 20)

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15 ⁹ See *Batterjee*, 361 F.3d at 1217 (recognizing that licensed firearms dealers are the equivalent of federal
16 agents with regard to the dissemination of information concerning whether a person is eligible to purchase
17 a firearm); *United States v. Tallmadge*, 829 F.2d 767, 774 (9th Cir. 1987) (“a buyer has the right to rely
18 on the representations of a licensed firearms dealer” concerning eligibility to “receive and possess a
19 weapon” after a “felony conviction has been reduced to a misdemeanor”).

20 ¹⁰ See *United States v. Washington*, 2012 WL 4602838 at *3 (D. Mont. Oct. 2, 2012) (holding that
21 whether a drug investigator with the Flathead Tribal Police, who was a member of the Northwest Drug
22 Task Force, a multi-jurisdictional entity, was acting as an authorized federal agent when he provided
23 erroneous advice about federal law was an issue for the trier of fact); see also *United States v. Christie*,
2013 WL 6860835 at *5 (D. Haw. Dec. 30, 2013) (requiring defendants to make a proffer concerning
their entrapment-by-estoppel defense premised on statements made by state and county officials
concerning the manufacturing and distribution of marijuana for religious purposes); cf. *United States v.*
Shinderman, 2006 WL 522105 at *29 (D. Me. Mar. 2, 2006) (concluding that an estoppel-by-entrapment
defense premised on the DEA’s “allegedly confusing regulation,” namely the pre-amendment version of
21 C.F.R. § 1301.12(b)(3), could not be dispositively addressed in connection with the defendant’s
motion to dismiss a 68-count indictment), *adopted in part and modified in part on other grounds*, 432 F.
Supp. 2d 149 (D. Me. 2006).

1 (citing Ex. A to Zennan Decl. (docket nos. 22-1, 22-2, 22-3, & 22-4), which contains
2 photocopies of 152 prescriptions). The Government arrives at a sum of \$17,000 in
3 connection with initial visits (\$125 x 136) and a sum of \$64,170 for subsequent services
4 (assuming all other prescriptions were issued after telephonic consultations¹¹), for a total
5 of \$81,170. The Government contends that Butterbaugh’s expenses need not be
6 considered, stating without proof that airline tickets and hotel expenses were covered by
7 eClinicMD, but the Court is not persuaded that it can simply ignore Butterbaugh’s
8 overhead, including telephone bills, and it does not, in any event, view the estimated
9 profit as justifying the substantially higher civil penalty that the Government requests.

10 **3. Harm to the Public**

11 The Government describes two types of public harm allegedly stemming from
12 Butterbaugh’s failure to obtain a Washington registration: (i) the DEA’s ability to
13 monitor and investigate Butterbaugh’s activities was impeded; and (ii) controlled
14 substances with a “street value” of at least \$1.7 million were dispensed. The Government
15 contends that Butterbaugh’s conduct is consistent with the operation of a “pill mill.” *See*
16 *Zennan Decl.* at ¶ 13 (docket no. 22). Butterbaugh used temporary or “pop-up” locations,
17 namely an acupuncture clinic and a chiropractor’s office, relied on eClinicMD to provide
18 him with medical records about his own patients, required patients to pay for visits in
19 advance, did not accept insurance, listed eClinicMD’s telephone number on his

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22 ¹¹ Butterbaugh contends that any wages he earned from telephonic consultations were necessarily related
23 to activities he conducted in Arizona, not Washington.

1 prescription forms, and serviced individuals who traveled hundreds of miles to see him
2 rather than seeking treatment in their local area. *Id.* According to the Government, these
3 behaviors are indicia of running a “pill mill.”

4 Butterbaugh responds that his Arizona DEA registration number, Washington
5 medical license number, and Washington address were on each form that he gave a
6 patient, rendering the Government’s accusation that he somehow evaded DEA oversight
7 “preposterous,” Resp. at 17 (docket no. 25), particularly when the Government itself
8 waited for over a year and nine months after initiating its investigation to send him a
9 cease-and-desist letter. Butterbaugh also calls the “street value” of the controlled
10 substances he distributed “irrelevant,” *id.*, because the Government has provided no
11 evidence that any of these medications made their way to the street, and he points out
12 that, despite having the names and contact information for Butterbaugh’s patients, the
13 Government has not even alleged, let alone proven, that the controlled substances at issue
14 were distributed or dispensed for other than legitimate medical purposes.¹² Butterbaugh
15 acknowledges that “pill mills” and prescription drug abuse are harmful to the public, but
16 he denies being responsible for these general societal ills. The Court concludes that the
17 “public harm” factor does not weigh in favor of a high penalty.

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20 ¹² Butterbaugh has explained that he treats patients with chronic pain, many of whom are elderly and
21 unable to obtain appropriate medications because of “the current climate of fear in the medical
22 profession.” Butterbaugh Aff. at ¶ 29 (docket no. 25-2). Butterbaugh indicates that he “did what [he]
23 could, and what was medically sound, to weed” out individuals who abuse drugs. *Id.* According to
Butterbaugh, “[i]f some doctors have prescribed controlled medications irresponsibly, I am not one of
them.” *Id.*

1 **4. Financial Capacity**

2 Rather than providing evidence concerning Butterbaugh’s assets, the Government
3 asks the Court to ignore the jurisprudence concerning motions for summary judgment and
4 to draw adverse inferences against the non-moving party for declining to answer certain
5 discovery requests. The Government, however, neither moved to compel discovery nor
6 deposed Butterbaugh, and it concedes that no further discovery may be conducted in this
7 case. *See* Minute Order (docket no. 10) (setting a discovery deadline of April 13, 2015).
8 The Government may not shift the burden to Butterbaugh to establish that he is unable to
9 pay a penalty, and it has not proven that Butterbaugh has the financial capacity to pay a
10 substantial civil penalty.

11 In contrast, Butterbaugh has provided a financial statement indicating that his
12 home is worth \$1,133,500, but has a mortgage of \$1,247,596, and that he has six motor
13 vehicles, two of which have outstanding loan balances exceeding their fair market value,
14 a recreational vehicle on which more is owed than it is worth, retirement accounts
15 holding in the aggregate approximately \$420,000, and a time share valued at \$17,500 on
16 which \$16,490 remains due. Ex. G to Resp. (docket no. 25-1 at 20-21). He also has over
17 \$45,000 in credit card and medical equipment debts. *Id.* Butterbaugh is not currently
18 working, having recently had surgery to address the symptoms of spinal disease, and his
19 wife is also in poor health. Butterbaugh Aff. at ¶¶ 27-28 (docket no. 25-2). The Court
20 concludes that the appropriate amount of a civil penalty is \$7,500, which constitutes a
21 manageable debt in light of Butterbaugh’s limited assets and substantial financial
22 liabilities. This sum also represents a fair civil penalty given Butterbaugh’s low level of
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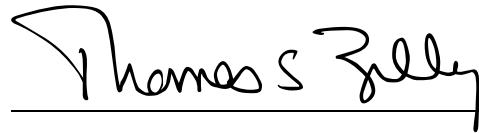
1 culpability, his meager profits, and the absence in the record of any concrete or
2 particularized harm to the public.

3 **Conclusion**

4 For the foregoing reasons, the Government's motion for summary judgment,
5 docket no. 20, is GRANTED in part and DENIED in part. The Clerk is DIRECTED to
6 enter judgment in favor of the Government and against Butterbaugh in the amount of
7 \$7,500 and otherwise consistent with this Order. The Clerk is further DIRECTED to
8 send a copy of this Order to all counsel of record and to CLOSE this case.

9 IT IS SO ORDERED.

10 Dated this 5th day of August, 2015.

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13 Thomas S. Zilly
14 United States District Judge
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