L. MITCHELL JONES (U.S.B. 5979)
Assistant Attorney General
MARK L. SHURTLEFF (U.S.B. 4666)
Attorney General
Commercial Enforcement Division
Heber M. Wells Building
Box 146741
Salt Lake City, UT 84114-6741
Telephone: (801) 366-0310

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING

OF THE DEPARTMENT OF COMMERCE

OF THE STATE OF UTAH

IN THE MATTER OF THE LICENSES OF	)	
BRENT WAYNE McFADDEN	)	STIPULATION AND ORDER
TO PRACTICE AS A PHARMACIST AND	)	
TO DISPENSE CONTROLLED SUBSTANCES	)	CASE NO. DOPL 2010--367
IN THE STATE OF UTAH	)	

BRENT WAYNE McFADDEN ("Respondent") and the **DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING** of the Department of Commerce of the State of Utah ("Division") stipulate and agree as follows:

1. Respondent admits the jurisdiction of the Division over Respondent and over the subject matter of this action.

2. Respondent acknowledges that Respondent enters into this Stipulation knowingly and voluntarily.

3. Respondent understands that Respondent has the right to be represented by counsel in this matter and Respondent's signature below signifies that Respondent has either consulted with an attorney or Respondent waives Respondent's right to counsel in this matter.

4. Respondent understands that Respondent is entitled to a hearing before the State of Utah's Board of Pharmacy ("Board"), or other Division Presiding Officer, at which time Respondent may present evidence on Respondent's own behalf, call witnesses, and confront adverse witnesses. Respondent understands that by signing this document Respondent hereby waives the right to a hearing, the right to present evidence on Respondent's own behalf, the right to call witnesses, the right to confront adverse witnesses, and any other rights to which Respondent may be entitled in connection with said hearing. Respondent understands that by signing this document Respondent hereby waives all administrative and judicial review as set forth in Utah Code Ann. §§ 63G-4-301 through 63G-4-405, and Utah Administrative Code R151-46b-12 through R151-46b-15. Respondent and the Division hereby express their intent that this matter be resolved expeditiously through stipulation as contemplated in Utah Code Ann. § 63G-4-102(4).

5. Respondent waives the right to the issuance of a Petition and a Notice of Agency Action in this matter.

6. Respondent understands that this Stipulation and Order, if adopted by the Director of the Division, will be classified as a public document. The Division may release this Stipulation and Order, and will release other information about this disciplinary action against Respondent's licenses, to other persons and entities.

7. Respondent neither admits nor denies the following, but agrees, for the purposes of this administrative proceeding only, that the Division may make the following findings of fact:

a. On or about July 10, 1995 Respondent was first licensed to practice as a pharmacist and to dispense controlled substances in the State of Utah.

b. Respondent was employed as pharmacist-in-charge at a pharmacy based in southern Utah at all times relevant to the following facts.

c. On or about May 8, 2006 the Division issued a letter of concern to Respondent regarding Respondent maintaining and documenting verbal prescription orders for both controlled substance and legend drugs on the same prescription pad.

d. On or about October 18, 2007 the Division issued a citation to Respondent for failing to submit required prescription information to the Utah Controlled Substance Database.

e. On or about August 17, 2010 Respondent's employment was terminated due to insubordination, leaving the pharmacy unattended, failing to pay for food and beverages, and taking medication directly from pharmacy stock. Respondent was later charged by Washington County prosecutors with seven counts of making or uttering a false prescription and seven counts of retail theft, in Fifth District Court, Washington County, Utah.

f. On or about August 17, 2010 Respondent admitted to a Division investigator that Respondent had, on multiple occasions, taken Maxide, a prescription only medication, and Phentermine, a Schedule IV controlled substance, from pharmacy stock for Respondent's own use. Respondent did not possess a valid prescription for Phentermine.

g. Respondent recently left the pharmacy unattended for 30 to 45 minutes to run an errand and pick up lunch. Respondent also admitted to the Division investigator that the practice of leaving the pharmacy unattended had occurred on three or four occasions in the past four years.

8. Respondent agrees that the findings of fact described above are unprofessional conduct as defined in Utah Code Ann. § 58-1-501(2)(a) and (h), and Utah Administrative Code R156-17b-614(7); and unlawful conduct as defined in Utah Code Ann. § 58-17b-501(6)(e) and

(12), § 58-37-6(7)(c)(i), and § 58-37-8(2)(a)(i); and that said conduct justifies disciplinary action against Respondent's license pursuant to Utah Code Ann. § 58-1-401(2)(a) and (b). Respondent agrees that an Order, which constitutes disciplinary action against Respondent's licenses by the Division pursuant to Utah Administrative Code R156-1-102(6) and Utah Code Ann. § 58-1-401(2), shall be entered in this matter as follows:

(1) Respondent's licenses shall be revoked. The revocation shall be immediately stayed. Respondent's licenses shall be subject to term of probation for a period of three years. The period of probation shall commence on the date the Division Director signs this Stipulation and Order. During the period of probation, Respondent shall be subject to all of the following terms and conditions. If the Board or Division later deems any of the conditions unnecessary such deletions may be made by an amended order issued unilaterally by the Division.

(a) Respondent shall meet with the Board and Division within thirty (30) days of signing of the accompanying Order and on a quarterly basis, or at other greater or lesser frequency as determined by the Board and Division for the duration of the probationary period thereafter to assess the progress of Respondent's probation. Respondent shall meet with the Board and Division at the first scheduled Board meeting after the effective date of the Order. Respondent shall meet with a Division staff member to review the Stipulation and Order prior to meeting with the Board.

(b) Respondent shall submit a practice plan to the Division and Board. Once approved by the Division and Board, Respondent shall practice according to the terms of the practice plan. The Division and Board may periodically require changes in the practice plan. As part of the ongoing implementation of the practice plan, Respondent's employer shall conduct controlled substance inventory audits of all controlled substances to which Respondent has access. The first audit shall be completed within 30 days of the effective date of this Stipulation and Order if Respondent is already employed, or within 30 days of Respondent beginning new employment. The employer shall continue to conduct similar audits on a quarterly basis until the Division and Board determine that said audits are no longer necessary. Respondent shall ensure the audit report is delivered to the Division as soon as the audit report is completed by the employer.

(c) Respondent may not be alone at any time in a pharmacy during either work or non-work hours.

(d) Respondent shall notify any employer of Respondent's restricted status and the terms of this Stipulation and Order. Respondent shall provide a copy of this Stipulation and Order to Respondent's employer and cause Respondent's employer to acknowledge to the Division and Board in writing that a copy of the Order has been provided to the employer. The employer shall submit employer reports to the Division and Board on a monthly basis for the first six months and quarterly thereafter, or at such frequency as directed by the Division or Board. The employer shall write the Division and indicate whether the employer will provide the periodic employer reports.

(e) Respondent shall work under the general supervision of a pharmacist licensed in good standing with the Division.

(f) Respondent shall complete all terms and conditions of any criminal sanctions, incurred before or during the period of this agreement, including probation or parole. If Respondent has not successfully completed all the terms and conditions of Respondent's criminal probation at the time Respondent's administrative probationary period ends, the period of Respondent's administrative probation shall be extended until all the conditions of Respondent's criminal probation have been successfully completed

(g) All reports and documentation required in this Stipulation and Order shall be submitted to the Board on a monthly basis for the first six months of probation. If Respondent is in compliance with all terms and conditions of the Order at the end of that time, all reports and documentation shall be submitted on a quarterly basis, or at such frequency as determined by the Board, for the remainder of probation. If Respondent is not in compliance with all terms and conditions of the Order by the end of the first six (6) months of probation, all reports and documentation shall be submitted on a monthly basis until Respondent is in compliance with the Order, after which all reports shall be submitted on a quarterly basis or at such frequency as determined by the Board.

(h) Respondent shall complete and submit to the Division and Board a self-assessment report at the frequency described in subparagraph (g) above. The self-assessment report shall be completed on a form prescribed by the Division.

(i) Respondent shall notify the Division and Board within one (1) week of any change of employer or employment status. This is required regardless

of whether Respondent is employed in Respondent's licensed occupation. The notification shall be in writing.

(j) Respondent shall limit Respondent's practice in accordance with the terms of probation, unless the Division and the Board authorize changes.

(k) In the event that Respondent leaves Utah for a period longer than 60 days, Respondent shall notify the Division and the Board in writing of the dates of departure and return. The licensing authorities of the jurisdiction to which Respondent moves must be promptly notified of the provisions of this Stipulation and Order. Periods of residency or practice outside Utah may apply to the reduction of the probation period if the new state of residency places Respondent' license on probation with equal or greater terms and conditions.

(l) Periods of unemployment or employment in other fields of practice shall be reported by Respondent to the Division and shall not count toward completion of probation. Should Respondent not be employed in Respondent's licensed occupation during Respondent's probationary period for a consecutive period of more than sixty (60) days, that period shall not apply to the reduction of probation, though the terms of probation shall remain applicable. If the Respondent works less than full-time in Respondent's licensed occupation, the reduction of any remaining probationary time shall occur on a pro-rata basis, in relation to a full-time position of 40 hours worked per week. Respondent must work at least sixteen (16) hours per week and no more than forty-eight (48) hours per week to be considered "practicing" in Respondent's profession.

(m) Should other acts of unprofessional conduct come to the attention of the Division or Board which have occurred prior to the entry of the Order in this case or should Respondent violate probation in any respect, the Division may, in addition to taking action as provided for herein, after giving Respondent notice and the opportunity to be heard, revoke probation or impose sanctions in accordance with applicable law.

(n) If a petition is filed against Respondent during Respondent's probation, the period of probation shall be extended until the matters alleged in the petition are fully resolved.

(o) Respondent shall immediately notify the Division, in writing, of any changes in private or professional address and agrees that written communication by the Division and/or the Board shall be mailed to Respondent at the last address provided to the Division via first class U.S.

Mail, and shall constitute notice to Respondent.

(p) Failure to pay for any of the costs associated with this probation shall be considered a violation of this Order. Respondent further agrees to complete all conditions of probation in a timely manner. Where a specific time for completion is not stated in this Order, it shall be within the Division and Board's discretion to set a time for completion.

(q) Respondent shall successfully complete three hours of continuing professional education courses focusing on ethics and pharmacy law. The courses shall be pre-approved by the Board and Division. The courses shall be completed within one year of the effective date of this Stipulation and Order. The courses shall not count toward the regular continuing professional education requirement for license renewal. Respondent shall provide documentation to the Division and Board of successful completion of the additional professional education.

(r) Respondent shall keep Respondent's Utah licenses current during the period of probation.

(s) Respondent shall notify the Division immediately if Respondent is charged or arrested with any criminal conduct not already addressed in this Stipulation and Order, and understands that a conviction is a violation of this agreement. Respondent shall notify the Division if Respondent is hospitalized or enters into a treatment program.

(t) Respondent shall a pay an administrative penalty of $2,500.00 (two-thousand five hundred dollars) to the Division, pursuant to Utah Code Ann. § 58-17b-504 and Utah Administrative Code R156-17b-504, within 90 days of the effective date of this Stipulation and Order.

9. Upon approval by the Director of the Division this Stipulation and Order shall be the final compromise and settlement of this non-criminal administrative matter. Respondent acknowledges that the Director is not required to accept the terms of this Stipulation and Order and that if the Director does not do so, this Stipulation and the representations contained therein shall be null and void, except that the Division and the Respondent waive any claim of bias or prejudgment they might otherwise have with regard to the Director by virtue of her having

reviewed this Stipulation, and this waiver shall survive such nullification.

10. Respondent shall abide by and comply with all applicable federal and state laws, regulations, rules and orders related to the Respondent's licensed practice.

11. This document constitutes the entire agreement between the parties and supersedes and cancels any and all prior negotiations, representations, understandings or agreements between the parties regarding the subject of this Stipulation and Order. There are no verbal agreements that modify, interpret, construe or affect this Stipulation. Respondent agrees not to take any action or make any public statement, that creates, or tends to create, the impression that any of the matters set forth in this Stipulation and Order are without factual basis. A public statement includes statements to one or more Board members during a meeting of the Board. Any such action or statement shall be considered a violation of this Stipulation and Order.

12. The accompanying Order becomes effective immediately upon the approval of this Stipulation and signing of the Order by the Division Director. Respondent shall comply with all the terms and conditions of this Stipulation immediately following the Division Director's signing of the Order page of this Stipulation and Order. Respondent shall comply with and timely complete all the terms and conditions of probation. If a time period for completion of a term or condition is not specifically set forth in the Stipulation and Order, Respondent agrees that the time period for completion of that term or condition shall be set by the Board. Failure to comply with and timely complete a term or condition shall constitute a violation of the Stipulation and Order and may subject Respondent to revocation or other sanctions.

13. If Respondent violates any term or condition of this Stipulation and Order, the Division may take action against Respondent, including imposing appropriate sanction, in the

manner provided by law. Such sanction may include revocation or suspension of Respondent's license, or other appropriate sanction.

14. Respondent understands that the disciplinary action taken by the Division in this Stipulation and Order may adversely affect any license that Respondent may possess in another state or any application for licensure Respondent may submit in another state.

15. If the Division files a Petition alleging that Respondent has engaged in new misconduct or files an Order to Show Cause Petition alleging that Respondent has violated any of the terms and conditions contained in this Stipulation and Order, the period of Respondent's probation shall be tolled during the period that the Petition or Order to Show Cause Petition has been filed and is unresolved.

16. Respondent has read each and every paragraph contained in this Stipulation and Order. Respondent understands each and every paragraph contained in this Stipulation and Order. Respondent has no questions about any paragraph or provision contained in this Stipulation and Order.

DIVISION OF OCCUPATIONAL &
PROFESSIONAL LICENSING

BY: _____
LAURA POE
Bureau Manager

DATE: 10-26-10

RESPONDENT

BY: _____
BRENT WAYNE McFADDEN

DATE: 20 Oct 2010

MARK L. SHURTLEFF
ATTORNEY GENERAL

BY: _____
L. MITCHELL JONES
Counsel for the Division

DATE: 26 Oct 2010

ORDER

THE ABOVE STIPULATION, in the matter of **BRENT WAYNE McFADDEN,** is hereby approved by the Division of Occupational and Professional Licensing, and constitutes my Findings of Fact and Conclusions of Law in this matter. The issuance of this Order is disciplinary action pursuant to Utah Administrative Code R156-1-102(6) and Utah Code Ann. § 58-1-401(2). The terms and conditions of the Stipulation are incorporated herein and constitute my final Order in this case.

DATED this 27 day of October, 2010.

DIVISION OF OCCUPATIONAL AND
PROFESSIONAL LICENSING

MARK B. STEINAGEL
Director

Investigator: Sandra Hess