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**BEFORE THE BOARD OF HEALING ARTS
OF THE STATE OF KANSAS**

**KANSAS STATE BOARD OF
HEALING ARTS**

IN THE MATTER OF
HERBERT A. DANIELS, M.D.

License No. 421291

**MODIFIED
VOLUNTARY STIPULATION
AND AGREEMENT AND
ENFORCEMENT ORDER**

Case No. 00-HA-25

COME NOW, the Kansas State Board of Healing Arts ("Board") by and through Stacy L. Cook, Litigation Counsel ("Petitioner") and Dr. Herbert Daniels ("Licensee"), by and through legal counsel, Thomas J. Kenny, and stipulate and agree to the following:

1. The Board is the sole and exclusive administration agency in the State of Kansas authorized to regulate the practice of the healing arts, specifically the practice of medicine and surgery. K.S.A. 65-2801 et seq.; K.S.A. 65-2869.
2. Licensee agrees that this Modified Stipulation and Agreement and Order ("Modified Stipulation") and the filing of such documents are in accordance with applicable law and that the Board has jurisdiction to consider the Modified Stipulation.
3. Licensee agrees that the Kansas Healing Arts Act is constitutional as applied in this case.
4. Licensee agrees that, in considering this matter, the Board is not acting beyond its jurisdiction as provided by law.
5. Licensee is or has been entitled to engage in the practices of medicine and surgery in the State of Kansas, having been issued license number 4-21291 on June 13, 1986. At all times relevant to the allegations set forth below, Licensee has held a current license to engage in the practice of medicine and surgery in the State of Kansas, having last renewed his license on May 24, 1999.
6. Licensee voluntarily notified the Board that on November 17, 1999 an Indictment was returned against Licensee in *United States v. Daniels* (No. 99-40099-DES) alleging fraud as it relates to Licensee's medical practice. Licensee denies all charges in the Indictment. The Board recognizes that Licensee is presumed innocent of the charges alleged in the Indictment unless and until proven guilty. The Board has reached no conclusions with respect to the conduct alleged in the Indictment. However, the parties voluntarily agree to enter into this Modified Stipulation to promote the interest of the public pending the trial, and to satisfy the Board's concerns relating to the Indictment.

7. On February 22, 2000, Licensee and Board agreed to a Voluntary Stipulation and Agreement

8. On April 6, 2000, pursuant to its authority under K.S.A. 65-2839(a) the Board served a subpoena on Licensee requesting documents provided to Licensee by the government in *United States v. Daniels* (“Subpoena”). In lieu of producing documents to the Board pursuant to the subpoena at this time, Licensee has agreed to modify the Voluntary Stipulation entered February 22, 2000.

9. Pursuant to K.S.A. 65-2838(b), the Board has authority to enter into this Modified Stipulation without the necessity of proceeding to a formal hearing.

10. Licensee voluntarily and knowingly waives his right to a hearing concerning the presentation of this Modified Stipulation to the Board for the Board’s approval. Licensee voluntarily and knowingly waives his right to present a defense by oral testimony and documentary evidence, to submit rebuttal evidence, and to conduct cross-examination of witnesses in the presentation of this Modified Stipulation to the Board for its approval. In the presentation of this Modified Stipulation to the Board for its approval, Licensee voluntarily and knowingly agrees to waive his right to an administrative hearing.

11. The terms and conditions of the Modified Stipulation are entered into between the undersigned parties and are submitted for the purpose of allowing these terms and conditions to become an Order of the Board. This Modified Stipulation shall not be binding on the Board until an authorized signature is affixed at the end of this document. Licensee specifically acknowledges that counsel for the Board is not authorized to sign this Modified Stipulation on behalf of the Board. This Modified Stipulation shall replace the Voluntary Stipulation entered February 22, 2000.

12. In consideration of the conditions, terms, covenants and promises contained herein, the parties agree as follows:

(a) In lieu of the conclusion of formal proceedings and/or an investigation of Licensee by the Board, Licensee, by signature affixed to this Modified Stipulation, hereby voluntarily agrees to the following measures relating to his practice of medicine and surgery in the State of Kansas:

1. Use of Informed Consent Form.

Licensee agrees to utilize a written “informed consent form” (“Form”), to be developed by the “Monitor” described below, with regard to his office visits with patients for whom he recommends a surgical procedure. This Form would be used in conjunction with Licensee’s office visits with patients, and would reflect Licensee’s descriptions of the risks, complications and alternatives to surgery. For purposes of this Modified Stipulation, “surgery” or “surgical procedures” shall mean procedures performed in an in-patient hospitalization setting, in which the patient is placed under general anesthesia. The Form would be prepared, by the monitor, in

advance for each of the surgical procedures performed by the Licensee, and signed by the patient at the time of the office visit. The Monitor selected would prepare the Form in consultation with Licensee and the Board, as necessary.

2. Monitor.

Licensee hereby designates, subject to approval by Board, a Monitor and authorizes said Monitor to perform peer review activities relating to his surgical practices, as defined in K.S.A. 65-4915. The Monitor must be a Board-certified Otolaryngologist and must be approved by the Board, or its designees, and Licensee and Board agree to confer to select an acceptable Monitor. The Monitor shall review 5-10 surgery cases per month. The Monitor shall review the cases following the office visit, but before the surgery. Licensee shall keep a list of all names of patients who have been scheduled for surgery. Licensee agrees to fax such a list to the Monitor at the end of each week. The Monitor, in conjunction with the Board if requested, will decide which surgery cases to review. Licensee agrees to make all relevant records available to the Monitor for review.

The Monitor may find it necessary to contact patients in order to perform the review. The Monitor shall review the records and discuss the matter with Licensee before contacting the patients. Licensee agrees to provide the Monitor with the address and phone number of patients if requested by the Monitor.

The Monitor shall submit monthly reports to the Board staff on a form provided. The monthly reports shall be submitted fifteen (15) days after the end of each month and shall include the Monitor's opinion as to whether it is within the standard of care to perform the surgery recommended by Licensee. In the event that in the Monitor's opinion, the surgery recommended is not within the standard of care, the Monitor will contact Licensee prior to the surgery and so advise. Before the first reports are due, the Monitor will review the Modified Stipulation and participate in a phone conference with counsel for the parties.

For purposes of this Modified Stipulation, "surgery" or "surgical procedures" shall mean procedures performed in an in-patient hospitalization setting in which the patient is placed under general anesthesia.

The Licensee and the Board acknowledge that the Monitor may not be able to review cases requiring emergency or urgent surgery.

3. Suspension of License Upon Conviction.

As further consideration for the Board's specific agreement to vacate the Subpoena, and not request further information from Licensee as set forth in paragraph 12(e) of this Modified Stipulation, Licensee agrees that in the event he is convicted of an offense in *United States v. Daniels*, he will, upon notice by either party, voluntarily allow the Board, without formal proceedings, to immediately suspend his license to practice medicine and surgery in the State of Kansas until the date on which the Board has concluded its investigation of Licensee or, if formal charges are filed by the Board against Licensee, the date on which the formal hearing on the charges is concluded. For purposes of this agreement, "conviction" shall mean a unanimous verdict by the jury in *United States v. Daniels*, to convict him of any of the offenses set forth in the above-referenced action.

4. Partial Extension of Modified Stipulation Upon Acquittal

Licensee agrees that, in the event he is acquitted of the charges in *United States v. Daniels*, all terms of this Modified Stipulation, except paragraph 12(a)(3) herein will be extended until the date on which the Board has concluded its investigation of Licensee or, if formal charges are filed by the Board against Licensee, the date on which the formal hearing on the charges is concluded. In the event of an acquittal, paragraph 12(a)(3) shall, at the time of such acquittal, be rendered null and void, and of no further force or effect.

(b) The parties agree that this Modified Stipulation does not constitute disciplinary action under the Healing Arts Act and does not constitute a limitation on Licensee's license to practice in Kansas. The Board understands that this Modified Stipulation is not required to be reported to the National Practitioner Databank, the Federation of State Medical Boards, or any other person or entity. However, Licensee agrees that in the event his license were suspended in the future pursuant to paragraph 12(a)(3) hereof, such suspension would be considered to be disciplinary action and will be reported to all applicable reporting entities.

(c) These voluntary supervisory measures shall remain in effect until the trial in the United States District Court for the District of Kansas has concluded, unless extended after acquittal pursuant to Section 12(a)(4).

(d) Licensee's failure to comply with the provisions of the Modified Stipulation may result in the Board initiating disciplinary action as the Board deems appropriate according to the Kansas Administrative Procedure Act.

(e) Nothing in this Modified Stipulation shall be construed to deny the Board jurisdiction to investigate alleged violations of the Healing Arts Act, or to investigate complaints received under the Risk Management Law, K.S.A. 65-4921 *et seq.*, that are known or unknown and are not covered under this Modified Stipulation, or to initiate formal proceedings based upon known or unknown allegations of violations of the Healing Arts Act. The foregoing notwithstanding, the Board agrees that it will vacate the Board subpoena dated April 6, 2000 and will not request any information from Licensee based on allegations in the Indictment until the trial in *United States v. Daniels* has concluded, unless the Board receives credible information that indicates there is a current and immediate threat to the public relating to such allegations. However, the Board may initiate disciplinary action in the event Licensee is convicted as a result of the Indictment.

(f) Licensee hereby releases the Board and its individual members (in their official and personal capacities), its employees and agents (hereinafter individually or jointly referred to as "Releases"), from any and all claims and causes of action, including but not limited to, those damages, actions, liabilities and causes of action, both administrative and civil, including the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 *et seq.* This release shall forever discharge Releasees from any and all claims or demands of every kind and nature that Licensee has claimed to have had at the time of this release or might have had, either known or unknown, suspected or unsuspected, and Licensee shall not commence to prosecute (either directly or indirectly), cause or permit to be prosecuted, any action or proceeding of any description against Releasees.

(g) Licensee further understands and agrees that, upon signature by Licensee, this document shall be deemed a public record. The Board agrees, however, that the activities of the Monitor appointed herein with regard to the Monitor's peer review activities relating to Licensee, and any documents created by such Monitor, shall constitute peer review activities, shall be confidential, shall not be deemed a public record and shall not be available to anyone under the Open Records Act, as set forth in K.S.A. 45-221(a)(36), except as may otherwise be subject to disclosure under K.S.A. 65-4915.

(h) This Modified Stipulation, when signed by both parties, constitutes the entire agreement between the parties and may only be modified or amended by a subsequent document executed in the same manner by the parties. The Licensee and the Board agree that this Modified Stipulation supercedes the Voluntary Stipulation and Agreement entered into between the parties on February 22, 2000.

(i) Licensee, by signature to this document, waives any objection to the participation of the Board members in the consideration of this offer of settlement and agrees not to seek the disqualification or recusal of any Board member in any future proceeding on the basis that the Board member has received investigative information from any source which otherwise may not be admissible or admitted as evidence.

(j) Licensee acknowledges that he has read this Modified Stipulation and fully understands the contents.

(k) Licensee acknowledges that this Modified Stipulation has been entered into freely and voluntarily.

(l) All correspondence or communication between Licensee and the Board relating to this Modified Stipulation shall be by certified mail addressed to the Kansas State Board of Healing Arts, 235 South Topeka Boulevard, Topeka, Kansas 66603-3068, Attention: Stacy L. Cook, Esq.

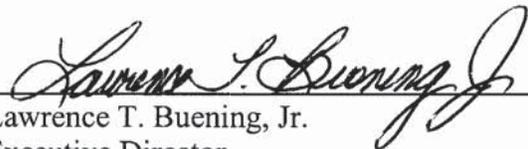
(m) Licensee shall obey all federal, state and local laws and rules governing the practice of medicine and surgery in the State of Kansas that may be in place at the time of execution of the Modified Stipulation or may become effective subsequent to the execution of this document.

(n) Upon execution of this Modified Stipulation by affixing a Board-authorized signature below, the provisions of this Modified Stipulation shall become an Order under K.S.A. 65-2838(b). This Modified Stipulation shall constitute the Board's Order when filed with the Office of the Executive Director for the Board and no further Order is required.

(o) The Board agrees that Licensee's disclosure to the Monitor of any patient records shall not violate the physician-patient privilege set forth in K.S.A. 60-427, as provided for pursuant to K.S.A. 65-2839a(e), and shall not violate any other provision of law.

IN WITNESS WHEREOF, the parties have executed this Agreement on this 17th
day of July, 2000.

KANSAS STATE BOARD OF HEALING
ARTS

By 
Lawrence T. Buening, Jr.
Executive Director

Date: 7-11-2000


Licensee
Herbert A. Daniels MD


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and

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CERTIFICATE OF SERVICE

I, Stacy L. Cook, Litigation Counsel, Kansas Board of Healing Arts, hereby certify that I served a true and correct copy of the Modified Voluntary Stipulation and Agreement and Enforcement Order by United States mail, postage prepaid, on this 7th day of July, 2000, to the following:

Lawrence T. Buening, Jr.
Executive Director
Kansas Board of Healing Arts
235 South Topeka Boulevard
Topeka, KS 66603-3068

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Stacy L. Cook