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OCT 19 2009

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

KS State Board of Healing Arts

In the Matter of)	
)	Docket No. 10-HA00048
Durwin K. Smith, D.C.)	
Kansas License No. 01-03570)	

CONSENT ORDER

COMES NOW, the Kansas State Board of Healing Arts, ("Board"), by and through Kathleen Selzler Lippert, Litigation Counsel ("Petitioner"), and Durwin K. Smith, D.C. ("Licensee"), by and through his counsel, Eldon L. Boisseau, and move the Board for approval of a Consent Order affecting Licensee's license to practice chiropractic in the State of Kansas. The Parties stipulate and agree to the following:

1. Licensee's last known mailing address to the Board is: 120 W. 3rd Street, Pratt, Kansas 67124.
2. Licensee is or has been entitled to engage in the practice of chiropractic in the State of Kansas, having been issued License No. 01-03570 on approximately May 21, 1981; having last renewed licensure in December 2008. Licensee's license is active.
3. The Board is the sole and exclusive administrative agency in the State of Kansas authorized to regulate the practice of the healing arts, specifically the practice of chiropractic. K.S.A. 65-2801 et seq. and K.S.A. 65-2869.
4. This Consent Order and the filing of such document are in accordance with applicable law and the Board has jurisdiction to enter into the Consent Order as provided by K.S.A. 77-505 and 65-2838. Upon approval, these stipulations shall

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constitute the findings of the Board, and this Consent Order shall constitute the Board's Final Order.

5. The Kansas Healing Arts Act is constitutional on its face and as applied in the case. Licensee agrees that, in considering this matter, the Board is not acting beyond its jurisdiction as provided by law.
6. Licensee voluntarily and knowingly waives his right to a hearing. 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. Licensee voluntarily and knowingly agrees to waive all possible substantive and procedural motions and defenses that could be raised if an administrative hearing were held.
7. The terms and conditions of the Consent Order 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 Consent Order 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 Consent Order on behalf of the Board.
8. The Board has received information and investigated the same, and has reason to believe there are grounds pursuant to K.S.A. 65-2836, to take action with respect to Licensee's license under the Healing Arts Act, K.S.A. 65-2801, *et seq.*
9. Licensee submitted an advertisement to the Hutchinson News in 2007 which claimed that allergies, runny nose and sneezing could be relieved with no drugs and the use of NeuroModulation Technique (NMT). The ad represents NMT as a

- clinical treatment that can cure allergies. Licensee obtained this information from Leslie S. Feinberg.
10. Licensee provided information in pamphlets he gave patients which stated that NMT was "a rapid and effective way of correcting all allergies". Information provided by Licensee constituted a promise of a cure. Licensee used information written by Leslie S. Feinberg.
 11. Literature for NMT represents that it is a proprietary system developed by Dr. Leslie S. Feinberg and is the result of his individual study of the many systems of energetic medicine.
 12. NMT is not taught as an acceptable method or procedure as part of the core curriculum of an approved professional school or an approved post graduate program for the healing arts nor is it based on sufficient learned publications supporting the safety and efficacy. NMT is an experimental treatment.
 13. Records obtained during the Board investigation revealed that Licensee did not document standard patient information such as height and weight and did not include many of the more typical elements of a chiropractic exam such as vital signs.
 14. Licensee's records do not contain proper informed consent for use of the experimental treatment.
 15. Licensee acknowledges that if formal hearing proceedings were conducted and Licensee presented no exhibits, witnesses or other evidence, the Board has sufficient evidence to prove that Licensee has violated the Healing Arts Act with respect to the above allegations. Licensee further waives his right to dispute or

otherwise contest the allegations contained in the above paragraphs in any further proceeding before this Board.

16. Licensee's acts, if proven, constitute unprofessional conduct as set forth in K.S.A.

65-2836; specifically,

- a. K.S.A. 65-2836(d) in that his advertisement contains fraudulent or false information.
- b. K.S.A. 65-2836(b), as further defined in K.S.A. 65-2837(b)(13), in that his advertisement contains false or misleading statements regarding the efficacy or value of a treatment.
- c. K.S.A. 65-2836(b), as further defined in K.S.A. 65-2837(b)(27), in that he used experimental forms of therapy without proper informed consent, without conforming to generally accepted criteria or standard protocols or without keeping detailed legible records or without having periodic analysis of the study and results reviewed by a committee or peers.
- d. K.S.A. 65-2836(b), as further defined in K.S.A. 65-2837(b)(25) and K.A.R. 100-24-1, in that he failed to create and maintain adequate medical records.

17. Pursuant to K.S.A. 65-2836, as amended by HB 2620 on July 1, 2008, the Board

may revoke, suspend, limit censure or place under probationary conditions,

Licensee's license and pursuant to K.S.A. 65-2863a the Board has the authority to

impose administrative fines for violations of the Healing Arts Act.

18. According to K.S.A.65-2838(b), the Board has authority to enter into this Consent

Order without the necessity of proceeding to a formal hearing.

19. All pending investigation materials regarding Licensee were fully reviewed and considered by the Board member(s) who serve on the Board's Disciplinary Panel. Disciplinary Panel No. 23 authorized and directed Board counsel to seek settlement of this matter with the provisions contained in this Consent Order.
20. In lieu of conducting a formal proceeding, Licensee, by signature affixed to this Consent Order, hereby voluntarily agrees to the following disciplinary action against his license to engage in the practice of chiropractic:

PROBATION: EDUCATION

- a. Licensee shall attend and successful complete a continuing education course for record-keeping, by April 30, 2010, at his own expense. The course must be pre-approved by the Board or its designee. Licensee shall provide proof of successful completion by May 15, 2010.
- b. Unless otherwise approved by the Board, said continuing education course(s) shall consist of a formal live lecture format.
- c. Licensee shall cease and desist experimental treatments unless he has complied with all statutes, regulations and/or rules relative to experimental treatments; including but not limited to K.S.A. 65-2837(b)(27).
- d. Licensee shall at all times keep Board staff informed of all his current practice locations, addresses and telephone numbers. Licensee shall provide the above information in writing to the Board within ten (10) days of any such change.

- e. All reports required pursuant to this Consent Order shall be submitted to the Board of Healing Arts, Attention: Complaint Coordinator, 235 S.W. Topeka Blvd., Topeka, Kansas 66603-3068.
- f. The Board designates Terry L. Webb, D.C. to review and approve/disapprove any proposed educational courses required under this Consent Order, and approve/disapprove any other issue that may arise in the implementation of this Consent Order.

FINES

- g. Licensee is hereby fined \$2,500. Such fine is payable in full to the "Kansas Board of Healing Arts" on or before May 30, 2010.

PROBATION TIMEFRAME

- h. The above probation is not self-terminating. After a period of one (1) year, Licensee may request modification or termination of the provisions. For any period of time that Licensee is not actively practicing chiropractic in Kansas, the probation provisions will remain in effect but will be tolled and not counted towards reducing the one (1) year timeframe.
21. Licensee's failure to comply with the provisions of the Consent Order may result in the Board taking further disciplinary action as the Board deems appropriate according to the Kansas Administrative Procedure Act and Kansas Healing Arts Act.
22. Nothing in this Consent Order 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. 64-4921 et seq., that are

known or unknown and are not covered under this Consent Order, or to initiate formal proceedings based upon known or unknown allegations of violations of the Healing Arts Act.

23. Licensee hereby releases the Board, its individual members (in their official and personal capacity), attorneys, employees and agents, hereinafter collectively referred to as "Releasees", from any and all claims, including but not limited to those alleged damages, actions, liabilities, both administrative and civil, including the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 et seq. arising out of the investigation and acts leading to the execution of this Consent Order. This release shall forever discharge the Releasees of 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, cause or permit to be prosecuted, any action or proceeding of any description against the Releasees.
24. Licensee further understands and agrees that upon signature by Licensee, this document shall be deemed a public record and shall be reported to any reporting entities authorized to receive disclosure of the Consent Order.
25. This Consent Order, 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.
26. Licensee agrees that all information maintained by the Board pertaining to the nature and result of any complaint and/or investigation may be fully disclosed to

and considered by the Board in conjunction with the presentation of any offer of settlement, even if Licensee is not present. Licensee further acknowledges that the Board may conduct further inquiry as it deems necessary before the complete or partial acceptance or rejection of any offer of settlement.

27. Licensee, by signature to this document, waives any objection to the participation of the Board members, including the Disciplinary Panel and General Counsel, in the consideration of this offer of settlement and agrees not to seek the disqualification or recusal of any Board member or General Counsel in any future proceedings on the basis that the Board member or General Counsel has received investigative information from any source which otherwise may not be admissible or admitted as evidence.
28. Licensee acknowledges that he has read this Consent Order and fully understands the contents.
29. Licensee acknowledges that this Consent Order has been entered into freely and voluntarily.
30. All correspondence or communication between Licensee and the Board relating to the Consent Order shall be by certified mail addressed to the Kansas State Board of Healing Arts, Attn: Compliance Coordinator, 235 S. Topeka Blvd., Topeka, Kansas 66603-3068.
31. Licensee shall obey all federal, state and local laws and rules governing the practice of chiropractic in the State of Kansas that may be in place at the time of execution of the Consent Order or may become effective subsequent to the execution of this document.

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

33. This Consent Order constitutes disciplinary action.

34. The Board may consider all aspects of this Consent Order in any future matter regarding Licensee.

IT IS THEREFORE ORDERED that the Consent Order and agreement of the parties contained herein is adopted by the Board as findings of fact and conclusions of law.

IT IS FURTHER ORDERED that:

PROBATION: EDUCATION

- a. Licensee shall attend and successful complete a continuing education course for record-keeping, by April 30, 2010, at his own expense. The course must be pre-approved by the Board or its designee. Licensee shall provide proof of successful completion by May 15, 2010.
- b. Unless otherwise approved by the Board, said continuing education course(s) shall consist of a formal live lecture format.
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- e. All reports required pursuant to this Consent Order shall be submitted to the Board of Healing Arts, Attention: Complaint Coordinator, 235 S.W. Topeka Blvd., Topeka, Kansas 66603-3068.
- f. The Board designates TERRY WEBB, D.C. to review and approve/disapprove any proposed educational courses required under this Consent Order, and approve/disapprove any other issue that may arise in the implementation of this Consent Order.

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- g. Licensee is hereby fined \$2,500. Such fine is payable in full to the "Kansas Board of Healing Arts" on or before May 30, 2010.

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- h. The above probation is not self-terminating. After a period of one (1) year, Licensee may request modification or termination of the provisions. For any period of time that Licensee is not actively practicing chiropractic in Kansas, the probation provisions will remain in effect but will be tolled and not counted towards reducing the one (1) year timeframe.

IT IS SO ORDERED on this 14th day of October, 2009.

9-22-2009 1:08PM

FROM

P. 12

From:

09/21/2009 15:31

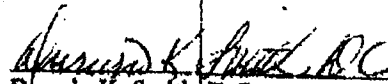
#230 P.012/013

**FOR THE KANSAS STATE
BOARD OF HEALING ARTS:**

Jack Confer
Executive Director

10-19-2009

Date



Durwin K. Smith, D.C.
Licensee

9-22-09

Date

PREPARED AND APPROVED BY:

Kathleen Selzler Lippert #17957
Litigation Counsel
Kansas Board of Healing Arts
235 S. Topeka Boulevard
Topeka, Kansas 66603-3068
785-296-0961

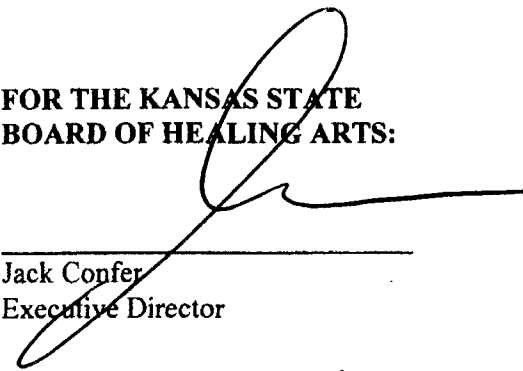
AGREED TO BY:



Eldon L. Boisseau
Attorney for Licensee
River Park Place
727 N. Waco, Suite 265
Wichita, Kansas 67203

Consent Order
Durwin K. Smith, D.C.

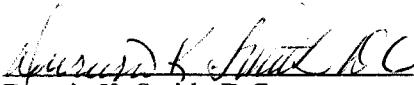
**FOR THE KANSAS STATE
BOARD OF HEALING ARTS:**



Jack Confer
Executive Director

10-19-09

Date

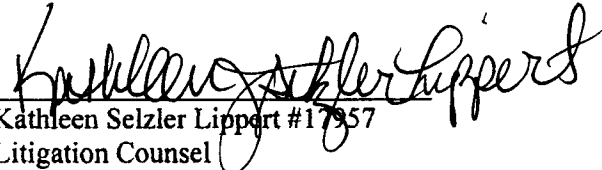


Durwin K. Smith, D.C.
Licensee

9-22-09

Date

PREPARED AND APPROVED BY:



Kathleen Selzler Lippert #17957
Litigation Counsel
Kansas Board of Healing Arts
235 S. Topeka Boulevard
Topeka, Kansas 66603-3068
785-296-0961

AGREED TO BY:

Eldon L. Boisseau
Attorney for Licensee
River Park Place
727 N. Waco, Suite 265
Wichita, Kansas 67203

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served a true and correct copy of the Consent Order by United States mail, postage prepaid, on this 19th day of October, 2009, to the following:

Durwin K. Smith, D.C.
Licensee
120 W. 3rd Street
Pratt, Kansas 67124

Eldon L. Boisseau
Attorney for Licensee
River Park Place
727 N. Waco, Suite 265
Wichita, Kansas 67203

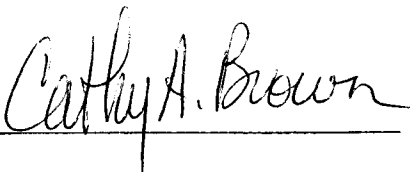
And the original was hand-filed with:

Jack Confer
Executive Director
Kansas Board of Healing Arts
235 S. Topeka Boulevard
Topeka, Kansas 66603-3068

And a copy was hand-delivered to:

Kathleen Selzler Lippert
Litigation Counsel
Kansas Board of Healing Arts
235 S. Topeka Boulevard
Topeka, Kansas 66603-3068

Melissa Massey
Compliance Coordinator
Kansas Board of Healing Arts
235 S. Topeka Boulevard
Topeka, Kansas 66603-3068



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