

STATE OF COLORADO  
DEPARTMENT OF LAW

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**ASSURANCE OF DISCONTINUANCE**

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IN THE MATTER OF FLATIRONS

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This Assurance of Discontinuance (“Assurance”) is entered into between the State of Colorado, *ex rel.* Philip J. Weiser, Attorney General for the State of Colorado (“the State”), and Flatirons<sup>1</sup> pursuant to the Attorney General’s powers under Colo. Rev. Stat. Section 6-1-110(2) and constitutes a complete settlement between the State and Flatirons (the “Parties”) regarding the State’s allegations that Flatirons’ medical billing practices violated the Colorado Consumer Protection Act (“CCPA”).

**I. INTRODUCTION**

Flatirons provides medical billing and practice management services to medical providers. This includes creating and processing claims for insurance reimbursement, appealing denials of coverage, facilitating payment of moneys owed by patients, and serving as a point of contact with insurers and patients for billing purposes. The State alleges, for a period from December 2018 through approximately October 2019, Flatirons sent confusing and deceptive letters and billing statements to consumers who had received treatment from out-of-network surgical assistants.

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<sup>1</sup> For purposes of this Assurance, all references to “Flatirons” includes “Flatirons Practice Management” and David Allen Enterprises, LLC, a Colorado limited liability company with a principal office street address of 6595 Odell Place, North Mezzanine, Boulder, Colorado 80301.

These bills and letters stated they were “not a bill,” but the State alleges that Flatirons and its surgical assistant clients considered these form billing statements and letters to be bills and, at times, sent consumers to collections based on these billing statements. Flatirons denies the State’s allegations.

This Assurance resolves the dispute between the State and Flatirons regarding Flatirons’ billing practices for surgical assistants. Flatirons denies that it violated the CCPA.

## **II. PARTIES**

1. Philip J. Weiser is the duly elected Attorney General for the State of Colorado and has express jurisdiction to investigate and prosecute violations of the Colorado Consumer Protection Act (“CCPA”), C.R.S. Sections 6-1-101 through 6-1-1121.

2. Flatirons is a Colorado corporation with the registered principal office address of 6595 Odell Place, North Mezzanine, Boulder, Colorado 80301.

## **III. DEFINITIONS**

3. The term “Effective Date” means the first date upon which both Parties have executed and delivered this Assurance.

4. Unless otherwise specified, all definitions found in C.R.S. Section 6-1-105(1) are incorporated herein, and any term defined in those Sections shall have the same meaning when used in this Assurance.

#### IV. STATE'S ALLEGATIONS

##### A. Flatirons' "Statement Detail" Sent to Consumers

5. In December 2018 Flatirons acquired another medical billing company, Delphi Management Services, LLC ("Delphi"). Delphi utilized an automated billing software program that Flatirons continued to use for a period of time after the acquisition. Flatirons ultimately switched over to a separate billing software program in mid-2019 but continued to use the original program for claim follow-up.

6. Delphi had existing contracts with medical providers, including several surgical assistants. When Flatirons acquired Delphi, they inherited these preexisting contracts. Some of the surgical assistants contracting with Flatirons assisted surgeons with procedures even when the surgical assistants were outside of the patient's insurance network.

7. When billing on behalf of an out-of-network surgical assistant who assisted an in-network surgeon, Flatirons first sought reimbursement from the insurance carrier.

8. If the insurer did not pay the surgical assistant the amount which the surgical assistant sought, Flatirons contacted the patient using billing systems that generated monthly letters and billing statements.

9. Flatirons began sending the patient a single-page "Statement Detail" that was formatted like a bill and contained language that could lead a consumer to believe the consumer needed to make a payment. The Statement Detail often included language that was misleading to some consumers such as: "This Is Not A

Bill However We Need Your Assistance!! Please Call Your Insurance And Request This Claim Be Processed In-network Per State Mandate.” These statements left patients confused about their obligation to pay and how to resolve the issue.

10. The Statement Detail listed the surgical assistant’s “billed rate,” a figure which was typically far higher than the rate at which insurance companies reimburse in-network providers. The billed rate was also far higher than the rates many of the surgical assistants ultimately accepted directly from patients.

11. Flatirons sent this Statement Detail to the patient on a monthly basis until Flatirons’ surgical assistant client received an amount the surgical assistant deemed acceptable.

12. Some patients spent months trying to sort out whether and how much money they owed to the surgical assistants. Although the Statement Detail stated that it was “not a bill,” if the surgical assistant did not receive a payment amount they deemed sufficient, Flatirons and its clients sometimes sent the patient to a collection agency for the full billed amount.

#### **B. Flatirons’ Misrepresentation Regarding the Billing Issue.**

13. Flatirons also misled patients regarding why they received these billing statements. These statements included language such as: “Your insurance processed the claim out of network. Please call them and request the claim be processed In-network per Colorado State Mandate.” Although the language varied, the message to the consumer typically presented the billing issue as an in-network versus out-of-network one.

14. Flatirons included this language on billing statements even when a patient's insurance company had paid the in-network rate per the state mandate. The actual billing dispute was often not about in-network versus out-of-network rates, but about what services were covered by a certain insurance carrier and the rates requested by the individual surgical assistant.

15. By Flatirons misrepresenting why it wanted patients to get involved in what amounted to disputes between individual surgical assistants and insurance companies, the patients could not effectively advocate for themselves to resolve the billing issues.

16. These billing statements at times resulted in patients spending hours telephoning and emailing Flatirons, insurance providers, and their medical providers to resolve the billing dispute.

17. Flatirons told some consumers to contact their insurance providers to ask them to pay the charges, and also asked consumers to file complaints with the Department of Regulatory Affairs, DORA. Consumers then provided misinformation to a regulatory agency that the claims were not being processed as in-network when they had been. As a result, DORA would not help resolve the dispute.

**C. Legal Allegations.**

18. The terms of a bill or letter are part of the representations and disclosures of material information made by a business to a consumer.

19. The CCPA, C.R.S. § 6-1-105(1)(e), prohibits a person in the course of the person's business, vocation, or occupation from "knowingly or recklessly mak[ing] a

false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods, food, services, or property...[.]”

20. The CCPA, C.R.S. § 6-1-105(1)(u), prohibits a person in the course of the person’s business, vocation, or occupation from “[f]ail[ing] to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction.”

21. The CCPA, C.R.S. § 6-1-105(1)(rrr) prohibits a person in the course of the person’s business, vocation, or occupation from “knowingly or recklessly engag[ing] in any unfair, unconscionable, deceptive, deliberately misleading, false, or fraudulent act or practice.”

22. The State alleges that Flatirons’ conduct here violated at least these subsections of the CCPA.

23. Flatirons denies that its conduct is covered by the CCPA and/or that it violated the CCPA.

## V. LEGAL AUTHORITY

24. C.R.S. Section 6-1-110(2) authorizes the Attorney General to accept an assurance of discontinuance for any deceptive trade practice listed in Part 7 of the CCPA. Section 6-1-110(2) also allows the Attorney General to accept a voluntary payment from Flatirons of any amount necessary to restore to any person money acquired by such alleged violator by means of a deceptive trade practice.

## **VI. CONSIDERATION**

25. The Parties enter into this Assurance for the purpose of compromising and resolving all disputed claims and to avoid further expense of protracted litigation. This Assurance does not constitute an admission by Flatirons of any violation of the CCPA, nor shall it be construed as an abandonment by the State of its claim that Flatirons has violated the CCPA.

## **VII. REFUNDS TO CLAIMANTS**

26. Flatirons shall make a refund for all amounts due and owing. The total amount due and owing is \$12,933.98. This amount relates to approximately 40 Colorado consumers. The amount is payable to the Attorney General of the State of Colorado, in trust by the Attorney General, to be used in the Attorney General's sole discretion for reimbursement of attorneys' fees and costs, the payment of consumer restitution, if any, and for consumer education purposes, for future consumer protection enforcement, or public welfare purposes. The Attorney General elects, in lieu of receiving payment directly to the Attorney General in the first instance, to direct Flatirons to pay refunds to these consumers, referred to as "Claimants" herein. To the extent that Flatirons is unable to locate any Claimants entitled to a refund or to otherwise make a refund to a Claimant within 120 days due to a Claimant not cashing or depositing a refund check within that timeframe, after 150 days such unpaid refunds or payments shall be paid to the Attorney General in accordance with paragraph 32 below.

27. A "Claimant" is an individual who:

- a. Received a "covered statement," a statement informing the claimant it was "not a bill" and instructed the claimant to pay a surgical assistant for billed amounts not covered by insurance providers; and
- b. Paid any amount of money to a surgical assistant or to Flatirons pursuant to a covered statement.

28. Flatirons agrees to provide to the State a confidential list of claimants and their respective reimbursement amounts within thirty (30) days of the Effective Date of this Agreement.

29. **REFUND PROCESS.** Within thirty (30) days of the Effective Date of this Agreement, Flatirons shall mail each Claimant a check in the amount the Claimant paid to Flatirons whether that amount was retained by Flatirons or paid in turn to a surgical assistant. In that same mailing, Flatirons shall notify Claimants by letter (in a form set forth in Exhibit A hereto) that they are receiving a refund because of an agreement with the State and of this Assurance of Discontinuance. All refunds or payments shall be made by check payable directly to the Claimant. If any check is returned or not processed within sixty (60) days after it is sent, then Flatirons shall exercise reasonable efforts and due diligence to re-attempt the payment one time. Checks that are returned due to an invalid address shall be re-sent if a forwarding address is provided or reasonably discoverable through skip tracing.



30. Each check to a Claimant shall be valid for a hundred and twenty (120) days. Any uncashed amounts after that date will be treated according to paragraph 32 of this Agreement.

31. **REPORTING OBLIGATIONS.** No later than one hundred and fifty (150) days after execution of this Assurance, Flatirons must submit to the Attorney General a report regarding the refund program described herein. The report shall include, at a minimum, the following information for each Claimant:

- a. Name and address;
- b. The amount of any refund paid to the Claimant;
- c. The date any refund was issued;
- d. Whether the Claimant has cashed the refund check;
- e. A list of all checks cashed, uncashed or returned;
- f. Whether the mail was returned to Flatirons as undeliverable; and
- g. The total amount remaining.

32. **Refund or Payment Outstanding Beyond 120 Days.** One hundred and twenty (120) days after a check has been issued, Flatirons shall stop payment on outstanding refund or payment checks and cease all attempts at account credits, and pay to the Attorney General, within thirty (30) days thereafter, the total amount of any and all refund amounts that remain outstanding, whether because they were returned as undeliverable, unclaimed, uncashed, undeposited, or otherwise.

33. Flatirons shall cooperate with any proceedings or investigations arising out of this Assurance. This includes submission of additional compliance reports the

State may reasonably request, promptly responding to reasonable requests for information made by the State, responding to consumer inquiries forwarded from the State related to compliance with this Assurance, and accepting service of Civil Investigative Demands related to compliance with this Assurance.

34. In the event Flatirons (i) materially defaults on the payment of valid claims or payments as set forth in this Assurance; or (ii) files a petition for relief under the United States Bankruptcy Code 11 U.S.C. §101 et seq. prior to completion of Flatirons' financial obligations described in this Assurance, the parties agree that the State shall have the right on written notice to Flatirons to assume control of the claims administration process, and Flatirons will reasonably cooperate in the transition of the claims process to the State.

35. Flatirons reaffirms and attests to the truthfulness, accuracy, and completeness in all material respects of all the information, including explicitly the information contained on Exhibit A, Flatirons provides and has provided to the Attorney General in response to queries in connection with entry of this Assurance to the best of its knowledge.

#### **VIII. NOTICE BY THE STATE**

36. In the event the Attorney General believes that Flatirons has not materially complied with the Refund Process requirements set forth at Paragraphs 26 through 35, the Attorney General shall provide written notice to Flatirons of the specifics regarding such material non-compliance so that the Attorney General and Flatirons may confer in good faith to resolve the dispute.

## **IX. RELEASE**

37. The State acknowledges by its execution hereof that this Assurance constitutes a complete settlement and release of all claims on behalf of the State against Flatirons with respect to all claims, causes of action, damages, fines, costs, and penalties which were asserted or could have been asserted for the conduct described in this Assurance, that arose prior to the Effective Date. The State agrees that, except as provided in the following paragraph, it shall not proceed with or institute any civil action or proceeding against Flatirons for any conduct or practice prior to the Effective Date which relates to the subject matter of this Assurance.

38. Nothing herein precludes the State from enforcing this Assurance, or from pursuing any law enforcement action under the CCPA with respect to the acts or practices of Flatirons not covered by this Assurance or any acts or practices of Flatirons conducted after the Effective Date. Nothing herein shall be construed to be a waiver or limitation of Flatirons' legal rights, remedies, or defenses in connection with any claim, matter, or suit related to the subject matter of this Assurance other than an action by the State to enforce the provisions of this Assurance.

## **X. ENFORCEMENT**

39. The obligations set forth in this Assurance are continuing.

40. The Parties consent to venue and jurisdiction for any proceeding necessary to enforce the terms of this Assurance within the District Court, Denver County, Colorado.

41. A violation of any of the terms of this Assurance shall constitute a *prima facie* violation of the CCPA under C.R.S. Section 6-1-110(2). If the State believes that Flatirons has violated any term of this Assurance, the State shall be entitled to file a civil action under the CCPA and to seek an injunction or other appropriate order from such court to enforce the provisions of this Assurance. In any such action, Flatirons agrees to waive any counterclaims that it may have had with respect to the subject matter of this Assurance and agrees to limit any defenses to (1) whether a violation has occurred; (2) the remedies for the violation.

#### **XI. MISCELLANEOUS PROVISIONS**

42. The State and Flatirons agree that this is a compromise of a disputed claim and that this Assurance is entered into without admitting any liability, which liability is expressly denied, and without agreement by any party to any of the allegations or defenses made by another party. Nothing contained herein shall be deemed an admission of liability or wrongdoing of any kind.

43. Flatirons voluntarily stopped sending the Statement Details outlined in the State's Allegations prior to the State's involvement and Flatirons agrees to not send Statement Details in the future with the language that is the subject of the State's Allegations.

44. This Assurance is the final, complete, and exclusive statement of the Parties' agreement on the matters contained herein, and it supersedes, terminates, and replaces any and all previous negotiations, agreements, and instruments as may exist between the Parties. Other than any representation expressly stated in this

Assurance, the Parties have not made any representations or warranties to each other, and no Party's decision to enter into this Assurance is based upon any statements by any other Party outside of those in this Assurance. No change or modification of this Assurance shall be valid unless in writing and signed by all Parties. If any provision(s) of this Assurance is held to be invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

45. This Assurance shall neither create nor waive or otherwise affect any private rights or remedies in any third parties nor waive any rights, remedies, or defenses of the Parties in respect to any third parties. Under no circumstances shall this Assurance or the name of the Attorney General or any of the State's employees or representatives be used by Flatirons or any person under their direction or control to suggest the State's endorsement of Flatirons' past, present, or future conduct. The parties agree Flatirons does not admit any violation of the law.

46. Nothing herein relieves Flatirons of its duty to comply with all applicable laws, regulations, or rules of the State of Colorado nor constitutes authorization by the State for Flatirons to engage in acts and practices prohibited by such laws.

47. Flatirons acknowledges that it is the State's customary position that an agreement restraining certain conduct by a party does not prevent the State from addressing later conduct that could have been prohibited, but was not, in the earlier agreement, unless the earlier agreement expressly limited the State's enforcement

options in that manner. Therefore, nothing herein shall be interpreted to prevent the State from taking enforcement action to address conduct occurring after the Effective Date that the State believes to be in violation of the law. The fact that such conduct was not expressly prohibited by the terms of this Assurance shall not be a defense to any such enforcement action.

48. The terms and provisions of this Assurance may be enforced by the current Colorado Attorney General, and by any of his duly authorized agents or representatives, as well as by any of his successors in interest, and by any of his successors in interest's agents or representatives.

49. Pursuant to C.R.S. Section 6-1-110(2), this Assurance shall be a matter of public record.

50. The State and Flatirons acknowledge that they had a full opportunity to review this Assurance and consult with legal counsel regarding it. The undersigned representatives of the State and Flatirons agree and represent that they have read and understood this Assurance, accept the legal consequences involved in signing it, and that there are no other representations, agreements, or understandings between the State and Flatirons that are not stated in writing herein.

51. This Assurance may be signed in one or more counterparts, each of which shall be deemed an original, but which together shall constitute the Assurance. Electronic copies of this Assurance and the signatures hereto may be used with the same force and effect as an original.

## XII. Notice

52. All notices regarding this Assurance shall be sent by certified mail, return receipt requested or reputable overnight delivery service (e.g., FedEx, UPS) at the addresses set forth below or by email unless any Party notifies the other Parties in writing of another address to which notices should be provided:

If to Flatirons:

6595 Odell Place, North Mezzanine  
Boulder, Colorado 80301

With copies to legal counsel by Regular U.S Mail and e-mail:

Peggy E. Kozal  
Gordon & Rees Scully Mansukhani, LLP  
555 Seventeenth Street, Suite 3400  
Denver, CO 80202  
[pkozal@grsm.com](mailto:pkozal@grsm.com)  
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Ellen Stewart  
Spencer Fane LLP  
1700 Lincoln Street, Suite 2000  
Denver, CO 80203  
Email: [estewart@spencerfane.com](mailto:estewart@spencerfane.com)

If to the State:

Colorado Attorney General  
1300 Broadway, 7<sup>th</sup> Floor  
Denver, Colorado 80203  
Attn.: Abigail Hinchcliff, First Assistant Attorney General,  
[abigail.hinchcliff@coag.gov](mailto:abigail.hinchcliff@coag.gov)

[Signatures appear on the following page(s)]

**STATE OF COLORADO:**

**FLATIRONS**

**PHILIP J. WEISER,  
ATTORNEY GENERAL**

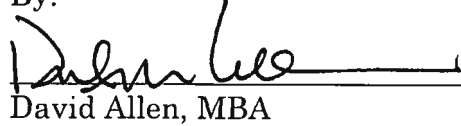
By:



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Abigail Hinchcliff  
First Assistant Attorney General  
Attorney Reg. No. 47942

By:



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David Allen, MBA