



## BUSINESS ASSOCIATE AGREEMENT

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This **BUSINESS ASSOCIATE AGREEMENT** ("Agreement") is entered into effective as of September 23, 2013 or any date thereafter under which "Protected Health Information" is involved (the "Effective Date") by and between \_\_\_\_\_

the Participant's dental practice, collectively referred to herein as "**Participant**", and the **Dentists Professional Liability Trust of Colorado** acting through its governing Board ("**Trust**") and its Program Administrator, **Berkley Risk Administrators Company, LLC** ("**BRS**"). The Trust and BRS shall be referred to herein as "Business Associate" and all entities shall collectively be referred to as the "Parties."

### **RECITALS:**

**WHEREAS**, Participant is a "health care provider" and is or may become a "covered entity" as those terms are used and defined in the Health Insurance Portability and Accountability Act of 1996, as amended ("HIPAA"), and its implementing regulations;

**WHEREAS**, Business Associate performs or may perform services for or on behalf of Participant (the "Services") pursuant to the Coverage Agreement and the related Trust Agreement (the "Underlying Agreements"), which Services involve or may involve the access, use and/or disclosure of Protected Health Information (as defined below); and

**WHEREAS**, the Parties desire to enter into this Agreement in order to comply with the Health Insurance Portability and Accountability Act of 1996, as amended ("HIPAA"), the HIPAA amendments issued pursuant to the Health Information Technology for Economic and Clinical Health ("HITECH") Act, and the implementing regulations.

**NOW THEREFORE**, in consideration of the obligations set forth herein and other good and valuable consideration the Parties agree as follows:

**1. Definitions.** Capitalized terms not otherwise defined in this Agreement shall have the same meaning as those terms in the HIPAA Privacy, Security, Enforcement & Breach Notification Final Omnibus Rules as they exist or as they may be amended from time to time (the "HIPAA Rules").

(a) "Breach" shall have the meaning set forth in 45 CFR § 164.402 (including all of its subsections).

(b) "Designated Record Set" shall have the same meaning as the term "designated record set" in 45 C.F.R. § 164.501.

(c) "Electronic Protected Health Information" or "E PHI" shall have the same meaning as the term "electronic protected health information" in 45 CFR § 160.103, limited to information that Business Associate creates, accesses, receives or maintains for or on behalf of Participant.

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(d) “Protected Health Information” or “PHI” shall have the meaning set forth in in 45 CFR § 160.103, limited to information that Business Associate creates, accesses, receives or maintains for or on behalf of Participant. PHI includes EPHI.

(e) “Privacy Rule” means the Standards for Privacy of Individually Identifiable Health Information, codified at 45 CFR parts 160 and 164, Subparts A, D and E, as currently in effect.

(f) “Security Rule” means the Standards for Security for the Protection of Electronic Protected Health Information, codified at 45 CFR parts 160 and 164, Subparts A and C, as currently in effect.

(g) “Unsecured Protected Health Information” shall have the same meaning as the term “unsecured protected health information” in 45 CFR § 164.402, limited to such information accessed, created, received or maintained by Business Associate.

### **2. Scope of Use and Disclosure of PHI.**

(a) Business Associate Status. Business Associate acknowledges that it is or may become the Participant’s “Business Associate” as defined by HIPAA or the HIPAA Rules. Business Associate agrees to comply with HIPAA, HITECH and the HIPAA Rules as they directly apply to business associates.

(b) Performance of Service. Business Associate shall not access, use or further disclose PHI, other than as permitted or required by this Agreement, to perform the Services pursuant to the Underlying Agreements or as required by law. Business Associate shall not access, use or disclose PHI in any manner that would violate HIPAA or the HIPAA Rules if such access, use or disclosure was done by Participant.

(c) Permitted Uses and Disclosures. Business Associate is authorized and entitled to use the PHI for the necessary and proper management and administration of the Trust and the Coverage Agreement including, expressly, but not necessarily limited to:

1. Any and all risk management functions;
2. The defense of, handling of, and any other activities related to, any incident or claim submitted by any patient or patient representative against the Participant for which the Coverage Agreement provides or may provide coverage to the Participant in any judicial or administrative proceeding initiated against the Participant;
3. The handling of responses to administration of or other activities related to any dental incident or other incident or wrongful act alleged against the Participant and which is covered and as provided for by the Coverage Agreement;
4. Cooperation with the Trust and any and all of the Trust's representatives and subcontractors, including defense counsel and expert witnesses, related to the defense or settlement of any notice of a claim or dental incident or wrongful act;
5. The enforcement of any right of contribution of the Trust against any other person or entity who may be liable to the Participant or the Trust because of any

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damages to which the Coverage Agreement applies;

6. Assistance in securing and giving evidence and obtaining of witnesses in defense of any proceeding against the Participant;
7. The investigation, settlement or defense of any claim; or
8. The assistance and cooperation with the Trust in the event any need exists in the judgment of the Trust to assist in or investigate any regulatory proceedings including, but not limited to, any such proceedings brought by the Colorado Board of Dental Examiners

Business Associate may also use any such PHI related to the functions and activities set out in the prior paragraphs in association with information they have and in their capacities as a Business Associate and/or as a subcontractor with or to defense counsel, coverage counsel, or expert witnesses as required by the circumstances or such activities as set forth in the prior paragraphs.

All of the foregoing are subject to the express conditions and terms of the Trust Agreement and the Coverage Agreement and any applicable endorsements.

(d) Minimum Necessary. Business Associate shall not access, use or disclose more than the minimum necessary PHI to perform or fulfill the intended permissible purpose, in accordance with this Agreement.

(e) Privacy Rule. To the extent Business Associate carries out one or more of the Participant's obligations under the HIPAA Privacy Rule, Business Associate shall comply with the requirements of HIPAA that apply to the Participant in the performance of such obligation(s).

(f) Security Rule and Safeguards. Business Associate shall use safeguards that are appropriate and sufficient to prevent access, use or disclosure of PHI other than as permitted or required by this Agreement. Business Associate shall comply with the Security Rule with respect to EPHI, including implementing Administrative Safeguards, Physical Safeguards, and Technical Safeguards that reasonably and appropriately protect the Confidentiality, Integrity and Availability of EPHI.

(g) Notification. Without unreasonable delay, and in no event in less than ten (10) days from discovery of a Breach, Business Associate shall notify the Participant, in writing, of any use or disclosure of PHI not provided for by this Agreement of which Business Associate becomes aware. Without unreasonable delay, Business Associate shall report to Participant in writing of any Security Incident of which it becomes aware in accordance with the Security Rule and Business Associate's obligations under the same. Upon Participant's or the Participant's request, Business Associate shall provide a report of any and all impermissible uses, disclosures and/or Security Incidents.

(h) Subcontractors. Business Associate shall ensure that any and all subcontractors that create, receive, maintain or transmit PHI on behalf of Business Associate agree, in writing, to the same restrictions and conditions that apply to Business Associate. Each subcontract agreement must include, without limitation, the provisions of this Agreement. Business Associate shall make such agreements with its subcontractors available to the

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Participant upon request.

(i) Audit. Business Associate shall make its internal practices, books, and records relating to the use and disclosure of PHI received from, or created or received by Business Associate on behalf of the Participant available to the Secretary of Health and Human Services and/or the Participant, upon request, for purposes of determining and facilitating Participant's compliance with HIPAA.

(j) Patient Rights.

1. Patient Right to Review. It is understood that the PHI and EPHI is expected to be exempt from access or accounting to the patient under the HIPAA Rules, §§ 164.524 and 164.528 of 45 C.F.R. In the event that any such PHI or EPHI records are not exempt, Business Associate shall make PHI or EPHI maintained in a Designated Record Set available to Participant in accordance with §164.524 of the Privacy Rule.

2. Patient Right to Amend. Business Associate shall make PHI available for amendment and incorporate any amendments to PHI maintained in a Designated Record Set at the direction of Participant and in accordance with §164.526 of the Privacy Rule. Participant shall be involved in any decision of Business Associate to amend the PHI of an Individual.

3. Patient Right to Request Accounting. Business Associate shall document and make available to Participant information relating to such Individual as is necessary for Participant to respond to a request for an accounting of disclosures in accordance with §164.528 of the Privacy Rule.

A. Business Associate agrees to implement an appropriate record-keeping process to ensure compliance with the requirements of this Section.

B. Business Associate, if the access or accounting is not exempt under the HIPAA Rules, agrees to provide PHI it maintains electronically in a Designated Record Set in an electronic form at the request of Participant and, when applicable, the Dental Practice or an Individual.

4. Notice to Participant. Business Associate shall notify the Participant immediately in writing upon receiving a request from an Individual to review copy or amend his or her medical record information or to receive an accounting of disclosures. Business Associate shall also provide Participant with a prompt written report of the details of its handling of such requests.

(k) Breach. Business Associate shall notify Participant of breaches of Unsecured PHI in accordance with the requirements of 45 CFR § 164.410 and in no event later than ten (10) days following discovery of any Breach. Such notification shall include, to the extent possible, the identification of each Individual whose PHI has been or is reasonably believed to have been accessed, acquired, used or disclosed during the Breach, along with any other information that Participant will be required to include in its notification to an affected Individual, the media and/or the Secretary, as applicable, including, without limitation, a description of the Breach, the date of the Breach and its discovery, the types of Unsecured Protected Health Information involved and a description of Business Associate's investigation, mitigation and prevention efforts.

(l) Mitigation. Business Associate agrees to mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of PHI by

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Business Associate or a subcontractor or agent of Business Associate in violation of the requirements of this Agreement, the Privacy Rule, the Security Rule or other applicable federal or state law.

### **3. Participant Obligations.**

(a) Notice of Privacy Practices. Participant shall notify Business Associate of limitation(s) in its notice of privacy practices to the extent such limitation affects Business Associate's permitted uses or disclosures under this Agreement.

(b) Individual Authorization. Participant shall notify Business Associate of changes in, or revocation of, authorization by an Individual to use or disclose PHI, to the extent such changes affect Business Associate's permitted uses or disclosures under this Agreement.

(c) Restrictions. Participant shall notify Business Associate of restriction(s) in the use or disclosure of PHI that Participant has agreed to, to the extent such restriction affects Business Associate's permitted uses or disclosures under this Agreement.

### **4. Term and Termination.**

(a) Term. The Term of this Agreement shall become effective as of the Effective Date, and remain in effect until all PHI or EPHI is returned or destroyed in accordance with this Section.

(b) Termination for Cause. Participant may terminate this Agreement immediately if Participant, in its sole discretion, determines that Business Associate has violated a material term of this Agreement. Participant, at its option and within its sole discretion, may (1) permit Business Associate take steps to cure the breach; and (2) in the event Participant determines such cure is sufficient, elect to keep this Agreement in force.

(c) Obligations of Business Associate upon Termination. Upon termination of this Agreement for any reason, Business Associate shall promptly return to Participant or destroy all PHI received from Participant, or created or received by Business Associate on behalf of Participant, that Business Associate still maintains in any form. Business Associate shall retain no copies of the PHI in any form. Upon request by Participant, Business Associate shall promptly supply a certification executed by an authorized representative of the Business Associate confirming that Business Associate has returned or destroyed all PHI and all copies thereof.

(d) Survival. The obligations of Business Associate under this Section shall survive the termination of this Agreement.

### **5. Miscellaneous Provisions.**

(a) Notices. Any notice required or permitted under this Agreement will be given in writing and will be sent via email or facsimile with hard copy to follow via Certified Mail, Return Receipt Requested:

To Participant at:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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To Business Associate at:

Dentists Professional Liability Trust of Colorado  
c/o Berkley Risk Administrators Company, LLC.  
Attn: Dr. Randy Kluender  
7807 East Peakview Avenue, Suite 350  
Centennial, CO 80111

(b) Waiver. No delay or omission by any party to exercise any right or remedy under this Agreement will be construed to be either acquiescence or the waiver of the ability to exercise any right or remedy in the future. Failure of a party to insist upon strict adherence to any term

or condition of this Agreement shall not be considered a waiver by that party of its right thereafter to insist upon strict adherence to that, or any other, term or condition of this Agreement. No waiver of any breach of any provision of this Agreement shall constitute a waiver of any prior, concurrent or subsequent breach of the same or any other provisions hereof, and no waiver shall be effective unless made in writing and signed by an authorized representative of the waiving party.

(c) Severability. All provisions of this Agreement are separate and divisible, and if any part or parts of this Agreement are held to be unenforceable, the remainder of this Agreement will continue in full force and effect.

(d) Amendments. The Parties shall confer and may amend this Agreement from time to time by mutual written agreement as may be necessary in order to keep this Agreement consistent with any changes made to the HIPAA or HITECH laws or HIPAA Rules. Participant may terminate this Agreement if the Parties are unable to agree to such changes by the compliance date for such new or revised HIPAA or HITECH laws or HIPAA Rules.

(e) Interpretation. Any ambiguity in this Agreement shall be interpreted to permit compliance with HIPAA and HITECH and the HIPAA Rules.

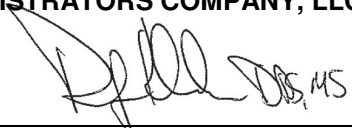
(f) Independent contractor. The Parties acknowledge and agree that Business Associate is an independent contractor. Nothing in this agreement shall be construed to create any partnership, joint venture, agency, or employment relationship of any kind between the Parties. Notwithstanding the foregoing, to the extent that Business Associate is ever determined for any purpose to be an agent of the Participant (under the Federal common law of agency or otherwise), Business Associate shall be acting outside of the scope of agency if Business Associate fails to notify the Participant immediately if Business Associate violates or breaches any provision of this Agreement or violates the HIPAA Rules.

(g) Integration. In the event the Business Associate and Participant were parties to a prior Business Associate Agreement, such prior Agreement is superseded and replaced by this Agreement.

**IN WITNESS WHEREOF**, the Parties have executed this Business Associate Agreement as of the Effective Date.

**DENTISTS PROFESSIONAL LIABILITY TRUST OF  
COLORADO AND BERKLEY RISK  
ADMINISTRATORS COMPANY, LLC**

By: **X** \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By:  \_\_\_\_\_  
Name: Randy L. Kluender, DDS, MS  
Title: Executive Director