

**ASSURANCE OF DISCONTINUANCE MADE
PURSUANT TO EXECUTIVE LAW § 63(15)
BETWEEN THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,
AND HIGHPOINTE ON MICHIGAN HCF
AND KALEIDA HEALTH**

DATED: October 31, 2019

WHEREAS, the Attorney General of the State of New York (the “Attorney General”), on behalf the People of the State of New York, commenced an investigation through the Medicaid Fraud Control Unit (the “MFCU Investigation”) of the circumstances surrounding the arrests of 17 caregivers in 2014 as well as the death of a 16-month old infant in 2015 at HighPointe on Michigan Health Care Facility (“HighPointe”), a 300-bed skilled nursing facility located in Buffalo;

WHEREAS, HighPointe is an unincorporated division of Kaleida Health (“Kaleida”), the largest not-for profit provider of health-care services in Western New York and Kaleida is the sole member of HighPointe;

WHEREAS, at all times relevant hereto, Kaleida, a not-for-profit corporation organized under the laws of New York State, through its fifteen member Board of Directors, was legally responsible for establishing and implementing policies regarding the management and delivery of care to the elderly and pediatric residents of HighPointe;

WHEREAS, at all times relevant hereto, HighPointe was enrolled in the New York State Medicaid Assistance Program (“Medicaid”) program and received funds to provide critical care to its pediatric and elderly residents, many of whom are Medicaid recipients;

WHEREAS, Kaleida Health is committed to the successful operation of HighPointe, and has expended and is committed to expending appropriate and necessary sums to serve the elderly and chronically ill and developmentally disabled children in Western New York;

WHEREAS, the following constitute the Attorney General's findings from the MFCU Investigation, hereinafter referred to as the "Covered Conduct";

Department of Health Survey Findings

A. Between 2012 and 2014, the Department of Health (the "DOH") cited HighPointe with 43 deficiencies, twice the New York State average. Each deficiency represents a violation of federal and state regulations designed to ensure that adequate care is provided to nursing home residents.

B. Significantly, DOH cited HighPointe three times for "Failure to Develop a Comprehensive Care Plan (s) for each resident; twice for Deficient Physician Services, and four times for failing to "Provide Care Services for Highest Well Being." These types of citations or "F-tags" represent deficiencies in the delivery of care to HighPointe's residents.

C. HighPointe's Management and Kaleida's Board of Directors received notice of these citations through communications with the DOH and the submission of "Plans of Corrections" to cure the deficiencies. These deficiencies were timely corrected by Kaleida in accordance with DOH standards.

Findings as to Criminal Conduct

D. In 2014, the Attorney General secured the convictions of 17 caregivers employed by HighPointe related to the criminal neglect of a 56-year old resident with Huntington's disease and falsification of business records relating to his care, in violation of the Penal Law and the Public Health Law.

Findings after the 17 Convictions

E. In response to the convictions, HighPointe hired Eugene Gonsiorek as a consultant and temporary Administrator of the facility

F. In August 2014, Mr. Gonsiorek reported to Kaleida's Quality Care Committee and the Board of Directors that :

- a. One third of the deficiencies cited by the DOH: "related to staff not being able to provide adequate care levels;"
- b. "there needs to be a change in culture and infrastructure at Highpointe;" and
- c. "A major deficit is the accountability and poor communication."

G. Mr. Gonsiorek served as HighPointe's temporary Administrator for a three- month period from June 1, 2014 through August 28, 2014 and was thereafter replaced by a full time Administrator of the facility. Mr. Gonsiorek then became the Vice President for Long Term Care.

MFCU Findings Relating to the Death of a Sixteen-Month-Old Infant

H. In July 2015, the Attorney General commenced an investigation, through MFCU, into the death of a sixteen-month old male infant who was a resident of the HighPointe pediatric unit. Based upon this investigation, the Attorney General determined that:

- a. The infant was admitted to HighPointe's pediatric unit on January 15, 2015, after staff at Kaleida's Women's and Children's Hospital convinced his mother to admit her son to HighPointe during the flu season;
- b. The infant was admitted to the HighPointe pediatric unit for 33 days until February 18, 2015, when he was pronounced dead after being found unresponsive in his room;

c. At the time of his death, the infant had a tracheotomy, was dependent on a gastric tube for feeding, was connected to a Humivent to assist with breathing, could not hold up his head without artificial support, and did not have the ability to clear his own throat or call for help;

d. Despite prior documented episodes of Humivent obstruction and of the infant vomiting while being fed, HighPointe did not adjust the infant's care plan to require nursing staff to be present to assist and observe the infant while he was being fed;

e. On February 18, 2015, the infant was left alone in his room and unattended for at least 67 minutes (4:24 p.m. until 5:31 p.m.), during which time he was inappropriately being tube-fed in a high chair that was not required by his care plan;

f. During the 67 minutes that the infant was left alone while he was being tube-fed, he suffocated on his vomit and ultimately died;

g. At the time of the infant's death, HighPointe's 20 bed pediatric unit was staffed by only four nursing professionals (one Registered Nurse, one Licensed Practical Nurse, one Certified Nurse Aide, and one Respiratory Therapist), instead of six nursing professionals (two registered Nurses, three Certified Nurse Aides, and one Respiratory Therapist) as was typical for that time of day;

h. Instead of closely monitoring the infant while he was being tube-fed, HighPointe staff instead relied upon an alarm / pager system designed to remotely monitor the infant's vital signs, the Masimo Safety Net System (the "Masimo System");

i. On the day the infant-resident died, the Masimo system was not adjusted to properly monitor the infant's vitals; HighPointe had no policies nor procedures in place to

correctly operate and rely on the Masimo system; and the nursing staff was not properly trained to use the Masimo system;

j. HighPointe failed to maintain adequate physician notes reflecting the lack of proper medical care or supervision of the infant, in violation of 10 NYCRR § 415.15(b);

k. The nursing notes reflected that the infant was not provided sufficient nursing care to the infant on February 8, 12, 13, 14, and 15, 2015, in violation of 10 NYCRR § 415.22;

l. HighPointe failed to maintain nurse practitioner notes documenting care of the infant for the time-period of January 15, 2015 through February 18, 2015, in violation of 10 NYCRR § 415.22;

m. HighPointe's management failed to properly investigate the death of the infant, in violation of 10 NYCRR § 415.4;

n. HighPointe failed to preserve crucial evidence regarding the death of the infant, including the report of the Director of Nursing and recorded video surveillance of the pediatric unit;

o. Finally, HighPointe's management failed to report the death of the infant to NYSDOH in violation of 10 NYCRR § 415.4 and NYSDOH reporting requirements, which resulted in the loss, and significant delay in the gathering, of critical information concerning the circumstances surrounding the infant's death.

Findings as to Insufficient Staffing, Lack of Training, and Failure to Investigate

I. Upon receipt of a complaint from the infant's mother regarding the circumstances surrounding the death of her son in April 2015, the DOH concluded that based on its investigation of the death of the infant resident that HighPointe placed all the residents on the Pediatric

Ventilator Unit in “Immediate Jeopardy” of “serious injury, harm impairment and death.” Again, HighPointe was cited for failing to develop and update residents Care Plans. Significantly, the DOH cited HighPointe’s Board of Directors for failing to “implement policies and procedures regarding the management of the facility to secure that the facility was managed in a manner to protect the safety and welfare of its residents.” DOH has determined that Kaleida corrected these deficiencies in a timely manner in accordance with DOH standards.

J. After the DOH placed HighPointe in Immediate Jeopardy, Kaleida rehired Mr. Gonsiorek, as the Vice President of Long Term Care to manage operations at HighPointe as well as another Kaleida skilled nursing home facility located at DeGraff Hospital in North Tonawanda, New York.

K. In his investigative summary of the infant’s death, Mr. Gonsiorek concluded:

a. HighPointe did not maintain their staffing patterns of two registered nurses on the day of the infant’s death;

b. The acuity level of the children on the Pediatric Unit had increased in 2015 and the increased acuity level “may be outside the skill set of the LPNs”;

c. The nursing staff on the Pediatric Unit was never trained or in-serviced as to how to use the Masimo Patient Safety Net system;

d. There was never a proper investigation completed for the facility of infant’s death to rule out abuse, mistreatment or neglect so as “to prevent the events from ever happening again.”

L. In August 2015, Mr. Gonsiorek reported to the Kaleida Board of Directors about the implementation of “many staffing changes” including a new administration and new medical leadership at HighPointe, as well as “greater corporate oversight.”

M. Among the staffing changes made by Mr. Gonsiorek was the hiring of 15 direct care nurses and the replacement of the facility's physicians group.

Conclusions

WHEREAS, the Attorney General has determined that Kaleida provided insufficient supervision and oversight of the management and nursing staff at HighPointe;

WHEREAS, the Attorney General has determined that the State has potential claims against HighPointe and Kaleida as a result of the Covered Conduct under the Executive Law § 63(12), the Public Health Law, State Finance Law § 189(1), the Not-for-Profit Corporation Law, and other statutes and the common law, for restitution, damages, and equitable relief;

WHEREAS, the Attorney General finds the relief and promises set forth in this Agreement appropriate and in the public interest, in the interests of the current and future residents of HighPointe, and in furtherance of Medicaid program integrity;

WHEREAS, Kaleida and HighPointe neither admit nor deny the Attorney General's findings and/or liability for the Covered Conduct but agree that the Attorney General's findings are admissible in an action by the Attorney General to enforce this Assurance of Discontinuance (the "Agreement" or "AOD");

WHEREAS, the Attorney General, on behalf of the State of New York, HighPointe and Kaleida wish to enter into this Agreement as of the date set forth above, to resolve the findings from the MFCU Investigation; and

WHEREAS, the Attorney General and Kaleida acknowledge and agree that the improvements, reforms, and increased oversight as proscribed in this AOD are a direct result of, and response to, the Attorney General's investigation as well the product of on-going discussions with Kaleida;

WHEREAS, HighPointe, Kaleida Health and the Attorney General (the "Parties") enter into this Agreement, an Assurance of Discontinuance (the "Agreement" or "AOD") as follows:

Section I:

MONETARY RELIEF

1. Kaleida shall pay the sum of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00) as set forth in Paragraph 2 below, in satisfaction of the Attorney General's civil claims arising from the Covered Conduct.

Restitution to the Medicaid Program

2. Upon the Effective Date of this Agreement, Kaleida shall pay the sum of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00) to the Medicaid Program (the "New York State Settlement Amount"), through the Medicaid Fraud Control Unit Restitution Fund.

3. No portion of the following payments and/or costs shall be claimed as a reimbursable expense on the facility's Medicaid or Medicare Cost Reports, Cost Statements, Information Statements or Payment Requests submitted by HighPointe to Medicaid or Medicare:

a. the payments Kaleida makes to New York State pursuant to this Agreement, including the Medicaid Restitution Settlement Amount of up to FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00);

b. the cost of responding to the MFCU Investigation; and

c. the negotiation of this Agreement.

Section II:

OVERSIGHT OF HIGHPOINTE FOR IMPROVED CARE

4. Kaleida will continue to operate HighPointe as a skilled nursing facility, including the pediatric unit, subject to the terms of this AOD and applicable law.

5. Kaleida and HighPointe commit to the Attorney General, as well as to HighPointe's residents and their families and the taxpayers of New York, that they will institute and continue all direct care improvements, revise all care systems and adopt all recommendations made by DOH and by Michelle Sinclair, Senior Director of Long Term Care, to assure that all caregivers are properly trained and supervised, including specialized pediatric training for those caregivers assigned to the pediatric unit, and that each and every HighPointe resident is treated with dignity and respect; that caregivers provide timely, consistent, safe, appropriate, adequate and professional services at all times; and that the misconduct uncovered by the MFCU investigation shall not be repeated.

Reforms to Improve Governance and Corporate Compliance of HighPointe

6. To ensure compliance with this Agreement and as well as to implement and maintain corporate compliance policies and procedures, within thirty (30) days after the Effective Date, Kaleida shall create a Corporate Compliance Officer solely responsible for HighPointe, who shall be responsible for preparing a HighPointe compliance report to the Audit and Corporate Compliance Committee ("ACCC") at each of the committee's meetings. A copy of this report shall be provided to the Attorney General. In addition, the committee shall include an item on its agenda during each meeting specifically for the discussion of HighPointe and presentation of the compliance report. The ACCC shall then have the responsibility to report this HighPointe compliance report to the Kaleida Board of Directors. To this end, Kaleida shall agree to have an item on its agenda during each Board of Directors meeting to accept and discuss this HighPointe compliance report. The relevant minutes of such meeting shall be provided to the Attorney General.

7. The compliance report shall include, at a minimum:

a. all efforts undertaken to ensure and maintain compliance with this AOD, including all steps taken to remedy any situations in contradiction to this AOD or in contradiction to paragraphs b-f below.

b. all management staff transactions including promotions, hires, resignations, and terminations, and the reason(s) therefore.

c. an assessment of the facility physicians group and a report on whether the group is supplying adequate physicians at a sufficiency and frequency with a requisite skill level to comply with the Public Health Law and regulations of Title 10 of the NYCRR.

d. a report that the Masimo system and/or all other monitoring systems are functioning properly and have been tested/maintained at the frequency of the manufacturer's specifications.

e. a report that the video surveillance system is functioning properly and has been tested/maintained at the frequency of the manufacturer's specifications, including the testing of the video retrieval/external storage capabilities.

f. a report of all accidents and incidents contrary to patient care plans, including but not limited to, incidents of abuse, neglect, and mistreatment, regardless of whether such accidents and incidents are required to be reported to DOH.

8. The Corporate Compliance Officer shall be responsible for ensuring the following:

a. development and implementation of an investigative protocol to properly investigate and report allegations of neglect and abuse of any HighPointe resident to the Department of Health as required by the PHL, as well as misconduct related to HighPointe's operations if the Corporate Compliance Officer believes that the misconduct may violate criminal

law, or may violate civil or administrative law or is otherwise reportable. A report will be promptly made to the ACCC, a copy of which shall be provided to the Attorney General.

b. to respond and produce promptly and completely, on behalf of HighPointe, documents, surveillance camera video footage and other tangible evidence in response to requests for information from regulatory authorities, including the Attorney General, subject to the provisions set forth in Paragraph 17 (Cooperation with the Attorney General).

c. develop policies, procedures, and training for the accurate making and retention of records, including but not limited to, the adoption of a surveillance camera video footage retention policy of at least one (1) year and to retain Accident and Incident reports for at least seven (7) years.

d. to interview any HighPointe and/or Kaleida officers, directors, employees and patients (upon patient consent) which, in the Corporate Compliance Officer's sole discretion, are necessary and appropriate to carry out the Corporate Compliance Officer's responsibilities. Subject to constitutional privileges, HighPointe and Kaleida agree to fully and promptly cooperate with the Corporate Compliance Officer and shall use their best efforts to cause HighPointe's officers, directors, and employees to fully and promptly cooperate with the Corporate Compliance Officer.

e. to examine all books and records of HighPointe which, in the Corporate Compliance Officer's sole discretion, are necessary or appropriate to carry out the Corporate Compliance Officer's responsibilities.

f. to communicate with state and federal regulators or investigating agencies without the consent of HighPointe and/or Kaleida and provide its reports to such entities.

g. The Corporate Compliance Officer will meet with the Administrator and Director of Nursing at HighPointe at minimum monthly to address areas of concern, if any, identified by the Corporate Compliance Officer and to outline any assistance the Corporate Compliance Officer may request.

9. Within thirty (30) days after the Effective Date, Kaleida shall also make the Vice President for Long Term Care responsible for presenting the HighPointe compliance report to the Quality and Patient Safety Committee ("QPSC") at each of the committee's meetings. The committee shall include an item on its agenda during each meeting specifically for the discussion of HighPointe and presentation of the compliance report. The QPSC shall also have the responsibility to report the HighPointe compliance report to the Kaleida Board of Directors.

Reforms to Improve Supervision, Staffing, and Quality of Patient Care

10. In an effort to improve supervision, staffing levels, and the quality of patient care at HighPointe, Kaleida, with the cooperation and input of the Attorney General, has made a substantial financial and capital investment in HighPointe during the pendency of the Attorney General's investigation. This includes the expenditure of over EIGHT MILLION EIGHT HUNDRED THOUSAND DOLLARS (\$8,800,000.00) from 2015-2018 for the hiring of additional care staff, supervisory staff, physician staff, and improvements to various systems and equipment, including:

- a. hiring a dedicated medical director for sub-acute and long-term care who is responsible for the care of the 280 adult residents and formalized interdisciplinary behavioral rounding across multiple shifts at a salary of \$120,000 per year;
- b. appointing a new medical director of the pediatric unit responsible for providing five hours of medical care on the unit per day which includes monitoring of daily acute

changes, weekly rounding with the disciplinary team members, 30 day assessments on each pediatric patient, and attendance at all family meetings are well as the coordination of all outpatient appointments and specialty medical visits, at a salary of \$137,740 per year;

c. retaining a medical director for the 10 bed adult ventilator unit responsible for ventilator settings, weaning schedules, acute respiratory changes, and weekly rounding on adult ventilator patients at a salary of \$28,000 per year;

d. adding over 55 full time equivalent positions from 2014-2018 to assist with patient care in the facility without a change in the census or acuity level of patients. These positions include two assistant directors of nursing, three nursing supervisors available seven days per week, an assistant nurse manager on the facility sub-acute unit available from 11 am – 7 pm, an assistant nurse manager for more complex cases, a nurse manager for the adult ventilator unit, a director of clinical reimbursement/quality, an MDS coordinator, and an environmental services manager;

e. adding an additional 40 full time equivalent positions for frontline staff including RNs, LPNs, CNAs, RTs, PTs and PT assistants, OTs and certified OT assistants, nutritional service workers, a dietary manager, a clinical pharmacist, and a manager of operations who coordinates staff;

f. making capital improvements that include upgrades to the Masimo system (\$162,500), pediatric cribs (\$12,240), patient lifts and scales (\$32,600), an enhanced Wanderguard system (\$36,410), and a state-of-the-art playground for children with disabilities (\$75,000),

g. completely reorganizing the clinical education department and providing extended training to all care professionals, as a result of the Attorney General's investigation,

h. instituting the Point-Click-Care electronic medical record system enabling 99% of patients to be documented on a daily basis by CNA staff.

11. In addition to the improvements and upgrades, and as a result of the Attorney General's investigation, Kaleida has acknowledged and agreed to maintain the following minimum staffing levels on the pediatric unit at all times at HighPointe, subject to consideration of the census and acuity level of the residents, and consisting of appropriately trained individuals:

- a. a nursing staff consisting of 2 RNs
- b. a nurse aide staff consisting of 2 CNAs
- c. a therapy staff consisting of 1 RT

12. Kaleida agrees to continue to maintain the current improved levels of staffing and additionally created positions at HighPointe pursuant to paragraph 10 of this AOD unless, subject to an assessment and sufficient documentation of consideration of the likely effect on resident care, there is an economic or other substantial reason (*e.g.* a reduction in resident acuity level or census) to change the level of staffing. Should there be such an occurrence, Kaleida agrees to notify the Attorney General in writing and provide an explanation for the change in the level of staffing and documentation in support thereof. Notice and documentation of the reasons for any contemplated change in staffing shall constitute compliance with the requirements of this paragraph, and the Attorney General shall not use the stated grounds or supporting documentation as the sole basis for declaring a breach under paragraph 15 of the AOD or any other paragraph hereunder.

13. As a result and with the knowledge of the Attorney General, during the pendency of the investigation, Kaleida was able to increase its CMS Quality Measures score from three stars in January 2017 to the current rating of five stars.

Section III:

PROHIBITION AGAINST VIOLATING NEW YORK LAW AND THIS AGREEMENT

14. In operating HighPointe or any other healthcare business, Kaleida shall not engage or attempt to engage in violations of the Penal Law, Executive Law § 63(12), the Social Services Law, the State Finance Law, the Public Health Law, and the rules and regulations governing New York nursing homes and the New York State Medicaid Program.

15. The Attorney General retains the right under Executive Law § 63(15) to compel compliance with this Agreement. Evidence of a material breach of this Agreement shall constitute prima facie proof of violation of the applicable law in any civil action or proceeding thereafter commenced by the Attorney General. Should it be determined that a breach or other violation of this Agreement by the Participating Defendants has occurred, said breaching party shall pay the Attorney General the cost, if any, of such determination and of enforcing this Agreement, including without limitation, legal fees, expenses and court costs, including those between the breaching party and the Attorney General.

Section IV:

SURVIVABILITY OF TERMS AND CONDITIONS

16. If ownership or the operations of HighPointe are sold, assigned, conveyed, or transferred for any reason, including, but not limited to, sale, gift, the termination of HighPointe's provider agreement or the exclusion of HighPointe from Medicaid or Medicare as a result of the Covered Conduct, then all terms and conditions of Paragraphs 11-12, 15 and 23, and the Conclusions on Pages 7-8 of this AOD shall continue in full force and effect on any successor, assignee or transferee. HighPointe and Kaleida shall cause this AOD to be adopted in any such transfer agreement.

Section V:

COOPERATION WITH THE ATTORNEY GENERAL

17. Subject to constitutional privileges, HighPointe and Kaleida shall fully and promptly cooperate with the Attorney General with respect to any investigation by the Attorney General, and related proceedings and actions, of any person or entity, including but not limited to HighPointe's current and former employees. This includes, without limitation, HighPointe using its best efforts to ensure that its officers, directors, employees, and agents fully and promptly cooperate with any such investigation and related proceedings and actions. Cooperation shall include, without limitation: (a) production, by HighPointe and Kaleida or its agents voluntarily and without service of subpoena, pursuant to 10 NYCRR §415.30 and 18 NYCRR §504.3, of any information and all documents, including but not limited to surveillance camera video footage, and other tangible evidence requested by the Attorney General (except where prohibited by statute), and any compilations or summaries of information or data that the Attorney General requests be prepared; (b) without the necessity of a subpoena, directing HighPointe's officers, directors, employees and agents to attend any proceedings at which the presence of any such persons is requested by the Attorney General and directing such persons to answer any and all inquiries that may be put by the Attorney General to any of them at any proceedings or otherwise ("proceedings" include, but are not limited to, any meetings, interviews, depositions, hearings, grand jury session, trial or other proceedings); (c) promptly, fully, fairly and truthfully disclosing all information and producing all records, including but not limited to surveillance camera video footage, and other evidence in its possession relevant to all inquiries made by the Attorney General concerning any fraudulent or criminal conduct whatsoever about which it has any knowledge or information; and (d) HighPointe and/or Kaleida shall not jeopardize the safety of any investigator or the

confidentiality of any aspect of the MFCU Investigation, or any other investigation by the Attorney General, including sharing or disclosing evidence, documents, or other information with others during the course of the investigation, without the consent of the Attorney General. Nothing herein shall prevent HighPointe and/or Kaleida from providing information to other government agencies or as otherwise required by law. Nothing set forth above shall require HighPointe and/or Kaleida or any officer, director, employee or agent to provide information which is subject to the attorney client or work product privileges. Any notice pursuant to this paragraph shall be provided to the Kaleida General Counsel.

18. If HighPointe and/or Kaleida violate the requirements of Paragraph 17 in any material respect, as determined solely by the Attorney General, the Attorney General may pursue any action, criminal, civil or administrative, against any person or entity for any crime or other violation of law that it has committed, as authorized by law, without limitation. As to any criminal prosecution brought by the Attorney General for violation of law committed within five (5) years prior to the date of this Agreement or for any violation of law committed on or after the date of this Agreement, or the pendency of this Agreement, HighPointe and/or Kaleida hereby waives any claim that such prosecution is time-barred on grounds of speedy trial, pre-indictment delay, speedy arraignment or any statute of limitations. The exercise of any individual's constitutional rights shall not be deemed a failure by HighPointe and Kaleida to cooperate in violation of this Agreement. HighPointe and Kaleida acknowledge that Obstruction of Justice is a crime.

19. For the term of this Agreement, HighPointe and Kaleida shall maintain custody of, or make arrangements to have maintained, all documents and records of HighPointe related to the Covered Conduct.

Section VI:

NOTICE, TERM OF AGREEMENT, AND OTHER PROVISIONS

20. Any notices pursuant to this Agreement shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery, express courier, or electronic mail at an address designated in writing by the recipient), followed by postage prepaid mail, and shall be addressed as follows:

IF TO THE ATTORNEY GENERAL:

New York State Attorney General
Medicaid Fraud Control Unit
Attn: Director, Medicaid Fraud Control Unit
28 Liberty Street, 16th floor
New York, New York 10005
Tel. 212-417-5300

and

New York State Attorney General
Managing Clerk's Office
Attn: Director, Medicaid Fraud Control Unit
28 Liberty Street, 16th floor
New York, New York 10005

and

Email: MFCUNotices@ag.ny.gov

IF TO KALEIDA HEALTH:

Daniel C. Oliverio, Esq.
Hodgson Russ LLP
The Guaranty Building
140 Pearl Street
Buffalo, New York 14202-4040

21. In any proceeding or action relating to this Agreement, email transmission of a copy of any papers to the persons set forth herein, with telephone confirmation of receipt shall be good and sufficient service on Participating Defendants.

22. Any notice to the Attorney General under this Agreement, including any determination subject to approval by the Attorney General, shall be given with sufficient time, in the Attorney General's sole discretion, to exercise review and consideration of the determination to be made. In no event shall the Attorney General's silence on an issue requiring the Attorney General's consent be deemed consent, waiver or approval.

Term of the Agreement and Releases

23. The Effective Date of this Agreement is October ____, 2019. The Term of this Agreement shall be a period of thirty-six (36) months from the Effective Date, unless payment has not yet been made pursuant to Paragraph 2, in which case the Term of this Agreement shall be extended until payment has been made; however, provided that payment has been made pursuant to Paragraph 2, the Term shall be reduced to thirty (30) months if HighPointe continuously maintains a CMS overall rating of Four Stars or better. Nothing in this Agreement shall relieve HighPointe and/or Kaleida of other obligations imposed by any applicable state or federal law or regulation or other applicable law.

24. Subject to the exceptions set forth below in Paragraph 25 and, in consideration of HighPointe and Kaleida's successful completion of their obligations hereunder, and conditioned upon full payment as identified in Paragraph 2 of this Agreement and compliance with all other terms of this Agreement, including any Extended Termination Date, the State of New York will release HighPointe and Kaleida, and their successors in interest, from any civil claim the State has or may have made for the Covered Conduct under the New York False Claims Act, N.Y. State Fin.

Law §§ 187 *et seq.*, N.Y. Executive Law § 63(12), NY Social Services Law § 145-b, or the common law or equitable theories of payment by mistake, disgorgement, unjust enrichment and breach of contract.

25. Notwithstanding any term of this Agreement, the State of New York does not release any person or entity from any of the following liabilities:

- a. any civil, criminal or administrative liability arising under state tax laws;
- b. any administrative liability, including mandatory or permissive exclusion from the Medicaid program;
- c. any liability to the State of New York (or its agencies) for any conduct other than the Covered Conduct;
- d. any liability based on the obligations set forth in this Agreement.

Releases

26. HighPointe and Kaleida hereby release the State, its agencies, officers, agents, employees, and servants, from any claims (including attorney's fees, costs, and expenses of every kind and however denominated) that HighPointe and/or Kaleida have asserted, could have asserted, or may assert in the future against the State, its agencies, officers, agents, employees, and servants, related to the Covered Conduct.

27. This Agreement shall not confer any rights upon any persons or entities other than the State, the Attorney General, and DOH. Nothing in this Agreement shall be deemed or interpreted to create any third party beneficiaries or third party rights of action, or confer any rights in any third parties to enforce the terms of this Agreement

28. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New York without regard to choice of law or conflict of laws principles. Any action

to enforce the terms of this Agreement shall be brought in Supreme Court, New York County. The Parties waive any objection that any of them may now have or hereafter may have to this venue, whether concerning this Agreement or for any related suit, action or proceeding, and irrevocably consent to the jurisdiction of the Court and shall accept and acknowledge service in any such suit, action or proceeding.

29. Any failure by the Attorney General to insist upon the strict performance by HighPointe and/or Kaleida of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions hereof, and the State and DOH, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Agreement to be performed by HighPointe and/or Kaleida.

30. This Agreement contains the entire agreement and understanding of the Parties. There are no additional promises or terms of the Agreement other than those contained herein. The terms or provisions of this Agreement may not be changed, waived, modified, or varied in any manner whatsoever unless in a writing duly signed by all Parties.

31. The Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. A complete set of original executed counterparts shall be maintained by the Attorney General.

32. The Agreement shall be deemed to have been mutually prepared by the Parties hereto and shall not be construed against any of them solely by reason of authorship.

33. HighPointe and Kaleida acknowledge that they have entered this Agreement freely and voluntarily and upon due deliberation with the advice of counsel. HighPointe and Kaleida agree that the alleged Covered Conduct exposed HighPointe and Kaleida to substantial liability

and that the forbearances and other terms granted by the State are valuable consideration for Participating Defendants payments and other obligations hereunder.

34. HighPointe and Kaleida and their affiliates, officers, directors, agents, trustees, or employees agree not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any finding in the Agreement or creating the impression that this Agreement is without factual basis. Nothing in this paragraph affects HighPointe and/or Kaleida's: (a) testimonial obligations or (b) right to take legal or factual positions in defense of litigation or other legal proceedings to which the Attorney General is not a party.

35. The Attorney General may delegate any power or function hereunder to Deputy Attorneys General, Assistant Attorneys General, or other agents appointed pursuant to the Attorney General's authority, and may delegate any right or oversight function to a different State agency or officer. HighPointe and Kaleida may not transfer or delegate any duty or obligation without consent of the Attorney General.

36. In the event that one or more of the provisions contained in this Agreement shall for any reason be held invalid, illegal, or unenforceable in any respect, HighPointe and Kaleida shall not assert that such invalidity, illegality, or unenforceability affect any other provision of this Agreement.

WHEREFORE, the following signatures are affixed hereto on this ____ day of October, 2019.

LETITIA JAMES
Attorney General of the State of New York

BY: _____
Thomas N. Schleif
Special Assistant Attorney General
Medicaid Fraud Control Unit

Kaleida Health:

BY: 
Jody Lomeo
President and Chief Executive Officer of Kaleida Health

Approved as to Form:

BY: _____
Daniel C. Oliverio, Esq

STATE OF NEW YORK

COUNTY OF ERIE

SS.:

On October 31, 2019, before me personally came Jody Lomeo, to me known, who being by me duly sworn, did depose and say that he resides in Erie County, New York; that he is the President and Chief Executive Officer of Kaleida Health., the Corporation which is described in and which executed the above instrument; and that he signed his name thereto by order of the Board of Directors of said Corporation.

BETSY S. BAUMLER
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN ERIE COUNTY
REGISTRATION #4948492
My Commission Expires March 20, 2023


NOTARY PUBLIC

WHEREFORE, the following signatures are affixed hereto on this ____ day of October, 2019.

LETITIA JAMES
Attorney General of the State of New York

BY: _____
Thomas N. Schleif
Special Assistant Attorney General
Medicaid Fraud Control Unit

Kaleida Health:

BY: _____
Jody Lomeo
President and Chief Executive Officer of Kaleida Health

Approved as to Form:

BY: _____
Daniel C. Oliverio, Esq.

STATE OF NEW YORK

COUNTY OF ERIE

ss.:

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NOTARY PUBLIC

WHEREFORE, the following signatures are affixed hereto on this ____ day of October, 2019.

LETITIA JAMES

Attorney General of the State of New York

BY:  11/15/2019

Thomas N. Schleif
Special Assistant Attorney General
Medicaid Fraud Control Unit

Kaleida Health:

BY: _____
Jody Lomeo
President and Chief Executive Officer of Kaleida Health

Approved as to Form:

BY: _____
Daniel C. Oliverio, Esq

STATE OF NEW YORK

COUNTY OF ERIE

ss.:

On _____, 2019, before me personally came Jody Lomeo, to me known, who being by me duly sworn, did depose and say that he resides in _____ County, New York; that he is the President and Chief Executive Officer of Kaleida Health., the Corporation which is described in and which executed the above instrument; and that he signed his name thereto by order of the Board of Directors of said Corporation.

NOTARY PUBLIC

