

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is made and entered into this 13th day of September, 2021 (the “Effective Date”), by and between Plaintiff Ann E. Gwyther, as Personal Representative of the Estate of Henry Hirvi and the Estate of Eva Hirvi (collectively, the “Hirvi Plaintiffs”); and Plaintiff Nancy Beurpere, as Personal Representative of the Estate of John DeFazio (the “DeFazio Plaintiff”), and collectively with all of the foregoing plaintiffs (“Plaintiffs”), Defendant Marylou Sudders, in her official capacity as Secretary of the Executive Office of Health and Human Services; Daniel Tsai, in his official capacity as Director of the Office of Medicaid, Executive Office of Health and Human Services; and Kim Larkin, in her official capacity as Director of the Board of Hearings (“Board”) of the Office of Medicaid of the Executive Office of Health and Human Services (collectively “Defendants”).

WHEREAS, Plaintiff Jean Maas and the Hirvi Plaintiffs filed Actions, Nos. 1884CV00129 and 1884CV00845, against the Defendants in 2018 challenging, inter alia, the sufficiency of notices of denial of eligibility that they had received from the Office of Medicaid of the Executive Office of Health and Human Services (“MassHealth”), and those Actions were consolidated;

WHEREAS, on June 22, 2018, the Court issued a Memorandum of Decision and Order on Plaintiffs’ Motions for Declaratory Judgment (June 22, 2018 Order) ruling that where MassHealth has counted trust assets for Medicaid eligibility purposes, and denied an applicant for benefits because the trust assets exceed Medicaid eligibility limits, MassHealth’s then-standard notices of denial did not comply with 42 C.F.R. § 431.210(b);

WHEREAS, MassHealth thereafter amended its standard denial notices for trust cases, and the Hirvi Plaintiffs filed a complaint for contempt of the June 22, 2018 Order, on grounds that the new standard denial notices did not comply with that Order, because the new notices stated that

the reasons for the denial “include, but are not limited to” the trust provisions identified in the denial notice; the Court issued another Order on October 11, 2018 clarifying that the amended notices on their face complied with the June 22, 2018 Order, and would be non-compliant only if the agency withheld or omitted additional grounds for the denial not recited in the denial notice; however, the Court held that “[n]othing in the Declaration precludes [MassHealth] from taking action based on information learned after issuance of the denial notice or from revising or correcting a denial notice”;

WHEREAS, on November 14, 2018, the Hirvi Plaintiffs had a hearing before the Board on their appeal of MassHealth’s determination that they were ineligible for benefits;

WHEREAS, on April 17, 2019, the Hirvi Plaintiffs filed another Action, No. 1984CV01210, alleging that the Board had failed to comply with 42 U.S.C. § 1396a(a)(3), requiring MassHealth to provide a fair hearing to any individual whose claim for benefits is denied or is not acted upon with “reasonable promptness”; 42 C.F.R. § 431.244(f), requiring the Board to issue decisions “ordinarily” within 90 days of the date that an individual requested a fair hearing; and G.L. c. 118E, § 48, requiring the Board to issue decisions within 45 days of the date that an individual requested a fair hearing on a denial of benefits, and seeking class certification;

WHEREAS, on April 22, 2019, the Board issued its decision in the Hirvis Plaintiffs’ administrative appeal;

WHEREAS, on May 8, 2019, the Hirvi Plaintiffs filed an Amended Complaint in Action No. 1984CV01210, in which the Hirvi Plaintiffs also alleged that MassHealth violated 42 U.S.C. § 1396(a)(8), requiring MassHealth to furnish assistance to all eligible individuals with “reasonable promptness”, and that denial of the Hirvi Plaintiffs’ application for benefits was a denial of “due process” and “reasoned consistency”;

WHEREAS, Action No. 1984CV01210 was consolidated with the Action Nos. 1884CV00129 and 1884CV00845;

WHEREAS, the DeFazio Plaintiff also filed an Action, No. 1884CV03631, that included a claim concerning the sufficiency of the denial notice that DeFazio had received, and that notice issued before the Court's June 22, 2018 Order; a claim concerning whether MassHealth had violated 42 U.S.C. 1396a(8) in failing to address his rehearing request with "reasonable promptness"; a claim concerning the "fair[ness]" of DeFazio's fair hearing; and a claim seeking reversal of his fair hearing decision;

WHEREAS DeFazio's Action was consolidated with Action Nos. 1984CV01210, 1884CV00129, and 1884CV00845 based on the notice claim;

WHEREAS, after the Board upheld DeFazio's denial of eligibility, and his Complaint was filed, MassHealth voluntarily redetermined DeFazio's application and found him eligible for benefits; DeFazio then filed an Amended Complaint adding claims concerning "reasoned consistency" and seeking certification of a class;

WHEREAS, the Court ultimately reversed the Board's decision affirming MassHealth's determination that the Hirvi Plaintiffs were ineligible for benefits;

WHEREAS, each of the Plaintiffs has asserted that their claims regarding timeliness, consistency, and notice are representative of patterns and practices of behavior in which the Defendants and their agencies engage, although no class has been certified;

WHEREAS, each of the Plaintiffs has asserted claims for attorneys' fees under 42 U.S.C. §§ 1983 and 1988;

WHEREAS, the Defendants do not admit liability; however, in order to avoid the burden and uncertainty of further litigation, the Parties wish to resolve all of the Plaintiffs' claims raised in the consolidated Hirvi and DeFazio Actions¹;

WHEREAS, the mutual objectives of the Parties in entering into this Settlement Agreement are (a) to ensure that a final determination on any appeal of a denial of eligibility for MassHealth benefits be acted upon by the MassHealth Board of Hearings within 90 days, pursuant to 42 C.F.R. § 431.244(f), and (b) to help improve and foster consistency in Board of Hearings decision-making in administrative appeals.

NOW THEREFORE, the Parties agree as follows:

1. **Final Settlement; No Admission of Wrongdoing:** This Agreement is in settlement of the claims raised in the consolidated Actions and shall not be considered an admission of any wrongdoing on the part of any of the Defendants, and is final and binding on the Parties and their officials, agents, employees and successors, personal representatives, and all persons acting on their behalf or in active concert or participation with them. The Parties further agree that they shall not seek judicial appeal of any of the findings and conclusions of this Agreement.

2. **Procedures to be Implemented by the Defendants:** The Defendants agree to implement the following procedures:

A. **Procedures to Ensure Reasonable Promptness:**

- i. Pursuant to 42 C.F.R. § 431.244(f), the Board shall render its final determination of a Request for Fair Hearing in any appeal of a denial of eligibility within 90 days of receipt of said Request,

¹ At a status conference on March 17, 2021, counsel for Plaintiff Jean Maas indicated that she is deceased, and the Court stated that judgment would enter in her Action. A fifth Action, brought by Plaintiffs John R. Levangie and Janet P. Levangie (No. 1984CV02831) was consolidated with these Actions, but was dismissed by stipulation on May 5, 2021.

except that the occurrence of any of the delays listed in Paragraph (ii), below, shall not count toward the 90-day total and instead shall operate to toll the running of the 90-day period during the time period attributable to such delay.

- ii. The following shall not count toward the 90-day total and instead shall operate to toll the running of the 90-day period:
 - a. Delays or enlargements of time requested or caused by the appellant or his or her appeal representative. Such delays include the appellant's delay in the submission of evidence, briefs, or other statements, rescheduling or continuances granted at the request of or for the benefit of the appellant, and any other delays caused by the actions of the appellant or his or her appeal representative including, but not limited to, requests by appellant or agreements to leave the record open for review of evidence submitted at hearing and/or additional post-hearing submissions by appellant. The hearing officer shall document in the hearing record, and notify the applicant of, any delay of this nature that, at the hearing officer's determination, is excluded from the 90-day period.
 - b. Delays due to acts of nature, serious illness, or other issues beyond the control of the Board of Hearings that make a hearing officer unable to render a timely decision. The hearing officer shall document in the hearing record any delay of this nature that, at the hearing officer's determination, is excluded from the 90-day period.
- iii. MassHealth shall create an email address to receive inquiries from appellants who are within 14 days of the 90-day deadline for a decision on their appeals. This address shall be monitored by a designated staff person within the MassHealth Legal Department.
- iv. Beginning on October 1, 2021, and continuing until at least October 1, 2024, the Board shall publish quarterly, on a designated website, which shall be available to the public, the following data demonstrating its compliance with decision time deadlines with respect to all appeals: Number of Appeals Filed, Number of Cases Closed by Decision, and Percentage of Decisions Issued within 90 Days.

B. Procedures to Promote Administrative Consistency:

- i. Upon a timely request, the Medicaid Director shall, for good cause shown as described in this subsection, direct the Director of the Board of Hearings to provide a rehearing pursuant to 130 CMR 610.091. Good cause shall exist if the appellant satisfactorily demonstrates to the Medicaid Director that the Board of Hearings has previously issued a hearing decision or an appellate court has issued a final, binding decision construing the same trust language or law, and the appellant's Board decision is directly inconsistent with the previous Board decision or binding appellate precedent. In requesting a rehearing on this basis, the appellant shall attach copies of the prior Board of Hearings decision and/or the appellate precedent relied upon and the challenged Board of Hearings decision and shall clearly identify and explain the inconsistencies between the decisions and the identity of facts and law. Appellant must also provide any prior Board of Hearings decisions that are consistent with the treatment provided to appellant on the identical facts and law.
- ii. Any rehearing conducted pursuant to Paragraph B(i) shall be confined to the specific consistency issues identified in the rehearing request with respect to the identified trust language and its prior interpretation by the Board of Hearings and/or appellate court. The hearing officer or the Board Director conducting the rehearing shall issue a decision explaining the Board's treatment of the identified trust.
- iii. The Medicaid Director shall act upon requests for rehearing within 45 days of said request or said request shall be deemed denied, unless the appellant advises the Medicaid Director in writing prior to the expiration of the 45 day deadline that he or she does not desire the request to be deemed denied in the event it is not acted upon within 45 days. If the Medicaid Director has denied a rehearing request, or if a request has been deemed denied because the Medicaid Director has not acted upon it within 45 days of the request, the appellant may immediately proceed to judicial review of the Board's decision under G.L. c. 30A. MassHealth shall amend its regulations in order to implement these requirements.
- iv. In addition to the foregoing rehearing procedures, the Board of Hearings shall, consistent with federal and state law privacy mandates, make best efforts to make its final written decisions available to the public and to hearing officers through the implementation of either a vendor-based online electronic searchable database (i.e. Westlaw, Lexis, Social Law Library or

similar service) or the Board's website within two years of the effective date of this Settlement Agreement. Said database may be fee-based, although it may be free to users who already subscribe to the chosen service provider. In addition, MassHealth shall continue to make available the free terminal that is currently located at the Board's offices for reviewing past Board decisions.

- v. Additionally, to further promote administrative consistency with respect to the treatment of trusts in the analysis of financial eligibility for long-term care benefits, MassHealth shall conduct a series of four one-hour meetings, at six-month intervals beginning in January 2022. The meetings shall be via Zoom or similar virtual technology and shall be attended by representatives of the MassHealth Legal Department and any other MassHealth staff as determined by MassHealth and stakeholders consisting of counsel for the Plaintiffs in this matter or other counsel who regularly represent applicants for MassHealth long-term care benefits before the Board of Hearings. The purpose of these meetings shall be to provide listening sessions so that the stakeholders may identify to MassHealth issues concerning the treatment of trusts in the analysis of financial eligibility for long-term care benefits.

C. **Procedures to Promote Compliance with the Court's June 22, 2018 and October 11, 2018 Orders:**

- i. MassHealth shall create an email address to receive inquiries from applicants who are denied long-term care benefits based on assets held in a trust, and who believe that the denial notice they received does not comply with the Court's June 22, 2018 and October 11, 2018 Orders. This address shall be monitored by a designated staff person within the MassHealth Legal Department.

3. **Attorneys' Fees:** Defendants shall pay to Plaintiffs the aggregate amount of \$94,410 (to be allocated as follows: \$61,021.50 to Attorney Nicholas Kaltsas as counsel for the Hirvi Plaintiffs; \$24,163.50 to Attorney John Welch as counsel for the DeFazio Plaintiff; and \$9,225 to Northeast Justice Center, LLC as counsel for the DeFazio Plaintiff), to compromise and settle Plaintiffs' claims for attorneys' fees and litigation expenses and costs (including, without limitation, expert fees and costs). The payment made by Defendants pursuant to this paragraph constitutes the full compromise and settlement of all claims for attorneys' fees and

litigation expenses and costs related to the Actions: (i) that any of the Plaintiffs has, as of the execution date of this Agreement, against all Defendants in any of the Actions; (ii) that any of the Plaintiffs might have against Defendants for activity occurring after the execution date, including without limitation for activity to monitor the implementation of this Agreement.

Payments under this paragraph shall not be construed as an admission or constitute evidence that any Defendant is liable to Plaintiff for the payment of attorneys' fees and litigation expenses or costs in, or related to, these Actions, but rather represent only the compromise and settlement of a disputed claim. The compromise and settlement of Plaintiffs' claims for attorneys' fees and litigation expenses and costs against the Defendants shall not establish: (1) a "reasonable" hourly rate for Plaintiff's counsel or any other counsel; (2) the "reasonableness" of any legal services or activities performed by Plaintiff's counsel in this or any other action; or (3) the "reasonableness" of any item of litigation expenses or costs in this or any other action.

4. Dismissal of Actions: Within seven (7) days of the date of Effective Date of this Agreement, the Parties, through their respective counsel, shall jointly file a Stipulation of Dismissal with Prejudice in the Hirvi II and DeFazio Plaintiffs' Actions (Nos. 1984CV01210 and 1884CV03631), in the form attached as Exhibit A. In the Hirvi I Action (No. 1884CV00845) the Parties shall jointly request that the Court enter Final Judgment consistent with the Court's June 22 and October 11, 2018, Orders, as shown in the form attached as Exhibit B.

5. Enforcement by Non-Parties: No other party who is not a signatory to this Agreement shall be entitled to enforce any of the provisions of this Agreement, except as set forth in this paragraph. For a period of three (3) years from the Effective Date of this Agreement, any applicant for MassHealth benefits who is determined to be ineligible for such benefits shall be permitted to seek enforcement of the 90-day requirement listed in Paragraph

2(A) of this Agreement if the Defendants fail to comply with such requirement with respect to that applicant. To enforce the 90-day requirement listed in Paragraph 2(A), an applicant must first submit a written demand to the email address described in Paragraph 2(A)(iii) that the Board issue a final fair hearing decision within the 90-day period described in Paragraph 2(A). The appellant may submit this written demand no sooner than 14 days before expiration of the 90-day period. If the appellant has submitted this written demand, and the Board fails to issue a final fair hearing decision within 14 days after receipt of the written demand, the applicant may enforce this provision solely through an action in Superior Court seeking an order of specific performance to issue the final fair hearing decision with respect to that applicant only.

6. **Notice to Public:** Within 30 days of the Effective Date of this Agreement, Defendants shall publish subregulatory guidance on MassHealth's website that summarizes the procedures available under Paragraphs 2(A)(i)-(iv), 2(B)(i) and (ii), 2(C)(i), and 5. This subregulatory guidance shall include the email addresses identified in Paragraphs 2(A)(iii) and 2(C)(i).

7. **Additional Provisions**

A. **Entire Agreement:** This Agreement contains all the agreements, conditions, promises and covenants between Plaintiffs and Defendants and their respective counsel regarding matters set forth in this Agreement and supersedes all prior or contemporaneous agreements, drafts, representations or understandings, either written or oral, with respect to the subject matter of this Agreement.

B. **Binding Effect:** Plaintiffs and Defendants represent and warrant that they have authority to enter into this Agreement and that this Agreement shall be binding upon, and inure to the benefit of, their successors and assigns. Each of the persons

executing this Agreement on behalf of a Plaintiff or Defendant represents and warrants that he or she has the authority to do so.

C. **Releases**: Each Plaintiff fully, finally and forever releases, relinquishes, discharges, and waives any and all causes of action, claims, demands, liabilities, obligations, or suits of any kind, known or unknown, from the beginning of time until the end of the term of this Agreement, arising out of or relating to the subject matter of the Actions, except for claims to enforce the terms of this Agreement.

D. **Written Modification**: No modification of this Agreement shall be effective or binding unless made in a writing executed by all Parties.

E. **Interpretation**: The Plaintiffs and Defendants participated in the drafting of this Agreement and, accordingly, any claimed ambiguity shall not be presumptively construed for or against any Plaintiff or Defendant.

F. **Execution**: This Agreement may be executed in counterparts, each of which shall constitute an original instrument and all of which together shall constitute one and the same Agreement.

G. **Eleventh Amendment Immunity**: Nothing in this Agreement shall constitute a waiver by the Commonwealth of its immunity under the Eleventh Amendment of the United States Constitution.

H. **No Consent Decree**: This Agreement shall not constitute, be construed as, or otherwise be incorporated into a consent decree or other order of the Court.

J. **Expiration**: This Agreement shall expire three (3) years from the Effective Date.

IN WITNESS WHEREOF, the below parties hereto have caused this Agreement to be duly executed by the respective authorized signatories of their counsel.

Plaintiffs,

**Ann E. Gwyther,
Personal Representative of the
Estates of Henry E. Hirvi and
Eva E. Hirvi**

**Nancy Beurpere, Personal Representative of
the Estate of John DeFazio**



Defendants,

**Daniel Tsai, Director of the Office of Medicaid,
Executive Office of Health and Human Services;
Marylou Sudders, Secretary of Executive Office
of Health and Human Services; and Kim Larkin,
Director of the Board of Hearings, Executive
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M Sudders

By: Marylou Sudders, Secretary of the Executive Office of Health and Human Services

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Ann E. Gwyther, P.R.

Nancy Beurpere

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M Sudders

By: Marylou Sudders, Secretary of the Executive Office of Health and Human Services