

Voluntary Resolution Agreement
Between the United States of America and
Jeffrey Smith, M.D., P.C., d/b/a Great Lakes Surgical Associates

I. Parties to Agreement

1. The Parties to this Voluntary Resolution Agreement ("Agreement") are:
 - (a) The U.S. Department of Justice, U.S. Attorney's Office for the Eastern District of Michigan ("DOJ"), pursuant to its jurisdictional authority under Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181-12189, and its implementing regulation, 28 C.F.R. Part 36, ("Title III of the ADA"), and the U.S. Department of Health and Human Services, Office for Civil Rights ("HHS"), pursuant to its jurisdictional authority under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*, and its implementing regulation, 45 C.F.R. Part 84 ("Section 504") and Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 and its implementing regulation, 45 C.F.R. Part 92 ("Section 1557") (collectively, "the Departments"); and
 - (b) Jeffrey Smith, M.D., P.C., d/b/a Great Lakes Surgical Associates ("GLSA").

II. Background

2. This matter was initiated when an individual ("Complainant") brought a complaint to DOJ alleging violations of Title III of the ADA and its implementing regulation.
3. Complainant alleged that, on or around November 15, 2016, GLSA discriminated against him by failing to provide him with the full and equal enjoyment of GLSA's goods, services, facilities, privileges, advantages or accommodations in violation of Title III of the ADA. Specifically, Complainant alleged that GLSA discriminated against him by refusing to treat him because of his HIV status.
4. Complainant, an individual living with HIV, has a physical impairment that substantially limits one or more major life activities, including the operation of the immune system, which is a major bodily function. Accordingly, Complainant has a disability within the meaning of the ADA, 42 U.S.C. § 12102 and 28 C.F.R. § 36.105. The definition of "disability" under the ADA is incorporated by reference into the definitions of disability under Section 504 and Section 1557. *See* 29 U.S.C. § 705(9)(B); 42 U.S.C. § 18116; *see also* 28 C.F.R. § 36.105(b)(2),(d)(2)(iii)(J) (Title III implementing regulation, effective Oct. 11, 2016) (The phrase "physical or mental impairment includes . . . Human Immunodeficiency Virus infection (whether symptomatic or asymptomatic)..... it should easily be concluded that..... Human Immunodeficiency Virus (HIV) infection substantially limit[s]..... immune function").
5. As Complainant alleges that he was subjected to a prohibited action because of an actual or perceived physical or mental impairment, he is also protected under the "regarded as" prong of the definition of "disability" under the ADA, Section 504, and Section 1557. *See* 42 U.S.C. § 12102(l)(C); 28 C.F.R. § 36.105(a)(1)(iii); 29 U.S.C. § 705(20)(B); 45 C.F.R. § 84.3(j); 42 U.S.C. § 18116; 45 C.F.R. § 92.4. Individuals "regarded as" having

a disability are individuals with a disability under the ADA, Section 504, and Section 1557. An individual may establish coverage under any one or more of the three prongs of the definition of "disability." 28 C.F.R. § 36.105(a)(2)(ii).

6. DOJ conducted an investigation of the Complainant's allegations. GLSA has cooperated in that investigation. Through its investigation, DOJ determined the following:
 - (a) Complainant's primary care physician recommended that he undergo bariatric surgery. Additionally, a specialist treating Complainant for HIV approved Complainant for bariatric surgery. Complainant's primary physician referred him to GLSA;
 - (b) In advance of his visit to GLSA, Complainant completed a medical form, indicating his intent to undergo bariatric surgery as well as his HIV status and his antiretroviral drug regimen. In November 2016, Complainant visited GLSA and met with a GLSA surgeon;
 - (c) During the surgeon's first and only meeting with Complainant, the surgeon became aware of Complainant's HIV status. The surgeon informed Complainant that he was a "high risk patient" and that GLSA would not perform bariatric surgery on him; and
 - (cl) Complainant continued to communicate with GLSA staff after the visit, who reiterated that GLSA would not provide further evaluation or treatment and referred Complainant elsewhere.
7. Based upon its investigation, DOJ determined that GLSA discriminated against Complainant on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of GLSA, in violation of 42 U.S.C. § 12182 and 28 C.F.R. § 36.201.
8. As a result of this complaint and in cooperation with DOJ, HHS initiated a compliance review of GLSA with regard to GLSA's compliance with Section 504 and Section 1557. In accordance with 45 C.F.R § 80.7(c), HHS initiated an investigation. When an investigation by HHS indicates a failure to comply with applicable nondiscrimination requirements, HHS attempts to resolve the matter by informal means whenever possible. *See* 45 C.F.R § 80.7(d) (incorporated by reference at 45 C.F.R. § 84.61).
9. The Parties agree that it is in their best interests, and the Departments believe that it is in the public interest, to resolve this dispute without engaging in protracted litigation.

III. Jurisdiction

10. Title III of the ADA prohibits public accommodations from discriminating on the basis of disability in the full and equal enjoyment of their goods, services, facilities, privileges, advantages, or accommodations. 42 U.S.C. § 12182.
11. The Attorney General is authorized, pursuant to 42 U.S.C. § 12188(b)(1)(B), to bring a civil action under Title III enforcing the ADA in any situation where a pattern or practice

of discrimination is believed to exist or a matter of general public importance is raised.

12. GLSA is a professional service corporation that provides, among other services, bariatric surgery, and its principal place of business is 315 Warwick Drive, No. 3 in Alma, Michigan. GLSA also provides patient care at 4851 East Pickard Street in Mount Pleasant, Michigan; 4201 Campus Ridge Drive, Suite 4050 in Midland, Michigan; and 602 Beach Street, Suite 2240 in Clare, Michigan.
13. GLSA, a private entity that owns, operates, leases or leases to places of public accommodation (here, professional offices of a health care provider) and whose operations affect commerce, is thus a public accommodation subject to the requirements of Title III of the ADA. 42 U.S.C. §§ 12181; 12182(a); 28 C.F.R. §§ 36.104; 36.201(a).
14. Section 504, 42 U.S.C. § 794(a), and its implementing regulation, 45 C.F.R. Part 84, prohibit discrimination on the basis of disability in any program or activity receiving federal financial assistance. In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of disability, deny a qualified disabled person these benefits or services. 45 C.F.R. § 84.52(a)(1).
15. Section 1557, 42 U.S.C. § 18116, and its implementing regulation, 45 C.F.R. Part 92, prohibit discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs and activities. Section 1557 provides that, except as provided in Title I of the Patient Protection and Affordable Care Act (ACA), an individual shall not, on the grounds prohibited under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or Section 504 of the Rehabilitation Act of 1973, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving federal financial assistance or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the ACA.
16. HHS is responsible for investigating complaints and conducting compliance reviews to determine if recipients of HHS funding operate their programs and activities in compliance with Section 504 and Section 1557. HHS has the authority, where appropriate, to negotiate and secure voluntary compliance agreements. If noncompliance cannot be corrected by informal means, HHS may take any action authorized by law. 45 C.F.R. § 84.61 (incorporating 45 C.F.R. §§ 80.6-80.10); 45 C.F.R. § 92.92.301(a).
17. GLSA is a recipient of federal financial assistance from HHS, including through its participation in Medicaid, Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, and is therefore subject to the requirements of Section 504. Further, GLSA is engaged in a health program or activity and is subject to the requirements of Section 1557.

IV. Purpose of Agreement

18. The Parties have determined that this matter can be resolved promptly and without further burden or the expense of additional investigation, enforcement proceedings or litigation.
19. In consideration of the terms of this Agreement, DOJ and HHS agree to refrain from

undeiiaking further investigation of USAO# 2017V 00070, DJ# 202-37-265, and/or OCR # I8-296437, and will not institute a civil action at this time alleging discrimination based on the allegations lodged against GLSA, except as provided in this Agreement. DOJ or HHS, however, may review GLSA's compliance with this Agreement and/or Title III of the ADA, Section 504, and Section 1557 at any time. Except as related to the facts alleged in the above-mentioned complaint(s), nothing contained in this Agreement shall be construed as a waiver by DOJ or HHS of any right to institute enforcement proceedings against GLSA for violations of any statutes, regulations, or rules administered by DOJ and HHS or to prevent or limit the right of DOJ and HHS to obtain relief under the ADA, Section 504, or Section 1557.

20. GLSA agrees to the terms stipulated in this Agreement and affirms that it fully intends to comply with all applicable provisions of Title III of the ADA, Section 504, and Section 1557. Nothing in this Agreement shall be construed or deemed as an admission by GLSA of any liability or fault regarding any of Complainant's factual allegations by GLSA, that it engaged in any wrongful or illegal activity, or that any of DOJ's detenninations are true, and nothing in this Agreement shall be construed as a waiver by GLSA to defend against any allegation claiming that GLSA violated any statutes, regulations, or rules administered by the Departments or to prevent or limit the right of GLSA to challenge any claim alleging noncompliance under the ADA, Section 504, or Section 1557.

V. **Definitions**

21. For purposes of this Agreement, the terms listed below shall have the following meaning:
- (a) The term "Duration of this Agreement" means the period of time this Agreement remains in effect.
 - (b) The term "Effective Date of this Agreement" means the date the Agreement is signed by all Parties.
 - (c) The term "Patient" as used herein means any individual who is seeking or receiving health care services (whether inpatient or outpatient, including consultations, treatment, scheduling of appointments, discussion of billing issues, attending health education classes, and other health care services) from GLSA.
 - (d) The term "GLSA personnel" means all employees, owners, and operators who have or are reasonably likely to have direct contact with Patients, as defined herein, and independent contractors with contracts to work for GLSA who have or are reasonably likely to have direct contact with Patients or Companions, as defined herein, including, , nurses, physicians, social workers, technicians, admitting personnel, receptionists, telephone operators, billing staff, security staff, counselors, and therapists, and volunteers. The term also includes all affiliated physicians or other health care professionals who have medical staff privileges that permit them to see and/or treat Patients at GLSA.

VI. Remedial Actions

A. **General Nondiscrimination Obligations**

22. Nondiscrimination. GLSA (with respect to any individual who has a disability , including any individual who has HIV, any individual who has a record of a disability, or any individual regarded as having a disability) agrees to comply with the requirements of Title III of the ADA, Section 504, Section 1557, and their implementing regulations, including, the following requirements:
- (a) GLSA shall not deny an individual on the basis of disability the opportunity to participate in or benefit from its goods, services, facilities, privileges, advantages, or accommodations. *See* 28 C.F.R. § 36.202; 45 C.F.R. § 84.4(b)(i); 45 C.F.R. § 92.101(a);
 - (b) GLSA shall not utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability. *See* 28 C.F.R. § 36.204; 45 C.F.R. § 84.4(b)(4); 45 C.F.R. § 92.101(b)(3)(ii); and
 - (c) GLSA shall not impose or apply eligibility criteria that screen out, or tend to screen out, an individual with a disability or any class of individuals with disabilities from fully and equally enjoying its goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities , privileges, advantages, or accommodations being offered. *See* 28 C.F.R. § 36.301(a); 45 C.F.R. § 84.4(b)(1)(vii); 45 C.F.R. § 92.101(a).
23. Retaliation and Coercion. GLSA shall not retaliate against or coerce any person who made, or is making, a complaint or exercised, or is exercising, his or her rights under Title III of the ADA, Section 504, or Section 1557, or who has assisted or participated in the investigation of any matter covered by this Agreement. 42 U.S.C. § 12203.
24. Designation of Civil Rights Coordinator. Within 15 calendar days of the Effective Date of this Agreement, GLSA agrees to designate at least one employee to be responsible for:
- (a) The coordination of GLSA's efforts to comply with Section 504, Section 1557, and Title III of the ADA;
 - (b) The investigation of any grievance communicated to GLSA alleging noncompliance with Section 504, Section 1557, or Title III of the ADA; and
 - (c) GLSA's compliance with the terms of this Agreement set forth herein, including coordinating and/or conducting trainings, maintaining records, providing compliance reports and logs, and creating and revising policies and procedures.

A. Policies and Procedures

25. Non-Discrimination Policies and Procedures. Within 45 calendar days of the Effective Date of this Agreement, GLSA shall produce, for approval by the Departments, policies and procedures for providing services in a nondiscriminatory manner to individuals with disabilities, in accordance with Title III of the ADA, Section 504, and Section 1557. HHS shall review policies and procedures for consistency with Section 504 and Section 1557, and DOJ shall review policies and procedures for consistency with Title III of the ADA.
26. Approval by the Departments. The Departments shall provide written comments, including any written objections, to GLSA after completing the review referenced in Paragraph 25. GLSA shall submit revised policies and procedures to the Departments no later than 30 calendar days from the date that GLSA receives HHS's and/or DOJ's written objections to the draft policies and procedures. Once HHS and DOJ approve the policies and procedures, GLSA shall implement, and provide evidence of staff training on, these policies and procedures within 30 calendar days of approval by both HHS and DOJ. GLSA's policies must provide, *inter alia*, that it shall not deny individuals with disabilities on the basis of immunosuppressive conditions an equal opportunity to obtain a complete, individualized assessment by GLSA of each individual's candidacy for medical treatment that is based on current, objectively-reasonable medical or scientific information.

VII. Notice of Nondiscrimination

27. Notice of Nondiscrimination. GLSA shall take appropriate and continuing steps to notify Patients, GLSA personnel, and the public of the rights and protections afforded by the ADA, Section 504, and Section 1557, and the following:
- (a) That it does not discriminate on the basis of race, color, national origin, sex, age or disability in its health programs and activities (Nondiscrimination Statement);
 - (b) The identity of, and contact information for the Civil Rights Coordinator, the responsible employee designated pursuant to Paragraph 24;
 - (c) The availability of the grievance procedure and how to file a grievance;
 - (d) How to file a discrimination of disability-based complaint with HHS and DOJ; and
 - (e) The terms of GLSA's approved non-discrimination policy referenced in Paragraph 25

Within 45 calendar days of the Effective Date of this Agreement, GLSA shall provide photographic evidence that it has prominently displayed this Notice of Nondiscrimination in prominent, visible locations within all patient waiting areas at all GLSA locations, and to all interested persons by posting the Notice prominently on the GLSA website.

VIII. Grievance Procedures

28. **Grievance Procedure.** Within 45 calendar days of the Effective Date of this Agreement, GLSA shall adopt a Grievance Procedure that incorporates appropriate due process standards and that provides for the prompt and equitable resolution of any complaints alleging discrimination on the basis of disability to ensure it addresses any complaints alleging any action that would be prohibited by Section 504, Section 1557, or Title III of the ADA.
29. **Publication of Grievance Procedure.** No more than 30 calendar days after the Departments' approval of the Grievance Procedure, GLSA shall publish on its website the Grievance Procedure and provide that link to HHS and DOJ. Also, no more than 30 calendar days after the Departments' approval of the Grievance Procedure, GLSA shall have each employee sign a form or other document indicating they have received, read, and understand the Grievance Procedure, which shall be produced to HHS and DOJ.

IX. Training of GLSA Personnel

30. **Training Requirement.** To ensure compliance with this Agreement, GLSA agrees to conduct the following trainings within the timeframes below. GLSA shall maintain copies of the training materials and attendance records for each training.
 - (a) **Title III of the ADA, Section 504 and Section 1557 Training.** No more than 30 calendar days after the Departments' approval of GLSA's policies and procedures and at least one time annually for the Duration of this Agreement, GLSA shall arrange for its entire staff to complete training of sufficient scope and duration to include GLSA's requirements under Title III of the ADA, Section 504, and Section 1557, including their prohibitions on discrimination against individuals who have HIV and other disabilities. The trainer and training materials must be approved by both DOJ and HHS prior to GLSA administering the training.
 - (b) **Training of New GLSA Personnel.** Within 60 calendar days of their start date at GLSA, all new GLSA personnel shall receive the training specified in Subsection (a), above.

X. Release, Compensatory Relief, and Civil Monetary Penalty

31. **Compensatory Relief for Complainant.** Pursuant to DOJ's enforcement authority under Title III of the ADA, 42 U.S.C. § 12188(b)(2)(B) and 28 C.F.R. § 36.504(a)(2), within 15 calendar days of the Effective Date of this Agreement, GLSA shall compensate Complainant in the amount of \$37,000. This payment shall be made by a certified check or a cashier's check payable to Complainant. GLSA shall deliver this payment to the undersigned Assistant United States Attorney for transmission to Complainant. GLSA will not withhold taxes from the monetary award, and Complainant, through the signed release, will accept full responsibility for taxes due and owing, if any, on such funds. GLSA will issue to Complainant an IRS Form 1099 reflecting the amount paid. Nothing in this Paragraph or any other provision of this Agreement constitutes an agreement by DOJ concerning the characterization of the Compensatory Relief for purposes of the Internal Revenue laws, Title 26 of the United States Code.

XI. Reporting and Monitoring

32. Notices to the Departments. Unless otherwise provided, all payments, notices, reports or other such documents required by this Agreement shall be submitted to DOJ by U.S. Mail and electronic mail at the following addresses:

AUSA Shannon M. Ackenhausen
U.S. Attorney's Office for the Eastern District of Michigan
Civil Rights Unit
211 West Fort Street, Ste. 2001
Detroit, Michigan 48226
Shannon.Ackenhausen(musdoj.gov)

Unless otherwise provided, all notices, reports or other such documents required by this Agreement shall be submitted to HHS by email to the Office for Civil Rights, Midwest Region, Regional Manager, Steven.Mitchell@hhs.gov.

33. Records. GLSA shall maintain appropriate records to document the information required by this Agreement, and shall make them available, upon request, to HHS and DOJ, throughout the duration of this Agreement.
34. Complaints. For the duration of this Agreement, GLSA shall notify HHS and DOJ if any person files a lawsuit, written complaint, or formal charge against GLSA with a state or federal agency (to exclude internal grievances) as described in Paragraph 28, alleging discrimination on any protected basis under Title III of the ADA, Section 504, or Section 1557. Such notification must be provided in writing via certified mail within 20 calendar days of the date GLSA receives notice of the allegation and must include, at a minimum, the nature of the allegation, the name of the person making the allegation, and any documentation possessed by GLSA relevant to the allegation. GLSA will reference this provision of the Agreement in the notification to the Departments.
35. Compliance Report. GLSA shall provide an initial written report ("Compliance Report") to HHS and DOJ regarding the status of its compliance with this Agreement within six months of the Effective Date of this Agreement and a new Compliance Report at each subsequent six-month interval for the duration of this Agreement (i.e., a second Compliance Report within 12 months of the Effective Date of this Agreement (covering the preceding six-month period); a third Compliance Report **18** months after the Effective Date of this Agreement (covering the preceding six-month period), etc.).
36. Required Content for Compliance Reports. Each Compliance Report shall include appropriate documentation of the steps GLSA has taken to comply with each term of this Agreement, including:
- (a) Any revised policies and procedures;
 - (b) The distribution of policies and procedures;
 - (c) The adoption and implementation of a Grievance Procedure;

- (d) The distribution of the materials ;
- (e) The training required by this Agreement , including the training materials and attendance records; and
- (f) The list of any grievance and/or complaints filed by Patients or those acting on their behalf regarding allegations of discrimination on the basis of disability, including a description of the allegations, the elate filed, the status and/or outcome of each grievance or complaint and a copy of the grievance itself.

XII. Enforcement

- 37. Duration of this Agreement. This Agreement will be in effect for three years from its Effective Date, as long as GLSA is in substantial compliance with this Agreement.
- 38. Compliance within Three Years. Notwithstanding Paragraph 37, this Agreement will terminate earlier than three years from the Effective Date if both HHS and DOJ determine that GLSA has demonstrated compliance with the terms of this Agreement, Title III of the ADA, Section 504, Section 1557, and their implementing regulations with respect to individuals with disabilities and their participation in and benefit from GLSA's services, programs, and activities, and maintained that compliance for one year.
- 39. Compliance Review and Enforcement. HHS or DOJ may review GLSA's compliance with this Agreement, Title III of the ADA, Section 504, Section 1557, or their implementing regulations, at any time. If either HHS or DOJ believes that this Agreement or any portion of it has been violated, HHS or DOJ will give notice (including reasonable particulars) of the violations to GLSA. GLSA must respond to the notice as soon as practicable but no later than ten days thereafter. HHS, DOJ, and GLSA will negotiate in good faith in an attempt to resolve any dispute. If HHS or DOJ believe at any time that resolution cannot be achieved, it shall promptly notify GLSA in writing and shall specify its final position with regard to the dispute. Thereafter, HHS and/or DOJ may take or recommend any other enforcement action authorized by law, which may include the filing of a civil action against GLSA in the appropriate United States District Court to enforce this Agreement, Title III of the ADA, Section 504, Section 1557, and their implementing regulations, or administrative proceedings to suspend, terminate, or refuse to grant or continue HHS financial assistance.

XIII. Miscellaneous

- 40. Entire Agreement. This Agreement and the attachments hereto constitute the entire agreement between the Parties on the matters raised here, and no other statement, promise, or agreement, either written or oral, made by either party or agents of either party, which is not contained in this written agreement, shall be enforceable. This Agreement is limited to the facts set forth herein and does not purport to remedy any other potential violations of the ADA, Section 504, Section 1557, or any other federal law. This Agreement does not affect the continuing obligations of GLSA to comply with the provisions of the ADA, Section 504, and Section 1557.

41. Binding. This agreement is final and binding on the parties, including all principals, agents, executors, administrators, representatives, successors in interest, beneficiaries, assigns, heirs and legal representatives thereof. Each party has a duty to inform any such successor in interest.
42. Non-Waiver. Failure by any party to seek enforcement of this Agreement pursuant to its terms with respect to any instance or provision shall not be construed as a waiver to such enforcement with regard to any instance or provision.
43. Headings. The headings in this Agreement are for convenience only and shall not affect in any way the language of the provisions to which they refer.
44. Execution of Agreement. The undersigned agents of the parties represent that they have been fully authorized by their clients to enter into and execute this Agreement under the terms and conditions contained herein.
45. Publication or Disclosure of Agreement. The Departments place no restriction on the publication of the Agreement. In addition, the Departments may be required to disclose material related to this Agreement to any person upon request, consistent with the requirements of the Freedom of Information Act, 5 U.S.C. § 522, and its implementing regulation, 45 C.F.R. Part 5.

AGREED BY THE PARTIES:

FOR GREAT LAKES SURGICAL ASSOCIATES:


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Jeffery Smith, M.D., P.C., d/b/a
Great Lakes Surgical Associates

Dated: 2/8/2021

FOR THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES:



By: Steven . Mitchell
Regional Manager, Midwest Region Office for Civil
Rights

Dated: 2/9/2021

FOR THE UNITED STATES DEPARTMENT OF JUSTICE:

Saima S. Mohsin
Acting United States Attorney



By: Shannon M. Ackenhausen
Assistant United States Attorney
Eastern District of Michigan

Dated: 2/10/2021

