AFFIDAVIT OF COUNSEL

NOW COMES Judith A. McDougall-Flynn of Falco & Associates, PC, and hereby deposes and states that:

1. I am an attorney in good standing, licensed to practice in the Commonwealth of Massachusetts, with a principal place of business at 50 Quincy Avenue, Quincy, Massachusetts, 02169.

2. I have been licensed since 2002 and practice exclusively in the areas of estate planning and elder and disability law. I have been actively involved in the National Academy of Elder Law Attorneys (NAELA) and its Massachusetts Chapter (MassNAELA) throughout my career, serving as President of MassNAELA in 2014.

3. A significant portion of my practice involves assisting clients to obtain community MassHealth coverage to receive home care benefits and long-term care MassHealth coverage to pay for skilled nursing care. I have worked on hundreds of long-term care MassHealth applications throughout my career, and represented many clients at administrative fair hearings to challenge wrongful denials. I have personally witnessed pervasive and universal due process violations throughout the long-term care MassHealth application and appeal process.

4. One of the most significant violations that occurs universally is that the Notice informing an applicant that his or her application has been denied lacks sufficient information to comply with basic Due Process requirements. For example, if the reason for the Denial is disqualifying transfer of assets within the five-year lookback period prior to application, the Notice will simply state that the application was denied, will reference in general terms a regulation which MassHealth deems applicable, and will state the total amount deemed by MassHealth to be transfers for less than fair market value, with no specific breakdown or clarification of which transactions they are referring to. There is no other information disclosing how the total was calculated, how the applicant violated the referenced regulation, or how MassHealth came to its determination. The MassHealth denial notices universally fail to provide a clear statement of the specific reasons for the denial of benefits. It is left for the applicant, his or her family members, or their counsel to try to figure it out prior to the administrative "fair" hearing.

5. When such a notice is issued, we reach out to the caseworker for clarification. Some caseworkers will provide ample clarification that allows us to try to remedy the situation without the necessity of a hearing, or so that we can properly prepare for the hearing by obtaining additional verifications to demonstrate that all or part of the transfers should not be deemed disqualifying, for example. In some cases, however, the caseworker does not respond in a timely manner or will not deal with the case until a hearing date is issued, which can be months later. The lack of any clear statement of the specific reasons for the denial results in added efforts by all parties, added expense to the applicant and his or her family and, most significantly, unnecessary emotional stress and anxiety to the applicant and family.

6. There are some occasions when caseworkers have refused to provide clarity of the specific reasons for denial despite multiple requests. A colleague of mine just represented a client at a hearing in the past week on a denial for disqualifying transfers. The caseworker did not provide a breakdown of the transfers she deemed to be disqualifying until the hearing, despite numerous requests. The caseworker added up numerous transfers of varying amounts over the previous five years for a total of $40,000 that she deemed disqualifying. There is no way any person can adequately prepare for a hearing such as this, without the opportunity to review the information in advance of the hearing. Had we had an opportunity to review the breakdown in advance, we could have gathered additional verifications to demonstrate that fair market value was received for some or all of the transfers. The hearing officer left the record open for two weeks for us to obtain the appropriate verifications, but there is no reason why we should not have had the specific reasons for the denial in advance so we could work on obtaining the required verifications in the three months we waited for a hearing to be scheduled. Furthermore, we only have one opportunity to present our best case to the hearing officer, and submitting additional verifications (if it's possible to obtain them in the short window we are given) after the hearing puts our clients at a clear disadvantage.

7 When a hearing involves a complicated issue, such as a trust or a promissory note, it is common practice for the MassHealth representative to present a legal memorandum authored by the Legal Department of MassHealth to the appellant. The memo is usually delivered to the worker prior to the date of the hearing, but the worker is instructed not to put the memorandum in the appellant's file or not to make it available to the appellant or appellant's counsel prior to the start of the appeal hearing. As a result, the applicant has absolutely no ability to prepare and present his/her challenge to the denial of the application before the hearing officer.

8. In one of my cases several years ago, the attorney representing the Legal Department (Katy Shelong) actually emailed the caseworker with instructions limiting our review of the file prior to the hearing, and instructing the caseworker to *destroy* the legal memorandum previously provided to her.

9. This situation is even more egregious for individuals who proceed without counsel as they are unlikely to know enough regarding MassHealth procedures to request that the hearing Officer leave the record open in order to have the opportunity to respond to the memorandum on the record after reviewing its contents after the hearing has concluded.

10. This pattern and practice is particularly problematic when dealing with more complicated matters such as trusts. Often the appellant is forced to go to the hearing with absolutely no understanding of what trust provision MassHealth has deemed to violate Medicaid law or regulations and rendered the trust assets to be deemed countable.

11. My clients are often in extremely vulnerable positions. They are concerned about not being able to stay in the nursing home. They are concerned about the delays, as their time is often limited. This pattern and practice of failing to give a clear statement of the specific reasons for the denial in the notice, of engaging in information withholding, of forcing a hearing to proceed for which the appellant cannot adequately prepare, not only violates their due process

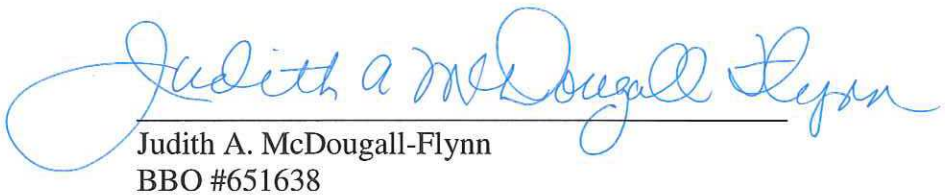
rights but also adds additional stress at a time when appellants and their families are most vulnerable.

12. I have personal knowledge of many cases in which appellants were denied benefits on a legal theory that had been discredited in prior hearing decisions or even court decisions, and in all of such cases the memorandum provided the Legal department failed to disclose the existence of such contrary authorities. I believe the knowing failure to provide such contrary authority is a violation of basic duties and fairness.

13. Many other lawyers have told me that they had similar experiences as I have described above. I have also heard from other lawyers that their subpoena requests to the hearing officer are routinely denied; that MassHealth applicants' case files routinely do not contain the reasons for the denial, especially on cases involving trusts and other complicated countable assets; that MassHealth workers often cite attorney-client privilege as their reason for not providing the reasons for the denial before the scheduled fair hearing; and that MassHealth denials are automatically computer-generated if the MassHealth worker does not timely complete work on the case file.

14. Automatically generated denials have increased over the past year and result in additional time, resources, and stress to all involved since a denial notice cannot be ignored, even if the caseworker provides a verbal promise that they will deal with the case shortly.

SIGNED under the pains and penalties of perjury on this 12th day of April, 2018.



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