AFFIDAVIT OF COUNSEL

NOW COMES Jane E. Sullivan, Esq., having offices at 624 Brayton Avenue, Fall River, Massachusetts, and hereby depose and state that:

1. I am an attorney in good standing, licensed to practice in the Commonwealth of Massachusetts, with a principal place of business at 624 Brayton Avenue, Fall River, Massachusetts. I have personal knowledge of the matters set forth herein.

2. My law practice has been exclusively devoted to estate planning, elder and special needs law since 1996. This includes assisting individuals and their families with MassHealth long term care applications. Over the past 22 years, I have processed and advised clients on over 500 MassHealth applications, including representation at numerous administrative fair hearings.

3. It has been my experience that once a MassHealth long term care application is filed, if the applicant receives a notice of denial for excess countable assets, the notice simply states that the application was denied, references in general terms a regulation which MassHealth deems applicable, states the amount of the applicant's assets which exceed the standard allowance of $2,000.00, and includes information regarding the right to appeal the decision. There is no other information disclosing how that excess assets were calculated, how the applicant violated the referenced regulation or how MassHealth came to its determination; in other words, the MassHealth denial notice does not provide a clear statement of the specific reasons for the denial of benefits.

4. As a result of this lack of any clear statement of the specific reasons for the denial, an appeal must be filed and an attempt made to determine the specific reasons for the MassHealth denial.

5. It has been my experience that it appears to be the common pattern and practice of MassHealth to decline or refuse to disclose additional information, which forces appellants to go to an appeal hearing to learn for the first time why the application was denied and how the amount of disqualifying excess assets was calculated.

6. In two particular recent cases, I was able to deduce that the excess assets included the value of real estate, in both cases, the principal residence of the applicant, title to which had been conveyed to an irrevocable trust well beyond the five year lookback period.

7. At the hearing for each of these cases, the MassHealth representative delivered to the hearing officer and to me a legal memorandum written by the Legal Department of MassHealth, which memorandum had only been delivered to the MassHealth representative on the date of the hearing, making it impossible for the memorandum to be provided to me in advance of the hearing for purposes of preparation, despite my requests for same.

8. In each case, in anticipation of the arguments of the Legal Department, I submitted my own memorandum to the hearing officer, and although the hearing officer in each case left the record open for the appellant to file a responsive brief, this pattern and practice gave MassHealth an unfair advantage during the presentation before the hearing officer at the time scheduled for the fair hearing and led to an additional delays in processing the application.

9. This pattern and practice is particularly problematic when dealing with more complicated matters such as trusts, as 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.

10. This situation is even more egregious for applicants and their families 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.

11. In my experience with applications involving trusts, I have represented appellants whose applications were denied on a legal theory that had been discredited in prior hearing decisions or even court decisions, and in all of such cases the memorandum failed to disclose the existence of such contrary authorities.

12. This pattern and practice of failing to give a clear statement of the specific reasons for the denial in the notice, of engaging in withholding information, and of forcing a hearing to proceed for which the appellant cannot adequately prepare, not only violates the due process rights of applicants, but also adds additional stress at a time when appellants are vulnerable. The applicants and their families are concerned about being discharged from the nursing home, as many threaten to do given the delay in payment.

13. In addition, in my recent experience, denial notices have been issued for failure to provide requested verifications, when in fact, the verifications were timely filed and verification of delivery is in hand. Such cases require the filing of an appeal, filing duplicate copies of the verifications, and then waiting months for an assigned hearing date. Typically, a call is then received from the MassHealth representative the day before or day of the hearing to confirm that the verifications have, in fact, been received, however, if additional verifications are then requested, the cycle commences anew, all resulting in delayed nursing home payment, added stress to the applicant and family, and additional legal fees and expenses.

14. In another pending case, which was approved in October, 2017, the community spouse, who is frail herself, received a termination notice for excess assets in March, 2018. There is no apparent relation between the asset valuations included in this notice and the assets of the couple, as the institutionalized spouse has less than $2,000 in his name, and verification of same was provided at the time of application. There is no caseworker who can be contacted directly to address this matter, and a call to the Ongoing Unit is an exercise in futility. An appeal has been filed, and I anticipate than once again, a call will

be received the day of or day before the hearing to rectify the matter. If such does not occur, I must represent this client at a fair hearing, resulting in additional expense to her and delayed payment to the nursing home, as benefits have been terminated.

15. My elder law colleagues advise me that they have similar experiences as described above; 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 the 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.

SIGNED under the pains and penalties of perjury on this 10th day of May, 2018.

Jane E. Sullivan, Esq.
BBO # 546255
624 Brayton Avenue
Fall River, MA 02721
Tel: 508-679-0535
Fax: 508-679-0566
jsullivan@janesullivanlaw.com