

EXHIBIT A – Affidavit of Steven Weiss

shareholder, at the firm of Cooley, Shrair, P.C. (f/k/a Cooley, Shrair, Alpert, Labovitz & Dambrov, P.C.), located in Springfield, Massachusetts. From February, 1994 to present I have been at my current firm. When I joined in 1994 I was initially "of counsel", but have been a shareholder since approximately 1996.

5. I speak regularly at conferences and seminars for attorneys on business and consumer bankruptcy matters. Over the last several years I have spoken at programs for the American Bankruptcy Institute, the National Association of Bankruptcy Trustees, Massachusetts Continuing Legal Education, the Massachusetts Bar Association, the Boston Bar Association Bankruptcy Section, and the Hampden and Worcester County Bar Associations. In addition, I have authored or co-authored a number of articles on bankruptcy-related topics, including "Resolved: A Chapter 7 Trustee May File Proofs of Claim on Behalf of Unsecured Creditors," Journal of the National Association of Bankruptcy Trustees, Summer 2014, co-authored with L. Alexandra Hogan; "Terminating an ERISA Retirement Plan: Can a Bankruptcy Trustee Serve Two Masters?," Journal of the National Association of Bankruptcy Trustees, Fall 2010, co-authored with David K. Webber; "Undoing the IRS Wrongful Levy," 106 Banking Law Journal 336 (July-August, 1989); "Bankruptcy Court Power to Enjoin the Internal Revenue Service from Collecting the Debtors' Taxes from its Officers: An Analysis of Recent Developments," Annual Survey of Bankruptcy Law, 1986; and "Post-Petition Tax Claims," Norton Bankruptcy Law Advisor, Issue 7, July 1985.
6. As a Chapter 7 Trustee, one of my most significant duties under Bankruptcy Code § 704(a) is to determine if there is property of the bankruptcy estate that can be administered, i.e., reduced to money, so creditors' claims can be paid. In that role, I effectively have the rights that creditors could exercise, and attempt to find ways to invade trusts.
7. From time to time debtors have interests as grantors, trustees or beneficiaries in trusts. To the extent that debtors have rights or powers under such trusts, and to the extent that they are not subject to an applicable exemption or enforceable "spendthrift" provision, those interests constitute property of the bankruptcy estate under Bankruptcy Code § 541(a), which generally encompasses all legal and equitable interests of the debtor. Essentially, the rights of a bankruptcy trustee to control assets of a trust are defined by the trust instrument. A bankruptcy trustee can exercise the rights held by a grantor or beneficiary, but by the same token, the trustee cannot ignore or disregard the terms of a trust. Similarly, if a creditor were to seek equitable relief to "reach and apply" a grantor's interest, that interest is defined by the terms of the trust.
8. In this matter, I have reviewed a copy of the [REDACTED] Irrevocable Home Trust, dated June 6, 2008 (the "Trust"). I have been asked to provide an opinion as to whether creditors of the Donors, [REDACTED], can satisfy claims against them by reaching the principal of the Trust.
9. Generally speaking, a grantor's right to exercise power to amend or revoke a trust, or to exercise dominion over trust property, constitutes a general power of appointment under Massachusetts law. A number of bankruptcy court opinions have held that to the extent that a grantor of a trust holds an exercisable general power of appointment, that right may be exercised by a bankruptcy trustee to satisfy creditors' claims. Conversely, if there is no general power of appointment, a bankruptcy trustee cannot reach trust assets. Having reviewed this Trust thoroughly, it is my opinion that the assets in the Trust do not constitute

*
COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
OFFICE OF MEDICAID
BOARD OF HEARINGS

Appeal No. 1507042

[REDACTED] v. Office of Medicaid

AFFIDAVIT OF STEVEN WEISS

Now comes Steven Weiss, Esquire ("Affiant") and submits this affidavit as an expert opinion on behalf of [REDACTED] and [REDACTED] as Co-Trustees of the [REDACTED] Irrevocable Home Trust (referred to herein as the "Trust").

1. Affiant has been on the panel of Chapter 7 Trustees for Region 1 of the United States Trustee program since 1987. I have also been appointed to serve as a Chapter 11 trustee in a number of cases, and I am the Chapter 12 Trustee for cases filed in central and western Massachusetts. In addition to my service as a bankruptcy trustee, my law practice consists primarily of representation of parties in bankruptcy, insolvency and reorganization matters. My practice includes representation of debtors, secured and unsecured creditors, creditors' committees, plaintiffs and defendants in bankruptcy litigation, and buyers and sellers of assets in bankruptcy cases.
2. I am a shareholder of the law firm of Shatz, Schwartz and Fentin, P.C., with an address of 1441 Main Street, Springfield, Massachusetts 01103. I am admitted to practice before the Supreme Judicial Court of Massachusetts, the United States District Court for the District of Massachusetts, and the Court of Appeals for the First Circuit. I am a member of the American Bankruptcy Institute, the National Association of Bankruptcy Trustees, the Massachusetts Bar Association, and the Hampden County Bar Association. I am also a member of the standing committee on Local Rules for the Massachusetts Bankruptcy Court.
3. My educational background is as follows. I attended Massachusetts Institute of Technology from September 1976 to December, 1977. I attended Michigan State University from September, 1978 to June, 1980, and received a Bachelor of Arts degree at that time. I attended Boston University School of Law and received a Juris Doctor degree in 1984.
4. My professional background is as follows. From August, 1984 to July, 1986 I served as a law clerk to the Hon. Arthur J. Spector, Bankruptcy Judge for the Eastern District of Michigan. From August, 1986 through February, 1994 I was an associate, and then a

property of the Donors, and the limited rights that the Donors retained in the Trust could not be used by creditors or a bankruptcy trustee to obtain control over those assets. It is my opinion that creditors of the Donors could not reach the assets of the Trust to satisfy their claims, nor could a bankruptcy trustee reach those assets in any bankruptcy case filed by or against the Donor, for the following reasons:

- (1) The Trust is irrevocable, and the Donors have no right to amend the Trust, and except as set forth in Paragraph 2, below, the Donors retained no power of appointment.
- (2) The right to substitute assets [see Article Sixteen] does not affect the Trust's irrevocable nature. While the Donor's right to substitute assets of an equivalent value is a limited right that a bankruptcy trustee could theoretically exercise, it would require the trustee to substitute "property of an equivalent value," and so it has no value to creditors of the Donors. The Trustee has a fiduciary duty to ensure that the assets being exchanged are of equivalent value.
- (3) The Trust grants to the Trustees (but not the Donors) wide discretion to buy, sell and invest Trust property, as is typical in a trust. However, Donors retained no rights to exercise any dominion or control over Trust property.
- (4) The Donors do not even have a beneficial interest in the Trust [See Article 11].

10. I have been asked by the Trustees to respond to several specific questions, and each question is followed by my answer:

- (1) Under bankruptcy law, would you as a bankruptcy trustee make every attempt to include self-settled irrevocable trusts in the bankrupt person's estate by disregarding (i) the purposes for which a trust is established, (ii) whether the trustees have or exercise any discretion under a trust, and (iii) any restrictions on when or whether distributions may be made from a trust? Answer: One of a bankruptcy trustee's roles is to locate non-exempt assets that can be liquidated to satisfy the claims of creditors. Thus, a trustee would attempt to include self-settled trusts in the bankruptcy estate, without regard to the purposes for which trusts are established, and without regard to the rights a trustee may have or any rights or restrictions under the declaration of trust. In this situation, I would not be able to include the assets of this trust in the Donor's bankruptcy estate.
- (2) Is the settlor's power to substitute assets under Article 16 the same as an option to make a purchase at fair market value? Answer: It is similar to an option, but it has no value, because the Donors or a bankruptcy trustee would have to have otherwise non-exempt assets of equivalent value to exchange in order to exercise that power.
- (3) Would the settlor's power to substitute assets affect the includability of trust principal in a bankrupt settlor's estate or availability of trust principal to the settlor's creditors? Answer: No, for the reasons set forth in answer (2). The Donors could not receive any financial benefit from such a power.
- (4) Does the possible factual issue of the Donors' using the real estate rent-free after transferring it to the Trust affect the includability of Trust principal in a bankrupt

Donor's estate or availability of trust principal to the Donor's creditors? Answer: No. There is no requirement in the Trust that the Donors be permitted to live in the real estate rent-free, such as a life estate. Mere usage of the real estate by a Donor cannot possibly be the equivalent of ownership, and I do not see how any valid argument could be made that using the real estate somehow makes the principal available to the Donor where the terms of this Trust specifically state otherwise.

- (5) Do the Trustees have fiduciary duties under the Trust to the holders of the beneficial interests that prevent usage of principal for the Donor and prevent conversion of principal to income? Answer: Yes, and the Trustee could incur personal liability under Massachusetts law for violation of his fiduciary duties.
- (6) Do the Trustees' powers to deal with Trust assets affect the includability of trust principal in a bankrupt Donor's estate or availability of trust principal to the Donor's creditors? Answer: No. All trusts grant powers to trustees, and those powers are meant to allow the trustee to perform his/her duties. The Trustees have discretion to deal with trust assets, not the Donors. In attempting to bring the principal of the Trust into the bankruptcy estate, the rights of a bankruptcy trustee are no greater than the rights held by the Donors. In this Trust, the Donors have no rights to obtain any access to principal of the Trust.
- (7) Would the Trustee's powers under Massachusetts law to make loans affect the includability of trust principal in a bankrupt settlor's estate or availability of trust principal to the Donor's creditors? Answer: No. The nature of the Trustee's investments of trust assets is irrelevant, due to the Trustee's fiduciary duties to the beneficiaries. No loan could be made to the Donors without a corresponding and equivalent debt, so the Donors could achieve no benefit from any loan.
- (8) Considering all of the trust details specified in the previous questions, and reading the Trust as a whole under Massachusetts law, is this Irrevocable Trust a fluid instrument that gives the Donors and Trustees any flexibility to give principal to the Donors or use principal for the Donor's benefit? Answer: No. The Donors have no discretion or authority to control Trust principal for their benefit.
- (9) Could a creditor of the Donors, such as a nursing home, or a bankruptcy trustee if the Donor filed for bankruptcy, reach the principal of the Trust to satisfy unpaid debts of the Donors? Answer: No. I am not aware of any reported case in Massachusetts in which a bankruptcy trustee has successfully reached assets in any trust with provisions similar to this Trust.
- (10) How, if at all, does M.G.L. c. 203E, § 808 apply to Article 16 of this Irrevocable Trust? Answer: To the extent that the statute applies, it would not affect the ability of a creditor of the Donor to reach assets of the Trust. Under this provision, the Donors would be considered to have fiduciary duties to the beneficiaries of the Trust, and thus could not direct the Trustee to take any action contrary to their interests.

I provide my opinions herein to a reasonable degree of legal certainty and based upon my background, training and experience.

Executed under pains and penalties of perjury on this 30th day of June, 2015.

By: _____


Steven Weiss, Esquire

BBO # 545619

Shatz, Schwartz and Fentin, P.C.

1441 Main Street, Suite 1100

Springfield MA 01103

(413) 737-1131

sweiss@ssfpc.com

15\0273\Affidavit.1601