

Matt Borden, Esq.
borden@braunhagey.com

August 29, 2019

VIA U.S. MAIL AND EMAIL

Hon. Gavin Newsom
1303 10th Street, Suite 1173
Sacramento, CA 95814

Xavier Becerra, Esq.
Office of the Attorney General
1300 "I" Street
Sacramento, CA 95814-2919

Re: An Open Letter to Governor Newsom and Attorney General Becerra About the Suffering of Nursing Home Residents in California

Dear Governor Newsom and Attorney General Becerra:

We write as legal counsel to plaintiffs Bruce Anderson, Robert Austin, John Wilson, and the non-profit, California Advocates for Nursing Home Reform (“CANHR”). Our clients have been forced to sue the State to satisfy one of its most basic functions: to enforce the law and protect our most at-risk citizens from being unceremoniously “dumped” by nursing homes in favor of more lucrative residents. As detailed in plaintiffs’ complaint, not only does the practice cause untold human suffering (one of our clients, John Wilson, died after we filed his case) but costs the State tens of millions of dollars in unnecessary hospital fees and related costs.

For years, our efforts to resolve the case with your representatives at the Department of Health and Human Services consistently have gone nowhere. That is due, in part, to the fact the individuals involved have been notoriously aligned with the nursing home lobby and unwilling to take meaningful action to stop abuse. Instead, the agency chose to litigate against nursing home residents and attempted to dismiss plaintiffs’ complaint, arguing that indigent residents should hire lawyers and sue facilities on a piecemeal basis.

On July 18, 2019, the Ninth Circuit ruled in favor of California’s 400,000 nursing home residents and their families. Enclosed is a copy of the Court’s decision in *Anderson, et al. v. Ghaly, Secretary of Health & Human Services*, No. 16-16193 (Ninth Cir., July 18, 2019). The decision reinstated plaintiff’s lawsuit and held that California must do something to enforce the results of California’s transfer, discharge and readmission hearings. The hearings are mandated by federal law and are residents’ only recourse for securing readmission after being unlawfully discharged. But up until now, California, as a matter of policy, has refused to enforce those determinations. As a result, nursing homes have ignored them and residents have suffered the consequence.

San Francisco
351 California Street, 10th Floor
San Francisco, CA 94104
Tel. & Fax: (415) 599-0210

New York
7 Times Square, 27th Floor
New York, NY 10036-6524
Tel. & Fax: (646) 829-9403

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On August 9, 2019, the Ninth Circuit issued its mandate in *Anderson*, returning the case to the District Court for litigation. This presents a good opportunity for your offices to alter the unfortunate course of events to date. As set forth below, we implore you to do the right thing and enforce meaningful remedies for our clients.

Dumping is a one of the biggest threats to nursing home residents in California. At issue in our case is an illicit practice known as “hospital dumping,” in which nursing facilities abandon Medi-Cal residents in hospitals and then refuse to readmit them, even when DHCS orders them to do so. Nursing homes do this to replace their poorest and neediest residents with more lucrative ones. The transfer trauma caused by dumping poses an acute threat the health and welfare of residents, especially those suffering from dementia, and in some cases can be fatal. It also tears families apart.

Cost to taxpayers. In addition to profound harm this unlawful practice causes to the victims, it has cost California taxpayers more than \$70 million in paying for unnecessary hospital beds for people who are not sick. The only beneficiary of dumping is the nursing home industry.

The State’s failure to act. Your predecessors, Governor Jerry Brown and Attorney General Kamala Harris, bitterly opposed enforcing DHCS decisions. In its 30-page Opinion, the Ninth Circuit blasted their position that California could satisfy the federal requirement to provide a “fair hearing” by offering a “meaningless show trial” with no enforcement.

Our Clients.

The story of resident dumping and its effect on citizens is best told through our clients. Plaintiff **Bruce Anderson** (right) won his DHCS hearing. As a result of California’s refusal to enforce the decision, he was forced to live in a hospital for over a year, confined to a hospital bed and drugged with antipsychotics.



Our client **John Wilson** (right), who also won his DHCS hearing, passed away while the case was on appeal. John had ALS. After becoming familiar with his caregivers at the nursing facility where he lived, he could communicate using eye movements. After he was dumped, he could not. He lived in a hospital for over six months with bills exceeding \$800,000, all of which were paid by the State.



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Our client **Robert Austin** (right), who also won his DHCS hearing, was coerced into a facility 400 miles from his home. This separated him from his sister Vera, who used to visit him every week, laundered his clothes and spent her holidays with him.



You can honor your public commitment to elder protection. We hope that your administration will take an enlightened view of this problem. Both of you have publicly stated that you care how we treat our elderly and that you want to protect health care access for Californians.

While the Ninth Circuit did not specify how the state must enforce DHCS decisions, it is clear from the Opinion that the state can no longer do nothing. It is also clear that the state has a panoply of robust enforcement powers – including precluding facilities from admitting new residents until they are in compliance with DHCS readmission orders – that it can use in an escalating fashion to obtain compliance with DHCS orders if it wants to do so.

On behalf of each of our clients and the untold tens of thousands of other residents affected by resident dumping, we appreciate your taking time to read this letter. The needless suffering described above and in plaintiffs' complaint is something that each of you, and those who work for you, are able to stop in an instant. Our request is to help us "Halt Resident Dumping in 5 Easy Steps:"

1. **Enforce DHCS hearings by promptly enjoining facilities to adhere to hearing determinations.**
2. **Enforce hearing determinations by imposing escalating consequences for refusals to readmit, and by using the Attorney General's resources to prosecute facilities that refuse to abide those orders.**
3. **Provide resources to enable dumped residents to contact the State or relevant resources (like those available through CANHR).**
4. **Identify the worst-offending repeat offender facilities and impose sanctions for dumping behavior, including withholding of Medi-Cal eligibility.**
5. **Provide restitution to the named plaintiffs.**

We look forward to re-starting a dialogue with your office(s) and ending DHCS's horrible policy without the need for further litigation.

Very truly yours,

Matthew Borden