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*Attorneys for Applicant
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**BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
OFFICE OF THE STATE AUDITOR
STATE OF MONTANA**

IN THE MATTER OF
THE CONVERSION OF BLUE CROSS AND
BLUE SHIELD OF MONTANA, INC. AND
THE ALLIANCE WITH HEALTH CARE
SERVICE CORPORATION,

Applicants.

Case No. INS-2012-238

**APPLICANT HEALTH CARE SERVICE
CORPORATION'S OPPOSITION TO
CSI'S MOTION FOR ORDER
COMPELLING DISCOVERY**

Applicant Health Care Service Corporation ("HCSC") hereby opposes CSI's Motion for Order Compelling Discovery. While chiding HCSC for its alleged "refusal to cooperate in discovery" and "subver[sion of] a legitimate request for relevant information," CSI fails to acknowledge that its request for financial planning underwriting gain forecasts was made more than a week *after* the deadline for serving discovery requests. CSI agreed to that deadline and it was embodied in the supplemental order entered after the first delay of these proceedings. CSI

has ignored that Order and made four requests for documents to HCSC and seven requests to Blue Cross and Blue Shield of Montana ("BCBSMT") after the February 19, 2013 deadline ordered by the Hearing Examiner. In a good faith effort to cooperate, Applicants have produced documents in response to all of those late requests except the single request at issue here. And with respect to the issues of HCSC's underwriting gains, HCSC has already produced to CSI *actual* underwriting gain information, voluminous *actual* rate filings, and testimony about the underwriting targets it has used on a product-by-product basis. HCSC's production of this information undercuts CSI's contention that the budget estimates it seeks are somehow "vital" to its consideration of the proposed transaction and shows that its last minute request is improperly cumulative. In addition, CSI's speculation about how easy it would be for HCSC to produce this information reflects a fundamental misunderstanding of HCSC's auditor's testimony, the genesis of the data and the burden the request imposes on HCSC.

Finally, as CSI is aware, provisions of the Patient Protection and Affordable Care Act ("ACA") make it impossible for any insurer, including HCSC, to make more than a specified percentage of gain on the policies it underwrites. Gains exceeding prescribed levels will have to be paid back to customers as rebates. Thus, CSI's argument that previous forecast numbers are probative of what HCSC might do in Montana in the future is simply not correct.

HCSC has been fully cooperative and forthcoming in all discovery in this process. It has responded to dozens of requests for information served by CSI including fourteen served on February 12, 2013, nine more served on the deadline for requests of February 19, 2013, and three of the four served ten days after the deadline on March 1, 2013. It has produced approximately 20,000 pages of documents, including voluminous data about its *actual* rates and underwriting gains that give CSI the information it claims it needs to evaluate whether HCSC leverages

premiums "to generate unconscionable profits."¹ Under these circumstances, and as more fully described below, CSI's Motion for Order Compelling Discovery should be denied.

BACKGROUND

This proceeding involves the Application of BCBSMT and HCSC for the approvals of CSI and the Montana Attorney General of a proposed alliance between BCBSMT and HCSC (the "Alliance"). Those approvals are required by Montana Code Annotated §§ 35-2-609, 35-2-617, and Title 50, chapter 4, part 7, which govern the conversion of a non-profit health entity to a for-profit or mutual benefit corporation (the "Conversion Statute").²

Section 50-4-702 of the Conversion Statute provides that a conversion transaction must be approved by CSI. The Conversion Statute further specifies the criteria CSI is to use in considering whether a conversion transaction is in the public interest. *See* Section 50-4-717. To enable CSI to evaluate these criteria, the Hearing Officer established a Prehearing Schedule and Procedural Order dated December 19, 2012 ("Procedural Order"), that provided for the use of discovery procedures under the Montana Rules of Civil Procedure, Mont. Code Ann. Title 25, chapter 20. The Procedural Order provided that discovery would close on January 29, 2013. The Procedural Order was supplemented and amended on February 13, 2013, ("Supplemental Order") to allow the parties some additional time beyond the initial deadline "to conduct reasonable, non-cumulative supplemental discovery." Supplemental Order at ¶ 3a. To avoid the burden of last minute discovery requests as the Parties prepared for hearing, the Supplemental Order directed that any request for additional discovery "shall be made by February 19, 2013."

¹ HCSC is not a profit-making entity in any case. HCSC is organized as a mutual legal reserve company doing business as a non-profit health care service plan. It has no shareholders and is legally prohibited from paying dividends.

² Applicants have stipulated to application of the Conversion Statute to the transaction effecting the Alliance for purposes of this Application and for no other, even though the assets proposed to be conveyed by BCBSMT will not be transferred to a for-profit entity.

Pursuant to this Order, CSI served an additional twenty-three document requests on HCSC on February 12, 2013 and February 19, 2013. Also, on February 19, 2013, CSI requested that HCSC produce an actuary for deposition. It advised HCSC via an e-mail on February 20, 2013, that the purpose of the deposition was to provide testimony about rate filing procedures and regulations in HCSC's four states:

Regarding the HCSC actuary, he or she should be familiar with the standards and requirements HCSC must meet in each of its four states and in each of its market segments. For example, insurers may be required to get prior approval in one state but not in another state, or to get it for individual insurance but not small group insurance. Or insurers may be permitted to raise their rates based only on an actuarial certification in one state, but required to submit complete actuarial justification in another state. The actuary HCSC produces should be able to talk about HCSC's rate filings in all four of its states and for all market segments it's in. Thought this would be helpful as you're trying to track down the right person.

(Ex 1. 2/20/13 E-mail from J. Laslovich to J. Lenmark.) The CSI provided no indication to HCSC that it was intended to question its actuary about financial budgeting and forecasting.

HCSC produced its Chief Actuary, Janice Knight, for deposition in Helena on February 27, 2013. During that deposition, CSI's outside counsel, Mr. Jay Angoff, asked Ms. Knight a series of questions about HCSC's historic goals with respect to underwriting gains in its divisions in Illinois, New Mexico, Oklahoma and Texas. (Ex. 2. 2/27/13 Knight Dep. Tr. 105:7 to 107:15.) Ms. Knight explained that HCSC establishes a benchmark based on the margin that a well-run company should make over the long term. Id. 105:7 - 106:4. She then answered Mr. Angoff's question about what the specific underwriting benchmarks are for the specific lines of business. Id. 106:5-9. She further explained that there are only small differences in the benchmarks across the four HCSC states, and that competitive issues result in changes to the benchmarks from year to year. Id. 107: 8-15.

Thus, in that series of questions, CSI obtained all the information it now says is "vital" to its understanding of the proposed alliance: it has the information it needs to evaluate "whether HCSC's underwriting objectives in other states are reasonable, or whether they could result in drastically heightened premium rates in Montana." (CSI Brief at 5.)

Mr. Angoff, however, then moved to issues far beyond the rate issues the CSI had represented were to be the topics for the actuary, and asked Ms. Knight additional questions about HCSC's overall financial forecasts and plans, and the specific dollar numbers in its current budget for each division's underwriting gain. (Ex. 2, 108:12-110:3.) When Ms. Knight asked him to clarify what he was asking about, he made clear he was asking about targets for purposes of financial planning, *not* for product pricing. (Ex. 2, 109:12-16.) Not surprisingly, Ms. Knight did not know the specific dollar figure in HCSC's financial plan for forecasted net gain or medical loss ratios by division. Two days later, the CSI requested, "All documents containing or relating to HCSC division-specific underwriting gain forecasts." (Ex. 3, 3/1/13 E-mail N. Mazanec to J. Lenmark.) Then, on March 7 the CSI further expanded its request for HCSC's financial budget forecasts when it asked for "HCSC's forecasted net gain by division (each of HCSC's four states) that is part of HCSC's financial forecast . . . for each of the last five years." (Ex. 4, 3/7/13 Email J. Laslovich to S. Kaleczyc and J. Lenmark.)

ARGUMENT

A. CSI's Request for HCSC Financial Forecasts Was Not Timely Made.

CSI's request for five years worth of HCSC's financial forecast data was made more than a week after the February 19, 2013 deadline for additional requests established in the Supplemental Order and agreed to by CSI. This deadline was already an extension of the previous January 29, 2013 deadline, and was set to avoid the last minute discovery burdens that were among the factors that led to postponement of the first hearing. It is not reasonable or

equitable for CSI to ignore deadlines it agreed to and to impose continuing discovery burdens on HCSC as the parties prepare for hearing.³ Its reliance on cases relating to litigants who have abused the discovery procedures and should therefore be punished (CSI Brief at 3-4) should be wholly ignored, as CSI has provided no evidence that HCSC has abused the process. It is CSI that has ignored the Order entered to ensure that discovery in this matter was conducted equitably and in an orderly manner.

CSI provides no justification for its failure to make the disputed request by the deadline in the Supplemental Order. Its motion should be denied on that basis alone.⁴

B. HCSC Has Provided Data and Information Sufficient to Evaluate Its Rate Setting And Underwriting Gains.

CSI's request for financial forecasting documents is also wholly irrelevant to the issues to be considered at the hearing, improperly cumulative and burdensome. CSI has had HCSC financial statements, showing its *actual* consolidated underwriting gains for the last five years since December 19, 2012. HCSC also provided CSI with Supplemental Health Care Exhibits to its Annual Statements for 2010 and 2011, which list HCSC's actual underwriting gains by division for those years. And HCSC's annual statements, which are public documents and are available to CSI through the National Association of Insurance Commissioners (NAIC), also contain the Exhibit of Premiums, Enrollment and Utilization (a), which reports premium and utilization information for each state in which HCSC is licensed as a health insurer.

CSI also has voluminous rate filings HCSC made for its most popular benefit products in all four of its states in the last several years. Those filings show the specific rate increases

³ HCSC agreed to produce documents in response to the other three late requests the CSI served on March 1, 2013, because it could do so without substantial burden.

⁴ HCSC objects to CSI's suggestion that the Hearing Record be left open for purposes of filing the materials it seeks to compel.

requested. HCSC also created a chart for CSI showing the medical trends it assumed and its loss ratio targets in all of these rate filings.

Finally, Ms. Knight's testimony outlined for CSI the target underwriting gain percentages used by HCSC's divisions, by product line. She confirmed that variations from state to state were small. (Ex. 2. 105:10-107:15.) The total dollar value that those percentages represent, which was the question Ms. Knight could not answer, would not provide CSI with any information probative of any determination CSI must make.

In sum, CSI has not identified any reasonable need for HCSC's financial forecasts; it already has all the data it needs to evaluate whether HCSC leverages premiums to generate "unconscionable profits." CSI's request does not constitute reasonable, non-cumulative discovery. Its motion should be denied for this reason as well.

C. ACA Limits Insurer Underwriting Gains.

If the Alliance is approved, the health insurance policies HCSC will assume and sell in Montana will be governed by ACA. ACA includes medical loss ratio ("MLR") standards already in effect that limit an insurer's underwriting gain. Generally speaking, MLR is the ratio of claims paid divided by premiums earned expressed as a percentage. If an insurer exceeds ACA MLR levels in a specified market segment in a state (80% for individual and small group products and 85% for large group products), the insurer is required to distribute rebates to its customers in the amount the MLR level was exceeded. Profits, but not losses, may not exceed the prescribed levels established in federal law. Thus, these requirements prevent HCSC from generating "unconscionable profits." As a result, HCSC financial underwriting forecasts are not probative of CSI's stated concerns and cannot "provide valuable insight into HCSC's future business practices in Montana[.]" (CSI Brief at 5.)

D. Production Of The Requested Documents Is Unduly Burdensome Especially In Light Of Its Lack Of Probative Value.

CSI speculates throughout its brief that the financial forecasts it seek "are likely widely disseminated among HCSC personnel," and "readily available and easily accessed by HCSC staff." (CSI Brief at 5, 6.) CSI is simply wrong. HCSC's financial forecasts are not widely disseminated among HCSC personnel. Furthermore, HCSC would need to identify, search for, review and redact for relevance and privilege a large number of voluminous financial and Board materials to satisfy CSI's requests for HCSC's financial forecasts. This request creates an undue burden on HCSC, especially in light of all the data and information already produced to CSI.

Given the absence of any probative value to the material CSI seeks, and its cumulative nature, its motion should be denied on the basis of the burden to HCSC of producing it as well.

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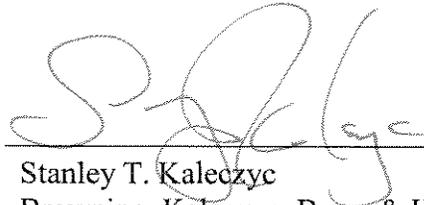
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CONCLUSION

For the reasons set out above, HCSC requests that CSI's Motion for Order Compelling Discovery be denied.

Dated: March 11, 2013



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*Attorneys for Applicant Health Care Service
Corporation, an Illinois Mutual Legal Reserve
Company*

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2013, a true and correct copy of the foregoing was e-mailed and deposited in the United States mail, postage prepaid, addressed to:

Ms. Sybil Shults
Office of the Commissioner of Securities &
Insurance
State Auditor's Office
840 Helena Avenue
Helena, MT 59601

Honorable W. William Leaphart
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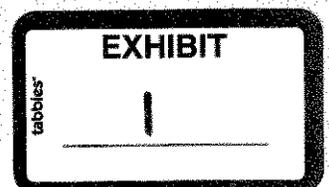
BROWNING, KALECZYC, BERRY & HOVEN, P.C.

Jackie Lenmark

From: Laslovich, Jesse [JLaslovich2@mt.gov]
Sent: Wednesday, February 20, 2013 3:35 PM
To: Jackie Lenmark
Cc: Mazanec, Nick
Subject: HCSC actuary

Jackie:

Regarding the HCSC actuary, he or she should be familiar with the standards and requirements HCSC must meet in each of its four states and in each of its market segments. For example, insurers may be required to get prior approval in one state but not in another state, or to get it for individual insurance but not small group insurance. Or insurers may be permitted to raise their rates based only on an actuarial certification in one state, but required to submit complete actuarial justification in another state. The actuary HCSC produces should be able to talk about HCSC's rate filings in all four of its states and for all market segments it's in. Thought this would be helpful as you're trying to track down the right person. Looking forward to hearing from you soon. Thanks. Jesse



In Re:

In the Matter of the Conversion of BCBS

Janice Knight
February 27, 2013

LESOFSKI COURT REPORTING & VIDEO CONFERENCING

Original File knight022713.txt

Min-U-Script®



1 Q And were you involved in the affiliation
2 with the Oklahoma Blue Cross plan at all?

3 A No.

4 Q And were you involved in the affiliation
5 with the New Mexico plan at all?

6 A No.

7 Q Does HCSC have a goal of earning a certain
8 underwriting profit each year?

9 MS. WITT: Object to the form.

10 Q (By Mr. Angoff) Do you know whether HCSC
11 has a goal of earning a certain underwriting profit
12 each year?

13 A Yes.

14 Q And what is that?

15 A It varies by line of business and by
16 division.

17 Q Let's go -- Does it vary by state?

18 A Yes. When I say division I mean state.

19 Q So let's go by line of business and by
20 division then. How about on the individual
21 business?

22 A Generally we did not specify a particular
23 contribution to free reserves, we look at the margin
24 that a well run company might make over the long
25 term and we establish a benchmark based on that.

1 That does not mean that we will, in effect, make
2 that amount of money in every given year and
3 depending on competitive pressures we might make
4 more or less than that in a particular year.

5 Q And what is that benchmark?

6 A For individual business it's 3 percent,
7 for small group business it's 6 percent and for
8 large group it varies between 3 and a half a percent
9 depending on the size of the group.

10 Q And did you use underwriting profit and
11 contribution to reserves or contribution to free
12 reserves interchangeably, did I understand that
13 correctly? Let me ask it this way, do those things
14 mean -- is underwriting profit the same thing as
15 contribution to reserves?

16 A No, because underwriting gain then is
17 affected by tax rates, by accounting charges, so
18 it's not the, it is not, it doesn't go to the final
19 surplus, there is charges against it.

20 Q But underwriting profit is pretax, no?

21 A Correct, but surplus or surplus is
22 post-tax.

23 Q We may be talking about the same thing.
24 But if you put contribution to reserves, if you put
25 a factor for contribution to reserves in a rate

1 filing is that the same thing as putting a provision
2 for underwriting profit in a rate filing?

3 MS. WITT: Object to the form.

4 A Underwriting gain is, or loss, is a result
5 of actual events. The margin for, or the
6 contribution for free reserves in the pricing is an
7 expectation of what you might achieve.

8 Q (By Mr. Angoff) I get you. The numbers
9 that you just gave by line, do those apply for each
10 state or are there differences among the states for
11 each line?

12 A There are small differences between the
13 states each year. As I explained before, it depends
14 on competitive issues, whether we are seeking to
15 make more or less than that amount.

16 Q And have you done any analysis of the
17 Montana market to determine what your underwriting
18 profit goals would be?

19 A No.

20 Q You've done no analysis for the individual
21 market in Montana?

22 A No.

23 Q Or the group market?

24 A No.

25 Q Do you have a goal of, do you have an

1 underwriting profit goal per state, that is, by
2 state including all lines within the state?

3 A For what purpose?

4 Q Does HCSC have a target, if you know, does
5 HCSC have a target underwriting profit by state?

6 A HCSC has in its filed policy forms
7 expected contribution to free reserves. We then
8 project in our financial forecasts what we think
9 that actual is going to be and the actual will vary
10 based on the amount of sales in the various
11 products.

12 Q So does HCSC have a particular benchmark
13 underwriting profit for each state?

14 A For what purpose?

15 Q For earning a certain profit per state
16 each year, is there a target, is there a goal?

17 A We have a forecasted net gain by division
18 that is part of our financial forecast and planned.

19 Q And when -- sorry.

20 A That is the goal for that division.

21 Q And when you say by division that means
22 state?

23 A State, yes.

24 Q So what is your current forecasted plan by
25 division?

1 A I can't tell you those numbers, I don't
2 know what they are. I know what they are if I had a
3 piece of paper in front of me that said what they
4 were.

5 MR. ANGOFF: Counsel, could you submit
6 those if we don't have them already?

7 MS. WITT: I don't know.

8 MR. ANGOFF: Sorry?

9 MS. WITT: We'll talk.

10 Q (By Mr. Angoff) Does HCSC have a target
11 medical loss ratio for each line of business?

12 A Again, I'm struggling with what the
13 purpose for which you're asking about this target.
14 Is this for financial results or for pricing
15 purposes?

16 Q Financial results.

17 A Yes.

18 Q And what is that target?

19 A Again, it's part of the financial plan and
20 it's in dollars.

21 Q I'm sorry, it's part of the financial plan
22 and it's in what?

23 A Dollars.

24 Q I don't know whether you said in dollars
25 or in Dallas.

Jackie Lenmark

From: Mazanec, Nick [NMazanec@mt.gov]
Sent: Friday, March 01, 2013 7:47 AM
To: Jackie Lenmark
Cc: Laslovich, Jesse; Shults, Sybil
Subject: Knight deposition documents

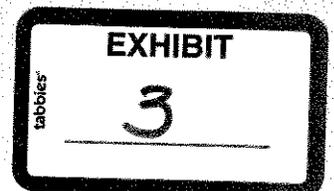
Jackie,

Pursuant to our discussions on Wednesday, we ask that HCSC provide the following documentation referenced during Janice Knight's deposition:

1. All documents containing or relating to HCSC division-specific underwriting gain forecasts.
2. All documents containing or relating to target MLRs by line of business, whether or not incorporated into HCSC's financial plan, and whether expressed in dollar figures or otherwise.
3. All documents containing or relating to the surplus allocable to HCSC's NM and OK divisions, as was previously disclosed to those states' DOIs.
4. Summaries of all scenario-based analyses HCSC developed in relation to the number of insureds who will qualify for subsidies under the Exchange.

Your timely response is appreciated.

Nick Mazanec
Attorney
Office of the Commissioner
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Montana State Auditor
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Stan Kaleczyc

From: Laslovich, Jesse [JLaslovich2@mt.gov]
Sent: Thursday, March 07, 2013 8:26 AM
To: Stan Kaleczyc; Jackie Lenmark
Cc: Mazanec, Nick
Subject: Request for information 3/1/2013 to HCSC No. 1
Attachments: 1050028.PDF

Stan:

As a follow-up to your attached correspondence seeking clarification about the CSI's request, the CSI specifies as follows:

The CSI requests HCSC's forecasted net gain by division (each of HCSC's four states) that is part of HCSC's financial forecast, as referenced by Janice Knight at 104:7-8 of her February 27, 2013 deposition, for each of the last five years.

Please provide this information as soon as possible and to the extent HCSC is still unwilling to provide the information, please advise, as the CSI will be seeking to compel the release of the information. Thank you. Jesse

From: Kristi Aaby [kristia@bkbh.com]
Sent: Wednesday, March 06, 2013 5:38 PM
To: Laslovich, Jesse; Mazanec, Nick
Cc: jtlenmark@kellerlawmt.com; mike@mlfp LLC.com; mary_belcher@bcbsmt.com; sean_slanger@bcbsmt.com; kirsi_parker@bcbsmt.com; Helen.witt@kirkland.com; deborah_dorman-rodriguez@hcsc.net; David_Kaufman@hcsc.net; Amir_Ovcina@bcbsil.com; Karen_Quirk@bcbsil.com; Stan Kaleczyc
Subject: Request for information 3/1/2013 to HCSC No. 1

Please find enclosed a cover letter respect to the above-referenced request.

If you have any issues in connection with this data submission or require additional information or clarification, please contact Stan Kaleczyc, stan@bkbh.com, ((406) 443-6820) or Helen Witt, Helen.witt@kirkland.com ((312) 862-2148).

Thank you,

Kristi Aaby

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