

scheme found in Title 50, chapter 4, part 10 [Conversion Statute].¹ Consent Order and Agreement Between the Montana State Auditor and BCBSMT, *In the Matter of the Report of the Examination (I-518) of Blue Cross and Blue Shield of Montana* (Nov. 7, 2005) [Consent Order] Exh. 3 attached to Appl. Brf. Supp.² BCBSMT-HCSC moved the Hearing Examiner for an express ruling that the Bulk Reinsurance Statute, 32-2-1212 [Bulk Reinsurance Statute], does not apply to the Transaction.

While the Bulk Reinsurance Statute by its plain language applies only to “domestic mutual insurers,” CSI nevertheless opposes BCBSMT-HCSC's motion based on a misinterpretation of 33-30-102. However, as discussed below, interpreting 33-30-102 as CSI proposes, which is that **all** of the sections and chapters listed in 33-30-102 would apply to the Transaction, would lead to a variety of incongruous results, including misapplying property and casualty provisions to health service corporations. Such a literal application of the statutes identified, without consideration of the resulting impacts, cannot prevail as a matter of statutory construction.

Even if for the sake of argument the Bulk Reinsurance Statute is to be considered, CSI is incorrect in asserting that the Bulk Reinsurance Statute would provide added protections of a separate “member” vote by policyholders. While the term “member” is not defined in the Insurance Code, it is defined in the nonprofit law to mean only persons or entities with voting rights and economic interests in the company. Because members do not have voting rights or an

¹Text references to the statutes in the Montana Code Annotated are by Title, chapter, and part or section number only without further designation as “MCA” or “Montana Code Annotated.”

²(a) “Applicants’ Brief in Support of Motion for Ruling on Applicability of 33-2-1212, MCA to Application” is cited as “Appl. Brf. Supp.” (b) CSI’s “Response to Motion for Ruling on Applicability of 33–1212, MCA to Application” is cited as “CSI Ans. Brf.”

economic interest in BCBSMT, and all corporate governance is vested solely in company directors, no further “member” approval is required under the Bulk Reinsurance Statute as company director approval has already been given. Moreover, no further policyholder interests are provided under the Bulk Reinsurance Statute beyond those already contained in the Conversion Statute. The more recent and comprehensive regulatory scheme of the Conversion Statute was specifically tailored to both provide protections to any deemed public assets of BCBSMT and consider whether the Transaction is in the best interest of policyholders.

Finally, if the statutes are applied as CSI contends, the joint regulatory oversight of the Commissioner of Insurance [Commissioner] and the Montana Attorney General provided in the Conversion Statute could be effectively usurped by the Commissioner or by the policyholders. Such an outcome is not supported in law and would compromise the comprehensive protections and judicial economies provided to protect the Transaction’s public assets.

ARGUMENT

1. An additional proceeding under the Bulk Reinsurance Statute subverts the single comprehensive public process designated for review and approval of the Transaction to which BCBSMT-HCSC, the Commissioner, and the Attorney General have already agreed.

a. The comprehensive provisions of the Conversion Statute in a single regulatory framework provide protections both to the public assets of BCBSMT and those afforded policyholders under the Bulk Reinsurance Statute.

The Application approval in the Conversion Statute requires a comprehensive and detailed analysis of all aspects of the Transaction, including its community impact and antitrust implications, with the assistance of independent experts; a noticed public hearing in which any member of the public, including BCBSMT policyholders and members, may voice an opinion on

the fairness of the Transaction and the distribution of the public assets;³ and joint oversight of the Transaction implementation by the Commissioner and Attorney General to ensure protection of the public assets and member interests. Mont. Code Ann. §§ 50-4-707, -710 through -712. The Commissioner and Attorney General each must make an independent determination that the Transaction is in the “public interest.” Mont. Code Ann. §§ 50-4-715, -717. The overarching considerations for determining that the Transaction is in the “public interest” is whether the fair market value of the public assets are preserved and protected and whether the Transaction includes sufficient safeguards to insure continued accessible and affordable health care. *Id.* Any consumer or policyholder protection afforded by 33-2-1212 is subsumed in this comprehensive analysis, which is consonant with the plain language of both the Conversion and Bulk Reinsurance Statutes.

b. The Bulk Reinsurance Statute is meant to address narrower “business in force” transactions of domestic mutual insurers and not the broader interests of this Transaction which are already protected by current proceedings and review of the Commissioner and the Attorney General.

CSI concludes that BCBSMT’s sale of its block of business constitutes assumption reinsurance and is a separate transaction distinct from the conversion or business combination of BCBSMT and HCSC. CSI Ans. Brf. at 3. The conclusion is incorrect. Indeed, there would be no conversion or business combination, and therefore no transaction, if the book of business

³ BCBSMT and HCSC have stipulated that for purposes of this Transaction only, and for no other, that the Conversion Statute applies as though BCBSMT is a Montana public benefit corporation and the following assets are public assets as defined in Mont. Code Ann. § 50-4-701(9): (a) the assets and liabilities of the Acquired Business as that term is defined in the Application for Approval of Alliance; and (b) the assets that remain in the old BCBSMT entity (as defined in the Application for Approval of Alliance), but only after old BCBSMT has satisfied or otherwise discharged the remaining liabilities of old BCBSMT, including those of its subsidiaries. All references to “public assets” herein are subject to this stipulation.

were not included. The Transaction under review, including assignment of BCBSMT's book of business, is an integrated and indivisible whole and is far broader than narrow assumption reinsurance. The appropriate review is a single comprehensive review that evaluates the Transaction as a whole, with priority focus on the public assets. Only the Conversion Statute provides that scrutiny.

The Bulk Reinsurance Statute, in 33-2-1212 provides, "A domestic mutual insurer may reinsure all or substantially all its business in force . . . by an agreement of bulk reinsurance after compliance with this section." Plainly, 33-2-1212 applies only to the reinsurance of the "business in force" of a domestic mutual insurer, i.e., reinsurance upon the "assumption" of a particular book of an insurer's business. Mont. Code Ann. § 33-2-1212(1); *See* CSI Ans. Brf. at 3. In the Transaction here, however, BCBSMT is selling to HCSC and HCSC is acquiring "all or substantially all of its property," including BCBSMT's employees, pension plans and liabilities, fixtures, certain real estate, marks, ASO contracts, and its insured health policies in force as permitted and regulated under 35-2-617. Appl. Brf. Supp. at 5-6. The consideration paid by HCSC to BCBSMT is the "public asset" to be protected. It follows that the Transaction is subject to the comprehensive Conversion Statute, which expressly invokes 35-2-617, the nonprofit law under which BCBSMT is organized. *See e.g.*, Mont. Code Ann. §§ 50-4-704, -707, -715.

CSI relies upon the recent transaction in which New West Health Services [New West] submitted to review under the Bulk Reinsurance as support for the conclusion that it should likewise govern the Transaction. CSI Ans. Brf. at 10-11. However, the New West transaction was not subject to the Conversion Statute so that transaction does not provide any sort of

precedent to follow in this case. In addition, in contrast to the case with BCBSMT members, the members of New West had voting rights under its corporate documents. Under CSI's interpretation, voting rights would have to be defined and created for individuals, entities and groups that have no such rights under BCBSMT's corporate structure all to be accomplished without any specific statutory direction or legal precedent.

CSI asserts that the Conversion Statute is insufficient to govern this Transaction, citing theoretical deficiencies either nonexistent or irrelevant to the Transaction. For example, CSI states the Conversion Statute is insufficient because it "effectively divests both the Attorney General and Commissioner of review authority if a transaction does not involve public assets." CSI Ans. Brf. at 6-7. That is not the case here, however. In light of the Consent Order under which BCBSMT has proceeded, BCBSMT-HCSC have stipulated in their Application that the transaction is subject to review under the Conversion Statute as though BCBSMT is a Montana public benefit corporation and its identified assets are public assets as defined 50-4-701(9). BCBSMT-HCSC Application for Approval of Alliance at 24-25, ¶ 7. *See also* at 24, ¶ 5. Under the facts in this case, the Conversion Statute is clearly sufficient.

CSI further asserts that a separate proceeding under 33-2-1212 is necessary to protect theoretical policyholders of insurers not a part of this proceeding from exposure to the "whims" of those insurers at other times. CSI Ans. Brf. at 2. This concern is unfounded. In addition to the considerable safeguards it provides to the public assets, the Conversion Statute, coupled with 35-2-617, was tailored (by the sitting Commission and Attorney General) to deliver all of the protection afforded by the Commissioner's sole limited review of "business in force" under 33-2-1212:

- a transaction agreement filed with the Commissioner (compare 33-2-1212 (1) with 50-4-707(2)(d), (e))
- a public hearing on the agreement prior to approval (compare 33-2-1212 (1) with 50-4-709(e), -710)
- approval by the Commissioner in a reasonable time (compare 33-2-1212 (2) with 50-4-702, -713)
- Commissioner finding that the agreement is fair and equitable to each insurer involved (compare 33-2-1212 (2) with 50-4-717(2)(d), (2)(e), (3(b))
- Commissioner finding that the agreement will not reduce policyholder protection or service (compare 33-2-1212 (2) with 50-4-717(2)(g)(i)).

The Conversion Statute provides a comprehensive statutory scheme to consider transactions such as the one proposed in the instant case. That scheme encompasses all of the policyholder protections contemplated in the Bulk Reinsurance Statute and more. *See generally*, Mont. Code Ann. § 50-4-717(2)(g) (Commissioner shall consider whether the Transaction “is equitable to the public interest, enrollees, insureds, shareholders, and certificate holders, if any, of the transferor” (50-4-717 (2)(g)(i)); “is in compliance with Title 33, chapters 30 and 31” (50-4-717 (2)(g)(ii)); “that the transferee will possess surplus in an amount sufficient to comply with the surplus required under law and provide for the security of the transferee’s certificate holders, if any, and policyholders” (50-4-717(2)(g)(iii)). These overlapping protections satisfy any obligation of the Commissioner or CSI under 33-2-1212 or to consumers under 33-1-311(3)(“The commissioner shall administer the department to ensure that the interests of insurance consumers are protected.”). Because the Conversion Statute contains more protections than the narrower Bulk Reinsurance Statute, there is no justification based on the plain language of the statute or public policy to apply both statutes to the Transaction. As stated above, the Conversion Statute provides all of the protections intended under Montana Law.

c. Application of the narrow authority in the Bulk Reinsurance Statute impermissibly trumps the comprehensive joint authority provided in the Conversion Statute.

In advocating separate proceedings and approvals under both the Bulk Reinsurance and Conversion statutes, CSI focuses solely on 33-2-1212(3) and misconstrues its provisions to reach a counterintuitive conclusion: that to approve the Transaction a vote is required by BCBSMT policyholders and members who, under its Articles and Bylaws, expressly have no controlling authority over or property interest in the corporation. CSI Ans. Brf. at 3 (“The Conversion Statute neglects a vital purpose of the Bulk Reinsurance Statute; namely to provide members a voice when policies are transferred to an entity with which they did not contract.”). CSI’s position is based upon a misreading of the Bulk Reinsurance Statute. A member vote is not the vehicle by which policyholders are or should be given a voice in a conversion transaction when the existing corporate structure expressly disclaims such an interest.

The Bulk Reinsurance Statute clearly distinguishes between policyholders in subsection (2) and “members” in subsection (3). Subsection (2) says that the Commissioner must review the transaction to confirm that it “does not substantially reduce the protection or service to policyholders.” Subsection (3) requires a vote of “members,” a term that is undefined in the Insurance Code. The term is defined in the nonprofit law, however, which makes the clear distinction that “members” should only include persons or entities with voting rights and economic interests in the company.

“Member” means, without regard to what a person is called in the articles or bylaws, a person or persons who, on more than one occasion and pursuant to a provision of a corporation’s articles or bylaws, have the right to vote for the election of a director or directors.

Mont. Code Ann. § 35-2-114 (21)(a) (emphasis added). That definition would control for purposes of application of the Bulk Reinsurance Statute. Indeed, if the Bulk Reinsurance Statute were interpreted here to require or permit a member vote, it would conflict with the provisions of the non-profit law which do not require a vote of the BCBSMT members.

Moreover, under its plain terms, no vote of BCBSMT's policyholders is required under the Bulk Reinsurance Statute as policyholders do not have voting rights or any individual economic interest in the company and thus the public assets. All BCBSMT corporate governance is vested solely in its Directors. Its members have no right to vote and no property interest in the corporation. Art. Inc., art. V ("The corporate powers of the corporation shall be exercised by its Board of Directors, who shall have the sole voting power on all matters." (emphasis supplied)); art. VI ("... in no event, shall any class of members have any voting rights or any property interest in the corporation."). *See* Appl. Brf. Supp. at 3-4, 7-8. In the case of BCBSMT, its "members," i.e., its Directors, have already voted in support of the Transaction. *See* Appl. Brf. Supp. at 7-8. This conclusion is consistent with other assumption reinsurance transactions, e.g., 33-2-1206, -1211, in which policyholder votes are not required or permitted. CSI confuses the fundamental characteristic of a mutual insurer, where policyholders or members have a property interest in the mutual company by its definition, with BCBSMT's structure in which policyholders do not have a property interest. In the case of BCBSMT, the public interest in BCBSMT's assets are protected by the Conversion Statute.

BCBSMT policyholders will not be disenfranchised in the Transaction proceeding by this result. Their interests are fully protected by the Conversion Statute. In addition to the protections to policyholders discussed above whereby the Transaction may only be approved if it

is determined to, among other things, be “equitable to the public interest, enrollees, insureds, shareholders, and certificate holders”,⁴ BCBSMT policyholders will retain all benefits they currently enjoy to the end of their policy terms, never longer than a year, at which time they may insure with another entity if they so desire. They can submit written comments and testimony or come to the noticed public hearing with other Montanans and voice on the record any position they may have for the Hearing Examiner’s and the regulator’s consideration. In addition to protection of the public’s interests, the Conversion Statute review must then additionally consider whether it is in the best interest of policyholders. To require a separate vote from policyholders who at most have a year-long contract with the company sets up a circumstance in which the policyholders may wrest control of the entire Transaction and the public assets over the assignment of only their policies.⁵

As construed by CSI, additional approval of this Transaction under 33-2-1212 abrogates the public input contemplated in 50-4-710 and supplants the joint regulatory framework with a narrow approval process . As construed by CSI, 33-2-1212 allows the Commissioner or BCBSMT nonvoting policyholders and members to usurp the joint authority conferred upon the Attorney General by 50-4-702 and -705. Indeed the construction actually divests the Commissioner of her approval authority; her considered determination of the public benefit to be derived from the Transaction can be overruled by the vote CSI advocates. The vote even may nullify the Transaction review and recommendation of this Hearing Examiner. When the

⁴ Mont. Code Ann. § 50-4-717(2)(g)(i).

⁵This is not unlike the portion of 33-2-1212(3) that allows life insurers to limit the right to vote “to members whose policies are other than term or group policies and have been in effect for more than 1 year.”

Commissioner is tasked under the Conversion Statute to protect policyholder interests, no public or private purpose would be served by imposing voting rights in this Transaction and there is no legal or public policy support for such an outcome.

2. By the plain language of the controlling statutes, the Bulk Reinsurance Statute, 33-2-1212, MCA, cannot apply to the Transaction.

It is well-settled law that any statute, including 33-2-1212, governs by the plain meaning of the words it contains. “In interpreting a statute, we look first to the plain meaning of the words it contains. Where the language is clear and unambiguous, the statute speaks for itself and we will not resort to other means of interpretation.” *Kluver v. PPL Montana, LLC*, 2012 MT 321, ¶ 55, ___ Mont. ___, ___ P.3d ___, [WL 6740152, 12]; Mont. Code Ann. § 1-2-102. CSI may not insert what has been omitted or omit what has been inserted. Mont. Code Ann. § 1-2-101, -102. Words and phrases used in a statute must be construed according to the context and the approved usage of the language; technical words and phrases are to be construed according to their “peculiar and appropriate” meaning or definition. Mont. Code Ann. § 1-2-106. “Whenever the meaning of a word or phrase is defined in any part of [the Montana Code Annotated], such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.” Mont. Code Ann. § 1-2-107.

Applying these rules to the two statutes, CSI’s strained construction of 33-2-1212 cannot be applicable to the Transaction. First, 33-2-1212 applies only to “domestic mutual insurers.” It reads: “A domestic mutual insurer may reinsure all or substantially all its business in force, or all or substantially all of a major class of its business, with another insurer, stock or mutual, by an agreement of bulk reinsurance after compliance with this section.” Mont. Code Ann. §

33-2-1212 (1) (emphasis supplied). The technical term “domestic mutual insurer” is defined in 33-3-102 and that definition must be used here. Mont. Code Ann. § 1-2-106. “Domestic mutual insurer” thus means “an incorporated insurer without capital stock, and the governing body of which is elected by the policyholders.” Mont. Code Ann. § 33-3-102 (1). It follows that 33-2-1212 can only apply to health service corporations that are organized as “domestic mutual insurers.”

BCBSMT is not a “domestic mutual insurer.” Its governing body is not elected by its policyholders. Its policyholders and members have no economic interest in the corporation, emblematic of mutual insurers. *See* Appl. Brf. Supp. at 7-8. Rather, it is a mutual benefit corporation that operates as a nonprofit health service corporation, the organizational control and formalities of which are regulated under the nonprofit law of Title 35. While its eligibility to be a nonprofit insurer and its insurance functions are generally regulated under Title 33, chapter 30, by virtue of its organization, it must be exempt from requirements under 33-2-1212.

As statutory support for imposing the requirements of 33-2-1212 upon the Transaction, CSI points to 33-30-102. That section provides:

(1) All health service corporations are subject to the provisions of this chapter. In addition to the provisions contained in this chapter, other chapters and provisions of this title apply to health service corporations as follows: 33-2-1212 [Bulk Reinsurance]; 33-3-307; 33-3-308; 33-3-401; 33-3-431; 33-3-701 through 33-3-704; 33-17-101; Title 33, chapter 2, part 19; Title 33, chapter 17, parts 2 and 10 through 12; and Title 33, chapters 1, 15, 18, 19, and 22, except 33-22-111.

(2) A law of this state other than the provisions of this chapter applicable to health service corporations must be construed in accordance with the fundamental nature of a health service corporation, and in the event of a conflict, the provisions of this chapter prevail.

CSI asserts that had the legislature intended for the statute to restrict the insertion of 33-2-1212 to less than all health service corporations, it could easily have done so. CSI Ans. Brf. at 9-10.

The assertion ignores the content and context of the numerous sections in 33-30-102 that are to apply to health service corporations, however. Stating in 33-30-102 that a given statute is applicable to health service corporations does not change the cited statute's plain meaning; it serves only to save the statute from not applying at all.

A review of the other statutes enumerated in 33-30-102 illustrates the point. For example, "Title 33, chapter 1" is to apply to all health service corporations, yet part 14 of Title 33, chapter 1 relating to the regulation of property and casualty actuarial opinions certainly does not. "Title 33, chapter 15" is to apply; but the provisions in chapter 15 relating to property and casualty policy simplification requirements (part 3), cancellation requirements (part 11), or other property and casualty sections scattered throughout likewise would not apply to health service corporations. "Title 33, chapter 18" also is listed, but by its plain language 33-18-210 would only be enforced against title, property, casualty and surety insurers. As with these examples, health service corporations that are "domestic mutual insurers" would come within 33-2-1212's purview, but the section by its express terms does not apply to a health service corporation that is not a mutual. Attempting to apply the statute incorrectly creates inconsistencies and conflicts with the statute enacted to address this Transaction, the Conversion Statute.

CSI emphasizes that if there is a conflict between the provisions of chapter 30 and other provisions of the Insurance Code, the provisions of chapter 30 must control, relying on 33-30-102(2). What is required, however, is construction of other statutes "in accordance with the fundamental nature of a health service corporation," and if after so construing there is a conflict, the provisions of Title 33, chapter 30, are to control. Importantly, the Conversion Statute, nonprofit corporation statutes, and the Consent Order entered by BCBSMT and CSI,

under which the Parties agreed the Transaction should proceed, all support and protect “the fundamental nature of [this] health service corporation” as provided in Title 33, chapter 30 and, more, the public asset. Mont. Code Ann. § 33-30-102 (2), -103. There is no conflict of statutory provisions to resolve.

Finally, as a practical matter of statutory construction, there is no guidance in statute, regulation, or in BCBSMT’s Articles or Bylaws on how the vote CSI contemplates must be taken, how an additional hearing should be incorporated, or how the results of a 33-2-1212 vote, hearing, and review solely by the Commissioner would be integrated with the joint conversion approval process set forth in the Conversion Statute that BCBSMT-HCSC, the Commissioner, and the Attorney General have agreed control.

3. The Conversion Statute provides comprehensive review and approval intended by the legislature.

The Conversion Statute enacted in 2005 provides for comprehensive review and approval of nonprofit conversion transactions, including the sale of the insurance business and risk (assumption reinsurance) that may be incorporated in them. It includes extensive and detailed criteria for coordinated and joint approval by the Attorney General and the Commissioner. It specifies a far broader scrutiny than can be provided through the Bulk Reinsurance Statute and, by making that comprehensive review subject to public hearing, also provides greater protection to the public assets, policyholders, and other Montana stakeholders. Its enactment after the amendment of 33-30-102 to include 33-2-1212 reflects the legislature’s intent to fill an existing vacuum regarding conversion transactions where, properly construed, 33-2-1212 did not apply. *State ex rel. Dick Irvin, Inc. v. Anderson*, 164 Mont. 513, 524, 525 P.2d 564, 570 (1974) (“In construing a statute, this Court presumes that the legislature intended to make some change in

existing law by passing it.”), *cited with approval in Cantwell v. Geiger*, 228 Mont. 330, 333-334, 742 P.2d 468, 470 (1987).

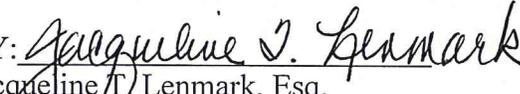
More, the legislation was introduced while a dispute between the Commissioner and BCBSMT over whether its assets upon dissolution were to be treated as assets of a public benefit corporation was pending. As stated by the Commissioner when seeking enactment of the Conversion Statute, “[h]is office’s priority has been to assure that, in the event of a conversion, any and all assets of Blue Cross and Blue Shield would be sequestered for a public purpose. This legislation puts into place a framework for the public hearing process and protects public assets.” S. Comm. on Publ. Health, Welfare, and Safety, (Feb. 11, 2005) *Hearings on SB 317* [2005 Mont. Laws 214] (testimony of Commissioner John Morrison). In resolving the dispute, BCBSMT and the Commissioner agreed that it would be the Conversion Statute that would control in a conversion as if BCBSMT was a public benefit corporation. *Id.* 2, ¶ 5. The Order then entered expressly cited the Conversion Statute as controlling transactions involving health service corporations such as BCBSMT. Order at 2-3. BCBSMT-HCSC have proceeded in this Transaction relying upon and compliant with the express requirement of the Order.

Failure to apply 33-2-1212 to BCBSMT here does not vitiate the validity of 33-30-102 to other transactions to which it does expressly apply. Applying both 33-2-1212, however, puts inconsistent provisions of law into play, needlessly complicating the review and approval procedure. Applying only the Conversion Statute to this Transaction provides a clear path for the Commissioner, the Attorney General, and the Hearing Examiner jointly to evaluate all of the evidence and all of the public input to reach their decision as required in the Consent Order.

The Conversion Statute and nonprofit law provide the proper basis for BCBSMT to engage in the broad business combination contemplated with HCSC and for the Commissioner jointly with the Attorney General to review the Transaction thoroughly to ensure the protection of the public assets involved, BCBSMT policyholders, and other stakeholders. No reason exists to apply the Bulk Reinsurance Statute. By its plain language it does not apply. Indeed, if applied, the joint regulatory oversight provided in the Conversion Statute may be effectively usurped, by the Commissioner or by the policyholders. Such an outcome is not supported in law and would compromise the comprehensive protections and judicial economies provided to protect the Transaction's public assets.

Respectfully submitted this 8TH day of January, 2013.

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CERTIFICATE OF SERVICE

I, Jacqueline T. Lenmark, KELLER, REYNOLDS, DRAKE, JOHNSON & GILLESPIE, P.C., certify that on January 8, 2013, I served a true and correct copy of the foregoing **APPLICANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR RULING ON APPLICABILITY OF 33-2-1212, MCA TO APPLICATION**, by mailing it first class postage prepaid to:

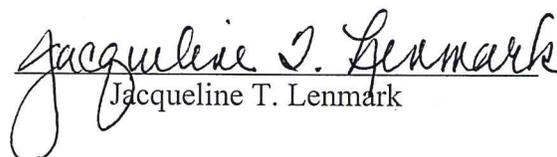
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DATED this 8th day of January, 2013.


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