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Attorneys for the CSI

**BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE
MONTANA STATE AUDITOR**

| | | |
|----------------------------------|---|-----------------------------|
| |) | Case No. INS-2012-238 |
| IN THE MATTER OF THE CONVERSION |) | |
| OF BLUE CROSS AND BLUE SHIELD OF |) | |
| MONTANA, INC., AND ALLIANCE WITH |) | BRIEF IN SUPPORT OF |
| HEALTH CARE SERVICE CORPORATION |) | MOTION FOR ORDER |
| |) | COMPELLING DISCOVERY |
| Applicants. |) | |
| _____ |) | |

The Office of the Commissioner of Securities and Insurance, Montana State Auditor, by and through counsel, moves the Hearing Examiner to compel discovery pursuant to Rule 37(a), Mont.R.Civ.P., for the reasons set forth below.

BACKGROUND

On February 27, 2013, counsel for the Office of the Commissioner of Securities and Insurance, Montana State Auditor (CSI), deposed Ms. Janice Knight. She was deposed in her capacity as Chief Actuary for Health Care Service Corporation (HCSC). The deposition pertained to HCSC's proposed acquisition of certain assets and liabilities of Blue Cross and Blue Shield of Montana, Inc. (BCBSMT) (Transaction). In attendance were representatives of the CSI, the Montana Attorney General, HCSC, and BCBSMT. Knight advised the CSI that HCSC

generated annual underwriting gain forecasts for each of its underlying divisions. (Ex. 1, Depo. Janice Knight 108:12-18 (Feb. 27, 2013).) A “division” equates to one of the four state-specific plans operated by HCSC. (*Id.* at 108:21-23.) Counsel for the CSI requested during the deposition that HCSC provide documentation of the forecasts. (*Id.* at 109:5-6.) On March 1, 2013, the CSI submitted a written follow-up request that HCSC produce “all documents containing or relating to HCSC division-specific underwriting gain forecasts.” (Ex. 2, E-mail from Nick Mazanec to Jacqueline Lenmark, *Knight Deposition Documents* (March 1, 2013).) On March 6, 2013, counsel for HCSC verbally advised counsel for the CSI that HCSC refused to produce the documentation. The same day, the CSI received a letter from counsel for HCSC requesting clarification of the CSI’s request for the forecast documentation. (Ex. 3, Ltr. from Stanley Kaleczyc to Jesse Laslovich (March 6, 2013).) On March 7, 2013, the CSI clarified its request to HCSC via e-mail: “[t]he 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.” (Ex. 4, E-mail from Jesse Laslovich to Stanley Kaleczyc and Jacqueline Lenmark, *Request for Information 3/1/2013 to HCSC No. 1* (March 7, 2013).) HCSC subsequently refused to produce the requested documentation. HCSC justified its refusal to provide the underwriting gain forecasts on three bases: (1) the information is irrelevant to the instant action, (2) the information is highly confidential, and (3) HCSC does not have sufficient time to collect the documents containing the information.¹

¹In a telephone call on March 6, 2013, HCSC counsel Stanley Kaleczyc advised the CSI that HCSC refused to provide the forecasts for reasons of relevance and confidentiality. A week after the written request was initially submitted, Kaleczyc informed the CSI via email that, “[g]iven that this is a Friday afternoon before the week of the hearing,” it was physically impossible for HCSC to collect and disseminate the documents the CSI sought. (Ex. 5, e-mail from Stanley Kaleczyc to Jesse Laslovich and Nick Mazanec, *Additional document requests from CSI* (March 8, 2013).)

ARGUMENT

I. Pursuant to the Montana Rules of Civil Procedure, the Respondents must produce the information requested by the CSI.

The CSI has, in its discovery request, required the production of documentation it deems relevant and material to this matter. HCSC's refusal to provide the information is without merit. HCSC has refused to fully comply with the CSI's discovery request and it is submitted that the Hearing Examiner should issue an order compelling discovery.

According to Rule 26(b), Mont. R. Civ. P., “. . . [p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense.” Moreover, “[t]he information sought need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.*

In interpreting the Rules of Civil Procedure, the Montana Supreme Court has consistently held that discovery must be a free exchange of information:

The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation.

Richardson v. State, 2006 MT 43, ¶22, 331 Mont. 231, 130 P.3d 634 (quoting *Massaro v. Dunham* (1979), 184 Mont. 400, 405, 603 P.2d 249, 252).

According to Rule 37(a) Mont. R. Civ. P., if a party fails to answer discovery requests, the discovering party may “. . . move for an order compelling an answer, designation, production, or inspection.” The Montana Supreme Court has held: “[i]t has long been the law in Montana that a party's abuse of discovery procedures which results in needless delay of a case should not be dealt with leniently; transgressors should be punished rather than patiently encouraged to cooperate in the discovery process.”

McKenzie v. Scheeler (1991), 285 Mont. 500, 506, 949 P.2d 1171 (citing *Smith v. Butte-Silver Bow County* (1996), 276 Mont. 329, 332, 916 P.2d 91, 92-93).

HCSC's refusal to provide the requested forecasts violates its obligation to cooperate in the discovery process. The reasons it proffers for its refusal are meritless and immaterial as to whether HCSC must disclose the information sought. The appropriate remedy, therefore, is to compel HCSC to provide the forecasting information.

1. The underwriting forecasts are relevant to whether the Transaction is in the public interest of Montanans.

The underwriting information the CSI seeks is vital to determining whether the transaction in question is in the public interest. As stated previously, a party may obtain discovery matter that is relevant and not privileged. Rule 26(b). Relevant evidence is that evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mont. R. Evid. 401.

The Commissioner of Securities and Insurance, Montana State Auditor (Commissioner), is tasked with determining whether the Transaction is in the public interest. Mont. Code Ann. § 50-4-717(1). Among other factors, the Commissioner must consider:

- (d) whether the conversion has the likelihood of creating a significant adverse effect on the availability or accessibility of health care services or health insurance coverage in the affected community;. . . [and]
- (g) whether the conversion transaction: (i) is equitable to the public interest, enrollees, insureds, shareholders, and certificate holders, if any, of the transferor. . . .

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

HCSC admittedly generates underwriting gain forecasts for each state in which it operates. (Ex. 1, Depo. Knight at 108:12-18.) The gain an insurer seeks to realize is to a large

extent correlative of the amount of premium a consumer pays. Significantly increased premiums can effectively restrict an insured's access to affordable health care by placing that care beyond the financial reach of that person. The HCSC forecast information would provide a wealth of data demonstrating whether HCSC's underwriting objectives in other states are reasonable, or whether they could result in drastically heightened premium rates in Montana. This evidence would provide valuable insight into HCSC's future business practices in Montana and assist the CSI in determining whether to approve the Transaction.

Likewise, the Commissioner must consider the equities of the Transaction more generally. Mont. Code Ann. § 50-4-717(2)(g)(i). Certainly, leveraging premiums to generate unconscionable profits would be inequitable to insureds. Again, examination of HCSC's underwriting forecasts in other states would tend to demonstrate whether pursuit of those gains could result in such an inequity (or has in other states). Thus, the information requested is highly relevant to the determinations the Commissioner must make, and HCSC's refusal to provide the forecasts is unjustifiable.

2. The allegedly confidential nature of the underwriting forecasts does not negate HCSC's obligation to disclose discoverable material.

HCSC is obligated to disclose the underwriting forecasts regardless of their purportedly confidential nature. The Rules of Civil Procedure encourage broad disclosure of discovery material. *Richardson*, ¶22 (citation omitted). This broad scope of disclosure is subject to limited exceptions inapplicable to this case.

A party may refuse to disclose otherwise discoverable information on the basis of privilege. Rule 26(b)(1). HCSC has asserted no privilege, and it is apparent that none applies. The underwriting gain information sought constitutes a significant component of HCSC's larger financial forecast. Presumably, these forecasts are heavily relied upon by HCSC, and for this reason are likely widely disseminated among HCSC personnel. It is highly unlikely the figures

were prepared by an attorney, or in anticipation of litigation. In short, HCSC has produced no evidence demonstrating a privilege applies to the forecasts.

A party may also under certain circumstances seek a protective order to prevent discovery. Rule 26(c)(1). Such an order may be granted upon a showing that the order is necessary to protect a party “from annoyance, embarrassment, oppression, or undue burden or expense.” *Id.* None of these factors apply in this case. The CSI’s request is highly relevant and made in good faith, undermining any assertion of intent to annoy, embarrass, or oppress. Moreover, the material constitutes high-level projections that figure significantly in HCSC’s overall financial plan. Given the underwriting forecasts’ apparent strategic importance to HCSC, they are likely readily available and easily accessed by HCSC staff. The CSI’s request thus places a minimal burden upon HCSC. For these reasons, no protective order is necessary or appropriate.

Even if HCSC feels strongly the information is confidential and that its public dissemination should be prevented, other means of maintaining confidentiality are readily available. The CSI already follows the procedure established by the Montana Supreme Court for the handling of trade secrets or confidential proprietary information submitted to a state regulatory agency. A party submitting such information may file a supporting affidavit demonstrating why “the information is a discernible property right entitled to protection.” *Great Falls Tribune v. Mont. Pub. Serv. Comm.*, 2003 MT 359, ¶ 60, 319 Mont. 38, 82 P.3d 876. A proper demonstration of protected status shields the submitted records from public disclosure. *See* Mont. Code Ann. § 2-6-102(3).

Indeed, the Montana Insurance Code repeatedly provides that trade secret information held by the Commissioner is to be given confidential treatment. Thus, the Code contemplates that the Commissioner must access trade secret information in order to regulate insurers. It does

not, however, provide that trade secret information is not discoverable by the Commissioner. *See Generally* Mont. Code Ann. §§ 33-2-1116; 33-1-409; 33-1-1403; 33-17-611; 33-18-609; 33-22-1809. While the Transaction is governed by Title 50, the same principle applies: the confidentiality of information does not prevent the CSI from accessing that information, but instead requires that it be protected from public disclosure if necessary.

The parties in this case have already adopted this affidavit practice for the handling of proprietary information. The CSI has repeatedly requested, and HCSC has repeatedly provided, sensitive information HCSC would characterize as proprietary. In each case, the CSI has accepted affidavits filed by HCSC pursuant to the aforementioned procedure established by the Montana Supreme Court. This procedure already provides HCSC with sufficient protection from public disclosure of the underwriting gain forecasts. Moreover, HCSC has not demonstrated why these forecasts are qualitatively distinct from any of the other proprietary documents it has already submitted; thus, the same procedure that applies to similar material should apply to the forecasts. In short, the allegedly proprietary nature of HCSC's underwriting forecasts in no way negates HCSC's obligation to disclose this properly discoverable material.

3. Given HCSC's failure to timely respond to the CSI's request, the proximity of the hearing does not obviate HCSC's duty to disclose the information.

HCSC's inability to locate and provide the forecast information is due to its own untimely reaction to the CSI's request. The insurer states that, given that the hearing begins shortly, "the problems in providing any additional documents are simply insurmountable." (Ex. 5, E-mail from Stanley Kaleczyc.) Yet HCSC had ample time to conduct an internal review and locate those records, but chose not to do so.

The CSI first requested the forecasting information during Knight's deposition on February 27, 2013. (Ex. 1, Depo. Knight 108:15-109:9.) It then reiterated its request in writing on March 1, 2013. (Ex. 2, E-mail from Nick Mazanec.) Finally, over a week after the CSI

submitted its request, HCSC conclusively refused to provide the information, citing to its own self-imposed time restrictions. (Ex. 5, E-mail from Stanley Kaleczyc.) HCSC's refusal to cooperate in discovery should not inure to the insurer's benefit by allowing it to subvert a legitimate request for relevant information.

Moreover, the timing of the pending hearing does not relieve HCSC of its discovery obligation. The parties have already discussed possibly leaving the record open following the hearing date. Consequently, even information received after the hearing could potentially be incorporated into the record for consideration. As has been previously demonstrated, the forecasts provide highly relevant information probative of whether the Transaction should be approved. While not optimal, it is surely better that the forecasts enter the record after the hearing, than that they not be considered at all. It is, therefore, imperative that HCSC be compelled to provide the CSI the requested underwriting forecasts.

CONCLUSION

For these reasons, the CSI respectfully requests that the Hearing Examiner grant the CSI's motion for an order compelling the discovery of HCSC's underwriting gain forecasts.

Dated this 8th day of March, 2013.

for: 

JESSE LASLOVICH
Chief Legal Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served on the 8th

day of March, 2013, to the following:

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Office of the Commissioner of Securities and
Insurance, Montana State Auditor

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.

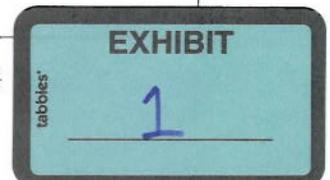
19 Q And when -- sorry.

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.

Mazanec, Nick

From: Mazanec, Nick
Sent: Friday, March 01, 2013 7:47 AM
To: 'Jackie Lenmark'
Cc: Laslovich, Jesse; Shults, Sybil
Subject: Knight deposition documents

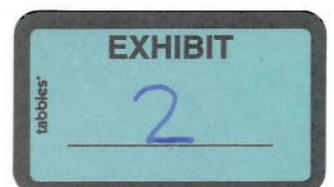
Jackie,

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.

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March 6, 2013

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Via E-Mail

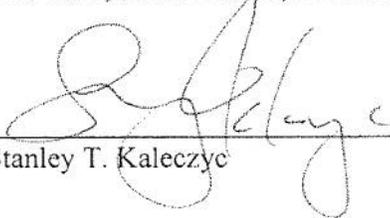
RE: *Application of Blue Cross and Blue Shield of Montana and Health Care Service Corporation*

Dear Jesse:

This letter is in response to CSI's March 1, 2013, request for documents, paragraph 1. Given that: (i) HCSC's response to this request for "all documents" would be voluminous, (ii) HCSC would not be able to produce the requested documents in a timely manner given the volume of information requested, and (iii) that such a voluminous production would not be useful to CSI, HCSC kindly asks that you clarify with more specificity the information and the particular materials that you are requesting from HCSC. To the extent you have specific follow-up questions regarding this topic, please feel free to contact Helen or me.

Sincerely,

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By 
Stanley T. Kaleczyc

cc: Nick Mazanec
Jackie Lenmark
Helen Witt



Mazanec, Nick

From: Laslovich, Jesse
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@mlfpllc.com; mary_belcher@bcbsmt.com; sean_slanger@bcbsmt.com; kirsi_parker@bcbsmt.com; Helen.witt@kirkland.com; deborah_dorman-rodriquez@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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and Kimberly A. Beatty
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Mazanec, Nick

From: Stan Kaleczyc [stan@bkbh.com]
Sent: Friday, March 08, 2013 5:04 PM
To: Laslovich, Jesse; Mazanec, Nick
Cc: Kristi Aaby; helen.witt@kirkland.com; Mike McMahon; Jackie Lenmark
Subject: Additional document requests from CSI

Jesse and Nick:

I have checked with HCSC on the additional documents you are seeking. Issues of relevance, confidentiality, and probative value aside, it is not physically possible for HCSC to locate and assemble the documents you are seeking. This applies both to the request for target underwriting gains for the past five years as well as to the agent and provider information from NM and OK. The information is not located in one place and accessible. In addition, the agent and provider information varies by market and by contract. Given that this is a Friday afternoon before the week of the hearing, the problems in providing any additional documents are simply insurmountable.

Stan

Stanley T. Kaleczyc

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