

On March 12, 2013, an additional public hearing was held. Hearing Examiner W. William Leaphart presided. Jacqueline T. Lenmark appeared for BCBSMT and HCSC. Michael F. McMahon appeared for BCBSMT. Stanley T. Kaleczyc and Helen E. Witt appeared for HCSC. Jesse Laslovich, Nick Mazanec, and Jay Angoff appeared for the CSI. Kelley Hubbard and Michael Black appeared for the Montana Attorney General, Department of Justice (Attorney General). Witnesses were called and testified, and evidence was introduced. The hearing was conducted pursuant to the contested case procedures set forth under § 50-4-711(1). Members of the public provided oral comment, some of whom subjected themselves to cross-examination. Testimony was received from witnesses for the CSI, Attorney General, BCBSMT, and HCSC. Exhibits were admitted into evidence. The hearing concluded on March 14, 2013. The record in the matter was closed on March 18, 2013. On May 2, 2013, the Hearing Examiner submitted Proposed Findings of Fact, Conclusions of Law, and Recommendations to the Commissioner of Securities and Insurance, Montana State Auditor (Commissioner).

STANDARD OF REVIEW

In reviewing the Hearing Examiner's proposed decision, the Commissioner adheres to the Montana Administrative Procedure Act (MAPA) regarding contested cases. Mont. Code Ann. § 2-4-621. Specifically, § 2-4-621(3) provides:

The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

§ 2-4-621(3).

As noted in *Ulrich v. State ex rel Board of Funeral Services*:

Final Agency Decision re Conversion of BCBSMT to HCSC

When conducting a review of the Board's decision, we note that the Board, which did not personally hear or observe the evidence, does not have the authority to conduct a *de novo* review of the hearing examiner's decision. Rather, it may reject the examiner's findings only if they are not based upon competent, substantial evidence. Additionally, the Board must state with particularity that the findings are not based upon competent, substantial evidence ... [omitting partial quote of Mont. Code Ann. § 2-4-621.]

A rejection of the hearing examiner's findings in violation of Mont. Code Ann. § 2-4-621(3) constitutes an abuse of discretion pursuant to § 2-4-704(2)(a)(vi). [omitting citation]

Ulrich, 1998 MT 196, MT ¶ 14, 289 Mont. 407, 961 P.2d 126

In interpreting MAPA, however, the Montana Supreme Court has held that a hearing examiner's findings of fact may be modified or rejected in other circumstances. See *In the Matter of the Grievance of Brady*, 1999 MT 153, 295 Mont. 75, 983 P.2d 292. The Commissioner may determine that certain of the hearing examiner's findings of fact are based on an interpretation of law and, therefore, such findings of fact may be rejected or modified like conclusions of law by the Commissioner. *Id.* at ¶ 14.

With regard to the hearing examiner's conclusions of law interpreting and applying the Montana Insurance Code, Mont. Code Ann. § 33-1-101, et seq., and Securities Act of Montana, Mont. Code Ann. § 30-10-101, et seq., and rules promulgated thereunder, the Commissioner may determine that the hearing examiner misinterpreted the law and may modify or reject the hearing examiner's proposed Conclusions of Law. *Id.* at ¶ 14; *Steer, Inc. v. Dept. of Revenue* (1990), 245 Mont. 470, 474, 803 P.2d 601, 603. Further, the Commissioner may accept or reduce the recommended penalty in the hearing examiner's proposed decision, but may not increase it without a review of the complete record. Mont. Code Ann § 2-4-621(3).

After due consideration of the entire record in this matter including, but not limited to, the transcripts of the hearings held on February 12, 2013, and on March 12, 2013, through March 14, 2013; all exhibits admitted into evidence; documents in the official records; and the

Stipulation entered into between the CSI and Applicants dated April 19, 2013, the Commissioner finds good cause to enter the following:

FINDINGS OF FACT

THE APPLICANTS

1. BCBSMT provides health insurance and third-party insurance administration services in the state of Montana. It has operated in various capacities as a Montana health insurer since 1940. (Direct Testimony of Michael E. Frank 4:5-12 (Mar. 5, 2013).)
2. BCBSMT is a nonprofit health service corporation. It provides comprehensive health insurance and third-party administrative services throughout the state of Montana. BCBSMT has operated in Montana for more than 70 years. It is licensed as a health service corporation under Montana law. (Dir. Test. Frank 4:5-12, 5:3-7.)¹
3. BCBSMT is an independent licensee of the Blue Cross and Blue Shield Association (BCBSA). (*Id.* at 5:4-5.) As a licensee, BCBSMT has exclusive rights to use the Blue Cross and Blue Shield trademarks and names within Montana. (*Id.* at 7:2-5.)
4. As of December 31, 2012, the membership of BCBSMT totaled 271,152. (*Id.* at 4:15.) The insurer has an extensive provider network within the state of Montana. (*Id.* at 4:15-18.)
5. The BCBSMT Bylaws provide that the Board of Directors (Board) shall “exercise all corporate powers” for BCBSMT, and they grant the Board supervision and control over corporate affairs. (Hrg. CSI Exhibit M, Bylaws, Art. III, Sec. 3.1 (May 10, 2012).) The Bylaws

¹ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This “substantial evidence” standard evaluates “whether substantial credible evidence supports the trier’s findings.” *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Hearing Examiner cites the testimony of BCBSMT Chief Executive Officer Mike Frank for the proposition that BCBSMT is “non-investor owned (NIO)” and a nonprofit mutual benefit corporation. Upon reviewing the complete record, the Commissioner determines that there is not competent substantial evidence to support the finding that BCBSMT is “organized as a nonprofit mutual benefit corporation.” Additionally, a review of Mr. Frank’s pre-filed testimony, cited by the Hearing Examiner, does not reference BCBSMT being “non-investor owned.” Accordingly, the Commissioner modifies Finding of Fact # 2 to accurately reflect the facts contained in the record.

do not restrict the ability of the Board to enter into a conversion transaction, or to make decisions relating to or facilitating such a transaction. (*Id.*)

6. The Board is self-perpetuating, meaning the Board elects new directors. (Hrg. Tr. vol. I, 117:24-118:2 (Mar. 12, 2013).)

7. The BCBSMT Articles of Incorporation do not restrict the ability of BCBSMT to engage in a conversion transaction. (CSI Hearing Exhibit L, BCBSMT Articles of Incorporation (May 5, 1995).)

8. HCSC is a health care service plan incorporated in the state of Illinois. (App., 5.) HCSC is a non-investor owned (NIO) corporation, meaning it has no third-party investors. (Direct Testimony of Colleen F. Reitan 4:5-7 (Mar. 5, 2013).)²

9. HCSC offers both fully-insured products and administrative services for self-insured plans. (*Id.* at 4:9-10.) Its diverse product lines cover virtually every aspect of the health insurance market. (*Id.* at 4:11-14.)

10. HCSC operates Blue Cross and Blue Shield (Blue) plans in Illinois, New Mexico, Oklahoma, and Texas. (*Id.* at 5:3-4.) In total, HCSC has over 13 million members cumulative of the four Blue plans. (*Id.* at 5:6-7.) Like BCBSMT, HCSC is a licensee of the BCBSA. (*Id.* at 5:4-5.)

THE APPLICATION **Mont. Code Ann. § 50-4-707**

11. On November 15, 2012, the Applicants submitted to the CSI an Application. In the Application, the Applicants requested that the Commissioner approve the Transaction between the Applicants pursuant to the requirements of the Conversion Statute. (App., 31.)³

² Because of the change to Finding of Fact #2, the Commissioner inserts what the acronym “NIO” stands for, which results in a change that is non-substantive.

12. The Application identified BCBSMT as the transferor and HCSC as the transferee of the assets in the Transaction. Included in the Application and its exhibits were the following:

- A. A Schedule of Assets and Liabilities to be transferred to HCSC and to be retained by BCBSMT if the Transaction is approved (Application Exhibit 1);
- B. A Consideration of Exchanges for the Transaction as of June 30, 2012 (Application Exhibit 2);
- C. An Asset Purchase Agreement (Agreement) executed by the Applicants (November 14, 2012) (Application Exhibit 3);
- D. A Financial and Community Impact Report prepared by NERA Economic Consulting (NERA) (November 10, 2012) (Application Exhibit 4);
- E. A Report Prepared By Actuarial Services & Modeling, Inc. as Requested by Blue Cross and Blue Shield of Montana Regarding Actuarial Appraisal of Certain Health Care Contracts With Appraisal Dates of January 1, 2013, and June 30, 2012 (Application Exhibit 5);
- F. An Antitrust Report prepared by NERA (Application Exhibit 6);
- G. A Valuation Analysis prepared by Moss Adams LLP (Moss Adams) providing an independent valuation of the fair market value of BCBSMT as of June 30, 2012 (Application Exhibit 7); and
- H. An internal BCBSMT document entitled Project Sapphire: Transaction Summary and Analysis (Application Exhibit 8).

13. The Applicants have stipulated that the Conversion Statute applies to the Transaction. (App., 3.)

³ This language is redundant, as “Commissioner” has already been previously characterized. Accordingly, this language is modified, but such modification results in a non-substantive change.

14. The Applicants have stipulated that the Conversion Statute applies as though BCBSMT is a Montana public benefit corporation. (App., 24.)

15. The Applicants have stipulated that certain assets of BCBSMT constitute public assets for purposes of the Transaction. (App., 24-25.)

The Asset Purchase Agreement

16. The Applicants structured the Transaction as an asset purchase through which HCSC would acquire the insurance and Administrative Services Only (ASO) operations and related assets and specified associated liabilities of BCBSMT. (App., 2, 7.)

17. The terms of the Transaction are memorialized in the Agreement. (App. Ex. 3.)

The Agreement includes the following terms:

- A. HCSC will acquire from BCBSMT its insurance and ASO contracts; (App., 7.)
- B. HCSC will acquire from BCBSMT its provider contracts; (App., 7.)
- C. HCSC will acquire from BCBSMT the license to use the Blue Cross and Blue Shield marks within Montana; (App., 7.)
- D. HCSC will acquire from BCBSMT certain other assets; (App. Ex. 1.)
- E. HCSC will assume specified liabilities, including liabilities associated with the acquired assets and specified pension liabilities; (App., 7-8.)
- F. HCSC will pay to the remaining corporation formerly known as BCBSMT (OldCo) \$17.6 million in consideration; (App., 8.)
- G. OldCo will retain certain assets, including surplus, investments, and BCBSMT plan buildings; (App. Ex. 3.) and
- H. OldCo will retain certain liabilities, including litigation liabilities. (App., 8.)

18. The assets BCBSMT seeks to sell to HCSC represent more than 10 percent in fair market value of BCBSMT's assets. (App. Ex. 2.)⁴

BCBSMT EXPERT ASSISTANCE
Mont. Code Ann. § 50-4-717(2)(b)

Graham & Dunn

19. BCBSMT retained the law firm of Graham & Dunn PC (Graham & Dunn) to assist BCBSMT in negotiating the Transaction. Graham & Dunn specializes in corporate transactional law, including mergers and acquisitions. (Dir. Test. Frank 39:9-20.) BCBSMT worked specifically with attorneys Mark Droppert and David Lundsgaard of Graham & Dunn. (Hrg. Tr. vol. I, 133:25-134:5 (Mar. 12, 2013).) Droppert is experienced in the field of health care. (*Id.* at 134:9-11 (Mar. 12, 2013).)

20. Graham & Dunn represented BCBSMT in negotiating the terms of the Agreement with HCSC. It also advised BCBSMT and senior management on the due diligence process, antitrust matters, the structure of the Transaction, and other related issues. (Dir. Test. Frank 39:9-20.)

Actuarial Modeling

21. BCBSMT retained Actuarial and Financial Modeling, Inc. (AFM) to independently value BCBSMT's core business. (Dir. Test. Frank 26:6-8; App. Ex. 5.) As President of AFM, James Galasso authored the AFM report and presented expert testimony at the hearing. (App. Ex. 5; Hrg. Tr. vol. II, 100 (Mar. 13, 2013).)

⁴ The changes to Findings of Fact #17 and #18 are citation changes and are therefore non-substantive.

NERA Economic Consulting

22. The Applicants retained NERA to provide expert opinions on various topics including, but not limited to, the impact of the Transaction upon the community and antitrust implications of the Transaction. As a member of NERA's project team, Dr. Thomas McCarthy co-authored the NERA reports and presented expert testimony at the hearing. (App. Ex. 4; Hrg. Tr. vol. II, 6:17-22 (Mar. 13, 2013).)

Moss Adams

23. BCBSMT retained Moss Adams to provide an expert opinion as to the fair market value of the BCBSMT surplus, certain other BCBSMT assets and liabilities, and its subsidiary, Health-E-Web. (App. Ex. 7 at 1.) As a member of Moss Adams' project team, Calvin Swartley co-authored the Moss Adams report and presented expert testimony at the hearing. (App. Ex. 7; Hrg. Tr. vol. III, 468:20-21 (Mar. 14, 2013).)

CSI EXPERT ASSISTANCE
Mont. Code Ann. § 50-4-712

Advanced Analytical Consulting Group

24. The CSI retained Advanced Analytical Consulting Group (AACG) to provide expert opinions on various topics including, but not limited to, the impact of the Transaction upon the community and antitrust implications of the Transaction. As a member of AACG's project team, Dr. Timothy Tardiff co-authored the AACG report and presented expert testimony at the hearing. (Direct Testimony of Timothy J. Tardiff, Ph. D. 5:9-10 (Feb. 7, 2013).)⁵

⁵ The Hearing Examiner's Finding of Fact # 25 has been removed. That finding relates solely to the statutory elements reviewed by the Attorney General, and is not relevant to the Commissioner's review of the Transaction. All subsequent Findings of Fact have been renumbered.

BCBSMT DECISION TO ENGAGE IN THE CONVERSION TRANSACTION
Mont. Code Ann. § 50-4-717(2)(a)

Due Diligence Process

25. As early as August of 2010, BCBSMT Chief Executive Officer Michael Frank expressed concerns to the BCBSMT Board regarding BCBSMT's ability to continue functioning as an independent entity. (Dir. Test. Frank 8:9-12.) Frank began discussing this issue further with the Board chairman in early 2012. (*Id.* at 8:12-13.)

26. In March of 2012, following further analysis of BCBSMT's condition and future viability, a team of BCBSMT personnel was tasked with preparing a document identifying possible alternative business arrangements, including partnering with another Blue plan. The document was presented to the Executive Committee of the Board in May of 2012. (*Id.* at 8:13-19.)

27. The Board examined at length various possible business arrangements, including shared services and outsourcing arrangements. (*Id.* at 10:9-15.) In light of BCBSMT's recent financial challenges, the Board seriously considered some form of partnership with another Blue plan. (*Id.* at 8:17-19.)

28. The Board considered the following factors in determining whether to partner with another Blue plan:

- A. BCBSMT's recent underwriting losses and declining risk-based capital ratio (*Id.* at 9:1-4);
- B. Increased market competition and shifting membership (*Id.* at 9:11-17);
- C. Required technology improvements and associated cost (*Id.* at 9:10-11); and

D. Marketplace challenges associated with implementation of the Patient Protection and Affordable Care Act (ACA) (*Id.* at 9:17-20).⁶

Financial Factors Influencing Decision

29. BCBSMT targets an underwriting profit of one-half of one percent of premiums earned, but has not met that target in the last several years. (Hrg. Tr. vol. I, 203:17-25 (Mar. 12, 2013).)

30. BCBSMT has experienced significant underwriting losses in four of the last five years, including losses of \$5.4 million in 2011 and over \$10 million in 2012. (Hearing CSI Exhibit A, 2012 BCBSMT Annual Statement, 28 (Dec. 31, 2012).) BCBSMT has had a combined \$63 million in underwriting losses over the past 15 years. (Direct Testimony of Mark A. Burzynski 10:9-12 (Mar. 5, 2013).)

31. Surplus is the excess of an insurer's assets over its liabilities. (Direct Testimony of Maurice S. Smith 4:9-19 (February 8, 2013).) The NAIC has developed a formula for determining the minimum surplus an insurer must hold to do business. (Hrg. Tr. vol. I, 258:9-13, 260:8-14 (Mar. 12, 2013).) This formula calculates an entity's risk-based capital (RBC) level. (*Id.* at 259:1-4.) As a practical matter, an insurer must hold surplus of at least a 200 percent RBC level, or else face heightened supervision or even receivership. (Hrg. Tr. vol. III, 567:7-16 (Mar. 14, 2013); Hrg. Tr. vol. I, 260:20-22 (Mar. 12, 2013).) In addition, the BCBSA enforces a minimum 375 percent RBC standard for BCBSA plans. (Hrg. Tr. vol. I, 261:2-10 (Mar. 12, 2013).)

32. RBC levels are calculated based on data provided in an insurer's annual statement. An annual RBC rate is determined using the Five-Year Historical Data page by

⁶ Because the Patient Protection and Affordable Care Act is identified on a recurring basis, the Commissioner inserts its common acronym, which results in a non-substantive change.

dividing line 14 (total adjusted capital) by line 15 (authorized control level risk-based capital).
See generally (Hrg. Tr. vol. I, 258:7-259:4 (Mar. 12, 2013); Hrg. CSI Ex. A, 28.)

33. BCBSMT has maintained a relatively consistent surplus amount over the past five years. As of December 31, 2008, BCBSMT held \$118 million in surplus; at the end of 2012, its surplus was \$127 million. (Hrg. CSI Ex. A, 28.)

34. BCBSMT's RBC ratio declined from 645 percent at year-end 2008 to 577 percent at year-end 2011. It dropped further in 2012, to 532 percent. (*Id.*)

35. BCBSMT has had a net profit nearly every year between 2007 and 2011. (App. Ex. 5 at Ex. 1.) However, these gains generally have been realized through non-core assets, including subsidiaries and investment income. (*Id.*)

36. From 2007 to 2011, BCBSMT lowered its adjusted administrative expense ratio from 16.3 percent to 12.8 percent. (App. Ex. 8 at 23.) Nevertheless, its adjusted administrative expense ratio has been consistently and significantly higher than that of HCSC. (*Id.*)

37. BCBSMT must invest an estimated \$100 million to satisfy identified capital requirements and incremental operating expenses. For example, BCBSMT must expend \$41 million to implement an ACA-mandated ICD-10 compliant claims system and data warehouse. (App., 7.) These expenditures are necessary to successfully compete in the marketplace, gain efficiencies, and comply with new ACA regulatory mandates. (*Id.* at 6.)

38. Due to its limited size and not-for-profit status, BCBSMT may have insufficient access to capital needed to satisfy the expenditure requirements it faces in the next several years to successfully compete in the marketplace, improve operational efficiency, and meet various standards, laws, and regulations. (Dir. Test. Burzynski 5:10-12.)⁷

⁷ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This "substantial evidence" standard evaluates "whether substantial credible evidence supports the trier's findings." *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511.

Other Factors Influencing Decision

39. BCBSMT must implement ACA market reform provisions in the coming years, some of which increase the risks facing small insurers such as BCBSMT. (*Id.* at 12:11-13.) In its current state, BCBSMT may be ill-suited to weather the additional financial uncertainty associated with ACA implementation. (*Id.* at 13:9-12, 15:1-4; Hrg. Tr. vol. I, 189:13-190:4, 194:12-195:6, 241:7-11 (Mar. 12, 2013).)⁸

40. Generally speaking, large insurers are better positioned to succeed in the post-ACA marketplace due to ability to access capital and leverage economies of scale. (Dir. Test. Frank 9:11-20.)

41. The ACA provides for creation of a federal health insurance exchange in Montana (Exchange). The Exchange is an online marketplace through which individuals may purchase health insurance. (Dir. Test. Burzynski 15:10-12.) This Exchange could result in greater competition within Montana, particularly in terms of pricing. This increased competition would further strain BCBSMT resources as it is forced to compete with larger, more efficient for-profit insurers. (*Id.* at 16:9-13.)

42. The new ACA medical loss ratio thresholds potentially limit the aggregate margin an insurer may realize because the insurer must refund premium in years when it fails to meet the thresholds, resulting in a direct decline in margin. (*Id.* at 14:4-13.)

The Hearing Examiner cites the testimony of BCBSMT Chief Financial Officer Mark Burzynski for the proposition that BCBSMT has insufficient access to capital in order to remain in good financial health. Upon reviewing the complete record, the Commissioner determines that there is not competent substantial evidence to support this finding and modifies it to be more consistent with Mr. Burzynski's pre-filed testimony. Additionally, the Hearing Examiner's Finding of Fact # 39 cited to an incorrect portion of the record. The Commissioner corrects this citation.⁸ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This "substantial evidence" standard evaluates "whether substantial credible evidence supports the trier's findings." *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Hearing Examiner cites the testimony of BCBSMT Chief Financial Officer Mark Burzynski for the proposition that BCBSMT "is" ill-suited to weather the financial uncertainty associated with the ACA. Upon reviewing the complete record, the Commissioner determines that there is not competent substantial evidence to support this characterization and modifies it to be more consistent with the Record.

43. The ACA eliminates annual and lifetime policy benefit limits. (*Id.* at 14:21-15:1.)

As a result, insurers like BCBSMT will carry greater risk due to required coverage of catastrophic claims. (*Id.* at 14:21-15:4.)

44. BCBSMT assumes proportionally greater risk as a result of eliminating annual and lifetime policy limits compared to larger insurers. This is due to BCBSMT's smaller membership base over which to spread catastrophic claim risks. (*Id.* at 15:1-8.)

45. As a direct result of comparative scale, small Blue plans generally carry significantly higher administrative expense ratios than their larger counterparts. (*Id.* at 19:3-10.)

46. BCBSMT's lack of scale causes it to pay a proportionally greater "per-unit" cost for infrastructure and other items that are required regardless of an insurer's size. Examples of such items include technology upgrades and employment of subject matter experts. (*Id.* at 18:13-19.)

Decision to Enter Into Conversion Transaction

47. The Board determined that associating with another plan would serve the best interest of BCBSMT, its policyholders, providers, and employees. (Dir. Test. Frank 10:5-9.)

BCBSMT SELECTION OF HCSC AS TRANSFEREE Mont. Code Ann. § 50-4-717(2)(a)

Process of Selecting a Transferee

48. The Board considered a number of factors in selecting a transferee. These included, but were not limited to, the following:

- A. The transferee must be a NIO entity (Dir. Test. Frank 10:18-19);
- B. The transferee must maintain use of the BCBSMT name and marks (*Id.*);
- C. The transferee must possess sufficient scale to address the efficiencies, capital access, and expense concerns BCBSMT currently faced (*Id.* at 11:3-8);

D. The transferee must possess information technology competencies (*Id.* at 13:8-10); and

E. The companies must enjoy organizational and cultural compatibility (*Id.* at 13:16-19).⁹

49. BCBSMT utilized its past experience with, and knowledge of, other Blue plans to narrow the field of prospective partners. (*Id.* at 15:3-8.) This included the experience of Frank, who regularly attends high-level BCBSA and BCBSA-related meetings and conferences. (*Id.* at 15:1-3.)

50. The Board first eliminated all for-profit Blue plans from partnership consideration. (*Id.* at 15:9-10.) It then eliminated plans it deemed too small to provide sufficient scale, and any geographically remote plans. (*Id.* at 15:10-12.) This process left two multistate Blue plans: HCSC and another entity. (*Id.* at 15:13.)

51. The Board chair and Frank reached out to both multistate Blue plan presidents in the spring of 2012. Each president expressed interest in aligning with BCBSMT. (*Id.* at 15:13-19.)

52. The Board chair and two BCBSMT officers conducted an informational on-site visit to HCSC in May of 2012. (*Id.* at 15:19-21.)

53. In early June of 2012, BCBSMT Board members and staff met separately with each plan. (*Id.* at 16:7-11.) Each potential transferee discussed its past and present operations, as well as future strategic direction. (*Id.* at 16:11-14.) BCBSMT personnel presented similar information. The parties then discussed potential opportunities. (*Id.* at 16:14-16.)¹⁰

⁹ The Hearing Examiner describes HCSC as a “partner,” but this is inconsistent with Mont. Code Ann. § 50-4-717(2)(a). Accordingly, the Commissioner modifies this finding to accurately reflect the law.

¹⁰ *Id.*

54. After additional conversations with each plan, the Board concluded HCSC best suited BCBSMT as a potential transferee. The Board then focused its attentions to the further vetting of HCSC. (*Id.* at 16:22-17:3.)¹¹

HCSC Attributes Influencing Selection

55. HCSC has earned underwriting gains in each of the past five years, including over \$1 billion in 2012. (Hearing CSI Exhibit C, 2012 HCSC Annual Report, 28 (December 31, 2012).)

56. HCSC has made a good faith commitment to maintain its nonprofit status for at least five years if the proposed Transaction is approved. HCSC has no current plans to become a for-profit company and doing so would run counter to its fundamental philosophy. (Hearing Applicants' Exhibit 9, Stipulation, ¶ 4 (Mar. 11, 2013); Hrg. Tr. vol. I, 268:25-270:12 (Mar. 12, 2013); Hrg. Tr. vol. II, 51:4-16 (Mar. 13, 2013).)¹²

57. HCSC has previously acquired various types of Blue plans in Texas (1998), New Mexico (2001), and Oklahoma (2005). As a result, it has experience in how to manage the full scale integration of a plan without disrupting core operations, including claims and customer service. (Hrg. Tr. vol. I, 266:12-267:7 (Mar. 12, 2013); Hrg. Tr. vol. II, 18:22-25, 80:17-24 (Mar. 13, 2013); App. Ex. 4 at 12; Direct Testimony of James L. Kadela 3:20-4:4, 9:8-10:3 (February 8, 2012).)¹³

¹¹ *Id.*

¹² The Hearing Examiner's Finding of Fact # 57 cited to the incorrect portion of the record. The Commissioner corrects this citation, but makes no substantive modification to what is now Finding of Fact # 56.

¹³ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This "substantial evidence" standard evaluates "whether substantial credible evidence supports the trier's findings." *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Hearing Examiner cites the testimony of HCSC's James Kadela for the proposition that HCSC has "completed successful alliances" with other Blue plans and has "significant expertise" in integration. Upon reviewing the complete record, the Commissioner determines that there is not competent substantial evidence to support this finding and modifies it to be more consistent with the complete record.

58. HCSC uses a simple integration approach that converts the simplest lines of business first, establishing a foundation. In its three other integrations, customer service, claims processing productivity, and costs per claim were all improved. Membership was increased in all three states. (*Id.* at 10:6-11:16.)¹⁴

59. HCSC emphasizes having local leadership and maintaining a local presence. (*Id.* at 17:1; Dir. Test. Reitan 5:22-23.)¹⁵

60. HCSC has consistently maintained a high level of surplus over a same five year period:

12/31/2008: \$6.1 billion
12/31/2009: \$6.7 billion
12/31/2010: \$7.8 billion
12/31/2011: \$8.9 billion
12/31/2012: \$9.6 billion

(Hrg. CSI Ex. C, 28.)¹⁶

61. Likewise, HCSC's RBC ratio is significantly higher than that of BCBSMT, and is growing. Its five-year RBC history is as follows:

12/31/2008: 1034 percent
12/31/2009: 1004 percent
12/31/2010: 1084 percent
12/31/2011: 1227 percent
12/31/2012: 1241 percent

(*Id.*)

¹⁴ The Hearing Examiner's Finding of Fact # 59 cited to the incorrect portion of the record. The Commissioner corrects this citation, but makes no substantive modification to what is now Finding of Fact # 58.

¹⁵ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This "substantial evidence" standard evaluates "whether substantial credible evidence supports the trier's findings." *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Hearing Examiner cites the testimony of HCSC's James Kadela for the proposition that a "significant factor in HCSC's success" is its commitment to local leadership and a strong local presence. Upon reviewing the complete record, the Commissioner determines that there is not competent substantial evidence to support this finding and modifies it to be more consistent with the complete record.

¹⁶ The Hearing Examiner's Finding of Fact # 61 cited to the incorrect portion of the record. The Commissioner corrects this citation, but makes no substantive modification to what is now Finding of Fact # 60.

62. HCSC has had an underwriting profit in each of the last ten years which has significantly exceeded BCBSMT's underwriting profit target of .5 percent. (Hrg. Tr. vol. I, 203:17-22 (Mar. 12, 2013).) For each of the last ten years, HCSC's underwriting profits have been as follows:

2003: 8.0 percent
2004: 12.0 percent
2005: 10.0 percent
2006: 9.0 percent
2007: 5.0 percent
2008: 5.4 percent
2009: 2.3 percent
2010: 6.3 percent
2011: 7.6 percent
2012: 5.0 percent

(Hrg. CSI Ex. C, 28; Hearing CSI Exhibit K, 2007 HCSC Annual Report, 29 (Dec. 31, 2007).)¹⁷

63. HCSC has consistently maintained a lower adjusted administrative expense ratio than BCBSMT. Additionally, it has lowered this ratio in four of the last five years:

2008: 10.5 percent
2009: 10.0 percent
2010: 10.2 percent
2011: 9.0 percent
2012: 8.6 percent

(App. Ex. 8 at 23.)

64. HCSC currently has over 13 million members, and its membership has increased by 12 percent over the past five years. (Dir. Test. Kadela 4:7-12.)

65. HCSC processes approximately 749,000 claims daily, with a financial accuracy rate of approximately 99 percent. (*Id.* at 4:15-21.)

¹⁷ Finding of Fact # 62 is included by the Commissioner. Based upon a complete review of the record, the Commissioner determines that Finding of Fact # 62 is supported by competent substantial evidence.

66. HCSC employs a single-system technology scheme. (*Id.* at 9:1-3.) BCBSMT would benefit from the increased scale and efficiency which results from operating on this common technology platform. (*Id.* at 9:1-3; App. Ex. 4 at 5, 10.)¹⁸

67. HCSC utilizes several proprietary information technology systems. (*Id.* at 5:3-4.) These include Blue Chip, an online, real time claims adjudication system (*Id.* at 5:10-14.); BlueSTAR, an online membership system (*Id.* at 5:21-6:2.); and Blue Gateway, which analyzes various financial data and generates operational reports (*Id.* at 6:4-8; App. Ex. 4 at 5.)¹⁹

68. In addition to these systems, HCSC also offers a variety of other web and mobile based services to its members and providers. (*Id.* at 6:11-12.) HCSC also possesses modern data centers that store insured-related data and are intended to provide uninterrupted service to policyholders. (*Id.* at 7:13-15, 7:22-8:3.)²⁰

69. HCSC spends over \$200 million annually on information technology-related expenses. (*Id.* at 9:4-7.)

¹⁸ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This “substantial evidence” standard evaluates “whether substantial credible evidence supports the trier’s findings.” *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Hearing Examiner cites the testimony of HCSC’s James Kadela for the proposition that HCSC’s technology scheme emphasizes efficiency and cost containment. Upon reviewing the complete record, the Commissioner determines that there is not competent substantial evidence to support this finding and modifies it to be more consistent with the complete record.

¹⁹ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This “substantial evidence” standard evaluates “whether substantial credible evidence supports the trier’s findings.” *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Hearing Examiner cites the testimony of HCSC’s James Kadela for the proposition that HCSC’s BlueSTAR membership system is efficiency-oriented. Upon reviewing the complete record, the Commissioner determines that there is not competent substantial evidence to support this finding and modifies it to be more consistent with the complete record.

²⁰ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This “substantial evidence” standard evaluates “whether substantial credible evidence supports the trier’s findings.” *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Hearing Examiner cites the testimony of HCSC’s James Kadela for the proposition that HCSC’s data centers are “state of the art” whose data are secure, “ensur[ing]” uninterrupted service. Upon reviewing the complete record, the Commissioner determines that there is not competent substantial evidence to support this finding and modifies it to be more consistent with the complete record.

BCBSMT Due Diligence Review of HCSC

70. BCBSMT assembled two teams to conduct further due diligence: a transactional due diligence team, and an operational due diligence team. (Dir. Test. Frank 17:16-19.) The teams conducted their respective duties over several months, concluding in October 2012. (*Id.* at 17:20-22.) As part of their research, the teams conducted multiple in-person visits with HCSC and spoke frequently via teleconference. (*Id.* at 18:1-2.)

71. The transactional due diligence team reviewed HCSC's financial state, size and scale, and technology. Additionally, it assessed HCSC's NIO focus and corporate culture. (*Id.* at 18:12-17.)

72. The transactional due diligence team concluded that HCSC satisfied BCBSMT's desired attributes with respect to the items it reviewed. (*Id.* at 18:18-19:16.)

73. The operational due diligence team reviewed HCSC's operational and service areas. (*Id.* at 19:19-21.) It examined, among other things, HCSC's customer-focused programs and technology. (*Id.* at 20:7-21:18.) These include HCSC's proprietary Blue Chip claims processing system, its Concierge Service Analytics customer service initiative, its enterprise data warehouse, and its Seasons of Life bereavement assistance program. (*Id.* at 20:7-21:7.) Additionally, BCBSMT considered HCSC's legal, financial, and internal audit resources. (*Id.* at 21:21-22:3.)

74. The operational due diligence team concluded that choosing HCSC as the transferee would greatly benefit BCBSMT policyholders, providers, and others (*Id.* at 21:16-18), and would free up resources to focus on Montana-specific issues (*Id.* at 22:3-6).²¹

²¹ The Hearing Examiner describes BCBSMT as "partnering" with HCSC, but this is inconsistent with Mont. Code Ann. § 50-4-717(2)(a). Accordingly, the Commissioner modifies this finding to accurately reflect the law.

75. BCBSMT officers also visited HCSC's Oklahoma plan site as part of the due diligence process. (*Id.* at 18:5-9.) They concluded that the plan seemed to maintain a local focus while experiencing the benefits of the scale HCSC enjoys. (*Id.* at 21:9-22:19.)²²

76. The findings of the due diligence teams were presented to the Board in written form in October of 2012. (*Id.* at 23:21-24:1.)

Decision to Select HCSC and Enter Into Transaction

77. On November 7, 2012, the BCBSMT Board approved the Transaction with HCSC and directed BCBSMT officers to take steps for its execution. (*Id.* at 24:4-8.)

BCBSMT NEGOTIATION OF CONVERSION TRANSACTION TERMS AND CONDITIONS Mont. Code Ann. § 50-4-717(2)(a)

78. The Applicants began negotiating the terms of the Agreement on or around August of 2012. (*Id.* at 25:12-16.)

79. The Applicants negotiated most of the Agreement terms including, but not limited to: which BCBSMT liabilities and assets would transfer to HCSC and which would be retained by the old BCBSMT, including BCBSMT's surplus; HCSC assumption of all existing policy risk and liabilities; HCSC assumption of contracted third-party administration services; HCSC retention of all currently employed BCBSMT employees at the employees' current seniority and salary, and with comparable benefits and retirement options; the distribution of BCBSMT subsidiaries; retention of BCBSMT provider and producer networks; typical commercial representations and warranties; and closing conditions. The Applicants did not,

²² The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This "substantial evidence" standard evaluates "whether substantial credible evidence supports the trier's findings." *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Hearing Examiner cites the testimony of BCBSMT's CEO, Mike Frank, about what the operational team "observed" while touring HCSC's Oklahoma plan site. Upon reviewing the complete record, the Commissioner determines that there is not competent substantial evidence to support this finding and revises it to be more consistent with Mr. Frank's pre-filed testimony and the complete record.

however, negotiate the purchase price of BCBSMT's core business. (App. Ex. 3; Dir. Test. Frank 25:10-16, 26:1-29:15; Hrg. Tr. vol. I, 135:5-136:6 (Mar. 12, 2013); Dir. Test. Reitan 15:14-18.)²³

80. The Applicants took the position that the purchase price the transferee should pay to BCBSMT should be determined by an independent third party, rather than be negotiated by the parties. (Dir. Test. Frank 26:2-6.)²⁴ The Applicants agreed that BCBSMT would hire an independent expert to value the assets and, upon receiving the independent valuation, HCSC would determine whether it would complete the Transaction by paying the value determined by the expert. (Dir. Test. Frank 26:6-8; Hrg. Tr. vol. I, 169:14-22 (Mar. 12, 2013); Hrg. Tr. vol. II, 81:13-82:3 (Mar. 13, 2013).)²⁵

81. BCBSMT hired James Galasso of Actuarial and Financial Modeling, Inc. to value its core health insurance business. (Dir. Test. Frank 26: 6-8.) BCBSMT also retained Calvin Swartley, Senior Manager and member of the Valuation & Litigation Services Group of Moss Adams LLP, in Portland, Oregon, to determine the fair market value of BCBSMT's total surplus, including the Galasso valuation of the core health insurance business as of June 30, 2012. (Dir.

²³ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This "substantial evidence" standard evaluates "whether substantial credible evidence supports the trier's findings." *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Hearing Examiner cites the testimony of BCBSMT Chief Executive Officer Mike Frank and HCSC Chief Operating Officer Colleen Reitan for the proposition that "[t]he Applicants negotiated the terms of the Agreement." Upon reviewing the complete record, the Commissioner determines that there is not competent substantial evidence to support the finding that the Applicants negotiated all terms of the Agreement, including the purchase price of BCBSMT's core business. In Mr. Frank's testimony cited by the Hearing Examiner, Mr. Frank acknowledges that the Applicants did not negotiate the purchase price. Dir. Test. Frank 26:3-4. Accordingly, the Commissioner modifies this finding to accurately reflect the facts contained in the record.

²⁴ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This "substantial evidence" standard evaluates "whether substantial credible evidence supports the trier's findings." *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Hearing Examiner cites the testimony of Mr. Frank that the Applicants "mutually understood" that the fair market value would be determined by an independent third party under the Conversion Statute. Upon reviewing the complete record and Mr. Frank's testimony, the Commissioner determines that there is not competent substantial evidence to support this finding and modifies it to be more consistent with the complete record. Specifically, Mr. Frank testified that the Applicants did not negotiate the purchase price and instead took the position that the Conversion Statute did not require a negotiation. (Dir. Test. Frank 26:2-6.)

²⁵ The Hearing Examiner's Finding of Fact # 80 cited to the incorrect portion of the record. The Commissioner corrects this citation.

Test. Frank 26:8-10; Direct Testimony of Calvin E. Swartley, CFA, ASA, Moss Adams LLP, 2:1-4, 3:2-8 (Feb. 8, 2013).)

82. Consistent with the Applicants' position, HCSC agreed to pay the value of \$17.6 million, as determined by Mr. Galasso. (Hrg. Tr. vol. II, 83:18-20 (Mar. 13, 2013).)^{26 27}

83. BCBSMT did not retain an investment banker to perform a valuation of BCBSMT or provide a fairness opinion regarding the purchase price of BCBSMT. (*Id.* at 171:21-172:14.)²⁸

84. BCBSMT did not review the purchase prices involved in HCSC's prior plan acquisitions. (*Id.* at 172:9-11.)

85. BCBSMT did not consider factors that would lead HCSC to pay a higher purchase price due to the synergies resulting from the Transaction. (*Id.* at 172:5-8.)

86. BCBSMT entertained no bids from other prospective purchasers. (*Id.* at 173:3-11.)

²⁶ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This "substantial evidence" standard evaluates "whether substantial credible evidence supports the trier's findings." *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Hearing Examiner cites to the Applicants' "understanding" that the fair market value would be determined by an independent third party under the Conversion Statute. Upon reviewing the complete record, the Commissioner determines that there is not competent substantial evidence to support this finding and revises it to be more consistent with the complete record. Specifically, the record shows that the Applicants did not negotiate the purchase price and instead took the position that the Conversion Statute did not require a negotiation. Accordingly, Finding of Fact # 82 has been modified to accurately reflect what's in the record.

²⁷ The Hearing Examiner's Findings of Fact # 83 through # 97 have been removed. Those findings relate solely to the statutory elements reviewed by the Attorney General, and are not relevant to the Commissioner's review of the Transaction. All subsequent Findings of Fact have been renumbered.

²⁸ Findings of Fact # 83 through # 114 are included by the Commissioner. Based upon a complete review of the record, the Commissioner determines that Findings of Fact # 84 through # 115 are supported by competent substantial evidence.

Investment Value of BCBSMT to HCSC

87. “Investment value” is the value an acquisition represents to a strategic buyer. Investment value considers factors such as synergies, economies of scale, and other benefits unique to the buyer. In light of such factors, strategic buyers tend to pay a purchase price exceeding the fair market value of an entity. (App. Ex. 7 at 30.)

88. One factor relevant to investment value is the opportunity of a strategic buyer to enter a marketplace in which they are not currently operating. (Hrg. Tr. vol. III, 484:8-11 (Mar. 14, 2013).)

89. HCSC cannot currently do business in Montana using the Blue Cross and Blue Shield marks, but would obtain the right to do so through acquiring BCBSMT. (Dir. Test. Frank 7:2-5; App., 7.)

90. In acquiring BCBSMT, HCSC would benefit from administrative synergies by gaining experienced BCBSMT employees and increasing membership. These synergies would increase HCSC’s scalability and enterprise efficiency. (Hrg. Tr. vol. I, 270:22-271:16 (Mar. 12, 2013).) HCSC would additionally benefit from assuming the existing BCBSMT provider relationships. (*Id.* at 271:17-23.)

91. Acquisition of BCBSMT would also allow HCSC to expand into a new geographic market. Geographic expansion could lead to a higher HCSC credit rating and lower borrowing costs. (Dir. Test. Smith 10:16-19.)

92. Acquiring BCBSMT would provide HCSC an immediate 66 percent share of the Montana group market and 90 percent share of the individual market. (App. Ex. 6 at 7.)

93. Moss Adams did not consider BCBSMT’s investment value to HCSC as a strategic buyer. (Hrg. Tr. vol. III, 483:8-12 (Mar. 14, 2013).)

The Galasso Report

105. Galasso valued the company at \$17.6 million as of June 30, 2012, but acknowledged that that value could change substantially if his modeling assumptions changed (App. Ex. 5 at 3; *See e.g.* Hrg. Tr. vol, II, 151:20-152:2, 155:11-25, 157:1-6, 159:19-160:3, 164:9-13, 166:14-167:5, 168:8-10 (Mar. 13, 2013).)

106. Galasso acknowledged that increasing the lapse replacement ratio from the seventy-five percent assumed in his model would increase the value of BCBSMT's core business. (Hrg. Tr. vol. II, 151:20-152:2 (Mar. 13, 2013).)

107. Galasso assumed in his model that the acquirer would pay 2.75 percent annually in premium taxes. Galasso acknowledged that if the acquirer were not required to pay premium taxes, the value of the core business would increase. (*Id.* at 155:11-25.)

108. Galasso estimated that a one percent decrease in the annual premium tax requirement would increase the value of BCBSMT's core business by \$24 million. (*Id.* at 157:1-6.)

109. Galasso acknowledged that an increase in the medical trend assumption would increase the value of the core business. (*Id.* at 168:8-10.)

110. During the first five years of the appraisal period, Galasso assumed largely static administrative expense ratios for individual and small group business segments and an increased administrative expense ratio for large groups. (App. Ex. 5 at Ex. 9(a).) Included in his calculation is a two percent annual administrative expense inflation factor. (App. Ex. 5 at 34.)

111. Assuming an annual administrative expense factor increase of one percent rather than two percent would increase the appraisal value by \$24 million. (Hrg. Tr. vol. II, 166:14-167:5 (Mar. 13, 2013).) Such an assumption is reasonable because:

- A. Galasso does not account for technological advances that directly decrease administrative expenses; (*See generally* App. Ex. 5.)
- B. Selling insurance through the Exchange will reduce insurer administrative expenses by changing methods of distribution, including increasing direct sales; (Hrg. Tr. vol. III, 652:12-15, 20-23 (Mar. 14, 2013).) and
- C. BCBSMT successfully lowered its administrative expense ratio by 3.5 percent from 2007 to 2011. (App. Ex. 8 at 23.)

112. Galasso acknowledged that a change of one percent in his assumed medical loss ratio would change the value of the company by \$24 million. (Hrg. Tr. vol. II, 164:9-13 (Mar. 13, 2013).)

113. Galasso acknowledged that a decrease of one percent in his assumed discount rates of eight percent for old business and 13 percent for new business would increase the value of the company by over \$17 million. (*Id.* at 159:19-160:3.)

114. Assuming a one percent discount rate downward adjustment for both old and new business is reasonable because Galasso himself uses these lower discount rates in one of his modeling scenarios. (App. Ex. 5 at Ex. 3(b).)

115. Blackmer testified at the hearing that \$40.2 million is a reasonable fair market value of the assets that HCSC proposes to purchase from BCBSMT in the Transaction. (Hrg. Tr. vol. III, 509:14-16 (Mar. 14, 2013).)

116. HCSC employee Maurice Smith testified that a core business purchase price of \$40.2 million was consistent with the aggregate fair market value of BCBSMT generated by MDS. (Hrg. Tr. vol. I, 275:4-8 (Mar. 12, 2013).)

117. HCSC Chief Operating Officer Colleen Reitan testified that HCSC believes \$40.2 million is a fair market valuation of BCBSMT's core business. (Hrg. Tr. vol. II, 83:13-14 (Mar. 13, 2013).)

CONFLICT OF INTEREST DISCLOSURE
Mont. Code Ann. § 50-4-717(2)(c)

118. BCBSMT represents that it has disclosed all conflicts of interest relating to the Transaction, including conflicts of the Board, BCBSMT executives, and experts retained by the Applicants. (App., 27.)

119. Frank testified that he was not aware of any conflicts of interest that any Board member, BCBSMT executive, or expert may have in relation to the Transaction. (Dir. Test. Frank 41:17-42.)

120. Galasso was compensated according to hourly rates; his total compensation amount was independent of his final findings and opinions. (Direct Testimony of James P. Galasso 9:1-2 (Feb. 8, 2013).)

121. Swartley was compensated according to hourly rates; his total compensation amount was independent of his final findings and opinions. (Dir. Test. Swartley 11:14-15.)

**COMMUNITY IMPACT: AVAILABILITY AND ACCESSIBILITY OF
HEALTH CARE SERVICES AND HEALTH INSURANCE COVERAGE**
Mont. Code Ann. § 50-4-717(2)(d)

122. McCarthy analyzed the Transaction to determine its impact upon the availability and accessibility of health care services and health insurance coverage in Montana. (Direct Testimony of Thomas R. McCarthy 4:1-4 (Feb. 8, 2013).) He concluded that the Transaction would not adversely impact Montanans' ability to obtain or access either health care services or health insurance coverage. (*Id.* at 4:3-4.)

123. HCSC's higher RBC ratio would reduce an HCSC-owned Montana Blue plan's risk exposure and increase its financial stability. (*Id.* at 8:24-5.) This greater stability translates to greater protection and security for members of the Montana plan. (*Id.* at 8:25.)

124. The Transaction would permit an HCSC-owned Montana Blue plan to spread its administrative expenses among HCSC's larger membership base, and the plan could access HCSC's technology. (*Id.* at 9:13-15.) These factors would result in a lower administrative expense ratio which could, in turn, lead to more reasonable premiums. (*Id.* at 9:13-17.)

125. By accessing the technology available to HCSC, a Montana-owned Blue plan would improve member services generally. (*Id.* at 10:10-12.)

126. Tardiff also analyzed the impact of the Transaction upon the availability and accessibility of health services and insurance coverage. He concluded that the Transaction would not adversely affect either of these factors. (Dir. Test. Tardiff 19:18-20:2.)

127. In his analysis, Tardiff considered: (1) the continued presence of care providers, insurance brokers, and enrollees; (2) marketplace competition; and (3) the presence and financial stability of BCBSMT. (*Id.* at 17:15-18:2.)

128. A reduction in the number of Montana providers would result in more limited health care services for Montanans. Factors potentially limiting provider presence include reductions in provider contracts or reimbursement rates. Because the Transaction is unlikely to restrict either of these factors, a reduction in provider presence is unlikely. (*Id.* at 18:5-10.)

129. Providers would benefit from the Transaction through faster claim processing and improved provider reimbursement methodologies. (Dir. Test. Reitan 17:20-21.)

130. If the Transaction is approved, HCSC will assume all current BCBSMT broker agreements. (Dir. Test. Tardiff 18:13-16.)

131. If the Transaction is approved, HCSC will assume all current enrollee contracts. Additionally, enrollment levels have not dropped following HCSC acquisitions of Blue plans in its other states, suggesting that Montana would not experience decreased enrollment. (*Id.* at 19:1-5.)

132. Because HCSC performs better than BCBSMT in terms of efficiency, financial stability, and risk, the Transaction would likely ensure the continued presence of a strong Blue plan in Montana. (*Id.* at 19:12-17.)

133. The Exchange will increase insurer competition by enabling individuals to easily access alternative insurance products. (Hrg. Tr. vol. II, 29:1-6 (Mar. 13, 2013).)

134. Testimony from the public also showed that availability and accessibility of health care services and health care coverage would continue or, alternatively, improve. (*See generally* Hrg. Tr., vol. I, 61:16-85:4 (Mar. 12, 2013).) For example, the Great Falls Development Authority testified that BCBSMT as a division of HCSC would be able to handle the costs associated with technological advances due to the size of HCSC. (*Id.* at 67:11-13.)

**COMMUNITY IMPACT: SAFEGUARDS ENSURING ACCESS TO
AFFORDABLE HEALTH CARE
Mont. Code Ann. § 50-4-717(2)(e)**

135. McCarthy analyzed the Transaction to determine whether it included sufficient safeguards to ensure that Montanans will have continued access to affordable health care. He concluded that sufficient competitive safeguards would exist to ensure continued access to affordable health care. (Dir. Test. McCarthy 10:14-24.)

136. Although BCBSMT has a 90 percent share of the individual market and a 66 percent share of the group market in Montana, Cigna, UnitedHealth and PacificSource have a presence in the Montana market. (App. Ex. 6 at 3, 7.)^{29 30}

137. Tardiff also analyzed whether the Transaction included sufficient safeguards to ensure continued access to affordable health care. He concluded that the Transaction would not adversely impact health care affordability. (Dir. Test. Tardiff 24:10-13.)

138. Tardiff examined three factors in relation to affordable health care access. These included: (1) the potential for increased premium rates, (2) the potential for modified benefit plans, and (3) the presence of regulatory safeguards. (*Id.* at 20:6-8.)

139. Tardiff's analysis of pre- and post-acquisition rating trends in those states where HCSC has acquired Blue plans indicates that such HCSC acquisitions traditionally do not result in significant rate increases, although Tardiff did not review either HCSC's rate increases or any other carrier's rate increases in those respective states. (*Id.* at 20:18-21:11.)³¹

²⁹ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This "substantial evidence" standard evaluates "whether substantial credible evidence supports the trier's findings." *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Hearing Examiner states that BCBSMT has "significant" competition, but upon reviewing the complete record, the Commissioner determines that there is not competent substantial evidence to support this Finding and modifies it, along with the supporting authority for such modification.

³⁰ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This "substantial evidence" standard evaluates "whether substantial credible evidence supports the trier's findings." *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Commissioner rejects the Hearing Examiner's finding #119. The Hearing Examiner, relying exclusively on Dr. McCarthy's testimony, states that BCBSMT as a division of HCSC "could lose significant membership to its competitors if it raised its premiums." Upon reviewing the complete record, the Commissioner determines that there is not competent substantial evidence to support this finding and rejects it. Under cross examination, Dr. McCarthy acknowledged that he did not look at premiums charged by BCBSMT or any other company in the Montana market when he conducted his analysis. (Hrg. Tr. vol. II, 18:7-17 (Mar. 13, 2013).)

³¹ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This "substantial evidence" standard evaluates "whether substantial credible evidence supports the trier's findings." *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Hearing Examiner cites to Dr. Tardiff's analysis for rates pre and post-acquisition by HCSC in those states in which HCSC acquired the Blue plan. Upon reviewing the complete record, the Commissioner determines that there is not competent substantial evidence to support this finding and revises it to be more consistent with the complete record and Dr. Tardiff's testimony. (Dir. Test. Tardiff 21:3-11.)

140. HCSC has represented that it has no current plans to modify or terminate existing BCBSMT benefit plans. (*Id.* at 22:5-7.)

141. The ACA provides for governmental review of certain premium rate increases that exceed 10 percent. The rating insurer must publicly disclose such rate increases and provide justification. This review procedure does not prevent insurers from using those rates, even if the rates are deemed unreasonable. (*Id.* at 23:6-10.)

142. Health insurers are not currently required to file rating plans with the CSI or any other Montana state agency. (*Id.* at 23:13-14; Hrg. Tr. vol. III, 543:12-16 (Mar. 14, 2013); *see generally* Mont. Code Ann. Title 33.)

143. If the Transaction is approved, the BCBSMT division of HCSC will continue its current process for handling escalated CSI consumer inquiries and complaints. This process will continue to be handled at the BCBSMT division in Montana with direct access to the BCBSMT Plan President. There is no expiration date on this commitment. (CSI Stipulation with Applicants (April 19, 2013).)

144. Testimony from the public also showed that aspects of the Transaction would include safeguards to ensure access to affordable health care. (*See generally* Hrg. Tr. vol. I, 61:16-85:4 (Mar. 12, 2013).) For example, Richard Miltenberger, a partner with Mountain West Benefits, which primarily advises associations and aggregations of smaller employers, testified that the financial strength of HCSC would protect Montana consumers. (*Id.* at 79:11-80:9, 81:20-21.)

CONVERSION TRANSACTION MANAGEMENT CONTRACTS
Mont. Code Ann. § 50-4-717(2)(f)

145. Frank testified that no management contracts will be transferred to HCSC by BCBSMT if the Transaction is approved. (Dir. Test. Frank 42:12-14.)

146. BCBSMT Chief Financial Officer Mark Burzynski testified that no management contracts were entered into in relation to the Transaction. (Dir. Test. Burzynski 31:5-7.)

147. HCSC represents that any management contract under the Transaction is for reasonable value. (App., 25.)

148. No evidence was introduced that any management contracts have been entered into in relation to the Transaction.

EQUITIES OF THE CONVERSION TRANSACTION
Mont. Code Ann. § 50-4-717(2)(g)(i)

149. McCarthy analyzed whether the Transaction was equitable to the public interest, and to BCBSMT's enrollees, insureds, shareholders, and certificate holders. He concluded that the Transaction was equitable to all of these parties. (Dir. Test. McCarthy 12:3-11.)

150. Tardiff also analyzed whether the Transaction was equitable to the public interest, and to BCBSMT's enrollees, insureds, shareholders, and certificate holders. He concluded that the Transaction was equitable to all of these parties. (Dir. Test. Tardiff 26:14-18.)

151. BCBSMT has no shareholders due to its not-for-profit status. (*Id.* at 25:1-2.)

152. The Transaction would result in a more efficient Montana Blue plan able to price its products more aggressively. (Dir. Test. Frank 34:10-13.)³²

153. Testimony elicited at the public hearing urged support for the Transaction, particularly regarding the equitability to the public interest. (*See generally* Hrg. Tr. vol. I, 61:16-

³² The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This "substantial evidence" standard evaluates "whether substantial credible evidence supports the trier's findings." *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. Relying on Dr. Tardiff's testimony, the Hearing Examiner states that "available data" suggests that HCSC will charge reasonable premiums while not significantly modifying benefit plans. Upon reviewing the complete record and Dr. Tardiff's pre-filed testimony, the Commissioner determines that there is not competent substantial evidence to support this entire finding. Specifically, in his cited testimony, Dr. Tardiff states that "[h]istorical data suggests HCSC will not unreasonably raise rates on these individuals. That being said, no rate review authority exists to prevent such raises." This does not support the Hearing Examiner's proposed finding and accordingly, the Commissioner modifies this finding to be more consistent with the complete record.

85:4 (Mar. 12, 2013).) For example, the president of the Kalispell Chamber of Commerce testified that HCSC's scale would be beneficial to reducing administrative costs. (*Id.* at 65:2-13.)

154. Similarly, the Great Falls Development Authority testified that BCBSMT could not be cost effective due to its small size and the necessity and increasing technological demands. (*Id.* at 67:11.)

155. Additionally, if the Transaction is approved, HCSC will charge insured Montana commercial market business for individuals and employers who enroll on average 500 members or less administrative fees, including margin, that are a lower percentage of their total premium basis than those charged by BCBSMT at the close of the Transaction. Certain items would be excluded from the calculation of administrative fees. This commitment would be effective for the three calendar years following the Transaction. In the event HCSC fails to meet this requirement, the CSI shall have available all administrative remedies under the Montana Insurance Code. (CSI Stip.)³³

156. Under the terms of the Agreement, HCSC will hire all BCBSMT employees at least at current compensation levels. (Dir. Test. Tardiff 25:9-12.)

157. If the Transaction is approved, HCSC will employ at least 100 individuals at a Montana-based HCSC facility. This shall occur no later than December 31, 2016. (CSI Stip.)

158. If the Transaction is approved, it will result in the creation of a foundation funded by the assets remaining in the OldCo following its wind-down. The value of these assets is

³³ The Hearing Examiner cites to the Stipulation entered into between the Applicants and the CSI. Upon reviewing the entire Stipulation, the Commissioner determines that it is necessary to add additional enforcement language to be more consistent with the language in the Stipulation.

estimated by the Applicants to exceed \$120 million. The foundation will be governed by a board of independent and disinterested members. (App., 2-3.)³⁴

159. HCSC has demonstrated that it is committed to charitable giving and community participation in the states in which it operates. (Dir. Test. Frank 32:15-33:3.)

160. If the Transaction is approved, HCSC shall continue at its expense BCBSMT's past charitable and community contributions in the amount of at least \$200,000 per year. This commitment would be effective for the calendar years 2014 through 2016. (CSI Stip.)

161. If the Transaction is approved, HCSC will operate a mobile immunization van in Montana to provide immunizations to Montanans at no expense. All Montanans would be eligible for this service, and HCSC would focus its immunization services on underserved areas. At least 2,000 immunizations will be made available to Montanans during the commitment period. The commitment would be effective on an ongoing basis until December 31, 2016. (*Id.*)

162. If the Transaction is approved, HCSC will donate an aggregate of \$3 million to the Foundation for Healthy Montanans, or to the Caring Foundation, or both. (*Id.*)

163. BCBSMT has benefited from an estimated \$87,125,733 in premium tax exemption during the last 10 years. (Hrg. Tr. vol. III, 519:14-19 (Mar. 14, 2013).) BCBSMT has been exempted from paying premium tax in Montana for at least the past 27 years. (*Id.* at 542:10-22.)

164. If the Transaction is approved, the BCBSMT division of HCSC will pay the insurer premium tax as set forth in Mont. Code Ann. § 33-2-705 so long as, as determined by the CSI, such tax remains applicable to health insurers in Montana not otherwise exempt from the

³⁴ The Commissioner may reject or modify a finding of fact that is not based upon competent substantial evidence. Mont. Code Ann. § 2-4-621(3). This "substantial evidence" standard evaluates "whether substantial credible evidence supports the trier's findings." *Schmidt v. Cook*, 2005 MT 53, ¶ 30, 326 Mont. 202, 108 P.3d 511. The Hearing Examiner cites to the Application to state that the value of the assets is estimated to exceed \$120 million. The Commissioner revises this finding to make it clear that such estimate and representation was made by the Applicants, which is based on competent substantial evidence contained in the Record.

payment of such tax under current Montana law, or unless Mont. Code Ann. § 33-2-705 is preempted by federal law expressly by Congress or as determined by a court of competent jurisdiction, or unless, as determined by the CSI, there is a substantial change in either applicable facts or law which result in the inapplicability of the premium tax to the BCBSMT division of HCSC. This commitment would be effective indefinitely. (CSI Stip.)

165. If the Transaction is approved, on or before March 31 of each year thereafter, the BCBSMT division of HCSC shall submit to the CSI a letter containing the same information as specified in the Supplemental Compensation Exhibit currently filed by BCBSMT with the CSI, regarding the annual compensation for the president of the BCBSMT division of HCSC and the four most highly paid other executive officers of such division for the previous calendar year. This information is considered a public record, pursuant only to Montana law, that is accessible by the public. (*Id.*)

COMPLIANCE WITH TITLE 33, CHAPTERS 30-31
Mont. Code Ann. § 50-4-717(2)(g)(ii)

166. BCBSMT represents that the Transaction complies with Mont. Code Ann. Title 33 chapters 30 and 31. (App., 27.)

167. No evidence was introduced that the Transaction violates Mont. Code Ann. Title 33 chapters 30 or 31.

SUFFICIENCY OF HCSC SURPLUS
Mont. Code Ann. § 50-4-717(2)(g)(iii)

168. As of December 31, 2012, HCSC held a surplus well in excess of the minimum required surplus of \$500,000. Mont. Code Ann. §§ 33-2-109(1)(b), 50-4-717(2)(g)(iii).

IMPACT UPON ECONOMIES OF SCALE
Mont. Code Ann. § 50-4-717(3)

169. Economies of scale consist of the relationship between cost and an entity's size and output. Specifically, a stronger economy of scale exists when cost falls as an organization grows and increases its production. (Dir. Test. McCarthy 13:14-15.)

170. McCarthy analyzed the effects of the Transaction upon scale. He concluded that the Transaction would result in greater economies of scale. (*Id.* at 13:21-22.)

171. BCBSMT will realize stronger scale economies by joining administrative processes with HCSC, allowing the two entities to spread administrative costs over a larger membership base. (*Id.* at 13:21-25.) Many administrative costs, such as technology costs, are fixed regardless of entity size; therefore, HCSC's technology expenses would not vary significantly due to the Transaction. (*Id.* at 14:11-12.)

172. HCSC has previously reduced the administrative expense ratios of the Texas, New Mexico, and Oklahoma Blue plans. (*Id.* at 14:21-24.)

173. Tardiff also evaluated the Transaction's impact on economies of scale. He concluded that the Transaction would result in increased economies of scale. (Dir. Test. Tardiff 17:3-6.)

174. In reaching his conclusion, Tardiff evaluated the Applicants' respective sizes, cost structures, and natures of business. (*Id.* at 16:1-2.) His assessment of these factors supported the conclusion that the Transaction would result in increased economies of scale. (*Id.* at 17:5-6.)

COMPLIANCE WITH ANTITRUST LAWS
Mont. Code Ann. § 50-4-717(3)(b)

175. McCarthy analyzed the Transaction to determine whether it implicated antitrust issues, i.e., whether it would lead to a lessening of competition in Montana. (Dir. Test. McCarthy 15:2-7.) His analysis included competitive effects on various lines of health insurance, dental insurance, and provider services. He concluded that the Transaction would not lessen competition in any of these areas. (*Id.* at 15:5-10.)

176. HCSC does not actively compete for members within Montana, and currently has very few insureds within the state. (*Id.* at 15:12-14.)

177. Those HCSC insureds in Montana are national account members tied to out-of-state employers. Because those employers are located outside of Montana, BCBSMT does not compete with HCSC for their business. (*Id.* at 15:14-19.)

178. Since HCSC and BCBSMT do not directly compete, no competition is lost if the two entities combine. (*Id.* at 15:19-21.)

179. McCarthy performed a NAIC Form E analysis in relation to the Transaction. (*Id.* at 16:2-3.) Many state departments of insurance use a Form E analysis to evaluate potential antitrust issues. (*Id.* at 16:8-10.) This Form E analysis identified no anticompetitive concerns. (*Id.* at 16:21-22.)

180. Tardiff also analyzed the Transaction from an antitrust perspective. Like McCarthy, he concluded that the Transaction would have no significant anticompetitive effects. (Dir. Test. Tardiff 15:7-9.)

181. Tardiff adopted the Horizontal Merger Guidelines (Guidelines) approach to evaluate the Transaction's effects upon competition. This approach has been set forth by the

United States Department of Justice (DOJ) and the Federal Trade Commission (FTC). (*Id.* at 9:4-6.)

182. The Guidelines identify several factors significant in a competitive analysis. Among these are: the product and geographic area that are the subject of competition, the competitors that are present in the market, and market concentration. (*Id.* at 10:13-16.)

183. A Guidelines analysis demonstrated that the Transaction implicates no antitrust concerns. (*Id.* at 15:9-12.)

184. The Applicants filed a Hart-Scott-Rodino filing with the DOJ and FTC. These agencies issued a letter to BCBSMT on February 5, 2013, indicating neither entity had identified antitrust concerns associated with the Transaction. (Dir. Test. Frank 40:1-7.)

LIQUIDATED DAMAGES PROVISION
Mont. Code Ann. § 50-4-717(4)

185. Section 10.01 of the Agreement identifies permissible reasons for each party to terminate the Agreement prior to closing of the Transaction. (App. Ex. 3.)

186. Section 5.08 of the Agreement requires that BCBSMT pay HCSC a Termination Fee equal to three percent of the Agreement purchase price (i.e., \$528,330.00) if the Agreement is terminated for certain specified reasons relating to BCBSMT entering into a business agreement similar to the Transaction with another entity. (App. Ex. 3, Sec. 5.08, 10.01(a), (c).)

187. The Agreement does not require HCSC to pay a Termination Fee under any circumstances.

Based on the foregoing, the undersigned proposes the following:

CONCLUSIONS OF LAW

INTRODUCTION

1. The Commissioner of Securities and Insurance, Montana State Auditor (Commissioner), has jurisdiction over this matter pursuant to Mont. Code Ann. §§ 2-15-1903, 3-1-311, and 50-4-702.
2. The Application was filed with the Commissioner, with a copy served upon the Attorney General. Mont. Code Ann. § 50-4-707(1).
3. The filing of the Application pursuant to the Conversion Statute satisfied the notice requirements of Mont. Code Ann. §§ 35-2-609 and 35-2-617. Mont. Code Ann. § 50-4-704(1)(b).³⁵
4. The Commissioner gave proper public notice of the Application by the internet and by press release. Mont. Code Ann. § 50-4-709.
5. The Commissioner and the Attorney General made all documents and records in this matter available to the public, except those records containing proprietary or confidential information as defined by law. Mont. Code Ann. § 50-4-708.
6. The public hearing was correctly scheduled within 90 days after the Application was filed. Mont. Code Ann. § 50-4-710.
7. The public was correctly advised when and how to file written comment and exhibits or make a statement at the public hearing. Mont. Code Ann. §§ 50-4-710, 50-4-711(2).
8. The CSI is under the control and supervision of the Commissioner pursuant to Mont. Code Ann. §§ 2-15-1902 and 33-1-301.

³⁵ The Commissioner removed the Hearing Examiner's Conclusion of Law # 4 because it relates solely to the statutory elements reviewed by the Attorney General, and is not relevant to the Commissioner's review of the Transaction. All subsequent Conclusions of Law have been renumbered.

9. The Commissioner shall enforce the applicable provisions of the laws of the state of Montana. Mont. Code Ann. § 33-1-311(1).

10. The Commissioner has a duty to ensure that the interests of consumers are protected. Mont. Code Ann. § 33-1-311(3).

11. The Commissioner has the powers and authority expressly conferred upon the Commissioner or reasonably implied from the laws of the state of Montana. Mont. Code Ann. § 33-1-311(2).

12. A person may not engage in a conversion transaction involving a nonprofit health entity unless the Commissioner and Attorney General issue separate orders approving the transaction under the Conversion Statute. Mont. Code Ann. §§ 50-4-702, 50-4-713(2).

13. The Commissioner may not approve a conversion transaction absent an affirmative finding that the transaction is in the public interest. Mont. Code Ann. § 50-4-717.

14. Mont. Code Ann. § 50-4-717(2) sets forth the criteria the Commissioner must consider in determining whether a conversion transaction is in the public interest. The subsection sets forth a factor-based test. The Commissioner need not conclude that all factors are satisfied to determine a transaction is in the public interest.

15. The Applicants carry the burden of demonstrating that the Transaction is in the public interest. Mont. Code Ann. § 50-4-717.

16. In reviewing a conversion transaction, the Commissioner and the Attorney General may contract with experts to provide assistance in reviewing the transaction including, but not limited to, determining whether to approve the transaction generally. Mont. Code Ann. § 50-4-712(1).

DEFINITIONS

17. “Nonprofit health entity” includes a nonprofit health service corporation. Mont. Code Ann. § 50-4-701(7)(a)(ii).
18. BCBSMT is a nonprofit health entity for purposes of the Conversion Statute. (Hrg. Tr. vol. III, 514:21-24 (Mar. 14, 2013).) Mont. Code Ann. § 50-4-701(7)(a)(ii).
19. “Conversion transaction” includes a sale by a nonprofit health entity resulting in the transfer of control or governance to another entity of more than 10 percent in fair market value of the assets or operations of a nonprofit health entity. Mont. Code Ann. § 50-4-701(3)(a).
20. The Transaction constitutes a conversion transaction because it contemplates the sale to HCSC of more than 10 percent of BCBSMT’s assets. (App. Ex. 2.) Mont. Code Ann. § 50-4-701(3)(a).
21. “Public assets” include assets held for the benefit of the public or the community. Mont. Code Ann. § 50-4-701(9)(a).
22. The assets of BCBSMT are public assets. *Id.*

THE APPLICATION **Mont. Code Ann. § 50-4-707**

23. Persons seeking to engage in a conversion transaction must submit an application to the Commissioner in the form prescribed under Mont. Code Ann. § 50-4-707.
24. The Application submitted on November 15, 2012, contains all the elements required under Mont. Code Ann. § 50-4-707. (App.)

BCBSMT DECISION TO ENGAGE IN THE CONVERSION TRANSACTION
Mont. Code Ann. § 50-4-717(2)(a)

25. The Commissioner must consider whether the transferor exercised due diligence in deciding to engage in a conversion transaction. Mont. Code Ann. § 50-4-717(2)(a).

26. The decision to engage in the Transaction is within the authority granted to the Board in the BCBSMT Bylaws. (Hrg. CSI Ex. M, Art. III, Sec. 3.1.) *Warren v. Campbell Farming Corp.*, 2011 MT 324, ¶ 22, 363 Mont. 190, 271 P.3d 36.

27. In light of BCBSMT's recent financial performance, marketplace pressures, and looming capital expenditures, the Board members acted in good faith when they decided that BCBSMT should engage in the Transaction. (Dir. Test Frank 9:1-7.) *Warren*, ¶ 22.

28. BCBSMT exercised due diligence in deciding to engage in the Transaction. (Dir. Test. Frank 10:5-9.) Mont. Code Ann. § 50-4-717(2)(a).

**BCBSMT NEGOTIATION OF CONVERSION TRANSACTION TERMS AND
CONDITIONS**

Mont. Code Ann. § 50-4-717(2)(a)³⁶

29. The Commissioner must consider whether the transferor exercised due diligence in negotiating the terms and conditions of a conversion transaction. Mont. Code Ann. § 50-4-717(2)(a).

30. The standard upon which to evaluate whether BCBSMT exercised due diligence in negotiating the terms and conditions of the transaction is not defined in Title 50, Chapter 4, Part 7.

³⁶ Conclusions of Law # 29 through # 43 are inserted by the Commissioner to address whether BCBSMT performed due diligence in negotiating the purchase price of BCBSMT's book of business. The Hearing Examiner did not perform this analysis in rendering his recommendation, but such an evaluation is necessary to determine whether the Applicants satisfied the requirements of Mont. Code Ann. § 50-4-717(2)(a). All subsequent Conclusions of Law are renumbered.

31. Additionally, nowhere in Title 50, Chapter 4, Part 7 does it state that the purchase price for a transaction involving a nonprofit health entity must be a price determined by an independent fair market valuation analysis.

32. The purchase price of BCBSMT's core business constitutes a term of the Transaction under Mont. Code Ann. § 50-4-717(2)(a). (Dir. Test. Frank 26:3-4.)

33. Because the purchase price of the core business constitutes a term of the Agreement, BCBSMT must exercise due diligence in negotiating the purchase price. (Dir. Test. Frank 26:3-4.) Mont. Code Ann. § 50-4-717(2)(a).

34. It is undisputed that, for purposes of the Conversion Statute, BCBSMT is a public benefit corporation. (App., 24.) *See* Mont. Code Ann. § 35-2-114(28). As a public benefit corporation, BCBSMT has a fiduciary duty to the Montana public. (Hrg. Tr. vol. I, 234:1-3 (Mar. 12, 2013).)

35. Under the *Revlon* doctrine, once the board of directors of a public company decides to sell the company, it has a fiduciary duty to its shareholders to obtain the highest possible value for the company. *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

36. The *Revlon* doctrine should apply equally to directors of a not-for-profit corporation, as they, too, have a fiduciary duty in relation to the corporation. *See* Mont. Code Ann. § 35-2-416. Such a standard is especially appropriate in the case of a self-perpetuating not-for-profit board of directors not subject to shareholder oversight.

37. However, Mont. Code Ann. § 50-4-717 is silent about the applicability of the *Revlon* standard for purposes of analyzing whether BCBSMT exercised due diligence in negotiating the terms and conditions of a conversion transaction. For that matter, Mont. Code Ann. § 50-4-717 is silent about the applicability of any kind of standard in analyzing whether

BCBSMT exercised due diligence in negotiating the terms and conditions of a conversion transaction.

38. For purposes of this analysis, however, the *Revlon* doctrine provides a reasonable analytical methodology and shall be used in evaluating whether BCBSMT exercised due diligence in negotiating the purchase price of BCBSMT's core business. (Dir. Test. Frank 26:4-8.) Mont. Code Ann. § 50-4-717(2)(a).

39. The use of the *Revlon* doctrine is consistent with BCBSMT's fiduciary duty to the people of Montana as a public benefit corporation. (App., 24; Hrg. Tr. Vol. I, 117:24-118:2 (Mar. 12, 2013).

40. Application of the *Revlon* doctrine does not necessarily result in a price that is higher than the fair market value of the public assets. Mont. Code Ann. § 50-4-715(2)(a).³⁷

41. Similarly, application of the *Revlon* doctrine does not mean that factors not associated with the purchase price are mutually exclusive from obtaining the highest possible price (i.e. preservation of local jobs, etc.). (App. Ex. 3; Dir. Test. Frank 25:10-16, 26:1-29:15; Hrg. Tr. vol. I, 135:5-136:6 (Mar. 12, 2013); Dir. Test. Reitan 15:14-18.) Indeed, BCBSMT did not negotiate the purchase price whatsoever. (Dir. Test. Frank 26:4-8.)

42. While BCBSMT negotiated certain terms of the transaction, BCBSMT did not exercise due diligence in negotiating the terms and conditions of the Transaction because BCBSMT did not negotiate the purchase price of BCBSMT's core business. (Dir. Test. Frank 26:4-8.) *Revlon*, 506 A.2d 173.

43. Even if the *Revlon* doctrine did not apply to the Transaction and a different standard or doctrine were used, BCBSMT nonetheless failed to exercise due diligence in its

³⁷ Because the Commissioner is not statutorily charged with determining whether the ultimate purchase price of \$40,200,000 preserves and protects the fair market value of the public assets, the Commissioner takes no position on it.

negotiations by not negotiating the purchase price of BCBSMT's core business. (Dir. Test. Frank 26:4-8.) Mont. Code Ann. § 50-4-717(2)(a).³⁸

BCBSMT SELECTION OF HCSC AS TRANSFEREE
Mont. Code Ann. § 50-4-717(2)(a)

44. The Commissioner must consider whether the transferor exercised due diligence in selecting the transferee in a conversion transaction. Mont. Code Ann. § 50-4-717(2)(a).

45. The selection of HCSC as transferee in the Transaction is within the authority granted to the Board in the BCBSMT Bylaws. (Hrg. CSI Ex. M, Art. III, Sec. 3.1.); *Warren*, ¶ 22.

46. The Board members acted in good faith when they selected HCSC as transferee after determining that it satisfied their detailed criteria for a prospective acquirer. (Dir. Test. Frank 23:21-24:1, 24:4-8.) *Warren*, ¶ 22.

47. BCBSMT exercised due diligence in selecting HCSC as the entity with which to enter into the Transaction. (Dir. Test. Frank 23:21-24:1, 24:4-8.) Mont. Code Ann. § 50-4-717(2)(a).

BCBSMT DECISION MAKING PROCEDURE AND EXPERT ASSISTANCE
Mont. Code Ann. § 50-4-717(2)(b)³⁹

48. The Commissioner must consider the procedures that the transferor used in deciding to enter into a conversion transaction. Such consideration includes whether the transferor utilized appropriate expert assistance. Mont. Code Ann. § 50-4-717(2)(b).

49. The procedures BCBSMT utilized in determining whether to enter into the Transaction with HCSC were appropriate because BCBSMT properly evaluated its current

³⁸ The Commissioner's Conclusions of Law regarding the due diligence associated with negotiating the terms and conditions of the Transaction are limited to BCBSMT's failure to negotiate a purchase price prior to the Application being filed with the CSI.

³⁹ The Hearing Examiner's Conclusions of Law regarding fair market value have been removed. Those conclusions relate solely to the statutory elements reviewed by the Attorney General, and are not relevant to the Commissioner's review of the Transaction. All subsequent Conclusions of Law have been renumbered.

circumstances justifying the Transaction, and engaged in a systematic process to identify an acquirer meeting the criteria it clearly delineated. (Dir. Test. Frank 10:5-9, 23:21-24:1, 24:4-8.)
Mont. Code Ann. § 50-4-717(2)(b).

50. BCBSMT used appropriate expert assistance and procedures in deciding to engage in this Conversion Transaction. Mont. Code Ann. § 50-4-717(2)(b).

CONFLICT OF INTEREST DISCLOSURE
Mont. Code Ann. § 50-4-717(2)(c)

51. In reviewing a conversion transaction, the Commissioner must consider whether the transferor and/or transferee disclosed any conflicts of interest. These include conflicts involving board members, executives, and experts retained by a party to the transaction. Mont. Code Ann. § 50-4-717(2)(c).

52. With respect to directors, a conflict of interest transaction is a transaction with the corporation in which the director of the corporation has a direct or indirect interest. Mont. Code Ann. § 35-2-418.

53. BCBSMT and HCSC have not failed to disclose any conflicts of interest with regard to the experts the Applicants retained in this matter. Mont. Code Ann. § 50-4-717(2)(c).⁴⁰

⁴⁰ The CSI may reject or modify a hearing examiner's conclusions of law in a proposal for decision. Mont. Code Ann. § 2-4-621(3). Conclusion of Law # 53 (formerly Hearing Examiner's Conclusion of Law # 55) is modified to limit its scope to the disclosure of expert conflicts of interest.

**COMMUNITY IMPACT: AVAILABILITY AND ACCESSIBILITY OF
HEALTH CARE SERVICES AND HEALTH INSURANCE COVERAGE**
Mont. Code Ann. § 50-4-717(2)(d)

54. The Commissioner must consider whether the conversion transaction is likely to create a significant adverse impact on the availability or accessibility of health care services or health insurance coverage in the affected community. Mont. Code Ann. § 50-4-717(2)(d).

55. The Transaction is unlikely to create a significant adverse impact on the availability or accessibility of health care services because it would not restrict or reduce the presence of care providers or insurance brokers. (Dir. Test. Tardiff 18:5-10, 13-16.) Mont. Code Ann. § 50-4-717(2)(d).

56. The Transaction is unlikely to create a significant adverse impact on the availability or accessibility of health insurance coverage in Montana because the Transaction would enable the continued presence of a strong Blue plan in Montana. (Dir. Test. Tardiff 19:12-17.) Mont. Code Ann. § 50-4-717(2)(d).

57. The Transaction is unlikely to create a significant adverse impact on the availability or accessibility of health insurance coverage in Montana because HCSC's superior size and financial condition would enable a Montana-owned Blue plan to control costs and charge more reasonable premiums. (Dir. Test. McCarthy 9:13-17.) Mont. Code Ann. § 50-4-717(2)(d).

58. The Transaction is unlikely to create a significant adverse impact on the availability of health insurance coverage because it would not result in decreased insurer competition in Montana. (Dir. Test. Tardiff 15:9-12.) Mont. Code Ann. § 50-4-717(2)(d).

59. The Transaction is unlikely to create a significant adverse impact on the availability of health insurance coverage in Montana because the Exchange will increase

competition by providing insureds greater access to alternative insurance products. (Hrg. Tr. vol. II, 29:1-6 (Mar. 13, 2013).) Mont. Code Ann. § 50-4-717(2)(d).

**COMMUNITY IMPACT: SAFEGUARDS ENSURING ACCESS TO
AFFORDABLE HEALTH CARE
Mont. Code Ann. § 50-4-717(2)(e)**

60. The Commissioner must consider whether the conversion transaction includes sufficient safeguards to ensure that the affected community will have continued access to affordable health care. Mont. Code Ann. § 50-4-717(2)(e).

61. No state regulatory safeguards exist to ensure continued access to affordable health care because health insurers are not currently subject to rate review in Montana. (Hrg. Tr. vol. III, 543:12-16 (Mar. 14, 2013).) *See generally* Mont. Code Ann. Title 33; Mont. Code Ann. § 50-4-717(2)(e).⁴¹

62. Limited federal regulatory safeguards exist to ensure continued access to affordable health care because, although certain health insurance rates are reviewed for reasonableness, insurers are not prevented from using such rates even if deemed unreasonable. (Dir. Test. Tardiff 23:6-10.) Mont. Code Ann. § 50-4-717(2)(e).

63. The limited scope of state and federal regulatory rate oversight is a marginal consideration in relation to the Transaction because the lack of regulation is not specific to the Applicants, but instead applies to Montana health insurers generally.

64. Present and anticipated future competition in the Montana health insurance market, combined with what limited federal rating oversight exists, sufficiently safeguard Montanans' continued access to affordable health care. (Dir. Test. McCarthy 11:6-10, 20-23.) Mont. Code Ann. § 50-4-717(2)(e).

⁴¹ The 2013 Montana Legislature passed HB 87, granting the CSI health insurance rate review authority. The bill is effective July 1, 2013, and applies to filings for the individual and small group market for coverage issued on or after January 1, 2014. Ch. 334, L. 2013.

CONVERSION TRANSACTION MANAGEMENT CONTRACTS
Mont. Code Ann. § 50-4-717(2)(f)

65. The Commissioner must consider whether any management contract under the conversion transaction is for reasonable value. Mont. Code Ann. § 50-4-717(2)(f).

66. HCSC and BCBSMT have established no management contracts relating to the Transaction. (Dir. Test. Burzynski 31:5-7.) Therefore, the Applicants have established no management contract for unreasonable value. Mont. Code Ann. § 50-4-717(2)(f).

EQUITIES OF THE CONVERSION TRANSACTION
Mont. Code Ann. § 50-4-717(2)(g)(i)

67. The Commissioner must consider whether the conversion transaction is equitable to the public interest, enrollees, insureds, shareholders, and certificate holders, if any, of the transferor. Mont. Code Ann. § 50-4-717(2)(g)(i).

68. The Transaction is equitable to BCBSMT's enrollees, insureds, and certificate holders because it will likely result in lower increases to premiums than the increases to premiums that would be charged by an independent BCBSMT. (Dir. Test. Tardiff 25:4-6; Dir. Test. Frank 34:10-13.) Mont. Code Ann. § 50-4-717(2)(g)(i).

69. The Transaction is equitable to the public interest because it provides for the continued employment of current BCBSMT employees and the future hiring of 100 other Montanans. (Dir. Test. Tardiff 25:9-12; Hrg. Tr. vol. I, 220:10-15 (Mar. 12, 2013); CSI Stip.) Mont. Code Ann. § 50-4-717(2)(g)(i).

70. The Transaction is equitable to the public interest because it would result in the creation and funding of the foundation contemplated in the Conversion Statute. (App., 2-3.) Mont. Code Ann. §§ 50-4-717(2)(g)(i), 50-4-720.

71. The Transaction is equitable to the public interest because it would result in HCSC providing ongoing corporate charitable contributions and related services in the state of Montana. (CSI Stip.) Mont. Code Ann. § 50-4-717(2)(g)(i).

72. The Transaction is equitable to the public interest because it would result in significant premium tax revenue for the State of Montana on an indefinite basis. (Hrg. Tr. vol. III, 519:14-19 (Mar. 14, 2013); CSI Stip.) Mont. Code Ann. § 50-4-717(2)(g)(i).

COMPLIANCE WITH TITLE 33, CHAPTERS 30-31
Mont. Code Ann. § 50-4-717(2)(g)(ii)

73. The Commissioner must consider whether the conversion transaction complies with Mont. Code Ann. Title 33, chapters 30 (Health Service Corporations) and 31 (Health Maintenance Corporations). Mont. Code Ann. § 50-4-717(2)(g)(ii).

74. The Transaction complies in all respects with Mont. Code Ann. Title 33, chapters 30 and 31. (App., 27.) Mont. Code Ann. § 50-4-717(2)(g)(ii).

SUFFICIENCY OF HCSC SURPLUS
Mont. Code Ann. § 50-4-717(2)(g)(iii)

75. The Commissioner must consider whether the conversion transaction ensures that the transferee will possess sufficient surplus to comply with regulatory requirements and provide for the security for the transferee's certificate holders, if any, and policyholders. Mont. Code Ann. § 50-4-717(2)(g)(iii).

76. A non-stock health insurer authorized to transact insurance in Montana and licensed after October 1, 1999, must maintain a minimum surplus of \$500,000. Mont. Code Ann. § 33-2-109(1)(b).

77. HCSC's current surplus complies with Montana regulatory surplus requirements because it exceeds the minimum required surplus of \$500,000. Mont. Code Ann. §§ 33-2-109(1)(b), 50-4-717(2)(g)(iii).

78. HCSC's current surplus is sufficient to provide for the security of BCBSMT members, as demonstrated by its RBC ratio. Mont. Code Ann. § 50-4-717(2)(g)(iii).⁴²

IMPACT UPON ECONOMIES OF SCALE
Mont. Code Ann. § 50-4-717(3)

79. A nonprofit health entity seeking to enter into a conversion transaction must consider whether the transaction would result in inefficient economies of scale. Mont. Code Ann. § 50-4-717(3)(a).

80. BCBSMT sufficiently considered whether the Transaction would result in inefficient economies of scale when it evaluated HCSC's operations throughout the due diligence process and retained NERA to evaluate the impact of the Transaction upon economies of scale. (Dir. Test. Frank 18:18-19:16; Dir. Test. McCarthy 13:21-22.) Mont. Code Ann. § 50-4-717(3)(a).

COMPLIANCE WITH ANTITRUST LAWS
Mont. Code Ann. § 50-4-717(3)(b)

81. A nonprofit health entity seeking to enter into a conversion transaction must consider whether the transaction would violate federal or state antitrust laws. Mont. Code Ann. § 50-4-717(3)(b).

82. BCBSMT sufficiently considered whether the conversion transaction would violate federal antitrust laws by submitting a Hart-Scott-Rodino filing for DOJ and FTC review. (Dir. Test. Frank 40:1-7.) Mont. Code Ann. § 50-4-717(3)(a).

⁴² This Conclusion of Law shall not be construed as a conclusion that HCSC's surplus is not excessive.

83. BCBSMT sufficiently considered whether the conversion transaction would violate state antitrust laws by retaining Graham & Dunn and NERA to evaluate antitrust implications of the Transaction. (Dir. Test. Frank 39:9-20; App. Ex. 6.) Mont. Code Ann. § 50-4-717(3)(a).

84. There is nothing in the record suggesting that the conversion transaction would violate federal or state antitrust laws.

LIQUIDATED DAMAGES PROVISION
Mont. Code Ann. § 50-4-717(4)

85. If an agreement for the conversion of a nonprofit health entity requires payment of money in the event the nonprofit health entity breaches the agreement, the Commissioner shall determine whether and to what extent the payment by the nonprofit health entity is in the public interest. Mont. Code Ann. § 50-4-717(4).

86. A liquidated damages provision provides for payment of a presumed amount of damages sustained due to breach of contract. Mont. Code Ann. § 28-2-721(2).

87. A contract may include a liquidated damages provision only if, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages. Mont. Code Ann. § 28-2-721(2).

88. Agreement Section 5.08 constitutes a liquidated damages provision under Montana law. (App. Ex. 3.) Mont. Code Ann. § 28-2-721(2).

89. A liquidated damages provision is presumed enforceable. A party seeking avoidance must show it is unconscionable as a matter of law. *Arrowhead Sch. Dist. No. 75 v. Klyap*, 2003 MT 294, ¶ 54, 318 Mont. 103, 79 P.3d 250.

90. A liquidated damages provision is unconscionable if (1) the provision is a contract of adhesion “such that the weaker bargaining party had no meaningful choice regarding

acceptance of the provisions,” and (2) the terms of the contract unreasonably favor its drafter. *Arrowhead*, ¶ 48.

91. Agreement Section 5.08 is not unconscionable because no evidence indicates that it is a contract of adhesion, or that its terms unreasonably favor one Applicant at the expense of the other. (App. Ex. 3.) Mont. Code Ann. § 50-4-717(4); *Arrowhead*, ¶¶ 48, 54.

92. Agreement Section 5.08 is in the public interest because it requires BCBSMT to pay a relatively small fee only under the limited circumstances set forth in Agreement Sections 5.08 and 10.01(a), (c), and the occurrence of such circumstances is within BCBSMT’s control. (App. Ex. 3) Mont. Code Ann. § 50-4-717(4).

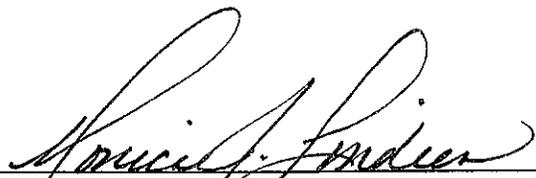
From the foregoing Findings of Fact and Conclusions of Law, the Commissioner issues the following:

ORDER

1. The Conversion of BCBSMT to HCSC is APPROVED.⁴³ This Approval is conditioned upon BCBSMT and HCSC fulfilling the terms and conditions of the Amended Stipulation entered into by the CSI on June 25, 2013. Failure to fulfill any terms or conditions in the Amended Stipulation will result in the imposition of a fine of up to \$25,000 per violation, pursuant to Mont. Code Ann. § 33-1-317.
2. The Applicants are hereby notified that they have the right to request judicial review of this Order by filing a petition for judicial review within 30 days after service of this Order with the district court in Lewis and Clark County, Montana, as provided in Mont. Code Ann. § 2-4-702.

⁴³ This Approval shall not be construed as approval of the Asset Purchase Agreement or Administrative Services Agreement.

DATED this 27th day of June, 2013.


MONICA J. LINDEEN
Commissioner of Securities and Insurance,
Montana State Auditor

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing document was hand delivered, picked up by courier, emailed, or sent by U.S. Mail, postage paid, this 27th day of June, 2013, to the following:

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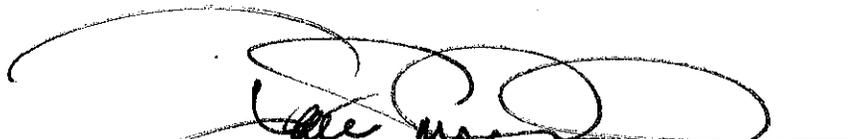
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