



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 Mont. Code Ann. § 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.

Based upon the public comment made subject to cross-examination, the testimony received, the exhibits admitted into evidence, documents in the official records, and the Stipulation entered into between the CSI and Applicants dated April 19, 2013, the undersigned makes 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, March 5, 2013.)
2. BCBSMT is a non-investor owned (NIO), 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 organized as

a nonprofit mutual benefit corporation and licensed as a health service corporation under Montana law. (Dir. Test. Frank 4:5-12, 5:3-7.)

3. BCBSMT is an independent licensee of the Blue Cross and Blue Shield Association (BCBSA). (*Id.* 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. (Hearing CSI Exhibit M, Bylaws, Art. III, Sec. 3.1(May 10, 2012).) The Bylaws 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. (Hearing CSI 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 NIO corporation, meaning it has no third-party investors. (Direct Testimony of Colleen F. Reitan 4:5-7 (March 5, 2013).)

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 of Securities and Insurance, Montana State Auditor (Commissioner), approve the Transaction between the Applicants pursuant to the requirements of the Conversion Statute. (App., 31.)

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.)

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).

**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).)

### 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 (February 7, 2013).)

**ATTORNEY GENERAL EXPERT ASSISTANCE**  
**Mont. Code Ann. § 50-4-712**

25. The Attorney General retained MDS Consulting, LLC (MDS) to provide an expert opinion on the fair market value of BCBSMT in conjunction with the Transaction. (Direct Testimony Timothy J. Blackmer 2 (March 5, 2013).) Timothy Blackmer authored the MDS report and presented expert testimony at the hearing. (*Id.*)

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

Due Diligence Process

26. 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.)

27. 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.)

28. 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.)

29. 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 (*Id.* at 9:17-20).

#### Financial Factors Influencing Decision

30. 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).)

31. 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 (December 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 (March 5, 2013).)

32. 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. (Hearing Transcript, 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. (Hearing Transcript, 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).)

33. 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 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).

34. 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)

35. 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.*)

36. 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.*)

37. 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.*)

38. 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.)

39. Due to its limited size and not-for-profit status, BCBSMT has insufficient access to capital needed to satisfy the expenditure requirements it faces in the next several years while remaining in good financial health. (Dir. Test. Burzynski 15:10-12.)

#### Other Factors Influencing Decision

40. 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 is ill-suited to weather the additional financial uncertainty associated with ACA implementation. (*Id.* at 13:9-12, 15:1-4.)

41. 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.)

42. 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.)

43. 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.)

44. 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.)

45. 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.)

46. 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.)

47. 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

48. 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

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

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

50. 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.)

51. 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.)

52. 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.)

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

54. In early June of 2012, BCBSMT Board members and staff met separately with each plan. (*Id.* at 16:7-11.) Each potential partner 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 partnership opportunities. (*Id.* at 16:14-16.)

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

### HCSC Attributes Influencing Selection

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

57. 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. (Applicants Ex. 9 at ¶ 4; Hrg. Tr. vol. I, 268:25-270:12 (Mar. 12, 2013); Hearing Transcript vol. II, 333:4-16 (Mar. 13, 2013).)

58. HCSC has previously completed successful alliances of various types with Blue plans in Texas (1998), New Mexico (2001), and Oklahoma (2005). As a result, it has significant expertise in how to manage the full scale integration of a plan without disrupting core operations, including claims and customer service. (Direct Testimony of James L. Kadela 3:20-4:4, 9:8-10:3 (February 8, 2012).)

59. 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. (Dir. Test. Kadela 10:13-11:16.)

60. A significant factor in HCSC's success in these other states has been its commitment to maintaining local leadership and strong local presence. HCSC is committed to the model of substantial local control. (Dir. Test. Kadela 20:20-21:1.)

61. HCSC has consistently maintained a high level of surplus over the 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

*(Id.)*

62. 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.)*

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.)*

66. HCSC employs a single-system technology scheme emphasizing efficiency and cost containment. *(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.)*

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 efficiency-oriented 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).

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 state-of-the-art data centers that securely store insured-related data and ensure uninterrupted service to policyholders. (*Id.* at 7:13-15, 7:22-8:3.)

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

#### 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 partnering with HCSC 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).

75. BCBSMT officers also visited HCSC's Oklahoma plan site as part of the due diligence process. (*Id.* at 18:5-9.) They observed that the plan seemed to maintain a local focus while experiencing the benefits of the scale HCSC enjoys. (*Id.* at 22:11-19.)

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 the terms of the Asset Purchase Agreement 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. (App. Ex. 3; Dir. Test. Frank 25:10-16, 26:11-29:15; Hrg. Tr. vol. I, 135:5-136:6 (Mar. 12, 2013); Dir. Test. Reitan 15:14-18.)

80. In negotiating the consideration HCSC would pay to BCBSMT for the assets it would receive in excess of the liabilities it would assume, the Applicants mutually understood the Montana Conversion Statute to require that the consideration represent the assets' fair market value and that the fair market value be determined by an independent third party. (Dir. Test. Frank Direct 26:2-6.) 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 26:6-7; Hrg. Tr. vol. I, 169:13-21 (Mar. 12, 2013); Hrg. Tr. vol. II, 363:13-364:3 (Mar. 13, 2013).)

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

82. Consistent with the understanding, HCSC agreed to pay the value of \$17.6 million, as determined by Mr. Galasso. (Hrg. Tr. vol. II, at 365:18-20 (Mar. 13, 2013).)

## **DETERMINING FAIR MARKET VALUE**

83. Under the Conversion Statute, the Attorney General must evaluate whether the proposed transaction is in the public interest. To determine whether the transaction is in the public interest, the statute provides three specific criteria concerning the fair market value of public assets, which the Attorney General shall require before approval: the fair market value of public assets is preserved and protected; the fair market value of public assets is expended or invested with reasonable and prudent consideration of the potential risk of financial loss associated with the conversion transaction; and the fair market value of the public assets of a nonprofit health entity will be distributed as provided in 50-4-720. (Mont. Code Ann. § 50-4-715(1) and (2)(a) - (c).)

84. The fair market value as of the date of the transaction or proposed transaction must be “determined by an independent appraisal of the assets or operations performed and communicated by a qualified appraiser according to applicable professional appraisal standards.” (Mont. Code Ann. § 50-4-701(4).)

85. Fair market value is defined in U.S. Treasury Department Revenue Ruling 59-60 as “the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts.” This standard was used in all valuation reports pertinent to the proposed transaction. (Fair Market Valuation of BCBSMT as of June 30, 2012, MDS Consulting, LLC, issued Feb. 26, 2013 (MDS Report) at 5 (filed Mar. 4, 2013); App. Ex. 7 at 1.)

86. Factors relevant in determining fair market value include, but are not limited to:  
(a) the value of the nonprofit health entity or the assets of a nonprofit health entity that are determined as if the nonprofit health entity had voting stock outstanding and 100 percent of its

stock was freely transferable and available for purchase without restriction; (b) the value as a going concern; (c) the market value; (d) the investment or earnings value; (e) the net asset value; and (f) a control premium, if any. (Mont. Code Ann. § 50-4-716(3).)

87. With respect to the value of the company, BCBSMT executives testified about declining financial performance of BCBSMT, the necessity of obtaining additional capital and resources in order to comply with the federal Affordable Care Act, and the uncertainties of the future health insurance market. (Dir. Test. Burzynski 4-8; Dir. Test. Frank 8-10) BCBSMT executives further testified about the potential risk of financial loss associated with the failure to consummate the proposed transaction as well as the expected benefits of completing the transaction. (Dir. Test Frank 33-39; *see generally* Dir. Test. Burzynski)

88. The Attorney General retained MDS to perform a fair market valuation of BCBSMT as of the time of the proposed transaction. (Dir. Test. Blackmer at 2.)

89. Blackmer performed the fair market valuation for MDS. He has a Master's degree in Business Administration, with an emphasis in Finance, from the University of Nevada. He is a Certified Public Accountant licensed in California and Washington State. Blackmer holds several accreditations in business valuation, including Accredited Business Valuation (ABV) from the American Institute of CPAs, Certified Business Appraiser (CBA) from the Institute of Business Appraisers, and Accredited Senior Appraiser (ASA) from the American Society of Appraisers. He has instructed undergraduate courses and seminars on issues pertinent to valuing businesses. Blackmer has completed valuations of asset portfolios for principals with annual gross revenues ranging from \$100,000 to over \$800 million. He has prepared hundreds of net tangible and intangible asset appraisals, including some in the health care and insurance industries. Blackmer's credentials as a qualified, independent valuation expert are substantial and undisputed. (Dir. Test. Blackmer at 1, 2; MDS Report at 60-61.)

90. In forming his expert opinion, Blackmer reviewed a large volume of written materials, including financial statements, tax returns, general ledger detail and other financial data, operating data, and information about the company. He conducted a site visit of BCBSMT, toured buildings, and had extensive discussions with BCBSMT management and key personnel about the history of the company and their expectations for the future. Blackmer also considered factors relating to the broader competitive environment of the health care business, including national and regional trends in health care and medical insurance, current local and national economic conditions, and characteristics of health and medical insurer businesses. (Dir. Test. Blackmer 7-9; MDS Report at 7-9.)

91. Blackmer analyzed the value of BCBSMT as a going concern, which is the value of a business enterprise that is expected to continue to operate into the future. (Blackmer Direct at 10.) He considered BCBSMT's value to a hypothetical purchaser of a 100 percent controlling ownership interest of all net tangible and intangible assets of the company. (MDS Report at 3; Dir. Test. Blackmer at 33.)

92. Blackmer analyzed the value of BCBSMT using several valuation methods, including the Income Approach, the Cost Approach, and the Market Approach. (MDS Report at 40-41.) The three approaches resulted in a range of value for BCBSMT between a minimum of \$182,500,000 and a high range of \$210,600,000 for all of the tangible and intangible assets of the company. (MDS Report at 3, 55.) The conclusion of value reached under each approach was assigned an equal weight of reliability, 33 percent, and the weighted indications of value from each approach were added to achieve a conclusion of value for BCBSMT of \$193,800,000 (rounded). (*Id.*)

93. The Moss Adams report expressed a fair market value of \$166,200,000 for BCBSMT as of June 30, 2012. (App. Ex. 7 at 39.) Included in the Moss Adams valuation was

an appraisal of the purchased assets performed by Dr. James Galasso of Actuarial Services and Financial Modeling, Inc. (*Id.* at 31, Ex. 21.) The Galasso appraisal valued the purchased assets, essentially the core insurance business of BCBSMT, at \$17.6 million as of June 30, 2012. (*Id.*; App. Ex. 5 at 19.)

94. On March 11, 2013, BCBSMT, HCSC, and the Attorney General entered into a stipulation establishing that a fair market value of the Purchased Assets is \$40.2 million, and that HCSC will agree to pay \$40.2 million for the Purchased Assets. (Hearing Applicants Exhibit 9, Stipulation between Applicants and Attorney General (Mar. 11, 2011).)

95. In reaching the agreed-upon purchase price of \$40.2 million for the assets HCSC seeks to acquire, the parties utilized or relied upon the MDS Report, Moss Adams Report, and Galasso Appraisal. (Hrg. Tr. vol. I, 273-275 (Mar. 12, 2013).)

96. In Blackmer's opinion, \$40.2 million is a reasonable fair market value for the core insurance business HCSC is proposing to acquire from BCBSMT. (Hrg. Tr. vol. III, 509.) Blackmer is qualified by education and experience to offer expert testimony regarding the fair market value of the public assets involved in the proposed transaction.

97. No evidence was presented to contradict the range of fair market value of BCBSMT presented in the MDS report. (Hrg. Applicants Ex. 9)

98. 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).)

99. 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).)

100. 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)**

101. 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.)

102. 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.)

103. 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 (February 8, 2013).)

104. 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)**

105. 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 (February 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.)

106. 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.)

107. 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.)

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

109. 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.)

110. 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.)

111. 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.)

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

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

114. 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.)

115. 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.)

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

117. 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. (Hrg. Tr. vol. I, 67:11-13 (Mar. 12, 2013).)

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

118. 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.)

119. BCBSMT currently faces several significant competitors in the health insurance market, including Cigna, UnitedHealth, and PacificSource, all of which have a growing Montana presence. (*Id.* at 11:6-10.)

120. If the Transaction were approved, a Montana-owned Blue plan could lose significant membership to its competitors if it raised its premiums. (*Id.* at 11:20-23.)

121. 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.)

122. 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.)

123. 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. (*Id.* at 20:18-21:2.)

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

125. 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.)

126. 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.)

127. 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).)

128. 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)**

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

130. 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.)

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

132. 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)**

133. 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.)

134. 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.)

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

136. Available data suggests that if the Transaction is approved, HCSC will charge reasonable premiums while not significantly modifying benefit plans. (*Id.* at 25:4-6.) The Transaction would result in a more efficient Montana Blue plan able to price its products more aggressively. (Dir. Test. Frank, 34:10-13.)

137. 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, 61:16-85:4 (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.)

138. 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.)

139. 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. (CSI Stip.)

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

141. 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.)

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

143. 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.)

144. 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.)

145. 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.*)

146. 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.*)

147. 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.)

148. 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 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.)

149. 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)**

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

151. 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)**

152. 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)**

153. 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.)

154. 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.)

155. 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.)

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

157. 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.)

158. 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)**

159. 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.)

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

161. 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.)

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

163. 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.)

164. 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.)

165. 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.)

166. 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.)

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

168. 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)**

169. 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.)

170. 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).)

171. 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).

4. The Attorney General's review of the Application under the Conversion Statute satisfies the review requirements of the Montana Nonprofit Corporation Act. Mont. Code Ann. §§ 35-2-609-617, 50-4-715(3).

5. The Commissioner gave proper public notice of the Application by the internet and by press release. Mont. Code Ann. § 50-4-709.

6. 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.

7. The public hearing was correctly scheduled within 90 days after the Application was filed. Mont. Code Ann. § 50-4-710.

8. 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, -711(2).

9. The CSI is under the control and supervision of the Commissioner pursuant to Mont. Code Ann. §§ 2-15-1902 and 33-1-301.

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

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

12. 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).

13. 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, -713(2).

14. 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.

15. 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.

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

17. 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

18. “Nonprofit health entity” includes a nonprofit health service corporation. Mont. Code Ann. § 50-4-701(7)(a)(ii).

19. 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).

20. “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).

21. 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).

22. “Public assets” include assets held for the benefit of the public or the community. Mont. Code Ann. § 50-4-701(9)(a).

23. The assets of BCBSMT are public assets for purposes of the Transaction. (App., 24-5.)

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

24. 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.

25. 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)**

26. 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).

27. 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.

28. 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.

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

30. 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).

31. 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. Ex. M.); *Warren*, ¶ 22.

32. 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.

33. 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).

**FAIR MARKET VALUE**  
**Mont. Code Ann. § 50-4-701(4) and 50-4-716(3)**

34. Section 50-4-715(2) of the Conversion Statute specifies that in determining whether a conversion transaction is in the public interest, the Attorney General shall require that:

- (a) the fair market value of public assets is preserved and protected;
- (b) the fair market value of public assets is expended or invested with reasonable and prudent consideration of the potential risk of financial loss associated with the conversion transaction; and
- (c) the fair market value of the public assets of a nonprofit health entity will be distributed as provided in 50-4-720.

Mont. Code Ann. § 50-4-715(2)(a)-(c) (emphasis added).

35. The Conversion Statute defines “fair market value” as the value “determined by an independent appraisal of the assets or operations performed and communicated by a qualified appraiser according to applicable professional appraisal standards.” Mont. Code Ann. § 50-4-701(4).

36. The applicable professional standard for determining the “fair market value” of the Purchased Assets is the price at which the property would change hands between a willing buyer and a willing seller when the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts. (MDS Report at 5; App. Ex. 7 at 1; Internal Revenue Service Revenue Ruling 59-60.)

37. The Conversion Statute reflects the Montana Legislature's determination that public assets impacted by a conversion transaction should be valued at their fair market value, so that the fair market value can be preserved and protected. The Legislature did not require public assets to be preserved or protected at the highest value attainable, which is a standard difficult to measure. Rather, it specified a fair market value standard, which is objective rather than subjective, and can be independently verified.

38. The Conversion Statute provides that "[i]n determining fair market value, the attorney general may consider all relevant factors that may include but are not limited to:

- (a) the value of the nonprofit health entity or an affiliate or the assets of the nonprofit health entity or affiliate that are determined as if the nonprofit health entity or affiliate had voting stock outstanding and 100 percent of its stock was freely transferable and available for purchase without restriction;
- (b) the value as a going concern;
- (c) the market value;
- (d) the investment or earning value;
- (e) the net asset value; and
- (f) a control premium, if any.

Mont. Code Ann. § 50-4-716(3).

39. The fair market value of the Purchased Assets proposed to be transferred to HCSC from BCBSMT in the Conversion Transaction, considering all these factors, is \$40.2 million. The evidence presented in the Application and in the hearing record provides ample factual support for this value, as described below.

40. Blackmer has the requisite knowledge, skill, experience, training, and education to express an expert opinion on the business valuations.

41. Blackmer gathered written materials, interviewed BCBSMT employees, conducted a site visit, and researched economic and industry factors to inform his opinion of the fair market value of BCBSMT. Blackmer is a qualified appraiser who performed an independent appraisal of the assets and operations of BCBSMT in accordance with Mont. Code Ann. § 50-4-701(4).

42. Blackmer used a fair market value standard to determine the value of the company, which is an appropriate professional appraisal standard in accordance with Mont. Code Ann. § 50-4-701(4).

43. Blackmer considered relevant factors in valuing BCBSMT, specifically its value as a going concern in which 100 percent controlling ownership interest in the net tangible and intangible assets would be available for purchase without restriction in satisfaction of Mont. Code Ann. § 50-4-716(3).

44. The fair market value of BCBSMT is between \$182,500,000 and \$210,600,000.

45. A reasonable fair market value for the assets that HCSC proposes to purchase is at least \$40.2 million.

46. HCSC has agreed to a purchase price of \$40.2 million for the assets it seeks to acquire. Because \$17.6 million is already factored into the Moss Adams valuation as a purchase price for the assets that HCSC seeks to acquire, adding \$22.6 million (the difference between the agreed purchase price and the price already accounted for in the report) to the Moss Adams fair market value of \$166,200,000 results in a total value of \$188,800,000 million. The resulting value is within the range of fair market value for the assets of BCBSMT.

47. The \$40.2 million purchase price similarly increases the resulting fair market value under the Blackmer analysis. The \$40.2 million purchase price represents the value of the intangible assets of BCBSMT, including the Contracts, Brands, Community Goodwill, and the

value of the Trained and Assembled Workforce. Blackmer's opinion of the value of these intangible assets was \$24,960,000. (MDS Report at 4.) By substituting the actual stipulated purchase price of \$40.2 million for the estimated value of the intangible assets in Blackmer's analysis, the resulting bottom line Rounded Estimate of Surplus Value increases to \$209,040,000. The resulting value is well within the range of fair market value for the assets of BCBSMT.

48. The agreed purchase price of \$40.2 million preserves and protects the fair market value of the purchased assets, as required by Mont. Code Ann. § 50-4-715(2)(a).

49. The stipulation entered into among BCBSMT, HCSC, and the Attorney General on March 11, 2013, establishing that a fair market value of the Purchased Assets is \$40.2 million and that HCSC will agree to pay \$40.2 million for the Purchased Assets, is reasonable and consistent with the record evidence. Thus, with respect to Mont. Code Ann. § 50-4-715(2)(a)-(c), the proposed Transaction is in the public interest. (Hrg. Applicants Ex. 9.)

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

50. 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).

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

52. 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)**

53. 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).

54. 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.

55. BCBSMT and HCSC have not failed to disclose any conflicts of interest with regard to the Board, BCBSMT's executives, or the experts the Applicants retained in this matter. Mont. Code Ann. § 50-4-717(2)(c).

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

56. 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).

57. 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).

58. 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).

59. 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.)

60. 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).

61. 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)**

62. 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).

63. 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).

64. 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).

65. 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.

66. 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).

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

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

68. 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)**

69. 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).

70. 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).

71. 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).

72. 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), -720.

73. 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).

74. 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)**

75. 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).

76. 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)**

77. 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).

78. 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).

79. 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).

80. 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).

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

81. 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).

82. 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)**

83. 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).

84. 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).

85. 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).

86. 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)**

87. 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).

88. 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).

89. 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).

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

91. 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.

92. 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.

93. 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.

94. 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).

### **PARTIES' RECOMMENDATIONS**

95. The Applicants, the Attorney General, and the CSI have all recommended that the Transaction be approved.

### **HEARING EXAMINER'S RECOMMENDATIONS**

**IN CONSIDERATION OF THE FOREGOING FINDINGS OF FACT and CONCLUSIONS OF LAW** and upon balancing the factors in Title 50, Chapter 4, Part 7 with the evidence in the Record and the Stipulation signed by the CSI and the Applicants on April 19, 2013, the undersigned respectfully recommends that:

- (1) the Attorney General approve the Conversion Transaction and Alliance of the Applicants pursuant to Montana Code Annotated § 50-4-715;
- (2) the Commissioner approve the Conversion Transaction and Alliance of the Applicants pursuant to Montana Code Annotated § 50-4-717;
- (3) the closing of the Conversion Transaction proceed; and
- (4) upon approval of the Transaction by the Attorney General and the Commissioner, the proceeds of the Transaction that are public assets be distributed to an existing or new foundation or other nonprofit organization to be held in trust, subject to the oversight and monitoring of the Attorney General, all pursuant to Mont. Code Ann. 50-4-720.

## MEMORUNDUM

Although all the parties to this Conversion Transaction have each recommended that it be approved by the Commissioner and the Attorney General, there are a couple of topics which merit further discussion.

### **The Question as to Valuation of BCBSMT**

The Applicants and the Attorney General are in agreement that the Applicants satisfied the statutory requirements by having an independent third party determine the fair market value of the core BCBSMT business. The CSI staff, on the other hand, has taken the position that BCBSMT had a fiduciary duty to “negotiate” a price with HCSC in an effort to obtain the highest possible value for the core business. CSI’s proposed findings fault BCBSMT for not retaining an investment banker to perform a valuation of BCBSMT; for not reviewing the purchase prices involved in HCSC’s prior plan acquisitions; for not considering factors that would lead HCSC to pay a higher purchase due to synergies resulting from the Transaction; and for not entertaining bids from other prospective purchasers.

CSI’s criticisms of BCBSMT’s failure to negotiate a price are directed at the fact that BCBSMT and HCSC agreed to accept the \$17.6 million valuation arrived at by Actuarial and Financial Modeling, Inc. (App. Ex. 5). Applicants’ approach of using an independent appraisal to ascertain a fair market value is entirely consistent with Mont. Code Ann. § 50-4-701(4) which defines “fair market value” as the value “determined by an independent appraisal of the assets or operations performed and communicated by a qualified appraiser according to applicable professional appraisal standards.” In light of the Legislature’s having adopted the fair market value standard, it would be incongruous to conclude that a sale of the core business at fair market value defeats the public’s interest. Secondly, the \$17.6 million figure was subsumed when

HSCS, per the March 11, 2013, stipulation with BCBSMT and the Attorney General, agreed to pay \$40.2 million - some 2.28 times more than the Galasso figure. (Hrg. Applicants Ex. 9.)

Finally, CSI's reservations about the process of evaluating BCBSMT's core business assets are ultimately mooted by the fact that the CSI staff join the Applicants and the Attorney General in recommending that the Transaction be approved at the \$40.2 million figure for the core business.

### **The Question of Conflict of Interest**

The CSI staff assert that BCBSMT Board member, Mike Frank (CEO) and BCBSMT executive Mary Belcher (General Counsel) "may" have an indirect interest in the transaction, in that if the transaction is approved, they could, as employees of HCSC, qualify for HCSC short-term and long-term incentive compensation programs.

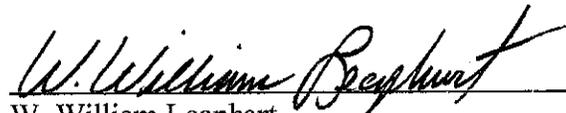
CSI staff point out that the facts contained in the record are insufficient as a matter of law to demonstrate that Frank's and Belcher's potential and indirect compensation conflicts were disclosed to the Board or BCBSMT members. Mont. Code Ann. § 50-4-717(2)(c).

Although the record does not indicate whether Frank or Belcher directly advised the BCBSMT Board or members that they stood to potentially benefit were they to become HCSC employees, it is apparent from the terms of the Asset Purchase Agreement that the employees of BCBSMT (Frank and Belcher included) will be retained at a salary equal to or greater than the annual base salary of such retained employee, and, will become eligible to participate in all employee benefit plans sponsored by HCSC, including all retirement plans and benefit programs offered to similarly situated employees of HCSC. (CSI Stip. at ¶9, App. Ex. 3 at 57, Art. VI, Employee Matters.) Clearly, the Board of BCBSMT was aware that, if the Application were

approved, Frank and Belcher could potentially benefit from the more generous benefit programs offered to HCSC employees.

Furthermore, disclosure of conflicts of interest is one of numerous factors that the Commissioner must consider in determining whether the transaction is in the public interest. The Commissioner need not conclude that all factors in Mont. Code Ann. § 50-4-717(2)(c) are satisfied in order to conclude that the transaction is in the public interest. Thus, even though CSI staff expressed concerns over disclosure of indirect conflicts of interest, it has, given Applicants' satisfaction of the other statutory criteria, recommended that the Transaction be approved.

Dated this 2<sup>nd</sup> day of May, 2013.

  
W. William Leaphart  
Hearing Examiner

**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 <sup>2<sup>nd</sup></sup> day of May, 2013, to the following:

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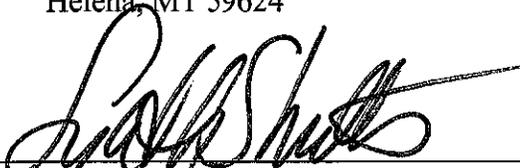
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