

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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)	
IN THE MATTER OF THE WINDING DOWN OF:)	
)	No. 217-2015-CV-00347
THE NEW HAMPSHIRE MEDICAL MALPRACTICE)	
JOINT UNDERWRITING ASSOCIATION)	
)	
_____)	

AFFIDAVIT OF PETER A. BENGELSDORF, SPECIAL DEPUTY COMMISSIONER, IN SUPPORT OF APPROVAL OF ASSUMPTION AGREEMENT WITH MEDPRO

I, Peter A. Bengelsdorf, depose and say:

1. I am the Special Deputy Commissioner of the New Hampshire Medical Malpractice Joint Underwriting Association (“NHMMJUA”) appointed by Roger A. Sevigny, Insurance Commissioner for the State of New Hampshire, as Receiver (“Receiver”) of the NHMMJUA. I submit this affidavit in support of the Receiver’s Motion for Approval of Assumption Agreement with MedPro (the “Approval Motion”). The facts and information set forth are either within my own knowledge gained through my involvement with this matter, in which case I confirm that they are true, or are based on information provided to me by others, in which case they are true to the best of my knowledge, information, and belief.

2. In light of the Act regarding the dissolution of the NHMMJUA, 2015 Laws 263 (“Act”), the Receiver identified the coverage-related obligations of the NHMMJUA, which consist of three components: (a) the obligations for incurred losses under NHMMJUA policies from the inception of the NHMMJUA in 1975 to the present,

including pending claims and incurred but not reported claims; (b) the obligations for the in-force book of NHMMJUA business, including the ongoing premium, loss, policy service, claim handling and commission obligations; and, (c) the contingent exposure to the NHMMJUA under structured settlements funded by annuities purchased by the NHMMJUA should any of the insurers that issued the annuities fail to pay amounts due.

3. On November 2, 2015, the Receiver moved for approval of an offering process for NHMMJUA coverage-related obligations. The motion sought approval of an offering process and engagement of Milliman, Inc., as consultant to the Receiver with respect to the offering process set forth in the Offering Process summary and the draft Request for Proposals (“RFP”) attached to the Receiver’s motion. The Court approved the Offering Process and the RFP by an Order Approving Offering Process for NHMMJUA Coverage-Related Obligations dated November 18, 2015.

4. Following the Court’s order, the Receiver executed the retention agreement with Milliman on November 30, 2015, and Milliman provided the Receiver’s RFP to over 20 potential bidders on December 4, 2015.

5. The Receiver received eight expressions of interest on or before December 22, 2015. These potential bidders subsequently executed the confidentiality and third party release agreement and the release letters regarding the NHMMJUA’s actuaries, Towers Watson, in accordance with the RFP. Working with Milliman, the Receiver made various policy and claim information available to the potential bidders starting on January 5, 2016. A number of the potential bidders asked questions on a weekly basis during January and early February, and the Receiver responded on a weekly

basis through February 12, 2016. The 145 questions and responses addressed a wide variety of issues, and they were made available to all potential bidders.

6. The deadline for submission of proposals was February 19, 2016. Seven proposals were received by the deadline. As set forth in the RFP, the Receiver evaluated the proposals considering the following:

- (a) the price for assuming the NHMMJUA coverage-related obligations;
- (b) the bidder's financial condition;
- (c) for the incurred losses and in-force business components, the bidder's experience in the medical malpractice insurance business, including in assuming and running off medical malpractice liabilities and claims;
- (d) for the incurred losses and in-force business components, the bidder's plans and ability to provide runoff services to the NHMMJUA policyholders; and
- (e) the completeness, clarity and quality of submission.

Proposals to assume all three components of the NHMMJUA coverage-related obligations were favored. Milliman assisted the Receiver in reviewing the proposals.

7. The Receiver first eliminated three of the bidders based principally on their financial rating (one bidder was rated BBB- by Standard and Poor's, a rating significantly lower than all the other bidders); the completeness of the proposals (two bidders did not make a proposal regarding the structured settlement contingent liability); price (one of the two bidders that did not bid on the contingent liability also made the highest priced proposal); and significant conditions (the other of the two non-comprehensive bidders required the creation of a multi-million dollar trust). The Receiver asked the four remaining bidders for clarifications of their proposals.

8. The Receiver then compared the four proposals, including making projected modifications to the proposed prices to reflect adjustments contained within some of the proposals for post-pricing date claim resolutions and premium. One bidder was eliminated because its price was several million dollars higher than the other three, which were relatively close in price. The Receiver chose among the three remaining proposals by looking to the financial strength rating (one bidder had a higher financial rating than the others), ongoing presence in the New Hampshire medical malpractice insurance market (one bidder does not currently participate in the New Hampshire medical malpractice insurance market), and reasonable deal terms. Price was not the sole determinative factor in selecting the bidder with which to negotiate, as the three final bidders' prices after adjustment were within a roughly \$1.3 million range.

9. As a result of this process, the Receiver selected MedPro to negotiate an assumption agreement. MedPro is an insurance company domiciled in Indiana that is licensed to transact insurance business in New Hampshire. MedPro is a subsidiary of Berkshire Hathaway. It has the highest financial strength ratings of all the bidders: AA+ from Standard and Poor's and A++ from AM Best. MedPro is also experienced in providing medical malpractice coverage and handling medical malpractice claims in New Hampshire. It presently insures over 400 providers in New Hampshire, including several hospitals, with respect to medical malpractice.

10. MedPro's proposed price was competitive: a total price of \$23 million, consisting of \$18 million for the incurred and in-force obligations and liabilities and \$5 million for the structured settlement contingent liabilities. This price will be reduced to reflect (a) open claims resolved and paid between February 1, 2016 and closing, and

(b) policies canceled prior to expiration between February 1, 2016 and closing. MedPro's price was between the prices proposed by the other two final bidders (\$22.1 million and \$26.9 million (the latter subject to anticipated reductions estimated to reduce it to approximately \$23.35 million)).

11. Over the past weeks, MedPro and the Receiver negotiated over the terms of an assumption agreement, and they have now agreed upon the Assumption Agreement attached as Exhibit A to this motion. The principal terms of the Assumption Agreement are described below. The substance of the agreement is that MedPro will assume, as its own direct obligations, the NHMMJUA Obligations (as defined) for a price of \$23 million (subject to certain adjustments). Agreement §§ 2.1, 2.2. The Agreement will only become effective upon the approval of the Court. Agreement §§ 1.1(f) and 7.1(c). If that approval is not obtained within 90 days of the date the Receiver's motion for approval is filed with the Court, then the Agreement will terminate automatically. Agreement §§ 6.2, 7.2. The Agreement is to close not more than 15 business days after the Effective Date. Agreement § 1.1(d).

12. The NHMMJUA Obligations to be assumed by MedPro are defined in Section 1.1(j) of the Agreement. They consist of (a) the obligations and liabilities of the NHMMJUA under Policies (as defined) issued from inception, (b) the obligations and liabilities of the NHMMJUA under in-force Policies, and (3) the contingent liability to the NHMMJUA should any annuity insurer fail to pay structured settlement amounts on the scheduled list of Annuities.

13. The historic and in-force Policies that are being assumed by MedPro are defined in Section 1.1(l) to be those listed on Schedules "C" and "D" to the Assumption

Agreement. These lists were provided by The Hays Group, Inc. (“Hays”), the company that has managed the NHMMJUA since 2005 (while Hays itself became involved in 2005, the same team has had responsibility for management of the NHMMJUA through other organizations since 1984). Hays has updated its historic policy list to include the policies expiring in 2016. That list is now Schedule “C”. The historical policyholder list was used as the basis for the earlier surplus distribution to policyholders from 1986 to 2012 approved by the Court. Upon due inquiry, the Receiver is not aware of any other policies issued by the NHMMJUA.

14. The annuities that present the contingent liability to the NHMMJUA that is being assumed by MedPro are listed on Schedule “A” to the Agreement. The NHMMJUA purchased other annuities to fund structured settlements as well, but those annuities do not present contingent liability to the NHMMJUA because they have already completely paid out, or because the settling claimants have released the NHMMJUA from obligations with respect to those annuities.

15. The NHMMJUA Obligations do not include the Excluded Claims as defined in Section 1.1(g) of the Agreement. The excluded claims include: (a) claims that were settled by the Receiver but not finalized as of MedPro’s January 31, 2016 pricing date (listed on Schedule “B”); (b) any open claims that were reported to the Receiver but not to MedPro; (c) claims arising out of annuities not on the Schedule “A” to the Agreement; (d) claims arising from the hardship grant program established pursuant to RSA 404-C:16, III; (e) non-coverage related claims arising out of or relating to the distribution of assets to policyholders or other creditors of the NHMMJUA or the resolution of the NHMMJUA receivership as contemplated under RSA 404-C: 17; (f)

claims arising from the Receiver's obligation to return tail coverage premium under RSA 404-C:15, II(e); and, (g) various types of claims that are not coverage obligations but relate to claims handling or other acts of the NHMMJUA prior to Closing.

16. These Excluded Claims are appropriately not included in the NHMMJUA Obligations to be assumed by MedPro because: (a) as of May 10, 2016, the Receiver has paid and closed all of the settled claims on Schedule "B"; (b) the Receiver is not aware of any open claims that were reported to the Receiver but not to MedPro; (c) the Receiver is not aware of any claims arising out of annuities not on Schedule "A"; (d) the Receiver is charged by the Act with establishing the hardship grant program; (e) matters arising from the ultimate distribution of NHMMJUA assets after the interpleader contemplated by RSA 404-C:17, III are not coverage obligations to be transferred; (f) the Receiver is charged by the Act with returning tail coverage premium, so these matters are not coverage obligations to be assumed; and, (g) after discussions with Hays, the Receiver is not aware of any claims regarding claims handling disputes or other categories of Excluded Claims. Such Excluded Claims are not coverage obligations of the NHMMJUA subject to being transferred; any such Excluded Claims will ultimately be foreclosed when the NHMMJUA's assets are interpled in this Court and the Receiver is discharged (if any Excluded Claims were to emerge before such interpleader and discharge, then the Receiver will address them).

17. Under the Assumption Agreement, as of Closing, the Receiver will transfer to MedPro all right, title and interest of the NHMMJUA to the Policies, and MedPro will assume the NHMMJUA Obligations (including the contingent obligation to pay structured settlement amounts funded by the Annuities) as its own direct obligations.

Agreement § 2.1. MedPro will succeed to all defenses that the NHMMJUA has with respect to the NHMMJUA Obligations. Id. The Receiver and NHMMJUA shall have no further interest or obligation for the NHMMJUA Obligations, except for the Excluded Claims. Id. MedPro will service and maintain the Policies and handle claims under the Policies. Id.

18. Under Section 2.2 of the Agreement, the Receiver will pay MedPro \$23 million as consideration for the assumption of the NHMMJUA Obligations. This price is subject to two potential adjustments to reflect events between the January 31, 2016 pricing date of MedPro's proposal and the closing of the transaction. First, if any of the open claims listed on Schedule "F" are resolved and paid by the Receiver during the period from January 31, 2016 to Closing for an amount less than the loss and loss adjustment expense reserve for the claim posted by the NHMMJUA as of January 31, 2016, the loss and post-January 31, 2016 loss adjustment expense paid for the claim are to be deducted from the price. If any of the claims are resolved for a payment that exceeds the January 31, 2016 loss and loss adjustment expense reserve for the claim, then the loss and post-January 31, 2016 loss adjustment expense will also be deducted from the price, up to an amount equal to 250% of the January 31, 2016 reserves, if MedPro has consented to the resolution (its consent may not be unreasonably withheld). Second, if any in-force policyholder as of January 31, 2016 listed on Schedule "D" cancels its policy prior to expiration but before the Closing, then the unearned premium is to be deducted from the price.

19. As of May 10, 2016, the Receiver has paid and closed one of the claims on Schedule "F", settled two others in principal, and obtained dismissals of three others.

The loss payments and post-January 31, 2016 loss adjustment expenses for those matters are expected to be deducted from the \$23 million price. There have also been 31 early cancellations of Policies listed on Schedule “D”, and the unearned premiums on those Policies will be deducted from the price. After these deductions, the price is expected to be approximately \$22.7 million. Other resolutions and cancellations may occur before the Closing, which will further affect the price. The schedules to be attached to the Transfer and Assumption Agreement to be executed at the Closing (Schedule “E”) will be updated and amended to reflect circumstances at the closing date.

20. Given the Receiver’s limited role and the statutory provisions for the ultimate dissolution of the NHMMJUA, interpleader of remaining funds pursuant to RSA 404-C:17, III, and discharge of the Receiver, the Agreement includes only limited representations and warranties by the Receiver concerning authority, validity and the right to transfer records. Agreement § 3.1. The Receiver disclaims any representations or warranties as to the scope of the NHMMJUA Obligations or the accuracy of information provided. Agreement § 3.2. The Receiver agrees to indemnify MedPro for any breach of the Receiver’s representations and for claims asserted against MedPro arising from the Excluded Claims. Agreement § 8.1. The Receiver’s indemnities are limited to one year, and MedPro’s recourse is limited to the assets of the NHMMJUA held by the Receiver. Agreement § 8.1. See also Agreement § 12.17.

21. MedPro in turn agrees to indemnify the Receiver against any breach of its representations for a period of one year. Agreement § 8.2. MedPro also agrees to indemnify the Receiver indefinitely against claims asserted against the Receiver arising

from MedPro's failure to discharge any of the obligations assumed under the Agreement.

Id.

22. As described above, the Receiver sought and received competitive bids, selected MedPro, and has now negotiated the Assumption Agreement with MedPro. The Receiver believes that the Assumption Agreement provides, on commercially reasonable terms, for the assumption of the coverage-related obligations of the NHMMJUA to provide continued protection for the NHMMJUA policyholders as well as providing for established obligations to claimants.

23. The Receiver believes that the limitations in the definition of NHMMJUA Obligations are commercially reasonable. Portfolio transfer transactions similar to this would typically involve warranties, representations and indemnities by which the assuming insurer would define the scope of the assumed obligations and protect itself against unexpected obligations by recourse to the original insurer. MedPro sought provisions to protect itself in various ways, including seeking warranties of the accuracy of information, excluding claims and incidents reported to the Receiver but not to MedPro, obtaining indemnity for Excluded Claims, obtaining a \$2.3 million escrow to back-up the Receiver's obligations, and defining the assumed policies by reference to a list.

24. In light of the role of the Receiver and the directive of RSA 404-C:17, III that the NHMMJUA's remaining assets be interpled, the NHMMJUA be dissolved, and the Receiver be discharged, the Receiver is not in a position to provide warranties, representations and indemnities, which presume that the NHMMJUA will continue to exist and have assets. The Receiver accordingly resisted providing warranties of the

accuracy of information, ambiguous exclusions, extensive and long-lasting indemnities, an escrow or a schedule of the NHMMJUA policies. MedPro receded on the warranty, escrow and lengthy indemnity in favor of a limited warranty and indemnity that is to last only a year. Agreement § 8.1.

25. However, the exclusion for claims and incidents not reported to MedPro and schedule of policies remained as the last items for negotiation. While Hays has a file of reported incidents (which MedPro has seen), the reporting obligations of insureds are not clear, and the term “incident” is not defined, so the language sought by MedPro presented a potential exclusion of uncertain extent. The Receiver accordingly sought to remove the reference to incidents and to specify that the claims of concern are the open claims. With respect to policies, the Receiver argued for a general assumption of policies without specification. MedPro insisted on an assumption limited to a list of NHMMJUA policies so that it would not be surprised by finding that the NHMMJUA had issued more policies of which MedPro was not aware.

26. These points were the subject of intense discussion, including final calls in which I participated with MedPro’s General Counsel. Ultimately, MedPro was willing to remove “incidents” and limit the exclusion to open claims that were reported to the Receiver but not to MedPro (the Receiver believes that all such claims have been reported) but only if the assumed policies were listed on a schedule. Hays had provided lists of historic policies and in-force policies that it was comfortable with (and which MedPro has), and the Receiver confirmed that Hays has updated its historic policy list to include the policies expiring in 2016, and that Hays is confident that the list includes all policies from 1984 (when the team that is now at Hays first started managing the business

– prior to that the list reflects records the team received from the previous manager) to 2016. The historical policyholder list was used as the foundational basis for the information compiled and used by class counsel to accomplish the earlier surplus distribution to policyholders from 1986 to 2012 previously approved by the Court. It is reasonable to assume given this and the unusually high success rate of the prior distribution (98.5%) that any “overlooked” policyholder would have spoken up at the time. In addition the Receiver’s counsel has worked cooperatively with previous class counsel (also proposed class counsel and counsel to numerous NHMMJUA policyholders) who has agreed to make the value-added policyholder contact database used in the prior distribution available to the Receiver to corroborate and cross-check the Receiver’s policyholder information. The Receiver believes the list is accurate, although the pre-1984 records may not be complete. In order to bring the matter to closure, the Receiver agreed to the policy schedule provided that “incidents” was removed from the exclusion. Subclause (2) of the definition of Excluded Claims now refers to “open claims” reported to the Receiver but does not refer to “incidents.” See Agreement § 1.1(g)(2). The definition of Policies identifies the Policies by reference to a list of historic policies (Schedule “C”) and a list of in-force policies as of January 31, 2016 (Schedule “D”). See Agreement § 1.1(l).

27. The definition of Excluded Claims is reasonable and consistent with the requirements of RSA 404-C:16, 17 because: (a) as of May 10, 2016, the Receiver has paid and closed all of the settled claims on Schedule “B”; (b) the Receiver is not aware of any open claims that were reported to the Receiver but not to MedPro; (c) the Receiver is not aware of any claims arising out of annuities not on Schedule “A”; (d) the Receiver is

charged by the Act with establishing the hardship grant program; (e) matters arising from the interpleader ultimate distribution of NHMMJUA assets are not coverage obligations to be transferred (the treatment of these matters in the Assumption Agreement has been reviewed by Nixon Peabody LLP, counsel for the prior class (and also counsel to numerous policyholders and proposed class counsel) who agrees it is reasonable); (f) the Receiver is charged by the Act with returning the tail coverage premium; and, (g) after discussions with Hays, the Receiver is not aware of any claims regarding claims handling disputes or other categories of Excluded Claims. In any event, such claims are not coverage obligations of the NHMMJUA subject to being transferred. (Any such claims will be foreclosed when the Receiver is discharged. If any were to emerge before discharge, then the Receiver will address them.)

28. The Assumption Agreement appropriately provides for the established obligations to claimants under Policies. It addresses open claims by providing for the Receiver to complete the settlements of claims settled in principle before the pricing date of January 31, 2016. Agreement § 1.1(g)(1) and Schedule “B”. It addresses other open claims by providing for payment by either the Receiver (who then receives a price adjustment) or MedPro. Agreement § 2.1, 2.2(a) and Schedule “F”. It provides for the established obligations to claimants with structured settlements (who have not had the settlements completely paid out or otherwise released the NHMMJUA) by providing “back-up” from the AA+ (S&P)/A++ (AM Best) rated MedPro for the annuities that are paying the settlements. Agreement § 2.1 and Schedule “A”. The Assumption Agreement provides that MedPro will pay the structured settlement amounts being funded by the Annuities in the event that the annuity insurer fails to do so. Agreement § 2.1.

29. The Receiver believes the Assumption Agreement is on commercially reasonable terms. It provides for the assumption of the NHMMJUA Obligations by MedPro and will permit the receivership to move forward in accordance with the Act. The Agreement provides for one-year indemnity by the Receiver for breaches of representations and for claims arising out of Excluded Claims. However, the representations are limited, and the Assumption Agreement is clear that MedPro does not assume Excluded Claims. Thus, there does not appear to be a significant risk of the indemnity coming into play. It was not possible to negotiate an agreement without some such protection for MedPro. Finally, given the need to finalize NHMMJUA taxes and related forms with the federal and state governments, the receivership will need to remain open for some time after closing to resolve the matters sufficiently to permit the interpleader of remaining assets and discharge of the Receiver, so providing MedPro with a limited one-year indemnity is reasonable.

30. In sum, the Receiver believes that the Assumption Agreement is commercially reasonable and will serve to protect the policyholders of the NHMMJUA as well as claimants to whom the NHMMJUA has established obligations. The Assumption Agreement was heavily negotiated, and any other bidder would be likely to have concerns about the extent of the assumption similar to those expressed by MedPro and to require similar protections. As noted, counsel for the proposed class (and to numerous policyholders and the prior class) with whom counsel for the Receiver have worked cooperatively, agrees the Assumption Agreement is reasonable and expects to assent to the Motion for Approval. The Receiver accordingly recommends that the Court approve the Assumption Agreement pursuant to RSA 404-C:16, II.

Signed under the penalties of perjury this 24 day of May, 2016.

Peter A. Bengelsdorf

Peter A. Bengelsdorf
Special Deputy Commissioner of the New Hampshire
Medical Malpractice Joint Underwriting Association

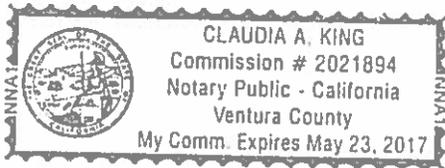
A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached and not the truthfulness, accuracy or validity of that document.

STATE OF CALIFORNIA
COUNTY OF VENTURA

On May 24, 2016 before me, CLAUDIA A. KING - NOTARY PUBLIC, personally appeared Peter A. Bengelsdorf, Special Deputy Commissioner of the New Hampshire Medical Malpractice Joint Underwriting Association, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature *Claudia A. King*
Signature of Notary Public