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In the Matter of the Plan of Conversion of
Medical Liability Mutual Insurance Company
and the Acquisition of Control of
Medical Liability Mutual Insurance Company
By National Indemnity Company

DECISION

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I. INTRODUCTION

This Decision is issued under the New York Insurance Law (the “Insurance Law”) on applications seeking approval of the conversion, demutualization, and proposed sale of Medical Liability Mutual Insurance Company, a mutual insurance company domiciled in New York (“MLMIC” or the “Company”) by its member policyholders, to National Indemnity Company (“NICO”), a stock insurance company domiciled in Nebraska that is a member of the Berkshire Hathaway Group, for cash consideration in the amount of \$2,502,000,000. Specifically, the relevant parties seek the approval of the Superintendent (the “Superintendent”) of the New York State Department of Financial Services (the “Department”) for:

- (1) MLMIC’s Plan of Conversion (the “Plan”), submitted to the Department on June 15, 2018, seeking to convert MLMIC from a mutual insurance company owned by its members to a stock insurance company (the “Demutualization”), along with an amended charter and by-laws of MLMIC and its name change to “MLMIC Insurance Company;” and
- (2) An application filed by NICO and its control persons, Berkshire Hathaway Inc. and Mr. Warren E. Buffett (together with NICO, the “Applicants”), dated June 12, 2018, seeking to acquire control of MLMIC (the “Acquisition Application”) in a transaction by which NICO would directly acquire 100% of the stock of MLMIC in exchange for \$2.502 billion in cash consideration to be distributed to Eligible Policyholders (as defined below) or their legal designees, resulting in MLMIC becoming a direct wholly-owned subsidiary of NICO.

The proposed Demutualization and the acquisition of control by NICO (the “Acquisition”) are interdependent transactions. The Demutualization is explicitly conditioned upon the closing of the Acquisition, pursuant to an Amended and Restated Acquisition Agreement between NICO and MLMIC dated February 23, 2018 (the “Acquisition Agreement”).

As set forth below, the Superintendent hereby approves both the Demutualization and the Acquisition Application. However, before such approvals can be effective, (i) the Plan must be submitted to a vote by the Record Date Policyholders,¹ and (ii) if, and only if, the Plan is approved by the policyholders as statutorily required, the parties must close the Acquisition by September 30, 2018 (unless the parties agree to extend the closing date). If these two requirements are not met, MLMIC will remain a mutual insurance company, as it is today, with no changes.

MLMIC has scheduled the special meeting of policyholders for September 14, 2018, pursuant to Insurance Law § 7307(i). Under Insurance Law 7307(j), the votes of two-thirds of the votes cast by the Record Date Policyholders represented at the meeting in person or by proxy in favor of the Plan are necessary for the adoption of the Plan. If the Record Date Policyholders do not approve the Plan, none of the transactions may proceed.

If the Record Date Policyholders approve the Plan and all closing conditions are met, the following steps shall occur, as described in further detail in the Plan § 6.3(c)-(f).

- (a) MLMIC will become a stock company named “MLMIC Insurance Company” with its new charter and bylaws;
- (b) A Certificate of Authority shall be issued by the Department to the new company;
- (c) All policyholder membership interests shall be extinguished;
- (d) MLMIC shall issue its stock and send 100% of the shares to the Conversion Agent;
- (e) NICO shall pay \$2.502 billion to the Conversion Agent;
- (f) The Conversion Agent shall send 100% of the MLMIC shares to NICO, at which point NICO will be the sole shareholder of MLMIC Insurance Company;
- (g) MLMIC Insurance Company shall publish notice of the Demutualization; and
- (h) The Conversion Agent shall distribute the \$2.502 billion purchase price to the Eligible Policyholders or their assignees pursuant to explicit written consents or assignments, except such amounts held in escrow pursuant to the objection and escrow procedure set forth in Schedule I of the Plan and as discussed further below.

In the event the transaction is closed, MLMIC Insurance Company shall remain a New York domestic insurer subject fully to the Insurance Law and related regulations and the Department’s supervision. As stated above, if either the policyholders do not approve the Plan

¹ Pursuant to Insurance Law § 7307(i), the policyholders entitled to vote on the Plan (the “Record Date Policyholders”) are those persons who were policyholders of MLMIC on the day preceding the MLMIC Board resolution required by Insurance Law § 7307(b) on which MLMIC’s application for permission to file a plan of conversion was based. MLMIC submitted such application to the Department on July 15, 2016, attaching a copy of a resolution adopted by its Board on that date. Accordingly, MLMIC’s policyholders as of July 14, 2016 are the Record Date Policyholders.

or the transaction is not closed, MLMIC will neither demutualize nor be acquired by NICO, and this Decision shall be rendered moot.

II. OVERVIEW

A. The Demutualization

Because MLMIC is a mutual insurer, in order for its member policyholders to sell it to NICO, MLMIC must first be converted from a mutual insurance company to a stock insurance company. MLMIC has proposed the Demutualization pursuant to the Plan, which was submitted to the Department on June 15, 2018. NICO proposes to acquire 100 percent of the stock of MLMIC immediately upon completion of the Demutualization (defined above as the “Acquisition” and collectively with the Demutualization, the “Sponsored Demutualization”). Upon completion of the Sponsored Demutualization, MLMIC would become a direct, wholly-owned subsidiary of NICO.

As required by Insurance Law § 7307(b)(3), the Department conducted a financial examination of MLMIC pursuant to an appointment dated August 10, 2016, and issued a report on examination dated September 21, 2017 (the “Examination Report”). In addition, pursuant to Insurance Law 7307(c), the Department engaged an independent consultant to conduct an appraisal of MLMIC and report to the Superintendent the fair value of MLMIC based on MLMIC’s then most recent statutory financial statement and any significant subsequent developments.

As required by Insurance Law § 7307(g), the Department held a public hearing on August 23, 2018 pursuant to notice dated June 20, 2018, at which interested parties testified. The Department also invited and received written comments from interested parties and the public until five days after the hearing, August 28, 2018. In rendering this Decision, the Department has reviewed and considered all comments received, as well as the entire record of this matter.

B. The Sponsored Demutualization

A mutual insurance company is owned by and operated for the benefit of its policyholders. A policyholder’s ownership interest in a mutual company is known as a “membership interest.” These membership interests provide policyholders with certain benefits, including the right to vote on matters submitted to a vote of members such as the election of directors, and the right to receive a distribution of profits earned by the mutual insurance company in the form of a dividend. Membership interests are not freely transferrable; they exist only in connection with a policyholder’s ownership of a policy.

When a demutualization occurs, membership interests in the mutual insurance company are converted to equity interests in the converted stock insurance company and eligible policyholders of the mutual insurance company thereby become shareholders of the converted stock insurance company. Under the Insurance Law, a plan of conversion is the operative document governing a demutualization, with such document subject to various procedural

requirements and the Superintendent's approval. In the case of a property/casualty insurer such as MLMIC, such approval is subject to the standards set forth in Insurance Law § 7307(h)(1).

1. Policyholder Consideration

The consideration paid to policyholders of a mutual insurer upon its demutualization involves converting membership interests into equity in the converted insurance company. Here, following the proposed demutualization, MLMIC proposes to sell to NICO all the stock it would otherwise issue to Eligible Policyholders upon the Demutualization. Thus, under the proposed Sponsored Demutualization, instead of receiving stock in the converted stock company, MLMIC's Eligible Policyholders will receive cash consideration.

Insurance Law § 7307(e)(3) expressly defines those persons who are entitled to receive the proceeds of the Demutualization as each person who had a policy "in effect"² during the three-year period preceding the MLMIC Board's adoption of the resolution (the "Eligible Policyholders"), and explicitly provides that each Eligible Policyholder's equitable share of the purchase price shall be determined based on the amount of net premiums timely paid on that Eligible Policyholder's eligible policy or policies as a fraction of the total of such net premiums paid on eligible policies.³ As the Plan explains, because the resolutions were adopted by the Board on July 15, 2016, pursuant to the Insurance Law, the three-year period for determining Eligible Policyholders is July 15, 2013 through July 14, 2016.

As described in further detail below, the Plan provides that the \$2.502 billion purchase price would be distributed to Eligible Policyholders or their designees, subject to certain payments being held in escrow based on objections by certain parties until disputes are resolved according to Schedule I to the Plan. The Department received oral testimony at the public hearing and written comments seeking clarification as to the methods by which MLMIC shall

² Under the Plan, a policy shall be deemed "In Effect" on a particular date if shown on MLMIC's records that the policy has been issued or coverage bound by MLMIC as of such date and such policy has not expired, been cancelled, non-renewed, or otherwise terminated (other than upon or following the expiration of its term); provided that, with respect to a policy that has expired, was cancelled, non-renewed or was otherwise terminated prior to July 15, 2013, for which an extended reporting period ("tail" coverage) was In Effect on or after July 15, 2013, such tail coverage shall not be considered to be a policy In Effect during the extended reporting period.

³ Insurance Law § 7307(e)(3) states, in pertinent part:

The equitable share of the policyholder in the mutual insurer shall be determined by the ratio which the net premiums (gross premiums less return premiums and dividend paid) such policyholder has properly and timely paid to the insurer on insurance policies in effect during the three years immediately preceding the adoption of the resolution by the board of directors under subsection (b) hereof bears to the total net premiums received by the mutual insurer from such eligible policyholders. In computing a policyholder's equitable share, no credit shall be given for any net premiums which result from an endorsement which is effective on or after the date of adoption of the resolution; except that credit shall be given for any net premiums resulting from an audit or retrospective premium adjustment which is billed within one hundred eighty days after such date, provided such premium is paid timely.

determine the proper parties to pay and the parties that are entitled to take advantage of the objection and escrow provisions in the Plan, discussed in greater detail below.

2. Record Date Policyholder Vote

Upon approval by the Superintendent, the Plan must be submitted to a vote of the Record Date Policyholders. The votes of two-thirds of all of the votes cast by the Record Date Policyholders represented at the meeting in person or by proxy are necessary for the adoption of the Plan.⁴ If the Plan is adopted upon such vote, the Superintendent, upon being satisfied that MLMIC Insurance Company will have at least the minimum capital and surplus required to be maintained for a newly organized domestic stock insurer transacting the same kinds of insurance, shall issue a new Certificate of Authority to MLMIC Insurance Company, thereby converting MLMIC into a stock insurer.⁵

By surrendering their membership interests as a result of the Sponsored Demutualization, MLMIC's policyholders would forfeit their ownership rights in MLMIC, including their rights to vote on matters that would be submitted to a vote of members of a mutual insurance company, the opportunity to receive any payment if MLMIC were sold again after the Sponsored Demutualization, the right to participate in any distribution of surplus, earnings and profits of MLMIC (including dividends), and the right to participate in meetings of members.

C. The Acquisition

Pursuant to Insurance Law § 1506, immediately following the Demutualization, NICO proposes to acquire all of MLMIC's capital stock to be issued for fixed cash consideration of \$2.502 billion. The Acquisition would result in MLMIC becoming a direct, wholly-owned subsidiary of NICO.

D. Charter and By-Laws

As required by Insurance Law § 7307(e)(1), MLMIC has submitted to the Department for approval an amended Charter and By-laws in accordance with Article 12 of the Insurance Law to reflect its Demutualization, including the removal of the word "Mutual" from its name.

III. **BACKGROUND**

A. MLMIC

Medical Liability Mutual Insurance Company ("Original MLMIC") and Hospital Underwriters Mutual Insurance Company were incorporated as mutual insurance companies under the laws of the State of New York in 1975 and 1976, respectively. In 1993, Hospital Underwriters Mutual Insurance Company changed its name to Healthcare Underwriters Mutual Insurance Company ("HUM"). In 2001, Original MLMIC was merged with and into HUM and the surviving New York domiciled mutual insurance company became MLMIC.

⁴ Insurance Law § 7307(j).

⁵ Insurance Law § 7307(m).

MLMIC is licensed to write business in nine states but only currently writes business in New York State. MLMIC writes mostly medical malpractice insurance (approximately 99.4% in 2017) and a small percentage of other liability insurance (approximately 0.6% in 2017). MLMIC wholly owns MLMIC Services, Inc. and HUM Marketing Group, Inc., each domiciled in New York State. The Examination Report provides further details about MLMIC.

B. The Proposed Transaction

Based on the record, including the testimony and written statements by Dr. James Reed, Chairman of MLMIC's Board of Directors, and Mr. Edward J. Amsler, Chief Executive Officer of MLMIC Services, Inc., a wholly-owned subsidiary of MLMIC, and Vice President and Assistant Treasurer of MLMIC, this transaction originated and proceeded as follows.

In September of 2015, the Berkshire Hathaway Group ("Berkshire") approached MLMIC about a possible acquisition of MLMIC by an affiliate of Berkshire, the Medical Protective Company ("MedPro").⁶ On October 6, 2015, MLMIC's executive officers apprised MLMIC's executive committee of this initial expression of interest, and MLMIC's executive committee determined not to pursue it due to concerns about potential changes to the operations of MLMIC following the proposed sale. Specifically, under the initially proposed transactions, MLMIC would have been managed by MedPro instead of the leadership MLMIC's policyholders had selected. Also, MedPro is a national carrier, while MLMIC is a New York admitted carrier with a mission of serving New York policyholders.

Subsequently, Berkshire revised its expression of interest to propose NICO as the purchaser with MLMIC continuing to operate as a separate New York insurer as presently operating with existing management. On October 14, 2015, this expression of interest was conveyed to MLMIC's executive committee, who voted unanimously to pursue the discussions further. MLMIC's executive officers continued discussions with Berkshire, keeping MLMIC's executive committee apprised of developments at meetings held on October 27, November 4, and December 2, 2015. On December 9, 2015 and December 16, 2015, the full MLMIC Board met to discuss the expression of interest. Dr. Reed testified that he was a member of the MLMIC Board on December 16, 2015 when the Board voted unanimously to pursue the revised expression of interest from Berkshire as being in the best long-term interest of MLMIC's policyholders.

Thereafter, Berkshire and MLMIC negotiated the terms of the acquisition, including a formula for determining the amount of consideration to be paid by NICO as "Tangible GAAP Book Value," a defined term,⁷ plus \$100 million, the precise amount to be estimated at closing

⁶ Berkshire and MLMIC were previously acquainted in that, on December 31, 2011, MedPro acquired from MLMIC its wholly-owned subsidiary, Princeton Insurance Company, a medical professional liability insurer operating in New Jersey.

⁷ In the initial Acquisition Agreement dated July 15, 2016, "Tangible GAAP Book Value" was defined as follows: "as of any date the tangible GAAP book value of MLMIC calculated in accordance with the Closing Statement Methodologies [as defined] as of such date." By the initial terms, MLMIC was to deliver an estimated closing statement to NICO no later than five business days prior to the closing, with a post-closing adjustment based on a

and finally determined post-closing by MLMIC and NICO. Berkshire then prepared a non-binding letter of intent, which was reviewed and approved by MLMIC's executive committee and Board on February 3, 2016 and February 10, 2016, respectively, following presentations by its legal counsel on how the proposed transaction would proceed under the Insurance Law. On March 16, 2016, the Board heard a presentation from an independent financial advisor, Keefe, Bruyette, & Woods, Inc. ("KBW"), regarding MLMIC's financial value. Mr. Amsler explained in his written statement:

KBW's analysis included, among other considerations, a discounted cash flow analysis based on projected future earnings of MLMIC provided to KBW by MLMIC, a review of precedent merger and acquisition transactions involving medical professional liability companies, a review of precedent conversions of New York domestic mutual insurance companies and an analysis of certain market statistics of a comparable public company.

Following the presentation, the Board concluded that Berkshire's offer was within a range of acceptable values. Berkshire and MLMIC then began negotiating the Acquisition Agreement and a plan of conversion to convert MLMIC from a mutual to a stock insurance company that would be acquired by NICO in exchange for cash consideration. On July 15, 2016, after reviewing the final Acquisition Agreement and draft plan of conversion, the MLMIC Board voted unanimously to approve the acquisition agreement and for MLMIC to enter into the proposed transaction with NICO. The same day, MLMIC announced the proposed transaction publicly and filed an application with the Department to request permission to convert MLMIC to a stock company.

C. Requirements for the Demutualization

The Insurance Law requires that, before a plan of conversion can become effective, it must be adopted by no less than a majority of the mutual insurer's board of directors,⁸ approved by the Superintendent,⁹ and approved by a vote of at least two-thirds of all votes cast by policyholders entitled to vote.¹⁰ Approval by the board of directors is the prerequisite to consideration by the Superintendent, which is in turn a prerequisite to a policyholder vote.

Upon receipt of the Board resolution and the application for a demutualization, the Insurance Law requires the Superintendent to order an examination of the mutual insurer pursuant to Insurance Law § 310, as of the last day of the period covered in the insurer's latest filed statement.¹¹ The Superintendent is also required to appoint one or more qualified disinterested persons to appraise and report to the Superintendent the fair market value of the

closing statement delivered within seventy-five calendar days after the closing, with sixty days for NICO to evaluate it or submit a dispute notice, followed by a resolution process.

⁸ Insurance Law § 7307(e).

⁹ Insurance Law § 7307(h).

¹⁰ Insurance Law § 7307(j).

¹¹ Insurance Law § 7307(b)(3).

mutual insurer and, to the extent necessary, its affiliates, on the basis of its latest filed statement, and of any significant subsequent developments.¹²

After receiving the examination report and the appraisal report, the Superintendent is authorized to grant or deny permission to the mutual insurer's board of directors to submit a plan of conversion.¹³ The Insurance Law requires that the plan of conversion include the following items: (1) the proposed charter and by-laws of the insurer as a stock corporation; (2) the manner of treating a holder of a debt instrument subject to Insurance Law § 1307 (*i.e.*, a surplus note holder), if any; (3) the manner and basis of exchanging the equitable share of each eligible mutual policyholder for securities or other consideration, or both, of the stock insurer into which the mutual insurer is to be converted and the disposition of any unclaimed shares; (4) the number of voting common shares proposed to be authorized for the stock insurer, their par value, and the price at which they are to be offered; and (5) any other information requested by the Superintendent.¹⁴

Before approving a plan of conversion, the Superintendent is required to hold a public hearing pursuant to Insurance Law § 7307(g). After such public hearing, the Superintendent may approve the plan as submitted, refuse to approve the plan, or request modification of the plan before granting approval. The Superintendent is authorized to approve such plan unless the Superintendent finds that the plan violates the Insurance Law, is inconsistent with law, or is not fair and equitable or in the best interests of the policyholders and the public.¹⁵

1. MLMIC Board Action and Application for Permission to File a Plan of Conversion

On July 15, 2016, MLMIC filed with the Department an application for permission to file a plan of conversion, attaching a MLMIC Board resolution in support, pursuant to Insurance Law § 7307(b). The July 15, 2016 resolution of MLMIC's Board stated its determination that the Sponsored Demutualization was in the best interest of the MLMIC policyholders and the public, for the following reasons:

- "Such affiliation will help ensure the continuity of [MLMIC]'s medical professional liability insurance and other business, will enhance the competitiveness of [MLMIC] and will generate efficiencies and opportunities for improved financial performance;
- [MLMIC] will become a member of a group which includes other insurers that specialize in providing liability insurance coverage to healthcare providers. The affiliation will broaden the healthcare related product offerings of the Berkshire Hathaway Group and provide additional healthcare contacts and insights for [MLMIC];
- Such affiliation will provide [MLMIC] with greater flexibility to obtain capital as compared to the current mutual insurance company structure, will enhance

¹² Insurance Law § 7307(c).

¹³ Insurance Law § 7307(d).

¹⁴ Insurance Law § 7307(e).

¹⁵ Insurance Law § 7307(h)(1).

[MLMIC]'s financial strength, and will provide [MLMIC] with greater resources to back its obligations to policyholders and to underwrite additional business, including by providing it with the opportunity to obtain an A.M. Best rating;

- Such affiliation will provide [MLMIC] with increased flexibility to support the growth of existing product lines and to take advantage of investment and acquisition opportunities as they may arise; and
- Such affiliation will be a strategic fit, matching the compatible visions of the future of the [MLMIC].”

2. The Department's Review of the Proposed Demutualization

Under Insurance Law § 7307(b), unless the Superintendent finds that: (A) the board resolution is defective; (B) the proposed conversion is contrary to law or is not in the best interests of the policyholders or the public; or (C) the mutual insurer's surplus to policyholders is less than the minimum capital and surplus required to be maintained for a newly organized stock insurer transacting the same kinds of insurance, the Department is to proceed with an examination and appraisal pursuant to Insurance Law §§ 7307(b) and (c). Upon review of the application, the MLMIC Board resolution and MLMIC's financial statement as of June 30, 2016, the Superintendent did not find that any of the preventive criteria in Insurance Law § 7307(b) was met. Accordingly, the Superintendent ordered an examination of MLMIC as of June 30, 2016, notifying MLMIC on August 22, 2016. In addition, in accordance with Section 7307(c) of the Insurance Law, on February 1, 2017, the Department commenced a bid solicitation and interview process to select a consultant to conduct an independent appraisal of MLMIC based on MLMIC's most recent financial statement and any significant subsequent developments. The Superintendent thereafter appointed an independent firm, Ernst & Young Investment Advisers LLP (“Ernst & Young”), as a consultant to report to the Superintendent on the fair market value of MLMIC. This appointment was pursuant to a letter agreement dated July 14, 2017, agreed and accepted by MLMIC on July 24, 2017, and agreed by the Department on July 26, 2017.

As part of the examination and appraisal process, the Department reviewed the parties' acquisition agreement including the provision stating that the purchase price would be determined post-closing. Section 7307 of the Insurance Law requires approval by the Superintendent of the plan of conversion with such approval including a determination that the purchase price is fair and equitable, as well as approval by a vote by the Record Date Policyholders. Because each of these steps must occur before the closing, the Department informed the parties that the purchase price must be a fixed sum prior to these approvals.

In response, and having considered changes to New York law regarding the statute of limitations for certain medical malpractice claims, MLMIC and NICO negotiated the cash amount to be paid by NICO. On February 23, 2018, the MLMIC Board voted unanimously to approve the Acquisition Agreement, as amended and restated, pursuant to which the cash amount was revised to provide fixed cash consideration of \$2.502 billion. In addition, the termination date under the Acquisition Agreement was extended from June 30, 2018 to September 30, 2018.

Following months of work evaluating MLMIC's financial condition and value, Ernst & Young submitted its 60-page valuation analysis to the Superintendent on May 18, 2018 (the "Valuation Report"). After explaining in detail the information reviewed and conducting multiple valuation methodologies, the Valuation Report concludes that the estimated total equity fair market value of MLMIC as of March 23, 2018 ranges from \$2.3 billion to \$2.7 billion. In addition, Ernst & Young submitted a fairness opinion to the Superintendent on August 13, 2018 (the "Fairness Opinion"), concluding that "the consideration to be received by the Eligible Policyholders, as a group, in exchange for their policyholder membership interests as a result of the Reorganization is fair, from a financial point of view."

Following receipt by the Superintendent of the Examination Report as required by Insurance Law § 7307(b) and the Valuation Report as required by Insurance Law § 7307(c), Insurance Law § 7307(d) provides that the Superintendent shall decide whether to grant permission to MLMIC to file a plan of conversion. On May 22, 2018, the Superintendent granted such permission to MLMIC to file an application with the Superintendent for approval of a plan of conversion in accordance with Insurance Law § 7307(d). On May 31, 2018, the MLMIC Board unanimously adopted a plan of conversion, including its exhibits and schedules. On June 15, 2018, MLMIC's officers revised that plan of conversion to be the Plan in its current form. Dr. John Lombardo, President of MLMIC, certified the resolutions adopted by the MLMIC Board on May 31, 2018 that authorized the officers of MLMIC to make such further revisions. MLMIC filed the Plan with the Department on June 15, 2018.

On June 4, 2018, the Department made technical corrections to the Examination Report and provided an Amended and Restated Examination Report of MLMIC as of June 30, 2016 to the Board pursuant to Insurance Law § 311. Dr. John Lombardo, President of MLMIC, certified on June 5, 2018 that each Director of MLMIC had signed a statement that s/he received and read the Amended and Restated Examination Report made available to MLMIC on June 4, 2018 and that such statements were retained in MLMIC's records in compliance with § 312(a) of the Insurance Law. The Amended and Restated Examination Report is posted on the Department's website and indicates that MLMIC had a policyholder surplus of \$1,865,459,468 as of June 30, 2016.

On June 12, 2018, the Applicants filed the Acquisition Application.

3. The Public Hearing

The Department held a public hearing on August 23, 2018, pursuant to published notice in the June 20, 2018 edition of the New York State Register and on the Department's website, along with a link to the Examination Report and the Valuation Report. In addition, on June 21, 2018, MLMIC published notice of the public hearing and a summary of the Plan in The Buffalo News, the Times Union and The New York Post, which are daily newspapers distributed in the United States, including in the borough of New York, the county in which MLMIC has its principal office, and in New York City and Buffalo, the two largest cities in New York State in which MLMIC has underwritten insurance within the five years preceding the date of the adoption of the resolution to demutualize. On July 10, 2018, MLMIC submitted affidavits to the Department evidencing such publication. On June 22, 2018, pursuant to Insurance Law

§ 7307(g), MLMIC mailed notice of the public hearing, a Policyholder Information Statement describing the Plan, and a copy of the Plan, to the Record Date Policyholders. Instructions for registering to attend the public hearing and for submitting comments regarding the Plan to the Department by mail or e-mail were included in these notices.

The Superintendent finds that adequate notice was provided to MLMIC's policyholders and the public of the public hearing.

The Superintendent convened the public hearing on August 23, 2018 in the Department's offices in New York, New York. Excluding Department personnel, 64 individuals registered to attend the public hearing, and 51 individuals attended. Eight interested parties requested to speak, and all such requests were granted. The Superintendent heard testimony, and received written testimony, for all individuals who requested to be heard. In addition, the Department has received numerous written comments from other interested persons. Notably, no person has submitted a request that the Superintendent disapprove the Plan. As discussed below, several comments have been received with respect to the amount and distribution of the cash consideration of the transaction.

At the hearing, testimony was presented by two representatives of MLMIC, one representative from MLMIC's actuarial firm, and one representative of NICO, followed by testimony by eight interested parties. After receiving such testimony, the Superintendent invited any other interested parties present who wished to be heard to do so; no one accepted this invitation. The Superintendent concluded the public hearing by reminding all attendees that the public comment period would remain open for five additional days, until August 28, 2018.

MLMIC's two witnesses, Dr. Reed and Mr. Amsler, testified in favor of the Sponsored Demutualization, discussing, among other things, the background of the transaction, the reasons that MLMIC's Board of Directors decided to pursue the Demutualization, the business rationale for agreeing to the acquisition by NICO, the bases for the agreement to the amount of cash consideration and other transaction terms, and MLMIC's support of NICO's Acquisition Application to acquire control of MLMIC.

Mr. Thomas Ryan, Principal and Consulting Actuary at Milliman, Inc., testified and submitted a written statement. Mr. Ryan testified that he has been a consulting actuary to MLMIC for over 20 years and has previously provided actuarial opinions regarding the adequacy of MLMIC's reserves, which he concluded for year-end 2017 "make a reasonable provision for MLMIC's future obligations." Mr. Ryan stated:

The Conversion and Acquisition will not impact the loss and loss adjustment expense reserves carried by MLMIC or its surplus. Therefore, in my actuarial opinion, and consistent with my findings for the year ended December 31, 2017, the Conversion and Acquisition will not adversely affect MLMIC's ability to meet its ongoing obligations. In my actuarial opinion, after the Conversion and Acquisition, MLMIC will remain well-capitalized and will be able to continue to pay claims.

Mr. Ryan also testified that he examined the loss portfolio transfer reinsurance and quota share reinsurance transactions and the proposed extraordinary dividend to NICO, and concluded that these “will not negatively affect MLMIC policyholders because MLMIC will continue to be well-capitalized and will be able to continue to pay claims.” Mr. Ryan also testified that because NICO’s liability under the loss portfolio transfer reinsurance agreement is unlimited, the acquisition by NICO provides additional protection that MLMIC does not currently have against any adverse reserve development, which would otherwise negatively impact MLMIC’s surplus.

Mr. Bruce Byrnes, Vice President and Senior Counsel of NICO, testified in support of the Acquisition. Mr. Byrnes explained the background of the transaction, discussed competition in the New York medical malpractice insurance market, and explained that the fixed sum of \$2.502 billion documented in the Acquisition Agreement on February 23, 2018 constitutes the amount of consideration determined by applying the formula in the original Acquisition Agreement (Tangible GAAP Book Value plus \$100 million) as of December 31, 2017. Mr. Byrnes noted “[p]ractically that has actually worked against us because the tangible GAAP book value at MLMIC has actually decreased since December 31, 2017, at least as of June 30, 2018.”

Following this testimony, eight witnesses testified, including physicians and representatives of medical groups and hospitals. While some of these witnesses raised questions about the amount and payment mechanism for the transaction consideration (discussed further below), no witnesses recommended disapproval of the transaction.

IV. THE SUPERINTENDENT APPROVES THE DEMUTUALIZATION AND THE ACQUISITION APPLICATION

A. Legal Standards for the Demutualization

Insurance Law § 7307(h)(1) authorizes the Superintendent to approve the Plan if it does not violate the Insurance Law, is not inconsistent with law, is fair and equitable, and is in the best interests of the policyholders and the public. The Superintendent has determined that each of these elements is met and hereby approves the Demutualization.

1. The Plan Does Not Violate the Insurance Law

As set forth above, the Superintendent finds that MLMIC has complied with the applicable provisions of Insurance Law, including, without limitation, § 7307, which governs the adoption of the Plan, the issuance of certain notices and materials to policyholders, and the publication of notice. Accordingly, the Superintendent determines that the Plan does not violate the Insurance Law.

2. The Plan Is Not Inconsistent with Law

As set forth above, the Superintendent has reviewed the Plan and determines that it is not inconsistent with law.

3. The Transaction Is Fair and Equitable

Considering all of the testimony and information available to the Department, the Superintendent concludes that the transaction, including the consideration in the amount of \$2.502 billion, is fair and equitable.

First, the Department has determined that the transaction price was negotiated at arm's length between MLMIC and NICO and was considered by the MLMIC board and executive committee in a fair and equitable manner. The testimony of MLMIC's and NICO's witnesses confirmed the arms-length nature of the negotiations, as well as the MLMIC Board's consideration of the transaction. Specifically, MLMIC engaged in negotiations with Berkshire for the acquisition of MLMIC by NICO in late 2015 and early 2016, after MLMIC rejected a prior expression of interest by Berkshire. These negotiations were followed by the execution of a non-binding letter of intent that was approved by MLMIC's executive committee on February 3, 2016 and by MLMIC's Board on February 10, 2016. MLMIC also engaged KBW, which gave a presentation on March 16, 2016 to MLMIC's Board that included discussion of the value of MLMIC. As Mr. Amsler testified, KBW's presentation included an analysis of the financial terms of the proposed agreement between MLMIC and NICO, information on the medical professional liability industry, and an analysis of the value of MLMIC. KBW included a discounted cash flow analysis, a review of precedent acquisitions of medical professional liability companies, a review of precedent demutualizations, and an analysis of market statistics of a comparable public company. Mr. Amsler testified that, following KBW's presentation, MLMIC's Board concluded that NICO's proposed purchase price formula was within a range of fair values. The record also demonstrates that MLMIC's Board took into account other considerations, including the company's commitment to its policyholders, in its consideration of the transaction (and rejection of a prior proposal).

Second, the amount of the transaction consideration is fair and equitable. In addition to the company's decision-making on the issue, the Department's independent consultant, Ernst & Young, which was retained pursuant to Insurance Law § 7307(c), conducted a thorough financial valuation based on MLMIC's "latest filed annual or quarterly statement, and of any significant subsequent developments." The 60-page Valuation Report sets forth the extensive information reviewed by Ernst & Young and the breadth of its valuation process and analysis. Consistent with the Insurance Law, Ernst & Young utilized MLMIC's December 31, 2017 balance sheet and also considered MLMIC's March 23, 2018 revised analysis of the effect on MLMIC's reserves of the then recent changes in New York law regarding the statute of limitations for certain medical malpractice claims. Ernst & Young obtained supplemental information from MLMIC in connection with that update, including MLMIC's balance sheet as of February 28, 2018.

As explained in detail in the Valuation Report, Ernst & Young considered four separate valuation methods, commonly accepted in the industry, in arriving at its opinion: the "net asset value" method, which measures the value of a company based on the difference between its assets and liabilities; the "discounted cash flow" method, which measures the value of a company based on the present value of future cash flows; the "guideline public company method," which is based on current public company data, a method limited in the current case

due to the absence of comparable public companies; and the “guideline transaction method,” which measures the value of the company based on transaction multiples in comparable transactions. The Valuation Report sets forth Ernst & Young’s opinion as to the range of fair values for each method as of March 23, 2018, and explains the limitations of the data as relevant to its analysis. Applying both quantitative and qualitative analyses, Ernst & Young concluded that the range of fair values for MLMIC is between \$2.3 billion and \$2.7 billion, which puts the purchase price of \$2.502 billion in the middle of the range. Furthermore, Ernst & Young provided the Fairness Opinion to the Superintendent, in which Ernst & Young concluded that the transaction and the \$2.502 billion purchase price is fair from a financial point of view. As the Insurance Law provides, the Valuation Report and Fairness Opinion were prepared independently for the Superintendent’s review of this proposed transaction. Ernst & Young’s conclusions support the fairness of the transaction.

Third, there is no record evidence that any third party is willing to pay more than \$2.502 billion for MLMIC, or that that value is not fair to policyholders. In fact, the overwhelming number of commenters support the transaction, even those that seek clarification regarding the payment of the purchase price. Moreover, a comparison of MLMIC’s financial statements as of December 31, 2017 and as of June 30, 2018 indicates that MLMIC’s surplus increased by \$106,770,280 from \$2,204,626,108 to \$2,311,396,388. This increase represents an approximately 4.62% change in surplus. The Department finds no basis for questioning either Ernst & Young’s conclusions or the MLMIC’s Board determination as to the fairness of the purchase price. Furthermore, the Plan sets forth a process for the payment of the cash consideration, consistently under the Insurance Law, as well as additional financial and other benefits from the transaction that render it fair and equitable.

Fourth, Insurance Law § 7307(h)(1) does not require the Superintendent to determine that MLMIC negotiated the best possible price at the time the parties agreed to the transaction. Rather, as explained, Insurance Law § 7307(h)(1) requires, among other things, that the Superintendent consider whether the Plan is “fair and equitable.” Insurance Law § 7307(c) sets forth the manner by which the Superintendent shall make this determination, which includes consideration of an appraisal of an independent consultant, an examination of MLMIC by the Department, and a public hearing. In rendering this Decision, the Superintendent has considered all relevant information. The Superintendent concludes that the amount of the purchase price is fair and equitable to the policyholders, and the Superintendent concludes that the transaction as set forth in the Plan is fair and equitable.

For all of these reasons, the Superintendent concludes that the Plan is fair and equitable.

4. The Transaction Is in the Best Interests of the Policyholders

The Superintendent also concludes that the transaction is in the best interests of policyholders of MLMIC.

As an initial matter, Eligible Policyholders will receive substantial consideration in exchange for their membership interests, well in excess of three years of premiums paid. Although Insurance Law § 7307(e)(3) determines those policyholders who are eligible to receive

the transaction consideration, the Superintendent concludes that the transaction is in the best interests of all MLMIC policyholders.

The record demonstrates that MLMIC's financial condition will be strengthened by its acquisition by the Berkshire Hathaway Group, an affiliation that should enhance the financial strength of MLMIC and may generate efficiencies and opportunities for improved financial performance. At present, MLMIC is owned by its policyholders. While the Department strongly believes that mutual insurance companies provide great benefits to their policyholders and the Department encourages the mutual form of organization, it also is the case that a mutual insurance company does not have equity stockholders providing access to capital that equity owners can provide. To be clear, not every stock corporation is more beneficial than a mutual insurance company. Here, however, by this transaction, policyholders will benefit by having a financially strong equity owner, which will secure MLMIC's continuing ability to service New York policyholders and pay claims to New Yorkers as they come due. In fact, this transaction includes a number of components that strengthen MLMIC, and therefore benefit its policyholders. For example, the loss portfolio transfer agreement between MLMIC and NICO (which covers all MLMIC's prior business and has no liability limit by NICO) and the quota share reinsurance agreement among MLMIC, NICO and NICO's affiliate National Liability & Fire Insurance Company, will provide significant reinsurance with substantial collateral to support MLMIC's payment of claims on an ongoing basis. Further, NICO has committed to the Department that it will maintain sufficient capital in MLMIC to maintain a level of risk based capital to the satisfaction of the Department, further benefitting policyholders.

The Superintendent concludes that furthering the ability of MLMIC's policyholders to continue to renew policies from MLMIC as a well-regulated New York domestic insurer, with MLMIC's enhanced financial strength to pay claims as a result of the Acquisition Agreement, is in the best interests of policyholders.

5. The Transaction Is in the Best Interests of the Public

The Superintendent also concludes that the transaction is in the best interests of the public.

MLMIC is the largest writer of medical malpractice insurance in New York State, writing approximately 26% of the premium in New York in 2017. In 2017, New York's 12 domestic insurers, including MLMIC, wrote approximately 55% of the premium, while 42 foreign insurers (domiciled out-of-state, but licensed in New York) wrote 6% of the premium, and 40 risk retention groups ("RRGs") and 39 excess lines insurers wrote 39% of the premium. To the extent New York's medical malpractice market is challenged, it is so because of the increase in writing by RRGs and excess lines insurers that elude much of state regulation and oversight. A policyholder electing to purchase a policy from an RRG or an excess lines insurer loses many critical protections that it otherwise would have by obtaining a policy from an authorized insurer. For example, the level of capital in an RRG or excess lines insurer is not regulated by the Department, nor is a policyholder or claimant of one of these entities protected by the Department's oversight of premiums and reserves. Moreover, when an RRG fails (which has happened), policyholders do not have the benefit of the state guaranty fund that policyholders

and claimants of admitted insurers do. Therefore, the public, which includes claimants and policyholders, is best protected when medical malpractice coverage is purchased from the admitted market rather than from RRGs or excess lines.

An integral part of this transaction is that MLMIC will remain an admitted New York carrier going forward, with a new, financially strong shareholder. As the testimony indicated, a prior offer was rejected by the MLMIC executive committee because it may have changed MLMIC's dedication to New York's policyholders going forward. With the additional financial strength to be provided by the sponsor of this Sponsored Demutualization, MLMIC will continue to be an admitted carrier regulated by the Department and will be in a stronger financial position. This benefits all medical practitioners, including those that are not MLMIC policyholders but continue to benefit from a competitive admitted medical malpractice market. It also benefits potential claimants of MLMIC policyholders, who will have the benefit of the enhanced financial strength of the company insuring their covered claims. Moreover, a stronger admitted insurer better protects the state's guaranty fund into which all property/casualty insurers contribute when an insurer fails. As a result, this transaction, as structured, is in the best interests of the public.

The Superintendent has considered that Berkshire owns another insurance company, MedPro, which writes medical malpractice insurance coverage in New York. The testimony indicates that in 2017, MedPro wrote 10% and MLMIC wrote 26%, for a total of 36% of New York's medical malpractice insurance market. While the Department disfavors any increase in concentration in any market, the Department notes that, in 2008, MLMIC wrote 40% of New York's market, and that, currently, there is significant competition in the market. Further, at the hearing, Mr. Byrnes testified on behalf of NICO and Berkshire that "[MLMIC] will continue to operate in the marketplace under the direction of its current management team and Board of Directors. It will also operate independently of MedPro and any other Berkshire Insurance subsidiary." In fact, MLMIC's independence was a key element of the MLMIC Board's consideration of this transaction.

It is the Department's considered view that New York's admitted medical malpractice market must remain competitive. While the Department encourages competition, it does not choose or prefer carriers for policyholders and nothing in this Decision may be interpreted otherwise. By this Decision, the Superintendent concludes, based upon commitments received, that the Sponsored Demutualization will not negatively affect competition in New York's medical malpractice market.

Importantly, following the Sponsored Demutualization, MLMIC will remain a New York domestic insurer, and thus MLMIC's policyholders and potential claimants will continue to have the full benefit of New York State's regulation of MLMIC.

For all the above reasons, the Superintendent concludes that the transaction is in the best interests of the public.

B. Legal Standards for the Acquisition

1. The Acquisition Application

The Plan (including the Demutualization) is conditioned upon closing the Acquisition pursuant to Section 6.3(b) of the Plan. NICO proposes to acquire control of MLMIC pursuant to an Acquisition Agreement dated February 23, 2018.

According to the Acquisition Application, Berkshire Hathaway, Inc., the parent company of Berkshire, is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. The stock of Berkshire Hathaway, Inc. is traded on the New York Stock Exchange. Berkshire Hathaway, Inc. is a holding company owning subsidiaries that engage diverse business activities including insurance and reinsurance, freight rail transportation, utilities and energy, finance, manufacturing, services and retailing.

NICO is licensed in 47 states and the District of Columbia and is an eligible excess lines insurer and an accredited reinsurer in New York, Massachusetts and New Jersey. NICO is part of the Berkshire Hathaway Primary Insurance Group, and also writes reinsurance as part of the Berkshire Hathaway Reinsurance Group. NICO underwrites special risk and commercial insurance on a primary basis and underwrites specialized reinsurance covers for primary insurers and reinsurers. NICO is the largest member of the Berkshire Hathaway Group of companies.

Warren E. Buffett is an individual residing in Omaha, Nebraska and is Chairman and Chief Executive Officer and a shareholder of Berkshire Hathaway, Inc.

The Acquisition Agreement includes three material conditions to closing: (1) a loss portfolio reinsurance transaction between MLMIC and NICO pursuant to which MLMIC will cede to NICO all of its existing liabilities as of the Closing in exchange for a transfer of assets of about \$2.977 billion (as of June 30, 2018), increasing MLMIC's policyholder surplus by \$20 million; (2) an extraordinary dividend to NICO in the amount of \$1.905 billion, an amount that was reduced to the Department's satisfaction and is based on the entirety of the transaction and commitments received; and (3) a quota share reinsurance agreement pursuant to which MLMIC would cede 85% of its post-closing business to NICO and its affiliate National Liability & Fire Insurance Company, with respective interest and liabilities of 75% and 25%. The loss portfolio transfer, the extraordinary dividend, and the post-closing 85% quota share treaty are all subject to approval of the Superintendent as part of the Plan, which is conditioned upon closing the Acquisition to complete the Sponsored Demutualization. Under the terms of the loss portfolio transfer and the 85% post-closing quota share treaty, the reinsurers will establish trust accounts for the benefit of MLMIC. The loss portfolio transfer treaty will be fully secured by collateral posted by NICO for the benefit of MLMIC, which will provide protection to MLMIC policyholders in that MLMIC will have access to sufficient assets to pay claims.

2. Analysis

The Acquisition Application was filed pursuant to Insurance Law § 1506(a) and 11 NYCRR § 80-1.6 ("Regulation 52") on June 12, 2018. Insurance Law § 1506(a) provides:

“No person, other than an authorized insurer, shall acquire control of any domestic insurer, whether by purchase of its securities or otherwise unless:

- (1) it gives twenty days’ written notice to the insurer, or such shorter period of notice as the superintendent permits, of its intention to acquire control, provided that the notice shall include an agreement by the person seeking to acquire control and the person will provide the annual report specified in section one thousand five hundred three of this article for so long as control exists; and
- (2) it receives the superintendent’s prior approval.”

Because NICO is not licensed in the State of New York to transact any line of insurance, and thus is not an “authorized insurer” within the meaning of Insurance Law § 107(a)(10), it cannot acquire control of MLMIC without the Superintendent’s prior approval.

Insurance Law § 1506(b) guides the Superintendent’s inquiry into whether to grant such approval by providing a list of factors to be considered. Those factors are:

- (1) the financial condition of the acquiring person and the insurer;
- (2) the trustworthiness of the acquiring person or any of its officers or directors;
- (3) a plan for the proper and effective conduct of the insurer’s operations;
- (4) the source of the funds or assets for the acquisition;
- (5) the fairness of any exchange of shares, assets, cash or other consideration for the shares or assets to be received;
- (6) whether the effect of the acquisition may be substantially to lessen competition in any line of commerce in insurance or to tend to create a monopoly therein; and
- (7) whether the acquisition is likely to be hazardous or prejudicial to the insurer’s policyholders or shareholders.

Regulation 52 correspondingly sets forth information that an applicant must furnish to the Superintendent when applying for approval of an acquisition of control. The information required includes the identity and background of the applicant; financial statements for the applicant; a description of the nature, source, and amount of consideration to be used in effectuating the acquisition; and a description of the applicant’s objectives in acquiring control.¹⁶

Upon considering the factors set forth in Insurance Law § 1506(b), based on the representations contained in the Acquisition Application, the Superintendent concludes that the statutory factors weigh in favor of approving the Acquisition. Specifically:

Financial Condition. The Department has reviewed the respective financial conditions of the Applicants and MLMIC and has found no conditions that preclude approval of the Acquisition Application.

¹⁶ See 11 NYCRR § 80-1.6.

Trustworthiness. Biographical affidavits of the directors and officers of the Applicants have been submitted to the Department and do not reveal any issues regarding the backgrounds of such individuals that would indicate untrustworthiness. The Department has been furnished with a commitment that, if any directors or officers of Applicants are found in the future to be untrustworthy, Applicants will promptly replace such individuals.

Plan of Operations. The Applicants do not have any plans or proposals for MLMIC to liquidate or to sell its assets. At the Department's request, to ensure adequate capacity for MLMIC's business, NICO intends to keep sufficient capital in MLMIC so that its company action level risk based capital ratio (RBC) does not fall below a specified percentage, which is subject to the Department's review on an ongoing basis. In addition, Mr. Byrnes testified on behalf of NICO and Berkshire that "[MLMIC] will continue to operate in the marketplace under the direction of its current management team and Board of Directors."

Upon completion of the Acquisition, the Applicants intend that NICO reinsure 100% of MLMIC's existing business and to reinsure 85% of the business MLMIC writes on a prospective quota share basis. In addition, upon completion of the Transaction, the Applicants intend that MLMIC (i) enter into an investment management agreement with Berkshire affiliates, subject to regulatory non-objection; and (ii) enter into a tax sharing agreement with NICO and its other affiliates, subject to regulatory non-objection.

Applicants have committed that they will notify the Superintendent and, if so requested, will file new financial projections if within five years of the Acquisition, MLMIC intends to enter into:

- a. A reinsurance treaty or agreement with Applicants or any of their affiliates;
- b. Any transaction investing with, lending to, or purchasing assets from Applicants or any of their affiliates; or
- c. Any transaction encumbering its assets to, or for the benefit of Applicants or any of their affiliates.

If the Superintendent determines that MLMIC's new projections show that MLMIC will not have adequate capital, then MLMIC shall obtain additional capital in an amount and of a quality sufficient to remedy any deficiency identified by the Superintendent.

Berkshire Hathaway Inc., plans to manage MLMIC's investments going forward. MLMIC currently uses an independent investment manager to manage its investments, in accordance with guidelines established by MLMIC's Board and the Department. Given Berkshire's size, strength and expertise in managing the investment portfolios of insurance companies, Berkshire will manage MLMIC's investment portfolio in accordance with the appropriate guidelines after the transaction closes.

Applicants further commit that they will promptly advise the Superintendent of any changes in the information submitted in connection with the proposed acquisition.

Nature, Source and Amount of the Consideration. At closing, NICO will pay the cash consideration in the amount of \$2.502 billion. The consideration will be paid from NICO's existing assets, without any third-party financing required.

Fairness of Consideration. As already discussed, the Valuation Report estimates MLMIC's fair market value as of March 23, 2018 to be in the range of \$2.3 billion to \$2.7 billion. Cash consideration of \$2.502 billion is within this range. In addition, the Fairness Opinion concludes that the transaction consideration is fair from a financial point of view, and Milliman has testified from an actuarial point of view that MLMIC will have adequate reserves and increased ability to pay its claims following this transaction.

Effect on Competition. Applicants have represented in the Acquisition Application that MLMIC will become a member of a group that includes other insurers that specialize in providing liability insurance coverage to healthcare providers. Mr. Ryan of Milliman stated in his written testimony that "the New York medical malpractice insurance market is highly competitive today," and that he does "not believe the Proposed Transaction will materially affect competition in the New York medical professional liability market."

The Department, using statutory data available through 2016 and considering Berkshire's existing medical malpractice insurer in the New York market, post-acquisition Berkshire with MLMIC would have a 36% market share with a Herfindahl – Hirschman Index rating of 1665. This is within the moderately concentrated range of 1500 to 2500. As noted above, the testimony is that MLMIC will be owned by NICO, MedPro is owned by a separate legal corporation, and MLMIC and MedPro will remain competitors after this transaction.

Potential Hazard to Policyholders. To ensure that MLMIC's policyholders are protected, NICO has committed that, if any of its officers or directors is found to be untrustworthy, NICO will promptly replace such individual. NICO has also committed to refrain from taking steps to cause MLMIC to pay any dividends for a period of two years from the date of consummation of the Sponsored Demutualization without the Department's prior approval. Further, NICO has agreed to notify the Department if MLMIC plans to make any change to its Plan of Operation and/or Financial Projections that were submitted to the Department with the Acquisition Application, including any plan to enter into new product lines or lines of business, and NICO will cause MLMIC to submit to the Department any revised Plan of Operation and Financial Projections for approval prior to implementation.

The Acquisition will cause Berkshire Hathaway, Inc. to be the ultimate controlling person of MLMIC under the definition of "control" set forth in Insurance Law § 1501(a)(2). Berkshire, including NICO, will therefore become subject to certain restrictions that Article 15 of the Insurance Law imposes on controlling persons, including: Insurance Law § 1503(b), which requires a holding company that directly or indirectly controls an insurer to adopt a formal enterprise risk management function and to file an annual enterprise risk report with the Superintendent; Insurance Law § 1504(b), which authorizes the Superintendent to subject a controlling person to an examination if it is found that there is cause to believe that such person's operations may materially affect the operations, management, or financial condition of any controlled insurer and cannot obtain relevant information from the controlled insurer; and

Insurance Law § 1506(c)(1)(A), which makes it a violation of the Insurance Law for a controlling person or any of its officers or directors to demonstrate untrustworthiness.

Pursuant to Insurance Law § 1503(a), every person who becomes a “controlled insurer” must, within thirty days thereafter, register with the Superintendent, and such registration must be amended within thirty days after any change in the identity of the insurer’s holding company or any other material change to the information provided in the registration. Accordingly, within thirty days after the closing of the Sponsored Demutualization, MLMIC must amend its registration to reflect the change in the identity of its holding company.

C. Amended MLMIC Charter and By-Laws

As required by Insurance Law § 7307(e)(1), MLMIC has submitted an amended Charter and By-laws in accordance with Article 12 of the Insurance Law to reflect its Demutualization. The Department has reviewed and hereby approves the proposed changes, including MLMIC’s request to remove the word “Mutual” from its name.

* * *

As set forth above, the Superintendent has considered the factors set forth in Insurance Law § 1506(b), and concludes that the entirety of the facts and considerations weigh in favor of the Acquisition Application, which is hereby approved subject to the noted agreements and conditions and representations made to the Department.

V. COMMENTS

Overwhelmingly, the oral and written comments are strongly in favor of the Demutualization, including from the largest medical society in the State of New York, the two large hospital associations in the State of New York, and individual physicians and medical groups. All comments have been considered in rendering this Decision. In addition to the discussion above, the Department responds to the following comments.

Fairness of Purchase Price. One commenter, representing three individual policyholders of MLMIC, has asserted (among other things) that the transaction consideration is not fair, and challenges certain decisions made by the MLMIC Board, including the KBW analysis. This comment, on the whole, does not reflect the requisite process or legal standards and requirements for the Superintendent’s approval of a demutualization under New York’s Insurance Law. As set forth above, Insurance Law § 7307 sets forth the requirements of a plan of conversion and the factors to be considered by the Superintendent in approving or disapproving a demutualization proposal. As part of the lengthy process required by law, the Department conducted an Examination and obtained for its independent review the Valuation Report and the Fairness Opinion. The Ernst & Young analysis and opinions, as well as all the input received, fully support the conclusion that the transaction is fair and equitable. MLMIC’s most recent statutory financial statement also supports the position that the transaction is fair and equitable. Furthermore, under the Insurance Law, following this Decision, Eligible Policyholders have the right to vote on the Plan.

The same commenter also asserted that “the policy information statement and other disclosures are an inadequate basis for the Superintendent’s decision and misleading to policyholders.” First and foremost, this Decision is not based on the Policyholder Information Statement. As noted above, this Decision is based on numerous facts and the considerations, and application of the Insurance Law. Among other things, this Decision is based on the Plan and the transaction agreements, the Department’s examination of MLMIC pursuant to Insurance Law § 7307(b) as set forth in the Examination Report, the Valuation Report obtained pursuant to Insurance Law § 7307(c), the Fairness Opinion, all of the written comments received, the testimony provided at the public hearing, and the Department’s knowledge and expertise regarding the Insurance Law and New York’s medical malpractice market.

With respect to the contention that the disclosures by the company are “misleading to policyholders,” the Department has found that the Policyholder Information Statement accurately summarizes the Plan. Again, Section 7307 of the Insurance Law sets forth the requirements for the Superintendent’s review of the transaction as being fair and equitable and in the best interests of policyholders and the public. The full Plan was made available to all policyholders and the public prior to the public hearing, and Eligible Policyholders have the right to vote in favor of or against the Plan at the upcoming September 14, 2018 special meeting. The Superintendent has determined that notice of the special meeting has been adequately provided pursuant to Insurance Law § 7307(i). In addition, MLMIC policyholders have had significant time since the transaction was first announced in July 2016 to ask questions at annual meetings or otherwise, and to vote for the election of the board of directors which unanimously approved the Plan in July 2016 and again in February 2018.

The same commenter asked that the Department postpone the public hearing for 60 days or, if not postponed, permit him to speak at the hearing. As there was no basis for postponing the hearing, which had been properly noticed for over 60 days, the Department granted the request to speak at the public hearing.

Subsequent to the hearing, a managing director of a professional services firm located in another state submitted a written declaration challenging the “reasonableness” of the purchase price, citing certain portions of the Valuation Report and arguing that it supports a higher purchase price. The Department has reviewed this submission, and notes that the declarant has not himself conducted a valuation analysis, and instead has cited discrete portions of the 60-page Valuation Report without proper context. This limited analysis does not undermine the Ernst & Young valuation. Moreover, Ernst & Young has submitted the Fairness Opinion to the Superintendent, which concludes that the transaction consideration is fair from a financial point of view. Furthermore, the determination of whether the transaction is fair and equitable is not limited to the amount of the cash consideration; for a number of reasons, set forth above, the Superintendent has determined that the Plan is fair and equitable, including the amount of the consideration.

Payment of Consideration to Eligible Policyholders. One interested party testified and submitted a written comment asserting that the group of policyholders eligible to be paid shares of the purchase price should be changed or that the purchase price should be allocated

differently. However, Insurance Law § 7307(e)(3) explicitly defines those policyholders who are eligible to receive the purchase price consideration based on the three-year period of eligible policies preceding the MLMIC Board resolution (which was adopted on July 15, 2016), and dictates that the transaction consideration shall be allocated to each Eligible Policyholder based on the amount of net premiums timely paid on that Eligible Policyholder's eligible policy or policies as a fraction of the total of such net premiums paid on eligible policies in the three years preceding July 15, 2016.

Dispute Resolution Process. The Department received oral testimony at the public hearing and several written comments regarding the dispute resolution and objection process in the Plan, with respect to the appropriate parties entitled to be paid the proportional shares of the purchase allocable to the eligible policies. Some of these commenters are policyholders who contend that all of the cash consideration should be paid to the Eligible Policyholders at closing, with no amounts held in escrow. On the other hand, several commenters are medical groups and hospitals that contend that the cash consideration should be paid to them in the circumstances where they paid the premiums on behalf of policyholders and/or acted as policy administrators. Notably, none of these commenters request that the Superintendent disapprove the Plan.

One commenter referred to the provision in Insurance Law § 7307(e) stating that in calculating each such person's equitable share one must factor in the amount "such policyholder has properly and timely *paid* to the insurer on insurance policies in effect during the three years immediately preceding . . ." (emphasis added). The commenter suggested that this means that the person that paid the premium is automatically entitled to the proceeds of the sale. The Superintendent finds that this is not determinative because the same provision refers to the "policyholder," which might or might not be the person who paid the premiums.

Insurance Law § 7307(e)(3) defines the policyholders eligible to be paid their proportional shares of the purchase price, but also recognizes that such policyholders may have assigned such legal right to other persons. Therefore, the Plan appropriately includes an objection and escrow procedure for the resolution of disputes for those persons who dispute whether the policyholder is entitled to the payment in a given case.

The Objection Procedure provides a reasonable framework for the resolution of disputes between certain policyholders and entities that claim to be Policy Administrators. Importantly, the Objection Procedure does not, in any way, impact any person's rights to resolve their dispute in any forum of their choosing or as required by contract or law. Rather, the sole purpose of the Objection Procedure is to create a category of disputed claims for which the cash consideration attributable to such claims will be placed in an escrow and released by MLMIC upon one of two events: MLMIC either receives (a) "joint written instructions from the Eligible Policyholder and the Policy Administrator . . . as to how the allocation is to be distributed," or (b) "a non-appealable order of an arbitration panel or court with proper jurisdiction ordering payment of the allocation to the Policy Administrator . . . or the Eligible Policyholder."

The determination of who may file an objection triggering the escrow revolves around the interpretation of the definition of "Policy Administrator" in the Plan. The Plan defines "Policy Administrator" on page 4 as

a Person designated on the declarations page of the applicable Policy or otherwise as the administrator of the Policy on behalf of the applicable Policyholder, or any successor to such Person. For the avoidance of doubt, such Person may be an organization, a professional practice group or a third party.

This language is clear on its face: the Objection Procedure is available only for persons “designated” as a “Policy Administrator.” By this Plan provision, to be a Policy Administrator for this purpose, a policyholder may designate such person by so designating on the declarations page of the applicable policy “or otherwise.” MLMIC has already recognized that this designation may occur by a separate designation form. However, the Plan language does not limit the designation to a declarations page or a specified designation form. At the same time, the provision is clear that there must be a “designation” by the policyholder of an identified person as a “Policy Administrator.”

MLMIC’s designation form states, in pertinent part, that a “Policy Administrator is the agent of all Insureds herein for the paying of Premium, requesting changes in the policy, including cancellation thereof, and for receiving dividends and any return Premiums when due. By designating a Policy Administrator each Insured gives us permission to release information about each such Insured, your practice, or any other information that we may have to such Policy Administrator.” To be clear, therefore, in order for a person to trigger the escrow, there must be evidence of a designation by the policyholder of that person to act as a Policy Administrator, which means to be designated by the policyholder as “the agent of [the] Insured[] . . . for the paying of Premium, requesting changes in the policy, including cancellation thereof, and for receiving dividends and any return Premiums when due.”

Accordingly, the Department concludes that all persons that submitted objections within the time period required by the Objection Procedure (i.e., prior to the public hearing) are eligible to trigger the escrow provision. That said, in order to have properly filed an objection, the person must have a good faith legal basis for asserting that it has been designated by the policyholder as a Policy Administrator. Any person who has submitted an objection who cannot satisfy this standard should communicate to MLMIC its withdrawal of the objection. With respect to all non-withdrawn objections, MLMIC is DIRECTED to withhold payment of the cash consideration attributable to those objections, and to send acknowledgements to such objecting parties and notices to the corresponding policyholders upon approval by a vote of the Record Date Policyholders and before the closing. Unless directed otherwise as set forth below, MLMIC should release the escrowed funds only if MLMIC receives (a) “joint written instructions from the Eligible Policyholder and the Policy Administrator . . . as to how the allocation is to be distributed,” or (b) “a non-appealable order of an arbitration panel or court with proper jurisdiction ordering payment of the allocation to the Policy Administrator . . . or the Eligible Policyholder.”

The Superintendent stresses that the escrow arrangement is simply a method of holding in an escrow a certain amount of the cash consideration for a reasonable amount of time to allow the relevant parties to resolve their claims, a process that is fair and equitable and in the interests

of the public. Nothing in this procedure or escrow arrangement shall affect the closing of the transaction. Moreover, nothing in the escrow arrangement is intended to shift the burden of proof or persuasion on the underlying issue. Nor does the definition of Policy Administrator represent the Department's view that anyone that falls within this definition is (or is not) entitled, under the particular facts or applicable law, to receipt of the cash consideration. The determination of who is entitled to the cash consideration depends on the facts and circumstances of the parties' relationship and applicable law, to be decided either by agreement of the parties or by an arbitrator or court.

Further, the Department notes that Section 6.3(d) of the Plan provides that the cash consideration is to be paid to the policyholder "as promptly as practicable." Likewise, for the escrow arrangement to be "fair and equitable," as required by Insurance Law § 7307(h)(1), it cannot continue for an unreasonable period of time. The Department, while making clear that the parties to these disputes maintain all legal rights to pursue their claims, encourages all persons involved in the Objection Procedure to resolve their differences in a prompt, fair and equitable manner. It is worth noting that, prior to the date of this Decision, thousands of policyholders and Policy Administrators resolved to execute assignments and consents with regard to the payment of the transaction consideration. The Department encourages the continuation of those efforts. To the extent those efforts do not resolve all objections, in order to ensure that the Plan is fully implemented in accordance with the statutory requirements, the Superintendent requests that MLMIC and NICO agree on the appointment of an individual with experience in alternative dispute resolution ("ADR Specialist") who will assist the policyholders and claimed Policy Administrators to resolve their disputes in a fair and expedited manner and avoid excessive litigation and expense.

The Superintendent notes that submission of such disputes to the ADR Specialist must be voluntary, and that MLMIC should bear the expenses of the ADR Specialist. The Superintendent suggests that disputes be resolved by a process in which both the claimed Policy Administrator and the relevant policyholder(s) submit their disputes to the ADR Specialist, after each side is offered the opportunity in writing to present their position. In all events, this process should be fair and expeditious, and does not limit any person's legal rights. Of course, persons can agree to be bound by the ADR Specialist's process and decision.

The Superintendent will provide the relevant parties with a period of 90 days following the closing to seek resolution of disputes including by use of the ADR Specialist. The Superintendent directs that, within 90 days of the closing of the transaction, MLMIC shall notify the Department of the status of the objections and, specifically, the number of objections, if any, remaining to be resolved on that date. The Superintendent will then determine whether further action by the Department is necessary to ensure full payment of the consideration of this transaction, including whether the Superintendent will direct that MLMIC release the remainder of the escrow to the policyholders; in such event, as noted above, the release of the escrow shall have no substantive effect on the parties' positions with respect to who is entitled to the payment under the relevant law.

VI. CONCLUSIONS

Accordingly, upon consideration of (1) the applicable statutory and regulatory factors; (2) the representations contained in the submissions by MLMIC and NICO; (3) the submissions and comments received at the public hearing and during the comment period that ended August 28, 2018; (4) the Department's familiarity with MLMIC's operations and history and its expertise in regulating New York's insurance industry; and (5) other material received and reviewed by the Department, the applications submitted by MLMIC and NICO are hereby APPROVED as follows:

1. Pursuant to Insurance Law § 7307(b)(2), the Sponsored Demutualization is not contrary to law, is fair and equitable, and is in the best interests of the policyholders and the public.
2. Pursuant to Insurance Law § 7307(b)(3), as of the last day of the period covered in MLMIC's latest filed statement before the Superintendent ordered its examination, MLMIC had a surplus to policyholders at least equal to the minimum capital and surplus required to be maintained for a newly organized stock insurer doing the same kinds of insurance.
3. Pursuant to Insurance Law § 7307(d), the Superintendent granted permission to MLMIC's Board of Directors to submit the Plan. The Plan includes the information required by Insurance Law § 7307(e) (1-5).
4. MLMIC provided notice of the public hearing in compliance with Insurance Law § 7307(g), and the public hearing was conducted in compliance with Insurance Law § 7307(g).
5. Pursuant to Insurance Law § 7307(h), the Plan (a) does not violate the Insurance Law, (b) is not inconsistent with law, (c) is fair and equitable, and (d) is in the best interests of MLMIC's policyholders and the public.
6. Pursuant to Insurance Law § 7307(l), the Superintendent did not find, at any stage in the proposed Sponsored Demutualization, that MLMIC is impaired or that the further transaction of business by MLMIC would be hazardous to its policyholders, its creditors, or the public.
7. Following this Decision, the Plan shall be submitted to a vote of the Eligible Policyholders pursuant to Insurance Law § 7307(i). The Plan provides for proxy voting in a manner prescribed by the Superintendent. MLMIC's Board of Directors has provided adequate notice of the September 14, 2018 policyholder special meeting to vote on the Plan, which notice was accompanied by a full copy and a summary of the Plan in compliance with Insurance Law § 7307(i). The policyholder vote shall be conducted in compliance with Insurance Law § 7307(j). Upon the conclusion of the vote, MLMIC shall submit to the Superintendent a certified copy of the Plan voted on and a certificate setting forth the results of the vote in compliance with Insurance Law § 7307(j).

8. Pursuant to Insurance Law § 7307(m), if the Plan is adopted by MLMIC's Eligible Policyholders, the Superintendent, upon being satisfied that MLMIC will have at least the minimum capital and surplus required to be maintained for a newly organized domestic stock insurer doing the same kinds of insurance, will issue a new Certificate of Authority as a stock insurer to the converted company. The converted company shall provide notice thereof through newspaper publication and posting on its website in compliance with Insurance Law § 7307(n), and the corporate existence of MLMIC will continue in the manner provided for in Insurance Law § 7307(o). Pursuant to Insurance Law § 7307(q), the directors and officers of MLMIC shall serve until new directors and officers have been duly elected and qualified pursuant to the Charter and By-laws of the converted company.

9. MLMIC shall pay no compensation of any kind to any person, other than regular salaries to existing personnel, in connection with the Sponsored Demutualization except for the costs and fees permitted by Insurance Law § 7307(r).

10. In addition to all other laws, regulations and commitments in this transaction, pursuant to Insurance Law § 7307(t), the converted company shall not:

- a. for a period of ten years after the Sponsored Demutualization, re-domesticate directly or indirectly or remove its principal offices from within the state; or
- b. for a period of five years after the Sponsored Demutualization:
 - (1) enter into any agreement by the terms of which any person or entity agrees to pay all or a portion of the expenses of management of the converted company in consideration of the company's agreement to pay such person or entity either commissions on premiums due the converted company or any other compensation for services, or
 - (2) enter into any agreement with an officer or director of the converted company or with any firm or corporation in which any officer or director of the converted company is pecuniarily interested, directly or indirectly, under which agreement the converted company agrees to pay, for the acquisition of business, any commissions or other compensation that by the terms of such agreement varies with the amount of the business or with the earnings of the converted company on the business.

11. The Acquisition Application is APPROVED, subject to the various commitments to the Department made by the Applicants. By separate communications, the Department will approve the reinsurance agreements and the extraordinary dividend discussed above.

12. MLMIC's amended Charter and By-laws are consistent with the requirements of Insurance Law § 7307(e)(1) and Insurance Law § 1201(a)(5).

THEREFORE, for the reasons and subject to the conditions set forth above, and in reliance on the representations made to the Department, the Demutualization Application, the Acquisition Application, and the application for approval of the amendments to MLMIC's Charter and By-laws, including MLMIC's name change, are hereby APPROVED.

This Decision, along with the transcript of the public hearing and all written comments received by the Department through the August 28, 2018 deadline, shall be posted on the Department's website.

Dated: September 6, 2018
New York, New York



MARIA T. VULLO
Superintendent of Financial Services