BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE, OFFICE OF THE MONTANA STATE AUDITOR

IN THE MATTER OF VICTORY INSURANCE COMPANY, Respondent.	Case No. INS 2021-313A **FINAL AGENCY DECISION**

This case appears before Special Deputy Insurance Commissioner Matthew Cochenour (Commissioner) as the duly appointed designee of the Montana State Auditor to render a final agency decision pursuant to the Montana Administrative Procedures Act (MAPA). *See* Mont. Code Ann. Title 2, Chapter 4. All actions set forth herein are done on behalf of the Commissioner of Securities and Insurance, Office of the Montana State Auditor (CSI).

The Commissioner has reviewed the Hearing Examiner's August 25, 2023, Findings of Fact, Conclusions of Law, Order, and Recommended Decision on the Commissioner's Motion for Summary Judgment (Proposed Order) in this matter as well as all briefing. The Proposed Order is attached as Exhibit A.

Oral Arguments were held on January 11, 2024. Respondent, represented by Lin Deola (argued), presented arguments supporting its exceptions to the Proposed Order.

CSI, represented by Hailey Oestreicher (argued) and Kirsten Madsen, presented arguments on behalf of CSI.

STANDARD OF REVIEW

MAPA sets forth the standard of review applicable to the Hearing Examiner's Proposed Order. Regarding conclusions of law, the Commissioner "may reject or modify the conclusions of law and interpretation of administrative rules" in the Proposed Order. Section 2-4-621(3), MCA. However, the Commissioner "may not reject or modify the findings of fact" unless the Commissioner determines "from a review of the complete record and states with particularity" that the factual findings were not based on "competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law." *Id*. The Commissioner may adopt the Proposed Order as the agency's final order. *Id*.

Regarding the penalty, the Commissioner "may accept or reduce the recommended penalty," but may not increase the penalty without a complete record review. *Id*.

Questions of Law presented by Respondent

Respondent Victory Insurance Company (Victory) presents three main arguments as to why the Commissioner should reject the Hearing Examiner's Proposed Order. First, Victory argues that the Hearing Examiner erred by disregarding the choice of law provision in the Managing General Agent (MGA) contract as well as that the standard industry practice is for insurers to draft and define the terms of MGA contracts. Second,

Victory argues that the Hearing Examiner erred in his statutory interpretation of § 33-2-1602(4), MCA. Finally, Victory argues that the Hearing Examiner improperly conducted independent research by considering the "metadata" in the information that Victory provided to CSI.

Regarding the first issue, the Hearing Examiner addressed Victory's arguments in the Proposed Order and determined that Montana law applied to the MGA contract. Having reviewed Victory's arguments and the Proposed Order, the Commissioner determines that Victory's arguments are without merit. Notably, a choice of law provision, even between parties to a contract, is only one factor that Montana courts consider when determining whether a choice-of-law provision is effective. *See e.g.*, *Modroo v. Nationwide Mutual Fire Insurance Co.*, 2008 MT 275, ¶ 54, 345 Mont. 262, 191 P.3d 389. Further, taking Victory's argument to its logical conclusion would mean that parties could adopt terms in their private contracts under the guise of "industry standards" that could effectively nullify the ability of state regulatory agencies to regulate the industry. Victory cites no law supporting this proposition. Victory's arguments do not support rejecting or modifying the Hearing Examiner's Proposed Order.

Victory's second argument is that the Hearing Examiner incorrectly interpreted § 33-2-1602(4), MCA. That statute provides that the Commissioner has access to the managing general agent's books, bank accounts, and records "in a form usable to the commissioner." Section 33-2-1602(4), MCA. Victory contends that the word "usable" limits the Commissioner and places a burden on the Commissioner to prove that the information an MGA provides is not usable.

Victory's arguments present a question of statutory interpretation. Well-established rules govern statutory interpretation. When interpreting statutes, courts strive to implement the legislative objectives in accordance with the statute's plain language. *State v. Alpine Aviation, Inc.*, 2016 MT 283, ¶ 11, 385 Mont. 282, 384 P.3d 1035. In interpreting plain language, courts may consider dictionary definitions. *Id*. Courts will not add language to a statute, nor will they ignore the statute's express language. Section 1-2-101, MCA. Further, courts will defer to the statutory interpretation of the state agency charged with administering the statute. *Montana Ass'n of Counties v. State*, 2023 MT 225, ¶ 10, 414 Mont. 128, 538 P.3d 1136.

Here, the plain language provides simply that MGA records available to the Commissioner must be "in a form usable to the Commissioner." Section 33-2-1602(4), MCA. The commonly understood meaning of the word "usable" is "[c]apable of being used," "fit for use," and "convenient for use." *Usable*, American Heritage Dictionary Online (last accessed March 18, 2024). Thus, applying the plain meaning of "usable," the Commissioner must have access to MGA records in a form that the Commissioner is capable of using and that are fit and convenient for the Commissioner's use. As a matter of both statutory interpretation and common sense, the Commissioner occupies the best position to determine what form the Commissioner is capable of using and whether a particular form is fit and convenient for the Commissioner's use. Contrary to Victory's contention, nothing in the statute indicates that the word "usable" imposes a limitation or a burden on the Commissioner to prove that provided information is not usable. Adopting Victory's interpretation would require inserting language into the statute, which is

impermissible. Section 1-2-101, MCA. The Hearing Examiner's statutory interpretation is consistent with the plain language of the statute, and the Commissioner will not reject or modify these conclusions.

Victory also contends that a fact question exists whether the information it provided was usable. Victory provided data in the form of PDFs, Word documents, JPEG images, Excel spreadsheets, and Outlook emails. Victory asserts that the Commissioner did not claim it could not use these formats. The Hearing Examiner found that Victory did not produce records in a format usable to CSI. (Proposed Order 5, 16.) The Commissioner may reject or modify this finding only if a "review of the complete record" establishes that this finding was not based on "competent substantial evidence." Section 2-4-621(3), MCA. Notably, the question is not whether the record contains evidence to support findings different from those the Hearing Examiner made, but whether substantial evidence supports the findings the Hearing Examiner made. *See Blaine County v. Sticker*, 2017 MT 80, ¶ 26, 387 Mont. 202, 394 P.3d 159. Here, the record contains a CSI letter specifying that "the form of the data that will be [usable] to CSI is in .csv files" as well as other usable formats. *See* Ex. 8. Thus, the record supports the Hearing Examiner's finding, and the Commissioner may not reject or modify the finding that Victory did not produce files in a form usable to CSI.

Victory's final argument is that the Hearing Examiner improperly inserted evidence into the record when he conducted independent research into the metadata of the PDF files that Victory produced to CSI and, based on the metadata, determined that Victory was untruthful in its representations. (Victory Opening Br. 10; Reply Br. 1.)

As an initial matter, there is no indication that the Hearing Examiner inserted evidence into the record or engaged in an independent investigation; rather, he simply viewed the evidence that Victory introduced, which indicated within the documents themselves that they had been converted to PDF. Thus, the record supports the Hearing Examiner's finding that Victory converted its files into PDF format, and the Commissioner may not reject or modify the finding.

Importantly, although the record supports the Hearing Examiner's finding, this finding is not dispositive to the decision to adopt the Proposed Order on summary judgment. The question of whether records are "usable" to the Commissioner does not hinge on the motives of the MGA or even the actions it takes in providing usable (or unusable) records. As discussed above, § 33-2-1602(4), MCA, requires that CSI must have access to an MGA's records in a "form usable to the commissioner." Nothing more, nothing less. Here, the record supports the finding that Victory failed to produce records in a format usable to CSI. That is sufficient to adopt the Hearing Examiners summary judgment recommendation.

ORDER

The Proposed Findings of Fact, Conclusions of Law, Order and Recommended Decision on the Commissioner's Motion for Summary Judgment (collectively Exhibit A) are adopted as the Final Agency Decision in this matter and by this reference is made a part of the Final Agency Decision except for the second sentence in the paragraph under

Recommended Agency Action. In place of that sentence, the following language should be substituted:

Based on the foregoing Findings of Fact, Conclusions of Law, and Order, the Commissioner imposes fines of $25,000 for each violation pursuant to § 33-1-317, MCA, for a total penalty of $75,000.

Respondent is hereby notified that it has the right to request judicial review of this Order by filing a petition for judicial review within 30 days after service of this Order with the district court in Lewis and Clark, County, Montana, as provided in § 2-4-702, MCA.

DATED this 19th day of March 2024.

MATTHEW COCHENOUR
Special Deputy Insurance Commissioner
Office of the Montana State Auditor

BEFORE THE COMMISSIONER OF SECURITIES AND INSURANCE, OFFICE OF THE MONTANA STATE AUDITOR

IN THE MATTER OF VICTORY INSURANCE COMPANY, Respondent.	Case No. INS-2021-313A **FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER, AND RECOMMENDED DECISION ON THE COMMISSIONER'S MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

The Commissioner of Securities and Insurance, Office of the Montana State Auditor (CSI), filed two Motions for Summary Judgment against Respondent Victory Insurance Company (Victory). CSI asserts it filed separate motions based on statements made by Victory in related district court proceedings. CSI's first motion seeks summary judgment based on two contractual violations alleged in CSI's Amended Notice of Proposed Agency Action and Request for Hearing ("Amended Notice"). CSI's second motion seeks summary judgment on violations concerning CSI's access to Respondent's records, also as alleged in CSI's Amended Notice. For the reasons set forth below, CSI's motions are granted.

II. UNDSIPUTED FACTS

1. Victory is an insurance company domiciled in Montanan with its principal place of business in Miles City, which sells workers compensation

insurance and, at all times relevant herein, provided managing general agent (MGA) services to other insurance carriers. (Exs. 10, 23.)

2. Clear Spring Property and Casualty Company (Clear Spring), an insurer licensed to do business in Montana, is a Texas corporation with offices in Illinois. (Ex. 23.)

3. On April 1, 2019, Victory signed a written MGA contract (the Agreement) with Clear Spring to act as Clear Spring's MGA, which included administration of claims sold on Clear Spring paper in Montana and four other states. The Agreement was effective November 10, 2018. (Exs. 1, 10, 20.)

4. At the time Victory entered into the Agreement, Victory was using a product offered by Insurity, LLC, called Worker's CompXPress, an integrated policy and billing system that allows clients of Insurity to manage the entire lifecycle of a workers compensation policy and data. (Ex. 10.)

5. On February 3, 2021, Clear Spring gave Victory notice it was terminating the Agreement, effective 90 days from the date of notice. (Exs. 1, 10.)

6. Following the termination notice, litigation ensued between Victory and Clear Spring in United States District Court for the Northern District of Illinois, Eastern Division. (Exs. 10, 21.)

7. Victory continued to act as Clear Spring's MGA under a series of informal agreements or arrangements from April 28, 2021, through December 31,

2021, for a fee of 6% of earned net premium. (Exs. 2 through 4, 10, 20.)

8. At the time CSI initiated the instant case on September 30, 2021, Victory had only agreed to continue acting as Clear Spring's MGA until October 2, 2021. (Ex. 4.)

9. Section I of the Agreement states that its purpose is to appoint Victory ". . . by the Insurer [(i.e., Clear Spring)] (where required), for the purpose of providing certain services which are necessary and required in the planning, management and administration of the day-to-day operations, business and affairs of the Insurer related to the business produced and administered by Victory. . . ." (Ex. 1 at 1.)

10. Section II of the Agreement provides that, "[t]he MGA shall be responsible for managing and administering certain affairs of the Insurer, including, but not limited to, marketing, underwriting, policy and certificate issuance, termination, reinstatement, accounting, regulatory reporting, and general administration related to the Victory book of business." (Ex. 1 at 1.)

11. Section II(D)(4) of the Agreement provides that, "Separate records of business written by the MGA shall be maintained by the MGA. The Insurer shall have access and the right to copy all accounts and records related to its business in a form usable by the Insurer." (Ex. 1 at 2.)

12. The Agreement does not contain a provision explicitly stating that all

claims files are the joint property of the insurer and MGA. (Ex. 1.)

13. Section VIII(C) of the Agreement provides that the "MGA shall make the Records available for inspection by . . . any governmental or regulatory authority having jurisdiction over the MGA or Clear Spring." (Ex. 1 at 9.)

14. The Agreement does not contain a provision explicitly specifying the Commissioner's right to access all books, bank accounts, and records of the managing general agent in a form usable to the Commissioner. (Ex. 1.)

15. Section VIII(A) of the Agreement defines "Records" as, "all books, records, applications and other forms of information relating specifically to the Carrier that are necessary to the performance of MGA's obligations under this Agreement. . . ." (Ex. 1 at 9.)

16. Section II(F) of the MGA Agreement grants the MGA the authority to settle claims on behalf of the Insurer. (Ex. 1 at 2-3.)

17. Section VIII(A) of the Agreement states that, ". . . [t]he Records shall remain at all times the sole property of Clear Spring." (Ex. 1 at 9.)

18. On September 3, 2021, Kate McGrath Ellis, legal counsel for the Commissioner, sent correspondence to Victory demanding information pursuant to § 33-2-1602(4), MCA. (Ex. 8.) The letter stated, in relevant part, as follows:

> This demand is being made pursuant to § 33-2-1602(4), MCA; thus, the Commissioner states that the form of the data that will be useable to CSI is in .csv files containing the data elements set forth in Exhibit A hereto, unless its native format is not conducive to a .csv file. For

> example, data stored in a database would be exported and provided in a .csv format; however, data retained in a .pdf file would be provided in .pdf format. Further, any data stored in more than one format, should be provided in its several formats. For example, the Commissioner requests the data in both Microsoft Excel and its native format if the alternative exists. Please also include a description of the software, including software manufacturer or developer and applicable software version, employed to use the data in its native format.

(Id. at 2.)

19. On September 17, 2021, Victory responded directly to the Commissioner's data access request, incorporating its earlier September 10, 2021, response in which it offered two sets of PDF files. Victory refused to provide the data access requested by CSI. (Exs. 9, 12.)

20. To the extent it produced records in response to the Commissioner's request, Victory did not produce files in a form usable to the Commissioner. To the extent they were produced, some or all files were converted from CSV formats to PDF when provided to the Commissioner. (Exs. 9-A through 9-H, 11-1-A.)

III. DISCUSSION

Summary judgment is an appropriate method of dispute resolution in administrative proceedings where the requisites for summary judgment otherwise exist. *Matter of Peila*, 249 Mont. 272, 280-81, 815 P.2d 139, 144-45 (1991). "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any

material fact and that the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56(c).

The moving party "must show a complete absence of any genuine issue as to all facts shown to be material in light of the substantive principle that entitles that party to a judgment as a matter of law." *Bonilla v. University of Montana*, 2005 MT 183, ¶ 11, 328 Mont. 41, 116 P.3d 823. A "material" fact is one capable of affecting the substantive outcome of the litigation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "'Material issues of fact are identified by looking to the substantive law which governs the claim.'" *Glacier Tennis Club at the Summit v. Treweek Constr. Co.*, 2004 MT 70, ¶ 21, 320 Mont. 351, 87 P.3d 431 (overruled in part on other grounds by *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 21, 336 Mont. 105, 152 P.3d 727; quoting *Babcock Place P'ship v. Berg, Lilly, Andriolo & Tollefsen, P.C.*, 2003 MT 111, ¶ 15, 315 Mont. 364, 69 P.3d 1145); *see also Anderson*, 477 U.S. 242 at 248; *Bonilla*, ¶¶ 11, 14. A dispute is "genuine" if there is enough evidence for a reasonable trier of fact to return a verdict for the non-movant. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). The inquiry is, essentially, ". . . whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

"The party opposing summary judgment must come forward with evidence of a substantial nature; mere denial, speculation, or conclusory statements are not sufficient." *McGinnis v. Hand*, 1999 MT 9, ¶ 18, 293 Mont. 72, 972 P.2d 1126 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262 (1997)). A tribunal reviews the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor and without making findings of fact, weighing the evidence, choosing one disputed fact over another, or assessing the credibility of witnesses. *Fasch v. M.K. Weeden Const., Inc.*, 2011 MT 258, ¶¶ 16-17, 362 Mont. 256, 262 P.3d 1117; *Hughes v. Lynch*, 2007 MT 177, ¶ 7, 338 Mont. 214, 164 P.3d 913.

A. Summary Judgment #1

In its first motion for summary judgment, CSI argues Victory violated § 33-2-1602, MCA, by placing business with an insurer under a written contract that did not contain the following provisions:

(1) That the Commissioner has access to the books, bank accounts, and records of Victory as a managing general agent in a form usable to the Commissioner as required by § 33-2-1602(4), MCA.

(2) That all claims files are the joint property of the Insurer and MGA as required by § 33-2-1602(8)(c).

Application of these provisions is dependent on the overall applicability of § 33-2-1602, MCA. To that end, "[a] person acting in the capacity of a managing general agent may not place business with an insurer unless there is in force a written

contract between the parties that sets forth the responsibilities of each party. Whenever both parties share responsibility for a particular function, the written contract must specify the division of responsibilities." Mont. Code Ann. § 33-2-1602.

As an initial matter, Victory's argument Clear Spring is not required to abide by Montana insurance laws when it sells insurance in Montana is absurd on its face. Victory backed down on this assertion at oral argument, and limited its argument to application of § 33-2-1602, MCA. The Montana Supreme Court's decision in *Victory Ins. Co. v. Downing*, 2023 MT 139, 413 Mont. 80, 532 P.3d 850, is dispositive on this issue. Victory is absolutely subject to Montana insurance laws. Nonetheless, it is worth discussing the specific arguments raised in this case, as they differ somewhat from those raised by Victory before the Supreme Court.

With regard to the substance of its argument, Victory does not dispute that the Agreement lacks the provisions CSI alleges were required under the MCA. Rather, Victory argues it did not "place business" with Clear Spring. To the contrary, it asserts Clear Spring retained Victory as its agent to place Clear Spring's business in Montana, and that Clear Spring—not Victory—placed business by issuing policies in Montana during the term of the Agreement. Victory also argues that, with respect to the Agreement itself, Clear Spring prepared the

Agreement in accordance with Illinois law, the law with which it, as an insurer, was required to abide.

In making its argument that it did not place business in Montana, Victory distorts the meaning of placing business and ignores the plain language of the statute that refers to business being placed with an insurer. Victory would have this tribunal believe that placing business refers to the act of selling insurance policies. A review of both § 33-2-1602, MCA, and the National Association of Insurance Commissioners (NAIC) Model General Agent's Act, which has been adopted at least in part in all states, shows otherwise. *See 7-46 Appleman on Insurance Law & Practice Archive* § 46.2, fn. 2 (2nd 2011). Just as § 33-2-1602, MCA, states that an entity "may not place business *with an insurer*" (emphasis added), the Model General Agents Act contains nearly identical language which states, in relevant part, that no one ". . . acting in the capacity of a MGA shall place business *with an insurer* unless there is in force a written contract between the parties. . . ." *Id*. (emphasis added). The MCA and Model Act both clearly contemplate that "placing business" does not refer to an insurer selling its product to the public, but rather to an agent of the insurer that facilitates the insurer to sell its product. To use an example, an agent may market the products of several insurers, but ultimately only places business with one of them when that particular insurer's product is chosen by a consumer.

Victory's responsibilities as an MGA under the Agreement were not merely administrative as Victory would imply. As section II of the Agreement states, "[t]he MGA shall be responsible for managing and administering certain affairs of the Insurer, including, but not limited to, marketing, underwriting, policy and certificate issuance, termination, reinstatement, accounting, regulatory reporting, and general administration related to the Victory book of business." (Ex. 1 at 1.) These activities involve placing the business generated through Victory's efforts with Clear Spring. Furthermore, Victory admits it acted as Clear Spring's agent to "place business" for Clear Spring policies issued in Montana, which is simply a backward way of saying Victory placed business with Clear Spring.

With respect Victory's argument that only Illinois law is applicable, the foregoing discussion shows this argument to be without merit, and that Montana law applies to the Agreement. The hearing officer nonetheless recognizes that an insurer and its agents may be subject to the laws of many states, not all of which have identical laws. In the case of MGA agreements, however, as stated above, the Model General Agent's Act promulgated by NAIC has been adopted at least in part in all states. *See 7-46 Appleman on Insurance Law & Practice Archive* § 46.2, fn. 2 (2nd 2011). Victory never argued that anything prevented it from entering into an MGA agreement which specifically met the requirements of Montana law, nor did it argue the Agreement could not have complied with the laws of more than

one state. It was at Victory's own peril that it entered into a single MGA agreement that covered four different states with seemingly no attempt to localize its language beyond Illinois. The fact that it now finds itself in violation of Montana's laws was something over which it had complete control when it entered into the Agreement, and to now argue it was not the party that drafted the Agreement or that it could not comply with the laws of more than one state simply amounts to an empty excuse.

Victory also argues that it cannot now amend a terminated agreement, nor can the State alter a contract between the parties. For those reasons, Victory argues § 33-2-1602, MCA, cannot be applied to the Agreement at issue. To reiterate, the Montana Supreme Court has already addressed this issue and found against Victory's argument. *See Victory*, ¶ 14. This argument is a distortion of CSI's position. CSI does not seek an amendment to the now-defunct Agreement or to interfere with its terms. Rather, CSI merely seeks a finding that the Agreement, for so long as it was in effect, was in violation of Montana law for failure to include required provisions and Victory may be subject to appropriate penalties as a result. *See* Mont. Code Ann. §§ 33-2-1602(4), 33-2-1605(1); *Victory*, ¶ 14. CSI's position completely undercuts Victory's arguments in this regard and renders them moot, since it does not seek to either amend a terminated agreement or to alter a contract between the parties.

For the same reasons as stated above, § 33-2-1602, MCA, applies to the Agreement. With there being no dispute that it did not contain the terms required under Montana law, the Agreement was, on its face, in violation of the law. CSI has therefore met its burden of showing it is entitled to summary judgment as a matter of law.

A. Summary Judgment #2

In its second motion for summary judgment, CSI asserts Victory violated § 33-2-1602(4), as well as §§ 33-1-311(2) and (4), MCA, by refusing to provide access to the records sought in the Commissioner's September 3 data access demand letter. Alternatively, CSI seeks summary judgment on the grounds that Victory violated these provisions by refusing to provide access in a form usable to the Commissioner.

Pursuant to § 33-2-1602, MCA, an MGA agreement must contain a provision which states in relevant part that, "[t]he commissioner has access to all books, bank accounts, and records of the managing general agent in a form usable to the commissioner." Mont. Code Ann. § 33-2-1602(4). Under § 33-1-311, MCA, "[t]he commissioner has the powers and authority expressly conferred upon the commissioner by or reasonably implied from the provisions of the laws of this state." Mont. Code Ann. § 33-1-311(2). Furthermore, "[t]he commissioner may conduct examinations and investigations of insurance matters, in addition to

examinations and investigations expressly authorized, as the commissioner considers proper, to determine whether any person has violated any provision of the laws of this state or to secure information useful in the lawful administration of any provision." Mont. Code Ann. § 33-1-311(4).

As part of the responsibility and authority to enforce the Insurance Code, the "powers and authority" of the commissioner and CSI are both those expressly conferred and those reasonably implied in the Code. Mont. Code. Ann. § 33-2-311(2). Among the responsibilities and express authorities is to conduct investigations of insurance matters "as the commissioner considers proper, to determine whether any person has violated any provision of the laws of this state or to secure information useful in the lawful administration of any provision." Mont. Code. Ann. § 33-2-311(4). Also among the express authorities of CSI is the responsibility to regulate MGAs. Mont. Code Ann., §§ 33-2-1601 *et seq*. Whether viewed as an express or reasonably implied power and authority, § 33-1-311(2), MCA, contemplates that CSI be able to access the MGA's records under its directive to enforce the Insurance Code and run CSI so as to protect consumers.

The most readily addressed alternative basis for summary judgment is the second issue raised by CSI—providing access in a form usable to the Commissioner. Both parties agree that the majority of the documents Victory provided to CSI were in the form of portable document format (PDF) files. CSI

argues that, given the tabular nature of the information contained in the files, PDF files were not "usable," and it should have received the documents in either a spreadsheet format or, at a minimum, in a comma delimited format that could be easily converted into a spreadsheet.

Neither party disputes that, on September 3, 2021, the Commissioner sent correspondence to Victory in which it requested records pursuant to § 33-2-1602(4), MCA and specified what forms of data were "usable" pursuant to that request. With certain exceptions based on the native formats of the files, the Commissioner demanded that Victory produce data in comma-separated values (a.k.a. comma-delimited) ".csv" files, and also that it produce Microsoft Excel spreadsheet files if the data was kept in that format. (CSV files may be easily converted into and out of a spreadsheet format.) Adobe Acrobat ".pdf" files were only to be produced if the native data was not conducive to a CSV format and was retained in a PDF format.

In contravention to the Commissioner's September 3, 2021, access to records letter request, Victory went out of its way to frustrate the Commissioner's investigation by producing only PDF files. Contrary to its counsel's assertion that Victory had to scan in paper files, the metadata (not to mention the quality and layout) of the PDF files provide by Victory clearly indicates they were electronically "printed" to PDF directly from Microsoft Excel spreadsheet files.

Victory was outright untruthful in its representations to this tribunal as to how the PDF documents were produced, and it easily could have produced the files in the format specified as usable by the Commissioner. Instead, Victory actively took steps to create and produce files in a less usable format.

With regard to whether Victory's actions were in violation of the Code, the statute at issue does not define what is a form "usable" by the Commissioner. *See* Mont. Code Ann. § 33-2-1602(4). It is apparent from the language of the statute, however, that within reason, forms of records usable by the Commissioner would be specified at the time they were requested. That is exactly what was done here by way of the Commissioner's September 3, 2021, access to records letter request. Victory had ample notice and opportunity to produce the records as requested, but actively chose not to do so. Furthermore, the metadata contained in the PDF files shows the data contained therein was kept in Microsoft Excel (and possibly another format prior to that) before being converted to PDF. Thus, there can be no argument that the files were not kept in that format, that the Commissioner's request was unreasonable, or that it would have suffered some kind of burden in having to produce Excel and/or CSV files. To the contrary, Victory placed extra burden on itself by converting all these files into PDF format, a form which would be significantly less useful to the Commissioner.

Victory's actions in not producing the records in a format usable to the Commissioner were in violation of the Code, and CSI has therefore met its burden of showing it is entitled to summary judgment as a matter of law. With regard to simply failing to produce the records requested, it is not necessary for the Hearing Officer to reach this issue based on the foregoing dispositive finding.

CONCLUSIONS OF LAW

1. The Commissioner has jurisdiction over this matter. Mont. Code Ann. § 33-1-311; *Victory Ins. Co. v. Downing*, 2023 MT 139, 413 Mont. 80, 532 P.3d 850.

2. The Commissioner administers the Insurance Code to protect the interests of insurance consumers. Mont. Code Ann. § 33-1-311.

3. Title 33, chapter 2, part 16, Montana Code Annotated governs regulation of managing general agents.

4. A person, firm, association, or corporation may not act in the capacity of a managing general agent with respect to risks located in Montana for an insurer licensed in this state unless the person is a licensed producer in Montana. Mont. Code Ann. § 33-2-1601(1); *see also* Mont. Code Ann. §§ 33-17-102(4), (20), 33-17-211(2).

5. A person acting in the capacity of a managing general agent may not place business with an insurer unless there is in force a written contract between

the parties that sets forth the responsibilities of each party. Mont. Code. Ann. § 33-2-1602(1).

6. The written contract must contain certain provisions listed in § 33-2-1602, MCA, including, in pertinent part:

a. That the Commissioner has access to all books, bank accounts, and records of the MGA in a form usable to the commissioner. Mont. Code Ann. § 33-2-1602(4);

b. That records must be maintained pursuant to § 33-3-401, MCA;

c. That if the contract permits the MGA to settle claims on behalf of the insurer, all claims files are the joint property of the insurer and MGA. Mont. Code Ann. § 33-2-1602(8)(c).

7. Under § 33-3-401(5), MCA, the failure to maintain records and make them available to the Commissioner's staff can result in the penalties and procedures set out in §§ 33-1-317, 33-1-318, and 33-2-119, MCA.

8. If, after a hearing, the Commissioner finds that a person has violated any provision of Title 33, Montana Code Annotated, or regulation promulgated by the Commissioner, the Commissioner may order a penalty of up to $25,000, or up to $5,000 per violation by an insurance producer. Mont. Code Ann. § 33-1-317. Additionally, if after a hearing, the Commissioner finds that a person has violated any provision of Title 33, chapter 2, part 16, Montana Code Annotated, the

Commissioner may order a penalty of $5,000 for each separate violation; order revocation or suspension of the producer's license; or order the MGA to reimburse the insurer for any losses incurred by the insurer caused by a violation of Title 33, chapter 2, part 16, Montana Code Annotated, committed by the MGA. Mont. Code Ann. § 33-2-1605.

10. Victory violated § 33-2-1602, MCA, by placing business with an insurer under a written contract that did not contain the following provisions:

a. That the Commissioner has access to the books, bank accounts, and records of Victory as a managing general agent in a form usable to the Commissioner as required by § 33-2-1602(4), MCA.

b. That all claims files are the joint property of the Insurer and MGA as required by § 33-2-1602(8)(c).

11. Victory violated § 33-2-1602(4), MCA, as well as §§ 33-1-311(2) and (4), by refusing to provide access in a form usable to the Commissioner.

12. There are no genuine issues of material fact in dispute regarding the Commissioner's claims herein, and the Commissioner is entitled to judgment as a matter of law that Victory has violated the Montana Insurance Code as found herein. Mont. Code Ann. §§ 33-1-101, *et seq*.; M. R. Civ. P. 56.

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ORDER

Upon the Commissioner's demonstration that no material facts are in dispute and that he is entitled to judgment as a matter of law,

IT IS HEREBY ORDERED that the Commissioner's Motions for Summary Judgment are GRANTED.

RECOMMENDED AGENCY ACTION

The Commissioner should impose a fine of up to $25,000, or up to $5,000 per violation, as a fine to the State of Montana. Mont. Code Ann. §§ 33-1-317, 33-2-1605. The Commissioner should also order Victory reimburse Clear Spring for any losses incurred by Clear Spring caused by violations of Title 33, chapter 2, part 16, Montana Code Annotated committed by Victory. Mont. Code Ann. § 33-2-1605(1)(c).

STATEMENT OF APPEAL RIGHTS

The amount of a fine the Commissioner may impose is limited to $25,000 per violation. The Commissioner may impose the fine *after* having conducted a hearing pursuant to Mont. Code Ann. § 33-1-701. These are the only applicable limits on the Commissioner's discretion to impose a fine upon Victory. This is the hearing. At the end of the hearing, the Hearing Examiner provides findings of fact, conclusions of law, and a recommended decision to the Commissioner; after the Hearing Examiner provides the findings, conclusions, and recommended decision,

there is no further role for the Hearing Examiner. Only after the Commissioner adopts the findings, conclusions, and recommended decision holding that the respondent has violated a provision of the Montana Insurance Code may the Commissioner impose a fine. Thus, the amount of the fine is not subject to review by the Hearing Examiner. Imposition of the fine pursuant to Mont. Code Ann. § 33-1-317 is an order from which an appeal may be taken, pursuant to the provisions of Mont. Code Ann. § 33-1-711.

DATED August 25, 2023.

By: */s/ Chad R. Vanisko*
CHAD R. VANISKO, Hearing Examiner
Montana Department of Justice
Agency Legal Services Bureau

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Findings of Fact, Conclusions of Law, Order and Recommended Decision on the Commissioner's Motion for Summary Judgment to be sent by email to:

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DATED: August 25, 2023 */s/ Elena M. Hagen*