IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 24-0552

VICTORY INSURANCE CO.
Petitioner/Appellant.

v.

OFFICE OF THE MONTANA STATE AUDITOR,

Respondent/Appellee,

APPELLANT'S REPLY BRIEF

On Appeal from the Montana First Judicial District Court
Lewis & Clark County
District Court Cause No. BDV-25-2023-0000774-JR
Honorable Michael F. McMahon, Presiding

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I. Victory Lawfully Assigned the Policies.

The Commissioner's brief shows fundamental misunderstandings about assignments. Similarly, the Commissioner misreads statutory law that expressly allows (without condition) Victory's right to assign policies. These arguments are addressed in detail below.

A. The Commissioner's Brief Fails To Understand That Assignment Does Not Require The Consent Of The Other Contracting Party.

The Commissioner cites § 28-1-1002, MCA, to claim Victory could not assign without the insured's consent. This statute provides, "The burden of an obligation may be transferred with the consent of the party entitled to its benefits, but not otherwise . . . ."

But this argument demonstrates the Commissioner poor understanding of how assignment works. Assignment inherently cannot require the consent of the other contracting party. If the other contracting party consents, it becomes a novation—a separate and distinct concept from assignment. *See Epland v. Meade Ins. Agency Assocs.*, 564 N.W.2d 203, 207 (Minn. 1997).

As *Epland* explained, "In the absence of an express agreement to the contrary, a party may delegate his or her duty to perform under a contract, but the original party remains liable" for a breach of that obligation *Id.* (cleaned up). That is, with

delegation, the "party may not divest itself of liability on a contract without the consent of the other party to the contract." *Id.*

This changes if the non-assigning party consents. "If the other party consents to the delegation of duties, thus completely substituting one party for another, the proper term for the transaction is a 'novation.'" *Id.* The novation is, in effect, a new agreement that releases the original party from any obligation to perform or legal liability.

As the *Epland* court further explained, an insureds lack of consent "does not render either of the assumption agreements at issue invalid and does not constitute a breach of the underlying insurance contract." *Id.* This is because the insured's consent "was necessary not to effectuate the assumption, but only to relieve the first insurer from liability on the insurance contract." *Id.*

Here, §28-1-1002, MCA only speaks to novation, not assignment. *Bratton v. Sisters of Charity of Leavenworth Health Sys*., 2020 MT 86, ¶ 16, 399 Mont. 490, 461 P.3d 127. The plaintiff in *Bratton* relied on § 28-1-1002, MCA, to argue that a contracting party could not delegate performance. This Court disagreed, stating, "The statute's plain language does not prohibit, without consent, a transfer of the performance of an obligation; rather, it is the 'burden of the obligation' itself that may not be transferred without consent." *Id.*

In sum, the Commissioner harbors confusion about assignment and consent. There is no consent requirement to assignment. To the contrary, assignment requires there is *not* consent. This is because if consent existed, the transaction would be a novation, not an assignment.

B. The Commissioner Misinterprets The Insurance Code Regarding Assignments.

Not only was Victory's transaction legal as a matter of common law but also statutory law. As the Insurance Code provides, "A policy or group certificate issued under a policy may be assignable or not assignable, as provided by its terms." § 33-15-414, MCA.

The Commissioner attempts to negate this statute. He contends that the concluding phrase, "as provided by its terms," modifies both the policy being "assignable" and "not assignable." Because Victory's policy is silent on Victory's assignment rights, he contends, the policy does not expressly allow assignment by its terms, rendering it not assignable.

Yet, the Commissioner advances no argument about why the phrase "as provided by its terms" modifies "assignable." And the Commissioner avoided addressing Victory's statutory interpretation argument about why this phrase only modified "not assignable."

Specifically, Victory's opening brief argued the last antecedent rule is at issue here. This interpretative tool provides that "a limiting clause or phrase . . . should

ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). "The rule reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it." *Lockhart v. United States*, 577 U.S. 347, 351, (2016).

Lockhart illustrates this rule. There, the Court interpreted a criminal statute that concerned prior convictions "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward . . . ." Applying the last antecedent rule, the Court held that the phrase "involving a minor" only modified the last crime, "abusive sexual contact," and not other listed crimes.

So too here, the phrase "as provided by its terms" only modifies the antecedent directly before it—"not assignable." The Commissioner has offered no reason that the context should direct a different result.

Two reasons further support Victory's reading. First, it comports with the common law rule that contracts are assignable unless the contract states otherwise.

Second, it creates a default rule when the contract is silent. The problem with the Commissioner's interpretation applying "as provided by its terms" to both assignable and not assignable is that it does not address what happens when the

contract is silent about assignability. Victory's reading addresses that by saying the contract is assignable unless the contract terms provide it is not assignable.

In sum, Montana allows assignment of insurance policies. And the code places no requirements or restrictions about how those assignments occur.

C. Victory's Policies Were Assigned, Not Cancelled. At A Minimum, Factual Dispute Exists.

The Commissioner alleges that there is no dispute of facts concerning the question of whether an assignment occurred. To the contrary, the Commissioner offered no rebuttal to the following facts:

- Insureds' policy terms were the same.
- Insureds' renewal dates remained the same.
- Insured premiums remained the same.
- There was no break in coverage for insureds.
- Absent an assignment, Clear Spring could not be the insureds' insurer. And yet, the Commissioner took no action against Clear Spring for a multitude of misrepresentations about being the insurer and taking premiums it had no contractual claim to.

The Commissioner notes that Clear Spring issued new policies. While that fact may potentially help the Commissioner, he offers no argument or evidence how issuing new policies (with identical terms) is dispositive. Rather, it is simply a fact that the Commissioner can present at hearing.

The Commissioner also notes various statements from Victory that the policies were terminated and claims that these are "judicial admissions." Yet, the Commissioner ignores that this claimed judicial admission was from a different case. And "judicial admissions are not conclusive and binding in a separate case from the one in which the admissions were made." *Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1142 (5th Cir. 1991).

At a minimum, reasonable minds looking at this evidence could conclude an assignment occurred because the obligations and terms did not change when Clear Spring became the insurer.

II. The Commissioner's Argument Regarding Misrepresentation Is Irrelevant As It Raises An Entirely Different Theory on Appeal.

Concerning misrepresentation, the Commissioner presents an entirely different theory than previously articulated. Namely, the Commissioner argues that Victory misrepresented the transaction by claiming the policy was "upgraded."

Yet, that has never been the Commissioner's theory, nor what the Hearing Examiner found. Instead, the Hearing Examiner concluded that Victory's communication to policyholders "made misrepresentations by failing to clearly explain that each Victory policy was terminated and rewritten by Clear Spring, a separate entity." Examiner Decision, COL, ¶ 78. The Examiner's finding had nothing to do with any claims of upgrades.

In sum, the Commissioner's brief attempts to defend the "misrepresentation" adjudication on a brand-new theory raised on appeal. It should be rejected on that basis alone.

III. Without Established Factors For Assessing An Appropriate Fine, Victory's Due Process Rights Were Violated Regarding the Fine Amount.

The Commissioner argues that his discretion is not unfettered because his discretion is limited to $25,000. But as argued below, without an aggregate cap, the $25,000 is not meaningful limit at all. What is more, there still is no direction, guidance, or restriction instructing the Commissioner whether to issue the maximum $25,000 fine or nominal one like $500. Without established factors, there is no consistency in issuing fines. And thus, there is no equal justice under the law.

A. In Practice, The $25,000 Fine Cap Is No Cap At All.

The Commissioner contends that his discretion is checked. Specifically, he notes that he is capped at $25,000 per violation.

But the Commissioner ignores Victory's point that a single act can constitute multiple violations, rendering the $25,000 cap meaningless in practice. As Victory noted (and the Commissioner did not dispute) many cases before the Commissioner include multiple violations stemming from a single decision or inaction. Victory pointed to three specific cases and the possible fines for each:

- a possible $2,700,000 fine here against Victory;

- a possible $55,000,000 fine against Continental Insurance; and
- a possible $11,000,000 fine against Blue Cross Blue Shield.

In each case, a single act or acts being done pursuant to a single company procedure amounted to numerous violations.

To follow the Commissioner, he should have unchecked discretion to issue million-dollar fines in these multiple violation cases and need not ensure constituency or reasoning for fining these full amounts. Such cannot be the law.

B. The Practices Of Other States Demonstrates That a Cap Alone Is An Inadequate Safeguard.

The Commissioner also never squares his cap arguments with other states. For example, Texas likewise has a $25,000 per violation cap. Tex. Ins. Code § 84.022. Despite this limitation, Texas still has concrete guidelines for what constitutes an appropriate fine. *Id.* South Dakota similarly caps an insurer's liability at $25,000. § 58-4-28.1. And yet, it also provides standards for how that fine is exercised.[1] ARSD 20:06:01:02.

So Montana is an outlier. Indeed, while the Commissioner derides out-of-state laws, he offers no counterpoint to show that other states follow a regime similar to Montana—high discretionary caps with no factors limiting that discretion. The

[1] Federal agencies are also replete with policies and factors for determining fines despite caps. As an example, OSHA can issue a maximum fine of $16,550 per "serious" violation. Despite this cap, OSHA is guided by numerous factors in determining the fine. See OSHA Field Operations Manual, Chapter 6 (accessible at: https://www.osha.gov/fom/chapter-6)

"widely share practice" of other states is instructive for analyzing due process because these practices are "concrete indicators of what fundamental fairness and rationality require." *Schad v. Arizona*, 501 U.S. 624, 640 (1991).

C. Contrary to the Commissioner's Contentions, Montana Criminal Law Seeks Consistency in Sentencing.

The Commissioner turns to a criminal law as an analogy here, noting judge's exercise discretion all the time in issuing punishment. But this analogy only confirms Victory's position.

When issuing criminal fines, courts have specific factors to consider. As this Court stated, determining an appropriate fine requires considering "(1) the nature and extent of the crime; (2) whether the violation was related to other illegal activities; (3) the other penalties that may be imposed for the violation and (4) the extent of the harm caused by the crime." *State v. Wilkes*, 2021 MT 27, ¶ 27, 403 Mont. 180, 480 P.3d 823.

What is more, Montana has "principles" courts must follow in issuing criminal sentences. § 46-18-101, MCA. Among other things, these principles ensure that sentencing is "consistent." *Id.* That is, these principles (which are effectively factors) seek to ensure that similarly situated defendants are treated similarly. And this Court will review criminal sentences to ensure compliance with these principles. *See, e.g., State v. Habets*, 2011 MT 275, ¶ 15, 362 Mont. 406, 264 P.3d 1139. So

unlike the Commissioner, judges are provided parameters in how they exercise discretion.

Additionally, with a criminal proceeding, a judge issues the sentence. That means something. Our Constitution ensures that judges have specific qualifications, such as being licensed lawyers for five years and in good standing. Simply stated, those issuing criminal sentences are uniquely qualified to render a just result.

In contrast, there are few qualification requirements for the Commissioner. And the Commissioner is not a neutral party like a judge. With criminal sentencing, a judge only acts as the umpire. In contrast, the Commissioner has approves bringing the case (and a proposed fine amount), his staff prosecutes the case, and he ultimately renders judgment.

D. Disparity in Process Creates Inconsistent Results.

Without established, uniform factors, there is disparity in process. This allows the Commissioner to practically do whatever he wants, even if it contradicts his argument in a prior case.

A prime example here is harm to the consumer. Victory has argued that no consumer was harmed, and that should be considered regarding an appropriate fine. The Commissioner argues that it is not a relevant factor.

If the Commissioner establishes a list of factors stating consumer harm is irrelevant, so be it. But equal justice does not allow the Commissioner to disregard

lack of consumer harm here to warrant a lower fine and then use the infliction of that harm in a separate case to increase the fine. Such conduct is the definition of whimsical decision making. Harm to the consumer is either relevant or irrelevant; it cannot change based on the convenience of whatever result the Commissioner desires.

And as it stands, nothing would prevent the Commissioner from taking contradictory positions in cases. The only thing preventing the Commissioner from making up the standards in each case is an established rule.

Established factors is all the more important when the Commissioner has delegated his decision-making. As Victory's opening brief noted, and the Commissioner does not dispute, he has hired different outside individuals to adjudicate these cases. But these outside individuals have no reference point for how to adjudicate a fine. Instead, each individual adjudicator is separately deciding what is, and is not, relevant to a fine amount with no guidance about how to determine the fine.

And as Victory previously noted, this case inherently proves the arbitrary nature of the fine amount. The Commissioner began by asking for a 2.7 million dollar fine, then his attorney (without explanation) lowered it to $1 million, and finally, his deputy issued a fine of $250,000 with $150,000 potentially suspended. At a minimum, that is a $2.45 million disparity amongst the Commissioner and his

staff about what an appropriate fine is. Such a massive disparity demonstrates that, without established guidelines, deciding a relevant number is effectively picking a number out of thin air depending who decides the fine amount.

E. Conclusion on The Lack of Established Standards

In sum, the Commissioner's process for issuing fines cannot stand. As this Court has stated, our laws must "prescribe a policy, standard or rule" to guide agency decision-making, and the rule "must not vest" agencies "with arbitrary and uncontrolled discretion." *Williams v. Bd. of County Comm'rs,* 2013 MT 243, ¶ 44, 371 Mont. 356, 308 P.3d 88. Rules without such standards "run afoul of the due process guarantees." *Id*., ¶ 45. This is because standardless rules allow an entity "to be held hostage by the will and whims" of a decision-maker "without reason or justification." *Id*., ¶ 50. And standardless rules "allows for unequal treatment under the law and is in clear contradiction of the protections of the due process clause of the Fourteenth Amendment." *Id*.

As the Fifth Circuit has echoed, an administrative agency must adjudicate penalties in similar cases similarly. *Univ. of Tex. M.D. Anderson Cancer Ctr. v. United States HHS*, 985 F.3d 472, 480 (5th Cir. 2021). "Were it otherwise, an agency could give free passes to its friends and hammer its enemies—while also maintaining that its decisions are judicially unreviewable because each case is unique. Suffice it to say the APA prohibits that approach." *Id.*

That is precisely the concern here. As it stands, there are no standards governing how a Commissioner exercises his discretion in issuing a fine. In fact, the Commissioner does not even pretend that he has considered a specific factual basis for his fine here. Instead, he simply asserts that the factual basis is that a violation occurred.

But this contention confuses the question. Just because the Commissioner *can* issue a fine does not answer what an appropriate fine should be. And the Commissioner provides no limitation on his power concerning this latter question.

Prudential reasons also support requiring standards for determining a fine. Without standards, this Court is effectively left with no meaningful way to review the Commissioner's fine. This Court has stated its administrative review includes considering whether the agency considered all the "relevant factors." *Belk v. Mont. Dep't of Envtl. Quality*, 2022 MT 38, ¶ 33, 408 Mont. 1, 504 P.3d 1090. Generally speaking, this means the agency defines the relevant factors through an administrative rule and the Court can then assesses whether those factors were addressed and considered. *See Id*. If the Commissioner has not defined the factors, it makes this Court's role difficult in assessing whether he considered the "relevant factors."

Accordingly, Victory asks that this Court reverse and remand. Specifically, the Court should (1) order the Commissioner adopt rule establishing standards to

adjudicate fines and (2) require an evidentiary hearing concerning an appropriate fine.

IV. Victory's Due Process Rights Were Violated When It Was Provided No Opportunity to Develop A Factual Record Concerning An Appropriate Fine.

Victory has argued that due process dictates Victory has a right to make a factual record concerning the amount of the fine. The Commissioner does not dispute Victory had no opportunity to create this record. Instead, he contends that Victory received all process due under MAPA.

But the Commissioner knows that is a false statement. As Victory has noted, and the Commissioner does not dispute, a MAPA hearing itself concerns the appropriate fine. Below, the Commissioner expressly stated that he was following § 2-4-621, MCA, to render a final determination. This statute concerns agency review of a hearing officer decision, and states, "The agency may accept or reduce the *recommended penalty in a proposal for decision* but may not increase it without a review of the complete record." Implicitly within this provision is that the hearing officer is (1) hearing evidence about an appropriate fine and (2) make a recommendation about the fine. In fact, the statute also indicates that what constitutes an appropriate fine is fact intensive since agency may only increase the fine if the agency official "has reviewed the whole record."

The Commissioner offers no substantive rebuttal to this point. Instead, the Commissioner claims Victory has raised a new legal theory by quoting the statute.

But this Court "of course permit parties to bolster their preserved issues with additional legal authority or to make further arguments within the scope of the legal theory articulated . . . ." *State v. Strizich*, 2021 MT 306, ¶ 32, 406 Mont. 391, 499 P.3d 575. At every stage in these proceedings, Victory has argued that due process dictates Victory has a right to have an evidentiary hearing concerning the amount of the fine. As the Commissioner himself notes, due process requirements are "reflected in MAPA." Comm. Br, p. 25 (citing *Anaconda Pub. Schools v. Whealon*, 2012 MT 13, ¶ 15, 363 Mont. 344, 268 P.3d 1258). Since MAPA reflects due process requirements, pointing out the MAPA standard is nothing more than bolstering Victory's existing argument that due process required an evidentiary hearing on an appropriate fine amount.

The Commissioner's only other argument concerning Victory's right to make a factual record is that the case was resolved on summary judgment. But the Commissioner ignores that summary judgment only adjudicated that a violation occurred; not what the amount of the fine should be.

Contrary to the Commissioner's contentions, determining the fine amount is a separate, highly factual inquiry. As the Fifth Circuit has described it, administrative

"penalty adjudications" are of a "fact-intensive nature," and that agencies must "evaluate each case on its individual facts." *Univ. of Tex.,* 985 F.3d at 480.

As there was no evidentiary hearing, factual details were never considered. Remarkably, the Commissioner issued this decision without any evidence for one Victory customer. Provided the opportunity, Victory would have provided evidence from these customers that they were aware of the transaction and had no problem with what occurred.[2] Similarly, Victory could have placed evidence in the record showing there was no malice by Victory.

V. Victory's Right to a Jury Trial Has Been Violated By the Administrative Action.

Victory's jury trial rights were also violated under *SEC v. Jarkesy*, 603 U.S. 109, 122 (2024).

A. *Jarkesy* Applies in Montana.

The Commissioner begins his argument with a falsehood—that Victory's argument does not rest on the Montana Constitution. Quite the opposite, Victory is invoking its State right.

But Victory's argument is that *Jarkesy* is still applicable because this Court has stated, "the right to trial by jury in this state is the same as that guaranteed by the

[2] For context, Victory is not a State Farm or a Progressive. It is a Montana-based insurer who prides itself on its individual relationship with customers.

Seventh Amendment." *Romero v. J & J Tire*, 238 Mont. 146, 151 (1989).[3] It follows if the rights are the same, then *Jarkesy*'s reasoning applies with equal force in Montana.

Nevertheless, the Commissioner contends that *Jarkesy* has no bearing because "the scope of Montana's jury trial right was the right as it existed when the Constitution was enacted." Comm. Br, p. 41. To follow the Commissioner's reading, if there was not explicitly recognized right to a jury trial before 1889, there is no right after 1889.

This argument is based on a poor reading of Montana law. Yes, Montana law does not recognize a right to a jury trial in all actions. But it recognizes a right to jury trial for any common law actions (i.e., the rights that existed before 1889). The test, therefore, is whether the action sounds in the common law or akin to a common law action.

This Court's decision in *Supola v. Mont. DOJ, Drivers License Bureau* explains this concept. 278 Mont. 421, 424, 925 P.2d 480, 482 (1996). In *Supola*, the

[3] If the Court were to rule *Jarkesy* does not apply, it would not only be acting inconsistent with its statement from *Romero* but also creating an anomaly of law. As the Court has observed, "unique language" in Montana's constitution is a basis to find enhanced protection compared to the United States Constitution. Montana right using the word "inviolate" is stronger phrasing than the United States Constitution, and there is nothing in the textual language or the Constitutional Convention suggesting Montana wanted less protection than the federal counterpart. So to accept the State's argument is to accept Montana's constitution provides stronger language but less protection without any historical or textual basis for reaching that conclusion.

Court addressed the right to a jury trial before suspending a driver's license for refusing a breath test. To follow the Commissioner's contention, the Court should have found that no right existed before 1889, therefore there is no right today.

That is not how the Court analyzed the question. Rather, the Court asked whether the action sounded in a legal remedy (i.e, the recovery of money) or in equity. The Court found that it sounded in equity because the "only possible relief is the reinstatement of the driver's license and the consequent resumption of driving privileges." *Id.*

This is precisely the analysis undertaken with the Seventh Amendment. And this is why this Court (contrary to the Commissioner's representation) has treated Montana's constitutional right to trial as the same as the Seventh Amendment. Thus, much like the analysis in *Supola*, the central issue here is whether the claim sounds in equity or whether it is "legal in nature." *Jarkesy*, 603 U.S. at 122.

B. The Defining Question Of Whether The Jury Trial Right is Implicated Is Whether the Claim is "Legal In Nature."

The Commissioner also disputes *Jarkesy*'s application here by contesting that the claim is not akin to a common law action. But as the United States Supreme Court has noted, America has followed the "English common law in treating the civil penalty suit as a particular type of an action in debt." *Tull v. United States*, 481 U.S. 412, 418, 107 S. Ct. 1831, 1836 (1987). And as *Jarkesy* reiterated, "Actions by the Government to recover civil penalties under statutory provisions . . . historically had

been viewed as a type of action In debt requiring trial by jury." 603 U.S. at 122. The Commissioner ignores these statements in analyzing the right to a jury trial.

What is more, *Jarkesy* made it clear that the jury trial right is not dependent upon the Government agency's cause of action. As the Court explained, "we have noted that the right is not limited to the common-law forms of action recognized when the Seventh Amendment was ratified." *Id.*

While the Commissioner argues that the misrepresentation does not mirror a fraud claim, he ignores an important consideration. It is sufficient that the statutory claim is "akin" to a common law action.

A recent Second Circuit is instructive here. *AT&T, Inc. v. FCC*, 2025 U.S. App. LEXIS 9172, at *15 (5th Cir. Apr. 17, 2025). The *AT&T* court (applying *Jarkesy*) found that the FCC administrative action violated AT&T's right to jury. Notably, the FCC raised many of the same arguments as the Commissioner. Specifically, it contended the enforcement action did not mirror a negligence claim because it did not mirror the negligence elements.

But the Court dismissed this argument, noting, "The key inquiry . . . is not what terminology the statute uses but whether the statute targets the same basic conduct as the common law claim." *AT&T, Inc.,* *15. The Court conceded that the "common law analogue is not as obvious as it was in *Jarkesy*." But noted any "ambiguity on this second consideration points us back to the 'more important' first

consideration—remedy." *Id.* As it observed, the FCC statute imposed "the archetypal common law remedy of money damages" which is "all but dispositive' of the Seventh Amendment issue," thus warranting a jury trial. *Id.*

Here, both a common law fraud claim and the statutory misrepresentation claim targets the same basis conduct—whether there was an untrue statement. What is more, the Commissioner fails to analyze the question of a negligent misrepresentation claim, which does invoke a jury trial right and largely mirrors the Commissioner's misrepresentation claim here. Without question, this negligent misrepresentation targets the same conduct of a party making a false statement regardless of whether they intended to or not.

The Commissioner also asks this Court to reject the *Jarkesy* decision and instead apply the public rights exception under *Atlas Roofing Co.* v. *Occupational Safety and Health Review Commission*, 430 U. S. 442, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977). The SEC also argued that the *Atlas* decision should control the outcome, but the Supreme Court rejected it.

The Court went on to explain that the application of *Atlas Roofing* was limited, as the "cases that *Atlas Roofing* relied upon did not extend the public rights exception to "traditional legal claims." *Id.* It also noted that "after *Atlas Roofing*, this Court clarified in *Tull* that the Seventh Amendment does apply to novel statutory regimes, so long as the claims are akin to common law claims." *Id*. at 2139.

Stated simply, the SEC made the same arguments asserted by the Commissioner. And those arguments were rejected. As it summarized, that when an action "from its nature, is the subject of a suit at the common law," a legislative body may not "withdraw it from judicial cognizance" under the guise of public rights. *Id.*, 603 U.S. at 140.

C. This Case Being Resolved At Summary Judgment Still Implicates the Right to a Jury Trial Because It Effects the Forum And The Fine Amount.

The Commissioner's urges this Court to disregard *Jarkesy* because the Commissioner's Final Order concerns summary judgment. But this argument misses the point. The right to a jury trial does not stand in a vacuum and it begins at the time an action is filed; not after the Commissioner has had the opportunity to engage in motion practice. As the *Jarkesy* concurrence explained:

> The Seventh Amendment's jury-trial right does not work alone. It operates together with Article III and the Due Process Clause of the Fifth Amendment to limit how the government may go about depriving an individual of life, liberty, or property. The Seventh Amendment guarantees the right to trial by jury. Article III entitles individuals to an independent judge who will preside over that trial. And due process promises any trial will be held in accord with time-honored principles. Taken together, all three provisions vindicate the Constitution's promise of a "fair trial in a fair tribunal." *In re Murchison*, 349 U. S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955).

Jarkesy, *Id*. at 2140.

The Commissioner's summary judgment argument also ignores the adjudication of the fine amount. Summary judgment only adjudicated liability, it did

not settle the amount of the fine. Victory had no opportunity to present its position before a jury or judge regarding the fine or make arguments about what the fine amount should be. So, to the degree the Commissioner's makes an argument about summary judgment, it cannot apply to the fine question.

CONCLUSION

Summary judgment was improperly granted both regarding the cancellation claim and the misrepresentation claim. This Court should reverse and remand on these issues.

However, the Court cannot remand this for further administrative proceeding. Victory has a jury trial right, and thus, any proceeding must proceed in district court.

Alternatively, if the Court affirms the Commissioner's ability to conduct administrative proceedings and affirms, the Court should remand regarding the fine. The Commissioner must establish a rule outlining factors for an appropriate fine. Once he does so, Victory should then have the right to create a factual record about what constitutes an appropriate fine.

RESPECTFULLY SUBMITTED this 7th day of May, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionally spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word 2008 for Mac is **4,992**, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

DATED this 7th day of May, 2025.

By: ___/s/ Linda M. Deola_____
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