UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GREAT AMERICAN LIFE INSURANCE COMPANY Plaintiff v. UNITED STATES DEPARTMENT OF THE INTERIOR 1849 C Street, N.W. Washington, D.C. 20240 SALLY JEWEL, SECRETARY OF THE INTERIOR 1849 C Street, N.W. Washington, D.C. 20240 LAWRENCE S. ROBERTS, ACTING ASSISTANT SECRETARY—INDIAN AFFAIRS MS-3642-MIB 1849 C Street, N.W. Washington, D.C. 20240 JACK R. STEVENS, ACTING DIRECTOR OF THE OFFICE OF INDIAN ENERGY AND ECONOMIC DEVELOPMENT MS-SIB-20 1951 Constitution Avenue, N.W. Washington, D.C. 20245 Defendants <u>Also serve</u>: Benjamin A. Glassman Acting United States Attorney U.S. Attorney's Office Southern District of Ohio 303 Marconi Boulevard, Ste. 200 Columbus, Ohio 43215	Civil Action No. 1:16-CV-00699 Judge COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF <u>Jury Trial Requested</u>

Loretta E. Lynch
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

INTRODUCTION

Regrettably, Plaintiff Great American Life Insurance Company ("GALIC") has been forced to bring this action because the United States, through the unconstitutional, arbitrary and capricious acts of the Defendants[1], reneged upon and refused to honor a certified Loan Guaranty issued by the Federal Government and duly transferred to GALIC as a secondary lender in the secondary market.

The loan that GALIC purchased in good faith was made by the original lender to a business wholly-owned by members of the Sioux tribe and guaranteed by the Government's Agency under the Indian Financing Act of 1974, as amended, codified at 25 U.S.C. §1451 *et. seq*. The failure of the Government's Agency—the Department of the Interior—to honor its Loan Guaranty is especially egregious in light of the key purposes and provisions of the Indian Financing Act:

- "It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts

[1] In the administrative proceedings and record below, the Defendants are referred to variously as "DOI" (Department of the Interior), "BIA" (Bureau of Indian Affairs, a division within DOI or "OIEED" (Office of Indian Energy and Economic Development), or "DCI" (Division of Capital Investment, a division within OIEED charged with administering the Loan Guaranty Program). For simplicity and clarity we refer to the Defendants throughout this Complaint collectively as the "Agency."

The Administrative Record itself is relatively large consisting of approximately 8,000 pages. The Parties possess the Record in both hard copy and digitally. Plaintiff plans to ask the Court at the first pretrial conference precisely how the Court prefers the Record to be submitted and filed.

comparable to that enjoyed by non-Indians in neighboring communities." 25 U.S.C. §1451.

- "In order to provide access to private money sources which otherwise would not be available, the Secretary may—(1) guarantee not to exceed 90 per centum of the unpaid principal and interest due on any loan made to any organization of Indians having a form or organization satisfactory to the Secretary, and to individual Indians…." 25 U.S.C. §1481.

- "Full faith and credit.

  1) In general.

     The full faith and credit of the United States is pledged to the payment of all loan guarantees and loan insurance made under this subchapter after December 13, 2002.

  2) Validity.

     Except as provided in regulations in effect on the date on which a loan is made, the validity of a guarantee or insurance of a loan under this subchapter shall be incontestable." 25 U.S.C. §1485(c).

- "…the Secretary shall develop such procedures and promulgate such regulations as are necessary to facilitate, administer, and promote transfers of loans and guaranteed and insured portions of loans under this section." 25 U.S.C. §1485(h).

The Agency flipped these statutory purposes and provisions on their head. The Loan Guaranty was used to induce GALIC to part with a considerable sum of its private money—$20,043,618.67—to purchase a loan to an Indian-owned business. But when the Indian business defaulted on that loan, the Agency reneged on the Loan Guaranty, relying on a procedure that violated GALIC's due process rights under the Fifth Amendment of the United States Constitution. Not surprisingly this flawed process resulted in a decision that ignored relevant factors and is contrary to applicable law.

Specifically, the Agency did not engage in "reasoned decisionmaking" as defined by a unanimous Supreme Court in *Judulang v. Holder*, 132 S.Ct. 476 (2011):

> … courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking. When reviewing an agency action, we must assess, among other matters, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." That task involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons.

Id. at 483-84 (internal citations omitted).

Justice demands that this Court fill the role described by the Supreme Court in *Judulang*, declare that GALIC is entitled to its Guaranty and order the Agency to honor that Guaranty. Given the Agency's violations of GALIC's due process rights in the administrative proceedings below, which were adjudicatory in nature, the standard of review to be applied in this case is *de novo*.

PARTIES

1. Plaintiff GALIC is an Ohio corporation with a principal place of business and headquarters located at 301 East Fourth Street, Cincinnati, Ohio 45202. GALIC is the wholly-owned subsidiary of the American Financial Group, Inc., corporations with their principal place of business at the same address.

2. Defendant United States Department of Interior ("DOI") is permitted pursuant to the Indian Financing Act to guaranty loans made by eligible lenders for the purpose of "provid[ing] capital on a reimbursable basis to help develop and utilize Indian resources." 25 U.S.C. §1451.

3. Defendant Sally Jewell is the Secretary of DOI. GALIC brings this Complaint against Defendant Jewell in her official capacity.

4. Defendant Lawrence S. Roberts is the Deputy Assistant Secretary-Indian Affairs of the Department of the Interior. GALIC brings this Complaint against Defendant Roberts in his official capacity.

5. Defendant Jack R. Stevens is the Acting Director of the Office of Indian Energy and Economic Development ("OIEED"). OIEED receives and decides upon applications for the issuance of loan guaranties under the Indian Financing Act. GALIC brings this Complaint against Defendant Stevens in his official capacity. Defendant Stevens manages the Agency's Division of Capital Investment ("DCI") which administers the Loan Guarantee Program. Phillip H. Viles, Jr. was the Chief of DCI at the time the original loan guaranty was approved and at the time it was purchased by and transferred to GALIC.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §1331, 28 U.S.C. §1361, 5 U.S.C. §§702-706, 25 U.S.C. §1496(a), and 43 C.F.R. §4.314.

7. This District is a proper venue for this matter under 28 U.S.C. §1391(e)(2), (3).

DESCRIPTION OF THE TRANSACTIONS AND RELATIONSHIPS AMONG THE PARTIES

A. The Loan Guaranty Program.

8. The Indian Financing Act of 1974, Pub. L. 93-262, §2, Apr. 12, 1974, 88 Stat. 77, as amended (the "Indian Financing Act") and codified at 25 U.S.C. 1451, *et. seq*., created the Loan Guaranty Program (the "Program"). In adopting the Program, Congress sought to encourage private commercial lenders to provide financial capital for the development of Native American communities in the United States when these lenders had previously been skeptical and risk adverse. Congress stated in its declaration of policy that:

> It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their

> own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

25 U.S.C. §1451. Congress elaborated that the specific purpose of the Program is to "provide access to private money sources which otherwise would not be available." 25 U.S.C. §1481(a).

9. President Richard M. Nixon approved passage of the Act and offered the following goals for the Program:

> The loan guarantee provisions of this bill are especially significant. The Bureau of Indian Affairs, which has been in the business of making loans to Indians for decades, can cite solid evidence showing that Indians are good loan risks. Unfortunately, the business community has not been fully aware of this fact. **The loan guarantee program is the Administration's way of backing up our conviction with Federal money.** I hope that enactment of this bill will greatly enhance the financial attractiveness of Indian borrowers in the private sector.

Richard Nixon: "Statement About Signing the Indian Financing Act of 1974," April 13, 1974. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=4174 (emphasis added).

10. The Agency through its BIA and OIEED interpreted as the purpose of the Program "to encourage eligible borrowers to develop viable Indian businesses through conventional lender financing[,] … help lenders reduce the **excessive risks** on loans they make[,] … [and] in turn help[] borrowers secure conventional financing that might otherwise be unavailable." 25 C.F.R. §103.02 (emphasis added). The Chief of DCI who approved the Guaranty at issue here, Phillip H. Viles, Jr., elaborated that the mission of BIA is to encourage a secondary market in BIA Guarantees. Mr. Viles made this statement in an email dated February 10, 2012, which reads:

> While we see our primary mission as guaranteeing the initial loan so as to spur economic development in Indian Country and make reservation life better,

> we need also to encourage a secondary market in our guarantees.

B. Prior to GALIC's purchase of the Loan in the secondary market there was an original Loan and Guaranty under the Agency's Loan Guaranty Program.

11. The Lower Brule Sioux Tribe of South Dakota (the "Tribe") attempted to finance and establish a financial broker-dealer enterprise that used the special status of Native American businesses to create tax-advantageous investments for both Native American and non-Native American investors. The Tribe was originally advised by the IRS-Office of Indian Tribal Governments that gains from investments passing through tribal-controlled entities would receive favorable tax treatment. The broker-dealer enterprise was acquired by the original borrower—LBC Western Holding, LLC ("LBCWH").

12. The Lower Brule Community Development Enterprise, LLC ("LBCDE"), as the original lender, loaned $22,519,638 in value (some cash and assumption of LBCWH's debt) to provide financing for the purchase of outstanding shares of the broker-dealer enterprise known as the Westrock Group, Inc. and its affiliates ("Westrock"). The loan was guaranteed for 90% of its value ($20,267,674) by the Agency under the authority of the Loan Guaranty Program. LBCDE is a wholly-owned subsidiary of the Lower Brule Corporation ("LBC"), which is, itself, a wholly-owned subsidiary of The Tribe. The Tribe is a federally-recognized Indian tribe pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C. §476, *et seq*. LBC wholly owns LBC Capital Markets, LLC ("LBC Capital") which, in turn, wholly owns the borrower of the guaranteed loan, LBCWH.

THE AGENCY GUARANTEES THE ORIGINAL LOAN FROM LBCDE TO LBCWH.

13. In 2009, the original lender LBCDE began the application process to secure a Loan Guaranty from the Agency as required by the Indian Financing Act (25 U.S.C. §1451, *et. seq*.) and 25 C.F.R. Part 103.

14. On June 24, 2010, the Agency issued Loan Guaranty No. G103D1A1501 to LBCDE, certifying that the Agency would guaranty up to 90% of the principal amount of the proposed loan by the original lender LBCDE to the borrower LBCWH. The structure of the original loan that the Agency approved involved three well-defined steps:

- **One**: The borrower LBCWH purchased the broker-dealer enterprise known as Westrock from its former owners. Borrower paid for this asset by incurring purchase money debt, evidenced by promissory notes payable by borrower to such former owners.

- **Two**: The purpose of the loan made by the original lender LBCDE to borrower was to refinance the borrower's purchase money debt.

- **Three**: This refinancing and the funding of the original loan occurred on November 29, 2010, when the proceeds of the original loan in the form of new notes from the lender LBCDE were received by the holders of the purchase money debt of borrower (said holders being the former owners of the Westrock broker-dealer businesses) and upon receipt of such proceeds, the purchase money debt of borrower was fully discharged and satisfied. Some cash was also paid to the borrower.

15. This structure, which is not uncommon in commercial transactions of this nature, is carefully and clearly set forth in the Loan Agreement between the original lender LBCDE and the borrower LBCWH.

16. This structure including the funding mechanism was discussed at length with the Agency. The Administrative Record clearly proves that the Agency knew about this structure and how the loan was to fund.

17. The Agency approved the structure of this original loan and how it was to fund.

18. After extensive discussion and analysis of the original loan structure and the loan documents, the Agency approved them and issued Loan Guaranty No. G103D141501 in order to guaranty it under the Indian Financing Act.

19. After obtaining the Loan Guaranty, the original lender sought to sell the Loan and Guaranty in the secondary market.

LBCDE SELLS ITS GUARANTEED LOAN IN THE SECONDARY MARKET

20. Beginning in 2011 and continuing into 2012, LBCDE actively solicited buyers in the secondary market for its loan to LBCWH and the Guaranty certificate.

21. GALIC was one of the potential buyers solicited by LBCDE in early 2012.

22. During the first quarter of 2012 GALIC conducted extensive due diligence regarding the purchase of the original loan and the Loan Guaranty. This due diligence met or exceeded the standard of care that a commercially reasonable lender would exercise under similar circumstances.

23. Given these circumstances which obviously involved the nature, extent and effectiveness of the Loan Guaranty, GALIC's due diligence involved discussions and email correspondence by GALIC and its advisors with the Agency, including but not limited to, Phillip H. Viles, Jr., Chief, Division of Capital Investment, Office of Indian Energy & Economic Development.

24. These discussions involved the nature, soundness and effectiveness of the original loan, the Loan Guaranty as well as the operation of the loan guaranty program generally.

25. In the course of these discussions, the Agency represented that the original loan and loan documents had been found to comply with the criteria and regulations of the Agency's loan guaranty program and that the Agency had, therefore, duly issued a Certified Loan Guaranty that

remained effective under the Indian Financing Act, backed by the full faith and credit of the United States.

26. Throughout the due diligence process the Agency represented to GALIC that all was in order with the original loan and Loan Guaranty and that the Loan Guaranty was effective.

27. GALIC presented an offer to purchase the guaranteed loan from LBCDE in a letter of March 7, 2012, to LBCDE through its wholly-owned subsidiary MidMarket Capital Partners, LLC. GALIC formally purchased the loan from LBCDE on April 2, 2012. On April 5, 2012, GALIC sent Phillip H. Viles, Jr. a letter pursuant to 25 C.F.R. §103.29 formally designated a "Notice of Transfer" that stated that LBCDE as the original lender "sold … and assigned all of its rights and obligations under, the Loan, Loan Agreement and all related instruments, agreements and documents."

28. The Borrower, LBCWH, made payments to GALIC in accordance with the Loan Agreement, as assigned through February of 2013.

29. LBCWH, however, did not make the next scheduled payment of principal and interest due to GALIC no later than April 1, 2013. On April 9, 2013, LBCWH informed GALIC that it could no longer make payments of principal and interest.

30. GALIC issued a letter to LBCWH on April 12, 2013, indicating that an Event of Default had occurred under Section 9.01(1)(a) of the Loan Agreement. LBCWH did not cure this default by making payment and further did not make the payments scheduled for May 1 and June 1 of 2013. Great American notified the Agency of this Event of Default in a letter dated April 23, 2013.

31. GALIC sent a letter to LBCWH on June 19, 2013, declaring a Notice of Acceleration as permitted under Section 9.02 of the Loan Agreement which declared the entire

unpaid principal balance of the loan and all interest accrued thereon accelerated and immediately due and payable.

GALIC'S CLAIM FOR LOSS UNDER THE CERTIFIED LOAN GUARANTY

32. GALIC also sent on June 19, 2013, to DCI a letter (1) informing DCI that a Notice of Acceleration had been tendered to LBCWH and (2) stating that, pursuant to 25 C.F.R. §103.36(d)(1), as its selection of remedy for LBCWH's default, GALIC was submitting a completed and executed Claim for Loss under the Certified Loan Guaranty and fully consistent with the terms and conditions of the Loan Guaranty Program.

33. In response to GALIC's letter of June 19, 2013, submitting the Claim of Loss, the Agency sent GALIC a request on July 11, 2013, for additional documentation which it stated was needed to properly evaluate the claim. GALIC provided additional documentation to the Agency on September 10, 2013, in the form of a CD-Rom. The Agency acknowledged receipt of these documents on October 1, 2013, yet BIA complained that the CD-Rom was not indexed and there was no indication of which documents were responsive to which part of the Agency's request. On November 1, 2013, BIA received a second CD-Rom from GALIC that did contain an index. On November 14, 2013, BIA sent GALIC another request for documentation. On December 11, 2013, GALIC submitted additional documentation to BIA. On December 23, 2013, the Agency denied GALIC's $20,043,618 claim for loss under Loan Guaranty Certificate No. G103D1415101.

PROCEEDINGS BEFORE THE AGENCY'S INTERIOR BOARD OF INDIAN APPEALS

34. In order to exhaust its administrative remedies GALIC was required to appeal the December 23, 2013, decision to the Interior Board of Indian Appeals ("IBIA"). A decision by the

IBIA constitutes final Agency action that is subject to judicial review by this Court under 5 U.S.C. §704. *See*, 43 C.F.R. §4.314.

35. GALIC filed a Notice of Appeal with the IBIA on January 17, 2014, challenging the correctness of DCI's December 23, 2013, declination of GALIC's Claim for Loss. The IBIA issued a Pre-Docketing Notice and Order for Parties to Address Jurisdictional Issues on January 29, 2014, requesting that DCI and GALIC submit briefs addressing the issue of whether DCI's declination of the Claim for Loss constitutes final agency action.

36. In response to the foregoing Order, the Director of OIEED filed a Request For Remand with the IBIA on February 28, 2014, arguing that it may be permitted reconsideration of its decisions without condition. GALIC did not object to this request. The IBIA issued an Order Dismissing Appeal and Granting Request for Remand on March 6, 2014, reasoning that DCI's declination decision was not "final for the Department of the Interior" and that the decision was subject to further review. Principal Deputy Assistant Secretary – Indian Affairs Lawrence Roberts acted upon the remand and issued a decision affirming the declination decision in a letter to GALIC dated June 17, 2014.

37. GALIC filed a "new" Notice of Appeal with the IBIA on June 27, 2014, appealing the Principal Deputy Assistant Secretary – Indian Affairs' decision. On July 2, 2014, the IBIA issued a Pre-Docketing Notice, Order Concerning Statement of Reasons, and Order for Administrative Record requesting that the Principal Deputy file the Administrative Record within 20 days.

38. On August 1, 2014, GALIC filed a Motion for Status, Scheduling and Case Management Conference with the IBIA. In this Motion GALIC requested discovery, an evidentiary hearing and oral argument as provided for in the Agency's own regulations at 43 C.F.R.

§4.26 and §4.337. GALIC made this Motion because it was clear from the Agency's December 23, 2013, declination letter that the Agency was relying on both illusory and disputed facts to deny GALIC's claim. GALIC was entitled to this type of proceeding under the due process clause of the Fifth Amendment yet the IBIA denied the Motion.

39. After seeking and receiving three separate extensions of time, the Agency finally filed a Certification of Administrative Record on November 26, 2014, in conjunction with the filing of the Administrative Record with the IBIA.

40. GALIC filed Objections to the Administrative Record with the IBIA on December 23, 2014. GALIC's objections described in great detail how and why the Administrative Record was inadequate, incomplete, contrary to law and in violation of the Agency's own guidelines for the content and production of an Administrative Record written by the Agency's Deputy Solicitor and captioned: *Department of the Interior Standardized Guidance on Compiling a Decision File and an Administrative Record*.

41. Specifically, GALIC's Objections articulated dozens of defects, such as the failure to include:

- Documentation of substantive meetings and conversations relevant to the decision-making process.
- Drafts of documents substantiating the BIA's decision-making process that indicate discussions, resulting revisions of documents and all relevant supporting documents relied upon by the BIA in writing these drafts, such as agency manuals, previous administrative records, and articles and publications.
- Contemporaneous memoranda that document relevant oral communications and confusing emails. For example, the Administrative Record should contain notations of the oral conversations concerning the purpose, revision and content of the documents produced as well as notes taken by Mr. Viles regarding meetings referenced in email exchanges.
- Minutes, transcripts of meetings, memorializations of telephone conversations and meetings, including personal memoranda or handwritten notes.

- Internal correspondence and memoranda between Phil Viles, his peers and subordinates.

42. Nearly 90 days later, after obtaining three separate extensions from the IBIA, the Agency filed a Response to GALIC's Objections. The Responses concede that the Record is incomplete but pronounces that "nothing more is needed" because the Record contains everything "relevant" to the Agency's decision. The response also concedes that the Administrative Record did not comport with the Agency's own guidelines because they were of "no legal force or logical impact in the matter."

43. GALIC filed a Reply on April 6, 2015. The Reply again described in detail over 25 pages how and why the Administrative Record was incomplete, inadequate and in violation of applicable law. GALIC's Reply provides dozens of examples of documents that should be in the Administrative Record but are not. These include documents that are described in the Administrative Record as having been received by the Agency or in its possession but yet are not included.

44. Given the patently incomplete and misleading record, GALIC's Reply again repeated its prior request for the IBIA to permit GALIC to take depositions and conduct other discovery. GALIC cited numerous cases to support its right to deposition and other discovery, including the following language from *Miami Nation of Indians of Indiana, Inc. v. Babbit*, 979 F. Supp. 771 (N.D. Ind. 1996), which upheld a challenge to another DOI Administrative Record: "[I]t would be improper for this court to allow the federal defendants to determine unilaterally what shall constitute the administrative record…plaintiffs are entitled to discover any materials, including internal memoranda, guidelines or hearing transcripts, that are necessary to complete the administrative record."

45. The IBIA again denied GALIC's request for discovery and an evidentiary hearing to resolve disputed issues of fact. The IBIA continued to deny GALIC's request for basic due process throughout the briefing phase of the proceedings below.

46. On August 14, 2015, GALIC filed its Opening Brief with the IBIA. The Principal Deputy filed an Answer Brief with the IBIA on September 25, 2015. GALIC filed its Reply Brief on October 30, 2015. On May 27, 2016, the IBIA issued its Order Affirming Decision of the Agency to deny GALIC's claim.

47. In its Order, the IBIA premised its decision to affirm the denial of GALIC's Claim for Loss of $20,043,618 on only one reason: that GALIC did not "provide sufficient documentation that the [original] Loan [between LBCDE and LBCWH] had funded and therefore the Loan [was] not guaranteed pursuant to §103.18 (a)(2) …." 63 IBIA 115. Section 103.18 provides in pertinent part:

> §103.18. How does BIA issue a loan guaranty or confirm loan insurance?
>
> (a) A loan is guaranteed under the Program when all of the following occur:
>
> 1) BIA issues a signed loan guaranty certificate bearing a series number, an authorized signature, a guaranty percentage rate, the lender's name, the borrower's name, the original principal amount of the loan, and such other terms and conditions as BIA may require;
>
> 2) The loan closes and funds;
>
> 3) The lender pays BIA the applicable loan guaranty premium; and
>
> 4) The lender meets all of the conditions listed in the loan guaranty certificate.

There is no dispute that the criteria articulated in (a)(1), (3) and (4) were met. The **only** reason the Agency, through its IBIA, offers for denying GALIC's $20 million claim is a lack of

"sufficient" documentation or "sufficient" evidence that the original loan—made two years before GALIC was solicited as a secondary lender in the secondary market—funded.

48. Not only is the Agency's decision untethered to the facts and law, its procedures were fundamentally unfair and violated GALIC's procedural due process rights.

49. The Agency's decision is contrary to and contradicted by facts in the Administrative Record. Not only is there "sufficient" documentation in the Record that the original loan closed and funded, there is conclusive and dispositive evidence.

50. This conclusive and dispositive evidence consists of the documentation that establishes the closing and funding of every loan in the country everyday:

- A fully executed Loan Agreement between LBCDE and LBCWH, which *inter alia*, describes precisely how the loan was going to fund as an exchange of cash and debt. Not only is this Loan Agreement in the Administrative Record, it is clear from the Record that the Loan Agreement and funding was reviewed and approved by the Agency as part of LBCDE's application process to obtain the Loan Guaranty.

- A fully executed negotiable Promissory Note from LBCWH to LBCDE in the amount of $22,519,638. Again, the form of this Promissory Note as well as the Notes evidencing the exchange of debt were reviewed and approved by the Agency as a part of the LBCDE's application for the Loan Guaranty.

- Audited financial statements of both LBCDE and LBCWH that verify and substantiate funding of the original loan transaction on the books of both companies.

- Ancillary related documents executed by third-party guarantors of LBCWH's debt to LBCDE.

51. In addition to the foregoing which are dispositive evidence of a loan funding, there is other evidence of funding in the Administrative Record that is unique to the Agency's Indian Loan Guaranty Program.

52. Specifically, in order for a Loan Guaranty to be effective, the lender must pay the Agency a "premium" equal to 2% of the amount of the Guaranty. This amount is to be paid at the time the guaranteed loan closes and funds. The Administrative Record contains the following:

- Contemporaneous email exchanges between LBCDE officers and Phil Viles, the then Chief of DCI stating that the loan will fund on November 29, 2010.
- Emails asking Viles where the premium check should be sent.
- Email response from Viles providing the information and stating that upon receipt of the premium check the Guaranty would be **effective**.
- A copy of the premium check from LBCDE to the Agency in the amount of $405,354.00.

53. This evidence in the Record is Agency confirmation of funding and of the fact that the Loan Guaranty **was effective**.

54. This evidence also directly contradicts the Agency's finding that: "Chief Viles apparently did not confirm whether or not he had knowledge of the loan funding." 63 IBIA 107.

55. The Agency's decision, therefore, is wrong as a matter of fact and is arbitrary and capricious because it does not explain why this evidence is not "sufficient" evidence of funding. It is also arbitrary and capricious because, when balancing the evidence, there is absolutely no evidence in the Record that the loan failed to fund. No document, no email, no memoranda, no letter, no testimony. Nothing. The abundance of evidence that the loan funded balanced against no evidence of a failure to fund clearly demonstrates that the Agency's decision to deny GALIC's claim is irrational and untethered to the facts.

GALIC IS A HOLDER IN DUE COURSE OF THE LOAN GUARANTY CERTIFICATE

56. Even assuming *arguendo* that there is not "sufficient" documentation that the original loan closed and funded, that fact cannot be used by the Agency as a defense to its obligation to pay on the guaranty because GALIC purchased the loan in good faith as a secondary

lender in the secondary market. As a good faith purchaser in the secondary market, GALIC is a holder in due course.

57. This holder in due course status was codified by Congress and is an integral part of the Indian Financing Act.

> §1494. Evidence of eligibility of loan for and amount of guaranty or insurance; **defenses and partial defenses against original lender**.
>
> Any evidence of guaranty or insurance issued by the Secretary shall be **conclusive evidence of the eligibility of the loan for guaranty** or insurance under the provisions of this Act [25 USCS §§1451 *et seq*.] and the amount of such guaranty or insurance: Provided, That nothing in this section shall preclude the Secretary from establishing, as **against the original lender**, defenses based on fraud or material misrepresentation or bar him from establishing, by regulations in force at the date of such issuance or disbursement, whichever is the earlier, partial defenses to the amount payable on the guaranty or insurance.
>
> 25 U.S.C. §1494 (emphasis added)

58. As this language provides, GALIC purchased the original loan and the Loan Guaranty Certificate as assignee with assurance of its validity. The Agency may not, of course undermine Congressional intent and argue as a basis for denying GALIC's claim for loss that the claim is not valid because there is no evidence that the original Loan actually funded, two years prior to GALIC's purchase in the secondary market. GALIC had absolutely no knowledge of what happened two years prior to appearing on the scene as an innocent purchaser in the secondary market. Furthermore, as clearly provided by Congress, the Agency may only assert such defenses against the original lender and not against GALIC.

59. Significantly, David Johnson—a former Acting Chief of DCI who was active in the GALIC transaction—agrees that secondary purchasers like GALIC should be paid as holders in due course. The following statement by Mr. Johnson appears in the Administrative Record:

> If the loan purchaser … relies on representations and warranties similar to those offered in similar transactions, and performs a level of due diligence approximating that conducted by other loan purchasers in sales of this sort, then the provisions of 103.40 should protect the purchaser and **secure payment under our guarantee**. I don't think anyone expects the purchaser to conduct an expensive, complete **forensic accounting** when the industry standard is to simply get the loan seller to assure that the loan documents remain enforceable, that loan proceeds went where they were intended to go, that loan payments aren't delinquent, etc. [Johnson asserts that he has] "strong views on how and why certain provisions of Part 103 were drafted as they were."
>
> (emphasis added)

60. The Administrative Record is clear in numerous places that GALIC relied on representations and warranties as well as other documentation like a fully executed Loan Agreement and Promissory Note that are part of all similar transactions involving the purchase of a loan and Government Guaranty. GALIC also relied on representations by the Agency itself that the Guaranty was effective.

CAUSES OF ACTION

Count One
(Breach of Contract)

61. GALIC realleges the foregoing paragraphs 1 – 60 as if set forth fully herein.

62. The Agency guaranteed the loan that GALIC purchased in the secondary market.

63. GALIC complied with the requirements under the Guaranty and all applicable laws and regulations.

64. GALIC filed a Claim of Loss with the Agency demanding payment under the Guaranty.

65. The Agency's refusal to pay GALIC under the Guaranty constitutes a breach of contract.

66. As a result of such breach, GALIC has sustained damages.

Count Two
(Violations of Due Process)

67. GALIC realleges the foregoing paragraphs 1 – 66 as if fully set forth herein.

68. GALIC purchased a loan guaranteed by the Agency under the Indian Financing Act.

69. Accordingly, GALIC had a property interest in the Loan Guaranty that is protected by the Fifth Amendment of the United States Constitution.

70. Under the Fifth Amendment, GALIC cannot be deprived of its property interest in the Loan Guaranty without due process.

71. The administrative process afforded GALIC was deficient under applicable due process standards and, therefore, a violation of GALIC's constitutional rights under the Due Process Clause. Among other deficiencies, the Administrative Record was incomplete; GALIC was denied the right to discovery; GALIC was denied the right to subpoena witnesses; GALIC was denied the right to present witnesses and other evidence; GALIC was denied the right to confront and cross-examine witnesses, and the other safeguards of an evidentiary hearing and was denied the right to appear and make an oral argument.

Count Three
(*de novo* Review)

72. GALIC realleges the foregoing paragraphs 1 – 71 as if fully set forth herein.

73. The administrative process below, including but not limited to the IBIA proceedings, were adjudicatory in nature. The fact finding and other procedures before the Agency were inadequate as more fully described above.

74. The United States Supreme Court has held that *de novo* is appropriate where there are inadequate fact finding and other procedures in an administrative process that is adjudicatory in nature. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971)).

75. The appropriate standard of review to be applied in this case, therefore, is *de novo*.

Count Four
(Arbitrary and Capricious Action)

76. GALIC realleges the foregoing paragraphs 1 – 75 as if fully set forth herein.

77. This count is pled in the alternative. For the reasons described in Count Three the appropriate standard of review to be applied in this case is *de novo*.

78. If, however, the Court finds that the Agency provided sufficient process, the Agency's decision to deny GALIC's claim for loss is arbitrary and capricious in that it is contrary to the facts, inconsistent with applicable statutes, regulations and other law and is not reasoned decisionmaking.

Count Five
(Fraudulent Inducement)

79. GALIC realleges the foregoing paragraphs 1 – 78 as if fully set forth herein.

80. Ohio law recognizes a tort that arises when:

> A person who has been injured by the fraud of another or others, by either a party or parties to a transaction or a third party or third parties committing fraudulent acts involving or bringing about the negotiation of a transaction, such transaction usually but not necessarily involving business or commercial dealings, may maintain an action at law in tort to recover damages for the injury received from the fraud and deceit perpetrated by such other or others. The foundation of the action is not contract but tort.

Saberton v. Greenwald, 66 N.E.2d 224, 230 (Ohio 1946).

81. The elements of this tort of fraudulent inducement are: (1) that the defendant knowingly (2) made a misrepresentation (3) that was material (4) with the intent of inducing the plaintiff's reliance, and (5) that the plaintiff relied upon that misrepresentation (6) to her detriment. *See*, *ABM Farms, Inc. v. Woods*, 692 N.E.2d 574, 578 (Ohio 1998).

82. Throughout the due diligence process in early 2012, and through GALIC's purchase of the original loan and Loan Guaranty, the Agency made material misrepresentations about, *inter alia*, the original loan, the effectiveness of the Loan Guaranty and the loan guaranty program generally, which in light of the Agency's rationale in 2016 are false. GALIC reasonably relied upon these misrepresentations and sustained damages.

Count Six
(Intentional Misrepresentation)

83. GALIC realleges the foregoing paragraphs 1 – 82 as if fully set forth herein.

84. Ohio law recognizes a tort of intentional misrepresentation, with the following elements:

> (a) a representation or, where there is a duty to disclose, concealment of a facts,
> (b) which is material to the transaction at hand,
> (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
> (d) with the intent of misleading another into relying upon it,
> (e) justifiable reliance upon the representation or concealment, and
> (f) a resulting injury proximately caused by the reliance.

Burr v. Stark Cty. Bd. of Commrs., 23 Ohio St. 3d 69, 73, 491 N.E.2d 1101 (1986).

85. Throughout the due diligence process in early 2012, and through GALIC's purchase of the original loan and the Loan Guaranty and beyond, the Agency made representations about, *inter alia,* the original loan, the Loan Guaranty and the loan guaranty program that were made falsely or with utter disregard and recklessness as to the truth. These false representations

were material to GALIC's decision to purchase the original loan and GALIC reasonably relied on them.

Count Seven
(Negligent Misrepresentation)

86. GALIC realleges the foregoing paragraphs 1 – 85 as if fully set forth herein.

87. Ohio law recognizes the tort of negligent misrepresentation. The elements of this tort are:

> (1) The defendant supplied false information; (2) in the course of his business, profession, or employment, or any other transaction for which he has a pecuniary interest; (3) that caused pecuniary loss to the plaintiff; (4) justifiable reliance; and (5) the defendant failed to exercise reasonable care or competence in obtaining or communicating the information at issue.

Delman v. City of Cleveland Heights, 41 Ohio St. 3d 1, 534 N.E.2d 835, 838 (1989).

88. Throughout the due diligence process in early 2012, and through GALIC's purchase of the original loan and Loan Guaranty and beyond, the Agency supplied false information to GALIC about, *inter alia*, the original loan, the effectiveness of the loan guaranty and the loan guaranty program. The Agency had a pecuniary interest in the original loan and loan guaranty and the transfer of them to GALIC by virtue of the premium it was paid in the amount of $405,354.00. The Agency also had a pecuniary interest in avoiding the risk of loss on the $20 million loan by shifting that risk to GALIC and by attempting to make that transfer of risk permanent by denying GALIC's legitimate claim of loss under the Loan Guaranty. The Agency failed to exercise reasonable care in the communication of this information to GALIC, which information GALIC reasonably relied upon.

Count Eight
(Declaratory Judgment)

89. GALIC realleges the foregoing paragraphs 1 – 88 as if fully set forth herein.

90. Pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, GALIC seeks this Court's declaration of its rights under the Loan Guaranty, specifically that the Agency is required under the Loan Guaranty to reimburse GALIC for its loss.

Count Nine
(Attorneys' Fees)

91. GALIC realleges the foregoing paragraphs 1 – 90 as if fully set forth herein.

92. Because of the Agency's refusal to reimburse GALIC for its claim of loss under the Loan Guaranty, GALIC has been forced to retain the services of the undersigned counsel.

93. Given the Agency's wrongful denial of GALIC's right to reimbursement under the Loan Guaranty, the Agency's arbitrary and capricious actions, and failure to provide due process, GALIC is entitled to recover its reasonable attorneys' fees.

WHEREFORE, GALIC demands relief as follows:

(a) the Court issue a declaratory judgment that GALIC is entitled to reimbursement under the Loan Guaranty;

(b) the Court order the Agency to pay GALIC's claim for loss under the Loan Guaranty within 10 days of such order;

(c) compensatory damages in an amount to be determined at trial;

(d) punitive damages in an amount to be determined at trial;

(e) the Court grant attorneys' fees incurred and costs and expenses; and

(f) the Court award such other and further relief as the Court deems just and equitable.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff Great American Life Insurer demands trial by jury in this action of all issues triable by jury in this matter.

DATED: June 27, 2016

Respectfully submitted,

/s/ Michael L. Cioffi
Michael L. Cioffi (0031098)
Nathaniel R. Jones (0026866)
John P. Curp (0064782)
Lori G. Nuckolls (0069386)
Blank Rome LLP
1700 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202
513-362-8701
513-362-8702 (fax)
cioffi@blankrome.com

Attorneys for Great American Life Insurance Company