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

GREAT AMERICAN LIFE INSURANCE COMPANY,	)	
Plaintiff,	)	**No. 1:16-CV-00699- MRB**
v.	)	
	)	**Judge Michael R. Barrett**
UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	)	
Defendants.	)	

PLAINTIFF GREAT AMERICAN LIFE INSURANCE COMPANY'S
MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, Plaintiff Great American Life Insurance Company ("GALIC") files this motion for summary judgment against the Defendant Secretary of the Department of Interior with respect to the remaining causes of action in GALIC's complaint for breach of contract and declaratory judgment. The grounds for GALIC's motion are set forth in the accompanying memorandum of law, which is incorporated by reference herein.

GALIC further notes that it is ***not*** requesting oral argument on this motion under Local Rule 7.1(b). As explained in the memorandum of law, this case involves no material disputed facts and the applicable statutory provisions governing GALIC's claims are unambiguous and clearly dictate that judgment be entered in its favor. As such, no oral argument is requested or required.

Accordingly, for the reasons set forth in the accompanying memorandum of law, GALIC respectfully requests that this motion for summary judgment be granted.

Dated: October 1, 2019

Respectfully submitted,

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PLAINTIFF GREAT AMERICAN LIFE INSURANCE COMPANY'S
MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

This action involves a contract claim by Great American Life Insurance Company ("GALIC") against the Secretary[1] of the Department of Interior ("Interior" or "Agency")[2] under the Indian Financing Act of 1974 ("IFA"), Pub. L. No. 93-262, as amended, 25 U.S.C. § 1451 *et seq*. GALIC's claim is based on a Loan Guaranty Certificate issued by the Agency concerning a $22,519,638 loan made by a subsidiary of the Lower Brule Corporation, a federally chartered tribal corporation. The loan at issue closed on October 29, 2010, was purchased by GALIC with Interior's approval in April 2012 for $22,368,035.51, and went into default almost exactly one year later. By letter dated April 12, 2013, GALIC promptly issued an Event of Default notice to the borrower, which it provided to Interior less than two weeks later. In a subsequent letter to Interior dated June 19, 2013, GALIC invoked its right under the IFA to submit a "Claim of Loss" under Interior's Loan Guaranty Certificate. At that time, GALIC's claim was for $20,043,618.67, representing the 90% of the outstanding loan balance plus the interest that accrued as of that date. Despite the Loan Guaranty Certificate that it had issued, the Agency denied that claim on the ground that there supposedly was insufficient evidence that the original lender had actually funded the loan in October 2010, more than 17 months before GALIC had purchased the loan in reliance on Interior's Loan Guaranty Certificate.

For purposes of this motion, the key statutory provisions of the IFA are 25 U.S.C. §§ 1484, 1485 and 1494. Section 1484 states in relevant part as follows:

> The application for a loan to be guaranteed hereunder shall be submitted to the Secretary for approval. The Secretary may review each loan application individually and independently from the lender. ***Upon approval, the Secretary shall issue a certificate as evidence of the guaranty***. ***Such certificate shall be***

[1] As this Court held in its previous ruling on the Defendants' motion to dismiss, pursuant to 25 U.S.C. § 1496, sovereign immunity is waived and the Secretary may be sued in this Court in his official capacity.

[2] The record and applicable statutory provisions and regulations refer to multiple Department of Interior divisions and offices, including the Bureau of Indian Affairs and the Division of Capital Investment. For simplicity, we will refer to all of them collectively as "Interior" or the "Agency."

> ***issued only when, in the judgment of the Secretary there is a reasonable prospect of repayment.***

25 U.S.C. § 1484 (Emphasis added).

Section 1485 provides, in relevant part, that "[a]ll or any portion of any loan guaranteed under this subchapter, including the security given for the loan . . . may be transferred by the lender by sale or assignment to any person" and further states that the "full faith and credit of the United States is pledged to the payment of all loan guarantees" with respect to such transferred loans. 25 U.S.C. § 1485.

Finally, Section 1494 states as follows:

> **§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).

Also relevant here is what the statutory provisions cited above do ***not*** say. In particular, in 2006 Congress passed an amendment to Section 1485 that ***removed*** language that arguably could have been interpreted as allowing the Secretary to assert the same defenses against a transferee of a guaranteed loan as the Secretary can assert against the original lender under Section 1494. See Pub.L. 109-221, Title IV, § 401(b).

Against that statutory backdrop, GALIC brings this motion for summary judgment. As an initial matter, GALIC notes that it strongly disagrees with the Agency's position that there supposedly was insufficient evidence that the original lender funded the loan. But for the purposes of this motion, the Court need ***not*** resolve that issue. That is because it is undisputed that the Secretary issued the Loan Guaranty Certificate and never revoked it prior to the transfer to GALIC and in fact acknowledged the transfer. Under the IFA provisions cited above, that

Certificate is dispositive evidence of the Agency's guaranty of the loan, and the Secretary is precluded from denying the Agency's obligation to guarantee the loan, ***except for certain defenses that the Secretary may assert against the original lender***. 25 U.S.C. § 1494. That provision in the Act – which is consistent with the settled commercial law holder-in-due course rule – prohibits the Secretary from disputing liability under the guaranty to GALIC now. Accordingly, the Secretary has no lawful basis for refusing to honor the guaranty and summary judgment should be entered in favor of GALIC.

STATEMENT OF UNDISPUTED FACTS

1. On June 24, 2010, the Agency issued Loan Guaranty Certificate No. G103D1A1501 to the Lower Brule Community Development Enterprise, LLC ("LBCDE") (the "Loan Guaranty Certificate"). See Loan Guaranty Certificate, attached as Exhibit 1 to Defendants' Reply in Support of Mot to Dismiss, Doc # 17 at PageID # 188-192.

2. As reflected in the document, the Loan Guaranty Certificate was issued in connection with a "Loan Agreement" between LBCDE and LBC Western Holdings, LLC ("LBC Western Holdings"). Id. at PageID # 189; see also Loan Agreement Documents at BIA03615-BIA03639, attached hereto at Ex. A to the accompanying Declaration of Michael L. Cioffi ("Cioffi Decl.").

3. LBC Western Holdings is a subsidiary of the Lower Brule Corporation ("LBC"). See May 27, 2016 Order of the U.S. Department of Interior Board of Indian Appeals ("IBIA Ruling"), attached as Ex. 1 to Defendants' Motion to Dismiss, Doc #10-1 at PageID # 82. LBC is a federally chartered tribal corporation formed in 2007 under Section 17 of the Indian Reorganization Act, and wholly owned by the Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota. Id.

4. The principal amount of the loan, as reflected in the Loan Guaranty Certificate, was $22,519,638. See Loan Guaranty Certificate, Doc # 17 at PageID # 189.

5. The Loan Guaranty Certificate also reflected that the Agency would guaranty up to 90 percent of the principal amount of the loan by LBCDE, or $20,267,674.20, plus any applicable interest. Id.

6. The Loan Agreement was executed on October 29, 2010. See Loan Agreement Documents at BIA03616 at Cioffi Decl., Ex. A.

7. One day prior to that, on October 28, 2010, an Interior official sent an email that "reaffirm[ed]" the Loan Guaranty Certificate. See Oct 28, 2010 email at Cioffi Decl., Ex. B.[3]

8. By letter dated November 30, 2010, counsel for LBCDE sent a check to the Agency in the amount of $405,354.00. See Nov. 30, 2010 letter at Cioffi Decl., Ex. C. That check represented the premium provided to the Agency in exchange for its agreement to guaranty the loan. Id.; see also 25 C.F.R.. §§ 103.8, 103.19 (providing that when a guaranteed loan closes and funds the Agency "charges the lender a premium for [the] guaranty" equal to "[t]wo percent of the original loan principal amount that [the agency] guarantees. . .").

9. On April 2, 2012, GALIC purchased the loan in question from LBCDE for a price of $22,368,035.51. See April 5, 2012 letter from M. Muething to P. Viles, at Cioffi Decl., Ex. D; see also Loan Agreement Documents at BIA03647-BIA03678 at Cioffi Decl., Ex. A (documentation memorializing the sale of the loan to GALIC).

10. By letter dated April 5, 2012, GALIC properly notified the Agency of its purchase of the loan. See April 5, 2012 letter from M. Muething to P. Viles, at Cioffi Decl., Ex. D; see also 25 U.S.C. § 1485(b)(2) (noting that a transferee of any guaranteed loan "shall give notice of the transfer to the Secretary"); 25 C.F.R. § 103.29 (regulation similarly requiring such notice).

11. By letter dated April 23, 2012, the Agency acknowledged receipt of the transfer notice and stated that it "appear[ed] to be in order." See April 23, 2012 letter from P. Viles to M. Muething, at Cioffi Decl., Ex. E.

[3] It appears that this reiteration of the Agency's commitment to guarantee the loan was necessary because the loan had not closed within 90 days of its approval on June 24, 2010, as required under the Agency's regulations, and the Agency had granted an extension of time period. See 25 C.F.R. 103.17(f) (dictating that loans close within that 90 day period unless the Agency "indicates otherwise. . .").

12. In a subsequent letter to GALIC, the Agency again acknowledged the transfer of the loan and stated that the Agency was "not aware of any information or circumstances which would render the Guaranty ineffective or non-compliant. . ." See May 29, 2012 letter from P. Viles to M. Muething, at Cioffi Decl., Ex. F.

13. By letter dated April 12, 2013, GALIC issued to LBC Western Holdings a notice of an Event of Default, citing the borrower's failure to make a scheduled payment under the loan on April 1, 2013. See April 12, 2013 letter from M. Muething to LBC Western Holdings at BIA02450-BIA02452, at Cioffi Decl., Ex. G. GALIC provided notice of the Event of Default to the Agency by letter dated April 23, 2013. See April 23, 2013 letter from M. Muething to Dept. of Interior at BIA02447-02448, at Cioffi Decl., Ex. G.

14. By letter dated June 19, 2013, GALIC stated to LBC Western Holdings that it was declaring a "Notice of Acceleration" under Section 9.02 of the Loan Agreement – pursuant to which GALIC was entitled to declare the entire unpaid principal balance of the loan and all accrued interest immediately due and payable – citing LBC Western Holding's failure to make subsequent loan payments that had been due on May 1 and June 1, 2013. See June 19, 2013 letter from M. Muething to LBC Western Holdings at BIA02454, at Cioffi Decl., Ex. G; see also Loan Agreement Section 9.02 at BIA03634, at Cioffi Decl., Ex. A.

15. In a separate letter dated June 19, 2013, GALIC advised the Agency of the Notice of Acceleration. See June 19, 2013 letter from M. Muething to Dept. of Interior at BIA02441-BIA02443, at Cioffi Decl. Ex. G. In that letter GALIC also stated that it was invoking its right under the IFA to submit a "claim for loss" (hereinafter, "Claim of Loss") under the Loan Guaranty Certificate. Id. at BIA02442

16. As set forth in the June 19, 2013 letter and an exhibit thereto, the amount of GALIC's claim at that time was $20,043,618.67, which represented 90 percent of the outstanding loan principal balance, plus accrued interest. Id. at BIA02457-BIA02459.

17. By letter dated December 23, 2013, the Agency advised GALIC that it was rejecting its claim under the Loan Guaranty Certificate. See IBIA Ruling, Doc # 10-1 at PageID # 93.

18. GALIC filed an administrative appeal of the denial of its claim with the Interior Board of Indian Appeals ("IBIA"). See generally IBIA Ruling, Doc. #10-1 at PageID # 78.

19. By a decision dated May 27, 2016, the IBIA affirmed the denial of GALIC's claim. See IBIA Ruling, Doc. #10-1 at PageID # 79. The IBIA based its decision on a single ground: that GALIC allegedly did not "provide sufficient documentation that the [original] Loan [between LBCDE and LBC Western] had funded," which the IBIA held GALIC had to demonstrate under regulations applicable to "lenders." See id. (citing 25 C.F.R. §§ 103.18(a), 103.39(a)).

20. In so holding, the IBIA also stated that Section 1485 of the IFA makes "no distinction" between an original lender and a subsequent purchaser or transferee, without referring to the 2006 amendment to that statute. Id. at PageID # 96.

ARGUMENT

I. STANDARD OF REVIEW

"Summary Judgment is appropriate where 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" Baker v. Sunny Chevrolet, Inc., 349 F.3d 862, 864 (6th Cir. 2003) (quoting Fed.R.Civ.P. 56). That standard is certainly met here. As the Secretary has previously acknowledged, GALIC's remaining claims for breach of contract and declaratory judgment present an "ordinary" and "routine" contractual dispute. See Defendants' Mot. to Dismiss, Doc #10-1 at PageID # 70. It is well settled that such disputes relating to contract interpretation raise issues of law that are tailored for resolution on summary judgment. B.F. Goodrich Co. v. U.S. Filter Corp., 245 F.3d 587, 595 (6th Cir. 2001).

Additionally, although the Secretary relies on certain provisions in the IFA and its implementing regulations that are said to be incorporated into the Loan Guaranty Certificate, the interpretation of a statute also raises pure questions of law. See generally U.S. v. Moore, 567

F.3d 187, 190 (6th Cir. 2009). In that regard, while in certain instances under the Supreme Court holding in Chevron USA, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), courts may accord some deference to an agency's interpretation of a statute, such "Chevron" deference is ***not*** applicable where the statutory language is unambiguous based on ordinary tools of statutory construction. Id. at 842-3; City of Arlington v. FCC, 569 U.S. 290, 296 (2013). Further, courts have held that "*Chevron* deference also is inappropriate where an agency has a self-serving, pecuniary interest in advancing a particular interpretation of a statute," such as when the statute is incorporated into a contract to which the agency is a party, just like the case at bar. Amalgamated Sugar Co. LLC v. Vilsack, 563 F.3d 822, 834 (9th Cir. 2009) (citing cases).

The language of the contract at issue – the Loan Guaranty Certificate – is unambiguous. So too is the pertinent statutory language incorporated into the contract. And applying the plain language of the contract documents and relevant statutory provisions to the undisputed facts of this case can lead to only one result: summary judgment in favor of GALIC, and an order requiring GALIC to be reimbursed for 90 percent of its claimed loss under the loan.

II. THE PLAIN LANGUAGE OF THE INDIAN FINANCING ACT PROHIBITS THE SECRETARY FROM DENYING LIABILITY UNDER THE GUARANTY

GALIC strongly disputes the Agency's assertion that its Loan Guarantee Certificate is not enforceable due to a belated claim that the original lender never funded the loan. However, on this motion the Court need not concern itself with that issue, because it is undisputed that the Secretary issued the Loan Guaranty Certificate and never revoked it prior to the transfer to GALIC and indeed acknowledged that transfer in April 2012.[4] As a matter of law, the issuance of the Loan Certificate Guaranty is dispositive and precludes the Secretary from denying GALIC's claim for enforcement of the Guaranty now.

[4] Should the case not be resolved by this motion, GALIC intends to vigorously pursue discovery on the funding issue and related matters from both the Agency and LBCDE, including comprehensive document discovery and depositions of several current and former Agency officials and LBCDE representatives.

The IFA could not be any clearer on this point. The IFA expressly provides that once the Secretary has approved the loan – as happened here – then "***the Secretary shall issue a certificate as evidence of the guaranty…when, in the judgment of the Secretary, there is a reasonable prospect of payment***." 25 U.S.C. § 1484 (Emphasis added).[5] The Secretary (through the Agency officials responsible for this matter) did just that with respect to the loan that GALIC eventually purchased, issuing the Loan Guaranty Certificate on June 24, 2010. The statute also authorizes the original lending party to transfer the loan and its underlying guaranty to a third party, see 25 U.S.C. § 1485(a)[6] – as LBCDE did here – and provides that the transferee then acquires the right of the original lender to enforce the guaranty on the loan. See 25 U.S.C. § 1491 (stating that upon default of a loan, the Secretary shall pay the holder of the guarantee the amount of guarantee due). And, the IFA makes clear that the Agency's guaranty with respect to any transferred loan is backed by "[t]he full faith and credit of the United States. . ." 25 U.S.C. § 1485 (c).

Finally, the "evidence of the guaranty" that the Secretary issues in the form of the "Loan Guaranty Certificate" is irrefutable proof of the Agency's obligation to guaranty the loan, and – except for certain defenses that may be asserted against the original lender – the Secretary is prohibited from denying that financial obligation pursuant to 25 U.S.C. § 1494. We cited Section 1494 previously, but its language is so critical that it warrants repeating again in full:

> **§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***.

[5] The regulations similarly provide that the guaranty should only be issued if, based on the Agency's review of the application, "there is a reasonable prospect of loan repayment. . ." 25 C.F.R. § 103.16(a).

[6] See also 25 C.F.R. §§ 103.28(a), 103.29(a) (similarly noting authorization to transfer guaranteed loans).

25 U.S.C. § 1494 (Emphasis added).

This statutory language is unequivocal: the certificate is "conclusive evidence" of the guaranty and its amount, and the Secretary may not assert any defenses to the Agency's obligation to guaranty the loan except as to the "original lender." Because it is undisputed that GALIC is not the original lender, the Secretary may not deny GALIC's claim to enforce the guaranty now.

Nor is this a surprising result. To the contrary, the language in Section 1494 limiting the Secretary to defenses against the original lender – and thus prohibiting the Secretary from asserting such defenses against subsequent purchasers like GALIC – is consistent with the settled commercial law holder-in-due course rule, which generally protects subsequent holders of negotiable instruments from defenses that would otherwise be available against the original lending party. See generally Bakery & Confectionery Union & Indus. Int'l Health Benefits & Pension Funds v. New Bakery of Ohio, 133 F.3d 955, 959 (6th Cir. 1998) (referencing the "holder in due course in commercial law who is entitled to enforce the writing without regard to the understandings or defenses applicable to the original parties.") (citation omitted); First International Bank of Israel, Ltd. v. L. Blankstein & Son, Inc. et al., 59 N.Y. 2d 436, 441 (App. Div. 1983) (similar rule under New York law).[7] As explained in a leading treatise, the main purpose of that rule is to encourage parties (like GALIC here) to purchase negotiable instruments and thereby increase market liquidity. See White & Summers, Uniform Commercial Code 457 (1972) ("It is sometimes said that the holder in due course doctrine is like oil in the wheels of commerce and that those wheels would grind to a quick halt without such lubrication.").

Nor is this somehow an unfair result that leaves the Secretary without any recourse. The Secretary exercised specific authority under the IFA to conclude that the guarantee was

[7] Because the underlying loan agreement has a New York choice of law clause, we cite to both New York state law and Sixth Circuit law, but largely for illustrative purposes, as the Secretary's defenses (or lack thereof) are governed in the first instance by the IFA. However, to the extent that the Court deems it applicable, GALIC reserves the right to seek summary judgment on the ground that it is a holder-in-due course under the common law.

appropriate under the circumstances and received a sizeable premium payment in return to cover any probable losses. See 25 U.S.C, §§ 1484; 1482.[8] The Secretary also never revoked the guarantee prior to GALIC's acquisition. Moreover, while the Secretary may not assert defenses against subsequent purchasers of a loan like GALIC, Section 1494 once again still does allow the Secretary to assert such defenses against the original lender. In a similar vein, the IFA also provides that once the Secretary has made payment to the "holder of the guaranty certificate" for the losses that it incurs, the Secretary "shall be subrogated to the rights of the holder of the guaranty and receive an assignment of the obligation and security," thus allowing the Secretary to pursue claims against third parties that might bear liability for the loss. 25 U.S.C. § 1491.[9]

Ultimately of course, it is up to the Secretary to decide whether or not to pursue such a subrogation claim. However, regardless of whether the Secretary chooses to enforce that right, one thing that the Secretary clearly may ***not*** do is to deny liability as a guarantor to GALIC.

III. THE SECRETARY'S ARGUMENTS TO THE CONTRARY ARE INCONSISTENT WITH THE INDIAN FINANCING ACT

Despite the language in 25 U.S.C. § 1494 precluding the Secretary from denying liability for GALIC's claim under the Loan Guaranty Certificate, the Secretary has contended that the IFA and its implementing regulations supposedly allow him to do just that. However, none of the arguments that the Secretary has advanced in support of that position withstand scrutiny.

A. The Statute Expressly Provides that the Certificate is Conclusive Evidence of the Agency's Guaranty of the Loan

First, we understand the Secretary to contend that under Section 1494 the issuance of a guaranty certificate is merely evidence of the "eligibility" of a loan for guaranty, and not evidence that a guaranty actually existed. But that argument – which seems to amount to the proposition that a guaranty certificate is nothing more than an indication that there is a ***possibility***

[8] See also 25 C.F.R. §§ 103.8, 103.19 (regulations also noting the premium requirement).

[9] See also 25 C.F.R. § 103.38 (regulation also referencing the Agency's subrogation rights).

that a loan might eventually be guaranteed – is simply not credible. Indeed, it is pointless for the Agency to issue a "Loan Guaranty Certificate" as it did here unless the document does exactly that – certify that the Agency is in fact guaranteeing the loan.[10]

In addition to defying common sense, the Secretary's argument cannot be reconciled with the unambiguous language of the IFA. As already noted, 25 U.S.C. § 1484 specifically dictates that once the Secretary has approved a loan then the "***the Secretary shall issue a certificate as evidence of the guaranty***." (Emphasis added). Thus, far from simply demonstrating the potential that a loan ***might*** eventually be entitled to a guaranty, as the Secretary would seem to have it, the certificate is "evidence" of the actual existence "of the guaranty."[11]

As also previously noted, 25 U.S.C. § 1494 makes plain that this "evidence of the guaranty" is to be deemed "conclusive" with respect to both "the eligibility of the loan for guaranty or insurance under the provisions of this Act ***and the amount of such guaranty or insurance***." (Emphasis added). That italicized language – which the Secretary tries to ignore – expressly dictates that the certificate also is dispositive evidence of the actual ***amount*** that the

[10] The IBIA decision appeared to make much of the fact that Section 1494 speaks of the guaranty certificate being conclusive evidence of the "eligibility" of the loan for guaranty instead of its "validity." However, it is hardly surprising that the term "eligibility" is used. In that regard, the Secretary's own regulations allow for a guaranty certificate to be issued prior to the loan actually closing, but also state that unless the Agency "indicates otherwise, the lender must close a guaranteed or insured loan within 90 days of any approval" of the loan or else the guaranty is no longer in effect. 25 C.F.R. §§ 103.17(f), 103.18(a)(2). And as reflected in the statement of the undisputed facts, the original lender in this case closed the loan slightly longer than that 90 day period, although it did so with the consent of the Agency, which expressly reaffirmed its commitment to guarantee the loan just before closing. See *supra* at p. 4. Thus, the undisputed record and the applicable statutory framework demonstrate that a guaranty certificate for the loan in question was issued, that this certificate was and is "evidence of the guaranty," and that the Agency did not rescind or withdraw that certificate prior to the time that the loan closed, even though it hypothetically could have done so when the loan did not close within 90 days of the date the Agency approved it on June 24, 2010.

[11] It bears reiterating that the IFA also provides that "[s]uch certificate shall be issued only when, in the judgment of the Secretary, there is a reasonable prospect of repayment." 25 U.S.C. § 1484. Consistent with that latter statutory requirement, the implementing regulations impose certain due diligence requirements, and authorize the Secretary (through the Agency) to "evaluate each loan application independently from the lender." 25 C.F.R. § 103.16(a). In addition, the Agency has the right to "attend closing of any loan that [it] agrees to guarantee. . ." 25 C.F.R. §§ 103.17(a).

Agency is agreeing to guarantee, thus belying any assertion that the certificate merely evidences the possibility that the loan might eventually be entitled to a financial guaranty.

That the Secretary's position is incorrect also is demonstrated by the concluding language in Section 1494 stating 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." Such language referring to the availability of defenses against the original lender with respect "to the amount payable on the guaranty" already presupposes the existence of an actual guaranty. Conversely, if (as the Secretary contends) the certificate was simply evidence of the potential that the loan might eventually be subject to a guaranty – and not evidence of the guaranty itself – there would be no need for Congress to include language providing that the Secretary could still assert certain defenses against the original lender notwithstanding the issuance of the certificate. Such an interpretation runs afoul of settled rules of statutory interpretation, which require courts to give effect to all provisions and to avoid a construction that renders any provision meaningless. See generally Wilson v. Safelite Group, Inc., 930 F.3d 429, 435 (6th Cir. 2019) (citation omitted).

In short, the Loan Guaranty Certificate that the Secretary issued is what it appears to be on its face: a document that certifies and serves as "conclusive evidence of" the Secretary's agreement to provide a guaranty of 90 percent of the loan at issue, and that consequently precludes the Secretary from denying that financial commitment to GALIC now.

B. The Statute Plainly Precludes the Secretary from Asserting the Claimed Defense Against GALIC

The second argument that the Secretary appears to have taken – which is that the concluding language in Section 1494 referring to the availability of certain defenses somehow allows the Agency to deny GALIC's claim – is also wrong. As noted throughout, that portion of Section 1494 refers to defenses that may be asserted ***only*** against the "original lender," which

GALIC indisputably is not. See 25 U.S.C. § 1494. The conclusion that this provision is limited to defenses against the original lender is also supported by the title of Section 1494, which reads as follows: "Evidence of eligibility of loan for and amount of guaranty or insurance; ***defenses and partial defenses against original lender***." Id. (emphasis added). The Secretary's argument to the contrary – which requires one to ignore both the plain language of the text of Section 1494 as well as its title – should be rejected. See Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 439 (2011) (court may look to the title heading of a statutory provision for interpretive guidance).

C. The Secretary's Position is Also Contrary to the 2006 Amendment to the Indian Financing Act

A third argument that the Secretary has offered is that, notwithstanding the language in Section 1494 restricting the Secretary to defenses against only the "original lender," a different section of the IFA – 25 U.S.C. § 1485 – supposedly allows the Secretary to challenge claims submitted by subsequent purchasers of guaranteed loans. Section 1485, which we have referred to previously, is the portion of the IFA that authorizes the sale or transfer of guaranteed loans. See 25 U.S.C. § 1485(a). Subpart (c)(2) of Section 1485 also contains a provision stating that "[e]xcept as provided in regulations in effect on the date on which a loan is made, the validity of a guaranty . . . under this subchapter shall be incontestable." According to the Secretary, because certain "regulations" in place on the date that the loan here was made – specifically 25 C.F.R. §§ 103.18(a), 103.39(a) – purportedly require evidence that the lender had funded the loan in order to recover under a guaranty certificate, that means that the Secretary may challenge GALIC's claim if the evidence is insufficient to show that such funding took place. In support of that contention, the Secretary has taken the position that "Section 1485(c)(2) makes no distinction in this regard between an original lender and a secondary lender" or transferee. See IBIA Ruling, Doc # 10-1 at PageID # 96.

That core premise underlying the Secretary's position – that Section 1485 "makes no distinction" between original lenders and transferees – is demonstrably false. The current

version of Section 1485 was amended in 2006. Prior to that time – between 2002 and 2006 – Section 1485 contained language stating that "[t]he lender of a loan guaranteed or insured under this subchapter may transfer [such loan] to any individual or legal entity" and also included a provision – at subpart b(3)(A) – stating that the "transferee" for any loan "***shall be deemed to be the lender for the purposes of this subchapter***" of the IFA. See Pub.L.107-331, Title I, § 103(b), 25 U.S.C. § 1485(b)(3)(A) (Effective December 13, 2002 to May 11, 2006) (attached hereto as Supplemental Ex. 1) (Emphasis added). However, when Congress amended Section 1485 in 2006, while it retained the introductory provision authorizing transfers of loans it also ***completely eliminated the provision that had been at subpart (b)(3)(A) that "deemed" the "transferee" to be a "lender."*** See 25 Pub.L.109-221, Title IV, § 401(b), 25 U.S.C. § 1485 (Effective May 12, 2006) (attached hereto as Supplemental Ex. 2). Nor is there any other provision in the current version of Section 1485 that states that original lenders and transferees should be "deemed" the same for the purposes of the IFA. See generally id.[12]

Thus, some six years ***before*** GALIC purchased the loan in question, Congress decided to remove the prior language in the statute that arguably ***might*** have supported the conclusion that original lenders and transferees should be treated the same. As such, it is simply incorrect for the Secretary to claim that the version of Section 1485 currently in force "makes no distinction" between original lenders and subsequent purchasers or transferees of loans. Instead, Section 1485 – as with other provisions in the IFA like Section 1494 – clearly ***does*** distinguish between original lenders and transferees, and prohibits the Secretary from denying liability to a transferee such as GALIC where (as here) a guaranty certificate has been issued.

But the Secretary's position is wrong for other reasons as well. For example, although it is true that Section 1485 does make reference to guarantees being subject to "regulations in effect on the date on which a loan is made," that section goes on to provide that the "regulations"

[12] In fact, the regulations provide that upon transfer, the transferee "will ***from that point forward*** be considered the lender for purposes of the Program" as opposed to inheriting the past acts of the original lender. 25 C.F.R. §§ 103.28(a), 103.29(a) (emphasis added).

that Congress had in mind were those that would "facilitate, administer, and promote transfers of loans and guaranteed and insured portions of loans under this section." 25 U.S.C. § 1485(h). The regulation that the Secretary purports to invoke here – or at least the manner in which the Secretary has interpreted that regulation – would be directly contrary to that stated Congressional purpose, as it would allow the Secretary to invalidate a guaranty to a subsequent purchaser based on alleged misconduct by the original lender that took place long before the loan was transferred. That type of action by the Secretary is clearly inconsistent with the Congressional directive to issue regulations designed to "facilitate, administer, and promote transfers of loans. . ."

On that note, it is axiomatic that the Secretary may not promulgate any such "regulations" that are contrary or inconsistent with the underlying statute on which they are based. U.S. v. Larionoff, 431 U.S. 865, 873 (1977). It also is well settled that a court should read the various provision of a statute together and harmonize them so that no provision is inconsistent with another. National Air Traffic Controllers Ass'n v. Secretary of Dept. of Transp., 654 F.3d 654, 657 (6th Cir. 2011) (when interpreting a statute court must "make every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.") (quoting Menuskin v. Williams, 145 F.3d 755, 768 (6th Cir. 1998)). Applying those rules here, it is evident that the Secretary's position is in error. Indeed, if the Secretary's position were to be adopted, that would mean that under Section 1485 the Agency could promulgate regulations that would allow it to deny claims brought by subsequent purchases of loans that are the subject of a guaranty certificate, even though Section 1494 expressly limits such defenses to original lenders when a guaranty certificate has been issued. That kind of interpretation would then render Section 1485 in conflict with Section 1494, an outcome that is impermissible as a matter of the black letter law cited above.[13] Instead, to the extent that Section 1485 does allow the Secretary to issue regulations that allow for defenses

[13] Similarly, the IFA at Section 1493 provides that where there are record keeping, servicing, or other deficiencies, the Secretary may decline to guarantee "further loans," but the "Secretary shall not refuse to pay a valid guaranty or insurance claim on loans previously made in good faith." 25 U.S.C. § 1493.

when a guaranty certificate has been issued, such defenses could only be available against original lenders, as set forth in Section 1494. That interpretation – which harmonizes both Sections 1485 and 1494 – is the correct one under longstanding canons of statutory construction.[14]

In sum, the Secretary's application of Section 1485 of the IFA – pursuant to which the Secretary purported to treat GALIC as if it were the original lender – is without merit.

IV. GALIC IS ENTITLED TO A DECLARATORY JUDGMENT OBLIGATING THE SECRETARY TO HONOR THE GUARANTY AND AN AWARD OF DAMAGES

For the reasons set forth above, GALIC is entitled to summary judgment against the Secretary on its remaining claims for declaratory judgment and breach of contract. As a result, GALIC is entitled to the relief sought on those counts, and so respectfully requests an order from the Court: (a) declaring that the Secretary (through the Agency)[15] is required under the Loan Guaranty Certificate to reimburse GALIC for the Claim of Loss that it submitted on June 19, 2013; and (b) award breach of contract damages in GALIC's favor in an amount equal to the Claim of Loss, $20,043,618.67, plus any recoverable interest. GALIC also further reserves the right to file a motion for attorneys' fees in accordance with Fed.R.Civ.P. 54(d)(2).

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[14] The Secretary's attempt to treat a transferee like GALIC as if it were the original lender also runs afoul of other regulations that the Secretary has promulgated. For example, 25 CFR 103.28(a) and 103.29(a), which address certain requirements relating to transferred loans, provide that the party to whom the loan is transferred "will from that point forward be considered the lender for the purposes of the Program." While that language deeming the transferee to be the "lender" would appear to be inconsistent with Congress's revision of Section 1485 in 2006, it is noteworthy that even under the Secretary's own regulations a transferee should only be deemed a lender from "that point forward" after the loan has been transferred. However, the action that the Secretary has taken here – which would hold a transferee responsible for the conduct of the original lender long before the loan was transferred – is contrary to 25 CFR 103.28(a) and 103.29(a), which preclude treating the transferee as the lender on a retroactive basis.

[15] As noted, see *supra* p. 1 n. 1, the Secretary is subject to jurisdiction in this Court pursuant to 25 U.S.C. 1496, which waives sovereign immunity and allows the Secretary to be sued in his official capacity for actions arising under the IFA. That provision also dictates that any "transactions of the Secretary incident to or arising out of the guarantee or insurance of loans" under the IFA "shall be final and conclusive upon all officers of the Government." Id. Thus, if (as should be the case) the Court concludes that the Secretary is required to reimburse GALIC for its losses under the Loss Guaranty Certificate, and awards damages for such losses, that finding (and corresponding obligation) would be binding and conclusive as to the Agency as well.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this document with the Clerk of the Court using CM/ECF on October 1, 2019, which will automatically generate and serve Notices of Electronic Filing on all counsel of record.

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