UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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

DEFENDANT'S OPPOSITION
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Great American Life Insurance Company's ("GALIC") Motion for Summary Judgment ("motion" or "Mot.") conflates the question of whether the Secretary of the Department of the Interior ("DOI") (the "Secretary") may challenge the existence and amount of a loan guaranty (the "Guaranty") issued by the Department's Loan Guaranty, Insurance, and Interest Subsidy Program ("Program"), with the separate question of when the Secretary must pay the holder of a Guaranty who submits a claim for loss ("Claim"). Ignoring the regulatory scheme governing Guaranties (25 C.F.R. Part 103 ("Part 103")), as well as basic facts about how the Program works, GALIC asks this Court to hold, as a matter of law based upon three isolated statutes in Title II of the Indian Financing Act of 1974 (codified at 25 U.S.C. §§ 1481-99) ("IFA"), that the *mere issuance* of a Guaranty *ipso facto* requires the Secretary to pay a full Claim on that Guaranty, regardless of *any* intervening circumstances. That is not the law.

In 2010, DOI issued a Guaranty certificate for up to 90 percent of a putative $22.5 million loan from one component of the Lower Brule tribe to another for the purchase of a Wall Street financial services holding company. Two years later, ignoring significant questions about the alleged loan, including the bankruptcies of that Wall Street company's subsidiaries, GALIC (allegedly) purchased the loan after apparently conducting due diligence for *less than two weeks*. Less than a year later, GALIC asserted the loan was in default and made a Claim to DOI under Program regulations, demanding payment for the *full amount* ($20.5 million) of the Guaranty.

After making multiple, fruitless requests for records any practiced lender would have maintained, DOI reviewed GALIC's Claim consistent with Program regulations. DOI rejected GALIC's Claim on multiple grounds, including GALIC's failure to produce documents

regarding the loan; failure to demonstrate that the loan was funded; failure to produce records indicating any funding (if made) was spent as required by the Guaranty; and failure to produce records showing that GALIC actually purchased the loan. GALIC appealed administratively twice, and in 2013, the Interior Board of Indian Appeals ("IBIA"), relying upon a 426-document Administrative Record, affirmed denial of GALIC's Claim because of GALIC's failure to provide documentation that the loan funded.[1]

GALIC now comes to this Court, with no new evidence, but the same demand – that the Court declare that DOI breached the Guaranty "contract," whose terms expressly encompass the Program regulations in Part 103. GALIC makes that demand for more than $20 million in taxpayer funds despite its failure to produce any verifiable records proving that an Indian business actually received any funds – the *entire purpose* of the Program.

Despite these circumstances, the Secretary is not yet cross-moving for summary judgment because a ruling in the Secretary's favor on GALIC's motion will not resolve the case. The Secretary does not dispute that the agency issued a Guaranty, or that GALIC made a Claim on that Guaranty that DOI denied. The Secretary stands prepared to demonstrate to the Court, on subsequent summary judgment proceedings, or at trial, that DOI's denial of the Claim was consistent with law and did not breach the Guaranty contract, which incorporated Program regulations. GALIC's motion, if granted, would render that Claim process meaningless, and thus should be denied.

[1] The Secretary submits the twelve-volume Administrative Record ("AR") as Exhibits 1-27 to this Opposition. Each volume, which is broken up into two or three exhibits, begins with an index of the entire AR. Citations to the AR in this opposition are made as AR__.

BACKGROUND[2]

I. The Department's Loan Guaranty, Insurance, and Interest Subsidy Program

The purpose of the Program, which is administered by the Division of Capital Investment ("DCI"), a component of the Office of Indian Energy and Economic Development ("IEED"), within the Office of the Assistant Secretary - Indian Affairs, is to encourage eligible borrowers to develop viable Indian businesses through conventional lender financing. The direct function of the Program is to help lenders reduce excessive risks on loans they make. That function in turn helps borrowers secure conventional financing that might otherwise be unavailable. 25 C.F.R. § 103.2.

For 44 years, the Program has been helping Indian-owned businesses secure commercial financing on reasonable terms, despite real and perceived obstacles seen by lenders such as lack of familiar collateral, and a lack of credit history or financial expertise.[3] The Program has helped businesses start and prosper despite these challenges, lifting the quality of life for Indian communities scattered throughout the country. Tribal self-determination requires that these projects be selected by the borrowers themselves.

The Program is popular across Indian-country as it is the only program of its kind specifically tailored to address the challenges Indian-owned businesses face when seeking financing. Despite the often complex issues the Program must address, it has maintained one of the lowest net loss rates (well under four percent) of all comparable loan guaranty programs.

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[2] Concurrent with this Opposition, the Secretary is filing Defendant's Counterstatement in Response To Plaintiff's Statement of Undisputed Facts, responding to the alleged undisputed facts stated in GALIC's motion. Mot. at 3-6.

[3] For more information about the Program, see https://www.bia.gov/as-ia/ieed/loan-guaranty-insurance-and-interest-subsidy-program; https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ieed/pdf/DCI-WhoWeAre-2019-broch_R3web%20%281%29.pdf.

Currently, DCI has only nine federal employees and five contractors to serve the entire Indian business community spanning 573 federally-recognized Indian tribes. In Fiscal Year 2019, this small team guaranteed or insured 54 loans totaling $165,917,481. DCI's numerous success stories[4] demonstrate the breadth and significance of what the Program has accomplished.

Most of the loans guaranteed by the Program are ultimately paid in full, terminating the Guaranty and costing the government nothing. But, borrowers do sometimes default on loans and, in the last five fiscal years, when lenders have complied with Program regulations, DCI has reviewed and honored at least 13 claims for loss concerning 15 different guaranteed or insured loans, with a total payout of $40,999,630.96.

II. Statutory and Regulatory Background

A. Indian Loan Guaranties

The Program was established under the IFA, Pub. L. No. 93-262, as amended, 25 U.S.C. § 1451 *et seq*., and regulations at 25 C.F.R. Part 103. Loan Guaranties are governed by Title II of the IFA (codified at 25 U.S.C. §§ 1481-99), which authorizes the Secretary to guarantee up to 90 percent of the unpaid principal and interest due on loans to Indian entities or individuals "[i]n order to provide access to private money sources which otherwise would not be available." 25 U.S.C. § 1481. As noted above, the Program is administered by DCI. The Program was originally administered by the Bureau of Indian Affairs ("BIA"), and the Part 103 regulations have not been amended to replace references to BIA with DCI.

DCI may issue a Guaranty if, among other requirements, the borrower is a federally recognized Indian tribe, an individual member of such a tribe, or a business that is at least 51

[4] https://www.bia.gov/as-ia/ieed/division-capital-investment/success-stories

percent Indian owned. 25 C.F.R. §§ 103.25, 103.44. In deciding whether to issue a Guaranty, DCI will consider "compliance with [Part 103] and whether there is a reasonable prospect of loan repayment." 25 C.F.R. § 103.16(a); *see also* 25 U.S.C. § 1484. DCI approves Guaranty applications by issuing an approval letter, followed by the procedures in § 103.18. 25 C.F.R. § 103.16(b). Under § 103.18(a), a loan "is guaranteed under the Program when all of the following occur:"

> (1) [DCI] issues a signed loan guaranty certificate . . . ;
> (2) The loan closes and funds;
> (3) The lender pays [DCI] the applicable loan guaranty premium; and
> (4) The lender meets all of the conditions listed in the loan guaranty certificate.

25 C.F.R. § 103.18(a)(1)-(4).

All or part of a guaranteed loan may be transferred by sale or assignment to any person, with notice to DCI. *See* 25 U.S.C. § 1485(a)-(b); 25 C.F.R. §§ 103.28-.29. From the date of the transfer forward, only the entity who is entitled to exercise the rights conferred by DCI's loan Guaranty certificate will be "considered the lender for purposes of the Program." 25 C.F.R. §§ 103.28-.29. That entity "must service the guaranteed loan and otherwise perform all of the duties required of the lender under the Program and the loan guaranty certificate." *Id.* § 103.29.

B. Claims for Loss

In the case of a borrower's "default," as defined in 25 C.F.R. § 103.44, the lender may make "a claim to [DCI] for its loss." *Id.* § 103.36(d)(1).

DCI may deny all or part of a lender's Claim under any of the circumstances set forth in § 103.39. They include:

> (a) The loan is not guaranteed . . . as indicated in § 103.18;
> (b) The guarantee . . . has become invalid under §§ 103.28, 103.29, or 103.36(e);
> (c) The lender has not met the standard of care indicated in § 103.30; [or]

> (e) The lender has otherwise failed in any material respect to follow the requirements of this part, and [DCI] can reasonably attribute some or all of the lender's loss to that failure.

25 C.F.R. § 103.39(a)-(c), (e).

When a guaranteed loan has been transferred, DCI will not reduce or deny payment "solely on the basis of §[] 103.39(c) or (e)," if the lender making the Claim: (1) was transferred the loan before maturity and for value; (2) gave proper notice of the transfer to DCI; (3) had no involvement in or knowledge of the actions or circumstances that would have allowed DCI to reduce or deny payment to a previous lender; and (4) has not itself violated the standards set forth in § 103.39(c) or (e). *Id.* § 103.40(a)(1)-(4).

Section 103.37 explains what a lender must do to collect payment under its loan Guaranty certificate. After the lender submits its Claim under § 103.37(a)(1), DCI "may require further information, including without limitation copies of any documents the lender is to maintain under § 103.32 . . . , to help [DCI] evaluate the lender's claim for loss." *Id.* § 103.37(d). Under § 103.32, "the lender must maintain . . . all final loan documents, including those listed in § 103.17 (concerning documents required for loan closing)," *id.* § 103.32(b), and other specified documents, *see id.* § 103.32(a), (c)-(i) (describing other categories of documents that the lender must maintain). *See also id.* § 103.42(b) ("a lender must maintain records with respect to a particular loan" for a period of time after either the loan is repaid in full or it accepts payment on a claim for loss).

DCI will pay the lender the guaranteed portion of the Claim "to the extent the claim is based upon reasonably sufficient evidence of the loss and compliance with the requirements of [Part 103]." *Id.* § 103.37(e).

III. The Alleged Loan and the Guaranty

A. Application for the Loan Guaranty

The Original Lender – Lower Brule Community Development Enterprise, LLC ("LBCDE") – was formed in September 2009 as a wholly owned subsidiary of the Lower Brule Corporation ("LBC"). LBCDE Certificate of Formation (AR 34); LBCDE Guaranty Application, Dec. 16, 2009, at 1 ("First Application") (AR 3). LBC is a federally-chartered tribal corporation and wholly owned by the Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota ("Tribe"). The Tribe's aim for LBCDE was to make "small loans on the reservation . . . [and] act as a non-bank lender for larger projects by funneling outside capital into Indian Country." First Application (AR 3) at 1.

The Borrower – LBC Western Holdings, LLC ("LBC Western Holdings") – was formed in April 2008 as a wholly owned subsidiary of LBC Capital Markets, LLC ("LBC Capital Markets"), which in turn is a wholly owned subsidiary of LBC. LBC Western Holdings Certificate of Formation (AR 22); LBCDE Guaranty Application, June 1, 2010, at Table "Company Overview" ("Final Application") (AR 27).

On or about the same day that LBCDE was formed, on September 9, 2009, the Tribe announced its acquisition of Westrock Group, Inc. ("Westrock"), a New York-based financial services holding company, and its subsidiaries. *See* News Releases (AR 2). Westrock and its subsidiaries were to form a Tribal Advisory Services Group to provide financial advisory services to the Tribe and other tribes across the country. *See id.* Previously, in June 2008, LBC, through LBC Capital Markets, LBC Western Holdings, and LBC Western, had agreed to purchase all of the stock of Westrock for approximately $14.5 million, using a mix of cash and

promissory notes. First Application (AR 3) at 3; Stock Purchase Agreement, June 16, 2008 (first page) (AR 4). But before the planned payment for the stock, in March 2009, the stock purchase agreement was amended to temporarily exchange stock for promissory notes alone until LBC could obtain a federal loan guaranty. *See* First Application (AR 3) at 3. Most or all of the owners of the three classes of Westrock stock agreed to exchange their stock for promissory notes, and the entire purchase price was reduced to promissory notes totaling $12,300,484. *See* Supplement No. 1 to Stock Purchase Agreement, Mar. 27, 2009 (first page) (AR 4).

On December 16, 2009, LBCDE[5] submitted an incomplete request to DCI for a Guaranty, based on a $14.5 million loan application from LBC Western Holdings for the acquisition of all of the stock of Westrock. First Application (AR 3) at 1-2. In its final application for a Guaranty, submitted on June 11, 2010, LBCDE requested a 90 percent guaranty based on a $22,519,638 loan application from LBC Western Holdings. Final Application (AR 27) at 1, 6 (unnumbered).

The stated purpose of the loan was for LBC Western Holdings to complete the acquisition of Westrock and its affiliates, and to perform on the Westrock business plan, with the primary collateral for the loan being the Westrock stock held by LBC Western Holdings.[6] *Id.* at 4, 6, 9 (unnumbered). The loan total was calculated as a percentage of Westrock's stock appreciation rights, combined with refinancing of debt, closing costs, a loan service fee, and a DCI premium. *Id.* at 11 (unnumbered). LBCDE conditioned the closing of the loan on its

[5] Within days of LBCDE's formation, the Tribe transferred its portfolio of several micro loans to LBCDE, and as of September 15, 2009, LBCDE held $1,079,000 in outstanding loans and a cash reserve of about $100,000. *See* LBCDE Draft Private Placement Memorandum, October 2010, at 9 ("Draft PPM") (AR 71). A year later, as of October 2010, LBCDE had "engaged in no material business other than acquiring the asset portfolio of the tribe." *Id.* at 14.

[6] Despite the fact that the loan guaranteed by the Program and (allegedly) purchased by GALIC was for the purpose of purchasing Westrock, GALIC's motion so ignores the facts of the underlying loan, which *it allegedly purchased*, that it fails to mention Westrock in its motion.

receipt of a 90 percent federal loan Guaranty and Westrock raising $3 million in "promissory notes" or a "bond," "in second position behind the [DCI] Guaranteed Loan," to roll out the Tribal Advisory Services Group (to be led by Gavin Clarkson and Rodney Dennis Ickes[7]), and other business groups. *Id.* at 10, 12, 17, 32 (unnumbered).

B. Approval of the Guaranty and Closing of the Loan

On or about June 24, 2010, the then-chief of DCI, Philip Viles, approved LBCDE's final application for a 90 percent Guaranty on the loan. *See* Loan Guaranty Agreement, June 24, 2010 (AR 35); Loan Guaranty Certificate No. G103D1A1501, June 24, 2010 (AR 37); Conditions of Approval, June 25, 2010 (AR 41).

The loan did not close by LBCDE's anticipated closing date of August 1, 2010, or the later 90-day regulatory deadline for closing, 25 C.F.R. § 103.17(f), but DCI extended the closing deadline to October 30, 2010. Letter from Viles to Clarkson, Sept. 29, 2010 (AR 64). Meanwhile, the Financial Industry Regulatory Authority ("FINRA") provided DCI with copies of "cease and desist" letters that it had issued to two Westrock subsidiaries, in September 2010. Letter from Thomas Kimbrell, FINRA, to Viles, Oct. 20, 2010 (AR 71) (attaching cease and desist letters). FINRA found that the subsidiaries had failed to demonstrate compliance with a Securities and Exchange Act rule requiring broker-dealers to maintain a certain level of net capital. AR 71 at 29.

[7] Clarkson and Ickes were central figures in the loan and Guaranty, and each apparently acted for LBCDE at times and LBC Western Holdings at times. *See* Guaranty Loan Administrative Information (AR 44); Email from Ickes to Shannon Loeve, DCI, June 26, 2013 (AR 335); Email from Ickes to Loeve, July 24, 2013 (AR 351); Chart of Affiliate Relationships (AR 355); *see also Seaport Loan Prods., LLC v. Lower Brule Cmty. Dev. Enter. LLC*, 2013 N.Y. Misc. LEXIS 4859, at *4, *7 (N.Y. Sup. Ct. Oct. 22, 2013).

At the same time, DCI also obtained a copy of LBCDE's October 2010 draft Private Placement Memorandum for funding the loan through private third parties. *See* Draft PPM (AR 71). According to that document, as an "interim step" to obtaining third-party funding for the loan to LBC Western Holdings, LBCDE planned to "raise up to $5,687,500 in new funds under the protection of the [DCI] Guaranty . . . [and] to make available the same protection to existing holders of promissory notes issued by Westrock Group (and to a certain extent, those issued by [LBC Western])." Draft PPM (AR 71) at 4, 7. LBCDE planned to "issue debt that, in part, will replace securities previously issued by certain of its affiliates. In particular, it [would] substitute its debt with (i) debt issued by Westrock Group, (ii) certain debt issued by LBC West[ern], and (iii) certain Units issued by [LBC Western Holdings]." *Id.* at 19-20.

DCI then sought reassurance from LBCDE and LBC Western Holdings that the Westrock stock provided collateral as "strong" as when the Guaranty was approved several months earlier. Email from Viles to Clarkson, Oct. 22, 2010 (AR 74). Viles noted he was aware of the two FINRA cease and desist letters, and that Westrock Advisors was now "defunct." *Id.*; Email from Viles to Ickes and Clarkson, Oct. 22, 2010 (AR 75). LBCDE responded, claiming that "shutting down Westrock Advisors has eliminated a significant cash drain on the enterprise and has actually improved the value of the collateral." AR 79 at 1. LBCDE also stated that its plan for "capitalization of the loan is a combination of a cash infusion and refinancing of high coupon debt. While we expect to infuse $5.6 million (our 'target raise'), our arrangement with the escrow agent allows us to break escrow at $3.0 million." *Id.* at 1.

On October 28, 2010, DCI transmitted the Loan Guaranty Agreement to LBCDE for its signature. Email from Viles to Ickes (AR 84). That same day, DCI also "reaffirm[ed]" the Loan

Guaranty Certificate and the Conditions of Approval. Email from Viles to Ickes and Clarkson, Oct. 28, 2010 (AR 91). DCI specified that it was "relying on the documents and your assertions that the financial health of the Borrower and/or the financial strength of the transaction contemplated by our guarantee of June 24, 2010 remain strong enough for the transaction to be consummated." *Id.*

According to representations by LBCDE and LBC Western Holdings, the loan closed on October 29, 2010. *See* Certification of Compliance with 25 C.F.R. § 103.17, Oct. 29, 2010 (AR 94) (enclosing Negotiable Promissory Note, Oct. 29, 2010, and Loan Agreement, Oct. 29, 2010); *see also* Security Agreement, Oct. 29, 2010 (AR 366, No. 14).

C. Alleged Funding of the Loan

The Loan Agreement, executed on October 29, 2010, states that "funding under this Agreement and the [Negotiable Promissory] Note shall be done immediately after, and contingent upon, the closing of the [LBCDE Private Placement Memorandum]." Loan Agreement § 2.08 (AR 94). On November 27, 2010, LBCDE informed DCI that the loan would be funding on November 29, 2010. Email from Clarkson to Viles (AR 96).

GALIC asserts that there was "a $22,519,638 loan made by a subsidiary of the Lower Brule Corporation." Mot. at 1. However, there is no evidence that the loan was actually funded or, if it was, the amount that was funded.[8] As described below, DOI concluded that GALIC "did not maintain and produce sufficient documentation that the Loan was funded." 63 IBIA 98-99.

[8] Examining all the documents attached to GALIC's motion for summary judgment, GALIC includes a Loan Agreement (beginning PAGEID # 271), but no documentation (like a check, or wire transfer, or other evidence of $22.5 million being transferred from lender to borrower) that the loan funded.

D. LBCDE Attempts To Sell the Loan

LBCDE actively sought investors to participate in the loan – and thus the Guaranty – before it claims to have funded the loan, and continued after that date to seek potential purchasers of the loan and Guaranty.[9] LBCDE's sales efforts resulted in potential investors – but not GALIC – contacting DCI between late 2010 through March of 2012 seeking to inform their consideration of a possible purchase of all or part of the loan.[10] Clarkson, representing LBCDE, appears to have been at the center of most of these sales efforts, and records show he went to considerable lengths to secure Chief Viles' cooperation in providing information and reassurance to prospective buyers.[11] Several of the prospective purchasers asked questions, including whether LBCDE had ever funded the original loan. *See, e.g.*, Email from David Stein to Viles, Dec. 2, 2010 (AR 100) (questioning whether LBCDE was allowed under the Program to escrow 10 percent of the Loan); Email from Gary Millhollon to Viles, Jan. 4, 2011 (AR 104) (stating that there appeared to be "no lender in place," and questioning the financial projections); Email from Frederick Petti to Viles, Aug. 8, 2011 (AR 143) questioning "whether any third parties loan[ed] any money to [LBCDE] so that it could actually fund the loan"). DCI did not confirm that it had knowledge that the loan had funded. *See* Email from Viles to Petti, Aug. 8, 2011 (AR 143) (stating only that DCI did not concern itself with any outside funding LBCDE may have

[9] AR 100-01, 103-04, 110-11, 113, 137-38, 145-46, 149, 151, 153-64, 166-69, 171-79, 182-84, 186-87, 190, 192-93, 195-97, 199, 201-03, 208, 210, 213-14, 217, 222-26, 228-36, 238-43, 245-49, 251, 253-56, 258-60, 390 and 391.

[10] Potential investors who ultimately declined to purchase the loan included Rochdale Capital Advisors, AR 100-01; Bank of Albuquerque, AR 103-04; the Alabama-Coushatta Tribe of Texas, AR 111, 114 and 116; Middleburk Bank, AR 113; Sandler O'Neill, AR 136-138, and 140; Dougherty & Company, LLC, AR 146-48; Eagle Private Equity, *see, e.g.*, AR 145, 153-61, 170-73, 201-03, 222-26, 233-36; Thomas Keresztes, AR 162; Pacific Western Bank, AR 166, 168-69, 174; Presidential Bank, FSB, AR 251.

[11] *See, e.g.*, AR 117-18, 122-24, 140-42, 153-54, 170-75, 203-04, 222-26, 251-52, and 275.

received). In May 2011, one of the prospective purchasers provided DCI with the final Private Placement Memorandum that LBCDE had issued on October 25, 2010, with a stated closing date of November 15, 2010. Email from Petti to Viles, May 15, 2011 (enclosing LBCDE Private Placement Memorandum, Oct. 25, 2010 ("Final PPM")) (AR 116).

The Final PPM is also referenced in later financial statements that LBCDE provided to DCI regarding LBC Western Holdings. Unaudited 2010 financials state that LBC Western Holdings had a $22,519,638 long-term liability, presumably referring to the loan. *See* Unaudited 2010 Financials, Feb. 14, 2011 (AR 131). But the audited 2010 financials state that only $15,021,497 was owed to LBCDE. *See* Audited 2010 Financials, June 15, 2011, at 2 (unnumbered) (AR 130).[12] The notes accompanying the 2010 audited financials discuss the final PPM, explaining that LBCDE issued it to replace certain notes and raise working capital. *Id.* at 12-13 (unnumbered). The total offering was approximately $5.6 million, and $3,531,650 in new money was raised. *Id.* at 13 (unnumbered).

An April 2013 business restructuring proposal describes the final PPM and its proceeds, stating that LBCDE raised "$3.5M, by offering fully and partially guaranteed debt instruments backed by the Indian Loan Guaranty Program. Simultaneously, LBCDE lends the proceeds to LBC [Western Holdings] and receives a $22.5M note." Restructuring and Business Plan, April 2013, at 4 (AR 322).[13]

[12] In addition, the unaudited 2010 financials depict a business that was solvent while the audited 2010 financials show total liabilities exceeding total assets by over $26 million.

[13] Descriptions of LBCDE's efforts to raise money to fund the loan to LBC Western Holdings, while confusing, do not in any event suggest, much less demonstrate, that LBCDE ever secured anywhere near the funds it needed ($22.5 million).

E. Transfer of the Loan

On March 21, 2012, GALIC began inquiring with DCI regarding a possible transfer of the loan, *see* Email from Marcie Landsburg, Blank Rome, LLP, to Viles (AR 250), and on April 5, 2012, GALIC provided notice to DCI that it had purchased the loan on April 2, 2012, *see* Letter from Mark Muething, GALIC, to Viles at 1 (AR 262), less than two weeks after GALIC first contacted DCI. In a letter subsequent to his acknowledgment of the transfer notice, Chief Viles stated that GALIC was "now the lender" under the guaranty." Letter from Viles to Muething, May 29, 2012 (AR 366, No. 18).

GALIC claims that it purchased the loan "with Interior's approval." Mot. at 1. Even assuming that GALIC did purchase the loan, the law does not require DOI to approve the purchase – and DOI did not do so.[14]

F. Default Events

After the transfer, GALIC and LBC Western Holdings failed to timely provide the 2011 annual audited financials as required by the Guaranty Conditions of Approval. *See* Letter from GALIC to DCI, Oct. 12, 2012, at 1 (First Notice of Selection of Remedy) (AR 298). On July 20, 2012, GALIC informed DCI that, based on information received from LBC Western Holdings, the delay in providing the financials was due to impending bankruptcies of various LBC Western

[14] 25 U.S.C. § 1484 permits transfer of "loan guaranteed . . . under this subchapter" when "(1) the transfer shall be consistent with such regulations as the Secretary shall promulgate under subsection (h); and (2) the transferee shall give notice of the transfer to the Secretary." 25 U.S.C. § 1484(b). The statue does *not* require the Secretary to approve the transfer. The regulations also do not require approval. Part 103, Subpart E addresses "Loan Transfers." The subpart also does *not* require the Secretary to approve the transfer, requiring only that when a lender transfers the entire loan, as happened here, the "acquiring person must send BIA written notice of the transfer." 25 C.F.R. § 103.29(a). Moreover, in an April 23, 2012 letter from DOI to GALIC acknowledging transfer of the loan and guaranty, DOI explained: "I draw your attention to the requirements of Title 25 Code of Federal Regulations Part 103 which cover our Program and to the Conditions of Approval enclosed in the Loan Guaranty Certificate." PAGEID # 350.

Holdings subsidiaries. Email from Landsburg to Viles, July 20, 2012, at 1 (AR 278). Westrock Advisors had previously filed a chapter 7 petition for liquidation, and LBC Western, Westrock Group, and Monarch Financial also intended to do so. *Id.*

On April 1, 2013, LBC Western Holdings allegedly failed to timely pay the March 2013 installment of principal and interest due, the alleged event of default on which GALIC based its Claim. Letter from GALIC to DCI, Apr. 23, 2013 (Second Notice of Event of Default) (AR 366, No. 250). In response, LBC Western Holdings submitted a restructuring plan to DCI and GALIC, which revealed that for approximately one year following the transfer of the loan to GALIC in April 2012, LBCDE had advanced principal and interest payments totaling $1.9 million to GALIC on behalf of LBC Western Holdings. Restructuring and Business Plan (AR 322) at 4. LBCDE was unable to continue this extension of credit to LBC Western Holdings due to its "outstanding loans [and] notes receivable." Restructuring and Business Plan (AR 322) at 6.

IV. GALIC Claim for Loss and Failure to Comply with Program Regulations

A. GALIC's Claim for Loss

GALIC notified DCI and LBC Western Holdings of the April 1, 2013, default event and submitted a Claim under the Guaranty for $20,043,618.67. *See* Second Notice of Event of Default; Letter from GALIC to LBC Western Holdings, Apr. 12, 2013 (AR 329 at 10); Second Notice of Selection of Remedy; Claim for Loss, June 19, 2013 (AR 329 at 2).

B. GALIC Fails to Provide Documentation to Support Claim

DCI determined that additional information and documentation from GALIC was required "to properly evaluate" the Claim. Letter from Loeve to Muething, July 11, 2013 (First

Request for Information) (AR 340). The request sought documents that "the lender[15] must maintain" under Part 103, such as "[a] complete and current history of all loan transactions, including dated disbursements, payments, adjustments, and notes describing all contacts with the borrower," 25 C.F.R § 103.32(e). First Request for Information (AR 340).

GALIC failed to provide any response for more than six weeks, and when it did, its response was incomplete. After 45 days, DCI sent a follow-up letter again requesting that GALIC provide the documentation DCI had requested GALIC to produce. Letter from Loeve to Muething, Aug. 26, 2013 (Second Request for Information) (AR 349). GALIC ultimately provided some documents to DCI, but many of the documents DCI requested had not been provided. Letter from Caulum to Courtney, Nov. 14, 2013 (AR 374). In another follow-up letter, DCI attached a lengthy list of outstanding documents that DCI had requested and that GAILC had failed to produce. *Id.*

GALIC's final response provided only a copy of the stock certificate issued by Westrock to LBC Western Holdings' subsidiary, LBC Western, together with a stock power executed in blank and signed by LBC Western. *See* AR 382 at 1 & Att. (Westrock Group Stock Certificate, Dec. 29, 2010, and Stock Power, May 30, 2012). In the response, GALIC acknowledged a $6.5 million inconsistency in the Loan amount in the 2010 (showing liability of $15,021,497) and 2011 (showing liability of $22,519,633) audited financials of LBCDE. *Id.* at 2. *GALIC* claimed that the earlier audit was incorrect. *Id.* at 2.

[15] As noted above, GALIC became the "lender" as that term is used in Part 103 after LBCDE transferred the loan to GALIC.

C. DOI Denies GALIC's Claim for Loss

1. The DCI Chief's Decision

On December 23, 2013, the Acting Chief of DCI (Chief) issued her decision denying GALIC's Claim "in its entirety because [GALIC] has not complied with the requirements of [Part 103]." Chief's Decision at 2 (AR 407). She concluded that GALIC "did not secure" and therefore "cannot produce even fundamental financial documents, such as those identified in . . . § 103.17(e), much less detailed loan history documents of the kind identified in . . . § 103.32." *Id.* at 1-2. The Chief found that, after reviewing the documents provided by GALIC, she could not confirm that: (1) the loan "was ever made"; (2) the loan "ever funded in accordance with . . . § 103.18(a)(2)"; the "funding (if it occurred) was spent in accordance with the loan guaranty conditions, as required by . . . § 103.18(a)(4)"; or (4) GALIC transferred funds to LBCDE in acquiring the loan. *Id.* at 1.

She also found that, because GALIC secured from LBCDE the documents concerning the Guaranty itself but failed to secure the documents identified in § 103.17 and § 103.32, GALIC did not rely on LBC Western Holdings' ability to repay the loan and instead relied "almost exclusively" on the Guaranty for debt repayment. *Id.* at 1-2. For that reason, she found that GALIC did not meet the standard of care in § 103.30, specifically, that GALIC did not "seek to avoid and mitigate any potential loss arising from the loan, using at least that level of care the lender would use if it did not have a [Department of the Interior] loan guaranty." *Id.*

The Chief closed by stating that there was insufficient evidence that all of the requirements in § 103.18(a) were satisfied for the loan to be guaranteed. *See id.* at 2. Citing 25 C.F.R. § 103.31 ("What loan servicing requirements apply to [DCI]?"), she advised that it was

not DCI's duty to uncover those problems for GALIC; it was GALIC's duty to "conduct sufficient due diligence to determine whether the loan was in existence and performing as intended." *Id.*

2. The Principal Deputy Assistant Secretary – Indian Affairs Affirms

GALIC timely appealed the Chief's decision to the Interior Board of Indian Appeals ("IBIA"). *See* Notice of Appeal, Jan. 24, 2014 (AR 409). On jurisdictional grounds, the IBIA remanded the case to the Principal Deputy Assistant Secretary – Indian Affairs (Principal Deputy). *See Great American Life Insurance Company v. Acting Chief, Division of Capital Investment, IEED*, 58 IBIA 214 (2014).

The Principal Deputy summarily affirmed the Chief's decision. Principal Deputy's Decision (AR 415). He stated, "I find that the decision is supported by the record. Therefore, I adopt and affirm the decision." *Id.*

3. The IBIA Affirms

GALIC appealed the Principal Deputy's Decision to the IBIA. Notice of Appeal, June 27, 2014 (AR 416). In a comprehensive and detailed 30-page decision, based upon an Administrative Record containing 426 documents, the IBIA affirmed the Principal Deputy's decision on May 27, 2016. *Great American Life Insurance Company v. Principal Deputy Assistant Secretary – Indian Affairs*, 63 IBIA 98. The IBIA explained that, "[p]ursuant to 25 C.F.R. § 103.39(a), all or part of a lender's claim for loss may be denied when the loan is not actually guaranteed as indicated in § 103.18(a), which requires, in addition to a signed guaranty certificate, that the loan 'close and fund.'" *Id.* at 99.

Without deciding whether the loan actually closed, the IBIA held that GALIC failed "to meet its burden on appeal to show error in the Principal Deputy's conclusion that [GALIC] did not maintain and produce sufficient evidence that the Loan was funded." *Id.* Thus, "[b]ecause there is no guaranty if the Loan was not funded, . . . we need not reach any other grounds cited by DCI or the Principal Deputy for denying the claim." *Id.*

ARGUMENT

Ignoring the multi-year, three-level agency review process, including the IBIA's comprehensive decision, and the 426-document Administrative Record developed below, as well as the majority of the IFA statutes and the entirety of the Program regulations in 25 C.F.R. Part 103, GALIC now argues that this Court should read three isolated statutes as mandating the Secretary to pay GALIC's $20+ million Claim merely because DOI issued a Guaranty, despite the fact that, as the IBIA concluded, "there is no guaranty if the Loan was not funded." *See* 63 IBIA 99. Granting GALIC's motion would eviscerate the Program, destroying the requirements and safeguards Congress and DOI have established to protect the Program and taxpayer funds, and turning DOI's issuance of a Guaranty into an absolute promise to pay.

I. SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE GALIC HAS NOT SATISFIED PAYMENT CONDITIONS IN THE IFA IMPLEMENTING REGULATIONS

A. To Obtain Payment on a Guaranty, Program Regulations Require that a Lender Must Submit a Properly Documented Claim for Loss

The IFA implementing regulations in Part 103, authorized by 25 U.S.C. § 1498, determine whether a guaranty holder is entitled to payment. GALIC, however, *does not mention* 25 C.F.R. 103.37 (What must the lender do to collect payment under its loan guaranty certificate . . . ?) in its motion. Yet GALIC's suit must be evaluated under these regulations, as GALIC

recognized by filing its Claim with DOI under Part 103. This Court should deny GALIC's motion because GALIC failed to comply with IFA implementing regulations governing Claims.

Collecting on a Guaranty requires compliance with the regulations governing "Default and Payment" – 25 C.F.R. Part 103, Subpart G. The regulation sets out the process for making a Claim.

1. A Claimant Must Document the Alleged Loss

DOI "may require further information, including without limitation copies of any documents the lender is to maintain under §103.32 . . ., to help [the agency] evaluate the lender's claim for loss." 25 C.F.R. § 103.37(d). Section 103.32 – titled "What sort of loan documentation does BIA expect the lender to maintain?" – sets forth a list of documents that, "[f]or every loan guaranteed or insured under the Program, the lender must maintain." *Id.* § 103.32. Those documents include "[o]riginal signed and/or certified counterparts of all final loan documents, including those listed in §103.17 (concerning documents required for loan closing); and [a] complete and current history of all loan transactions, including dated disbursements, payments, adjustments, and notes describing all contacts with the borrower." *Id.* at (b), (e). Documents showing loan disbursements are necessary to demonstrate compliance with section 103.18, which explains that a loan is only "guaranteed . . . 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.[16]

[16] One of those conditions in the loan Guaranty certificate issued here placed additional reporting requirements upon the lender:

25 C.F.R. § 103.18(a).

DOI "will pay the lender the guaranteed or insured portion of the lender's claim for loss, to the extent the claim is based upon reasonably sufficient evidence of the loss and compliance with the requirements of this part." 25 C.F.R. § 103.37(e). When resolving a claim for loss, section 103.39 further describes when the agency may deny a claim for loss. 25 C.F.R. § 103.39. Section 103.39 states that the agency "may deny all or part of a lender's claim for loss when":

> . . . (b) The guarantee or insurance coverage has become invalid under §§103.28, 103.29, or 103.36(e);
> (c) The lender has not met the standard of care indicated in §103.30; . . .
> (e) The lender has otherwise failed in any material respect to follow the requirements of this part, and BIA can reasonably attribute some or all of the lender'' loss to that failure.

25 C.F.R. § 103.39.

2. A Claimant Must Meet the "Standard of Care"

Program regulations establish the "standard of care" a lender must meet. 25 C.F.R. § 103.30. A lender "must service all loans . . . under the Program in a commercially reasonable manner, in accordance with standards and procedures adopted by prudent lenders in the . . . region in which the borrower'' business is located, and in accordance with this part." *Id.* Among the actions a lender must take to meet its standard of care is:

> . . . (b) Take reasonable precautions to assure that loan proceeds are used as specified in BIA's guaranty certificate . . .;

> Until the Loan is repaid in full, the Lender must secure and provide the Department with copies of all: (a) internally prepared quarterly financial statements within 45 days of quarter close, (b) annual audited financial statements no later than one hundred twenty (120) days after fiscal year end, and (c) proof that Borrower has met all FINRA, SIPC, State, Federal and all other reporting requirements within 30 days of the required filing dates.

Conditions of Approval, ¶ 7 (PAGEID # 300).

> (m) Otherwise seek to avoid and mitigate any potential loss arising from the loan, using at least that level of care the lender would use if it did not have a BIA loan guaranty . . . .

25 U.S.C. § 103.30.

3. GALIC's Status as a Transferee Does Not Entitle It to Greater Rights to Payment under the Guaranty

GALIC's motion asserts that it is automatically entitled to payment on the Guaranty because it was not the original lender but a transferee, and argues that DOI has failed to recognize that distinction. GALIC is wrong. Program regulations acknowledge that the purchaser of a guaranteed loan is generally not responsible for actions taken by the original lender before the purchase, but upon acquisition, the new lender has fundamental record-keeping and reporting obligations to maintain the value of DOI's guarantee. Specifically, "[s]tarting on the date of the transfer [of a loan guaranteed by DOI], [the transferee] will from that point forward be considered the lender for purposes of the Program." 25 C.F.R. § 103.29(a). However, DOI "will not reduce or deny payment solely on the basis of §§103.39(c) or (e) when the lender making the claim for loss" is "a person to whom a previous lender transferred the loan" and the lender "[h]as not itself violated the standards set forth in §§103.39(c) or (e)." 25 C.F.R. § 103.40(a)(1), (4). Reading these two regulations together, DOI may deny a transferee's Claim on any basis, except those carved out by section 103.40(a).

Because the IFA implementing regulations discussed here mandate that a holder of a Guaranty who seeks to be paid on that Guaranty must submit a Claim to DOI, and that DOI may deny that Claim as outlined in Part 103, GALIC's motion, which fails to demonstrate how these regulations are contrary to governing statutes, must be denied. Thus, the only way for GALIC to obtain the relief it seeks from this Court is to prove that the agency breached the Guaranty

contract, which expressly states that it is "subject to the provisions of the Loan Guaranty, Insurance, and Interest Subsidy Program, 25 U.S.C. §§ 1481 *et seq.*, 1511 *et seq.*, and 25 CFR Part 103." Dkt. 28, PAGEID # 298. Summary judgment should be denied because GALIC has not demonstrated it has satisfied Program regulations.

B. GALIC's Claim for Loss Did Not Satisfy DOI's Regulations

In its motion, GALIC essentially challenges DOI's denial of its Claim. That challenge fails, however, because DOI's denial was entirely consistent with the Part 103 regulations discussed above. GALIC's contention that the mere existence of a Guaranty from DCI means that GALIC is entitled to payment is not supported by the Program's regulations. Instead, as discussed above, conditions must be fulfilled before taxpayers are required to reimburse a lender for a supposed loss. GALIC did not meet those conditions in agency proceedings, and, based on the documents it has submitted to date, it has not met them before this Court.

When GALIC submitted its Claim, and DOI began investigating that Claim to determine if it was valid, DOI asked GALIC to provide records verifying that LBCDE in fact made the loan to LBC Western Holdings. *See* 25 C.F.R. §103.18(a)(2). GALIC failed to provide those records to the agency; and it has not provided them to this Court.[17]

Indeed, GALIC appears to concede that the loan was not "funded" – meaning that LBCDE did not advance funds to LBC Western Holdings. "A 'loan' is a transaction that involves an agreement 'whereby one person advances money to the other and the other agrees to

[17] DOI is not holding GALIC responsible for any fraud or material misrepresentation that may have occurred *before* its purchase of the loan. DOI did not consider those potential defenses in its review of GALIC's claim, consistent with 25 U.S.C. § 1494 and 25 C.F.R. §103.40(a)(1), (2) and (3). But DOI *was* entitled to insist that GALIC, as the new "lender" under 25 C.F.R. §103.29 after it purchased the loan from LBCDE, obtain and maintain fundamental records and abide by the same Claim procedures required of other lenders under Program regulations.

repay it.'" *In re Burm*, 554 B.R. 5, 16 (Bankr. D. Mass. 2016) (quoting *HHS v. Smith*, 807 F.2d 122, 124 (8th Cir. 1986)). In the Complaint, GALIC explains that LBC Western Holdings purchased Westrock via promissory notes (no transfer of funds). Dkt. 1 at ¶ 14. Then, LBCDE issued promissory notes (no transfer of funds) to the former owners of Westrock, "discharge[ing] and satisfy[ing]" the promissory notes issued by LBC Western Holdings. *Id.*

Thus, even though LBC Western Holdings signed a promissory note on October 29, 2010, no money changed hands. The supposed "funding" that occurred on November 29, 2010 was not an event where LBCDE produced its own money and placed it at risk. What it did instead was to convince the creditors of the borrower to release the borrower from liability and put LBCDE – also unable to pay the amount in question – on the hook instead. One promise was exchanged for another – nothing more.[18]

Under the Program, a Guaranty exists only for *funded* loans. 25 C.F.R. § 103.18(a)(2). DOI had no obligation to pay a non-existent Guaranty. 25 C.F.R. § 103.39(a). Moreover, a lender – original or subsequent – must possess and maintain sufficient records that any prudent lender would be expected to routinely maintain and have available upon request showing the fundamental aspects of the loan, such as loan documents and a payment history. GALIC failed to produce that documentation in support of its Claim, and thus failed to satisfy Program regulations. *See* 25 C.F.R. §§ 103.30, 103.32 and 130.33. GALIC therefore also failed the

[18] One may wonder why the borrower's creditors would accept a substitute borrower and the release of its original borrower. The probable answer is that all three parties were desperate – LBC Western Holdings to relieve a debt it could not pay, LBCDE to look like it had funded a loan it could not afford before DOI withdrew its Guaranty, and the broker creditors to improve the chance that they might receive anything at all in compensation for what they must have known would soon be revealed as a worthless group of brokerage businesses.

standards required for payment outlined in 25 C.F.R. § 103.39(c) and (e), and thus cannot rely upon the carve out 25 C.F.R. §103.40(a).

II. GALIC INCORRECTLY READS 25 U.S.C. §§ 1484, 1485 AND 1494

Because GALIC's motion does not satisfy the conditions for payment on a Claim, which are incorporated into the Guaranty, GALIC's arguments about three IFA statutes are irrelevant. In any event, GALIC's interpretation of the IFA is wrong.

A. The Plain Language of the Three Statutes GALIC Relies Upon Do Not Support Granting Summary Judgment

GALIC readily concedes that, as noted above, its motion relies entirely on three statutes. Mot. at 3 ("For purposes of this motion, the key statutory provisions of the IFA are 25 U.S.C. §§ 1484, 1485 and 1494."). However, the plain language of these three provisions do not establish or support GALIC's alleged absolute right to payment on its Claim.

1. Section 1484

First, IFA section 1484 merely authorizes DOI to *issue* a Guaranty. The provision says nothing about the circumstances under which DOI must pay a Claim submitted by a holder of a Guaranty.

GALIC incorrectly asserts that DOI's position is that the issuance of a Guaranty certificate "is nothing more than an indication that there is a *possibility* that a loan might eventually be guaranteed." Mot. at 10-11. To be clear, the issuance of a Guaranty certificate *does* guarantee the loan. GALIC, however, confuses the fact of the Guaranty with DOI's obligation to pay a Claim on a Guaranty. Requiring payment without proof of loss would destroy the Program's effectiveness by opening the floodgates for liabilities Congress never intended.

Similarly, GALIC asserts that the "issuance of the Loan Certificate Guaranty is dispositive." Mot. at 7. If this Court grants GALIC's motion, then any Guaranty would be "dispositive" when issued, regardless of *any* circumstances that follow, such as whether the loan is funded, the amount of the loan (if any) actually funded, whether the funded amount is utilized for the purposes for which the guaranty was issued, etc. There is nothing in the plain language of any statute that suggests Congress intended that the mere issuance of a Guaranty creates an absolute right to pay.[19]

2. Section 1485

Second, IFA section 1485 provides authority for a holder of a Guaranty to transfer the underlying loan to another person or entity. The statute merely authorizes a lender to transfer a loan guaranteed by DOI to another person or entity, consistent with Program regulations and with notice to the Secretary. In IFA section 1485(c), Congress confirms that transfer of the loan does not alter the validity of the Guaranty. Section 1485 thus encourages lenders to make loans supported by a DOI Guaranty by assuring them, and purchasers in the secondary market, that transfer of the loan does not alter the validity of the Guaranty.

GALIC, however, apparently reads this statute to suggest that transfer of a loan somehow enhances the Guaranty, such that transfer transforms the Guaranty into an absolute right to be

[19] GALIC ignores how the Program works. First, a Guaranty is issued *before* a loan is scheduled to close. Here, the Guaranty was issued long before the loan was scheduled to be closed (because a condition for the lender to agree to the loan is that DOI has guaranteed it). And, after DOI provided the Guaranty, the agency did not have hands-on oversight of the loan (and did not have the resources for such monitoring). The loan was a transaction between two private parties and, after providing a Guaranty, DOI has little or no involvement in the transaction until and unless a Claim is filed. The responsibility for making and receiving payment on the loan is on the lender. For this reason, Program regulations focus on what the *lender* must do to establish a right to payment under the Guaranty. If the lender files a Claim, that lender must satisfy all the regulatory obligations placed on the lender – which are intended to limit the agency's liability for payment only to those circumstances where the lender incurred a loss it could not have prevented.

paid by the Secretary, regardless of the Claim process and any other circumstances. That contention is not supported by the plain language of the statute. If GALIC's reading of section 1485 were accurate, then any lender obtaining a DOI Guaranty would immediately transfer the loan and Guaranty to another entity, converting it into an automatic right to pay. That is not the result Congress intended, because section 1485, by its plain language, does not alter the status of the Guaranty.

3. The 2006 Amendment of Section 1485 Is Not Relevant

GALIC attaches great significance to the fact that IFA section 1485 was amended in 2006 – *before* DOI issued the Guaranty at issue in this case. However, the change to the statute, the previous version of which was in force from 2002-06, has no bearing on the issues here.

GALIC contends the IBIA erred in stating that "§ 1485(c)(2) makes no distinction in this regard between an original lender and a secondary lender." Mot. at 13-14. But section 1485(c)(2) does *not* distinguish between an original lender and a secondary lender. *See* § 1485(c)(2). GALIC apparently claims that because a prior version of the statute included language that was eliminated by the amendment, we must interpret the current version of section 1485, which *does not* distinguish between the original lender and a transferee, as doing *exactly that*. First, the plain language of section 1485 unequivocally does not distinguish between the original lender and a transferee – that ends any question of what the statute means. Second, without legislative history explaining the amendment, and GALIC cites to none, this Court cannot assume Congress's intent, particularly when the amendment was not a mere deletion of a word or phrase, but a wider change to the structure of the statute. Exhibit 28 (Westlaw comparison of current statute with 2002-06 version).

4. Section 1494

Finally, GALIC misreads IFA section 1494. Specifically, GALIC misunderstands this portion of the statute:

> 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.

§ 1494 (emphasis added). GALIC contends that the italicized phrase modifies the remainder of the sentence, immunizing GALIC from *any* defense to payment on the Guaranty that DOI has. GALIC is wrong. The plain meaning of the statute is evident when the two disjunctive clauses are separated:

- "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."

Displayed in this manner, without altering the order or content of the words, the two clauses have a parallel structure. GALIC would have the statute read as follows:

- "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."

Displayed as such, the statutory language lacks parallel structure and clarity of meaning.[20] Under this construction, the transfer of a loan guaranteed by DOI from the original lender to a

[20] To the extent that GALIC relies upon the use of "defenses and partial defenses against original lender" in the title of section 1494, "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Spurr*

transferee turns the Guaranty into an automatic right to claim payment and strips DOI of a meaningful process for evaluating whether the Claim should be paid and any ability to raise defenses against payment.

By contrast, the Secretary's interpretation of the statute coheres with section 1494's wording and obvious Congressional purpose. Under the Secretary's reading, the Secretary may not raise defenses based on fraud or material misrepresentation in obtaining the Guaranty against a loan purchaser who had no knowledge of or participation in obtaining the Guaranty, but the Secretary is free to raise any other defenses against that purchaser, who becomes the "lender" upon transfer.[21]

Defenses relating to the existence and amount of the guaranty – fraud, material misrepresentation and defenses to the amount payable – do not affect whether the agency must pay a claim for loss when the claimant has failed to comply with the Part 103 regulations.[22]

Moreover, a loss claim need not be paid simply because a guaranty certificate establishes the "amount" of the guaranty. GALIC's contrary contention, Mot. at 11-12 (quoting 25 U.S.C.

v. Pope, 936 F.3d 478, 488 (6th Cir. 2019) (quoting *Bhd. of R.R. Trainmen v. Balt. & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)).

[21] An example may be helpful here. Assume that the original lender transfers the loan to a purchaser in 2015. The purchaser continues to collect payments from the borrower, who ultimately defaults in 2019. The purchaser, though, submits a Claim for the entire amount of the Guaranty (as if the borrower had not made four years of payments). GALIC interprets section 1484, 1485 and 1494 to force DOI to pay the full "amount" of the Guaranty and to prevent DOI from raising any defenses against the purchaser. Congress could not have intended to authorize such a waste of taxpayer funds.

[22] In any event, section 1494 would only be relevant here if the Secretary contested the existence or the Guaranty or the amount of the Guaranty asserting GALIC had committed fraud or misrepresentation. But, the Secretary has never contested that the Guaranty was issued or the amount of the Guaranty. And, in any event, while the Secretary denied GALIC's Claim, that denial was not based upon "defenses based on fraud or material misrepresentation."

§ 1494), conflates establishment of a guaranty's amount with payment conditions. Take another simple example. Bank A intends to loan up to $1 million to a tribe to build a greenhouse, and DOI guarantees 90% of that amount - $900,000. Assume that Bank A advances $500,000 to the tribe, but the tribe stops construction and defaults on its payments to Bank A. Bank A then submits a claim for loss to DOI. Is Bank A, which only advanced $500,000, entitled to recover $900,000 from DOI because DOI cannot contest the "amount" of the guarantee? Of course not. Assuming it can meet the regulatory requirements, Bank A can recover on a claim for loss up to $500,000. This simple example demonstrates that GALIC's contention regarding the "amount" of the guaranty reflects its misunderstanding of the law. Here, DOI has never contested the amount of the guaranty issued to the LBC. But conclusiveness regarding the amount of a guarantee is not the same as conclusiveness regarding DOI's obligation to pay that amount on a claim for loss.[23]

B. GALIC Ignores DOI's Regulations

Should the Court reject the Secretary's plain language reading of the three statutes at issue and conclude the statute are somehow ambiguous regarding GALIC's alleged absolute right to be paid on the Guaranty, the Court should then look to DOI's regulations implementing the IFA, which set forth in detail the obligations on a Guaranty holder submitting a Claim. This opposition referenced many of these regulations – 25 C.F.R. §§ 103.17, 103.18, 103.29, 103.30, 103.32, 103.37, 103.39, 103.30 – above.

[23] GALIC also misreads 25 U.S.C. § 1491 in suggesting that GALIC must be entitled to payment because the Secretary can be subrogated to the rights of the holder. *See* Mot. at 10. Section 1491 explains that subrogation is the result of the Secretary's payment on a Guaranty – upon payment, the Secretary is subrogated to the rights of the holder. *See* 25 C.F.R. § 103.38. Here, for the reasons set forth during DOI's administrative process, the Secretary was not obligated to pay GALIC on the Guaranty, and thus the issue of subrogation does not arise.

GALIC mainly ignores these regulations in its motion. But for this Court to grant the relief demanded by GALIC, it would, in essence, be required to conclude that these regulations are invalid because they are contrary to the IFA. In the IFA, Congress specifically instructed the "Secretary [to] promulgate rules and regulations to carry out the provisions of this subchapter." 25 U.S.C. § 1498.

The implementing regulations promulgated under the IFA do not conflict with the IFA's text. Moreover, in evaluating them, the Court should apply *Chevron* deference, which asks "whether the agency's answer is based on a permissible construction of the statute." *Tennessee Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1037-38 (6th Cir. 2018) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). A court "may not disturb an agency rule unless it is arbitrary or capricious in substance, or manifestly contrary to the statute." *Zurich Am. Ins. Group v. Duncan*, 889 F.3d 293, 302 (6th Cir. 2018) (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011). All of the Program regulations governing or relating to the process by which a holder of a Guaranty must submit a Claim to obtain payment are consistent with the IFA and its stated purpose. *See* 25 U.S.C. § 1481(a)(1) ("In order to provide access to private money sources which otherwise would not be available, the Secretary may . . . guarantee not to exceed 90 per centum of the unpaid principal and interest due on any loan made to any organization of Indians . . . .").

GALIC's argument that DOI has promulgated regulations in Part 103 that are inconsistent with the IFA is completely without merit. Mot. at 15. GALIC does not clearly identify what regulations it claims are in conflict or identify the nature of the conflict. Instead, GALIC appears to suggest there is conflict between two *statutes* - §§ 1485 and 1494. *Id.* The

plain language of the statutes and the regulation do not demonstrate any conflict, and neither statute is inconsistent with 103.29(a), which deems the transferee to be a lender. GALIC's contentions that DOI treated GALIC as "the original lender" and "h[e]ld [GALIC] responsible for the conduct of the original lender," Mot. at 16 n.14, also lack merit. DOI treated GALIC as a lender after it received the transfer of the loan, as required by section 103.29, and held GALIC to the obligations placed on a lender who submits a Claim as found in Part 103. Nothing in IFA §§ 1485 and 1494 prohibits DOI from doing so. And, as described above, even if the court concludes the statutes are ambiguous, DOI's regulations, promulgated after notice and comment, are entitled to *Chevron* deference.[24]

III. "HOLDER IN DUE COURSE" LAW DOES NOT APPLY HERE

GALIC contends that it is a holder in due course under federal and New York law.[25] Mot. at 9. However, the Court need not examine federal common law to determine if GALIC is a holder in due course, because the IFA and Program regulations in Part 103 set out the rights and obligations of an entity that is transferred a loan guaranteed by DOI. As explained above, 25

[24] GALIC apparently finds significance in the fact that section 103.29(a) deems a transferee a lender "[s]tarting on the date of the transfer." Mot. at 14 n.12. But the agency cannot retroactively deem a transferee to be a lender. Rather, upon accepting the transfer of the loan, the transferee becomes the "lender" and must meet all the obligations placed on lenders by Part 103. The agency's denial of GALIC's Claim was not based on GALIC's failure to do something *before* it became the transferee/lender, but its failure to meet its obligations after that point. DOI's denial was not based on GALIC's failure to fund the loan, but GALIC's failure to prove the loan was funded. Before GALIC paid (allegedly) more than $20 million to acquire the loan, GALIC presumably would have conducted sufficient due diligence to possess proof that the loan it purchased was actually funded, proof it should have easily been able to provide to DOI (if such proof actually existed).

[25] GALIC appears to assert that New York law may control its rights against DOI. Mot. at 9 n.7. GALIC is wrong. DOI is not a party to the loan agreement between the two Lower Brule entities. The relevant document here is the Guaranty, and federal law determines any rights GALIC has against the Secretary under the Guaranty contract because, (1) the Guaranty incorporates the IFA and Part 103, and (2) federal law governs federal contracts. *See, e.g.*, *Sec'y of USAF v. Commemorative Air Force*, 585 F.3d 895, 899 (6th Cir. 2009) ("A government contract is governed by federal law when the contract was 'entered into pursuant to authority conferred by federal statute, and, ultimately, by the Constitution.'") (quoting *United States v. Seckinger*, 397 U.S. 203, 209-10 (1970)).

C.F.R. §§ 103.28 and 103.29 describe the transfer process, deeming the transferee to be the lender going forward. *See Matter of Oswego Barge Corp.*, 664 F.2d 327, 335 (2d Cir. 1981) (explaining that "separation of powers concerns create a presumption in favor of preemption of federal common law whenever it can be said that Congress has legislated on the subject.").

Even if the Court examines federal common law, GALIC is not a "holder in due course." In order to be a holder in due course, a party must hold a "negotiable instrument." *See Jackson v. Culinary School of Washington*, 788 F. Supp. 1233, 1248 (D.D.C. 1992) ("Because these loan instruments are not negotiable instruments, the Defendants cannot qualify as holders in due course and thereby preclude Plaintiffs from raising defenses attributable to the original lender's conduct."). The Uniform Commercial Code ("UCC") defines a "negotiable instrument" as "an unconditional promise or order to pay a fixed amount of money." UCC § 3-104.

The Guaranty is not a negotiable instrument because it is not an "unconditional" promise to pay, such as is generally found in a check or promissory note. In contrast, the Guaranty certificate states the "guarantee is subject to the provisions of the Loan Guaranty, Insurance, and Interest Subsidy Program, 25 U.S.C. §§ 1481 *et seq.*, 1511 *et seq.*, and 25 CFR Part 103, the Conditions of Approval attached to this Loan Guaranty Certificate." Dkt. 28, PAGEID # 298. These conditions must be met by the lender. If they are not, then the Guaranty is not valid. One of those conditions, described above, required the lender to provide DOI with audited financial statements and other related documents. Conditions of Approval, ¶ 7 (PAGEID # 300). Finally, if there were still any doubt that a guaranty is not "unconditional," section 103.19 explains that a lender must pay the Secretary the loan guaranty premium "within 30 calendar days of the loan

closing." If the lender fails to do so, "BIA's guaranty certificate . . . with respect to that particular loan is void, without further action."

CONCLUSION

For the foregoing reasons, GALIC's motion for summary judgment should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and served by ECF to all parties on record.

/s/ Marc S. Sacks
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