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
REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Great American Life Insurance Company ("GALIC") respectfully submits this reply in support of its motion for summary judgment against the Defendant Secretary of the Department of the Interior ("Interior" or the "Agency").

As explained in GALIC's opening Motion for Summary Judgment (Doc. # 28 at PAGEID # 249-267, "Motion"), this is a very straight-forward case in which GALIC is entitled to judgment as a matter of law based on the terms of the Indian Financing Act ("IFA") and a few simple undisputed facts. Those undisputed facts include that in 2010 the Agency approved a loan under the IFA that was issued by Lower Brule Community Development Enterprise, LLC ("LBCDE") to LBC Western Holdings, a federally chartered tribal corporation. The undisputed facts further show that the Agency issued a "Loan Guaranty Certificate" that evidenced the fact that the Agency agreed to guarantee 90 percent of the outstanding principal and interest on that loan, and that it never withdrew that Guaranty Certificate. The undisputed facts also show that there was a valid transfer of that loan to GALIC in April 2012, that the Agency acknowledged that transfer and advised that "everything appears to be in order," and also represented to GALIC that it was aware of no information that would render the Guaranty ineffective. Nonetheless, when the loan went into default one year later, the Agency refused to honor its guarantee obligations to GALIC, based on the premise that GALIC supposedly could not show that LBCDE had actually funded the loan when it closed back in October 2010, despite the fact that LBCDE had represented that it had done just that.

The Secretary's position in this case – essentially holding GALIC responsible for the possible fraud of the original lender, which would have been committed under the Agency's watch and years before GALIC was even in the picture – is groundless. Furthermore, in doing so the Secretary violated the terms of the IFA, which provide that the Loan Guaranty Certificate was "conclusive evidence" of the Agency's obligation to guarantee the loan and preclude the Agency from denying that obligation except for certain defenses – including defenses based on fraud or misrepresentations – that it can assert against ***only*** the "original lender." 25 U.S.C. §

1494. Because it is indisputable that GALIC is not the "original lender," the Secretary's defense fails and the Court should enter judgment in favor of GALIC. It is just as simple as that.

The Secretary's opposition is an exercise in obfuscation, which attempts to distract the Court's attention from the handful of relevant undisputed facts and the unambiguous provisions of the IFA. That opposition filing – which includes a 35 page brief as well as a separate 5 page supplemental response to our statement of facts – is two-and-a-half times the length of GALIC's opening brief, and contains countless, irrelevant background factual assertions (including a discussion of the number of employees and independent contractors in the division that approved the loan at issue) as well as over 8,000 pages of exhibits that have nothing to do with the issues raised in GALIC's motion. Moreover, while we based our motion on just a few discrete and clearly worded statutory provisions in the IFA – including the aforementioned one at 25 U.S.C. § 1494 – the Secretary does not even address those provisions until page 25 of his brief.

GALIC is confident that the Court will see through the Secretary's transparent attempt to confuse the issues. Indeed, it is even perhaps understandable that the Secretary would attempt to bury his discussion of the IFA some two-thirds of the way into his brief, because nothing he says can overcome the plain language of the statute, which is fatal to the defenses that he is asserting against a subsequent purchaser like GALIC. In fact, the Secretary actually concedes a crucial point that the Agency had disputed before: the Agency had previously held (incorrectly) that there was "no guaranty," but in his opposition brief the Secretary finally acknowledges that it is "clear" that the Loan Guaranty Certificate ***does*** evidence the "existence [of] the Guaranty." *See* Defendant's Opposition to Plaintiff's Motion for Summary Judgment ("Def. SJ Opp"), Doc # 33 at PageID # 421 & 425 n. 22. That new admission is dispositive, because 25 U.S.C. § 1491 states that where (as here) a "loan guaranteed" under the IFA goes into default and the holder of the guaranty certificate provides notice of that default, then the "***Secretary shall thereupon pay to such holder the pro rata portion of the amount guaranteed***." (Emphasis added). That clear statutory directive – when coupled with the Secretary's concession that the loan was guaranteed

– mandates that the Agency pay GALIC's claim. None of the various other arguments that the Secretary makes to cast blame on others can override the express provisions of the IFA.

Similarly, notwithstanding the lengthy "Factual Background" in the opposition, the Secretary has not identified any disputed material fact that would allow him to avoid summary judgment. If anything, the "facts" that the Secretary alleges highlight how baseless the Agency's position is. Just by way of example, the Secretary alleges that LBCDE relied on promissory notes as a mechanism to fund the loan and cites that as a basis for claiming that the loan was not properly "funded." But the Secretary also notes in his opposition that the Agency was aware of the promissory notes before the loan closed, and nonetheless reaffirmed its commitment to guarantee the loan shortly thereafter. That the Secretary would challenge GALIC's claim based on information that the Agency itself relied upon to guarantee the loan is remarkable. More importantly, neither the promissory notes nor any other "facts" that the Secretary alleges create a valid defense to GALIC's claim as a subsequent purchaser of the loan.

The Secretary also contends that if this summary judgment motion were to be granted it would "eviscerate" the loan guaranty program. GALIC sees no need to respond to such overheated rhetoric, except to note that GALIC seeks nothing more than the enforcement of the language of the IFA, which is something that would not "eviscerate" the program but instead require it to be run in the manner that Congress directed. In that regard, the nightmarish hypothetical scenarios that the Secretary speculates might result are without merit and precluded by the statutory language, as we shall show. Truth be told, it is actually that Secretary's actions that put the guaranty program at risk. One of the principal reasons that Congress passed a law authorizing the Secretary to guarantee loans issued to Native America tribes – as well as the transfer of such loans to third parties – was to facilitate the financing of economic development for Native Americans. *See generally* 25 U.S.C. § 1451; *see also* 25 U.S.C. § 1481 (guaranty program designed "to provide access to private money sources which otherwise would not be available"). But if the Secretary can simply walk away from an obligation to guarantee a loan when the Agency has previously agreed to do so – as happened here – then the "guaranty"

certificates that the Agency issues would not be worth the paper on which they are printed. That uncertainty is what truly could "eviscerate" the guaranty program. Such policy concerns are particularly acute in this case, in which the Agency attempts to shirk its guarantee obligations owed to a subsequent loan purchaser based on alleged misconduct by the original lender years earlier – which would have occurred while that original lender was subject to the Agency's oversight – and despite the Agency previously representing to the subsequent purchaser that it was aware of no basis to question the validity of the guaranty.

At a fundamental level, the Secretary's rejection of GALIC's claim is nothing more than an attempt to make GALIC pay for mistakes that the Agency made. As we previously advised the Court, the Inspector General of Interior undertook an investigation of this matter and issued a report finding that the officials responsible for approving the loan had failed to comply with internal Agency underwriting standards.[1] The Secretary cannot now attempt to pass blame where there is no lawful basis for the Agency to renege on its financial commitment to GALIC under the Loan Guaranty Certificate, and this motion for summary judgment should be granted.

II. THE SECRETARY'S STATUTORY ARGUMENTS ARE UNAVAILING

As recounted in GALIC's Motion, based on the undisputed facts and the material provisions of the IFA – including (but not limited to) 25 U.S.C. §§ 1484, 1485 and 1494 – GALIC is entitled to judgment as a matter of law. None of the statutory arguments that the Secretary makes to the contrary can avoid this result.

A. Based on the Admissions Made by the Secretary in the Opposition Brief, GALIC is Entitled to Summary Judgment Pursuant to 25 U.S.C. § 1491

Significantly, the lead statutory argument that the Secretary makes (Def. SJ Opp., Doc # 33 at PageID # 421-422) actually concedes a material point that – when combined with the plain language of the IFA – inexorably leads to the conclusion that summary judgment should be granted in GALIC's favor. In particular, the Secretary now ***admits*** that the Loan Guaranty Certificate is conclusive proof that the Agency has guaranteed the loan. Or, as the Secretary puts

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[1] *See* Summary of Inspector General Report (at GALIC Notice of Additional Authority, Doc # 18).

it, "[t]o be clear, the issuance of a Guaranty Certificate *does* guarantee the loan." Def. SJ Opp., Doc. # 33 at PageID # 421 (emphasis in original). Elsewhere in the opposition brief, the Secretary similarly acknowledges that he has ***not*** "contested the existence [of] the Guaranty or the amount of the Guaranty. . ." *Id.* at PageID # 425 n. 22.

This concession that the Loan Guaranty Certificate is "clear" evidence that the Agency "*does* guarantee the loan" – while certainly welcome – is inconsistent with the Secretary's previous position and the ruling by the IBIA, which (erroneously) held that there was "no guaranty" because GALIC had supposedly failed to provide evidence that the original lender had funded the loan. *See* IBIA Ruling, Doc # 10-1 at PageID # 79. GALIC's opening brief explains in detail why the IBIA's ruling was wrong and contrary to the IFA. *See* Motion, Doc. # 28 at PageID # 260-266. However, because the Secretary has finally acknowledged the "existence of the Guaranty" on the loan that GALIC purchased, this Court need not address that issue now.

Furthermore, the new argument that the Secretary has now shifted to – which is that the "fact of the Guaranty" supposedly does not mean that the Agency has an "obligation to pay a Claim on a Guaranty" – is wrong. That is because another provision of the IFA also cited in the Motion – 25 U.S.C. § 1491 – makes clear that the Secretary's disavowal of an "obligation to pay a Claim on a Guaranty" in these circumstances is legally baseless. In relevant part, Section 1491 states as follows:

> ***In the event of a default of a loan guaranteed hereunder*, *the holder of the guaranty certificate may immediately notify the Secretary in writing of such default and the Secretary shall thereupon pay to such holder the pro rata portion of the amount guaranteed*** and shall be subrogated to the rights of the holder of the guaranty and receive an assignment of the obligation and security**.**

25 U.S.C. § 1491 (emphasis added). Put another way, Section 1491 provides that: (1) if there is a "loan guaranteed" under the IFA; and (2) that loan goes into default and the "holder of the guaranty certificate" provides notice to the Secretary "of such default"; ***then*** (3) "the Secretary ***shall*** thereupon pay to such holder the pro rata portion of the amount guaranteed. . ." *Id.* (Emphasis added).

All of those material elements in Section 1491 are met here. Specifically, as to (1), there is no dispute that the loan at issue was "guaranteed" under the IFA, as the Secretary now acknowledges that it is "clear" that "the issuance of the Guaranty Certificate *does* guarantee the loan." It also is undisputed that the Secretary never withdrew that Guaranty. As to (2), there likewise is no dispute that GALIC is the holder of the guaranty certificate and that it provided notice to the Secretary of the default of the loan. Thus, given that those preconditions exist – i.e., that a "loan guaranteed" by the Agency went into default and the holder of the guaranty certificate provided notice of that default to the Secretary – Section 1491 dictates that "the Secretary shall thereupon pay to such holder the pro rata portion of the amount guaranteed."

What is more, that statutory directive that the "Secretary shall" pay the pro rata portion of the amount guaranteed – here, 90 percent of the outstanding principal and accumulated interest – is one that cannot be avoided by the Secretary. As a matter of settled law, the use of the word "shall" in a statutory provision sets forth a mandatory obligation with which the Agency must comply. *See generally Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016).

In short, based on the Secretary's own admissions and the other undisputed facts, the Secretary has a statutory obligation to pay GALIC's claim under 25 U.S.C. § 1491. For that reason alone, GALIC's summary judgment motion should be granted.

B. 25 U.S.C. § 1494 Prohibits the Defenses that the Secretary Has Raised

Given the Secretary's concession of the "existence of the Guaranty" of the loan at issue – and Congress's mandate at 25 U.S.C. § 1491 that when there is a "default of a loan guaranteed" under the IFA that the "Secretary shall thereupon pay to such holder" of the guaranty certificate "the pro rata portion of the amount guaranteed" – there would not appear to be anything else that need be said and that summary judgment should be granted in GALIC's favor. However, for the sake of completeness, GALIC addresses the other arguments that the Secretary raises in his opposition brief, none of which can withstand scrutiny.

Towards that end, 25 U.S.C. § 1494 provides that where – as indisputably happened in this case – the Secretary has issued a Guaranty Certificate, that certificate is "conclusive evidence" of the Agency's guaranty of the loan as well as the amount of that guaranty, and the Agency cannot avoid that guaranty obligation except for certain defenses against the original lender. *See* 25 U.S.C. § 1494. As explained in the Motion, that statutory provision limiting the Secretary's defenses to original lenders is consistent with the longstanding commercial common law "holder in due course" rule, which generally protects subsequent holders of notes from defenses that might otherwise be available against the original lending party. *See* Motion, Doc # 28 at PageID #259 (citing cases).[2]

In the opposition brief, the Secretary concedes (as he must) that under Section 1494 the issuance of the Loan Guaranty Certificate precludes him from asserting defenses based on fraud or material misrepresentation except as to original lender. *See* Def SJ Opp., Doc. 33 at PageID # 424. However, the Secretary contends that Section 1494 allows the Agency to assert "partial defenses to the amount payable on the guaranty" against subsequent purchasers or transferees like GALIC. *Id.* But that argument does not advance the Secretary's case, for multiple reasons.

For one thing, the Secretary's argument cannot be reconciled with the language of the statute, which once again states in its entirety 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).

[2] As GALIC also noted, although the statutory provisions in the IFA bear some similarities to the common law holder in due course rule, GALIC's motion is based solely on the terms of the statute. *See* Motion, Doc. # 28 at PageID #259 n. 7.

The Secretary's assertion that Section 1494 allows for "partial defenses" to be asserted against subsequent purchasers is contrary to the text of the statute highlighted above, which expressly refers only to those defenses that may be asserted against "the original lender." That Congress intended to restrict all of the Secretary's defenses – including "partial defenses" – to original lenders is further bolstered by the title to Section 1494, which unequivocally states "***defenses and partial defenses against the original lender***" (Emphasis added). If there were any potential uncertainty about the language in the text of the statute – and we submit there is none – it is resolved by the language in the title to Section 1494, which unmistakably limits both complete ***and*** partial defenses to the "original lender." *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 439 (2011) (relying on the title to interpret text of the statute).

But even if one were to accept the Secretary's contention that Section 1494 allows him to assert "partial defenses to the amount payable" against subsequent purchasers like GALIC, it would still not excuse the Agency from paying its guarantee obligations here. The term "partial defense" has to mean just that: not a "complete" defense but instead a defense to a portion of a plaintiff's claim for liability, such as defenses like set-off, contributory negligence or mitigation of damages. *See generally Black's Law Dictionary*, definition of "Defense" (11th ed. 2019) (a partial defense "goes only to a part of the cause of action, or which only tends to mitigate the damages to be awarded."); 71 *C.J.S. Pleading* § 172 (2019 ed.) ("The function of a partial defense is to allege facts that will not destroy the complaint but will limit or restrict the extent or quality of the relief granted.").[3] However, here the Secretary is ***not*** asserting a "partial defense" to a portion of GALIC's claim, but rather is denying ***any*** liability at all to GALIC's claim based on the allegation that the original lender might not have funded the loan as it represented it

[3] *See also Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 865 (7th Cir. 2010) (a "partial defense" is one "which merely reduces damages awarded the plaintiff. . ."); *Industrial Risk Insurers v. Port Authority of New York and New Jersey*, 387 F.Supp.2d 299, 309 (S.D.N.Y. 2005) (complete defense is one "totally negating" liability while a "partial defense" is one "diminishing a recovery. . ."); *United States v. Kramer*, 913 F. Supp. 848, 853 (D. N.J. 1995) (distinguishing between complete and partial damages and noting that the latter relates to mitigation of damages); *In re Jackson*, 2019 WL 1013031, at *11 (Bankr. D. Conn. March 1, 2019) (partial defense "goes to mitigation of damages"); *Bank of Am. v. Kosovich*, 878 P.2d 65, 67 (Colo. App. 1994) (partial defense is one that "mitigate[es] the damages to be awarded).

would. Even under the Secretary's narrow (and incorrect) reading of the statute, nothing in Section 1494 allows him to assert a complete defense to liability like that against GALIC.

The other arguments that the Secretary makes as to Section 1494 fare no better. For example, the Secretary posits that GALIC is trying to "turn the Guaranty into an automatic right to claim payment" that would preclude the Agency from disputing the "amount" of the claim even if a transferee sought payment for more than it was really owed. In furtherance of that argument, the Secretary poses a hypothetical scenario in which a lender known as "Bank A" seeks to recover 90 percent of a loan of "up to $1 million" – or $900,000 – even though "Bank A" in actuality advanced only $500,000. *See* Def. SJ Opp., Doc # 33 at PageID #426.

The Secretary's assertions on this point are false, and a classic example of a "straw man" argument. Both the terms of the Loan Guaranty Certificate as well as the relevant provisions of the IFA limit GALIC's claim to the actual amount of unpaid principal and interest due to it, and GALIC has never contended otherwise. Indeed, the Loan Guaranty Certificate states that the "Loan Guaranty Percentage" is equal to "90%" and that this guaranty percentage is for the amount of "any loss of principal, accrued interest, and authorized charges." Loan Guaranty Certificate, attached as Exhibit 1 to Defendants' Reply in Support of Mot. to Dismiss, Doc # 17 at PageID # 189. Thus, the Certificate itself identifies the "amount" of the guaranty as being equal to 90 percent of the actual outstanding principal, interest and other charges owed to GALIC. Similarly, the language in 25 U.S.C. § 1494 providing that a guaranty certificate is "conclusive evidence" of the "amount" of the guaranty obviously means the "amount" of that guaranty as stated in the certificate, which once again here is 90 percent of the outstanding amount due. In addition, 25 U.S.C. § 1481 – which is the provision in the IFA that specifically authorizes the Secretary to issue loan guarantees in the first place – states that "the Secretary may . . . guarantee ***not to exceed 90 per centum of the unpaid principal and interest due***" on any loan issued to a recognized tribe. (Emphasis added). Thus, all of the Secretary's exaggerated rhetoric about how GALIC seeks to enforce an "automatic" right to payment, without any regard for the actual principal and interest due to it, is baseless.

The other hypothetical scenarios that the Secretary has conjured up are equally baseless. For instance, the Secretary suggests that applying the plain language of Section 1494 that makes a guaranty certificate "conclusive evidence" of the guaranty would allow lenders to collect on a guaranty regardless of whether "the funded amount is utilized for the purposes for which the guaranty was issued. . ." Def. SJ Opp., Doc # 33 at PageID # 422. But that assertion is not so. If the lender represents in the application for the guaranty that the loan proceeds will be used for a particular purpose but in fact does not do so, then under Section 1494 the Secretary would have a defense sounding in fraud or misrepresentation, which the statute expressly allows the Secretary to assert against original lenders.

Also without merit is the Secretary's assertion that under "GALIC's reading" of the IFA "any lender obtaining a DOI Guaranty would immediately transfer the loan and Guaranty to another entity, converting it to an automatic right to pay." Def. SJ Opp., Doc # 33 at PageID # 423. The Secretary seems to be suggesting here that a lender might obtain a guaranty on a loan that it knows might go into default, and then quickly sell it to a transferee so that the latter can get a quick payout. If that is what concerns the Secretary, he would in actuality have nothing to worry about. As an initial matter, the Secretary must first approve any loan that is to be guaranteed, and by statute that does not occur unless the Secretary determines in his independent judgment that there is a reasonable prospect for repayment. *See* 25 U.S.C. § 1484. The Secretary's speculation about the supposed attraction of an "automatic right to pay" also overlooks the fact that the guarantee is only for 90 percent of the loan; thus, the parties in the Secretary's hypothetical would have to be willing to take on an "automatic" 10 percent loss on the investment, as well as a 2 percent premium on top of that, which would have to be paid to the Agency for that privilege.[4] That hardly seems like a good investment, and is certainly not something that poses a realistic risk of "eviscerating" the program as the Secretary speculates.

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[4] *See* 25 C.F.R. § 103.8 (requiring payment of a premium to the Agency in an amount equal to 2 percent of the original loan principal after the guaranteed loan closes and funds).

Finally, the Secretary makes much of the fact that the Loan Guaranty Certificate here was initially issued before the loan actually closed. However, we already noted that fact in our opening brief, in which we explained that the Agency has promulgated a regulation that allows for guarantees to be issued before loan closure, but that also further provides that such guarantees become void if the loan did not actually close within 90 days thereafter (unless the Agency extends that 90-day period, as happened here). *See* GALIC Memo in Support of Mot. for SJ, Doc # 28 at PageID 254 & n. 3 (citing 25 CFR § 103.17). As we also noted previously, in this case it is undisputed that the Agency subsequently reaffirmed its previously issued agreement to guarantee the loan on October 28, 2010 – one day before the scheduled closing date – and that the Agency never attempted to withdraw that guaranty prior to the time that the loan was transferred to GALIC, even though the Secretary suggests in his opposition brief that the Agency was aware of potential issues with selling the loan on the secondary market prior to GALIC's involvement.[5] *See* Def. SJ Opp., Doc # 33 at PageID # 408 & n. 10.

Furthermore, there is nothing in the Agency's regulations or, more importantly, in the statutory provisions of the IFA that actually ***requires*** the Agency to issue a guaranty certificate ***before*** it receives notice of the closing of the loan. The issuance of a guarantee is a decision that the Agency voluntarily made on its own under its own timing. Going forward, perhaps the Agency would think it prudent to withhold formal issuance of guaranty certificates until after it receives what it deems to be satisfactory confirmation of the closing and funding of the loan. Along those lines, the Secretary's own regulations expressly contemplate that the Agency will actively participate in the closing of any loan and confirm its guarantee only after funding. *See* 25 C.F.R. § 103.17(a) (noting that the Agency has the right to "attend closing of any loan that [it]

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[5] The Secretary also acknowledges multiple times that the original lending parties gave the impression that the loan had closed, presumably in an attempt to absolve the Agency for its continued reaffirmation of the guarantee. *See, e.g.*, Def. SJ Opp., Doc # 33 at PageID # 406-407 (stating that reaffirmation of guarantee was based on Gavin Clarkson's representations that the loan would close and be funded); *see also id.* at PageID # 420 & n. 18 (alleging that use of promissory notes was to make the loan appear to be funded). But this just underscores what GALIC has said all along, which is that the Secretary is attempting to hold GALIC responsible for the alleged fraud of the original lender, which would have taken place on the Agency's watch.

agrees to guarantee"); 25 C.F.R. § 103.18 (a)(2) (referencing funding of loan). However, regardless of what practice the Agency might consider adopting in the future, its voluntary decision to issue the Loan Guaranty Certificate when it did in this case does not provide a justification for it to refuse to comply with its guarantee obligations now.

C. The Secretary's Interpretation of 25 U.S.C. § 1485 Also is Wrong.

The Secretary's brief also offers a variety of mistaken assertions about 25 USC § 1485, the provision in the IFA that authorizes a lender to transfer a guaranteed loan to another party, as LBCDE did in this case when it sold the loan at issue to GALIC. The IBIA relied upon this provision in its ruling, in which it held that Section 1485 supposedly authorizes the Agency to impose regulations that allow it to avoid liability on claims submitted by transferees. On that point, while the Secretary has (in contrast to the IBIA) admitted that the loan was guaranteed, he has nonetheless also adopted the IBIA's conclusion that Section 1485 "makes no distinctions" between original lenders and subsequent purchasers or transferees, and so therefore allows the Agency to adopt regulations that deny claims by the latter, even as to loans that are the subject of a duly issued guaranty certificate.

However, the Secretary's assertion that Section 1485 "makes no distinction" between original lenders and transferees is belied by the fact that in 2006 Congress amended Section 1485 to specifically remove language in the prior version of the statute that did expressly state that original lenders and transferees should be "deemed" the same. *See* Motion, Doc # 28 at Page ID # 263-264. Or, as we explained in our opening brief, "some six years ***before*** GALIC purchased the loan in question, Congress decided to remove the prior language in the statute [Section 1485] that arguably ***might*** have supported the conclusion that original lenders and transferees should be treated the same." *Id.* at PageID # 264.

Despite that amendment in 2006, the Secretary contends that we "cannot assume Congress's intent" as to whether original lenders and transferees should be treated the same. Def. SJ Opp., Doc # 33 at PageID # 423. That argument is incorrect. After all, the prior version of the statute contained a provision expressly stating that transferees should be "deemed" the

original lenders for the purposes of the statute – which is the very premise of the Secretary's attempt to hold GALIC responsible for the alleged actions of the original lender – but in 2006 Congress decided to delete that language entirely. The only logical conclusion that one could draw from that amendment is that Congress intended to do just what it did: eliminate a provision in the IFA that "deemed" that transferees should be treated the same as original lenders.

However, this Court need not decide the issue in a vacuum. As the Supreme Court has repeatedly held, "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995) (citing cases). As such, the Secretary's contention that we "cannot assume Congress's intent" based on its 2006 amendment is completely the ***opposite*** of what the law ***actually*** is. *See also Intel Corp. v. Advanced Micor Devices, Inc.*, 542 U.S. 241, 258-59 (noting Congressional amendment to statute deleting a reference to "pending" proceedings and citing *Stone* for the proposition that such a deletion is presumed to have a "real and substantial effect").

Finally, the Secretary's position that Section 1485 "does not distinguish between the original lender and a transferee" also runs afoul of another settled rule of statutory construction, namely the rule that requires a court to read the various provisions of a statute together and to 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). If Section 1485 were read as the Secretary advocates – which would allow the Agency to deny a guaranty obligation in its entirety to a transferee even though it has issued a guaranty certificate – it would render Section 1485 in conflict with Section 1494, which expressly limits such defenses to original lenders. That kind of interpretation is plainly prohibited as a matter of law. *Id.* at 657. Although we raised this issue in our opening brief, in the opposition the Secretary makes no attempt to explain how his interpretation of 1485 can possibly be reconciled with the language in Section 1494. Thus, the Court should reject the Secretary's erroneous interpretation of Section 1485, and instead, construe that statute in a manner that is consistent with the express provision

in Section 1494 limiting the Secretary's defenses to "original lenders" and/or to "partial defenses" that are not applicable here.

III. THE SECRETARY'S ARGUMENTS CONCERNING AGENCY REGULATIONS ALSO ARE WRONG AND NOT ENTITLED TO DEFERENCE UNDER *CHEVRON*

Not counting the Secretary's irrelevant argument at the conclusion of his brief that the general commercial law "holder in due course" rule does not apply – which the Court can safely disregard, because we made clear in our opening brief that we were not moving for summary judgment under that common law rule[6] – the only other legal argument that the Secretary makes is that GALIC supposedly "ignores DOI's regulations." Def. SJ Opp., Doc # 33 at PageID # 426. That assertion is incorrect, as GALIC's opening brief is replete with references to the relevant Agency regulations, where appropriate.

More significantly, the Secretary's invocation of various Agency regulations throughout his brief skirts the key issue in this case, which is whether those regulations – or, more precisely, whether the Secretary's ***interpretation***[7] of those regulations – is actually consistent with the IFA. In that regard, it is axiomatic that an agency's regulations may not conflict with the underlying Congressional statute, and that when a regulation and statute do conflict, the statutory language must govern. *United States v. Larionoff*, 431 U.S. 865, 873 (1977).

Despite the Secretary's contention to the contrary, GALIC's opening brief plainly did identify the Agency regulations that are being interpreted in a way that conflicts with the IFA: 25 C.F.R. §§ 103.18(a), 103.39(a), the two regulations the IBIA cited to support its conclusion that the Agency had no obligation to pay GALIC's claims because it supposedly did not produce sufficient evidence to show that the original lender had funded the loan. While the Secretary now apparently disagrees with the IBIA's (erroneous) conclusion the guaranty was never in existence, the Secretary still relies on 25 C.F.R. §§ 103.18(a), 103.39(a) as the grounds for his refusal to

[6] *See* Motion, Doc # 28 at PageID #259 n. 7.

[7] As we noted in our opening brief and as well shall again address below, the Secretary's actions here are actually inconsistent with his own regulations, which the Secretary is misinterpreting.

pay GALIC's claim, because (as with the IBIA ruling) the Secretary contends that GALIC cannot receive payment unless it can prove what the original lender did to fund the loan.

However, to the extent that those or any other regulations that the Secretary cites are being interpreted as providing the grounds for denying GALIC's claim, such an outcome is clearly impermissible under the IFA. Once again, 25 U.S.C. § 1494 is unambiguous and provides that where a guaranty certificate has been issued that is "conclusive evidence" of the Agency's obligation to guarantee the loan, which that precludes the Secretary from denying liability, except of course for defenses against the "original lender" or other defenses that plainly are not relevant to this case. *See supra* at pp. 7-9. The Secretary has no authority to issue regulations that would contradict that plainly worded statutory directive, or to interpret those regulations in such a way.[8]

Similarly, the Secretary also may not interpret his regulations in such a manner that contradicts the mandatory language in 25 U.S.C. § 1491 providing that in the event that a "loan guaranteed" under the IFA is in default that the "Secretary . . . shall thereupon pay to such holder [of the guaranty] the pro rata portion of the amount guaranteed." As there is now no dispute that the loan at issue is one that is "guaranteed under" the IFA – the Secretary having expressly conceded that fact in his opposition brief – and also no dispute that GALIC provided timely notice of a default of that loan, under the statute the Secretary "shall" issue payment for "the pro rata portion of the amount guaranteed." The Secretary simply has no authority to ignore that Congressional instruction.

Although the Secretary quotes at length numerous regulations throughout his brief, the only other regulation that the Secretary cites as a specific basis for denying GALIC's claim for payment on this summary judgment motion is 25 CFR 103.39(c) & (e), which the Secretary alleges GALIC violated because it did not "possess and maintain sufficient records" relating to

[8] Indeed, as we already noted, the Secretary's own regulations even contemplate that the Agency itself will confirm that a loan has closed and funded ***before*** it confirms its guarantee of the loan, *see supra* at pp. 11-12, ***not*** that it can simply disregard its obligations under a guaranty long after it has been issued.

the loan. *See* Def. SJ Opp., Doc 33 at PageID # 420-421. Those regulations purport to authorize the Secretary to deny a claim if "[t]he lender has not met the standard of care" with respect to "servicing a loan" or if the "lender has otherwise failed in any material respect to follow the requirements of this part [of the regulations], and [the Agency] can reasonably attribute some or all of the lender's loss to that failure." 25 CFR §§ 103.39 (c), (e) & 103.30. However, aside from conclusory assertions, the Secretary's brief makes no effort at all to explain what ***specific*** "standards of care" were not met or "lender[] loss[es]" resulted from such alleged "failure[s],' much less any evidence demonstrating what those "standards" and "losses" are. The Secretary cannot avoid summary judgment with such unsupported, conclusory statements. *Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009) ("conclusory assertions" merely "restating the requirements of the law . . . therefore cannot create a genuine issue of material fact sufficient to defeat summary judgment") (citations omitted).

Furthermore, the only "record-keeping" and "servicing" issues that the Secretary identifies appear to relate to the time period before GALIC purchased the loan from LBCDE in 2012. *See* Def. SJ Opp., Doc # 33 at PageID # 412, 420-421. In addition to the profound unfairness of holding GALIC responsible for any errors of LBCDE, relying on such alleged record-keeping and servicing issues as a basis for denying a claim by a subsequent purchaser – in its entirety – is impermissible under Section 25 U.S.C. 1494, which once again only allows for complete defenses against "original lenders." The Secretary's position also is prohibited by 25 U.S.C. § 1493, which provides that the Secretary may ***not*** use supposed "record-keeping" or "servicing" issues as a basis for refusing payment to ***any*** holder of a guaranty certificate, including both transferees ***and*** original lenders. *See* 25 U.S.C. § 1493 (noting that record-keeping and servicing deficiencies may be used as grounds for refusing "to guarantee or insure any ***further*** loans made by such lender or holder" but "the Secretary ***shall not*** refuse to pay a valid guaranty or insurance claim on loans previously made in good faith."[9]) (Emphasis added).

[9] We note that the Secretary has not alleged (and could not truthfully allege) that GALIC failed to act in "good faith."

The Secretary's assertion that his interpretation of the foregoing regulations should be accorded "*Chevron*" deference also is wrong and something we already addressed previously. As an initial matter, *Chevron* deference "is inappropriate where an agency has a self-serving, pecuniary interest in advancing a particular interpretation of a statute," including circumstances like the case at bar where the statute is incorporated into a contract to which the agency is a party. *Amalgamated Sugar Co. LLC v. Vilsack*, 563 F.3d 822, 834 (9th Cir. 2009). Furthermore, *Chevron* also does not apply if the applicable statute is unambiguous. *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013). That is certainly the case here, because there is nothing remotely ambiguous about the language in the statutory provisions on which we rely here. Notably, the Secretary has not identified any alleged ambiguities. Moreover, in its decision on the motion to dismiss this Court clearly ruled that this case constitutes a breach of contract claim – and not a claim under the Administrative Procedures Act – thus making the Secretary's plea for deference to the Agency all the more improper here. The Secretary himself even seemed to acknowledge this reality in the motion to dismiss briefing. *See* Defs' Reply in Support of Mot. to Dismiss, Doc. # 17 at PageID # 171 & n. 6 (noting that the Secretary would have had a "stronger litigation position if this Court conducted APA review. . .").

Finally, while the statutory language must take precedence over any contrary provision in the Secretary's regulations (or his interpretation of those regulations), it also bears emphasizing that the Secretary's position in this case is even inconsistent with those regulations. In particular, the regulations specifically addressing transferred loans – 25 CFR 103.28(a) and 103.29(a) –state the party to whom the loan is transferred "will from that point forward be considered the lender for the purposes of the Program." In his brief the Secretary concedes that these "[p]rogram regulations acknowledge that the purchaser of a guaranteed loan is generally not responsible for actions taking by the original lender before the purchase." Def. SJ Opp., Doc # 33 at PageID # 418. However, although the Secretary attempts to deny it, blaming an innocent party is exactly what the Agency has done in denying GALIC's claim: hold GALIC responsible for the original lender's supposed failure to fund the loan as it represented it would do, and which the Agency

presumed had been done when it reaffirmed its guarantee of the loan. Thus, by the Secretary's own reckoning of what his regulations provide, there is no valid basis to deny GALIC's claim.

IV. THE SECRETARY'S FACTUAL ALLEGATIONS ARE INCORRECT AND IRRELEVANT

In closing, GALIC feels compelled to respond to certain factual allegations that the Secretary makes in the first half of his opposition brief. The fact that GALIC is choosing to address those allegations now – at the conclusion of its reply – is not an oversight or accident. It is instead by design, because the Secretary's allegations are utterly irrelevant and, as we observed at the outset, a transparent attempt to distract this Court's attention from the relevant issues. However, in the interest of correcting the record, GALIC provides the following responses to the allegations that the Secretary has made.

Most notably, the Secretary continues to claim that there is "no evidence" that the original lender LBCDE ever funded the loan, *see* Def. SJ Opp. Doc # 33 at PageID # 407, and even goes so far as to state "GALIC appears to concede that the loan was not 'funded.'" *Id.* at PageID # 419. The latter assertion clearly is contrary to the record, as GALIC has repeatedly made clear its position that the evidence it produced was sufficient to show that the loan funded. *See* Motion, Doc# 28 at PageID # 252, 257.

In a similar vein, the Secretary contends that LBCDE did not technically "loan" money to LBC Western because it instead obtained funding for the loan via promissory notes issued to third parties. *See* Def. SJ Opp., Doc #33 at PageID # 406, 420. However, the apparent premise of the Secretary's position – which seems to be that the loan could only be considered "funded" if it involved an actual outlay of cash by LBCDE – is not supported by any of the provisions in the terms of the Loan Agreement itself, the IFA or the regulations. Certainly, the Secretary has not identified any such provision. Moreover, as the Secretary acknowledges in his brief, the Agency was aware of LBCDE's decision to fund the loan through promissory notes at least by October 2010 and, not only raised no objection, but actually reaffirmed the Agency's commitment to the guaranty on the loan. *See id.* at PageID # 406-407. That the Secretary would

criticize GALIC for purchasing the loan by relying on the same information that the Agency relied upon when it approved the loan is incredible.

More importantly, although GALIC vigorously disputes the Secretary's factual assertion that the evidence it produced was insufficient to show that the original lender funded the loan, we also reiterate that for the purposes of this motion the Court need not reach that issue. The Secretary's allegations – which are tantamount to an assertion that the original lender defrauded the government by failing to fund a loan that it said it would make in order to get the Agency's guaranty – simply do not afford any basis to deny a claim by a transferee like GALIC under the clear terms of the IFA at 25 U.S.C. § 1494. Instead, those are issues that the Secretary must take up with the original lender LBCDE and its principals.

Curiously, the Secretary also spends several pages of his brief discussing alleged difficulties that the original lender LBCDE had in obtaining Agency approval for the loan and in closing the loan, including, *inter alia*, charges that the initial loan application was "incomplete," that the financial services company that the borrower was going to purchase with the proceeds of the loan – Westrock Group – had been the subject of multiple "cease and desist" letters from the Financial Industry Regulatory Authority (FINRA), that there were questions raised about whether Westrock was "defunct" and about the collateral for the loan, and that the loan did not close by the initial anticipated closing date of August 1, 2010. *See* Def. SJ Opp, Doc # 33 at PageID # 403-407.

However, even if those allegations were all accepted as true, they are completely beside the point, because it is undisputed that the Agency eventually did approve the loan and issued the "Loan Guaranty Certificate," and also that the Agency expressly reaffirmed that Guaranty on October 28, 2010, the day before the loan closed. Pursuant to 25 U.S.C. § 1484, the Agency could not have issued that approval and guaranty unless it was satisfied that the loan was appropriately documented and that there was a reasonable prospect of repayment. While it now appears that the Agency is having second thoughts about having approved the loan – as we noted previously, the Inspector General of Interior issued a report in which it found that the Agency

had failed to comply with its internal underwriting guidelines when it approved the loan – whatever misgivings the Agency might have do not provide a legitimate basis for it to renege on its obligations under the Loan Guaranty Certificate now.

The Secretary also suggests that GALIC has not proven that it actually purchased the loan. *See* Def SJ Opp., Doc # 33 at PageID # 397, 410. But that is false. The evidence submitted with our opening brief included documentation memorializing the sale and transfer of the loan from LBCDE to GALIC. *See* Loan Agreement Documents, Exhibit A to Decl. of M. Cioffi, Doc # 28-2 at PageID # 302-333. GALIC presented this documentation to the Agency when it provided notice of the transfer of the loan, and the Agency responded by specifically acknowledging that everything "appear[ed] to be in order." Cioffi Decl. Ex. E, Doc # 28-6 at PageID # 350. The more than 8,000 page administrative record that the Secretary attached to his opposition brief also includes contemporaneous communications between GALIC and LBCDE officials noting that GALIC had wired funds to LBCDE in connection with the purchase of the loan. *See* April 2, 2012 email from G. Clarkson, attached to Def's SJ Opp at Doc # 33-3 at PageID # 4878 (LBCDE representative confirming that the "Funds are in"). Moreover, the report issued by the Agency's Inspector General found that the loan was in fact sold and also concluded that LBCDE incurred no significant losses in connection with the loan. *See* GALIC Notice of Supplemental Authority, Doc 18 & 18-1 at PageID # 196. The Secretary's suggestion also defies common sense, because one would think that if GALIC had not really paid LBCDE, the latter would not sit idly by while GALIC pursued this claim to enforce the Secretary's guaranty obligations. In any case, the Secretary's musings about the evidence relating to GALIC's transfer of funds to purchase the loan are irrelevant, because the Secretary notably does not assert this allegation as a basis for denying GALIC's summary judgment motion.

Finally, the Secretary alleges that GALIC did not maintain adequate records relating to the loan and supposedly failed to provide adequate documentation to support its claim. *See* Def. SJ Opp., Doc # 33 at PageID # 411-412. However, we already addressed this "record keeping"

objection above and demonstrated that it was not only false and conclusory but also legally irrelevant, because it does not afford grounds for denying GALIC's claim.

Despite the Secretary's attempt to muddy the waters with his voluminous opposition filing, this is a very simple case. The undisputed facts show that the Agency approved a loan, that it issued a "Loan Guaranty Certificate" that serves as "conclusive evidence" that the Agency guaranteed that loan, that the Agency acknowledged a valid transfer of that loan to GALIC, and that GALIC subsequently submitted a claim to enforce the Agency's guarantee when the loan went into default. Under the provisions of the IFA, in such circumstances the Secretary is obligated to pay GALIC "the pro rata portion of the amount guaranteed," and cannot deny the Agency's liability for that guaranty except as to certain defenses that are only applicable to the "original lender" and/or "partial defenses" that are not relevant here. *See* 25 U.S.C. §§ 1491, 1494. The Court should therefore grant GALIC's motion for summary judgment.

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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 December 2, 2019, which will automatically generate and serve Notices of Electronic Filing on all counsel of record.

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