

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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BRENDA KAY PFEIFFER, )  
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 Plaintiff, )  
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 v. ) Civ. No. 07-522 (EGS)  
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 ARNE DUNCAN,<sup>1</sup> Secretary )  
 of Education, *et. al.*, )  
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 Defendants. )  
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**ORDER**

Pending before the Court are plaintiff's motion for partial summary judgment and defendant's motion for summary judgment. Upon consideration of the motions, responses and replies thereto, the applicable law, the entire record, and for the reasons stated in the Memorandum Opinion issued this day, it is by the Court

**ORDERED** that the parties' cross-motions are **GRANTED IN PART AND DENIED IN PART**; and it is

**FURTHER ORDERED** that any and all claims for declaratory and injunctive relief are dismissed from this action; and it is

**FURTHER ORDERED** that the parties shall file a joint status report, including a recommendation for further proceedings, by no

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<sup>1</sup> The complaint, filed on March 19, 2007, named as defendant Margaret Spellings, in her official capacity as U.S. Secretary of Education. Arne Duncan was sworn in as Secretary of Education on January 20, 2009 and is therefore substituted in his official capacity for Ms. Spellings as a defendant in this case pursuant to Fed. R. Civ. P. 25(d).

later than October 19, 2009. In the event that counsel are unable to agree on a joint recommendation, each party shall file an individual recommendation by that time.

**SO ORDERED.**

**Signed: Emmet G. Sullivan  
United States District Judge  
October 5, 2009**

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**MEMORANDUM OPINION**

Student loan borrower Brenda Kay Pfeiffer has brought this breach of contract action against the U.S. Secretary of Education, the Department of Education, and the United States (collectively "DOE" or "defendants"). Plaintiff alleges that defendants violated the terms of the promissory note governing her student loan repayment plan, and has moved for partial summary judgment on the issue of liability. Defendants have also filed a motion for summary judgment. The question before the Court is whether the promissory note executed by plaintiff contractually authorizes defendants to capitalize interest that accrued during the period between defendants' receipt of

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<sup>1</sup> The complaint, filed on March 19, 2007, named as defendant Margaret Spellings, in her official capacity as U.S. Secretary of Education. Arne Duncan was sworn in as Secretary of Education on January 20, 2009 and is therefore substituted in his official capacity for Ms. Spellings as a defendant in this case pursuant to Fed. R. Civ. P. 25(d).

plaintiff's June scheduled payment and June 30 - the date on which DOE annually capitalizes accrued interest - for those years when plaintiff's loan was in a "negative-amortization condition" under the Income Contingency Repayment Plan ("ICRP") in which she participated. Upon consideration of the motions, responses and replies thereto, the applicable law, the entire record, and for the reasons stated below, the Court **GRANTS IN PART AND DENIES IN PART** both parties' motions.

## **I. Background**

### **A. DOE's Direct Loan Program**

DOE lends money to students pursuing post-secondary education through the William D. Ford Direct Loan Program (the "Direct Loan Program"). Borrowers participating in the Direct Loan Program are given a number of repayment plans from which to choose, see 34 C.F.R. § 685.208; Defs.' Mot. at 4 n.2, one of which is the ICRP. Under the ICRP, a borrower's scheduled monthly payment is determined by a formula based on "adjusted annual income, family size and the principal balance of the loan." Pl.'s Statement of Undisputed Material Facts ("Pl.'s Statement") ¶ 8; see 34 C.F.R. § 685.209(a) (explaining calculation of borrower's repayment amount under ICRP). Because the monthly scheduled payments of borrowers participating in the ICRP are based primarily on their income rather than on the amount of their loan, the scheduled payment can sometimes be an

amount less than the interest accruing on their loans each month. Pl.'s Statement ¶ 10; Defs.' Mot. at 7. DOE designates these loans as being in a negative-amortization condition. See Pl.'s Mot. at 2; Defs.' Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried ("Defs.' Statement") ¶ 21.

Individuals who obtain student loans from DOE pursuant to the Direct Loan Program execute identical or substantially identical form promissory notes. Pl.'s Statement ¶¶ 1-2. The promissory note contains "the terms and conditions of the loan, including how and when the loan must be repaid." Pl.'s Statement ¶ 2 (internal citations and quotation marks omitted).

When a student borrower's loan enters repayment, DOE assigns each borrower a monthly "payment due date" of the 7th, 14th, 21st, or 28th of each month.<sup>2</sup> Pl.'s Statement ¶ 6; Tr. of Nov. 14, 2008 Mot. Hr'g ("Tr.") at 45, 56. When the agency receives a payment on a student loan, it applies the payment "first to any accrued charges and collection costs, then to any outstanding interest, and then to outstanding principal." 34 C.F.R. § 685.211(a)(1). On each monthly due date, DOE bills the borrower for the interest that has accrued as of his or her payment date. Pl.'s Mot. at 2. Interest that accrues after a borrower's

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<sup>2</sup> At the hearing held on November 14, 2008, counsel for defendants initially stated that borrowers actually pick their due dates. Tr. at 19. Counsel later clarified that the agency assigns a payment due date to the borrower, but the borrower has the ability to change that date. Tr. at 62.

monthly due date is not billed until the borrower's next monthly due date the following month. Pl.'s Mot. at 2.

**B. DOE's Capitalization of Interest**

Borrowers participating in the ICRP who are in a negative-amortization condition may be subject to the capitalization of certain interest that accrues on their loans. As defined by 34 C.F.R. § 685.202(b)(1), capitalization is the process of increasing the principal balance of a loan by "add[ing] unpaid accrued interest to the borrower's unpaid principal balance." DOE's form promissory notes describe the agency's practice of capitalizing interest as follows:

**Interest.** Except for interest [DOE] does not charge me during an in-school, grace or deferment period, I agree to pay interest on the principal amount of my Direct Consolidation Loan from the date of disbursement until the loan is paid in full or discharged. [DOE] may add interest that accrues but is not paid when due to the unpaid principal balance of this loan, as provided under the Act. This is called capitalization.

Pl.'s Mot. at Ex. 6 (form promissory note used in 2001); Defs.' Mot. App. at 27 (same).

DOE regulations also address the agency's authority to capitalize interest, but the regulatory language differs somewhat from the language contained in the form promissory notes. Specifically, 34 C.F.R. § 685.202(b) states that "the Secretary [of Education] annually capitalizes unpaid interest when the borrower is paying under the [ICRP] and the borrower's scheduled

payments do not cover the interest that has accrued on the loan.”  
*Id.* § 685.202(b)(4).

The standard form promissory notes executed by borrowers also contain a section relating to governing law. See Pl.’s Mot. at Ex. 3. That provision of the promissory note states that

[t]he terms of this [promissory note] will be interpreted in accordance with the Higher Education Act of 1965, as amended (20 U.S.C. 1070 et seq.), the U.S. Department of Education’s . . . regulations, as they may be amended in accordance with their effective date, and other applicable federal laws and regulations (collectively referred to as the “Act”).

*Id.*; Defs.’ Mot. App. at 30.

Since at least March 19, 2001, DOE has been capitalizing interest accrued on loans in a negative-amortization condition not paid as of June 30 each year, a date that is not specified in the regulations but is chosen by the agency for administrative reasons. See Pl.’s Statement ¶ 11; Tr. at 37, 44-45. These interest-capitalization procedures are based upon a borrower’s scheduled payment amount, regardless of the amount of the borrower’s actual payments and payment due date. Defs.’ Statement of Genuine Issues ¶ 11, attached to Defs.’ Mot. (“Defs.’ Opp’n Statement”). Moreover, the unpaid accrued interest annually capitalized on June 30 includes interest accruing after receipt of the borrower’s June payment through June 30. *Id.*

**C. Plaintiff's Participation in the Direct Loan Program**

Plaintiff graduated from chiropractic school in 1994 with multiple DOE student loans. Compl. ¶ 7. She executed two variable interest rate notes with the agency in 1997, and another note in November 2001 that consolidated her loans and "locked in" a fixed interest rate. See Pl.'s Statement ¶¶ 13-14; Defs.' Statement ¶¶ 1-2, 7. Since she executed the 2001 promissory note, plaintiff has participated in the Federal Direct Consolidation Loan Program, one of the four program components of the Direct Loan Program which "provides loans to borrowers to consolidate certain Federal educational loans." 34 C.F.R. § 685.100(a)(4); Defs.' Mot. at 3 n.1. Plaintiff has at all times elected to use the ICRP for repayment of her loan. Defs.' Statement ¶ 6.

Plaintiff's monthly scheduled payments were less than the amount of interest that accrued on her loan in the years ending June 30, 2002; June 20, 2004; and June 30, 2005. Defs.' Mot. at 7. In those years, plaintiff was not contractually required to make payments that covered the entire amount of interest accruing on her loan. Defs.' Mot. at 7. Because plaintiff's scheduled monthly payments were less than the amount of monthly interest accruing on her loan, her loan was designated in negative-amortization condition for these years, and defendants

capitalized all unpaid interest as of June 30 in those years.  
Defs.' Mot. at 7.

Plaintiff's actual monthly loan payments since November 2001 have been timely and at an amount "equal to or greater than the interest accrued in the previous month as estimated by [DOE]." Compl. ¶ 16. Thus, even though plaintiff's scheduled monthly payments for the years in question did not cover the entire amount of the interest accruing on her loan, plaintiff's actual payments were greater than her scheduled monthly payment listed on the statements she received from DOE.

#### **D. Procedural History**

On March 19, 2007, plaintiff filed a complaint against defendants on behalf of herself and all others similarly situated seeking damages and injunctive and declaratory relief.<sup>3</sup> See generally Compl. Plaintiff alleges that DOE has breached the terms of her 2001 form promissory note by capitalizing interest that accrued after her June payment date through June 30, because payment for such interest was not required until her July payment

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<sup>3</sup> Pursuant to Federal Rule of Civil Procedure 23, plaintiff seeks to maintain this suit as a class action on behalf of "[a]ll individuals who have been obligated to repay money to the United States Department of Education at any time since March 19, 2001 pursuant to a Federal Direct Consolidation Loan Promissory Note." Compl. ¶ 28. In January 2008, plaintiff filed a motion to certify a class. The Court subsequently denied that motion without prejudice to refile pending resolution of the motions for summary judgment. This Memorandum Opinion therefore does not address any issues relating to plaintiff's request for class certification.

date. See Compl. ¶¶ 1, 37-39. The complaint does not challenge defendants' interest-capitalization practices with regard to her 1997 promissory notes. Defs.' Mot. at 7 n.5. Furthermore, as her scheduled monthly payments exceeded the amount of interest that accrued on her loan for the years ending in June 30, 2003 and June 30, 2006,<sup>4</sup> plaintiff's complaint does not address her loan payments during these years. Defs.' Mot. at 7 n.6.

On January 31, 2008, defendants filed a motion for summary judgment on the basis that the promissory note executed by plaintiff expressly authorizes DOE to capitalize interest in the challenged manner. Plaintiff filed a cross-motion for partial summary judgment with respect to defendants' liability for breach of contract. She seeks an Order from the Court (1) declaring that defendants' practice of capitalizing interest that accrues between a borrower's June payment due date and June 30 each year constitutes a breach of the form promissory note; (2) enjoining defendants from continuing this practice; and (3) directing the parties to meet in an attempt to stipulate as to the proper measure of damages. The Court heard oral argument on November 14, 2008, at which point it directed the parties to submit supplemental briefing on the applicability of *Segar v. Mukasey*,

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<sup>4</sup> Plaintiff's scheduled monthly payments exceeded the amounts of interest that accrued on her loan for the year ending June 30, 2007 as well, though that date occurred after plaintiff filed her complaint.

508 F.3d 16 (D.C. Cir. 2007). On March 16, 2009, the Court denied the parties cross-motions without prejudice and ordered a renewed round of consolidated briefing. The parties have rebriefed the issues and the cross-motions are now ripe for decision.

## **II. Standard of Review**

Summary judgment is appropriate if the pleadings on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Material facts are those that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment bears the initial burden of demonstrating an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). In considering whether there is a triable issue of fact, the court must draw all reasonable inferences in favor of the non-moving party. *Tao*, 27 F.3d at 638.

## **III. Discussion**

### **A. Contract Interpretation**

Courts interpreting a contract to which the United States is a party apply general principles of contract law. See *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002). The starting

point for such interpretation is the plain language of the contract and the ordinary meaning of its terms - "unless the parties mutually intended and agreed to an alternative meaning." *Boeing Co. v. United States*, 75 Fed. Cl. 34, 42 (2007) (quoting *Harris v. Dep't of Veteran Affairs*, 142 F.3d 1463, 1467 (Fed. Cir. 1998)). Because contract interpretation is a matter of law, issues of contract interpretation are often "readily susceptible of resolution via summary judgment." *Id.*

In the event that a contract provision is ambiguous, the ambiguity is to be resolved against the drafter, which in this case is DOE. See *United States v. Seckinger*, 397 U.S. 203, 216 (1970) (noting that this principle merited "considerable emphasis" in that case "because of the Government's vast economic resources and stronger bargaining position in contract negotiations"). A contract provision, however, "'is not ambiguous merely because the parties later disagree on its meaning.' It is ambiguous only 'if it is reasonably susceptible of different constructions.'" *Segar v. Mukasey*, 508 F.3d 16, 22 (D.C. Cir. 2007) (quoting *Bennett Enters. v. Domino's Pizza, Inc.*, 45 F.3d 493, 497 (D.C. Cir. 1995)).

"When a contract incorporates a regulation by reference, that regulation becomes a part of the contract for the indicated purposes as if the words of that regulation were set out in full in the contract." *United States ex rel. Dep't of Labor v. Ins.*

*Co. of N. Am. ("INA II")*, 131 F.3d 1037, 1042 (D.C. Cir. 1997) (concluding that a bond provision, which stated that liability would be determined "pursuant to [the relevant] Act and the applicable regulations duly promulgated thereunder," evidenced an unambiguous intent by the parties to incorporate by reference the statute and implementing regulations). Here, the governing law section of the promissory note and the reference to the Act in the note's section dealing with interest make clear that the language of the applicable DOE regulations is incorporated by reference into the note.<sup>5</sup>

In the present case then, the Court's task is to interpret the promissory note in a way that reconciles the language of 34 C.F.R. § 685.202(b) (defining capitalization as the practice of adding "*unpaid accrued interest*" to the loan balance and permitting DOE to capitalize "*unpaid interest*" (emphasis added)), with the language in the promissory note stating that the agency will annually capitalize "interest that accrues but is *not paid when due*," Pl.'s Mot. at Ex. 6; Defs.' Mot. App. at 30. See, e.g., *United States v. Ins. Co. of N. Am. ("INA I")*, 83 F.3d 1507, 1511 (D.C. Cir. 1996) ("[T]he 'cardinal principle of

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<sup>5</sup> Although plaintiff did not explicitly concede this point, plaintiff's counsel did acknowledge at oral argument "that the regulation and the note should be construed consistently." Tr. at 42. The Court in any event finds no serious room for doubt that the regulatory language is incorporated by reference into the promissory note.

contract construction [is] that a document should be read to give effect to all its provisions.'" (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995)); *Shulman v. Voyou, LLC*, 251 F. Supp. 2d 166, 169 (D.D.C. 2003) ("[W]here two seemingly conflicting contract provisions exist within a contract, it is the province and duty of the court to find harmony between them and reconcile them if possible."). In so doing, the Court is mindful that it "must give reasonable meaning to all parts of the contract and not render portions of the contract meaningless." *YRT Servs. Corp. v. United States*, 28 Fed. Cl. 366, 389 (1993).

**B. Scope of the Parties' Dispute**

At the outset, the Court notes the substantial number of issues *not* seriously disputed by the parties. Both plaintiff and defendants agree that interest accrues on plaintiff's loan on a daily basis, but that for the convenience of both parties, DOE does not require daily payment of such interest. See Defs.' Mot. at 12; Tr. at 48, 63. The parties also agree that DOE clearly has the authority to capitalize interest under certain circumstances - namely, that the promissory note authorizes the agency to capitalize any interest that accrues and has not been paid as of the borrower's scheduled payment date. Furthermore, defendants do not dispute that during the relevant time period, plaintiff voluntarily submitted payments in excess of her

