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## **WRITING SAMPLE**

(Reply Brief Excerpt)

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

<p>JON EWING,  Plaintiff,  v.  FEDERAL HOME LOAN BANK OF DES MOINES, RICHARD SWANSON, NICHOLAS SPAETH, and MICHAEL GUTTAU,  Defendants.</p>	<p>CASE NO. 4:09-cv-106  PLAINTIFF'S BRIEF IN SUPPORT OF RESISTANCE TO DEFENDANTS' MOTION TO DISMISS</p>
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## INTRODUCTION

On April 17, 2009, Defendants filed with the court a Motion to Strike Punitive Damages and a Motion to Dismiss. On April 20, 2009, Plaintiff resisted Defendants' Motion to Dismiss and Motion to Strike and requested additional time in which to file a brief in support of Plaintiff's resistance as Plaintiff's counsel was out of state for trial. Defendants did not contest Plaintiff's request for an extension of time.

## ARGUMENT

### I. FEDERAL HOME LOAN BANKS ARE NOT FEDERAL INSTRUMENTALITIES

While the Plaintiff acknowledges that there is federal jurisdiction under *American Nat'l Red Cross v. S.G.*, 505 U.S. 247 (1992), as read with 12 U.S.C. § 1432(a), the issue of whether Federal Home Loans Banks are federal instrumentalities is one of first impression in the Eighth Circuit.

On similar facts, the Fourth Circuit Court of Appeals found that the Federal Home Loan Bank of Atlanta was not a federal instrumentality. *Andrews v. Federal Home Loan Bank of Atlanta*, 988 F.2d 214 (4th Cir. 1993). In finding that FHLB was not a federal instrumentality, the court noted that the Bank receives no federal funding (12 U.S.C. § 1438), its shares are wholly owned by its members and its profits are distributed as dividends to shareholders (12 U.S.C. § 1426(g)), member institutions vote for eight of the fourteen directors of the Bank (12 U.S.C. § 1427(a)), and the directors are the ones responsible for directing the affairs of the Bank, including the election of the Bank's president (12 U.S.C. § 1427(j)). *Andrews*, 998 F.2d at 215-216.

Additionally, while the Banks are federally-chartered, and have been described as instrumentalities (*Registration of Federal Home Loan Bank Equity Securities*, 69 Fed. Reg. 38,799, 38,799 (June 29, 2004)), the Bank operates more like a private entity. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 543 (1987), the Supreme Court found that the USOC was a private entity despite its federal charter, cautioning that “[i]t hardly need be said that if federally created private corporations were to be viewed as governmental rather than private actors, the consequences would be far reaching.” *Id.*

Influenced by *San Francisco Arts*, the *Andrews* court found that because of its private characteristics, FHLB should be regarded as a private entity, similar to the USOC. In *Andrews*, the court found:

“[T]he Bank is privately funded, privately owned, and it pays out its profits to its shareholders in the form of quarterly dividends. The Bank provides private banking services, such as lending money, issuing letters of credit, and serving as a trustee. The Bank’s employees are not in the civil service and are not employees of the federal government. There is thus ample reason to conclude that, despite its federal charter, the Bank operates more like a private entity than as a party of the federal government. *Andrews*, 998 F.2d at 216.

The 7th Circuit has found that Federal Land Bank Associations, similar to Federal Home Land Banks in a variety of ways, including private ownership, are not federal instrumentalities. *Hannah v. Federal Land Bank*, 903 F.2d 1159, 1162 (7th Cir. 1990). In *Hannah*, the court held that “[e]ven though Federal Land Bank Associations and Production Credit Associations are ‘federally chartered instrumentalit[ies] of the United States,’ created under the Farm Credit Act of 1971, they are not considered as federal agencies per se...” *Id.* The court further wrote that “Congress’ intent was that the farm credit system was to be owned and operated by farmers rather than the federal government. Thus, both Federal Land Bank Associations and Production

Credit Associations are farmer-owned and operated agencies rather than federal instrumentalities.” *Id.*

Furthermore, an “agency” is defined as follows:

The term “agency” includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

28 U.S.C. § 451 (2006). Defendants have not indicated that the United States has a proprietary interest in FHLB. Thus, on its face, FHLB does not meet the statutory definition of “agency.” Moreover, it is instructive that Congress, while choosing to expressly define the agency status of another federally chartered institution, failed to do the same in 12 U.S.C. §§ 1421, *et seq* (2006), FHLB’s enabling legislation. For example, 12 U.S.C. § 1452(f) (2006), specifically deems Federal Home Loan Mortgage Corporations as federal agencies for the purposes of 1442(a)(1). Yet, Congress did not mandate the same status for Federal Home Loan Banks in 12 U.S.C. §§ 1421, *et seq.* Accordingly, it appears that Congress’ failure to attach agency status to Federal Home Loan Banks indicates the legislature’s intent to exclude Defendant FHLB from the benefits of being a federal agency or instrumentality.

Within the context of the FTCA, many other courts have consistently held that other financial institutions chartered under United States statutes were not “agencies” or “federal instrumentalities.” In *Lewis v. United States*, 680 F.2d 1239 (9th Cir. 1982), the court considered several factors to determine whether a federal reserve bank was a federal instrumentality under the FTCA; whether the federal government controlled the daily physical performance of reserve banks; whether the bank in question was an independent corporation; whether the government was involved in the bank’s infancies; and whether the mission of the bank furthered the policy of

the United States. The court noted that the performance of an important governmental function is but a single factor, and not determinative of inclusion in the FTCA. *Id.* at 1242; *see Federal Reserve Bank v. Metrocentre Improvement District #1*, 657 F.2d 183, 185 n. 2 (8th Cir. 1981).

In *United States v. Orleans*, 425 U.S. 807 (1976), an agency funded under the Economic Opportunity Act of 1964 claimed that it was either an agency or a federal instrumentality under the Federal Tort Claims Act. In that case, the Court found that the agency's day to day operation was supervised by local officials, not the federal government. 425 U.S. at 916. The Court therefore found that the agency was not an agency nor a federal instrumentality under the FTCA. *Id.*

In *DeLaigle v. Federal Land Bank*, 568 F.Supp. 1432 (S.D.Ga. 1983), the court held that a federal land bank was a private corporation without sufficient government involvement to support a cause of action under the Federal Due Process Clause of the Fifth Amendment. Relying on language from 28 U.S.C. § 1349, the court stated that "district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of congress, unless the United States is the owner of more than one-half of its capital stock."

Finally, in *Federal Land Bank v. Cotton*, 410 F.Supp. 169 (N.D.Ga. 1975), the court stated that "it is clear that a federally-chartered corporation is not an 'agency' unless the government has a substantial proprietary interest in it, or at least exercises considerable control over operation and policy in the corporation..."

Federal Home Loan Bank of Des Moines is not a federal instrumentality or an agency of the United States. Defendant FHLB was organized under the Federal Home Loan Bank Act, 12 U.S.C. § 1421. There are twelve regional Federal Home Loan Banks, each with its own

president and board of directors. *See* FHLB Des Moines, *System Overview*, [http://www.fhlbdm.com/au\\_system.htm](http://www.fhlbdm.com/au_system.htm); *see also* FHLB Des Moines, *Board of Directors*, [http://www.fhlbdm.com/au\\_bod.htm](http://www.fhlbdm.com/au_bod.htm). Each bank has its own set of customers and regional members. *Id.* The federal government does not control its day to day operations; those operations are managed primarily by the bank's staff in Des Moines and the regional board of directors and president. *Id.* Defendant FHLB admits in their Press Kit Facts Sheets that "Federal Home Loan Banks (Banks) are privately owned, wholesale banks." FHLB Des Moines, *Press Kit Facts Sheet*, [http://www.fhlbdm.com/Docs/About\\_Us/Press\\_Room/Press%20Kit%20Items/2008/Press%20Kit%200608.pdf](http://www.fhlbdm.com/Docs/About_Us/Press_Room/Press%20Kit%20Items/2008/Press%20Kit%200608.pdf). Defendant FHLB further states that "all 12 regional Banks are privately capitalized, have individual boards of directors and do not receive any taxpayer assistance." *Id.* "They raise their funds by issuing debt instruments in capital markets." *Id.* Defendant FHLB is a privately owned and funded corporation, it is neither an agent nor instrumentality of the federal government.