

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

---

**LUANA SAVINGS BANK,**

**Plaintiff,**

**vs.**

**FEDERAL HOME LOAN BANK OF DES  
MOINES,**

**Defendant.**

---

**Case No. EQCE085919**

**ORDER RE: PARTIAL MOTION TO DISMISS**

**I. INTRODUCTION**

Before the court is a partial motion to dismiss filed by plaintiff Luana Savings Bank (“LSB”) on July 9, 2020 seeking dismissal of count II of Federal Home Loan Bank’s amended counterclaims filed on July 22, 2020.<sup>1</sup> Defendant Federal Home Loan Bank of Des Moines (“FHLB”) filed its resistance to plaintiff’s motion on July 22, 2020. LSB filed its reply brief on August 27, 2020. The court heard the parties’ arguments at a videoconference hearing on September 18, 2020. The court now enters its order on the motion.

**II. BACKGROUND FACTS**

FHLB is one of eleven federally-established banks created by the Federal Home Loan Bank Act.<sup>2</sup> It is privately-capitalized and owned as a cooperative by its member institutions.<sup>3</sup> FHLB

---

<sup>1</sup> Federal Home Loan Bank filed an initial answer, affirmative defenses, and counterclaim on June 19, 2020.

<sup>2</sup> Answer and Amended Counterclaims, at 9, ¶ 2 (Polk Cty Dist. Ct. July 22, 2020).

<sup>3</sup> *Id.*

allows its members access to a stable source of collateralized loans or advances that members can use to support mortgage lending, economic development, and affordable housing in the communities FHLB serves.<sup>4</sup> To maintain funds, FHLB is self-capitalizing.<sup>5</sup> To become a member of FHLB and to receive advances, an institution must purchase FHLB stock.<sup>6</sup>

LSB is a member institution of FHLB and has been a participating financial institution (“PFI”) in FHLB’s Mortgage Partnership Finance (“MPF”) program since 2007.<sup>7</sup> The relationship between FHLB and LSB is governed by several contracts, including (1) a Master Transaction Agreement (“MTA”) dated June 11, 2018 and its attendant Guides, (2) an Advances, Pledge and Security Agreement (“APSA”) dated May 3, 2006, and (3) a Participating Financial Institution Agreement (“PFIA”) dated July 2, 2007.<sup>8</sup> FHLB also had a Capital Plan dated May 31, 2015.<sup>9</sup>

Under the MPF program, LSB sold thousands of residential mortgage loans to FHLB while retaining the servicing rights for the loans.<sup>10</sup> After a mortgage loan originated by LSB was closed, LSB sold the loan to FHLB.<sup>11</sup> In most cases, FHLB paid a premium to purchase the loan.<sup>12</sup> FHLB then held the mortgage loans on its balance sheet while LSB handled the servicing of the loans, which included billings to borrowers, payment collection, and customer service.<sup>13</sup> Section 3.6 of the PFIA states that LSB owed fiduciary duties to FHLB in the course of servicing FHLB’s loans,

---

<sup>4</sup> *Id.* at 10, ¶ 3.

<sup>5</sup> *Id.* at 10, ¶ 4.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 10, ¶ 5.

<sup>8</sup> *Id.* at 10, ¶ 6.

<sup>9</sup> Petition, at 2, ¶ 12 (Polk Cty Dist. Ct. May 20, 2020).

<sup>10</sup> Answer and Am. Countercls., at 10, ¶ 7.

<sup>11</sup> *Id.* at 10, ¶ 8.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

with respect to (i) the handling of money, (ii) the handling of mortgage documents, and (iii) compliance with applicable laws in the origination, sale, and servicing of the mortgages.<sup>14</sup>

LSB earned profits from receiving a premium on loans sold to FHLB and from collecting servicing fees over the life of the loan where it retained servicing rights.<sup>15</sup> FHLB expected to earn profits, which FHLB would distribute to member banks as dividends, through interest paid by borrowers over the life of the loans held by FHLB.<sup>16</sup>

In 2015, LSB asked FHLB whether LSB could repurchase loans it had previously sold to FHLB.<sup>17</sup> The PFIA and related FHLB guidelines do not permit members to repurchase loans without written permission.<sup>18</sup> FHLB advised LSB of these terms and did not grant LSB written permission to repurchase loans.<sup>19</sup>

Notwithstanding FHLB's response, LSB began to repurchase loans from FHLB under the guise of the loans being refinanced by the underlying borrowers.<sup>20</sup> LSB submitted payoff amounts on loans as the servicer, ostensibly as a result of a borrower refinancing the loan.<sup>21</sup> Because LSB was the loan servicer, upon payment of the loan balance, FHLB returned the original promissory note to LSB to be returned to the borrower.<sup>22</sup> Rather than immediately cancelling the note, LSB held the note and continued to collect monthly loan payments, including interest, and loan servicing fees without advising the borrower that it had paid the loan balance and now held the

---

<sup>14</sup> Ex. C, PFIA, § 3.6.

<sup>15</sup> Answer and Am. Countercls., at 10, ¶ 9.

<sup>16</sup> *Id.* at 10, ¶ 10.

<sup>17</sup> *Id.* at 11, ¶ 11.

<sup>18</sup> *Id.* at 11, ¶ 12.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 11, ¶ 13.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 11, ¶ 14.

loan, rather than FHLB.<sup>23</sup> LSB would later advise the borrowers of refinancing opportunities.<sup>24</sup> LSB then sold loans for the same borrower and secured by the same property to FHLB a second time after refinancing the loan that LSB had repurchased from FHLB months earlier.<sup>25</sup>

In 2019, FHLB discovered LSB's actions and questioned LSB about the suspected conduct.<sup>26</sup> LSB acknowledged it had been repurchasing loans.<sup>27</sup> On March 2, 2020, FHLB provided notice to LSB of LSB's default under the governing documents due to unauthorized repurchases.<sup>28</sup>

LSB has a demand deposit account ("DDA") at FHLB to facilitate transactions with FHLB.<sup>29</sup> According to § 4.2.2 of the Capital Plan, FHLB committed to repurchase its stock from LSB that exceeds the thresholds required for member stock holdings.<sup>30</sup> Section 2.2 of the Capital Plan states that FHLB should place proceeds from stock repurchases into LSB's DDA.<sup>31</sup> Since March 2020, FHLB has not paid proceeds from the repurchase of LSB's stock to the DDA, but instead placed the proceeds in a certificate of deposit where LSB cannot access the funds.<sup>32</sup>

Section 3.4 of the Capital Plan states that FHLB must pay any declared dividends on its stock to the members holding its stock.<sup>33</sup> FHLB has withheld certain declared dividends from LSB and placed the funds in the same certificate of deposit where LSB cannot access the funds.<sup>34</sup>

The PFIA contains a broad setoff provision, which states:

---

<sup>23</sup> *Id.* at 11, ¶ 15.

<sup>24</sup> *Id.* at 11, ¶ 17.

<sup>25</sup> *Id.* at 11, ¶ 18.

<sup>26</sup> *Id.* at 11, ¶ 19.

<sup>27</sup> *Id.* at 12, ¶ 20.

<sup>28</sup> *Id.* at 12, ¶ 23.

<sup>29</sup> Pet. at 3, ¶ 22.

<sup>30</sup> *Id.* at 3, ¶ 16.

<sup>31</sup> *Id.* at 3–4, ¶ 23.

<sup>32</sup> *Id.* at 4, ¶¶ 24–25.

<sup>33</sup> *Id.* at 5, ¶ 34.

<sup>34</sup> *Id.* at 5, ¶ 35.

To secure any and all indebtedness or liability of the PFI [LSB] to the Bank [FHLB] under this Contract and under any other agreement with the Bank, however and whenever incurred or evidenced, whether direct or indirect, absolute or contingent, due or to become due, the PFI hereby assigns, transfers, and pledges to the Bank and grants to the Bank a first priority security interest in (i) all balances, credits, deposits, moneys, and drafts now or hereafter in the deposit account(s) or any other account that the PFI may maintain with the Bank, (ii) all collateral provided by the PFI from time to time as described in Section 4.7 above, and (iii) any rights accruing to the PFI under the terms of this Contract including, without limitation, servicing rights with respect to the Mortgages delivered and/or serviced under this Contract; and the Bank is authorized to charge such indebtedness or liability against the deposit account(s), or any other account or such other collateral, whether or not the same is then due.<sup>35</sup>

On May 20, 2020, LSB filed its petition, alleging that FHLB is improperly withholding funds from stock repurchases and declared dividends. LSB seeks relief in its petition in five counts under theories, which include a request for declaratory judgment, conversion, breach of contract, promissory estoppel, and unjust enrichment. FHLB filed its answer, affirmative defenses and counterclaims on June 19, 2020, stating it was entitled to setoff due to LSB's contractual breaches, and asserting claims for breach of contract and negligent misrepresentation. FHLB amended its answer and counterclaims on July 22, 2020. On July 9, 2020, LSB filed its partial motion to dismiss, arguing that FHLB failed to state a claim upon which relief could be granted, regarding count II in its counterclaim where they seek relief under a theory of negligent misrepresentation.

### III. STANDARD OF REVIEW

“Under our rules of civil procedure, a party need not conform to technical forms of pleading.”<sup>36</sup> “Rather, ‘[e]ach averment of a pleading shall be simple, concise, and direct.’”<sup>37</sup> “In Iowa, ‘notice pleading’ is all that is required.”<sup>38</sup> “Nearly every case will survive a motion to dismiss

---

<sup>35</sup> Ex. C, PFIA, § 4.8.

<sup>36</sup> *Cemen Tech, Inc. v. Three D Industries, L.L.C.*, 753 N.W.2d 1, 12 (Iowa 2008).

<sup>37</sup> *Id.* (citing Iowa R. Civ. P. 1.402(2)(a)).

<sup>38</sup> *Id.* at 12.

under notice pleading.”<sup>39</sup> Notice pleading requires the petition “contain factual allegations that give the defendant ‘fair notice’ of the claim asserted so the defendant can adequately respond to the petition.”<sup>40</sup> “The ‘fair notice’ requirement is met if a petition informs the defendant of the incident giving rise to the claim and of the claim's general nature.”<sup>41</sup> A plaintiff is not required to set forth specific legal theories for recovery in the petition.<sup>42</sup> The only issue when considering a motion to dismiss is the “petitioner's right of access to the district court, not the merits of his allegations.”<sup>43</sup> “In determining whether to grant the motion to dismiss, a court views the well-pled facts of the petition ‘in the light most favorable to the plaintiff with doubts resolved in that party's favor.’”<sup>44</sup> “A motion to dismiss admits the allegations of the petition and waives any ambiguity or uncertainty in the petition.”<sup>45</sup> “A motion to dismiss is sustainable only when it appears to a certainty that the [the party seeking relief] would not be entitled to relief under *any state of facts that could be proved* in support of the claims asserted.”<sup>46</sup>

#### IV. CONCLUSIONS OF LAW

LSB argues that FHLB has failed to state a claim for negligent misrepresentation, because under no set of facts can FHLB recover. LSB contends the parties’ relationship was arms-length and adversarial, so that LSB had no duty to exercise reasonable care or competence in obtaining or communicating any information to FHLB about servicing the loans. LSB contends the Iowa Supreme Court has restricted claims for negligent misrepresentation to claims where the party

---

<sup>39</sup> *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009).

<sup>40</sup> *Id.* at 354 (quoting *Rees v. City of Shenandoah*, 682 N.W.2d 77, 79 (Iowa 2004)).

<sup>41</sup> *Id.* at 354.

<sup>42</sup> *Cemen Tech, Inc.*, 753 N.W.2d at 12.

<sup>43</sup> *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001) (citations omitted).

<sup>44</sup> *Geisler v. City Council*, 769 N.W.2d 162, 165 (Iowa 2009) (citing *Haupt v. Miller*, 514 N.W.2d 905, 911 (Iowa 1994)).

<sup>45</sup> *Leuchtenmacher v. Farm Bureau Mut. Ins. Co.*, 460 N.W.2d 858, 861 (Iowa 1990).

<sup>46</sup> *Penn. Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 810 (Iowa 2002) (emphasis added) (citation omitted).

providing the information has been limited to professions such as accountants, attorneys, financial advisors, and abstractors. FHLB responds that negligent misrepresentation is not limited to these professions but also applies to mixed businesses that sell products or services and supply information. FHLB argues that LSB was in the business of providing information for the guidance of FHLB and had a pecuniary interest in providing that information and, therefore, LSB owed a duty to FHLB to provide accurate information about servicing the loans.

Iowa adopted the Restatement (Second) of Torts' articulation of a negligent misrepresentation claim, which provides:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.<sup>47</sup>

However, Iowa law recognizes a narrower scope of liability than the language of the Restatement supports.<sup>48</sup> “[O]nly those in the business of supplying information to others owe a duty to ensure that information is correct, accurate, and thorough.”<sup>49</sup> Iowa law distinguishes advisory relationships from relationships that are adversarial and at arm’s length, the sale of information as a product from information given incidentally as part of another transaction, and professional purveyors of information from those who work in another capacity.<sup>50</sup> Courts “seek to capture the concept of foreseeability within those circumstances that impose a duty of care.”<sup>51</sup> These considerations are “principles of law that help frame the parameters of the tort and express its

---

<sup>47</sup> *Dinsdale Constr., LLC v. Lumber Specialties, Ltd.*, 888 N.W.2d 644, 649–50 (Iowa 2016) (citing Restatement (Second) of Torts § 552 (Am. Law Inst. 1977)).

<sup>48</sup> *Id.* at 650.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 650–51.

rationale more than they are factors to weigh in determining the existence of a duty.”<sup>52</sup> Instead, courts must examine each specific transaction and only impose a duty on persons who, in the course of their business, profession, or employment, or in any other transaction in which they have a pecuniary interest, supply information to others in their business transactions.<sup>53</sup> “Mixed” businesses that sell products or services and supply information can have a duty of care.<sup>54</sup> The pecuniary interest requirement normally comes from consideration paid or given to the person who supplies the information as a part of the transaction, whether that consideration is direct or indirect.<sup>55</sup>

FHLB has sufficiently stated a claim upon which relief could be granted regarding its negligent misrepresentation counterclaim. To survive a motion to dismiss, FHLB does not need to make a winning argument, or even have a likelihood of success. FHLB must show only that some set of facts, if proven, would entitle it to relief.

The series of transactions FHLB alleges give rise to a duty of care include (1) the initial sale of loans from LSB to FHLB and the agreement for LSB to service those loans; (2) LSB providing funds to pay off loans previously sold to FHLB, and FHLB returning the loans to LSB; and (3) FHLB’s transactions with third parties where FHLB relied on the information that LSB provided. The court cannot determine at this stage whether the parties’ relationship was purely adversarial, with any information LSB provided being incidental to the transactions, or whether the parties’ relationship and the information LSB provided gave rise to a duty of care. FHLB alleges that LSB was in the business of providing information to FHLB, because FHLB relied on

---

<sup>52</sup> *Id.* at 651.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 652–53.

loan servicing information provided by LSB in order to (1) structure its relationships with third parties and (2) to determine when to return loans to LSB and when to buy loans from LSB.

The information LSB provided included information regarding underlying borrowers, interest rates, maturity dates, and payment terms of the loans. LSB also represented to FHLB that the underlying borrowers were paying off or refinancing certain loans that LSB had previously sold to FHLB and that LSB continued to service. LSB submitted to FHLB purported payoff amounts on those loans and LSB represented to FHLB that, given the payoffs and refinancing, FHLB needed to return the loans to LSB. LSB sold loans for the same borrower and secured by the same property back to FHLB a second time, representing to FHLB that the loans were new or different loans and were qualified for FHLB to purchase.

LSB had a pecuniary interest in providing this information. From providing the information on underlying borrowers and loan terms, LSB could earn a premium from initially selling the loans to FHLB and could earn servicing fees for the loans it sold to FHLB. By providing the payoff and refinancing information, LSB was able to secure the return of loans from FHLB, enabling LSB to (1) to convert revenue streams like interest payments from FHLB to LSB; (2) to reduce LSB's minimum capital position with FHLB; and (3) to resell those same loans for further financial gain. By representing that the loans sold back to FHLB were new loans, LSB earned a second premium payment.

FHLB alleges that LSB's fiduciary duty under § 3.6 of the PFIA encompasses a duty upon LSB to provide accurate and thorough information to FHLB, making their relationship one where LSB was in the business of providing information to FHLB in an advisory capacity. According to FHLB, LSB's duty to provide information involved providing guidance on how to structure its transactions with third parties. FHLB states that it relied on LSB's false information in determining

how much to pay members in dividends, determining how much capital FHLB had available to fund further loans and financial activity for members, and building relationships with members and the banking and financial services community. FHLB alleges the inaccurate information supplied reduced the amount of dividends FHLB could pay and damaged FHLB's reputation in the industry. FHLB also alleges that it relied on the information in determining when to return loans to LSB and when to buy loans from LSB, which resulted in lost interest payments and paying a second premium on the same loans.

FHLB has shown that it may be able to prove facts establishing LSB owed it a duty of care to provide accurate information. The motion to dismiss stage is not the appropriate time to eliminate FHLB's counterclaim for negligent misrepresentation. The court makes no determination on the merits of FHLB's counterclaim and LSB is free to challenge the counterclaim in later proceedings.

#### **V. RULING**

**IT IS THEREFORE ORDERED** that Luana Savings Bank's partial motion to dismiss is **DENIED**.



State of Iowa Courts

**Type:** OTHER ORDER

**Case Number**      **Case Title**  
EQCE085919      LUANA SAVINGS BANK V FEDERAL HOME LOAN BANK

So Ordered

A handwritten signature in black ink, appearing to read "L. P. McLellan". The signature is written in a cursive, flowing style.

Lawrence P. McLellan, District Court Judge,  
Fifth Judicial District of Iowa