

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore**

Case No. 15-CV-01634-RM

THE FOURTH CORNER CREDIT UNION,

Plaintiff,

v.

NATIONAL CREDIT UNION ADMINISTRATION,

Defendant.

**PLAINTIFF'S MOTION TO COMPEL MEDIATION AND STAY PROCEEDINGS
Pursuant to D.C.COLO.L.CivR 16.6 and 28 U.S.C. §652(a)**

NOW COMES The Fourth Corner Credit Union [4CCU or plaintiff], by and through its undersigned attorneys, and it hereby moves this Honorable Court for an order directing the parties to engage in mediation. Further, to facilitate settlement or resolution, the Court should stay the action in whole until further order pursuant to D.C.COLO.L.CivR 16.6 and 28 U.S.C. §652(a).

Prior to filing this Motion plaintiff conferred in good faith with defendant National Credit Union Administration [NCUA or defendant] in an effort to achieve resolution of the matters addressed herein, without success.

In support of this Motion plaintiff would show unto the Court as follows:

1. On July 30, 2015, plaintiff filed a Complaint against defendant NCUA seeking judicial review of defendant's rejection of plaintiff's application for federal share deposit insurance (ECF No. 1).

2. 4CCU is a credit union chartered by Colorado to bring about a legal solution to the marijuana-banking conundrum. In March 2015, U.S. Senator Michael F. Bennet (D-CO) described the conundrum in a letter to former Federal Reserve Chair Janet Yellen as follows: “Since legalization, most retail stores and dispensaries have lacked access to basic banking services, which has required them to transact nearly all of their business in cash. This has raised significant public safety concerns for both the employees and the customers of these businesses. The cash-only nature of these businesses has also made it more difficult for the state to audit these entities and to conduct oversight.” *Exhibit 1*.

3. On July 5, 2016 Judge Moore issued an Order and Opinion denying in part NCUA’s motion to dismiss. NCUA claimed its denial of federal share deposit insurance to plaintiff was not subject to judicial review. (ECF No. 23). The court determined that the touchstone for judicial review applicable to this action is whether the NCUA’s denial of 4CCU’s application for federal share deposit insurance was based on a consideration of the relevant factors. Specifically, the criteria the NCUA must consider before approving an application for insurance are: (1) the history, financial condition, and management policies of the applicant; (2) the economic advisability of insuring the applicant without undue risk to the insurance fund; (3) the general character and fitness of the applicant’s management; (4) the convenience and needs of the applicant’s members; (5) whether the applicant is a cooperative association organized to promote thrift among its members and create a source of credit for provident and productive purposes. 12 U.S.C. §1781(c)(1). In the Complaint, plaintiff alleges defendant failed to follow its own regulations.

Notably, plaintiff alleges that, in violation of 12 C.F.R. §741 3(f), defendant failed to provide a letter of disapproval; stating the reasons why plaintiff's application was disapproved; citing authority for the NCUA's decision; or providing suggested methods by which plaintiff could correct its deficiencies. (ECF No. 1 at ¶113). Plaintiff further alleges that defendant violated 12 U.S.C. §1781(c) because its letter of disapproval did not represent the formal action of the NCUA's Board. (Id. at ¶¶90, 94). The court concluded that these allegations are reviewable. (ECF No. 23 at p. 9).

4. On August 17, 2016, Judge Moore issued an Order Referring Case to Magistrate Judge Kathleen M. Tafoya with the *proviso* that Magistrate Judge Tafoya, may, on her recommendation or informal request, or on the request of the parties by motion, "direct the parties to engage in an early neutral evaluation, a settlement conference, or other alternative dispute resolution proceeding." (ECF No. 27). The Court has power to order the parties to mediate, even if one party objects. D.C.COLO.L.CivR 16.6.

5. On December 9, 2016, the parties settled the administrative record (ECF No. 58). No further proceedings have taken place in this action, largely because the parties were awaiting a judicial decision in related, protracted federal court litigation involving the Federal Reserve.

6. This action seeking federal share deposit insurance is related to *The Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City*, (FRB-KC), Civil Action No. 15-cv-01633-RBJ, *The Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City*, 861 F.3d 1052(10th Cir. 2017), and *The Fourth Corner Credit Union v.*

Federal Reserve Bank of Kansas City, Civil Action No. 17-cv-02631-CMA-KLM in which 4CCU sought a Federal Reserve master account. A history of the master account litigation is as follows:

(a) On January 5, 2016, The Honorable R. Brooke Jackson dismissed 4CCU's complaint seeking to compel FRB-KC to issue 4CCU a master account, *with prejudice*. A master account is a bank's bank account, which allows it to clear checks and process electronic transactions for its customers. Without a master account, a bank is nothing more than a vault. This access is necessary for the electronic transfer of funds. Simply put, without access to the payments system 4CCU was out of business. The dismissal with prejudice meant 4CCU could never file a case against FRB-KC to get a master account ever again. Judge Jackson agreed with 4CCU's reading of the law that 12 U.S.C. §248a(c)(2) required FRB-KC to issue 4CCU a master account but that the court could "not use its equitable powers to issue an order that would facilitate criminal activity." Judge Jackson lamented, "I regard the situation untenable and hope that it will soon be addressed and resolved by Congress." *Fourth Corner v. FRB-KC, supra*, ECF No. 46 at Page 9. The untenable situation was the "common sense" conclusion that "operation of MRBs on a cash-only basis created significant public safety concerns for customers and employees, while making regulation, auditing and tax collection more difficult." *Id.* at p. 2.

(b) In January 2016, 4CCU appealed Judge Jackson's order dismissing TFCCU's case to the 10th Circuit Court of Appeals. The Board of Governors of the Federal Reserve System filed an *amicus curiae* brief in which the Board argued it had discretion over the issuance of master accounts and that 4CCU should not be granted a master account. Likewise, FRB-KC argued against the issuance of a master account.

(c) On June 27, 2017, the 10th Circuit Court of Appeals issued a *Per Curiam* Opinion that vacated Judge Jackson's order and ruled 4CCU could proceed with its claims to obtain a master account. Each of the 3 Circuit Judges issued a separate opinion. One opinion, that of Circuit Judge Bacharach, dissected every argument made by FRB-KC and the Board of Governors. He concluded the law "unambiguously entitles Fourth Corner to a master account." *Fourth Corner, supra*, 861 F.3d at 1068. He stated his interpretation of "§248a(c)(2) is supported by (1) repeated interpretations by the Board of Governors and regional Federal Reserve Banks, (2) the legislative history, and (3) the longstanding interpretation of this statute by other courts and academics." *Id.*

(d) On September 12, 2017, 4CCU submitted new documents to FRB-KC seeking a master account, and TFCCU pledged to follow the law. FRB-KC's master account form states, "processing [of a master account] may take 5 - 7 business days." When the master account was not granted in that timeframe, 4CCU again sued FRB-KC in the United States District Court for the District of Colorado, in

a case styled *The Fourth Corner Credit Union vs. Federal Reserve Bank of Kansas City*, Case No. 17-cv-02631-CMA-KLM.

(e) On February 2, 2018, 4CCU and FRB-KC resolved their dispute. FRB-KC agreed to “conditionally grant TFCCU a master account with FRB-KC upon fulfillment of stated conditions.” *Exhibit 2*. The conditions, succinctly stated, are that 4CCU will follow the law, and that FRB-KC will treat 4CCU like any other depository institution.

7. At present, marijuana is federally illegal. Most financial institutions rely on the Department of Treasury’s FinCEN guidance to bank state-licensed marijuana and hemp businesses, but truly there is no “safe harbor” for these institutions as there is a possibility of federal prosecution. See, “BSA Expectations Regarding Marijuana-Related Businesses,” FIN-20140G001. Therefore, there is no stable banking in this space until there is an act from Congress.

8. 4CCU is a leading advocate for a change in federal banking laws. It is actively engaged in establishing a coalition of States that have legalized marijuana to develop strategies for legal access to banking for marijuana-related businesses. This case presents issues of national importance to 4CCU, to Colorado, and the coalition of 29 States and the District of Columbia that have legalized marijuana. Yet, federal agencies are often unwilling to engage in discussion with States or state-chartered entities when it comes to this subject matter. Also, the position of the Department of Justice may not be in synch with the position of Treasury, the Federal Reserve or the NCUA. 4CCU has had to file multiple federal lawsuits to assert its rights under the law and bring attention to this urgent public safety issue. After 4 years of litigation, 4CCU needs one final approval.

9. 4CCU must follow the letter of the law, while it continues its crusade to change the law, so that marijuana-related businesses can have stable access to

banking that is legal at both the state and federal level. In the meantime, 4CCU can proceed to serve ancillary businesses, community supporters of cannabis legalization, and 4CCU's list of certified charities. Now that 4CCU has reached a settlement with FRB-KC, it is committed to focusing its efforts on working with the NCUA.

10. On January 23, 2017, J. Mark McWatters was appointed Chairman of the NCUA board. In April of 2015, while an NUCA board member, Chairman McWatters stated in an interview with Credit Union Times that he was worried about large amounts of cash on the street – sales proceeds from marijuana businesses in states where cannabis is legal.¹ He stated he would like financial institutions, including credit unions to do something about it. *Id.* He spoke out about ways for credit unions to serve the fledgling cannabis industry by helping those businesses become active members of the financial services system. *Id.* He also discussed the concept of a specialized credit union being established to perform enhanced due diligence of marijuana-related businesses. *Id.* 4CCU's mission to bring about legal access to banking for cannabis businesses is in line with the Chairman's former statements. For this reason, 4CCU believes that a court-ordered mediation in which the Chairman, or his designee, and regulators from the Colorado Division of Financial Services (Colorado DFS) participate could bring about a resolution of this action, or at least narrow the issues.

11. After almost 4 years of litigation against the Federal Reserve, 4CCU has been conditionally granted a Federal Reserve master account. Now, 4CCU needs

¹ See, <http://www.cutimes.com/2015/04/28/weed-industry-raises-public-safety-concerns?&slreturn=1518713405>

to obtain federal share deposit insurance from the NCUA, or comparable private share deposit insurance approved by the Colorado DFS. C.R.S. §11-30-117.5 (1).

12. NCUA has indicated that now that 4CCU has been conditionally granted a master account, 4CCU can voluntarily dismiss its case and re-apply for federal deposit insurance, but NCUA will not provide any assurance that it will timely act on a second application, or that it will follow its own regulations. Further, there is no need for 4CCU to dismiss its case or re-apply as 4CCU's business plan and its mission remain substantially unchanged; that is to bring fully legal banking to the cannabis and hemp industries. The NCUA has indicated it will reconsider its denial, in light of FRB-KC's grant of the conditional master account. Under the above facts, court-ordered mediation is an appropriate process to facilitate a resolution of this proceeding.

CONCLUSION

WHEREFORE 4CCU respectfully requests that the Court 1) order the parties to engage in mediation within the next 30 days; 2) that representatives of 4CCU and of the NCUA with settlement authority be ordered to attend; 3) that Colorado DFS be permitted to participate in the dispute resolution process; 4) that the action be stayed until further order of the Court; 5) that the parties be ordered to file a status report by March 26, 2018 addressing the outcome of the mediation and the need to lift the stay.

Date: February 15, 2018

Respectfully submitted,

s/ Mark A. Mason

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CERTIFICATE OF SERVICE

I hereby certify counsel for defendant was served via ECF.

s/ Mark A. Mason

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