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

Case No. 15-cv-01634-RM-KMT

THE FOURTH CORNER CREDIT UNION,

Plaintiff,

v.

NATIONAL CREDIT UNION ADMINISTRATION,

Defendant.

OPINION AND ORDER

Currently pending before the Court are the following: (1) Plaintiff The Fourth Corner Credit Union's ("plaintiff") motion to compel mediation and stay proceedings ("the motion to compel") (ECF No. 63); and (2) Defendant the National Credit Union Administration's ("NCUA" or "defendant") motion for judgment on the pleadings ("the motion for judgment") (ECF No. 64), filed pursuant to Fed.R.Civ.P. 12(c) ("Rule 12(c)"). A response (ECF No. 65), but no reply, has been filed to the motion to compel. A response (ECF No. 66) and reply (ECF No. 67) have been filed to the motion for judgment. The Court takes the motion for judgment first.

I. Legal Standard

Motions for judgment on the pleadings premised upon a lack of subject matter jurisdiction—like the instant one—are treated like motions to dismiss brought under Fed.R.Civ.P. 12(b)(1). 5C Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367 (3d ed. Apr. 2018 update). A motion to dismiss for lack of subject matter jurisdiction can

take two principal forms: (1) a facial attack, or (2) a factual attack on the allegations in the complaint. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). Here, defendant appears to mount a factual attack on the Complaint, given that defendant relies upon at least one document outside the Complaint (notably, a complaint in a different case). (*See* ECF No. 64 at 6-7.) In such a posture, this Court need "not presume the truthfulness of the complaint's factual allegations," and may consider "other documents" to resolve a jurisdictional dispute. *Holt*, 46 F.3d at 1003.

II. Discussion

Defendant argues that this case should be dismissed because it is moot. (ECF No. 64 at 8-11.) Specifically, defendant argues that, in its application for insurance, plaintiff stated that it was a credit union serving state licensed cannabis and hemp businesses, while, recently, plaintiff has agreed to new conditions for its business, which include not serving marijuana-related businesses. (*Id*. at 9.) Defendant argues that, as a result, any decision in this case related to plaintiff's application for insurance will have no effect. (*Id*. at 9-10.) Plaintiff argues that this case is not moot. (ECF No. 66 at 2-11.) Specifically, plaintiff argues that its business model has remained the same in that it still proposes to serve marijuana-related businesses, and thus, the issue of whether defendant can insure a credit union proposing to serve such businesses remains a live controversy. (*Id*. at 2-3, 6-8.) Plaintiff further argues that the issue of what criteria defendant will use in considering an application for insurance from a credit union proposing to serve marijuana-related businesses is still live. (*Id*. at 3-6.)

With respect to mootness, the ultimate question is whether a plaintiff has suffered an actual injury that can be redressed by a favorable judicial decision. *Ind v. Colorado Dep't of Corr.*, 801

F.3d 1209, 1213 (10th Cir. 2015).[1] Here, the alleged injury plaintiff suffered was defendant denying plaintiff's application for insurance without applying any known criteria to the application and without explaining ways in which plaintiff could cure any deficiencies in its application (*see* ECF No. 1 at ¶ 77, 113; ECF No. 66 at 4-5, 9-10), as well as in making various arbitrary conclusions with respect to the application.[2] In other words, plaintiff's alleged injury is the denial of its application for insurance in various arbitrary or improper ways. The question then is: can the Court redress that injury with a judicial decision favorable to plaintiff?

The Court finds that it cannot. The Court could find that defendant must apply criteria known to plaintiff in considering an application for insurance. The Court could find that defendant must provide plaintiff with ways of curing deficiencies in plaintiff's application for insurance. The Court could also find that all of the alleged arbitrary decisions made in denying plaintiff's application for insurance were arbitrary. None of that would redress plaintiff's injury (the denial of its application for insurance), though, because plaintiff would still be required to file a new application for insurance. When viewed more closely, plaintiff's arguments in response do not contend otherwise. For sure, plaintiff is displeased with the thought that it might have to file a new application for insurance—because it may take two years to consider a new application,[3] because

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[1] Under other circumstances, another question could be whether an exception to the mootness doctrine applies. *See Ind*, 801 F.3d at 1213. However, here, plaintiff makes no argument that, even if this case is found to be moot, an exception applies. (*See generally* ECF No. 66.) As a result, the Court does not further address the exceptions to the mootness doctrine herein.

[2] Although the Court found that Claims Two through Sixteen, as well as potentially Claim 1, survived defendant's earlier motion to dismiss (ECF No. 23), the parties address whether this case is moot as if their arguments apply equally to all of plaintiff's surviving claims. As a result, the Court does the same.

[3] It is not precisely clear how plaintiff's hoped-for plan-of-action for this case will result in a speedier resolution. Plaintiff wants the parties to be ordered to mediation. (ECF No. 66 at 11; ECF

defendant would not provide the standards for considering a new application, and because defendant would not commit to providing ways to cure any deficiencies in a new application (ECF No. 66 at 9-10)—but plaintiff does not contend that it would not need to file a new application.[4]

This is understandable, in light of another circumstance that plaintiff does not accurately dispute. Notably, the change in whom plaintiff plans to serve through its business. As defendant contends, plaintiff no longer intends to serve marijuana-related businesses. So it is clear, serving marijuana-related businesses was one of the purposes of plaintiff as originally formed. (ECF No. 1 at ¶ 15.) Now, however, plaintiff has agreed that it will "not serve marijuana-related businesses until there is a change in federal law that authorizes financial institutions to serve marijuana-related businesses." Case No. 17-cv-02361-CMA-KLM, ECF No. 1 at ¶ 41.

As far as the Court is concerned, that is a fundamental change to plaintiff's business model that leaves its original application for insurance moot. Plaintiff, of course, attempts to paint gloss

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No. 63.) There is, of course, no guarantee that mediation will result in an outcome plaintiff approves of however. Then what? Come back to this Court for rulings? Update plaintiff's original application for insurance? The former may have the probable advantage of the parties perhaps knowing what is required of them. But, there is no guarantee that, that potential certainty will result in the outcome plaintiff ultimately hopes for—an approved application for insurance—arriving any faster.

[4] To the extent plaintiff's argument, in a footnote, that relevant regulations envision a "back and forth" administrative process, is meant to contend that a new application need not be filed, the Court rejects it. First, no mention of the administrative process being "back and forth" is alleged in the Complaint. Second, the Court disagrees that, under the present circumstances, plaintiff's application for insurance is not an old vs. new application situation. As will be discussed in more detail *infra*, plaintiff's business, in terms of whom it is planning to serve, has changed, and changed quite substantially. As such, to say that plaintiff could tinker around with its old application to cure deficiencies is simply not accurate when the fundamental basis for any application is now different. Instead, plaintiff should have to file a new application that sets forth its altered business. Third, even if plaintiff could simply amend its original application for insurance, such an amended application for insurance is not currently before the Court. (And it does not appear that plaintiff has any intent to amend its application for insurance until this Court makes rulings or the parties engage in mediation.) Thus, the Court would still be left with the facts set forth in the original application for insurance, which are no longer the facts of this case. Why the Court should make rulings on an application for insurance that is out-dated is left unexplained by plaintiff.

on an ugly situation, but all of its efforts miss the mark. Plaintiff argues that its business model has not markedly changed. According to plaintiff, it still "intends to serve" marijuana-related businesses, and its business plan has always been to follow the law. (ECF No. 66 at 6-7.) That would be all well and good if it were not for plaintiff's express concession—in the case cited above and even in its response to the motion for judgment—that *it cannot commence to serve marijuana-related businesses unless and until it becomes lawful under federal law*. (*See id*. at 7.) In other words, although, as plaintiff contends, its business model may be "forward thinking" (*id*.), that is the precise problem with whether plaintiff's alleged injury is redressable *right now*. It is not. It may in the future should plaintiff *commence* serving marijuana-related businesses, but that is not plaintiff's business right now. Put another way, while there may be a controversy over whether defendant can insure a credit union intending to serve marijuana-related businesses, plaintiff is not currently one of those credit unions, and thus, the controversy is not live.[5]

As for plaintiff's contention that it has always planned to follow the law, that is also all well and good, but it does not change the fact that plaintiff will no longer serve marijuana-related businesses until it becomes legal to do so under federal law. To the extent that fact could be described as merely a clarification of plaintiff's business, it is still a substantial change given that plaintiff originally planned to serve marijuana-related businesses.

[5] Plaintiff uses the phrases "proposing to serve" and "intends to serve" throughout its response. (ECF No. 66 at 2, 6.) It is not entirely clear what plaintiff means in making these assertions, given that plaintiff concedes it cannot commence serving marijuana-related businesses right now. (*See id*. at 7.) Thus, the Court takes the phrases as meaning what the facts support: plaintiff hopes to serve marijuana-related businesses in the future, but does not currently.

III. Conclusion

For the reasons discussed herein, the Court GRANTS the motion for judgment (ECF No. 64), finding this case to be moot. As a result, this case is hereby DISMISSED AS MOOT. In addition, the motion to compel (ECF No. 63) is DENIED AS MOOT.

The Clerk is instructed to CLOSE this case.

SO ORDERED.

DATED this 25th day of June, 2018.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge