IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-cv-01633-RBJ-NYW

THE FOURTH CORNER CREDIT UNION,
a Colorado state-chartered credit union,

Plaintiff,

v.

FEDERAL RESERVE BANK OF KANSAS CITY,

Defendant.

PLAINTIFF THE FOURTH CORNER CREDIT UNION'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT FEDERAL RESERVE BANK OF KANSAS CITY'S MOTION TO DISMISS PURSUANT TO FED.R.CIV.P. 12(b)(6)

Plaintiff The Fourth Corner Credit Union ("TFCCU") hereby opposes Defendant Federal Reserve Bank of Kansas City's ("FRB-KC") motion to dismiss its original Complaint.[1]

Question Presented: Can a credit union chartered by a sovereign state for the express purpose of serving a social movement grounded in state's rights, personal liberty and wellness hold a master account at the nation's central bank? The affirmative answer to this question of federalism is found in the text of a federal statute that guarantees *all* financial institutions access to the nation's central bank.

[1] TFCCU has filed a First Amended Complaint so the record is clear as to the terms of TFCCU's charter. TFCCU will be filing a summary judgment motion. Respectfully, TFCCU believes the court's decision on legal issues raised by the parties should resolve this case on the merits. TTFCCU has consented to a mutual stay of discovery, as it is not necessary for a determination of matters of law.

The State Credit Union Charter: On November 19, 2014, the Colorado Division of Financial Services ("DFS") granted TFCCU state credit union *Charter No. 272* ("charter").[2] The charter is a grant of power and rights from a sovereign state[3] that "authorized [TFCCU] to conduct business pursuant to all of the powers conferred upon it by law."[4]

The Field of Membership: TFCCU is a multiple common bond credit union ("CU");[5] a CU whose field of membership ["FOM"] consists of more than one group, each of which has a "common bond of employment or association."[6] Primarily, TFCCU's FOM consists of persons that are members of lawful business associations and charitable foundations that support legalization of marijuana.[7] The vast majority of TFCCU's members will be supporters of

[2] C.R.S. §11-30-101 *et seq.* provides for the chartering of credit unions. The power of a state to charter a credit union ("CU") derives from the U.S. Const., amend. 10 which provides "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

[3] Colo. Const. art. XV, §2 states "the general assembly shall provide by general laws for the organization of corporations hereafter to be created." Colo. Const. art. XV, §3 gives the general assembly power to revoke or annul any charter of incorporation "whenever in their opinion it may be injurious to the citizens of the state."

[4] *See*, ***Exhibit A***, *State of Colorado, Charter No. 272*. Prior to issuing the charter the DFS Commissioner determined TFCCU's incorporators possessed the general character, fitness and qualifications to operate the credit union in a sound and lawful manner. *See* C.R.S. §11-30-101(3)(b). One of the powers conferred on TFCCU is the power "to engage in such activity in which such credit union could engage were it operating under a federal charter at the time, provided such activity is not prohibited by the laws of this state." *See* C.R.S. §11-30-104(1)(j).

[5] A CU is a member-owned, not-for-profit financial cooperative that provides financial services to its members. Membership is based on a common bond, a linkage shared by members who belong to specific organizations. CU's are economic democracy. Each CU member has equal ownership and one vote – regardless of how much money a member has on deposit. At a CU, every customer is both a member and an owner.

[6] C.R.S. §11-30-103(2).

[7] Specifically, TFCCU's FOM consists of: (a) persons and businesses that are or become members of the following business associations: Marijuana Industry Group, Medical Marijuana Industry Group, Cannabis Trade Council, National Cannabis Industry Association, Cannabis Business Alliance, National Organization for the Reform of Marijuana Laws ("NORML") and the Rocky Mountain Hemp Association; (b) persons or businesses that are or who become members of the following non-profit organizations and charitable foundations: Realm of Caring Foundation, the National Brain Tumor Society

legalization, *not* state-licensed marijuana-related businesses ("MRBs").[8] *If* authorized by federal law, state-licensed, compliant MRBs, will be eligible to apply for membership at TFCCU.[9]

Federal Guidance Authorizing Depository Institutions to Serve MRBs: Presently, formal federal guidance issued by the Department of Treasury, Financial Crimes Enforcement Network (FinCEN), entitled "BSA Expectations Regarding Marijuana-Related Businesses," FIN-2014-G001" (the "FinCEN guidance" or "guidance") authorizes all depository institutions to serve MRBs.[10] The guidance has been formally adopted by the: (1) Board of Governors of the Federal Reserve System; (2) Federal Deposit Insurance Corporation, (3) Comptroller of the

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and Project Wounded Ego; and (c) state-licensed marijuana-related businesses ("MRBs), *provided* that depository institutions are authorized by state and federal law to serve MRBs.

[8] Colo. Const., art. XVII, §14 provides for the medical use of marijuana for persons suffering from debilitating medical conditions. Colo. Const., art. XVII, §16 provides for personal use and regulation of marijuana. These provisions, and their related statutes, are not at issue in this case.

[9] There are approximately 1200 state-licensed MRBs that presently operate in Colorado, a percentage of which would apply to become TFCCU members. *If* all depository institutions are permitted by federal law to serve MRBs, TFCCU would be competing for business with institutions that elect to serve the industry. FRB-KC concedes banks are serving MRBs. See FRB-KC, MTD at Page 1, Fn.1. TFCCU, if issued a master account on nondiscriminatory terms, would be positioned to compete for a segment of the market share. There are hundreds of thousands of supporters of legalization who are members of, or who could join, one of the multiple business associations or charitable foundations within TFCCU's FOM and thereby be eligible to apply to become a TFCCU member; this category, made up of a rapidly increasing number of legalization supporters, is the vast majority of TFCCU's potential membership. At present, TFCCU has no members, as it has not commenced operations. ¶

[10] See ***Exhibit B***, *Timeline of Events – Exhibits Related to FinCEN Guidance Regarding Marijuana-Related Businesses*. Federal executive agency "guidance" has persuasive precedential effect to the extent it may be relied upon. *Id. at* ¶7. The authorities in ***Exhibit B*** state: (a) the guidance clarifies how financial institutions can provide services to MRBs, *Id.* at ¶6; (b) the guidance provides additional clarity for banks that do business with MRBs, *Id.* at ¶9; (c) the guidance clarifies that financial institutions can provide services to MRBs consistent with their Bank Secrecy Act obligations, *Id.* at ¶10; (d) the guidance is being used to provide much needed transparency into financial institution dealings with MRBs *Id.* at ¶12; (e) the guidance was incorporated into the Federal Financial Institutions Examination Council's Bank Secrecy Act/Anti-Money Laundering Examination Manual as a standard for use by bank examiners, *Id.* at ¶15; (f) the guidance allows banks to serve MRBs only if they conduct a level of due diligence into customers' activities sufficient to unearth any affront to federal interests, *Id.* at ¶17; (g) the guidance authorizes banks to do business with marijuana sellers in states that have legalized marijuana sales, *Id.* at ¶18; and (h) the guidance allows banks to work with MRBs that are operating in accordance with state laws and regulations, *Id.* at ¶19.

Currency, and (4) National Credit Union Administration – *all* of the federal financial agencies. The law in this area is evolving. TFCCU only seeks to serve MRBs *if* authorized by law. TFCCU's policies on serving MRBs will evolve as federal law evolves.

The Master Account: After receiving its charter and Routing Transit Number ("RTN"),[11] TFCCU completed standard board resolution and authorization forms to establish a master account[12] at FRB-KC pursuant to The Depository Institutions Deregulation and Monetary Control Act of 1980 ("MCA"),[13] 12 U.S.C. §248a(c)(2), which states "[a]ll Federal Reserve bank services . . . shall be made available to nonmember depository institutions . . ." ("the mandatory access provision" of the MCA).[14] FRB-KC is a Federal Reserve Bank; a quasi-governmental entity, controlled by private commercial member banks in the Tenth District.[15] As a state

[11] "An RTN can be issued to a 'Financial Institution' by the ABA Registrar of Routing Numbers if it is eligible for a master account at a Federal Reserve Bank." *See* Federal Reserve Banks, Operating Circular 1, Account Relationships, (Effective February 1, 2013), Page 3, fn. 5.

[12] A "Master Account" is the record of financial rights and obligations of an Account Holder and the Administrative Reserve Bank" ("ARB"). Debit and credit transaction activity between financial institutions is settled in the Master Account. FRB-KC is TFCCU's ARB because TFCCU is located in the Tenth District of Federal Reserve System.

[13] The MCA is codified as an amendment to the Federal Reserve Act, 12 U.S.C. §226. The FRA consists of 31 sections. Primarily at issue in this case is Section 11A, entitled *Pricing of Services*, 12 U.S.C. §248a. "With the passage of the MCA, the Fed was required to price most of its payments services and to make them available to all depository institutions, not just members." *See* T*he Evolution of Monetary Policy and the Federal Reserve System Over the Past Thirty Years: An Overview*, Lynn Elaine Browne, New England Economic Review, January/February 2001, at Page 8.

[14] The Federal Reserve Act ("FRA") grants a Reserve Bank "all powers specifically granted" in the FRA "and such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by" the FRA. 12 U.S.C. §341.

[15] Congress' power to charter the Reserve Banks derives from the Necessary and Proper Clause. U.S. Const. art. I, §8; *McCulloch v. Maryland*, 17 U.S. 316 (1819). There are 12 Reserve Banks located in different regions across the country. Each Reserve Banks is subject to the supervision of a nine-member board of directors. Six of the directors are elected by the private commercial member banks of the respective Federal Reserve District, and three of the directors are appointed by the Board of Governors of the Federal Reserve System. Directors are responsible for the administration of their Reserve Bank operations. In each Reserve District, private commercial banks that are members of the Federal Reserve System own the stock of their District's Reserve Bank and elect the majority of the Reserve Bank's board of directors. *See* http://www.federalreserve.gov/aboutthefed/directors/about.htm.

chartered CU, TFCCU is a "financial institution" or "depository institution." In the context of a master account, FRB-KC is a customer service provider; TFCCU is a customer. FRB-KC is not a supervisor or regulator of TFCCU; those functions are performed by Colorado DFS. A master account is an essential facility under antitrust laws. There is no application form, nor any substantive submittals required to obtain a master account.[16] Entitlement to a master account hinges *solely* upon establishing the existence of a state or federal charter. Issuance of a master account is a routine process. According to the *one page* Master Account Agreement, it "may take 5-7 business days" for the account to be established.

Importance of a Master Account: Without a master account, TFCCU cannot access the nation's centralized payments system; it cannot receive Reserve Bank services essential for it to operate, such as check clearing and collection services, wire transfer services, and automated clearinghouse services. Without the services of the nation's central bank, TFCCU's state charter is a nullity; it cannot compete with the private member banks that control the Reserve Banks.[17]

FRB-KC's Refusal to Honor Colorado's Charter: FRB-KC denied TFCCU a master

[16] For instance, TFCCU is not required to share its business plan with FRB-KC because it would be akin to divulging trade secrets to a competitor. Competition between banks and credit unions is legendary; federal lawsuits settled by congressional action bear testimony to its ferocity. *See*, https://www.stlouisfed.org/publications/regional-economist/october-2003/credit-unions-make-friendsbut-not-with-bankers

[17] In its Initial Rule 26(a)(1) Disclosures, FRB-KC states Don Childers, President of the Colorado Banker's Association, has knowledge of TFCCU's "application to the FRB-KC for a master account" and "the controversy surrounding the formation of the TFCCU." Rival member banks were stripped of power to decide if CU's got access to essential Reserve Bank services with the passage of the MCA. The role of the President of the member banks' trade association in TFCCU's private request for a master account and the feigned "controversy" over its charter is suspect. Member bank involvement in requests by competitors for access to Reserve Bank services was ended by the MCA. Prior to the MCA, member banks controlled the essential facility of the payment system. They used control of the payment system as a bottleneck to prevent entry of competitors into the market until the U.S. Department of Justice ended that practice with antitrust enforcement actions in 1977. Congress legislatively ended the anti-competitive practice with the passage of the MCA in 1980.

account because of TFCCU's *express purpose* to serve supporters of legalization, and MRBs - *if* federally authorized. It claims this express purpose *invalidates* the Colorado charter. FRB-KC posits TFCCU's politically controversial mission presents an undefined risk to the nation's payment system. FRB-KC's premise is the fledgling CU will force its will on the nation's highly regulated centralized payment system by taking deposits from MRBs in open defiance of federal law. FRB-KC asserts it has unbridled discretion in deciding which depository institutions get access to the essential system. This case presents a clash of sovereignty over the validity of a state charter; a head-on collision between Federal Reserve Wall Street member banks and Main Street. Indeed, it is Colorado's sovereignty that is at stake here.[18]

The Action to Enforce Mandatory Open Access: TFCCU filed this action for declaratory and injunctive relief seeking an enforcement order that requires FRB-KC issue a master account to TFCCU pursuant to the mandatory access provision of the MCA.[19] If

[18] "In order to ensure the protection of our fundamental liberties the Constitution establishes a system of dual sovereignty between the States and the Federal Government. The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages, such as a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society and increased opportunity for citizen involvement in democratic processes. Furthermore, the Framers observed, the compound republic of America provides a double security to the rights of the people because the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments." *Wythe v. Levine*, 555 U.S. 555, 584, (2009) (internal citations omitted).

[19] FRB-KC asserts TFCCU failed to address the standards necessary for injunctive relief. In that this case presents a request to enforce the MCA, a federal statute, the test for injunctive relief is not the general one, as equitable discretion is controlled by the terms of a statute. FRB-KC, MTD. P. 9. Fn. 7. "[A] court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation. . . Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought. Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute. Their choice (unless there is statutory language to the contrary) is simply whether a particular means of enforcing the statute should be chosen over other permissible means; their choice is not whether enforcement is preferable to no enforcement at all." *See United States v. Oakland Cannabis Buyers Co-op*, 352 U.S. 483, 497 – 98 (2001) (internal citations omitted). Thus, *eBay Inc. v. MercExchange L.L.C.*, 547 U.S. 388, 391 (2006) is inapposite.

enforcement is ordered FRB-KC and TFCCU would execute a standardized Master Account Agreement in which TFCCU would be legally and contractually bound to comply with "the provisions of all operating circulars of each Federal Reserve Bank . . . as the circulars may be amended from time to time."[20] These circulars contain federally established terms of use uniformly applicable to all federal or state chartered institutions. TFCCU seeks equal access, non-discriminatory treatment and equal justice under law. As rules regarding the use of the nation's payments system to serve or not to serve MRBs evolve, so too will the business practices of TFCCU. TFCCU will conform to the rules, not break them. It seeks to enforce its right to be born; to grow up to be an innovative, compliance-centric, member-focused, democratically run institution, in keeping with the character of its charter.

FRB-KC's Affirmative Defenses Raised by Motion: FRB-KC has moved this court to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) based upon three affirmative defenses:[21] (1) federal preemption of TFCCU's state charter as being in irreconcilable conflict with the Controlled Substances Act ("CSA"), 21 U.S.C. §801 *et seq.*; (2) unclean hands arising from an illegal purpose to serve MRBs; and (3) FRB-KC's claim to unbridled discretion in the issuance of a master account under Section 13 of the Federal Reserve Act, 12 U.S.C. §342.

The Federal Preemption Defense: FRB-KC asserts the sovereign act of Colorado, taken pursuant to the Colorado Credit Unions Article, C.R.S. §30-11-101 *et seq.*, in granting the

[20] *See*, Federal Reserve Bank, Operating Circular 1, Appendix 1, Master Account Agreement (Revised September 2011).

[21] A complaint may be subject to dismissal under Rule 12(b)(6) only when an affirmative defense appears on its face. See *Jones v. Bock*, 549 U.S. 199, 212-15 (2007). To survive a motion to dismiss plaintiff must assert a plausible claim; one that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The First Amended Complaint forecloses non-textual inferences of inequity FRB-KC has sought to draw between the lines.

charter that authorizes TFCCU to conduct business "pursuant to all of the powers conferred upon it by law" is preempted by (invalidated by) the federal CSA. FRB-KC's preemption defense is based upon the argument that it is *physically impossible* for TFCCU to comply with the terms of its state charter and the federal CSA (impossibility preemption) and/or that the charter presents an *obstacle* to the accomplishment and execution of the full purposes and objectives of Congress under the CSA (obstacle preemption).[22]

RESPONSE: TFCCU avers: (a) FRB-KC does not have standing to raise a constitutional challenge because it has not met its burden of establishing its claimed injury is personal, particularized, concrete, and otherwise judicially cognizable;[23] (b) there is no conflict between the state charter which authorizes *lawful* activity and the federal CSA that triggers preemption analysis;[24] (c) a conflict between federal financial crime statutes and federal executive agency policy guidance does not trigger preemption analysis;[25] (d) formally adopted

[22] TFCCU's charter authorizes it to exercise powers conferred by law. ***See Exhibit A.*** TFCCU's purpose is to use its charter to build a safe and sound financial institution that unites members from multiple associations that support legalization. MRBs will be eligible for membership *if* authorized by federal law.

[23] FRB-KC does not have standing to raise a constitutional challenge of the federal stance on banking MRBs because it has not met its burden of establishing its claimed injury is personal, particularized, concrete, and otherwise judicially cognizable. See *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997). The abstract conflict between the federal guidance on banking MRBs and the federal financial crime statutes is within the constitutional sphere of the executive and legislative branches of government and is not judicially cognizable.

[24] TFCCU's charter authorizes it to act pursuant to powers conferred by "law." The word "law" means *both* state and federal law. See *Coats v. Dish Network*, LLC, 350 P.3d 849, 852 (Colo. 2015) (commonly accepted meaning of the term "lawful" is that which is permitted by law or, conversely, that which is not contrary to, or forbidden by law). TFCCU's business plan is to follow the law. Any other plan would be ill advised and doomed for failure.

[25] The FinCEN guidance that authorizes banks to serve MRBs conflicts with federal financial crime statutes. *See* ***Exhibit B***. See also James M. Cole, Deputy Attorney General, U.S. Department of Justice, "*Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes*" (February 14, 2014), *Id.* at ¶8. A conflict between federal law and federal agency guidance does not trigger preemption analysis. See *Grier v. American Honda Motor Co., 529 U.S. 861 (2000).* Preemption analysis is triggered by an irreconcilable conflict between a state law and a federal law.

federal executive agency guidance authorizes all depository institutions to provide banking services to MRBs, however, interpretation or enforcement of the guidance is *not* before the court;[26] (e) it is not physically impossible for TFCCU to comply with state and federal law;[27] (f) if TFCCU is to feasibly operate it is impossible for TFCCU *not to comply* with both laws; as compliance is a condition to the use of federally governed Reserve Bank services on the same legal and contractual basis as all institutions;[28] (g) if obstacle preemption analysis is undertaken, the state charter does not present an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the CSA; rather, *a* purpose that underlies the valid charter facilitates the accomplishment of expressly stated federal policy objectives that seek

[26] FRB-KC's preemption defense seeks to shut down all banking by MRBs on constitutional grounds. The enforcement of the FinCEN guidance that authorizes all banks to serve MRBs is *not* before the court. The only relief sought is a master account. Courts should not give consideration to constitutional questions unless such consideration is necessary to the determination of a real and vital controversy between the litigants in the particular case before it. *County of San Diego v. San Diego NORML*, 165 Cal.App.4th 798, 814 (2008) (internal citations omitted). Consonant with well-settled principles of judicial restraint a court should avoid expansive constitutional pronouncements that inevitably judge future controversies and may have unforeseen and questionable consequences in other contexts. *Id.* at 831. It is the duty of a federal court, whenever possible, to minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to serve as a laboratory in the trial of novel social and economic experiments without risk to the rest of the country. *U.S. v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 502 (2001) (Justice Stevens concurring) (internal citations omitted).

[27] There is no conflict between TFCCU's charter and the CSA. TFCCU will not serve the MRB sequent of its prospective field of membership unless federally authorized. TFCCU can comply with the CSA and the terms of its charter that only confers power authorized by law. "Impossibility preemption is a demanding defense." *Wyeth v. Levine*, 555 U.S. 555, 573 (2009). TFCCU can comply with both laws by refraining from serving MRBs until authorized by federal law. For example, in *Barnett Bank v. Nelson*, 517 U.S. 25, 27 (1996), the question was whether a federal statute that permits national banks to sell insurance in small towns pre-empts a state law that forbids them to do so. Although the two statutes where logically inconsistent, the Court held that it was not physically impossible to comply with both. *Id.* at 31. A national bank could simply refrain from selling insurance, just as TFCCU can refrain from serving MRBs.

[28] The nation's central bank is the most regulated and supervised financial system in the free world. It would not be possible, with red flags flying, to openly use the system in violation of its terms of use, at least not for long. Defiance of federal law was never part of TFCCU's plan. TFCCU's board members are too smart and honorable to chart such a ruinous course.

transparency and reporting on MRBs;[29] and (h) the vital purpose to organize legalization supporters as members of a financial cooperative is constitutionally protected activity that does not conflict with the CSA.

The Facilitation of Criminal Activity Defense: FRB-KC asserts TFCCU is a criminal wrongdoer with unclean hands that seeks the assistance of this federal court to aid in the commission of a federal crime and injure the public. The argument seeks to incriminate TFCCU in the eyes of this court based upon the premise that TFCCU, as a rogue institution chartered by a rogue state, could prospectively use its charter and master account to serve MRBs in open defiance of federal law.[30] This defense is premised upon the dismissive assertion that guidance adopted by all of the federal financial agencies that authorizes all regulated institutions to serve MRBs to further federal policy objectives *does not change* the legal analysis.[31]

Response: TFCCU avers: (a) it has engaged in no illegal act, nor does it propose to

[29] If banking MRBs is authorized by FinCEN guidance, following the guidance is not an obstacle to a federal purpose. The federal executive agencies made a policy choice, *to wit*: illegal trafficking in controlled substances and narco-terrorism are better controlled by transparency and reporting of regulated MRB financial transactions to law enforcement than by choking MRBs out of the regulated financial system. FRB-KC must respect this federal policy choice. "The 'positive conflict' phrase in the CSA's preemption section, 21 U.S.C. §903, precludes applying obstacle preemption." *People v. Crouse*, 2013 COA 134 (2013) (no federal court has addressed the viability of obstacle preemption under the CSA). The case for federal preemption is particularly weak where executive agencies acting under delegated authority from Congress indicate the awareness of the operation of state law in a field of federal interest, and nonetheless decide to stand by both concepts and to tolerate whatever tension there is between them. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-167 (1989).

[30] FRB-KC argues Colorado's sovereign act of chartering TFCCU to organize legalization supporters is akin to Colorado enacting "a scheme to allow trade with North Korea in derogation of federal laws." *See* FRB-KC MTD, P.8. The comparison of a social movement using democratic means to end prohibition with a communist dictatorship engaged in crimes against humanity establishes FRB-KC does not understand democracy, or Colorado. FRB-KC proceeds to further disrespect the dignity of the state by arguing FRB-KC should not be forced to make federal "services available to all comers;" because a rogue state like Colorado could jeopardize the nation's monetary system "through the quality of the institutions to which they granted credit union charters." *See* FRB-KC, MTD, P.13. These are corrupt arguments. This overdrawn picture is in reality a perversion of the facts, the only effect of which is to divert attention from the real question presented and to prejudice its impartial consideration.

[31] *See* FRB-KC, MTD, P. 7.

engage in any illegal act; it harbors no illegal purpose or bad intent, as *prospectively* it will only offer services to MRBs *if* authorized by federal law;[32] (b) FRB-KC seeks a back door advisory opinion on the conflict between federal financial crime laws and federal executive agency guidance that authorizes banks to serve MRBs, for its own protection, (*i.e.* the protection of its controlling private commercial member banks) not based upon an actual controversy presented by this case;[33] (c) there is no direct connection between any hypothetical/prospective illegal act of TFCCU and the obligation sued upon; (d) no wrongful conduct of TFCCU has changed the equitable relationship between TFCCU and FRB-KC or injured FRB-KC in any way; (e) TFCCU's plea seeks the mandatory issuance of a master account; it does not invoke the equitable powers of this court to facilitate criminal activity;[34] (f) TFCCU has *not* requested this court order FRB-KC to permit TFCCU to serve MRBs; that is a policy decision controlled

[32] TFCCU does not intend to serve the MRB segment of its prospective field of membership unless authorized by federal law. It has no illegal purpose. FRB-KC has not been injured. There is no connection between any illegal act and relief sought. "Where asserted, unclean hands must be pled with the specific elements required to establish the defense. These elements include a showing that the party seeking equitable relief is (1) guilty of conduct involving fraud, deceit, unconscionability, or bad faith, (2) directly related to the matter at issue, (3) that injures the other party, and (4) affects the balance of equities between the litigants." *Purzel Video GmbH v. Smoak*, 11 F.Supp.3d 1020 (D. Colo. 2014) (internal citations omitted). FRB-KC cannot establish the unclean hands defense. Where a party acts fairly and in good faith as to the controversy at issue there is no transgression of equitable standards of conduct to invoke the unclean hands defense. *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 815 (1945) (finding unclean hands where inequitable conduct impregnated the entire cause of action). TFCCU's transparent conduct meets the requirements of conscience and good faith.

[33] The conflict between federal financial crime statutes and the guidance on banking MRBs sends a mixed message to all banks, including FRB-KC; it does not render TFCCU's efforts to follow the law and evolve as the law evolves an illegal purpose. Congress should sort this out, legislatively.

[34] The court would not be facilitating the commission of any illegal act by ordering FRB-KC to grant TFCCU a master account; such order would only give TFCCU access to the nation's central bank on legal and contractual terms applicable to all institutions. This case is distinguishable from *In re: Arenas*, 524 B.R. 887 (D. Colo. 2014) where granting bankruptcy relief "directly involves a federal court in administering the fruits and instrumentalities of federal criminal activity" in a way that inextricably "involves the Court and the Trustee in the Debtors' ongoing criminal violation of the CSA." *Id.* at 891. It is also distinguishable from *In re: Rent Rite Super Kegs West, Ltd.*, 484 B.R. 799 (D. Colo. 2012) where the debtor was involved in an ongoing violation of the CSA such that the debtor's criminal conduct impacted "the ability of a chapter 7 trustee to administer a chapter 7 estate." *Id.* at 810.

exclusively by the federal government; (g) Colorado DFS has not required TFCCU to serve MRBs; TFCCU's charter restricts its activities to "powers conferred upon it by law;" neither the charter or Colorado law permit TFCCU to violate federal law; and (h) the use that will be made of TFCCU's charter and master account is a legal, federally authorized use.

The Unbridled Discretion Defense: FRB-KC asserts that Section 13 of the Federal Reserve Act (12 U.S.C. §342) gives FRB-KC (*i.e.* the private commercial member banks in the Tenth District) unbridled discretion in deciding which institutions gain access to essential services FRB-KC is mandated by the MCA, Section 11A of the Federal Reserve Act, (12 U.S.C. §248a), to provide to all depository institutions.

Response: TFCCU avers: (a) the plain language of the MCA states "[a]ll Federal Reserve bank services . . . *shall* be made available to nonmember depository institutions . . . " (*emphasis supplied*); the phrase "shall be made available" is language of command that admits no discretion on the part of the Reserve Banks to carry out the mandate from Congress; the language used is categorical, and unambiguously prescribes a mandatory procedure;[35] (b) if there is ambiguity as to Congressional intent, legislative history and secondary authority establish Reserve Banks are *required* to provide access to Reserve Bank services to all depository institutions on nondiscriminatory terms;[36] (c) unbridled discretion in Reserve Banks to act as gatekeeper to decide which institutions have access to the nation's payment system (*if* it existed,

[35] The text of the MCA mandates FRB-KC issue a master account to TFCCU. It admits of no discretion. The analysis begins and ends with the text.

[36] *See* ***Exhibit C****, Selected Chronological Excerpts from the Congressional Record Relating to the Introduction, Debate and Passage of the Depository Institutions Deregulation and Monetary Control Act of 1980.* The legislative history fully supports the mandated open access unambiguously expressed in the text. The MCA ended country club access and pricing policies. *See also* ***Exhibit D,*** *Secondary Authority on Mandatory Access Provision of the Monetary Control Act.* The secondary authority fully supports the mandated open access unambiguously expressed in the text.

which it does not) would be an unconstitutional standardless delegation of legislative authority over chartering in violation of U.S. Const. art. I, §1;[37] (d) the discretion granted to Reserve Banks in Section 13 of the Federal Reserve Act relates to what type of financial instruments it *may receive*, not which depository institutions are entitled to essential Reserve Bank services;[38] (e) FRB-KC has not identified any statutory delegation of authority, any standards by which its claimed discretion would be exercised, the existence of any rules in place to guide the exercise discretion, or a *single instance* post-MCA in which it has exercised the claimed discretion to determine access – all facts that evidence no discretion exists;[39] (f) FRB-KC's argument that a

[37] A standardless delegation of discretion to the Reserve Banks to decide who gets to use the system would be an unconstitutional delegation of legislative power. When Congress confers decision-making authority upon agencies Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

[38] FRB-KC argues Section 13 (12 U.S.C.§342) gives it unbridled discretion to decide which institutions get *access to* essential Reserve Bank services, citing *Farmers and Merchants Bank of Monroe, N.C. v. Federal Reserve Bank of Richmond*, 262 U.S. 649, 662 (1923). In *Farmers' and Merchants*, at issue was whether a state chartered bank could charge its customers a fee for its service in collecting a check. FRB-Richmond argued "that Congress had imposed upon them the duty of making par clearance and collection of checks universal in the United States" and that state chartered banks could not charge a fee for their service in collecting checks. *Id.* at 657. SCOTUS held "neither section 13, nor any other provisions of the Federal Reserve Act, imposes upon reserve banks any obligation to receive checks for collection. The act merely confers authority to do so." *Id.* at 662. The ruling granted state banks the ability to charge customers for check collection. Section 13 (12 U.S.C.§342) deals with the type of instruments Reserve Banks "may receive," not the type of institutions to whom they must provide access to essential services. 57 years after the decision in *Farmers' and Merchants'*, Congress mandated Reserve Banks provide access to its services to all depository institutions on nondiscriminatory terms by adopting the MCA inserted at Section 11A of the Federal Reserve Act, (12 U.S.C. §248a), to address pricing and access. Pricing and access go hand in hand – because a depository institution can be denied access by being priced out of the market, as well as by being frozen out. FRB-KC's warped construction of Section 13 as its grant of discretion to determine which institutions get access leads to the illogical result FRB-KC could, in its discretion, refuse to serve the United States or other Reserve Banks.

[39] FRB-KC argues that the MCA only laid out a "schedule of fees" but did not provide for mandatory access for all depository institutions. At page 13, footnote 8 of its motion to dismiss FRB-KC cites to an article entitled "*The Monetary Control Act and The Role of the Federal Reserve in the Interbank Clearing Market*" to support its argument the MCA did not require equal access. In the fist sentence this secondary authority is *directly* contrary to the proposition for which it is cited. Therein, it is stated that the MCA "required services which had previously been made available free of charge to Federal Reserve member

requirement it serve "all comers" places too much risk on the Reserve Banks because a rogue state could charter a rogue institution - disregards the law, to wit: (1) in the MCA Congress established financial reserve and reporting requirements for all institutions using Reserve Bank services to protect it from risk;[40] and (2) FRB-KC must respect state sovereignty under the Tenth Amendment by not acting to nullify state charters; (g) unbridled discretion to act as gatekeeper of the nation's central bank was not delegated by Congress to Reserve Banks – an independent entity controlled by private commercial member banks; and (h) anti-competitive conduct of member banks in controlling the pre-MCA "country club" access and pricing model was the primary evil the MCA (Section 11 of the Federal Reserve Act, 12 U.S.C. §248a) was enacted to correct.

CONCLUSION

FRB-KC'S motion to dismiss pursuant to Fed.R.Civ. P. 12(b)(6) should be denied, whether the motion is addressed to the original Complaint or the First Amended Complaint. A denial would dispense with all legal affirmative defenses; the denial of FRB-KC's affirmative defense of discretion in the issuance of a master account would represent a legal ruling FRB-KC has *no* discretion, which in turn would entitle TFCCU to a legal ruling FRB-KC must issue TFCCU a master account as a matter of law. TFCCU is poised to move for summary judgment

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banks, to be priced competitively and made available to all depository institutions on equal terms." The link provided by FRB-KC first connects to the Federal Reserve Bank of Richmond web site wherein it is stated "The Monetary Control Act of 1980 radically changed the role of the Federal Reserve in the interbank clearing market. Among other things, the Act required the Fed to give all depository institutions equal access to its payments services and to price those services competitively." *See* FRB-KC's misquoted cited link at:
https://www.richmondfed.org/publications/research/economic_review/1985/er710403

[40]Congress required depository institutions using Reserve Bank services have financial reserves to control risk. FRB-KC is not a gatekeeper empowered to make standardless case-by-case risk assessments that will determine who becomes its competitors.

that as a matter of law FRB-KC has no discretion in the issuance of a master account. Respectfully, the court should address the legal issue of *discretion v. no discretion* – which is at the heart of the claim and the defense in this action - in the manner it deems most judicially efficient. In the event the court determines FRB-KC has discretion, a trial would be necessary to determine if FRB-KC made the correct decision in denying TFCCU a master account.

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Respectfully submitted,

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 30th day of September 2015, a true and correct copy of the foregoing was filed electronically. Notice of this filing will be sent to all counsel of record by the operation of the Court's CM/ECF system.

s/ Mark A. Mason
Mark A. Mason