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 MOTION FOR SUMMARY JUDGMENT PURUSANT TO FED.R.CIV.P. 56

Pursuant to Federal Rule of Civil Procedure 56, Plaintiff, The Fourth Corner Credit Union ("TFCCU"), respectfully moves this Court for Summary Judgment on the declaratory and injunctive relief claim asserted by TFCCU in its First Amended Complaint against Defendant Federal Reserve Bank of Kansas City ("FRB-KC"). TFCCU seeks a declaration and injunction requiring that FRB-KC issue a master account to TFCCU and thereby provide Federal Reserve Bank payment services to TFCCU pursuant to the Depository Institutions Deregulation and Monetary Control Act of 1980 ("MCA"), 12 U.S.C. §248a.

Question Presented: Is a credit union chartered by a sovereign state entitled, as a matter of law, to a master account at the nation's central bank? The affirmative answer to this question is found in the text of a federal statute that guarantees *all* depository institutions access to the essential payments services provided by the nation's central bank. *See* 12 U.S.C. §248a(c)(2).

Statement of Undisputed Facts: Colorado is a sovereign state. Colorado issued a

credit union charter to TFCCU. TFCCU, by virtue of its charter, is a depository institution. TFCCU requested that FRB-KC issue a master account to TFCCU so it could thereby access essential Federal Reserve Bank ("FRB") payments services. FRB payments services give a depository institution the ability to effectuate the electronic transfer of funds. FRB-KC refused to provide payments services to TFCCU. TFCCU asserts FRB-KC is mandated by a clear statutory command to provide all depository institutions with access to FRB payment services pursuant to the MCA, 12 U.S.C. §248a. This is a case of statutory construction.

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").[1] The charter is a grant of power and rights from a sovereign state[2] that "authorized [TFCCU] to conduct business pursuant to all of the powers conferred upon it by law."[3]

The Field of Membership: TFCCU is a multiple common bond credit union ("CU");[4] a CU whose field of membership ["FOM"] consists of more than one group, each of which has a "common bond of employment or association."[5] Primarily, TFCCU's FOM consists of persons that are members of lawful business associations and charitable foundations that support

[1] 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."

[2] Colo. Const. art. XV, §2 states "the general assembly shall provide by general laws for the organization of corporations hereafter to be created."

[3] *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).

[4] 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.

[5] C.R.S. §11-30-103(2).

legalization of marijuana.[6] The vast majority of TFCCU's members will be supporters of legalization, *as opposed to* state-licensed marijuana-related businesses ("MRBs").[7] *If* authorized by federal law, state-licensed, compliant MRBs, will be eligible to apply for membership at TFCCU.[8]

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.[9] The guidance has been formally adopted by: (1) the Board of Governors of the

[6] 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 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.

[7] 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 articles and their implementing statutes are not at issue in this case.

[8] 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 or authorized by federal law to serve MRBs, TFCCU would be competing for business with other institutions that elect to serve the industry. FRB-KC concedes banks are serving MRBs. *See Docket Entry* 20, FRB-KC, MTD at P. 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.

[9] 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

Federal Reserve System; (2) the Federal Deposit Insurance Corporation, (3) the Comptroller of the Currency, and (4) the 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"),[10] TFCCU completed standard board resolution and authorization forms to establish a master account[11] at FRB-KC in order that it could receive FRB payments services pursuant to the MCA,[12] 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

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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.

[10] "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.

[11] 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. Federal Reserve Bank payment services are charged to the master account. FRB-KC is TFCCU's ARB because TFCCU is located in the Tenth District of Federal Reserve System. An exemplar of a Federal Reserve Financial Services master account statement is attached as ***Exhibit C.***

[12] The MCA is codified as an amendment to the Federal Reserve Act ("FRA"), 12 U.S.C. §226, *et seq.* 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. https://www.bostonfed.org/economic/neer/neer2001/neer101a.pdf

the MCA). FRB-KC is a Federal Reserve Bank, a "body corporate,"[13] granted a "franchise" from the federal government; a quasi-governmental entity, controlled by private commercial member banks in the Tenth District.[14] As a state 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;[15] it allows depository institutions to receive FRB payment services to effectuate the electronic transfer of funds. 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 ministerial process. According to the *one page* Master Account Agreement, it "may take

[13] A Federal Reserve Bank is "a body corporate" with the power "to sue and be sued." Its "franchise" lasts until dissolved by Act of Congress, or until forfeited "for violation of law." 12 U.S.C. §341. Congress mandated that there be an annual independent audit of the Board of Governors of the Federal Reserve System and of each Reserve Bank. 12 U.S.C. §248b.

[14] 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 Bank 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.

[15] See footnote 30, for the proposition electronic payments services are essential facilities under antitrust law.

[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 legislation bear testimony to its ferocity. *See* https://www.stlouisfed.org/publications/regional-economist/october-2003/credit-unions-make-friendsbut-not-with-bankers

5-7 business days" for the account to be established.[17]

Importance of a Master Account: Without a master account, TFCCU cannot directly access the nation's centralized electronic payment system. It cannot receive FRB payment services essential for it to operate, such as check clearing and collection services, wire transfer services, and automated clearinghouse services to effectuate the electronic transfer of funds. Without the critical services of the nation's central bank, TFCCU's state charter is a nullity. It cannot operate or compete for business with the private member banks that control the Reserve Banks.[18]

FRB-KC's Refusal to Honor Colorado's Charter: FRB-KC denied TFCCU a master account because of TFCCU's *express purpose* to serve supporters of legalization, and MRBs - *if* federally authorized.[19] It claims this express purpose *invalidates* the Colorado charter.[20] FRB-KC posits TFCCU's politically controversial mission presents an undefined risk to the nation's

[17] See below link to the one page Master Account Agreement form. https://www.frbservices.org/files/forms/account_services/pdf/master_account_agreement_oc1_app1_rv.pdf

[18] 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 privately controlled the essential facility of the electronic payments system. They used control of the electronic payments 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 anticompetitive practice with the passage of the MCA in 1980.

[19] *See Docket Entry 20*, FRB-KC, MTD, P.1, fn. 1. TFCCU filed a First Amended Complaint (*Docket Entry 24*) and a Memorandum of Law In Opposition to FRB-KC's Motion to Dismiss (*Docket Entry 23*). The First Amended Complaint mooted the motion to dismiss directed to the original Complaint. TFCCU anticipates FRB-KC will renew its previously filed motion to dismiss to assert legal defenses in response to the First Amended Complaint.

[20] *See Docket Entry 20*, FRB-KC, MTD, P.8.

payments system.[21] FRB-KC asserts it has unbridled discretion in deciding which depository institutions get access to the essential system.[22] 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.

The Action to Enforce Mandatory Open Access: TFCCU filed this action for declaratory and injunctive relief seeking an enforcement order that requires FRB-KC to issue a master account to TFCCU pursuant to the mandatory access provision of the MCA.[23] If 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

[21] *See Docket Entry 20,* FRB-KC, MTD, P.13.

[22] The reason TFCCU refers to the claimed discretion in the issuance of a master account as "unbridled" is FRB-KC has not identified any standards used to exercise discretion, or any procedures by which a review of a master account request would take place. There are no standards and no procedures because the Reserve Banks do not have discretion in the issuance of a master account. FRB-KC points out that its actions relative to TFCCU's request for a master account involved "significant communication with and input from FRB-KC's legal counsel." *See Docket Entry 21,* FRB-KC, Motion to Stay, P.4. Despite the army of lawyers at FRB-KC no reference to any standards or procedures was cited by FRB-KC to support its claim to discretion. *See Docket Entry 20.* Moreover, no standards or procedures related to the exercise of discretion in issuing a master account appear in the thousands of pages of materials published online, or in the Federal Register.

[23] FRB-KC asserts TFCCU failed to address the standards necessary for injunctive relief in its original Complaint. *See Docket Entry 20*, FRB-KC, MTD. P.9, Fn. 7. 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. "[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.

provisions of all operating circulars of each Federal Reserve Bank."[24] These circulars contain federally established terms of use of the nation's electronic payment service uniformly applicable to all federal or state chartered institutions. The master account is necessary for TFCCU to receive essential Federal Reserve Bank electronic payments services. TFCCU would then order explicitly priced FRB payment services; these services settle payments in the master account.[25] TFCCU seeks equal access, non-discriminatory treatment and equal justice under law.

FRB-KC's Affirmative Defenses Raised by Motion: FRB-KC moved to dismiss the original Complaint pursuant to Fed. R. Civ. P. 12(b)(6) based upon three affirmative defenses it asserts should be decided by the court as a matter of law:[26] (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. TFCCU agrees these affirmative legal defenses present pure questions of law, but asserts that as a matter of law FRB-KC cannot prevail on any defense.[27]

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[24] *See*, Federal Reserve Bank, Operating Circular 1, Appendix 1, Master Account Agreement. https://www.frbservices.org/files/forms/account_services/pdf/master_account_agreement_oc1_app1_rv.pdf

[25] *See* ***Exhibit C***, exemplar of a Federal Reserve Bank master account statement.

[26] 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 sought to draw between the lines of the original Complaint.

[27] *See Docket Entry 23*, TFCCU's memorandum in opposition to FRB-KC's motion to dismiss. It is anticipated the Court will rule on FRB-KC's legal defenses in the context of a renewed motion to dismiss directed to the First Amended Complaint (*Docket Entry 24*) or if asserted in response to this Motion for Summary Judgment.

Claim and Defenses Present Purely Legal Questions: "Questions of statutory construction and legislative history traditionally present legal questions properly resolved by summary judgment." *Union Pacific Land Resources Corporation v. Moench Investment Company, Ltd.*, 696 F.2d 88, fn. 5 (10th Cir. 1982), *cert. denied*, 460 U.S. 1085. "Statutory construction is a matter of law to be decided by the court." *Bowe v. SMC Elec. Products, Inc.*, 945 F.Supp. 1482, 1484 (D.Colo. 1996) citing *Southern Ute Indian Tribe v. Amoco Production Co.*, 874 F.Supp. 1142, 1152 (D.Colo. 1985). "[S]ummary judgment is proper when, as here, neither party contends that a genuine issue exists as to any material fact and none is present." *State of Okl. ex rel. Dept. of Human Services v. Weinberger*, 741 F.2d 290, 291 (10th Cir. 1983) (*internal citations omitted*).[28]

[28] FRB-KC has conceded this case presents purely legal issues that can be decided by the court without discovery. FRB-KC argues in its motion to stay discovery that "no beneficial purpose would be served by allowing discovery" because its defenses present questions of law that "could end this lawsuit altogether." *See Docket Entry 21,* FRB-KC, Motion to Stay, P. 2. FRB-KC argues its affirmative defenses of (1) preemption, (2) illegality and (3) its statutory construction defense that asserts unbridled discretion in the issuance of a master account, are all matters of law under Fed.R.Civ.P. 12(b)(6). *Id.* at P. 5. FRB-KC argues that under TFCCU's legal theory "there are no real fact issues and no basis for extensive discovery. Thus, a stay of discovery should not materially delay the progress of the case under Plaintiff's own theory." *Id.* TFCCU has consented to a mutual stay in discovery; and requested that this court stay discovery until it rules on TFCCU's motion for summary judgment. *See Docket Entry 25*, TFCCU's response to motion to stay. The purpose of a summary judgment motion is to assess whether trial is necessary. *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). It is TFCCU's legal position that discovery and a bench trial would only be necessary *if* the court determines as a matter of law that FRB-KC has discretion in the issuance of a master account. If that be the ruling, discovery would then need to be had into the (a) standards, if any, upon which the decision was based; (b) the procedures followed; and (c) the evidentiary bases for the denial. The production of documents and depositions would be necessary to prepare for a trial in which it is respectfully submitted that this Court would review the denial *de novo*, without any deference to the decision of FRB-KC, an independent Reserve Bank not entitled to the deference accorded to an administrative agency. If there be discretion there would exist genuine issues of material fact that would require discovery and preclude summary judgment. In its memorandum in opposition to FRB-KC's motion to dismiss, it is submitted that TFCCU effectively negated FRB-KC's defenses. *See Docket Entry 23.* It is respectfully submitted that a denial by the Court of FRB-KC's (renewed) motion to dismiss as to its third defense that claims discretion in the issuance of a master account *ipso facto* represents a ruling in favor of TFCCU on its statutory construction claim as it would represent a legal conclusion FRB-KC *does not have discretion* in the

Intent is Determined from Plain Meaning of Statute: In determining congressional intent, the court first looks to the language of the statute and assumes that its plain meaning accurately expresses the legislative purpose. *Bowe v. SMC Elec. Products, Inc.*, 945 F.Supp. 1482, 1484 (D.Colo. 1996), citing *United States v. James*, 478 U.S. 597, 604 (1986). "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (*internal citations omitted*). If a word of common use is contained in a statute, it is construed in its "natural, plain and ordinary significance." *Balanced Rock Scenic Attractions v. Town of Manitou*, 38 F.2d 28, 30 (10th Cir.), cert. denied, 281 U.S. 764. "The plain meaning of a word is not determined by reference to variations on its ordinary meaning, but by the ordinary meaning itself." *Southern Ute Indian Tribe*, 874 F.Supp. 1142, 1152 (D.Colo. 1995). In determining the ordinary meaning of a word it is appropriate to look to general dictionary definitions. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 617-618 (1944). "Statutes should be construed in a common sense fashion." *Southern Ute Indian Tribe*, 874 F.Supp. at 1152. The primary task in construing a statute is "to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." *Negonson v. Samuels*, 507 U.S. 99 (1993). If the language is clear, the analysis ends and the plain meaning must be applied. *Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1161 (10th Cir. 2011).

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issuance of a master account. TFCCU will not, in this memorandum in support of its motion for summary judgment rehash the arguments that negate FRB-KC's preemption and illegality defenses; those arguments are hereby incorporated herein by reference, and will be made in reply, if necessary.

Object and Policy of Law is Important to Determine Legislative Intent: To determine legislative intent the court should pay due regard to the object in view by looking first to the whole statute. "[I]t is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law. . . " *Stafford v. Briggs*, 444 U.S. 527, 535 (1980), citing *Brown v. Duchesne*, 19 How. 183, 194, 15 L.Ed 595 (1857).

The Problem Resolved by the MCA: To determine the object and policy of the MCA it is useful to examine the problem or dispute the MCA was intended to resolve. Pre-MCA, in the late 1970s, the Federal Reserve Banks operated with an "extreme version of 'country club' pricing."[29] Member banks had access to Federal Reserve Bank services included in their membership dues; they charged non-members "for access to these free services." Also, large commercial banks privately controlled the evolving technology used to effectuate electronic payments. Member banks used their control of the Reserve Banks and their control of evolving electronic payment technology to engage in anticompetitive practices relative to nonmembers; they decided on what terms nonmembers got access to Federal Reserve Bank services, on what terms nonmembers got access to the evolving electronic payment technology, and arbitrarily, how much it cost to gain access. This gave rise to a heated dispute between member banks and

[29] "In essence, the Federal Reserve System operated with an extreme version of 'country club' pricing. In return for a stiff annual fee, based on size—the reserve requirement burden— each correspondent bank received an array of financial services, free of charge, and could charge its respondent banks for access to these free services. In a country club setting, this would be equivalent to free use of the golf course, the tennis courts, and the pool as well as free meals for both the member and all his guests, even though the member could charge his guests full price for each of these services. Thus, the value of free services could more than offset the burden of reserve requirements for some of the largest correspondent banks, while many smaller banks found membership a financial burden." *See The Role of the Federal Reserve in the Payments System* by Paul M. Connolly and Robert W. Eisenmenger. https://www.bostonfed.org/economic/conf/conf45/conf45f.pdf

small (nonmember) financial institutions. The United States Department of Justice brought enforcement actions to put an end to the violation of existing antitrust laws.[30] A compromise was reached. The Federal Reserve Banks would get into the interbank electronic payments business. They would explicitly price services, and make those services available to all depository institutions at a fair cost. To receive these services, all depository institutions would be required to hold reserves with the Federal Reserve Banks. The dispute was resolved by Congressional legislation - the MCA, 12 U.S.C. §248a. Rightfully, nonmember depository institutions wanted mandatory language clearly commanding Reserve Banks to provide all depository institutions access to Federal Reserve Bank payments services. Pre-MCA, those services were subject to the vicissitudes of the extreme country club pricing model; electronic payment services were the subject of anticompetitive practices.

The Eight Commandments of the MCA: The pre-MCA problem was that nonmember depository institutions wanted mandatory open access to essential electronic payment services at

[30] "The Justice Department's Antitrust Division sided with the thrift industry in the debate over the issues of access and pricing, arguing that any access policy that treated thrifts differently from banks violated existing antitrust laws. This argument was based on an established Access Principle, which the Justice Department explained as follows: 'Antitrust law requires that those who control an essential facility must grant access to it on reasonable and non-discriminatory terms to all competitors.'"https://www.richmondfed.org/~/media/richmondfedorg/publications/research/economic_review/1985/pdf/er710403.pdf "In the context of antitrust law, an 'essential' facility is one that provides a significant competitive advantage to any market participants that have direct access to that facility. No alternatives to the Federal Reserve's ACH system existed at that time. Moreover, it was argued that because the Federal Reserve did not charge explicit fees for these services, no competing private sector alternative was likely to develop. The Justice Department's view, therefore, was that the ACH system operated by the Federal Reserve was essential for purposes of antitrust law. On these grounds, it was argued that thrift institutions should be permitted direct access to ACH services on equal terms with commercial banks. Like thrift industry groups, the Justice Department favored the adoption of a system of nondiscriminatory fees for these services. The Justice Department's position was apparently based on the premise that thrifts should be permitted to compete directly with commercial banks on equal terms." *Id.* at Page 6-7.

fair prices. This is why the MCA, 12 U.S.C. §248a - the solution to the problem - contains eight (8) mandatory commandments from Congress to the Board of Governors of the Federal Reserve System. The Eight Commandments of the MCA are: (1) the Board "shall publish . . . a set of pricing principles;" (2) "the Board shall begin to put in effect a schedule of fees for such services;" (3) the "services which shall be covered" were enumerated; (4) "The schedule of fees prescribed . . . shall be based on" explicit pricing and open access; (5) "All Federal Reserve bank services . . . shall be explicitly priced;" (6) "All Federal Reserve bank services . . . shall be available to nonmember depository institutions;" (7) "services shall be priced at the same fee schedule applicable to member banks;" and (8) "nonmembers shall be subject" to the same terms and reserve requirements the Board may determine are applicable to member banks. *Excerpts from* 12 U.S.C. §248a.

Fight Over Control of the Nation's Electronic Payment System Settled by Congressional Mandate: The fight for control over the nation's electronic payment system was settled by Congress by way of the MCA. In the MCA, Congress used the word "shall" eight times in a single statutory section. It also used the word "prescribed." Nine commands. This plain language of command has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty that can be enforced. It is hard to envision a statutory section with more mandatory commands than 12 U.S.C. §248a. However, the MCA settled a dispute between *big member banks v. small depository institutions* fighting with each other over the *control of money*; thus the need for repetitive use of the word "shall." This fight over the ability to control the electronic transfer of money is perhaps the genesis of the title - the Monetary Control Act. The fight was settled, not unlike a playground dispute – everyone gets to

play and as such, the playing field was leveled. An Act that dealt with the control of money – could not be left to the discretion of a cartel of powerful member banks conflicted by self-interest. The mandatory language of command repetitively used by Congress in 12 U.S.C. §248a is entirely consistent with the ends and aims of the MCA; it forecloses discretion.

Use of the Mandatory "Shall" Eight Times in §248a is a Plain Congressional Mandate: The MCA's use of the mandatory "shall" eight times in §248a is a plain legislative command that Reserve Bank's must provide payment services to all depository institutions.[31] It is a "seemingly obvious rule" that:

> [u]nless Congress explicitly states otherwise, 'we construe a statutory term in accordance with its ordinary or natural meaning.' *FDIC v. Meyer*, 510 U.S. 471, 476, 114 S.Ct. 996, 127 L.Ed. 308 (1994). Thus, absent a congressional directive to the contrary, 'shall' must be construed as a mandatory command, see *American Heritage Dictionary* 1598 (4th ed. 2000) (defining 'shall' as (1)a. 'Something that will take place or exist in the future . . . b. Something, such as an order, promise, requirement or obligation: *You shall leave now. He shall answer for his misdeeds. The penalty shall not exceed two years in prison*'). If Congress desires for this Court to give 'shall' a nonmandatory meaning, it must say so explicitly defining the term 'shall' to mean something other than a mandatory directive. Indeed, Congress is perfectly free to signify the hortatory nature of its wishes by choosing among a wide array of words that do, in fact, carry such meaning: 'should,' 'preferably,' and 'if possible' readily come to mind.

Barnhardt v. Peabody Coal Co., 537 U.S. 149, 184 (2003) (Justice Thomas, dissenting). Congress' use of the word "shall" imposes "discretionless obligations." *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (requirement that Bureau of Prisons "shall" provide substance abuse treatment created a discretionless obligation). Use of the word "shall" in a statute indicates a legislative command. *United States v. Thoman*, 156 U.S. 353, 359-60 (1895). An instruction that comes in terms of the mandatory "shall" normally "creates an obligation impervious to

[31] *See* ***Exhibit D***, which is 12 U.S.C. §248a.

judicial discretion." See *Lexecon Inc. v. Milberg Weiss Bershad Haynes & Lerach*, 523 U.S. 26, 35 (1998). "The word 'shall' is ordinarily 'The language of command.'" *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) citing *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935). Ordinarily, shall is mandatory.[32] Codified cannons of common law rules of statutory interpretation uniformly legislate that the use of the word "shall" in a statute is mandatory.[33]

Black's Law Dictionary, p. 1233 (5th ed. 1979) defines "shall" as:

> As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always and must be given a compulsory meaning; as denoting obligation. It has a preemptory meaning and it is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears.

The MCA's use of the mandatory "shall" is language of command that establishes a discretionless obligation on the part of the Reserve Banks to provide payments services to all depository institutions.

Resort to Legislative History, if Plain Meaning Uncertain: In that FRB-KC seeks to obfuscate the plain meaning of the MCA to render it uncertain, a trip beyond the borders of the Act, further elucidates its meaning. A court may travel, in its search for the meaning of lawmakers, beyond the borders of the statute, if the meaning be uncertain. *United States v. Great Northern Ry. Co.*, 287 U.S. 144, 154 (1932). "In aid of the process of construction, [the court is]

[32] *See* Yule Kim, Cong. Research Serv., 97-589, Statutory Interpretation: General Principles and Recent Trends, P. 9 (2008).
[33] *See* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 Geo. L. Rev. 341, 362 (2010).

at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress." *Id.*

Congressional Testimony Establishes Legislative Intent to Mandate Open Access: Excerpts from the testimony of members of Congress and witnesses about the MCA reveal the objects and policy of the law is to mandate open access and non-discriminatory pricing.[34]

Federal Reserve Bank Statements About Implementation of MCA Support Mandated Open Access Interpretation: TFCCU's position that the MCA mandated open access to Federal Reserve payment services is supported by reports issued by Federal Reserve Banks on implementation of the MCA.[35]

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[34] *See* ***Exhibit E****, Selected Chronological Excerpts Collected From The Congressional Record Relating to The Introduction, Debate and Passage of The Depository Institutions Deregulation and Monetary Control Act of 1980*. (1) "The [Carter] administration is, in principle, in favor of open access to Federal Reserve services for all nonmembers at nondiscriminatory prices." *Id.* ¶#4; (4) " . . . we favor open access to Federal Reserve services for all nonmembers, at nondiscriminatory prices." *Id.* ¶#4; (2) "The committee believes that the wide access to Federal Reserve services for nonmember banks authorized by this bill will ensure that a basic level of services is available to all banks throughout this country on a nondiscriminatory basis." *Id.* ¶#6; (3) "[P]ricing and open access should go hand in hand. Access to the Federal Reserve services is important, not only for member banks and nonmember banks, but also because of the innovations that are taking place in the payment mechanism." *Id.* ¶#7; (4) "[W]e are dealing with much more than Federal Reserve membership. . . Included in this context are . . . the preservation of an appropriate balancing of Federal and state power in the regulation of banking and other depository institutions . . . "*Id.* ¶#8; (5) "Such a strategy should provide for equitable treatment of like institutions, explicit pricing of Federal Reserve services, and open access to those services for all depository institutions." *Id.* ¶# 9; (5) "Some of these services are very difficult to provide in an efficient way unless they are open to all banks. So long as we have some banks that are members and some that are not, without open access, those problems are compounded." *Id.* ¶# 10; (6) "At the same time, the legislation should provide for a more universal access to the Federal Reserve's services, and at a realistic price." *Id.* ¶# 11; (7) "These changes have become necessary because of . . . the need to provide equity among depository institutions. . . In the future, access to services will be open to all depository institutions willing to pay the established fees on the same basis as members. The fee schedule and open access will increase efficiency in the clearing of payments." *Id.* ¶#13. The conclusion derived from the legislative history is that the MCA mandated open access for all depository institutions on nondiscriminatory terms.

[35] *See* ***Exhibit F,*** *Selected Authority on Mandatory Access Provision of the Monetary Control Act.* (1) "Services covered by the fee schedule are available to all depository institutions." *Id*. ¶#3; (2) "The Board has adopted . . . pricing principles, which incorporate both the specific statutory requirements of the Monetary Control Act and provisions intended to fulfill its legislative intent . . . " *Id.* ¶#4; (3) The

The Mandated Federal Reserve Payment Services: The plain language of the MCA, its legislative history and its implementation support TFCCU's claim that FRB-KC is mandated to provide TFCCU with a master account so it can have access to Federal Reserve payments services on nondiscriminatory terms. The services mandated by the MCA are "(1) currency and coin services; (2) check clearing and collection services; (3) wire transfer services; (4) automated clearinghouse services; (5) settlement services; (6) securities safekeeping services; (7) Federal Reserve float; and (8) any new services which the Federal Reserve System offers, including but not limited to payment services to effectuate the electronic transfer of funds." 12 U.S.C. §248a(b)(1)-(8).[36]

MCA "will, to steal a phrase from the Senate Banking Committee Chairman, 'create a level playing field' for competition between the various types of financial institutions. All depository institutions . . . will have access to Federal Reserve services on equal terms." *Id.* ¶#5; (4) "The Act also provides for access by all depository institutions to major Fed services . . . Previously, these services had been restricted largely to member banks." *Id.* ¶#7; (5) The MCA "has fundamentally altered the relationships between Federal Reserve Banks and depository institutions. The entire concept of membership has lost much of its traditional meaning. Our services will now be available to all depository institutions, on an equal basis, regardless of membership in the Federal Reserve System." *Id.* ¶#8; (6) "Federal Reserve payment services are available to all depository institutions, including smaller institutions in remote locations that other providers might choose not to serve. Since the implementation of the [MCA], the Reserve Banks have provided access to Federal Reserve services to nonmember banks, mutual savings banks, savings and loan associations, and credit unions." *Id.* ¶#9; (7) The MCA "has expanded the Federal Reserve's role by requiring the Federal Reserve to provide its services to all depository institutions on an equitable basis, taking into account the need to ensure an adequate level of services nationwide." *Id.* ¶#10; (8) The MCA "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." *Id.* ¶#11; (9) "With the passage of the MCA, the Fed was required to price most of its payment services and to make them available to all depository institutions, not just members. This put the Fed in the position of competing with some of the large banks that were its biggest customers and also induced the Fed to adopt a more customer-oriented mind-set." *Id.* ¶#13.

[36] "Federal Reserve bank services" are offered through "Federal Reserve Financial Services" ("FRFS"), that provides customer relations and support for the Federal Reserve Banks. FRFS, as required by law, has a published fee schedule in which its services are "priced explicitly." *See Item* 1: https://www.frbservices.org/serviceofferings/index.html. As explained in the Federal Reserve System Account Management Guide (July 2015) "[y]our institution accrues service charges for the use of the Federal Reserve's priced services. The Monetary Control Act of 1980 requires Reserve Banks to charge for these services." *See Item* 2: https://www.frbservices.org/files/regulations/pdf/amg_0715.pdf at IV-2.

Management of Payment System Risk: The risk presented to the Federal Reserve payments system by the mandate Reserve Banks provide payment services to all depository institutions on equal terms was specifically addressed by Congress in the MCA. The MCA states that in order for a depository institution to access Federal Reserve Bank payments services it is subject to "a requirement of balances sufficient for clearing purposes, that the Board [of Governors of the Federal Reserve System] may determine are applicable to member banks." 12 U.S.C. §248a(c)(2). This sentence establishes a universal standardized reserve requirement.[37] In

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FRFS "offers a comprehensive suite of products to facilitate the day-to-day payment operations of financial institutions nationwide." *See Item* 1, P.1. They include FedLine® Access Solutions, Account Services, Check Services, FedACH®Services, FedCash®Services, FedComplete® Packages, FedTransaction Analyzer®, Fedwire®Services, and National Settlement Services.The FedComplete® Packages include FedACH® Services, Fedwire®Funds Service, National Settlement Service, Check Services, Account Management Information, Service Charges Information and various other Accounting Information Services. The FedComplete 200 Premier Package is $1,375/month. This is the suite of payments services TFCCU would likely order. To use Fedwire® a depository institution "must have a Master Account with the Federal Reserve Banks." https://www.frbservices.org/servicesetup/fedwire/fedwire_funds_service.html.To use National Settlement Service a depository institution must have a Master Account. https://www.frbservices.org/servicesetup/national_settlement_service/index.html. The "Account Services Offerings" available to all depository institutions relate to the management of a depository institution's master account at its Administrative Reserve Bank. The "Account Management Information (AMI)" is "a powerful online tool that offers critical real-time information regarding your Federal Reserve Bank account . . ." https://www.frbservices.org/serviceofferings/account/index.html. The "Service Charge Information" provides a means to view a "Summary Statement of Service Charges and to 'drill down' to view the details of these charges." The "Daily Statement of Account" provides "details for transactions that have posted to your financial institution." The "Statement of Service Charges" details "service charges and transactions data for your financial institution based on services performed by the Federal Reserve Banks." The "Federal Reserve" provides "a daily Statement of Account for each institution with a master account." *See Item* 2 at II-32. A "Master Account" is the record of financial rights and obligations of an Account Holder and the Administrative Reserve Bank with respect to each other, where opening, intraday, and closing balances are determined." https://www.frbservices.org/servicesetup/account/master_account.html. There is no charge to open a Master Account at a Reserve Bank. https://www.frbservices.org/servicefees/account_services_2015.html. Rather, the charges pertaining to the Master Account are levied for "End-of-Day Financial Institution Reconcilement Data (FIRD) File" and the "Statement of Account Spreadsheet File," not for the account itself. *Id.*

[37] Reserve requirements are the amount of funds that every depository institution must hold in reserve against specified deposit liabilities. Within limits specified by law, the Board of Governors has sole

addition, Reserve Banks use a number of technology tools to control payment system risk.[38] Also, Colorado DFS performs its statutory duties related to consumer protection before issuing a credit union charter, and through supervision and examination; thereby further mitigating payment system risk.

Enforcement of MCA Supported by Text and History and Leads to Logical Result:

Enforcement of the mandatory access provision of the MCA is supported by statutory text, legislative history and 35 years of implementation. Enforcement of open access for all depository institutions does not create undue risk; Congress built risk management into the MCA by requiring all institutions to maintain reserve deposits. Mandated access to Federal Reserve payments services does not automatically give a depository institution access to borrowing privileges at the Discount Window.[39] Enforcement avoids the constitutional issue that would

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authority over changes in reserve requirements. Depository institutions must hold reserves in the form of vault cash or deposits with Federal Reserve Banks. Reserve ratios are specified in Federal Reserve Board's Regulation D. 12 C.F.R. §204. The reserve ratio on net transaction accounts depends on the amount of net transactions accounts at the depository institution. Reserve Account Administration provides depository institutions with a Reserve Requirement Report, an example of which is attached hereto as ***Exhibit G.*** On its first day of business, TFCCU would have no net transaction accounts, so its reserve requirements would be $0. Once its net transaction accounts become $14.5 million to $103.6 million its reserve requirement would be 3% of liabilities. Once its net transaction accounts become more than $103.6 million its reserve requirements would be 10% of liabilities.

[38] *See* "The what, when and where of the National Settlement Service" (April 2015). https://www.frbservices.org/fedfocus/archive_general/general_0415_01.html.
"Real-time risk management controls . . . can be applied at the Federal Reserve Banks' discretion . . . If utilized, the risk controls are designed to ensure that debits to a settler's master account will not be processed if certain Federal Reserve Bank-prescribed limits are exceeded. These risk controls are essential tools for enabling prompt finality of settlement entries without creating undue risk to the Federal Reserve Banks." *Id.* Reserve Banks "monitor institutions' account balances and payment activity on a real-time basis and reject or intercept certain transactions."
https://www.frbservices.org/files/regulations/pdf/amg_0715.pdf at II-2.

[39] Payment system risk is not to be confused with credit risk. The Board of Governors explains "Eligibility to Borrow" at the Discount Window thusly: "By law, depository institutions that maintain reservable transaction accounts or nonpersonal time deposits (as defined in Regulation D) may establish borrowing privileges at the Discount Window. *Eligibility to borrow is not dependent on or related to the*

arise if a Reserve Bank could nullify Colorado's charter.

CONCLUSION

For the foregoing reasons, TFCCU respectfully requests that its Motion for Summary Judgment be granted.

Dated: October 7, 2015

Respectfully submitted,
s/ Mark A. Mason
Mark A. Mason
Gabrielle Z. Lee
Counsel of Record
THE MASON LAW FIRM, P.A.
Tidewatch Centre on Shem Creek
465 W. Coleman Boulevard, Suite 302
Mount Pleasant, South Carolina
Telephone: (843) 884-1444
FAX: (843) 884-3595
E-mail: mark@masonlawfirm.com

Counsel for Plaintiff

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use of Federal Reserve priced services." See, The Federal Reserve Discount Window, at Page 3, Paragraph 4. (*emphasis supplied*).
https://www.frbdiscountwindow.org/en/Pages/General-Information/The-Discount-Window.aspx FRB-KC must provide all depository institutions in the Tenth District Federal Reserve payment services; however, its credit and risk department (applying standards applicable to all depository institutions) has discretion in determining if a depository institution may exercise borrowing privileges at the Discount Window. The Discount Window helps to relieve liquidity strains for individual depository institutions and for the banking system as a whole by providing a reliable backup source of funding. Much of the statutory framework that governs lending to depository institutions is contained in Section 10B of the Federal Reserve Act. The general policies that govern discount window lending are set forth in the Federal Reserve's Regulation A. Depository institutions have access to three types of discount window credit – primary credit, secondary credit, and seasonal credit. All discount window loans must be collateralized to the satisfaction of the lending Reserve Bank.
http://www.federalreserve.gov/newsevents/reform_discount_window.htm. A decision about whether or not to grant a depository institution access to the Discount Window is a discretionary determination made by FRB-KC's credit and risk department; it is *not dependent on or related to* the use of Federal Reserve priced payment services. Access to the nation's payment system is mandated; access to the Discount Window is discretionary, based on established standards. TFCCU would be eligible to establish privileges at the Discount Window *if* it is in generally sound financial condition as determined by FRB-KC based upon supervisory ratings and capitalization data, and if it can provide collateral acceptable to FRB-KC. The Discount Window is the only Federal Reserve service that is discretionary; the master account and other payment-related services are mandated by the MCA to be provided to any federal or state chartered depository institution.

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 7TH day of October 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