New York County Clerk's Index No. 101880/15

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2018-998

THEO CHINO and CHINO LTD,

Plaintiffs-Petitioners-Appellants,

against

THE NEW YORK DEPARTMENT OF FINANCIAL SERVICES and MARIA T. VULLO, in her official Capacity as the Superintendent of the New York Department of Financial Services,

Defendants-Respondents-Respondents.

MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

THE CIRIC LAW FIRM, PLLC
Attorneys for Plaintiffs-Petitioners-Appellants
17A Stuyvesant Oval
New York, New York 10009
212-260-6090
pciric@ciriclawfirm.com

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THEO CHINO and CHINO LTD,

Plaintiffs-Petitioners-Appellants,

-against-

THE NEW YORK DEPARTMENT OF FINANCIAL SERVICES, et al.,

Defendants-Respondents-Respondents.

NOTICE OF MOTION FOR LEAVE TO APPEAL

Index No. 101880/15

PLEASE TAKE NOTICE that, upon the annexed affidavit of Plaintiffs-Petitioners-Appellants Theo Chino and Chino Ltd., sworn to on May 31, 2019, and upon the order of unanimous affirmance of this Court, dated and entered April 23, 2019, and upon all the prior pleadings and proceedings in this action, the Plaintiffs-Petitioners-Appellants will move this Court at a Motion Term to be held at the Appellate Division Courthouse, 27 Madison Avenue, New York, New York, on Monday, July 01, 2019, or as soon after as counsel can be heard for an order granting the above-named Plaintiffs-Petitioners-Appellants leave to appeal to the Court of Appeals; and granting such other and different relief as may be just.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b), answering papers, if any, are required to be served upon the undersigned at least seven days before the return date of this motion.

Dated: May 31, 2019
New York, New York

Pierre Ciric
THE CIRIC LAW FIRM, PLLC
17A Stuyvesant Oval

New York, NY 10009
Email: pciric@ciriclawfirm.com
Tel: (212) 260-6090
Fax: (212) 529-3647
Attorney for Plaintiffs-Petitioners-Appellants

To: New York State Supreme Court
Appellate Division – First Department
Clerk's Office
27 Madison Avenue
New York, New York 10010
(212) 340-0400

Eric R. Haren
Special Counsel
Office of the Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-8804

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THEO CHINO and CHINO LTD,

Plaintiffs-Petitioners-Appellants,

-against-

THE NEW YORK DEPARTMENT OF FINANCIAL SERVICES, et al.,

Defendants-Respondents-Respondents.

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

Index No. 101880/15

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, Pierre Ciric, being duly sworn, deposes and says:

1. I am the attorney for the Plaintiffs-Petitioners-Appellants ("Appellants") and produce this affirmation in support of the motion for leave to appeal to the Court of Appeals from the decision of affirmance of this Court.

BACKGROUND

2. The Appellants brought this action in the Supreme Court, New York County, challenging the "virtual currency" regulation promulgated by the New York Department of Financial Services at Part 200 of Chapter 1 of Title 23 of the New York Codes, Rules and Regulations (cited as "NYCRR") (the "Regulation") because it: (i) violates the separation of powers doctrine; (ii) is arbitrary and capricious; (iii) is preempted by federal law; and (iv) contains disclosure requirements that violate commercial speech rights under the First Amendments to the United States Constitution and New York Constitution. The Defendants-Respondents-Respondents ("Respondents"), moved to dismiss this action on the grounds that

Appellants lacked standing to challenge the Regulation. An order granting the Respondents' motion to dismiss was issued on December 21, 2017.

3. Appellants duly appealed from that order to this Court, which unanimously affirmed the order of the court below by order dated April 23, 2019. A copy of the order of affirmance and the memorandum of this Court upon which it is based is annexed to this affirmation as Exhibit A.

4. Respondents served electronically a copy of the decision and order with notice of entry on Appellants on May 1, 2019, and this motion is made within thirty (30) days after the service of the notice of entry.

5. In 2013, prior to the public at large knowing anything about Bitcoin and other cryptocurrencies, Theo Chino started a small business, Chino LTD, to allow more people to use Bitcoin in everyday life. He wanted New York City bodegas, small grocery, and convenience stores to be able to accept Bitcoin as a form of payment for everyday items. Theo's desire to encourage small businesses to use Bitcoin was another iteration of his entrepreneurial efforts to ensure that this new technology would reach more consumers. By May 2015, Theo Chino entered into seven contracts with convenience stores in New York and invested significant funds to develop a system infrastructure to achieve his goal.

6. The New York Department of Financial Services ("DFS"), of its own initiative and without the New York State Legislature's mandate or instructions, rushed a regulation to quash the growth of cryptocurrency in New York. DFS's Regulation took effect on June 24, 2015.

7. Theo Chino immediately filed an application for a license under the Regulation, which he submitted on August 7, 2015. Realizing, through the application process, the incredible

burdens of this Regulation, as well as DFS's overreach to create law outside of the New York State Legislature's mandate, and while his application was pending, Theo filed a pro se verified complaint and petition on October 16, 2015, under New York Civil Practice Law and Rules ("CPLR") Article 78. Theo Chino's application was returned without further processing on January 4, 2016.[1]

8. The appeal before this Court focused on the standing[2] issue, specifically, whether Appellants exhausted administrative remedies and whether Appellants suffered an injury due to the Regulation.

EXHAUSTION

9. This Court disagreed with Appellants' argument that they fall within the existing exceptions to the exhaustion rule. If this Court's decision stands, it will effectively overturn the exceptions to the exhaustion rule crafted by the Court of Appeals in *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978] as applied to start-up companies. A petitioner need establish just one exception to the exhaustion rule to avoid its application. Appellants demonstrated in their filings that they fall within multiple exceptions to the exhaustion rule.

10. For example, Appellants argued that DFS acted beyond its legislative grant of power. The New York Financial Services Law ("FSL") only authorizes DFS's Superintendent to promulgate "rules and regulations . . . involving financial products and services." FSL §201(a) and §302(a). The definition of financial products and services does not include virtual currency.

[1] Theo Chino later hired counsel and filed an amended verified complaint and petition through counsel on May 26, 2017.

[2] The issue of whether Appellants' cross-motion for limited discovery (filed on August 2, 2017, and denied as moot in the decision dated December 21, 2017) was warranted was also addressed. However, this issue was not the focus of the appeal, but brought up to preserve the request should the Supreme Court's decision on standing be overturned.

Record on Appeal (R.) 209-217. Thus, the Regulation was ultra vires, triggering an exception to the exhaustion rule. *Bankers Trust Corp. v New York City,* 750 NYS2d 29, 34 [1st Dept 2002]; *Watergate II Apts,* 46 NY2d at 57. Appellants therefore have standing to bring their claims.

11. Moreover, the Court of Appeals explicitly stated that the exceptions defined in *Watergate II Apts.* were not meant to be exhaustive. The Court of Appeals has never looked at applying those exceptions in the context of a modern dynamic start-up economy and even noted that the exhaustion rule is not an inflexible one. The *Watergate II Apts.* decision was issued over forty years before the invention of Bitcoin. Therefore, this case raises a significantly important question as to how this rule should apply in the context of modern start-up enterprises facing new regulations.

12. This Court also found that a "sparse" application and non-payment of $5,000 non-refundable application fee meant Appellants had not exhausted their remedies. However, Appellants' request for an exemption from paying the application fee because of its impact on a small start-up was not granted by DFS. Furthermore, Appellants do not rely on the sufficiency of Appellants' application, but rather argue that Appellants were not required to go through the application process because they were challenging the entire Regulation on statutory and constitutional grounds, and not the granting or denial of a license.

13. Appellants have standing to challenge the Regulation even if they did not submit an application. When Appellants filed the initial action, they were operating a business subject to the licensing requirements under the Regulation. Whether or not Appellants submitted a complete application, or no application at all, they have standing because the Regulation applied to their activities at the time of filing of the action, here October 16, 2015. Similarly, whether or not Appellants paid the application fee did not matter since the Regulation applied to their

activities at the time of filing. Either way, Appellants have standing to challenge the Regulation because of the exhaustion exceptions.

14. Furthermore, applying the exhaustion requirements to Appellants' challenge would effectively insulate DFS from any litigation. As all agencies, DFS was already protected by a short statute of limitations period in which a petitioner can challenge a new regulation, i.e. four months from the promulgation date.

15. In addition, DFS has been subjecting technology firms acting in a dynamic and quickly changing environment to submit themselves to a lengthy application process requiring prohibitively high compliance costs. A person already engaged in virtual currency business activity was required to apply for a license within forty-five days of the effective date of the license, and was permitted to continue operating while their license was pending if they did so. 23 NYCRR § 200.21. The Regulation had a disparate impact on start-ups: of the approximately eleven entities that applied during this safe harbor period, no start-ups besides Appellants applied because it was cost prohibitive. R. 139. It was reported that companies spent between $50,000 and $100,000 applying for a license under the Regulation. R. 33; R. 44 (citing Daniel Roberts, Behind the "Exodus" of Bitcoin Startups from New York, FORTUNE (Aug. 14, 2015), http://fortune.com/2015/08/14/bitcoin- startups-leave-new-york-bitlicense/.) The Regulation is unjustifiably burdensome on start-ups and small companies, and has in many instances left businesses with no other option than to flee and otherwise abandon New York. R. 41-42. Because such start-ups moved out of New York following the promulgation of the Regulation, no other entity beside Appellants had the necessary nexus to this jurisdiction for standing purposes to challenge the Regulation.

16. Under this Court's exhaustion holding, all of the start-ups (both Appellants, who applied for a license, and those that left New York rather than applying for a license) would be forced to apply for a license and go through a very burdensome and expensive process just for the chance to challenge the ultra vires nature of the Regulation. This result would in effect overturn the *Watergate II Apts.* holding and would completely insulate DFS from any litigation by any of the interested parties.

17. For all these reasons, Appellants seek leave from this Court to permit the Court of Appeals to address whether the application of the exhaustion requirements in the context of rapidly developing technologies denies the due process and constitutional rights of entities which have been wrongfully and negatively impacted by the Respondents.

STANDING

18. Similarly, the Court of Appeals should address the application of the injury-in-fact prong of the standing analysis in the context of start-up businesses.

19. Theo Chino took many affirmative steps to establish his business, such as signing contracts with convenience stores and investing significant funds into system infrastructure. In fact, his business was fully operational at the time of the Regulation's promulgation, and at the time the initial action was filed, on October 16, 2015. Appellants decided to stop their business activities on January 4, 2016, after they received the letter from Respondents refusing to grant a license and instead seeking additional information. The standing analysis must be applied as of the date of the submission of the complaint, October 16, 2015, and not at the time Appellants stopped their business activities. Therefore, any argument around the notion that the injury suffered by Appellants was self-inflicted or caused by other factors is irrelevant, since this argument focuses on the Appellants' financial situation as of January 4, 2016. Therefore, the

injury portion of the analysis must be submitted to the Court of Appeals to review the exact date when the injury analysis should be applied.

20. Furthermore, this review is critical to determine the exact class of plaintiffs which may satisfy the standing test in the start-up environment. If an entrepreneur had a business idea involving Bitcoin, but took no affirmative action to start the business before the Regulation went into effect, certainly that entrepreneur could not satisfy the standing test. If an entrepreneur had an established business in New York involving Bitcoin for ten years leading up to the Regulation going into effect, courts would easily find that this person suffered an injury and therefore satisfies the standing test. However, if an entrepreneur created a start-up business and took affirmative steps towards that end, then got stopped by a regulation, the entrepreneur's rights would be severely impaired under this Court's ruling. Therefore, the Court of Appeals must be provided with an opportunity to determine when a start-up business that has taken affirmative steps and expended a non-trivial amount of money can satisfy the injury prong of the standing analysis.

21. Declining to provide an opportunity for the Court of Appeals to review the standing analysis as to start-up environments would have profound implications and a severe impact on new technology sectors, where market participants effectively would be denied the opportunity to challenge new regulations. At the time the Regulation was issued, only technology firms interested in starting business involving cryptocurrency were subject to the Regulation. However, no start-up companies besides Appellants applied because it was cost prohibitive. R. 139; R. 33; R. 44. The Regulation has, in many instances, left businesses with no other option than to flee New York rather than comply with the Regulation. R. 40-42. Start-up companies that fled New York would have encountered significant legal hurdles to establish

standing, since their nexus to the New York jurisdiction would have been weakened by their decision to leave New York. Therefore, Appellants, who stayed in the jurisdiction, are uniquely positioned to challenge the Regulation because they were the only ones satisfying the standing requirements by remaining in New York.

22. If Appellants do not have standing in this case, then no one would have standing to challenge the Regulation, which would have profound implications on the due process and constitutional rights of these entities, as well as the ability of the court system to adjudicate the Regulation's lawfulness.

23. As applied to Appellants, the record before this Court demonstrated that the standing test was satisfied at the time of the filing of the action, and that Appellants have made significant investments to launch their business plans. The record also establishes that Appellants were not able to reap the benefits of their investments because of the Regulation. Appellants filed their action on October 16, 2015, BEFORE they decided to stop their business activities on January 4, 2016. Therefore, Appellants must have an opportunity to seek the Court of Appeals' ruling as to how the standing test applies in this type of new technology environment.

24. The fact that Appellants abandoned the licensing process and stopped their business activities on January 4, 2016, is irrelevant to the standing analysis. The injury to Appellants was created the moment the Regulation was promulgated, and its analysis must take place at the time of the filing of the initial action. At the time of filing, Appellants were subject to the Regulation, were continuing their business activities, and knew such activities would be negatively impacted by the Regulation.

25. Finally, Theo Chino stopped operating his Bitcoin processing business on January 4, 2016, the same date he received the letter from DFS, to avoid running afoul of the Regulation.

His fears were well-founded because DFS has an inherent power to enforce all its regulations since their promulgation. Furthermore, in early 2016, the Bitcoin industry was roiled by the U.S. Department of Justice's numerous prosecutions of both businesses and individuals who offered cryptocurrency exchange services. *See United States v Murgio*, 209 F. Supp. 3d 698 [SDNY 2016]; *United States v. Faiella*, 39 F Supp 3d 544 [SDNY 2014]; *United States v Budovsky,* No. 13-cr-368 [DLC], 2015 US Dist LEXIS 127717 [SDNY Sep. 23, 2015]; *United States v E-Gold*, Ltd., 550 F Supp 2d 82 [DDC 2008]; *United States v Ulbricht*, 31 F Supp 3d 540 [SDNY 2014]. Those prosecutions were focused on whether a cryptocurrency business was supposed to be subject to the federal requirements related to money transmitter statutes, creating significant uncertainty in the industry.

26. Therefore, it is clear that when Theo Chino decided to stop his business operations on January 4, 2016, he had a credible fear of being prosecuted by DFS or by the U.S. Department of Justice due to the vagueness of both the New York and federal interpretation of existing statutes and regulations and their enforcement on Bitcoin businesses such as Appellants'.

QUESTIONS FOR THE COURT OF APPEALS

27. Based on all the information above, the questions of law Appellants seek to submit for review to the Court of Appeals are:

a. Whether the exceptions to the exhaustion of remedies requirement to challenge a regulation may extend to start-up businesses which attack a regulation promulgated while the start-up business is being launched?

b. Whether start-up businesses satisfy the injury-in-fact requirement to challenge a regulation promulgated while the start-up business is being launched and when

the action is filed prior to the start-up business abandoning its business plan due to the regulation?

28. Since these questions regarding the exhaustion of remedies and standing requirements involve novel issues which have not been previously decided in New York, I respectfully ask this Court to grant leave to appeal to the Court of Appeals for purposes of addressing the two questions described above.

Dated: May 31, 2019
New York, New York

Pierre Ciric
THE CIRIC LAW FIRM, PLLC
17A Stuyvesant Oval
New York, NY 10009
Email: pciric@ciriclawfirm.com
Tel: (212) 260-6090
Fax: (212) 529-3647
Attorney for Plaintiffs-Petitioners-Appellants

To: New York State Supreme Court
Appellate Division - First Department
27 Madison Avenue
New York, New York 10010
(212) 340-0400

Eric R. Haren
Special Counsel
Office of the Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-8804

EXHIBIT “A”

Renwick, J.P., Gische, Webber, Singh, JJ.

9076 Theo Chino, et al., Index 101880/15
Plaintiffs-Petitioners-Appellants,

-against-

The New York Department of Financial Services, et al.,
Defendants-Respondents-Respondents.

_____

The Ciric Law Firm, PLLC, New York (Pierre Ciric of counsel), for appellants.

Letitia James, Attorney General, New York (Eric R. Haren of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Carmen Victoria St. George, J.), entered on or about December 21, 2017, granting respondents' motion to dismiss the proceeding, and denying petitioners' motion seeking discovery, unanimously affirmed, without costs.

This action arises from petitioners' application for a license pursuant to 23 NYCRR § 200.3(c)(2), pertaining to virtual currency. DFS neither approved nor rejected the application because the information petitioners provided was so sparse that no determination could be made, including whether the business activity plaintiffs were seeking to engage in required licensing under the challenged regulation. Petitioners never sought to provide the missing information; nor did they ever pay the

required licensing fee. Petitioners neither exhausted their administrative remedies, nor demonstrated applicability of one of the exceptions to the doctrine of exhaustion (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]; *Sohn v Calderon*, 78 NY2d 755, 767 [1991]; *Martinez 2001 v New York City Campaign Fin. Bd.*, 36 AD3d 544, 548-549 [1st Dept 2007]). As for their direct constitutional claims, the motion court correctly determined that petitioners lack standing, as they failed to show some actual or threatened injury to a protected interest by reason of the operation of an unconstitutional feature of the regulation at issue (*Cherry v Koch*, 126 AD2d 346, 351 [2d Dept 1987], *lv denied* 70 NY2d 603 [1987]). Indeed, any injury suffered by petitioners was self-created, by abandonment of the licensing process after submission of an incomplete application. Their motion seeking discovery was properly denied as moot.

We have considered petitioners' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 23, 2019

CLERK

EXHIBIT “B”

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THEO CHINO and CHINO LTD,

Plaintiffs-Petitioners-Appellants,

-against-

THE NEW YORK DEPARTMENT OF FINANCIAL SERVICES and ANTHONY J. ALBANESE, in his official capacity as Superintendent of the New York Department of Financial Services and MARIA T. VULLO, in her official capacity as the Superintendent of the New York Department of Financial Services,

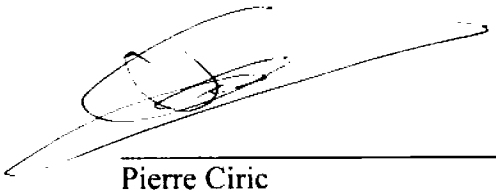
Defendants-Respondents-Respondents.

New York County
Index No. 101880/2015

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Plaintiffs-Petitioners-Appellants Theo Chino and Chino Ltd. hereby appeal to the Appellate Division of the New York State Supreme Court, First Judicial Department, from each and every part of the Decision and Order of the Honorable Carmen Victoria St. George, of the New York County Supreme Court, dated December 21, 2017, and received by NYSCEF on December 27, 2017, which granted Defendants-Respondents-Respondents cross-motion to dismiss the complaint and denied Plaintiffs-Petitioners-Appellants cross-motion for limited discovery. Notice of entry was filed on January 14, 2018.

Dated: February 03, 2018
New York, New York



Pierre Ciric
THE CIRIC LAW FIRM, PLLC
17A Stuyvesant Oval
New York, NY 10009
Email: pciric@ciriclawfirm.com
Tel: (212) 260-6090
Fax: (212) 529-3647
Attorney for Plaintiffs-Petitioners-Appellants

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THEO CHINO and CHINO LTD,

Plaintiffs-Petitioners-Appellants,

-against-

THE NEW YORK DEPARTMENT OF FINANCIAL SERVICES and ANTHONY J. ALBANESE, in his official capacity as Superintendent of the New York Department of Financial Services and MARIA T. VULLO, in her official capacity as the Superintendent of the New York Department of Financial Services,

Defendants-Respondents-Respondents.

New York County
Index No. 101880/2015

PRE-ARGUMENT STATEMENT

Plaintiffs-Petitioners-Appellants Theo Chino and Chino Ltd. (collectively "Appellants") submit this Pre-Argument Statement pursuant to section 600.17 of the Rules of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department:

1. Title of Action: The title of the action is as set forth in the caption above.

2. Full Names of the Parties: The full name of the original parties were Theo Chino, Plaintiff-Petitioner, and The New York Department of Financial Services and Anthony J. Albanese, in his official capacity as the acting Superintendent of the New York Department of Financial Services, Defendants-Respondents. Chino Ltd. was added as Plaintiff-Petitioner. Anthony J. Albanese was removed as a Defendant-Respondent and Maria T. Vullo, in her official capacity as the Superintendent of the New York Department of Financial Services, was added as a Defendant-Respondent.

3. Name, Address, and Telephone Number of Attorney for the Appellants:

Pierre Ciric
THE CIRIC LAW FIRM, PLLC
17A Stuyvesant Oval
New York, NY 10009
(212) 260-6090

4. Name, Address, and Telephone Number of Attorney for the Respondents:

Jonathan Conley
Assistant Attorney General
of Counsel
Office of the Attorney General of the State of New York
120 Broadway, 24th Floor
New York, NY 10271
(212) 416-8108

5. Court From Which Appeal is Taken: Supreme Court of the State of New York, County of New York.

6. Order Appealed From: This is an appeal from the decision, order and judgment of the Supreme Court of the State of New York, County New York, by Honorable Carmen Victoria St. George, dated December 21, 2017, and received by NYSCEF on December 27, 2017. The order and judgment addressed two different motions: (A) a cross-motion to dismiss, and (B) a cross-motion for limited discovery. Notice of entry was filed on January 14, 2018.

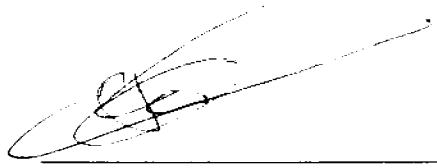
7. Nature of the Action: In this Article 78 proceeding, Appellants challenged the "virtual currency" regulation promulgated by the New York Department Financial Services at Part 200 of Chapter 1 of Title 23 of the New York Codes, Rules and Regulations (cited as "NYCRR") (the "Regulation") because it: (i) violates the separation of powers doctrine; (ii) is arbitrary and capricious; (iii) is preempted by federal law; and (iv) contains disclosure requirements that violate commercial speech rights under the First Amendment to the United States Constitution and New York Constitution.

8. Result Reached Below: (A) The lower court granted the Defendants-Respondents cross-motion to dismiss on the grounds that Appellant lacked standing to challenge the Regulation. (B) The lower court denied Appellants cross-motion for limited discovery as moot.

9. Grounds for Reversal: The Order and Judgment appealed from should be reversed on the grounds that Appellants did not lack standing. Appellants have showed (1) that there is "injury in fact," meaning that Appellants will actually be harmed by the administrative action; and (2) that the interest the Appellants assert falls "within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." If Appellants do not have standing, no business located in New York would have access to the court to challenge this Regulation. If the Order and Judgment as to the motion to dismiss is reversed the Order and Judgment as to discovery should no longer be considered moot.

10. Related Actions: Theo Chino filed a claim in the State of New York Court of Claims on August 13, 2014 alleging the defendant proposed a regulation outside the scope of their authority. The claim was dismissed on March 16, 2015. No appeal was filed.

Dated: February 03, 2018
New York, New York



Pierre Ciric
THE CIRIC LAW FIRM, PLLC
17A Stuyvesant Oval
New York, NY 10009
Email: pciric@ciriclawfirm.com
Tel: (212) 260-6090
Fax: (212) 529-3647
Attorney for Plaintiffs-Petitioners-Appellants

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Theo Chino and Chino LTD,

Plaintiffs-Petitioners,

- against -

The New York State Department of Financial Services and Maria T. Vullo, in her official capacity as Superintendent of the New York State Department of Financial Services,

Defendants-Respondents.

Notice of Entry

Index No. 101880/2015

PLEASE TAKE NOTICE that the enclosed is a true copy of a court order and decision in the above-captioned matter, dated December 21, 2017, and duly entered in the office of the Clerk of the Supreme Court of the State of New York, County of New York, on December 27, 2017.

Dated: New York, New York
January 14, 2018

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Counsel for Defendants-Respondents

Jonathan D. Conley
Assistant Attorney General
120 Broadway, 24th floor
New York, New York 10271
Tel.: (212) 416-8108

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CARMEN VICTORIA ST. GEORGE J.S.C.
Justice

PART 34

Index Number : 101880/2015
CHINO, THEO
vs
DEPARTMENT OF FINANCIAL
Sequence Number : ~~003~~ 001
COMPEL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s). 3, 12-13
Answering Affidavits — Exhibits Cross-Motion + Reply	No(s). 14-19; 33-34
Replying Affidavits	No(s). 20-23

Upon the foregoing papers, it is ordered that ~~this motion is~~ the cross-motion to dismiss is granted and the case is dismissed pursuant to the accompanying decision. The Clerk is directed to enter judgment accordingly.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/21/2017

_____, J.S.C.
HON. CARMEN VICTORIA ST. GEORGE

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED (cross-motion) ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34

----------X

THEO CHINO and CHINO LTD,

Plaintiffs-Petitioners,

-against-

THE NEW YORK DEPARTMENT OF FINANCIAL SERVICES and MARIA T. VULLO, in her official Capacity as the Superintendent of the New York Department of Financial Services,

Respondents,

----------X

Index No. 101880/2015

Decision, Order and Judgment

Motion Sequence No. 001

CARMEN VICTORIA ST. GEORGE, J.S.C.:

In this Article 78 proceeding, motion sequence number 001, plaintiffs-petitioners Theo Chino and Chino Ltd (collectively, petitioner) seek the following relief against defendants-respondents The New York Department of Financial Services and Maria T. Vullo, in her capacity as the Superintendent of the Department (collectively, respondent): a) an order enjoining and permanently restraining DFS from enforcing Title 23, Chapter 1, Part 200 of the New York Codes, Rules, and Regulations (NYCRR), which went into effect on June 24, 2015; b) a declaration that Part 200, which regulates virtual currency, violates the separation-of-powers doctrine in that it delegates to DFS the authority to promulgate the regulation; c) an order enjoining and restraining implementation of the regulation on the ground that it is arbitrary and capricious; d) an order enjoining and restraining implementation on the ground that federal law preempts the regulation; e) an order setting aside the regulation as being made in violation of law; f) a declaration that DFS exceeded its jurisdiction; g) a declaration that the law is preempted; and h) granting Chino

monetary relief, attorney's fees, costs, and interest. DFS makes a pre-answer motion to dismiss on the bases that 1) petitioner lacks standing to challenge the legislation, 2) the challenged regulation is not arbitrary and capricious, and 3) federal law does not preempt the regulation. Separately, as motion sequence number 003, Chino moves to compel limited discovery and to hold DFS's cross-motion to dismiss in abeyance pending the completion of that discovery.[1] For the reasons below, the Court grants the cross-motion to dismiss the petition and denies the motion for limited discovery as moot.

BACKGROUND

Bitcoin is an electronically based and mathematically created currency, or cryptocurrency, which was invented by Satoshi Nakamoto,[2] following the publication of Satoshi Nakamoto's essay titled "Bitcoin: A Peer-to-Peer Electronic Cash System" (https://bitcoin.org/bitcoin.pdf). Bitcoins are released into cyberspace according to a mathematically predetermined system. Under the current protocol, bitcoin circulation will be capped at 21 million. A peer-to-peer user network regulates bitcoin, eliminating central entities such as banks. In addition, to ensure the legitimacy of transactions, individuals or entities called "miners" identify and verify the bitcoins used in the transactions. Miners block groups of these verified transactions together in "blockchains," recording the blockchains online on a shared public ledger. According to *Mastering Bitcoin: Unlocking Digital Cryptocurrencies* (Andreas M. Antonopoulos [2014] [avail at http://chimera.labs.oreilly.com/books/1234000001802/ch01.html]), to which petitioner cites for various principles, the formulas and algorithms "form the basis of a digital money ecosystem" that

[1] Chino refers to this as a "cross-motion," but it is a separately filed motion. The Court also has before it pleadings and documents filed by Chino prior to his retention of counsel, but they are not relevant to the resolution of the cross-motion

[2] Nakamoto is a pseudonym, and the actual identity of the author remains unknown.

can "do just about anything that can be done with conventional currencies, including buy and sell goods, send money to people or organizations, or extend credit" (*Id.*, Chapter 1, Introduction: What is Bitcoin?).

According to respondents, the State legislature merged the State's banking and insurance departments, creating DFS, in 2011 in reaction to the 2008 financial crisis. The Financial Services Law (FSL) empowers DFS to regulate and supervise specified financial products and services as well as those who provide them. Among other things, DFS used this power to create a regulation governing virtual money businesses (Title 23, Chapter 1, Part 200 of the NYCRR [the regulation]). The regulation went into effect on June 24, 2015.

The regulation defines virtual currency broadly, and includes all digital units of exchange that:

> (1) have a centralized repository or administrator;
> (2) are decentralized and have no centralized repository or administrator; or
> (3) may be created or obtained by computing or manufacturing effort. Virtual currency shall not be construed to include any of the following:
> (i) digital units that:
> *(a)* are used solely within online gaming platforms;
> *(b)* have no market or application outside of those gaming platforms;
> *(c)* cannot be converted into, or redeemed for, Fiat Currency[3] or Virtual Currency; and
> (ii) may or may not be redeemable for real-world goods, services, discounts, or purchases; digital units that can be redeemed for goods, services, discounts, or purchases as part of a customer affinity or rewards program with the issuer and/or other designated merchants or can be redeemed for digital units in another customer affinity or rewards program; or
> (iii) digital units used as part of Prepaid Cards.

[3] Fiat Currency includes any currency that is recognized by the government as legal tender but is not backed by a physical commodity such as gold.

(Regulations of the Superintendent of Financial Services: Virtual Currency [23 NYCRR] § 200.1 [p]).

Virtual currency business activity includes the following conduct involving New York or a resident of New York:

> (1) receiving Virtual Currency for Transmission or Transmitting Virtual Currency, except where the transaction is undertaken for non-financial purposes and does not involve the transfer of more than a nominal amount of virtual currency;
> (2) storing, holding, or maintaining custody or control of Virtual Currency on behalf of others;
> (3) buying and selling Virtual Currency as a customer business;
> (4) performing Exchange Services as a customer business; or
> (5) controlling, administering, or issuing a Virtual Currency.

(*Id.*, at § q).

In addition, pursuant to 23 NYCRR § 200.3 (a), anyone engaged in virtual currency business activity must first obtain a license. The following section, 23 NYCRR § 200.4 (a), states that the application, which must be accompanied by a $5,000 fee (*see* 23 NYCRR § 200.5), must include:

> (1) the exact name of the applicant, including any doing business as name . . .;
> (2) a list of all the applicant's Affiliates and an organization chart illustrating [their] relationship [to] the applicant . . .;
> (3) a list of . . . each individual applicant and each director . . . including such individual's name, physical and mailing addresses, and information and documentation regarding such individual's personal history, experience, and qualification, which shall be accompanied by a form of authority, executed by such individual, to release information to the Department;
> (4) a background report prepared by an independent investigatory agency acceptable to the superintendent for each individual applicant, and each Principal Officer, Principal Stockholder, and Principal Beneficiary of the applicant, as applicable;

(5) for each individual applicant . . . and for all individuals to be employed by the applicant who have access to any customer funds, whether denominated in Fiat Currency or Virtual Currency:
(i) a set of completed fingerprints. . . for submission to the State Division of Criminal Justice Services and the Federal Bureau of Investigation;
(ii) if applicable, . . . processing fees [prescribed by the Superintendent] . . .; and
(iii) two portrait-style photographs of the individuals . . .;
(6) an organization chart of the applicant and its management structure . . .;
(7) a current financial statement for the applicant and each Principal Officer, Principal Stockholder, and Principal Beneficiary of the applicant, as applicable, and a projected balance sheeting and income statement for the following year of the applicant's operation;
(8) a description of the proposed, current, and historical business of the applicant . . .;
(9) details of all banking arrangements;
(10) all written policies and procedures required . . .;
(11) an affidavit describing any pending or threatened [actions or proceedings of any kind]
(12) verification from the New York State Department of Taxation and Finance that the applicant is compliant with all . . . tax obligations . . .;
(13). . . a copy of any insurance policies maintained for the benefit of the applicant, its directors or officers, or its customers;
(14) an explanation of the methodology used to calculate the value of Virtual Currency in Fiat Currency; and
(15) such other additional information as the superintendent may require.

A verification that the applicant has complied with the above requirements is considered part of the application (*see id.*, § 200.4 [b]). The Superintendent is required to rule on applications

within 90 days from the date on which the filing is "deemed by the superintendent to be complete" (*See id.*, § 200.6 [b]). The remaining provisions regulate the approved virtual currency business, requiring mandatory compliance with anti-money laundering rules, the maintenance of adequate books and records and the obligation to allow the Superintendent to inspect such records, minimum capitalization requirements, and the obligation to protect its customers' assets in several enumerated respects (*See generally* 23 NYCRR §§ 200.7-200.22).

According to petitioner, many of the requirements for virtual currency businesses do not exist in the rules applicable to "fiat currency transmitters" (Amended Verified Complaint and Article 78 Petition [Petition], ¶ 52]. These include the requirement that it maintain records of anti-money laundering programs for seven, as opposed to five, years; the requirement that it provide the identity and physical address of parties to transactions; and the requirement to report all transactions with an aggregate amount of more than $10,000. Petitioner claims that Superintendent Benjamin Lawsky, who held the position before the current Superintendent Maria T. Vullo, acknowledged that his goal was not in response to a pressing need and instead was intended to create a working model for regulated banks and insurance companies.[4]

FACTS

On November 19, 2013, petitioner, a New York resident, incorporated Chino LTD (LTD) in Delaware. With the corporation, petitioner intended to set up a business in New York that was to install Bitcoin processing services in bodegas in New York State. He applied to conduct business in New York under Business Corporation Law § 1304, as an out-of-state corporation. In addition, in March 2014, he hired an employee to sell the LTD's services. On December 31, 2014, he co-founded Conglomerate Business Consultants, Inc. (CBC), which was incorporated in New York,

[4] For the purposes of this order, the Court need not address the accuracy of this statement.

and which purchased phone minutes and created phone calling cards the bodegas also could sell using LTD's bitcoin processing services. Petitioner submits copies of his tax returns showing that LTD lost $4,367 in 2013, $59, 667 in 2015, and $30,588 in 2016. He alleges these losses are attributable to start-up costs including computer equipment, as well as marketing and other ongoing costs.

As the Court noted above (*see supra*, at p 3), the regulations governing virtual currency businesses became effective on June 24, 2015.[5] Petitioner applied for a Virtual Currency Business license on behalf of LTD on August 7, 2015. Petitioner annexes a copy of the application as Exhibit IX to his petition. He provided the name but not the address of LTD. He did not provide an authorization as required by 23 NYCRR § 200.3 (a) (3); instead, he wrote on the form that he did not authorize the release of information. He filled out some but not all financial information on the form requested, and he indicated that he had no insurance and kept no financial or accounting books. For his background report certification, he wrote: "[Could] not obtain in time." He filled out a personal information form but he refused to disclose his employment history for the last fifteen years, and he did not provide the names and addresses of past employers. He did not disclose whether he was employed by, performed services for, or had business connections with any agency or authority of the State of New York, or any institutions subject to DFS supervision. He stated he had no financial interest in any agency or authority in New York or any other state. He provided none of the required references. He stated that his high school, college, and professional or technical school information was not applicable. He refused to disclose his social

[5] In advance of the regulation's effective date, between November 2014 and June 2015, petitioner filed several Freedom of Information Law requests, hoping to clarify DFS' "process for framing the Regulation" (Petition, ¶ 62). According to the petition, DFS did not provide any information, stating the material either did not exist or was exempt from disclosure.

security number. Along with his application, he submitted a handwritten letter which requested a waiver of the $5,000 application fee based on his characterization of the size of the business, its budget, and its financial status.[6]

Petitioner initiated this proceeding, pro se, on October 16, 2015, before he received any response from DFS; he states that he did so because he realized "he would be required to incur expenses beyond his means to comply with the burdensome compliance costs under the Regulation" (Petition, ¶ 91). On January 4, 2016, DFS returned his August 7, 2015 application without processing it. The letter states that DFS could not evaluate the application because it contained "extremely limited" information and, among other things, did not describe the business in which LTD was or would be engaged and did not specify in what respect, if any, the business involved virtual currency (DFS Jan. 4, 2016 letter [Exh. XI to Petition]). The letter explained that because of this DFS could not determine whether LTD was a virtual currency business subject to the regulations. Petitioner states that CDC discontinued its bitcoin processing services at that time but LTD continued as a nonoperating business. He states LTD lost $53,053 in 2016 because of its inability to provide bitcoin services. He provides tax returns for LTD for 2016 as well as for 2013-15 to substantiate his allegation that LTD lost money during these years.

The Ciric Law Firm, PLLC, appeared on behalf of petitioner on October 31, 2016. On May 26, 2017, the parties stipulated to convert the proceeding to e-filing. Accordingly, all papers submitted on or after that date are e-filed. Petitioner amended the action/proceeding around that time, and submitted a supplement summons on August 10, 2017. Respondent filed its notice of cross-motion and supporting papers on August 15, 2017.[7] The matter was argued before this Court

[6] The petition refers to this as a request for a fee waiver under Banking Law § 18-a (6) (a).
[7] Respondents previously had cross-moved in response to the original pleadings.

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NYSCEF DOC. NO. 37 RECEIVED NYSCEF: 12/27/2017

on October 10, 2017, and the parties were directed to order and provide copies of the transcript, which they did the following week.

ARGUMENTS REGARDING STANDING

In their cross-motion, respondents first argue the threshold issue of standing. They point to the January 2016 letter of DFS, which not only stated that it could not determine whether LTD was engaged in a virtual currency business activity but that, by returning the application, DFS did not "offer any opinion as to whether. . . any business activity of the Company requires or would require licensing by New York" (DFS Jan. 4, 2016 letter [Exh. XI to Petition]). The letter provided petitioner with contact information for the Supervising Bank Examiner for DFS' Capital Markets Division. Respondents state that after he received the letter, petitioner did not supplement the application, did not submit a new application for CBC, and did not contact the Supervising Bank Examiner or anyone else at DFS with questions. Instead, he treated the letter as a de facto denial of his application and shut down CBC.

Based on the facts in the petition and on the January 4, 2016 letter, respondents argue, petitioner has not shown standing. They note that petitioner has the burden to establish standing (*Society of the Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 769 [1991]) and that without standing, this matter is not justiciable (*Roberts v Health & Hosp. Corp.*, 87 AD3d 311 [1st Dept 2011]). The party must demonstrate an injury in fact – which, in turn, requires a showing of actual harm due to the administrative action (*N.Y. State Assoc. of Nurse Anesthetists v Novello*, 2 NY3d 207, 214-15 [2004] [Novello]). Actual harm, by definition, cannot be conjectural or ephemeral, and cannot be based on a general harm but must be specific to the individual or entity asserting the claim (*Id.*). Absent such a showing, the Court of Appeals has stated, the lawsuit is "little more than an attempt to legislate through the courts" (*Rudder v Pataki*, 93 NY2d 273, 280 [1999]).

According to respondents, petitioner's failure lies in his inability to demonstrate that he has suffered an injury in fact. He has not shown that he has or is likely to sustain a cognizable injury due to the regulation, they argue, because he submitted an incomplete license application which made adequate review impossible, he began his lawsuit before DFS responded to his application, and he did not attempt to pursue his application when DFS stated he had provided insufficient information to them and they could not evaluate his application. Petitioner cannot assert standing, respondents argue, before DFS even determined whether an application was required. Instead of proceeding with the application process, respondents state, petitioner "charted a decidedly different course by preemptively halting the operations of CBC and Chino LTD and commencing this litigation" (Mem. of Law in Support of Defendants'-Respondents' Cross-Motion to Dismiss the Amended Verified Complaint and Article 78 Petition [Respondents' Mem. in Support], at p 12). Petitioner's decision to shut down his businesses does not confer standing, respondents argue, because petitioner based his decision "on the speculative assumption that their operations *might* be impacted by the Regulation" (*Id.* [emphasis in original]).

Furthermore, respondents argue that LTD's tax returns do not show any causal connection between the regulation and petitioner or LTD's financial losses, because the returns were for 2013 through 2015, and the regulation did not go into effect until the second half of the last of these three years. Thus, LTD's losses of $4,367 in 2013 and $59,667 in 2014 were entirely unrelated to the regulation. The losses of $30,588 in 2015 partly occurred prior to the effective date of the regulation and partly were due to litigation expenses. As for LTD's loss of $53,053 in 2016, respondents note that this purportedly was partly due to litigation expenses, partly because LTD remained an active business and retained its equipment operational in case it prevails in this lawsuit, and partly due to interest on the loan he used to establish his business. Respondents argue

that "these losses plainly arise from [petitioner's] decision to challenge the legality of the Regulation before determining whether it even applied to his businesses, and cannot be plausibly attributed to the Regulation going into effect" (*Id.*).

In opposition, petitioner contends that he has standing. He reiterates the arguments he set forth originally in support of his proceeding. He states that he commenced the petition/action before he received a determination from DFS because he could not afford the regulatory costs of running a virtual currency business, and that he did not respond to the January 4, 2016 letter he received from DFS "because I had already commenced this action in October 2015 and I knew this action could invalidate the Regulation. Therefore, I concluded that it was futile for me and for my business to continue the application process at this stage" (Theo Chino Aff. in Support of Opposition to Cross-Motion [Chino Aff.], at ¶ 16). He states that the January 4, 2016 "response from the Department" forced him "to abandon my Bitcoin processing business because my application *was not approved*" (*Id.*, at ¶ 15 [emphasis supplied]). Petitioner further states that respondents have not submitted documentary evidence which refutes his statement of facts. Therefore, he states, the Court must accept his asserted facts as to standing as true and rule in his favor on this threshold issue. He states that he satisfies the two-pronged test the Court of Appeals set forth in *Novello* (2 NY3d at 211). He states that the closure of his businesses demonstrates his actual harm because "it is reasonably certain that the harm will occur if the challenged action is permitted to continue" (*Police Benevolent Ass'n of N.Y. State Troopers, Inc. v Division of N.Y. State Police*, 29 AD3d 68, 70 [3rd Dept 2006] [Police Benevolent Ass'n]). Citing *New York Propane Gas Ass'n v N.Y. State Dep't of State* (17 AD3d 915, 916 [3rd Dept 2005]), he argues that he need not quantify his loss with particularity. Furthermore, he asserts, the drastic increase in LTD's financial losses following the implementation of the regulations and its accompanying

application process establishes a causal connection, and that his realization that the cost of compliance with the regulation would be prohibitive is causally connected to his decision to shutter his business. He states that he did not shut his business voluntarily but was compelled to do so by the burdens of the application process and the anticipated burden of compliance. He suggests that it was unnecessary for DFS to determine that his business qualified as a virtual currency business under the regulation because he, an expert in the field, knew that LTD was subject to the regulation.

Petitioner also claims standing with respect to his claim for declaratory relief. Relying on *Plaza Health Clubs, Inc. v New York* (76 AD2d 509 [1st Dept 1980] [finding no standing because plaintiffs contended they did not engage in any business activities proscribed by the statute]) for the proposition that the possible threat to his business activity is sufficient to confer standing with respect to this claim. The reasonable certainty of future harm, he states, is enough (*Police Benevolent Ass'n*, 29 AD3d at 70 [finding that standing existed because, due to the petitioners' violations of court orders and the court's warning that they would be held in contempt for their alleged misconduct, the asserted harm was more than speculative]).

In reply, respondents reiterate their earlier arguments. They emphasize that petitioner did not complete the application process or allow DFS to reach a final determination. They contend that petitioner's entire argument rests on the fallacy that DFS' January 4, 2016 letter constitutes a denial of petitioner's application. They challenge petitioner's proximate cause argument because petitioner stopped operating his business before DFS even determined that a license and the accompanying compliance requirements applied. DFS also did not order LTD to cease its operations, respondents point out. Moreover, they contend that petitioner's statement that compliance with the regulation would be unduly burdensome is a speculative allegation regarding anticipatory harm.

DISCUSSION

After careful consideration, the Court concludes that petitioner has no right to commence an Article 78 proceeding and lacks standing to challenge the underlying regulation.

I. Petition

Petitioner did not complete LTD's application, and did not respond to DFS' January 2016 letter which notified him of his failure to do so. Petitioner acknowledges that he abandoned the application process because of the pendency of this hybrid action/proceeding challenging the regulation (Chino Aff. in Opp. To Cross-Motion, at ¶ 16). CPLR § 7803 provides a petitioner with a means to challenge "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR § 7808 [3]). Moreover, "one who objects to the acts of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*DiBlasio v Novello*, 28 AD3d 339, 341 [1st Dept 2006] [citations and internal quotation marks omitted]). Courts cannot "interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency" (*Id.*). In the proceeding at hand, DFS did not reach a final decision. Indeed, it did not reach any decision. Accordingly, there is nothing for this Court to review.

The Court notes that an exception exists to the exhaustion requirement when the action "is challenged as either unconstitutional or wholly beyond its grant of power, when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury" (*Martinez 2001 v New York City Campaign Finance Bd.*, 36 AD3d 544, 548 [1st Dept 2007]). The exception does not apply in this instance. Again, petitioner's failure to complete his application precludes him from raising this argument. Because of his failure, the agency did not take any action

– constitutional or otherwise, and neither within nor exceeding its grant of power. The DFS letter stating more information was necessary is not an action or decision within the meaning of the governing law. Instead, it is the legislation itself that petitioner challenges here. Any irreparable injury petitioner alleges is a result of the underlying law and not of any agency action.

Moreover, even if an ultra vires or unconstitutional action were at issue, petitioner has not shown that DFS has caused it irreparable harm. LTD's tax returns show three-and-a-half years of losses prior to the initiation of this action, and show comparable losses in 2014 – prior to the existence of the regulation – due to ongoing operation expenses. Petitioner attributes the 2016 losses to ongoing operation expenses and litigation costs resulting from this proceeding. Petitioner only shows one sale dated January 4, 2016 with a $279.41 invoice to support his contention regarding lost profits. Petitioner has not shown DFS would have determined the business was subject to the regulation. Although LTD appears to have engaged in a virtual currency business and petitioner claims that it was such a business, DFS never had the opportunity to evaluate the issue because petitioner did not provide it with most of the information it sought and the application obstructed DFS' efforts to obtain further information about him or LTD.

Similarly, petitioner's application for mandamus relief under Article 78 must fail. To the extent that he brings an Article 78 proceeding it is based on a challenge to DFS' action. Here, the purported action relates to petitioner's virtual currency business certification application. Not only did he fail to complete his application, but he does not seek an order mandating the granting of the license. Instead, he challenges the underlying regulation. Article 78 is not the proper vehicle for a challenge to the constitutionality of a regulation (*Westhampton Beach Assoc., LLC v Village of Westhampton Beach*, 151 AD3d 793 [2nd Dept 2017]).

II. Action

Next, the Court examines the question of whether petitioner has standing to challenge the constitutionality of the regulation. This presents a much closer issue than that of his Article 78 proceeding. To establish standing, a plaintiff must show injury in fact, which, "[a]s the term itself implies, . . . must be more than conjectural" (*Quast v Westchester County Bd. of Elections*, 155 AD3d 674, 674 [2nd Dept 2017]). In addition, the plaintiff must establish that he or she falls within the zone of interest which the regulation impacts (*See id.*). Moreover, "personal disagreement and speculative financial loss are insufficient to confer standing" (*Roulan v County of Onandaga*, 21 NY3d 902, 905 [2013] [rejecting plaintiff's standing argument that he sustained financial harm because challenged plan caused him to be assigned fewer criminal cases]; *see New York State Psychiatric Assoc., Inc. v Mills*, 29 AD3d 1058, 1059 [3rd Dept 2006] [asserted financial harm to psychiatrists was speculative]). The issue of standing, when applicable, must be considered at the outset of the litigation (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). If there is no standing, a court cannot issue a declaration as to the validity of a regulation (*See Roulan*, 21 NY3d at 905).

In the proper circumstances, the argument that a regulation imposes "an unacceptable burden" on an individual or business is sufficient to establish standing (*See Doe v Axelrod*, 136 AD2nd 410 [1st Dept 1988] [concerning regulations on pharmaceutical and medical professions that allegedly interfered with ability to provide medical case, invaded patients' privacy, and violated interstate commerce clause]). If, for example, this matter involved the issue of organizational standing, or, as in *Doe v Axelrod*, a large coalition of business owners who showed harm to their business under the regulation, or an individual or business that could show the probability of financial harm, there might be a strong argument in favor of standing. Here,

however, petitioner did not apply for certification,[8] and has not shown sufficient economic loss. Any argument as to the $5,000 application fee was waived because petitioner did not pay the fee or pursue the application. His economic loss argument is otherwise insufficient because LTD has never made a profit and petitioner showed proof of only one $279.41 sale. Moreover, its losses in 2016, once petitioner thought LTD was subject to the regulation, are not inconsistent with LTD's prior financial history.

III. Motion for Limited Discovery

Petitioner's motion for limited discovery is denied as moot. The discovery petitioner requested included depositions of Nobel Prize-winning New York Times columnist Paul Krugman and former DFS chair Benjamin Lawsky, and any documentary evidence relevant to respondents' conclusion that bitcoin is a financial product or service within the meaning of the regulation. None of the proposed discovery relates to the standing issue. Moreover, the Court notes that even if it had reached the issue of whether bitcoin should be governed by the regulation, it would have concluded that this discovery was unwarranted. It was not necessary to depose Paul Krugman and Benjamin Lasky, or to examine the entire history behind DFS' determination that bitcoin is a financial product governed by the regulation. Instead, the issue is the impact of the regulation on petitioner and other virtual currency businesses, and the discovery he seeks is not relevant to that issue. Petitioner has not provided – or argued that he attempted to provide – any pertinent evidence supporting this critical contention.

[8] The application form he submits here, with so much of the critical information absent and without allowing for further examination by DFS, cannot be considered an application, especially when petitioner abandoned his attempt to obtain certification prior to his receipt of the DFS January 2016 letter.

CONCLUSION

For the reasons above, the Court need not reach the other issues. Accordingly, it is

ORDERED that the cross-motion to dismiss which is part of motion sequence number 001 is granted and therefore the petition, also part of motion sequence number 001, is dismissed; and it is further

ORDERED that motion sequence number 003, which seeks limited pre-joinder discovery, is denied as moot.

Dated: 12/21, 2017

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.