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

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Cal. 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.

RECORD ON APPEAL

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Table of Contents

Page

Table of Contents
(Continued)

Page

Table of Contents
(Continued)

Page

Table of Contents
(Continued)

Page

Table of Contents
(Continued)

Page

Table of Contents
(Continued)

Page

Pre-Argument Statement
[pp. 1 - 3]

FILED: NEW YORK COUNTY CLERK 02/04/2018 07:16 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 40 RECEIVED NYSCEF: 02/04/2018

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:

FILED: NEW YORK COUNTY CLERK 02/04/2018 07:16 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 40 RECEIVED NYSCEF: 02/04/2018

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(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
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(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 SEP (iv) contains disclosure requirements that violate commercial speech rights under the First Amendment to the United States Constitution and New York Constitution.

FILED: NEW YORK COUNTY CLERK 02/04/2018 07:16 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 40 RECEIVED NYSCEF: 02/04/2018

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

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Notice of Appeal, dated February 3, 2018
[pp. 4 - 5]

FILED: NEW YORK COUNTY CLERK 02/04/2018 07:16 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 40 RECEIVED NYSCEF: 02/04/2018

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.

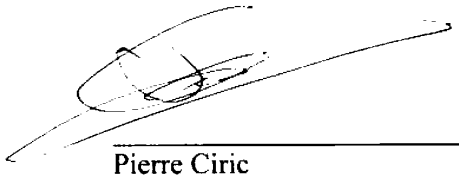
New York County
Index No. 101880/2015

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

FILED: NEW YORK COUNTY CLERK 02/04/2018 07:16 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 40 RECEIVED NYSCEF: 02/04/2018



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Attorney for Plaintiffs-Petitioners-Appellants

Decision, Order and Judgment of the Honorable Carmen Victoria St. George, dated December 21, 2017, Appealed From, with Notice of Entry [pp. 6 - 24]

FILED: NEW YORK COUNTY CLERK 02/04/2018 07:16 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 40 RECEIVED NYSCEF: 02/04/2018

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

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FILED: NEW YORK COUNTY CLERK 12/04/2018 07:16 AM INDEX NO. 101880/2015
NYSCEF DOC. NO. 40 RECEIVED NYSCEF: 12/04/2018

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

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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,

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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.

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.

FILED: NEW YORK COUNTY CLERK 02/04/2018 07:16 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 40 RECEIVED NYSCEF: 02/04/2018

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.

Amended Verified Complaint and Article 78 Petition, dated May 25, 2017, with Exhibit List [pp. 25 - 62]

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

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

THEO CHINO and CHINO LTD,

Plaintiffs-Petitioners,

-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.

Index No. 101880/2015
Hon. Lucy Billings

AMENDED VERIFIED COMPLAINT AND ARTICLE 78 PETITION

ORAL ARGUMENT REQUESTED

Plaintiffs-Petitioners Theo Chino and Chino LTD, by and through their attorney, Pierre Ciric, with the Ciric Law Firm, PLLC, upon information and belief, alleges the following against the New York Department of Financial Services ("NYDFS") and Maria T. Vullo, in her official capacity as the Superintendent of NYDFS:

PRELIMINARY STATEMENT

1. This case is about the "Virtual Currency" regulation promulgated by NYDFS at Part 200 of Chapter 1 of Title 23 of the New York Codes, Rules and Regulations (cited as "NYCRR") (the "Regulation"). The effective date of the regulation was June 24, 2015.

2. On November 19, 2013, Theo Chino incorporated Chino LTD. The original purpose of Chino LTD was to install Bitcoin processing services in the State of New York.

3. On December 31, 2014, Theo Chino co-founded Conglomerate Business Consultants, Inc. ("CBC"). CBC entered into formal contracts with seven bodegas in New York to offer Bitcoin processing services provided by Chino, LTD through the resale of calling cards by the bodegas to their customers. Theo Chino's goal was to secure long-term and stable

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

commercial relationships with the bodegas using CBC's calling cards. Once those relationships were established, bodegas would be able to offer the use of Bitcoin as a settlement method for regular items sold by bodegas (milk, food, etc.). At all times, Chino LTD was providing Bitcoin processing services to CBC and to the bodegas for transactions involving both calling card and regular items.

4. While CBC was a distributor of the Bitcoin processing service directly to bodegas, Chino LTD provided the actual processing services.

5. As required under NYCRR § 200.21, Theo Chino, on behalf of Chino LTD, submitted an application for license on August 7, 2015 to engage in Virtual Currency Business Activity, as defined in 23 NYCRR § 200.2(q).

6. While the application was pending, Theo Chino filed pro se his first complaint/petition on October 16, 2015 because he realized that the Regulation would impose significant costs to run his business and because the deadline to challenge the Regulation, 4 months after the effective date, October 24, 2015, was nearing.

7. On January 4, 2016, NYDFS returned Chino LTD's application without further processing after they performed an initial review. The stated reason for returning the application was that NYDFS was unable to evaluate whether the company's current or planned business activity would be considered Virtual Currency Business Activity that requires licensing under the New York Financial Services Law and regulations.

8. On January 4, 2016, CBC stopped offering Bitcoin processing services when NYDFS did not approve Chino LTD's application.

9. NYDFS acted beyond the scope of its authority when it promulgated the Regulation because NYDFS is only authorized to regulate "financial products and services", but

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

Bitcoin lacks the characteristic of a financial product or service, and, in the absence of an explicit legislative authorization, NYDFS is not authorized to regulate it.

10. During hearings held by NYDFS on the topic of virtual currency on January 28 and January 29, 2014 in New York City, Mark T. Williams, member of the Finance & Economics Faculty at Boston University, was the only witness present at the hearings who introduced in the written record direct testimony as to the economic nature of Bitcoin. His testimony establishes that Bitcoin is not a currency, but instead should be treated as a commodity. New York State Department of Financial Services Hearings on the Regulation of Virtual Currency (2014)(statement of Mark T. Williams, Member of the Finance & Economics Faculty, Boston University), http://www.dfs.ny.gov/about/hearings/vc_01282014/williams.pdf.

11. NYDFS does not have the authority to imply additional terms to a statute. If the legislature wanted NYDFS to regulate Bitcoin or other so-called "cryptocurrencies," it would have included it in the definition of "financial product or service".

12. The Regulation is preempted by federal law because under the Dodd-Frank Act, State consumer financial laws are preempted if the State law "is preempted by a provision of Federal law other than title 62 of the Revised Statutes." 12 U.S.C. § 25b(b)(1)(C).

13. The Regulation is arbitrary and capricious because: (1) the scope of the Regulation is irrationally broad, (2) the Regulation's recordkeeping requirements are without sound basis in reason, (3) the Regulation irrationally treats virtual currency transmitters differently than fiat currency transmitters, and (4) there is no rational basis underlying a one-size-fits all Regulation that unreasonably prevents startups and small businesses from participating in Virtual Currency Business Activity, and imposes capital requirements on *all* licensees.

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

14. The Regulation violated the First Amendment of the U.S. Constitution and the New York Constitution under the compelled commercial speech and the restricted commercial speech doctrines because some of the required disclosures under the Regulation are forcing Plaintiffs-Petitioners to make false assertions to customers, or overly broad or unduly burdensome statements to their customers.

PARTIES

15. Plaintiff-Petitioner Chino LTD is a Delaware Sub S-corporation, authorized to do business in New York. Chino LTD's principal place of business is located at 640 Riverside Drive, Apt 10B, New York, NY 10031, in New York County.

16. Plaintiff-Petitioner Theo Chino is a New York State resident, residing at 640 Riverside Drive, Apt 10B, New York, NY 10031, in New York County. He is the owner of Chino LTD.

17. Defendant-Respondent the New York Department of Financial Services is an agency of the State of New York charged with the enforcement of banking, insurance, and financial services law. N.Y. Fin. Serv. Law (cited as "FSL") § 102. NYDFS's principal place of business is located at 1 State St, New York, NY 10004, in New York County.

18. Defendant-Respondent Maria T. Vullo is the Superintendent of NYDFS. The Superintendent is head of NYDFS. FSL § 202. Maria T. Vullo's principal place of business is located at 1 State St, New York, NY 10004, in New York County.

JURISDICTION AND VENUE

19. This Court has subject matter jurisdiction to decide this Petition pursuant to CPLR § 7803 because the body or officer, here Defendant-Respondents, proceeded in excess of jurisdiction, because the Regulation promulgated by Defendants-Respondents is a final

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

determination made in violation of lawful procedure, affected by an error of law, and is arbitrary and capricious.

20. This Court has subject matter jurisdiction to render a declaratory judgment pursuant to CPLR § 3001.

21. This Court has personal jurisdiction over Defendants-Respondents pursuant to CPLR § 301.

22. Venue properly lies in the County of New York pursuant to CPLR §§ 503(a), 505(a), 506(a), 506(b), and 7804(b), as the parties reside in the County of New York, as Defendants-Respondents' principal office is located in the County of New York, as Defendants-Respondents made the determination at issue in the County of New York, as material events took place in the County of New York, and as claims are asserted against officers whose principal offices are in New York County.

FACTUAL BACKGROUND

Bitcoin

23. Bitcoin was collaboratively developed by an independent community of Internet programmers without any financial backing from any government.

24. Bitcoin is the result of transparent mathematical formulas, which lack the attributes of traditional financial products or transactions.

25. Bitcoin consists of four different components: (1) a decentralized peer-to peer network (the bitcoin protocol), (2) a public transaction ledger (the blockchain), (3) a decentralized mathematical algorithm, and (4) a decentralized verification system (transaction script). Andreas M. Antonopoulos, MASTERING BITCOIN: UNLOCKING DIGITAL CRYPTOCURRENCIES (2014).

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

26. Bitcoins are created through the computation of a mathematical algorithm through a process called "mining," which involves competing to find solutions to a mathematical problem while processing bitcoin transactions. *Id.* Anyone in the Bitcoin network may operate as a "miner" by using their computer to verify and record transactions. *Id.* The bitcoin protocol includes built-in algorithms that regulate this mining function across the network. *Id.* The protocol limits the total number of bitcoins that will be created. *Id.* Once bitcoins are created, they are used for bartering transactions using the blockchain technology. *Id.* This technology relies on data "blocks," which are "a group of transactions, marked with a timestamp, and a fingerprint of the previous block." *Id.* A blockchain is "[a] list of validated block, each linking to its predecessor all the way to the genesis block." *Id.* The genesis block is "[t]he first block in the blockchain, used to initialize the cryptocurrency, and the universe of bitcoin transactions in capped at 21 million. *Id.*

27. As with traditional commodities, like crude oil and gold, the value of Bitcoin is highly volatile and dependent upon supply and demand. Like gold, bitcoins are a finite resource. "[O]nly 21 million bitcoins will ever be created." *Frequently Asked Questions*, BITCOIN, https://bitcoin.org/en/faq#is-bitcoin-a-bubble (last visited Aug. 16, 2016).

28. Furthermore, acquiring Bitcoin is analogous to acquiring other commodities. A person who wishes to obtain a commodity, like gold, for example, can either purchase gold on the market or can mine the gold himself. Similarly, a person who wishes to obtain bitcoins can either purchase them on the market or "mine" them himself through participation in Bitcoin's transaction verification process. *See* Stephen T. Middlebrook & Sarah Jane Hughes, *Regulating Cryptocurrencies in the United States: Current Issues and Future Directions*, 40 WM. MITCHELL L. REV. 813, 818 (2014).

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

29. Bitcoin is not money, and because currencies are representations of money, Bitcoin is not a true currency. *See* Leo Haviland, WORD ON THE STREET: LANGUAGE AND THE AMERICAN DREAM ON WALL STREET 294 (2011); *In re Coinflip, Inc.*, CFTC Docket No. 15-29 at 3 (Sept. 17, 2015).

30. True currencies, unlike Bitcoin, "are designated legal tender, [that] circulate and are customarily used and accepted as a medium of exchange in the country of issuance." *In re Coinflip, Inc.* at 3; s*ee also* Notice 2014-21, IRS, https://www.irs.gov/pub/irs-drop/n-14- 21.pdf (recognizing that bitcoins "[do] not have legal tender status in any jurisdiction").

31. Unlike true currencies, Bitcoin is neither widely accepted as mediums of exchange nor a stable store of value, nor issued by a government. Dominic Wilson & Jose Ursua, *Is Bitcoin a Currency?,* 21 GOLDMAN SACHS: TOP OF MIND 6, 6 (2014), http://www.paymentlawadvisor.com/files/2014/01/GoldmanSachs-Bit-Coin.pdf; *See Model State Consumer and Investor Guidance on Virtual Currency*, CONFERENCE OF STATE BANK SUPERVISORS (Apr. 23, 2014), http://www.ncsl.org/documents/summit/summit2014/onlineresources/ModelConsumerGuidance--VirtualCurrencies.pdf; *Virtual Currency: Risks and Regulation*, THE CLEARING HOUSE at 17 (June 23, 2014), https://www.theclearinghouse.org/issues/articles/2014/06/20140623-tch-icba-virtual-currency-paper.

32. In the case *US v. Petix*, Case No. 15-CR-227, currently in the United States District Court, Western District of New York, Magistrate Judge Scott, in his Report and Recommendation dated December 1, 2016, gave a detailed analysis concluding that Bitcoin is not money or funds under 18 U.S.C. § 1960, a federal statute prohibiting unlicensed money transmitting businesses. Magistrate Judge Scott noted that money and funds must involve a

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

sovereign: "'[m]oney,' in its common use, is some kind of financial instrument or medium of exchange that is assessed value, made uniform, regulated, and protected by *sovereign power.*" (Citation omitted). "Bitcoin is not 'money' as people ordinary understand the term." "Like marbles, Beanie Babies™, or Pokémon™ trading cards, bitcoins have value exclusively to the extent that people at any given time choose privately to assign them value. No governmental mechanisms assist with valuation or price stabilization, which likely explains why Bitcoin value fluctuates much more than that of the typical government-backed fiat currency." *United States v. Petix*, 2016 U.S. Dist. LEXIS 165955 (W.D.N.Y., Dec. 1, 2016, No. 15-CR-227A).

33. Similarly, because Bitcoin is not issued by a government, no entity is required to accept it as payment. Karl Whelan, *How is Bitcoin Different from the Dollar?*, FORBES (Nov. 19, 2013), http://www.forbes.com/sites/karlwhelan/2013/11/19/how-is-bitcoin-different-from-the-dollar/#68c676c86d34.

34. Moreover, while currencies are generally secured by a commodity or a government's ability to tax and defend, Bitcoin is not safeguarded by either. Jonathon Shieber, *Goldman Sachs: Bitcoin Is Not A Currency,* TECHCRUNCH (Mar. 12, 2014), https://techcrunch.com/2014/03/12/goldman-sachs-bitcoin-is-not-a-currency/.

35. Bitcoin lacks the characteristics of a true currency and therefore lacks the characteristics associated with a financial product.

Regulation

36. The New York Legislature has authorized NYDFS to regulate *financial* products and services. However, NYDFS promulgated a Regulation that monitors and controls non-financial products and services.

37. Bitcoin is considered a "virtual currency" for purpose of the Regulation.

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

38. The Regulation requires those engaged in "virtual currency business activity" that involves New York or New York residents to obtain a license. 23 NYCRR §§ 200.2(q), 200.3(a).

39. Applying for the license under the Regulation requires a non-refundable $5,000 application fee. 23 NYCRR § 200.5.

40. It has been reported that companies spent between $50,000 and $100,000 applying for a license under the Regulation. 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/. These companies are then required to shell out even more money every year to continue complying with the Regulation.

41. According to the Regulation, the same requirements apply to all virtual currency transactions, regardless of whether 1-cent worth or thousands of dollars' worth is being transacted.

42. The Regulation requires licensees to maintain a capital requirement as determined by the Superintendent. 23 NYCRR § 200.8.

43. Further, the fundamental protocol used to conduct most Internet activity falls within the Regulation's definition of "Virtual Currency".

44. Subject to three narrow exceptions, "Virtual Currency" means "*any* type of digital unit that is used as a medium of exchange or a form of digitally stored value." 23 NYCRR § 200.2(p) (emphasis added). Furthermore, 23 NYCRR § 200.2(p) mandates that this definition be "broadly construed." *Id.* Given this instruction and the Regulation's failure to define "digital unit" or "medium of exchange," nearly all Internet activity could be interpreted under the Regulation to involve virtual currency.

45. Transmission Control Protocol/Internet Protocol (TCP/IP) allows computers to

communicate over the Internet. Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815, 821 (2004). People engage the TCP/IP protocol to send emails, visit websites, or download music. John Gallaugher, *12.3, Get Where You're Going*, A MANAGER'S GUIDE TO THE INTERNET AND TELECOMMUNICATIONS (2012), http://2012books.lardbucket.org/books/getting-the-most-out-of- information-systems-v1.3/s16-a-manager-s-guide-to-the-inter.html; Nick Parlante, *How Email Works*, STANFORD UNIV., https://web.stanford.edu/class/cs101/network-4-email.html (last visited Oct. 25, 2016). The TCP/IP system takes data, divides it into packets, and then bounces those packets from the starting point to the final destination. LAWRENCE LESSIG, CODE 43 (2nd ed. 2006). A TCP/IP packet is "the smallest unit of transmitted information over the Internet," and is thus a "digital unit." *See* Roberto Sanchez, *What is TCP/IP and How Does It Make the Internet Work?*, HOSTINGADVICE.COM (Nov. 17, 2015), http://www.hostingadvice.com/blog/tcpip-make-internet-work/; *Digital*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/digital (last accessed Oct. 25, 2016) (defining "digital" as "using or characterized by computer technology"). TCP/IP packets are also "the exchange medium used by processes to send and receive data through Internet networks." *TCP/IP Terminology*, IBM KNOWLEDGE CENTER, https://www.ibm.com/support/knowledgecenter/ssw_aix_71/com.ibm.aix.networkcomm/tcpip_terms.htm (last visited Oct. 25, 2016). Accordingly, a TCP/IP packet, which is a "digital unit," is used "as a medium of exchange," and thus falls within the Regulation's definition of "virtual currency". *See* 23 NYCRR § 200.2(p). This means that when people engage in Internet activity, they almost always use "virtual currency", as it is defined in the Regulation, to do so, rendering such activity potentially subject to the Regulation.

46. NYDFS intended to regulate financial intermediaries in so-called

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

"cryptocurrencies." Nermin Hajdarbegovic, *Lawsky: Bitcoin Developers and Miners Exempt from BitLicense*, COINDESK (Oct. 15, 2014), http://www.coindesk.com/lawsky-bitcoin-developers-miners-exempt-bitlicense/ (noting that the Superintendent clarified, "[w]e are regulating financial intermediaries . . . we do not intend to regulate software or software development"). Many cryptocurrencies, like Bitcoin, are blockchain technologies. *E.g.* Steven Norton, *CIO Explainer: What is Blockchain?*, WALL ST. J. (Feb. 2, 2016), http://blogs.wsj.com/cio/2016/02/02/cio-explainer-what-is-blockchain/. Blockchains are essentially public ledgers that record users' entries. *Id.* For example, when a person exchanges a bitcoin, or a fraction thereof, the transaction is recorded on the Bitcoin blockchain. *See How Does Bitcoin Work?*, BITCOIN, https://bitcoin.org/en/how-it-works (last visited Oct. 25, 2016). Blockchain technologies fall within the Virtual Currency definition because they can be used as a medium or exchange or a form of digitally stored value. *See* 23 NYCRR § 200.2(p). Even non-financial uses of blockchain technology fall within the Regulation's definition of "virtual currency" because, to participate in blockchain technology, a user engages "digital unit[s]," that [are] "used as medium[s] of exchange." It is digital units, like bitcoins, that carry value, and "even non-financial uses require a de minimis amount of currency," a "medium of exchange." *See* 23 NYCRR § 200.2(p); Trevor I. Kiviat, Note, *Beyond Bitcoin: Issues in Regulating Blockchain Transactions*, 65 DUKE L.J. 569, 591, 597 (2016); Jeffrey A. Tucker, *What Gave Bitcoin Its Value?*, FOUND. FOR ECON. EDUC. (Aug. 27, 2014), https://fee.org/articles/what-gave-bitcoin-its- value/. Because blockchain technologies fall within the Regulation's definition of "virtual currency", they are potentially subject to the Regulation. *See* 23 NYCRR §§ 200.2(p)(q)-200.3. Blockchain technologies, however, are not inherently financial. *See* Luke Parker, *Ten Companies Using the Blockchain for Non-Financial Innovation*, BRAVE NEW COIN (Dec. 20,

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

2015), http://bravenewcoin.com/news/ten-companies-using-the-blockchain- for-non-financial-innovation/. People can, and do use blockchain technologies to engage in a slew of non-financially related activities. *See*, *e.g. id.* Artists use blockchain technology to assert ownership over their works, insurers use blockchain technology to track diamonds, and people use blockchain technology to timestamp documents and photos. *See id.* Additionally, people can use blockchain technology to cast votes, send messages, or enter into contracts. *See Blockchain Technology in Online Voting*, FOLLOW MY VOTE, https://followmyvote.com/online-voting-technology/blockchain-technology/; Naomi O'Leary, *British Traders Have Discovered Bitcoin*, BUS. INSIDER (Apr. 2, 2012), http://www.businessinsider.com/british-traders-have-discovered-bitcoin-2012-4 (noting that the first Bitcoin transaction was used to send a political message); Nik Custodio, *Explain Bitcoin Like I'm Five*, MEDIUM (Dec. 12, 2013), https://medium.com/@nik5ter/explain-bitcoin-like-im- five-73b4257ac833#.ri7s32qfb. Yet, the definition of "virtual currency" does not exclude or otherwise exempt these non- financial uses of blockchain technology, rendering such uses potentially subject to the Regulation. *See* 23 NYCRR § 200.2(p).

47. Five categories of activities qualify as Virtual Currency Business Activities. *See* 23 NYCRR §§ 200.2(q), 200.3. Each category is defined by terms that have a broad range of meanings, and that encompass numerous activities that are entirely unrelated to financial exchanges, services, or products. Furthermore, only one category of activities exempts non-financial uses. *See* 23 NYCRR § 200.2(q).

48. The Regulation requires anyone engaged in "storing, holding or maintaining custody or control of Virtual Currency on behalf of others" to obtain a License and comply with the Regulation. 23 NYCRR § 200.2(q)(2). However, the Regulation fails to clarify what

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

activities qualify as "storing," "holding," or "maintaining custody or control" of Virtual Currency. *See* 23 NYCRR §§ 200.1-200.22. Thus, if a New York citizen established a trust, designated himself as trustee, and funded the trust with his own bitcoins, he would arguably be required to obtain a license, because, as a trustee, he could be interpreted as "holding... Virtual Currency on behalf of others," in this case, the beneficiaries of the trust. Likewise, a bitcoin owner's fiancée would not legally be allowed to hold her fiancé's Bitcoin wallet for safekeeping unless she first obtained a license, because in safekeeping his Bitcoin wallet, she would arguably be "holding...Virtual Currency on behalf of others."

49. The Regulation also requires anyone "controlling... a Virtual Currency" to obtain a license. The Department did not define "controlling," leaving room for expansive interpretation. *See* 23 NYCRR §§ 200.1-200.22. Arguably, any Bitcoin owner with a tenuous relationship to New York is subject to the Regulation. A Bitcoin owner "controls" a Virtual Currency, regardless of whether that Bitcoin owner uses bitcoins as financial instruments. This means that someone wishing to cast a vote using bitcoins, exercise his freedom of speech using bitcoins, or create digital art using bitcoins would arguably be required to obtain a license and comply with the Regulation in order to do so.

50. The Regulation requires most actors engaged in "controlling, administering, or issuing a Virtual Currency" to obtain a license and abide by minimum capital requirements, even if such "controlling, administering, or issuing" has no tie to the financial sector. *See* 23 NYCRR §§ 200.2(p), 200.2(q)(4), 200.3, 200.8. Furthermore, the blanket Regulation subjects those engaged in "[t]ransmitting Virtual Currency" to minimum capital requirements unless "the transaction is undertaken for non-financial purposes *and* does not involve the transfer of more than a nominal amount of Virtual Currency." 23 NYCRR §§ 200.2(q)(1), 200.3, 200.8 (emphasis

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

added). Therefore, a father who wishes to give his daughter one bitcoin for her birthday would be transmitting a non-nominal amount of Virtual Currency, and would thus be required to obtain a license and abide by minimum capital requirements in order to do so.

51. The Regulation requires Licensees to: (1) record "each transaction, the amount, date, and precise time of the transaction... the names, account numbers, and physical addresses of (i) the party or parties to the transaction that are customers or accountholders of the Licensee; and (ii) to the extent practicable, any other parties to the transaction," and (2) maintain those records "for at least seven years." 23 NYCRR § 200.12(a). These extensive and onerous requirements apply to *all* virtual currency transactions, regardless of whether, for example, a Satoshi, worth less than 1 cent, is being transacted, or 100 bitcoins, worth approximately $56,944, are being transacted. *See id.* A Licensee could foreseeably be forced to spend more money to make and retain records than the transaction itself is worth.

52. The Regulation's anti-money laundering provisions are inconsistent with NYDFS's preexisting anti-money laundering regulations. NYDFS has imposed stringent anti-money laundering requirements upon Virtual Currency businesses that it has not imposed on fiat currency transmitters. *See* 23 NYCRR § 200.15; 3 NYCRR § 416.1.

53. NYDFS requires money transmitters to comply with federal anti-money laundering laws. 3 NYCRR § 416.1. The Regulation, however, requires virtual currency transmitters to comply with anti-money laundering requirements that go beyond those required under federal law. *See* 23 NYCRR § 200.15.

54. The Regulation requires Licensees to file Suspicious Activity Reports ("SAR") even if they would not be required to do so under federal law. 23 NYCRR § 200.15(e)(3)(ii). Furthermore, this provision subjects such firms to potential liability for submitting SARs because

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

though the federal SAR requirements include a safe harbor provision that extends immunity to disclosing institutions, the Regulation does not contain a comparable provision. 31 U.S.C. § 5318(g)(3); 23 NYCRR § 200.15. Thus, under NYDFS's regulatory scheme, a money transmitter dealing in fiat currency that is not required to file SARs would be required to file SARs if that transmitter wished to engage in Virtual Currency transmission. *See* 23 NYCRR § 200.15(e)(3)(ii).

55. Additionally, the Regulation requires Licensees to retain all records related to their anti- money laundering programs for at least seven years. 23 NYCRR § 200.12(a). By contrast, fiat currency transmitters are only required to retain such records for five years. 3 NYCRR § 416.1(b)(2)(i) (requiring licensees to retain records in accordance with 31 CFR § 103); 31 CFR § 1010.430(d) (formerly at 31 CFR § 103.38(d); requiring licensees to retain records for five years).

56. A number of other requirements imposed on Virtual Currency business are not imposed on other money transmitters, such as keeping records on all transactions, including the identity and physical address of the parties, 23 NYCRR § 200.15(e)(1)(i); reporting and notifying transactions exceeding $10,000 in an aggregate amount, 23 NYCRR § 200.15(e)(2); or complying with a Cyber Security Program, including staffing and reporting requirements, 23 NYCRR § 200.16.

57. Superintendent Benjamin Lawsky publically admitted that the rationale for these different rules not imposed on other institutions was to test them as "models for our regulated banks and insurance companies," and not as a genuine response to a pressing regulatory need. Superintendent Benjamin M. Lawsky, Address at Benjamin N. Cardozo School of Law (Oct. 14, 2014), at page 2 (transcript available at

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

http://web.archive.org/web/20150702103620/http://www.dfs.ny.gov/about/speeches_testimony/sp141014.htm).

58. The Regulation is an untailored blanket regulation that fails to consider that not all virtual currency businesses are equally situated, and it irrationally imposes capital requirements on all Licensees.

59. The Regulation has a severe disparate impact on startups and small businesses, which do not have access to the funds and resources the Regulation requires. The cost of applying for a License is exorbitant. *See* 23 NYCRR § 200.5 (requiring a non-refundable $5,000 application fee); 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/. Furthermore, the costs of staying in compliance with the Regulation, if granted a License, are unwarranted and potentially excessive. Licensees are required to "maintain at all times such capital in an amount and form as the superintendent determines is sufficient." 23 NYCRR § 200.8(a). This vague, open-ended requirement is likely to unreasonably impede cash-strapped startups and small businesses from being able to engage in Virtual Currency Business Activity. The Regulation's requirement that Licensees "maintain a surety bond or trust account... in such a form and amount as is acceptable to the superintendent" is similarly prone to effectively prohibit underfunded startups and small businesses from engaging in Virtual Currency related business. *See* 23 NYCRR § 200.9(a).

60. The tech industry is an increasingly important piece of New York's economy, and digital currency is a prominent emerging technology. *See The New York City Tech Ecosystem*, HR&A ADVISORS (Mar. 2014), http://www.hraadvisors.com/wp-content/uploads/2014/03/NYC_Tech_Ecosystem_032614_WEB.pdf; Brian Forde, *How to*

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

Prevent New York from Becoming the Bitcoin Backwater of the U.S., MEDIUM (May 12, 2015), https://medium.com/mit-media-lab-digital-currency-initiative/how-to-prevent-new-york-from-becoming-the-bitcoin-backwater-of-the-u-s-931505a54560#.u05t446p2. Startups are essential to technological innovation and growth, and in 2015, New York City was recognized as being one of the top startup ecosystems in the world. Richard Florida, *The World's Leading Startup Cities*, CITYLAB (July 27, 2015), http://www.citylab.com/tech/2015/07/the-worlds-leading-startup-cities/399623/; Emily Edwards, *Financial Technology Startups Are Bringing Underbanked Into the Economy*, MEDIUM (May 16. 2016), https://medium.com/village-capital/financial-technology-startups-are-bringing-the- underbanked-into-the-economy-24978561b9ea#.635lp86ks. However, the Regulation has transformed this once welcoming New York landscape into an inhospitable environment for digital currency-related startups. 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/.

61. When Superintendent Lawsky announced the final version of the Regulation, he said: "we should not react so harshly that we doom promising new technologies before they get out of the cradle." Ben Lawsky, *The Final NYDFS BitLicense Framework*, MEDIUM (June 3, 2015), https://medium.com/@BenLawsky/the-final-nydfs-bitlicense-framework-d4e333588f04#.akxneegmv. Yet the Regulation has done just that. The Regulation has effectively forced digital currency-related startups to relocate outside New York and to otherwise severe ties with New York citizens. *See, e.g.*, 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 startups and small companies, and has in many instances left businesses with no other option than to flee and

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

otherwise abandon New York. *See id.*; *BitLicense Restrictions for New York Customers*, BITFINEX (Aug. 7, 2015), https://www.bitfinex.com/posts/51.

62. Between November 2014 and June 2015, Theo Chino filed five Freedom of Information Law ("FOIL") requests to understand NYDFS's process for framing the Regulation. Indeed, as required under New York State's Administrative Procedure Act, Defendant-Respondent referred to, in the statement of "needs and benefits" published with the proposed regulation, an "extensive research and analysis" performed to prepare the Regulation.

63. Theo Chino did not receive any of the requested information. Instead, NYDFS said they did not have any of the records requested or that NYDFS is in possession of some of the records requests but the records have not been provided because they are exempt from disclosure.

64. A similar FOIL was submitted by Jim Harper, then Global Policy Counsel at the Bitcoin Foundation, a not-for-profit organization dedicated to the advancement of Bitcoin, to Defendants-Respondents on August 5, 2014, to which he never received any response.

Other States, Agencies, and Jurisdictions

65. Bitcoin is akin to commodity-like mediums of exchange. This view is consistent with the positions taken by the IRS and the Commodity Future Trading Commission (CFTC).

66. The IRS has concluded that bitcoins are property, not currency for tax purposes. Notice 2014-21, IRS, https://www.irs.gov/pub/irs-drop/n-14-21.pdf.

67. Texas and Kansas have taken the position that Bitcoin is not money and issued memorandum stating this. Tex. Dep't of Banking, Supervisory Memorandum 1037, Regulatory Treatment of Virtual Currencies Under the Texas Money Services Act 2-3 (Apr. 3, 2014), http://www.dob.texas.gov/public/uploads/files/consumer-information/sm1037.pdf; Kan. Office

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

of the State Bank Commissioner Guidance Document, MT 2014-01, Regulatory Treatment of Virtual Currencies Under the Kansas Money Transmitter Act 2-3 (June 6, 2014), http://www.osbckansas.org/mt/guidance/mt2014_01_virtual_currency.pdf.

68. California has tried twice to use the legislative process to pass a bill regulating virtual currency. California introduced AB-1326 to regulate virtual currency business on February 27, 2015. A.B. 1326, 2015-2016 Reg. Sess. (Cal. 2015), History, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB1326. The bill was ordered to become an inactive file on September 11, 2015 at the request of Senator Mitchell. *Id.* The bill was reintroduced on August 8, 2016. *Id.* On August 15, 2016, Assembly member Matt Dababneh withdrew the bill from consideration. Aaron Mackey, *California Lawmaker Pulls Digital Currency Bill After EFF Opposition,* ELEC. FRONTIER FOUND. (Aug. 18, 2016), https://www.eff.org/deeplinks/2016/08/california- lawmaker-pulls-digital-currency-bill-after-eff-opposition.

69. New Hampshire's House of Representatives passed HB 436, which seeks to exempt virtual currency users from having to register as money service businesses. Rebecca Campbell, *New Hampshire's Bill to Deregulate Bitcoin Passes House,* CryptoCoinsNews (Mar. 11, 2017), https://www.cryptocoinsnews.com/new-hampshires-bill-deregulate-bitcoin-passes-house/.

70. In Texas, a constitutional amendment was proposed, Texas House Joint Resolution 89, which would protect the right to own and use digital currencies like Bitcoin in Texas. Stan Higgins, *Texas Lawmaker Proposes Constitutional Right to Own Bitcoin,* COINDESK (Mar. 3, 2017), http://www.coindesk.com/texas-lawmaker-proposes-constitutional-right-bitcoin/. The constitutional amendment would prevent any government effort to interfere with that use or

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

ownership of digital currencies like Bitcoin. *Id.*

71. A Florida court recently ruled that Bitcoin is not money. *Florida v. Espinoza*, No. F14-2923 at 6 (Fla. 11th Cir. Ct. July 22, 2016) (concluding that "it is very clear, even to someone with limited knowledge in the area, that Bitcoin has a long way to go before it is the equivalent of money" most notably because it is not accepted by all merchants, the value fluctuates significantly, there is a lack of a stabilization mechanism, they have limited ability to act as a store of value, and Bitcoin is a decentralized system.)

Chino LTD

72. On November 19, 2013, Theo Chino incorporated Chino LTD in Delaware. A copy of the Delaware Certificate of Incorporation is attached as Exhibit I.

73. On February 24, 2014, I submitted an application for authority to conduct business in the state of New York under § 1304 of the Business Corporation Law as a foreign business corporation. The original purpose of Chino LTD was to install Bitcoin processing services in the State of New York. A copy of the New York filing receipt is attached as Exhibit II.

74. In March 2014, Theo Chino hired an employee to sell Chino LTD's Bitcoin-related services in New York County and Bronx County.

75. Chino LTD's employee distributed surveys to local bodegas and stores to evaluate the Bitcoin landscape and identify potential clients in the Manhattan area. A copy of one of the translated surveys is attached as Exhibit III.

76. On December 31, 2014, Theo Chino co-founded Conglomerate Business Consultants, Inc. ("CBC"). A copy of the New York Certificate of incorporation is attached as Exhibit IV.

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

77. CBC started out by purchasing phone minutes from E-Sigma Online LLC, and later from NobelCom LLC. CBC would distribute the phone minutes to bodegas who would in turn sell the phone minutes to customers. A copy of a receipt of transactions between CBC and Multiservice And Innovations Inc. involving NobelCom LLC phone minutes is attached as Exhibit V.

78. After business relationships were established with bodegas through selling phone minutes, between December 2014 and May 2015, CBC entered into formal contracts with seven bodegas in New York to offer Bitcoin processing services provided by Chino LTD. A copy of one of the contracts between CBC and a bodega is attached as Exhibit VI. Theo Chino's goal was to secure long-term and stable commercial relationships with the bodegas using CBC's calling cards. Once those relationships were established, bodegas would be able to offer the use of Bitcoin as a payment method for regular items sold by bodegas (milk, food, etc.). At all times, Chino LTD was providing Bitcoin processing services to CBC and to the bodegas for transactions involving both calling card and regular items.

79. The bodegas were given signage to display that they accepted Bitcoins. A photo of the signage is attached as Exhibit VII.

80. Every day, Chino LTD would provide the bodegas the daily exchange rate that would be used for the Bitcoin processing services.

81. While CBC was a distributor of phone minutes and the Bitcoin processing services directly to bodegas, Chino LTD provided the actual processing services.

82. Chino LTD provided all the research and development for Bitcoin processing, bought all of the computer to run the backend of processing Bitcoin, rented all of the hosting equipment to run the front end of processing Bitcoin, and developed custom operating systems to

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

run the Bitcoin processing.

83. Chino LTD's Bitcoin processing business fell within the "Virtual Currency Business Activity" under the Regulation. The Regulation requires those engaged in "Virtual Currency Business Activity" that involves New York or New York residents to obtain a license. 23 NYCRR §§ 200.2(q), 200.3(a).

84. Theo Chino is a New York resident who conducted business in New York with New York residents thus the Regulation applied to Theo Chino and Chino LTD.

85. In 2013, the year Chino LTD was incorporated, it suffered losses of only $4,367. The losses were due to the cost of purchasing computer equipment to test how to protect Bitcoin and figure out how to monetize it. A copy of Chino LTD's 2013 U.S. Income Tax Return for an S-Corporation is attached as Exhibit XII.

86. In 2014, Chino LTD suffered losses of $59,667. The losses were mainly due to the cost of computer hardware required to run the Bitcoin warehousing, the cost of renting computer time on the cloud, and marketing the service to bodegas. A copy of Chino LTD's 2014 U.S. Income Tax Return for an S-Corporation is attached as Exhibit XIII.

87. In 2015, the year Chino LTD submitted an application for a license to engage in Virtual Currency Business Activity, Chino LTD suffered losses of $30,588. The losses were due to the cost of the utilities to process Bitcoin (computer time on the internet cloud), the interest on the borrowed capital required to purchase the equipment the previous year, the cost associated with supporting CBC (who entered into the agreements with bodegas), and the cost of litigation. A copy of Chino LTD's 2015 U.S. Income Tax Return for an S Corporation is attached as Exhibit XIV.

88. As required under NYCRR § 200.21, Theo Chino, on behalf of Chino LTD,

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

submitted an application for a license on August 7, 2015 to engage in "Virtual Currency Business Activity," as defined in 23 NYCRR § 200.2(q). A copy of the application is attached as Exhibit IX.

89. Theo Chino took other affirmative steps and researched New York banking law and requested an application fee waiver, which he believed he was entitled to receive under N.Y. Banking Law § 18-a, which allows the superintendent to waive or reduce an application fee.

90. August 16, 2015, Theo Chino submitted an application under the New York State Minority Owned/Women Owned Business Enterprise Program for Chino LTD, which is still pending with New York State. A copy of the application and of its status information is attached as Exhibit VIII.

91. Realizing he would be required to incur expenses beyond his means to comply with the burdensome compliance costs under the Regulation, Theo Chino initiated this lawsuit on October 16, 2015, one week before the expiration of the deadline to challenge the Regulation.

92. In January 2016, one customer at a bodega named Rehana's Wholesale made a purchase using Bitcoin which was processed by Chino LTD. A copy of the bill indicating the purchase is attached as Exhibit X.

93. On January 4, 2016, NYDFS returned Chino LTD's application without further processing after they performed an initial review. The stated reason for returning the application was that NYDFS was unable to evaluate whether the company's current or planned business activity would be considered Virtual Currency Business Activity that requires licensing under the New York Financial Services Law and regulations. A copy of the January 4, 2016 letter is attached as Exhibit XI.

94. On January 4, 2016, CBC stopped offering Bitcoin processing services when

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

NYDFS did not approve Chino LTD's application. In 2016, even though Chino LTD could no longer offer Bitcoin services because it did not receive a license, Chino LTD remained an active S-Corporation and suffered losses of $53,053. The losses were due to the utilities for keeping the equipment to process Bitcoin in the event of a successful litigation, the interest on the borrowed capital from the previous three years, and the cost of the litigation. A copy of Chino LTD's 2016 U.S. Income Tax Return for an S Corporation is attached as Exhibit XV.

FIRST CAUSE OF ACTION
Violation of the Separation of Powers Doctrine and Ultra Vires Conduct

95. Plaintiffs-Petitioners incorporate by reference all of the preceding paragraphs.

96. Under the New York State Constitution Art. III, § 1, "[t]he legislative power of this state shall be vested in the senate and assembly."

97. A delegated agency may only adopt regulations that are consistent with its enabling legislation and its underlying purposes.

98. When an administrative agency moves beyond enforcing policies enacted by the legislative branch and implements policy on its own accord, it is acting outside the scope of its authorized power.

99. On, October 3, 2011 the New York State Banking Department and the New York State Insurance Department were abolished and the functions and authority of both former agencies transferred to NYDFS. The New York Legislature has authorized NYDFS to regulate *financial* products and services. FSL §§ 201(a) and 302(a). It did not offer any definition which included the concept of virtual currency. *See* FSL § 104(a)(2).

100. As explained above, Bitcoin is not a financial product or service.

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

101. Therefore, NYDFS has promulgated a Regulation that monitors and controls non-financial products and services.

102. The Regulation promulgated by Defendants-Respondents is in violation of the separation of powers established by the New York Constitution, is *ultra vires*, without lawful authority, and in violation of law. Therefore, Defendant-Respondents proceeded in excess of jurisdiction.

SECOND CAUSE OF ACTION
Arbitrary and Capricious Regulation

103. Plaintiffs-Petitioners incorporate by reference all of the preceding paragraphs.

104. An administrative regulation will be upheld only if it has a rational basis, and is not unreasonable, arbitrary or capricious.

105. A regulation is irrational, and therefore arbitrary and capricious, if it is excessively broad in scope.

106. The Regulation is arbitrary and capricious because it does not have a rational basis and it is excessively board in scope.

107. Subject to three narrow exceptions, "Virtual Currency" means "*any* type of digital unit that is used as a medium of exchange or a form of digitally stored value." 23 NYCRR § 200.2(p) (emphasis added). Furthermore, 23 NYCRR § 200.2(p) mandates that this definition be "broadly construed." *Id.* Given this instruction and the Regulation's failure to define "digital unit" or "medium of exchange," nearly all Internet activity could be interpreted under the Regulation to involve Virtual Currency. Thus, the definition of Virtual Currency is grossly overinclusive and irrational.

108. Even non-financial uses of blockchain technology fall within the Regulation's definition of Virtual Currency because, to participate in blockchain technology, a user engages

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

"digital unit[s]," that [are] "used as medium[s] of exchange." the definition of Virtual Currency does not exclude or otherwise exempt these non- financial uses of blockchain technology, rendering such uses potentially subject to the Regulation. *See* 23 NYCRR § 200.2(p).

109. The Regulation requires anyone engaged in "storing, holding or maintaining custody or control of Virtual Currency on behalf of others" to obtain a License and comply with the Regulation. 23 NYCRR § 200.2(q)(2). However, the Regulation fails to clarify what activities qualify as "storing," "holding," or "maintaining custody or control" of Virtual Currency. *See* 23 NYCRR §§ 200.1-200.22.

110. The Regulation also requires anyone "controlling... a Virtual Currency" to obtain a license. NYDFS did not define "controlling," leaving room for expansive interpretation. *See* 23 NYCRR §§ 200.1-200.22. Arguably any Bitcoin owner with a tenuous relationship to New York is subject to the Regulation

111. The Regulation requires Licensees to: (1) record "each transaction, the amount, date, and precise time of the transaction... the names, account numbers, and physical addresses of (i) the party or parties to the transaction that are customers or accountholders of the Licensee; and (ii) to the extent practicable, any other parties to the transaction," and (2) maintain those records "for at least seven years." 23 NYCRR § 200.12(a). These extensive and onerous requirements apply to *all* virtual currency transactions, regardless of whether 1-cent worth or thousands of dollars' worth are being transacted. It is unreasonable to require Licensees to create and maintain records of microtransactions

112. The Regulation's anti-money laundering provisions are inconsistent with NYDFS's preexisting anti-money laundering regulations. NYDFS has imposed stringent anti-money laundering requirements upon Virtual Currency businesses that it has not imposed on fiat

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

currency transmitters. NYDFS requires money transmitters to comply with federal anti-money laundering laws. 3 NYCRR § 416.1. The Regulation, however, requires virtual currency transmitters to comply with anti-money laundering requirements that go beyond those required under federal law. *See* 23 NYCRR § 200.15. There is no rational basis or objective reason provided by NYDFS for subjecting fiat money transmitters and Virtual Currency transmitters to different anti-money laundering requirements.

113. The Regulation requires Licensees to file Suspicious Activity Reports ("SAR") even if they would not be required to do so under federal law. 23 NYCRR § 200.15(e)(3)(ii). This requirement imposes an unreasonable burden on virtual currency firms who would not otherwise be subject to federal SAR provisions. Furthermore, this provision subjects such firms to potential liability for submitting SARs because though the federal SAR requirements include a safe harbor provision that extends immunity to disclosing institutions, the Regulation does not contain a comparable provision. 31 U.S.C. § 5318(g)(3); 23 NYCRR § 200.15. Thus, under NYDFS's regulatory scheme, a money transmitter dealing in fiat currency that is not required to file SARs would be required to file SARs if that transmitter wished to engage in Virtual Currency transmission. *See* 23 NYCRR § 200.15(e)(3)(ii). There is no rational basis to support NYDFS's inconsistent treatment of money transmitters.

114. The Regulation requires Licensees to retain all records related to their anti-money laundering programs for at least seven years. 23 NYCRR § 200.12(a). By contrast, fiat currency transmitters are only required to retain such records for five years. 3 NYCRR § 416.1(b)(2)(i) (requiring licensees to retain records in accordance with 31 CFR § 103); 31 CFR § 1010.430(d) (formerly at 31 CFR § 103.38(d); requiring licensees to retain records for five years). There is no rational reason or objective rationale to require virtual currency transmitters to retain their

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

records two years longer than non-technology based financial transmitters are required to retain their records.

115. The Regulation has a severe disparate impact on startups and small businesses, which do not have access to the funds and resources the Regulation requires. The cost of applying for a License is exorbitant. *See* 23 NYCRR § 200.5 (requiring a non-refundable $5,000 application fee).

116. The costs of staying in compliance with the Regulation, if granted a License, are unwarranted and potentially excessive. Licensees are required to "maintain at all times such capital in an amount and form as the superintendent determines is sufficient." 23 NYCRR § 200.8(a). This vague, open-ended requirement is likely to unreasonably impede cash-strapped startups and small businesses from being able to engage in Virtual Currency Business Activity. The Regulation's requirement that Licensees "maintain a surety bond or trust account... in such a form and amount as is acceptable to the superintendent" is similarly prone to effectively prohibit underfunded startups and small businesses from engaging in Virtual Currency related business. *See* 23 NYCRR § 200.9(a).

117. At that point the Regulation was promulgated, both the application fee and the compliance costs were overly burdensome to Plaintiffs-Petitioners. Chino LTD does not run a high volume business, rather offering small processing services for small purchases in retail stores. The capital requirements imposed by the Regulation are disproportionate compared to the profit Chino LTD would make on each transaction or each retail relationship. Having the same standards apply to Chino LTD that apply to large financial institutions is unreasonable.

118. While it may be appropriate to impose minimum capital requirements on select Virtual Currency businesses, it is irrational, arbitrary, and capricious, to impose blanket capital

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

requirements on *all* actors subject to the Regulation. The Regulation, however, applies to a wide range of virtual currency businesses that do not pose the same risks banks, insurance companies, and broker-dealers do. Applying capital requirements to such businesses is inappropriate and irrational

119. Chino LTD would be forced to maintain a minimum capital requirement even though it is operating at a very low risk.

120. Defendants-Respondents have never provided an objective rationale for these burdensome and arbitrary requirements.

121. Therefore, the Regulation promulgated by Defendants-Respondents is arbitrary and capricious.

THIRD CAUSE OF ACTION
Federal Preemption

122. Plaintiffs-Petitioners incorporate by reference all of the preceding paragraphs.

123. Implied preemption exists where federal law is sufficiently comprehensive to make a reasonable inference that Congress left no room for supplementary state regulation.

124. Federal law defines “financial service or product’ in eleven carefully constructed subparagraphs of 12 U.S.C. § 5481(15).

125. The federal law is sufficiently comprehensive to reasonably infer that Congress left no room for supplementary state regulation.

126. The Dodd-Frank Act states that a "statute, regulation, order, or interpretation . . . in any State is not inconsistent with... this title if the protection that [it] affords to consumers is greater than the protection provided under this title." 12 U.S.C. § 5551. However, under the Dodd-Frank Act, State consumer financial laws are preempted if the State law “is preempted by a provision of Federal law other than title 62 of the Revised Statutes.” 12 U.S.C. § 25b(b)(1)(C).

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

Title 62 of the Revised Statutes contains 12 U.S.C. §§ 5133 through 5243, therefore excluding 12 U.S.C. §5481, making preemption appropriate.

127. Congress' objectives in enacting Title 12 of the United States Code was to implement and enforce Federal consumer financial law consistently to ensure that *all consumers* have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive. 12 U.S.C. § 5511(a) (emphasis added). The term "all consumers" establishes a purpose of uniformity in markets for consumer financial products and services. New York does not have the authority to define for themselves a term with the history of substantial federal regulation.

128. Therefore, the Regulation is preempted by federal law.

FOURTH CAUSE OF ACTION
Violation of the First Amendment of the U.S. Constitution and the New York Constitution

129. Plaintiffs-Petitioners incorporate by reference all of the preceding paragraphs.

130. The Regulation violated the First Amendment of the U.S. Constitution, as applied to the states through the Fourteenth Amendment, under the compelled commercial speech doctrine and/or the restricted commercial speech doctrine.

131. The First Amendment protection under the New York Constitution is stronger than the one provided in the U.S. Constitution, therefore, the First Amendment claims sought by Plaintiffs-Petitioners under the U.S. constitution are also asserted under the New York Constitution.

132. The following section of the Regulation violate either the compelled commercial speech or the restricted commercial speech doctrine under the U.S. Constitution and violate the First Amendment of the New York Constitution: 23 NYCRR §§ 200.19, 200.19(a)(6), 200.19(a)(7), 200.19(a)(8), 200.19(a)(9), 200.19(b)(1), 200.19(b)(2), 200.19(c)(3), 200.19(c)(4),

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

and 200.19(g).

133. The disclosures are not purely factual and uncontroversial.

134. One of the required disclosures is that "the nature of Virtual Currency may lead to an increased risk of fraud or cyber attack." FSL § 200.19(a)(8). However, this is blatantly false. Using virtual currencies puts you at no greater risk of fraud or cyber-attack than using a credit card or online shopping. The compelled disclosures are not reasonably related to the State's interest in preventing deception of consumers.

135. The compelled disclosures do not directly advance—and are far more extensive than is necessary to serve—any interest the state might have.

136. 23 NYCRR § 200.19(a)(6) requires Plaintiffs-Petitioners to make a specific disclosure about the lack of business continuity. This compelled disclosure is speculative, because using Bitcoin does not trigger a business continuity risk higher or lower than using other forms of payments. This disclosure is both unjustified and unduly burdensome because Plaintiffs-Petitioners contracted with each bodega customer to provide Bitcoin processing services for each transaction, which is no more or less riskier than any other service used by Plaintiffs-Petitioners' customers, especially if Defendants-Respondents do not have the jurisdictional basis to regulate Bitcoin.

137. 23 NYCRR § 200.19(a)(7) requires Plaintiffs-Petitioners to make a specific disclosure about the volatility of Bitcoin's value. This compelled disclosure is irrelevant, since Plaintiffs-Petitioners guarantees an exchange rate to the bodega's customer, and has agreed to take the exchange rate risk away from the bodega's customer. This disclosure is both unjustified and unduly burdensome because Plaintiffs-Petitioners contracted with each bodega customer to eliminate the exchange rate risk from the bodega customer.

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

138. 23 NYCRR § 200.19(a)(9) requires Plaintiffs-Petitioners to make a specific disclosure about the technological difficulties which Plaintiffs-Petitioners may encounter in delivering their Bitcoin processing services. This compelled disclosure is inaccurate, as the Bitcoin technology is no more or less reliable than other technological devices, such as credit card payment machines, and because technological difficulties relate to the equipment used by the customer and are not intrinsically related to the nature of Bitcoin. Furthermore, this requirement restricts Plaintiffs-Petitioners' commercial speech rights, because they can no longer make any statements as to the reliability of a payment using Bitcoin. This disclosure is both untrue, and is also unjustified and unduly burdensome because Plaintiffs-Petitioners' speech is severely restricted AND his ability to market Bitcoin processing services is severely restricted.

139. 23 NYCRR § 200.19(b)(1) requires Plaintiffs-Petitioners to make a specific disclosure about the customer's liability for unauthorized Bitcoin transactions. This compelled disclosure is overly broad, because Plaintiffs-Petitioners would be unable to identify specifically a given customer liability when the bodega customer uses Bitcoin as compared to using other forms of payments. This disclosure is unjustified and unduly burdensome because Plaintiffs-Petitioners' ability to market Bitcoin processing services is hampered by the lack of specific instructions from the government in articulating the customer's liability when he uses Bitcoin as compared to using other forms of payments.

140. 23 NYCRR § 200.19(b)(2) requires Plaintiffs-Petitioners to make a specific disclosure about the customer's right to stop a pre-authorized Bitcoin transaction. This compelled disclosure is both irrelevant and overly broad, since Plaintiffs-Petitioners guarantee a return policy at least equivalent to the return policy of the bodega to the bodega's customer. Therefore, this disclosure is overly broad, because Plaintiffs-Petitioners cannot guarantee more

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

than what the bodega provides to its current customer under existing New York law. This disclosure is unjustified and unduly burdensome because Plaintiffs-Petitioners cannot guarantee more than what the bodega provides to its current customer under existing New York law.

141. 23 NYCRR § 200.19(c)(3) requires Plaintiffs-Petitioners to make a specific disclosure about the type and nature of the Bitcoin transaction. This compelled disclosure is overly broad, since Plaintiffs-Petitioners would be unable to identify specifically the extent to which this information should be provided when the bodega customer uses Bitcoin as compared to using other forms of payments. This disclosure is unjustified and unduly burdensome because Plaintiffs-Petitioners cannot guarantee more than what the bodega provides to its current customer under existing New York law.

142. 23 NYCRR § 200.19(c)(4) requires Plaintiffs-Petitioners to make a specific disclosure about the ability to undo the Bitcoin transaction. This compelled disclosure is both irrelevant and overly broad, since Plaintiffs-Petitioners guarantees a return policy at least equivalent to the return policy of the bodega to the bodega's customer, therefore eviscerating the need for this required disclosure. This disclosure is both irrelevant and unduly burdensome because Plaintiffs-Petitioners cannot guarantee more than what the bodega provides to its current customer under existing New York law.

143. Similarly, 23 NYCRR § 200.19(g) requires Plaintiffs-Petitioners to make a specific disclosure about fraud prevention. This compelled disclosure is both irrelevant and overly broad, since Plaintiffs-Petitioners are already required to engage in fraudulent activity prevention under New York law, and because this requirement would trigger enormous administrative burdens well in excess of the Plaintiffs-Petitioners' ability to generate income from Bitcoin processing services. This disclosure is both irrelevant and unduly burdensome

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

because Plaintiffs-Petitioners would be subject to an enormous administrative burden well in excess of his ability to generate income from Bitcoin processing services.

144. Therefore, the Regulation violates both the First Amendment of the U.S. Constitution and of the New York Constitution.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs-Petitioners respectfully request judgment as follows:

(a) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing the Regulation on the basis that it is unlawfully *ultra vires*, and declaring the Regulation invalid;

(b) Declaring the Regulation unconstitutional because it violates the separation-of-powers doctrine to the extent they are found to have delegated and/or authorized Defendants-Respondents to promulgate the Regulation;

(c) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers and employees from implementing or enforcing the Regulation on the basis that it is arbitrary and capricious;

(d) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers and employees from implementing or enforcing the Regulation on the basis that it is preempted by federal law;

(e) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers and employees from implementing or enforcing the Regulation on the basis that it violates both the First Amendment of the U.S. Constitution and of the New York Constitution;

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

(h) Declaring that the Regulation is preempted by federal law;

(i) Declaring that the Regulation violates both the First Amendment of the U.S. Constitution and of the New York Constitution;

(j) Awarding Plaintiffs-Petitioners incidental monetary relief as well as its reasonable attorneys' fees, costs and interest, including without limitation attorney's fees permitted under CPLR Article 86, and;

(k) Granting such other and further relief as the Court deems just and proper.

Dated: May 25, 2017
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

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

VERIFICATION

STATE OF NEW YORK)

) ss:

COUNTY OF NEW YORK)

Theo Chino, being duly sworn, deposes and says:

I am a plaintiff-petitioner in the above-entitled action. I have a read the foregoing complaint and know the content thereof. The same are true to my knowledge, except as to matters therein stated to be alleged on the information and belief and as to those matters I believe them to be true.

THEO CHINO

SWORN to before me, this 24 day May, 2017

NOTARY PUBLIC

SHAKIRA LATEEFAH SPENCE
Notary Public - State of New York
NO. 01SP6295206
Qualified in Bronx County
My Commission Expires Dec 30, 2017

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 3 RECEIVED NYSCEF: 08/10/2017

VERIFICATION

STATE OF NEW YORK)

) ss:

COUNTY OF NEW YORK)

Theo Chino, being duly sworn, deposes and says:

I am the owner of Chino LTD, a plaintiff-petitioner in the above-entitled action. I have a read the foregoing complaint and know the content thereof. The same are true to my knowledge, except as to matters therein stated to be alleged on the information and belief and as to those matters I believe them to be true. The reason this verification is not made by plaintiff-petition is that plaintiff-petitioner is a corporation and Theo Chino is its duly authorized representative. The sources on which I rely in verifying the truth of the allegations in the complaint are the documents contained in the accompanying exhibits to the complaint and other books and records maintained by Chino LTD.

THEO CHINO
On behalf of Chino LTD

SWORN to before me, this 24 day May, 2017

NOTARY PUBLIC

SHAKIRA LATEEFAH SPENCE
Notary Public - State of New York
NO. 01SP6295206
Qualified in Bronx County
My Commission Expires Dec 30, 2017

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

Amended Complaint and Verified Article 78 Petition Exhibit List

EXHIBIT	DOCUMENT DESCRIPTION
I	Chino LTD Delaware Certificate of Incorporation
II	Chino LTD's Filing Receipt for Application for Authority (Foreign Bus)
III	(1) Survey Given to Potential Client, Caridad Restaurant, in Spanish, (2) English Translation of Survey and (3) Certificate of Translation
IV	CBC's New York Certificate of Incorporation
V	A receipt of transactions between CBC and Multiservice And Innovations Inc. involving NobelCom LLC phone minutes
VI	Bitcoin Processing Agreement between CBC and Neio Wireless
VII	Photo of Signage Given To Stores
VIII	Application under the New York State Minority Owned/Women Owned Business Enterprise Program for Chino LTD and Status Report
IX	Chino LTD's Application for License to Engage in Virtual Currency Business Activity
X	Receipt from Rehana's Wholesale indicating Bitcoin purchase
XI	January 4, 2016 Letter from New York State Department of Financial Services
XII	Chino LTD's 2013 U.S. Income Tax Return, filing as an "S Corporation"
XIII	Chino LTD's 2014 U.S. Income Tax Return, filing as an "S Corporation"
XIV	Chino LTD's 2015 U.S. Income Tax Return, filing as an "S Corporation"
XV	Chino LTD's 2016 U.S. Income Tax Return, filing as an "S Corporation"

Exhibit I to Amended Verified Complaint -
Certificate of Incorporation of Chino Ltd Delaware
[pp. 63 - 64]

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

County of New Castle
Dated: November 19th, 2013

ORGANIZATION ACTION IN WRITING OF INCORPORATOR

OF

CHINO LTD

(Organized on November 19th, 2013)

The following action is taken this day through this instrument by the incorporator of the above corporation:

1. The election of the following person[s] to serve as the director[s] of the corporation until the first annual meeting of stockholders and until their successors are elected and qualified or until their earlier resignation or removal:

Theo B Chino

The Company Corporation, Incorporator

By: William C. Bartz
Name: William Bartz
Assistant Secretary

Ed. 09/08

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

State of Delaware
Secretary of State
Division of Corporations
Delivered 12:22 PM 11/19/2013
FILED 11:41 AM 11/19/2013
SRV 131324060 - 5434708 FILE

CERTIFICATE OF INCORPORATION

FIRST: The name of this corporation shall be: CHINO LTD

SECOND: Its registered office in the State of Delaware is to be located at 2711 Centerville Road, Suite 400, Wilmington, County of New Castle, Delaware, 19808. The name of its registered agent at such address is The Company Corporation.

THIRD: The purpose or purposes of the corporation shall be:

To engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

FOURTH: The total number of shares of stock, which this corporation is authorized to issue is One Thousand, Five Hundred (1,500) shares of common stock without a par value

FIFTH: The name and address of the incorporator is as follows:

The Company Corporation
2711 Centerville Road
Suite 400
Wilmington, Delaware 19808

SIXTH: The Board of Directors shall have the power to adopt, amend or repeal the by-laws.

SEVENTH: No director shall be personally liable to the Corporation or its stockholders for monetary damages for any breach of fiduciary duty by such director as a director. Notwithstanding the foregoing sentence, a director shall be liable to the extent provided by applicable law, (i) for breach of the director's duty of loyalty to the Corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) pursuant to Section 174 of the Delaware General Corporation Law or (iv) for any transaction from which the director derived an improper personal benefit. No amendment to or repeal of this Article Seventh shall apply to or have any effect on the liability or alleged liability of any director of the Corporation for or with respect to any acts or omissions of such director occurring prior to such amendment.

IN WITNESS WHEREOF, the undersigned, being the incorporator herein before named, has executed signed and acknowledged this certificate of incorporation this 19th day of November, 2013.

The Company Corporation, Incorporator

By: /s/ William Bartz
Name: William Bartz
Assistant Secretary

**Exhibit II to Amended Verified Complaint -
Filing Receipt for Application for Authority
(Foreign Bus) of Chino Ltd**

N. Y. S. DEPARTMENT OF STATE
DIVISION OF CORPORATIONS AND STATE RECORDS ALBANY, NY 12231-0001

FILING RECEIPT

ENTITY NAME: CHINO LTD

DOCUMENT TYPE: APPLICATION FOR AUTHORITY (FOREIGN BUS) COUNTY: NEWY

FILED:02/24/2014 DURATION:PERPETUAL CASH#:140224000732 FILM #:140224000671
DOS ID:4533808

FILER:	EXIST DATE
THEO CHINO 640 RIVERSIDE DRIVE 10B NEW YORK, NY 10031	02/24/2014

ADDRESS FOR PROCESS:
THEO CHINO
640 RIVERSIDE DRIVE 10B
NEW YORK, NY 10031

REGISTERED AGENT:

The corporation is required to file a Biennial Statement with the Department of State every two years pursuant to Business Corporation Law Section 408. Notification that the biennial statement is due will only be made via email. Please go to www.email.ebiennial.dos.ny.gov to provide an email address to receive an email notification when the Biennial Statement is due.

SERVICE COMPANY: ** NO SERVICE COMPANY ** SERVICE CODE: 00

FEES	225.00	PAYMENTS	225.00
FILING	225.00	CASH	0.00
TAX	0.00	CHECK	225.00
CERT	0.00	CHARGE	0.00
COPIES	0.00	DRAWDOWN	0.00
HANDLING	0.00	OPAL	0.00
		REFUND	0.00

DOS-1025 (04/2007)

**Exhibit III to Amended Verified Complaint -
Survey Given to Potential Client-Caridad Restaurant
in Spanish, with English Translation and Certificate
[pp. 66 - 68]**

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

MAR 26 ENT'D

Chino, Ltd

Negocio

Nombre del negocio: Caridad Restaurant
Dirección: 3531 Broadway
Nombre de la persona que toma decisión: Amauris
Hora que se puede encontrar el dueño:

Aceptan Tarjetas de Crédito

Fees: Yes

Aceptaría trabajar con el Bitcoin

Yes!

Qué opinión sobre el Bitcoin

dice que eso no vendra ahora pero espero que suceda

Notas (correo electrónico, teléfono, etc ..)

Amaury@caridad145.com

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

MARCH 26, 2017'D

Chino, Ltd

Business

Name of the business: CARIDAD RESTAURANT
Address: 3531 BROADWAY
Name of the person that makes decision: AMAURIS
Time the owner can be reached:

Accept Credit Card

Fees: YES

Would they accept working with Bitcoin

Yes!

What opinion of the Bitcoin

Says that she will not use at this moment, but hope one day

Notes (email, phone number, etc....)

AMAURI@CARIDAD145.COM

--- ENGLISH TRANSLATION ---

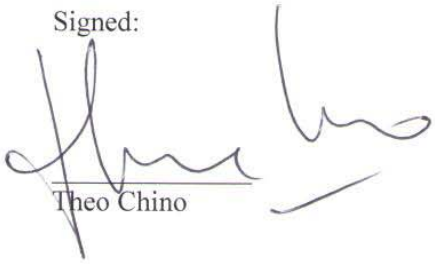
FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

CERTIFICATE OF ACCURACY IN TRANSLATION

I, Theo Chino, hereby certify that I am fluent in both English and Spanish, and that I have faithfully translated from Spanish into English, to the best of my knowledge, the attached document, titled:

"Survey Given to Caridad Restaurant"

Signed:



Theo Chino

New York, New York
October 25, 2016

**Exhibit IV to Amended Verified Complaint -
Certificate of Incorporation of Conglomerate
Business Consultants Inc
[pp. 69 - 72]**

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

STATE OF NEW YORK

DEPARTMENT OF STATE

I hereby certify that the annexed copy has been compared with the original document in the custody of the Secretary of State and that the same is true copy of said original.

WITNESS my hand and official seal of the Department of State, at the City of Albany, on December 31, 2014.

Anthony Giardina
Executive Deputy Secretary of State

Rev. 06/07

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

CERTIFICATE OF INCORPORATION
OF
Conglomerate Business Consultants Inc

Under Section 402 of the Business Corporation Law

FIRST: The name of the corporation is:

Conglomerate Business Consultants Inc

SECOND: This corporation is formed to engage in any lawful act or activity for which a corporation may be organized under the Business Corporation Law, provided that it is not formed to engage in any act or activity requiring the consent or approval of any state official, department, board, agency or other body without such consent or approval first being obtained.

THIRD: The county, within this state, in which the office of the corporation is to be located is NEW YORK.

FOURTH: The total number and value of shares of common stock which the corporation shall have authority to issue is: 200 SHARES WITH NO PAR VALUE.

FIFTH: The Secretary of State is designated as agent of the corporation upon whom process against it may be served. The address within or without this state to which the Secretary of State shall mail a copy of any process against the corporation served upon him or her is:

Conglomerate Business Consultants Inc
14 Wall Street 2oth Floor
New York, NY 10005

I certify that I have read the above statements, I am authorized to sign this Certificate of Incorporation, that the above statements are true and correct to the best of my knowledge and belief and that my signature typed below constitutes my signature.

Silfrido Martinez (signature)

Silfrido Martinez, INCORPORATOR
14 Wall Street 20th Floor
New York, NY 10005

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

Filed by:
Silfrido Martinez
14 Wall Street 2oth Floor
New York, NY 10005

FILED WITH THE NYS DEPARTMENT OF STATE ON: 12/31/2014
FILE NUMBER: 141231010182; DOS ID: 4686913

FILED: DEPARTMENT OF STATE
DIVISION OF CORPORATIONS AND STATE RECORDS ALBANY, NY 12231-0001

ONLINE FILING RECEIPT

==========

ENTITY NAME: CONGLOMERATE BUSINESS CONSULTANTS INC

DOCUMENT TYPE: INCORPORATION (DOM. BUSINESS) COUNTY: NEW

==========

FILED:12/31/2014 DURATION:PERPETUAL CASH#:141231010182 FILE#:141231010182
DOS ID:4686913

FILER:	EXIST DATE
SILFRIDO MARTINEZ 14 WALL STREET 20TH FLOOR NEW YORK, NY 10005	12/31/2014

ADDRESS FOR PROCESS:
CONGLOMERATE BUSINESS CONSULTANTS INC
14 WALL STREET 20TH FLOOR
NEW YORK, NY 10005

REGISTERED AGENT:

STOCK: 200 NPV

The corporation is required to file a Biennial Statement with the Department of State every two years pursuant to Business Corporation Law Section 408. Notification that the Biennial Statement is due will only be made via email. Please go to www.email.ebiennial.dos.ny.gov to provide an email address to receive an email notification when the Biennial Statement is due.

==========

SERVICE COMPANY: ** NO SERVICE COMPANY **
SERVICE CODE: 00

FEE:	145.00	PAYMENTS	145.00
FILING:	125.00	CHARGE	145.00
TAX:	10.00	DRAWDOWN	0.00
PLAIN COPY:	0.00		
CERT COPY:	10.00		
CERT OF EXIST:	0.00		

==========

DOS-1025 (04/2007)

Authentication Number: 1412310167 To verify the authenticity of this document you may access the Division of Corporation's Document Authentication Website at http://ecorp.dos.ny.gov

**Exhibit V to Amended Verified Complaint -
Receipt of Transactions between Conglomerate
Business Consultants Inc and Multiservice and
Innovations Inc. Involving NobelCom LLC Phone Minutes
[pp. 73 - 74]**

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

Original Message

Message ID	<201506081154.t58BsYts029008@intranet.inhse.knyc.ny.us.chino.ws>
Created at:	Mon, Jun 8, 2015 at 7:54 AM (Delivered after 222 seconds)
From:	CBC Info <autoinfo@cbcna.co>
To:	Bouna Fade <ouze91@gmail.com>
Subject:	$214.00 or 4.67 mXBT - Monday, June 8, 2015
SPF:	PASS with IP 91.121.200.135 Learn more

Download Original Copy to clipboard

Gmail Theo Chino <theo.chino@gmail.com>

$214.00 or 4.67 mXBT - Monday, June 8, 2015

CBC Info <autoinfo@cbcna.co> Mon, Jun 8, 2015 at 7:54 AM
To: Bouna Fade <ouze91@gmail.com>

cBc Conglomerate Business Consultants, Inc.
14 Wall Street - 20th Floor, New York, NY 10005
(888) 522-5211 - support.co

Multiservice And Innovations Inc.

Owner: *Bouna Fade*

If you see any errors on the transactions you performed yesterday, please contact us imediatelly.

Information valid from
06/08/2015 - 8:00 am to 06/08/2015 - 10:00 pm

Bitcoin rate provided by:
Chino, Ltd

214.00 USD = 1.00 XBT
1.00 USD = 4.67 mXBT

NOBEL ONE 1988
Balance:

Time	Product	Retail Price	Retail Cost	Status	Invoice Number	Phone Number
11:58 AM	Nobel One	10.00	7.50	Cancelled	P-1481261246	917-362-1878

12:04 PM	Nobel One	5.00	3.75	Fully processed	P-5662261227	347-362-1978
12:02 PM	Nobel One	10.00	7.50	Fully processed	P-7991261224	347-394-9198
12:00 PM	Nobel One	5.00	3.75	Fully processed	P-3091261272	347-940-9505
01:05 PM	T-Mobile RTR + Prepaid Wireless	60.00	58.80	Fully processed	P-9844261277	34-75565026
01:04 PM	Top Up Guinea - Cellcom	5.00	4.55	Fully processed	P-1044261238	224-654419735
02:56 PM	Top Up Liberia --- Lonestar Cell (MTN)	5.00	4.30	Fully processed	P-9288261255	231-886754875
02:55 PM	Top Up Liberia --- Lonestar Cell (MTN)	5.00	4.30	Fully processed	P-8978261201	231-888743460
02:28 PM	Top Up Senegal - Orange	26.00	22.62	Fully processed	P-4487261211	221-774355980
02:22 PM	Nobel One	20.00	15.00	Fully processed	P-2367261260	917-536-7434
05:53 PM	Top Up Guinea - Cellcom	5.00	4.55	Fully processed	P-0345361258	224-656097743
05:41 PM	Top Up El Salvador - Movistar	5.00	4.33	Fully processed	P-7205361236	503-61300435
06:14 PM	Top Up Guinea - Cellcom	5.00	4.55	Fully processed	P-8906361274	224-654431409
07:40 PM	Top Up Mali - Orange	12.00	10.32	Fully processed	P-7009361274	223-78774327
	Total cost for Sunday, June 7, 2015 transactions:		$ 155.81			

**Exhibit VI to Amended Verified Complaint -
Bitcoin Processing Agreement between Conglomerate
Business Consultants Inc and Neio Wireless, dated May 28, 2015
[pp. 75 - 76]**

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

Conglomerate Business Consultants, Inc.

14 Wall Street – 20th Floor, New York, NY 10005
(888) 522-5211 – support@cbcna.co

001016

BITCOIN PROCESSING AGREEMENT

Effective beginning 05 / 28 / 2015 with the regularly scheduled transfers following the date of acceptance of this authorization by **Conglomerate Business Consultants, Inc.** ("CBC, Inc") and of which CBC, Inc. will notify me in writing, I (hereafter "I", "me" or "my") hereby authorize **Conglomerate Business Consultants, Inc** and its successors or assigns to process blockchain inscriptions and bictoin transfers on my behalf.

The amount of each such **inscription** will be equal to my scheduled invoice due under the retail contract held by CBC, Inc and I (the "Agreement".)

I understand that any financial information provided herein shall be deemed a part of this authorization.

Activation Fee 0	Per Transaction Fee	
Monthly Airtime Fee (per terminal) 0	One Time Fee 0	
BANK ROUTING NUMBER	ACOUNT TYPE (CHECK ONE)	BANK ACCOUNT NUMBER

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

I may cancel this authorization by one of the following methods:

a. Sending a written cancellation request by regular mail to **CBC, Inc, 14 Wall St, 20th Floor, New York, NY 10005**;
b. Sending an email requesting cancellation addressed to **autopaycancel@cbcna.co**;
c. Sending a cancellation request by facsimile to **(888) 531-3901**; or
d. Enrolling as a registered user at **http://www.cbcna.co** and canceling as provided in that website;
e. Requesting from any CBC, Inc. representative for the written cancellation form in person or by calling **(888) 522-5211** and returning it to CBC, Inc.

This authorization will remain in full force and effect until I cancel it by a method listed herein; and CBC, Inc. cancels it in writing. x AR

COMPANY NAME	ADDRESS
Neio Wireless	1481 Saint Nicholas Ave
FINANCIAL INSTITUTION NAME	NAME(S) ON BANK ACCOUNT
BANK ROUTING NUMBER	ACOUNT TYPE (CHECK ONE) ☐ Checking ☐ Savings / BANK ACCOUNT NUMBER
BANK ACCOUNT OWNER/AUTHORIZED SIGNER'S SIGNATURE	DATE
	05/28/15

Important Enrollment Information

1. Please make sure all information above is filled in and that a blank voided check is included with this authorization form containing any missing information.
2. Return the Authorization Form and voided check to the address below or by fax to 1-888-531-3901.

Conglomerate Business Consultants, Inc.
14 Wall Street – 20th floor
New York, NY 10005

Exhibit VII to Amended Verified Complaint -
Photo of Signage Given to Stores

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

Exhibit VIII to Amended Verified Complaint - Application Under the New York State Minority Owned/Women Owned Business Enterprise Program for Chino Ltd and Status Report [pp. 78 - 87]

Certification Application: View Application

Generated by Theo Chino, Chino Ltd on 8/16/2015

Help & Tools

Main | Documents | Signature | Submit | Q & A | Utilities | Cert List

Chino Ltd
Application Type: **New Application**
Application Number: **1109683**

Application status: **Submitted, Pending Receipt**
Application started: **6/26/2015**
Submitted: **8/16/2015**

Print to Printer | Print to PDF File

Certification Application Information

Application Type	**New Application**
Certifying Agency	**New York State**
Business Name	**Chino Ltd**
Current Status	**Submitted, Pending Receipt**
Application Number	**1109683**
Contact Person	**Theo Chino**

Questions

1.A. This firm is applying for certification as	
	Minority Business Enterprise (MBE)
1.B. Name of applicant firm	
	Chino Ltd
1.C. "Doing Business As" (DBA) Name	
1.D. Business Address	
	640 Riverside Drive 10B New York, NY 10031
1.E. Mailing Address	
	640 Riverside Drive 10B New York, NY 10031
1.F. Business Phone Number	
	347-809-5004
1.G. Alternate Business Number	
1.H. Fax Number	
	212-809-5004
1.I. Email Address	
	nyscontract@vendor..chino.ws
1.J. Website	
	https://www.chino.ws
1.K. Twitter	
1.L. Facebook	

1.N. Federal Employer Identification Number (or SSN)

[redacted]1473

1.O. Contact Person

Theo Chino, Founder

1.P. Name of Company President/Chief Executive Officer/Owner

Theo Chino, CEO

1.Q. Type of ownership

Corporation

1.R. Date firm was established

11/19/2013

1.S. Did the business exist under a different type of business ownership prior to the date indicated above?

No

1.T. Method of Acquisition

Started new business

1.U. Date of acquisition

1.V. Gross Receipts

Year Ending	Total Receipts
2014	$0
2013	$0
2012	$0

1.W. Number of employees

Permanent		Temporary/Seasonal	
Full-time	0	Full-time	0
Part-time	0	Part-time	0

1.X. In what regions of New York State are you willing and able to conduct your business activity?

All

2.A. Name & Position of all person(s) with ownership interest in this firm.

Name	Position	Gender	Ethnic Group	Citizen	Date of Ownership	Ownership %	Voting %
Theo Chino	CEO	Male	Hispanic	Yes	11/19/2013	100.0%	100.0%

2.B. If this firm is owned in full or in part by another firm, please identify the firm and percentage of ownership interest.

None

2.C. Please identify the cash and capital contributions to this firm by those identified as owners above.

Contributor/Source	Amount/Value	Type	Date of Contribution
Theo Chino	$50,000	Cash/Loan	11/19/2013

2.D. Identify holdings of all shareholders

Shareholder	Number of Shares	Class	Amount Paid When Purchased	Date of Ownership
Theo Chino	1,500	Common	$0	11/17/2013

2.E. Number of shares

	Authorized Shares	Issued Shares
Common Stock	1500	1500
Preferred Stock	1500	1500
Total Shares	**3000**	**3000**

2.F. List of current Board of Directors

Generated by Theo Chino, Chino Ltd on 8/16/2015

Name	Title/Position	Date Appointed	Ethnicity	Gender
Theo Chino	President	11/17/2013	Hispanic	Male

3.A. If licensing, permits or accreditation is required to conduct the business, please identify

Not applicable or no licenses/permits held

3.B. Business Categories

Professional Service, Technical Service, Other: BlockChain Technology

3.C. Describe principal products/commodities sold, specialties or services offered

We offer Internet Blockchain technology which is licensed to other company to provide service to small businesses.

3.D. Provide the business's primary North American Industry Classification System (NAICS) number

NAICS 42511: Business to Business Electronic Markets

3.E. Provide the business's secondary North American Industry Classification System (NAICS) number

3.F. Additional OPTIONAL North American Industry Classification System (NAICS) number

3.G. Additional OPTIONAL North American Industry Classification System (NAICS) number

3.H. Additional OPTIONAL North American Industry Classification System (NAICS) number

3.I. Additional OPTIONAL North American Industry Classification System (NAICS) number

3.J. Additional OPTIONAL North American Industry Classification System (NAICS) number

3.K. Additional OPTIONAL North American Industry Classification System (NAICS) number

3.L. Additional OPTIONAL North American Industry Classification System (NAICS) number

3.M. Additional OPTIONAL North American Industry Classification System (NAICS) number

4.A. Identify those individuals responsible for managerial operations

1. Financial Decisions

Name	Title/Position	Ethnicity	Gender	Owner
Theo Chino	Founder	Hispanic	Male	Yes

2. Estimating

Name	Title/Position	Ethnicity	Gender	Owner
Theo Chino	Founder	Hispanic	Male	

3. Preparing Bids

Name	Title/Position	Ethnicity	Gender	Owner
Theo Chino	Founder	Hispanic	Male	Yes

4. Negotiating Bonding

Name	Title/Position	Ethnicity	Gender	Owner
Theo Chino	Founder	Hispanic	Male	Yes

5. Negotiating Insurance

Name	Title/Position	Ethnicity	Gender	Owner
Theo Chino	Founder	Hispanic	Male	Yes

6. Marketing & Sales

Name	Title/Position	Ethnicity	Gender	Owner
Theo Chino	Founder	Hispanic	Male	Yes

7. Hiring & Firing

Name	Title/Position	Ethnicity	Gender	Owner
Theo Chino	Founder	Hispanic	Male	Yes

8. Supervising Field Operations

Name	Title/Position	Ethnicity	Gender	Owner
Theo Chino	Founder	Hispanic	Male	Yes

9. Purchasing Equipment/Sales

Name	Title/Position	Ethnicity	Gender	Owner
Theo Chino	Founder	Hispanic	Male	Yes

10. Manging & Signing Payroll

Name	Title/Position	Ethnicity	Gender	Owner
Theo Chino	Founder	Hispanic	Male	Yes

11. Negotiating Contracts

Name	Title/Position	Ethnicity	Gender	Owner
Theo Chino	Founder	Hispanic	Male	Yes

12. Signatories for Business Accounts

Name	Title/Position	Ethnicity	Gender	Owner
Theo Chino	Founder	Hispanic	Male	Yes

4.B. Is this firm currently involved in the bidding process or other contract/purchase order negotiations with any governmental agency, department or authority?

No

4.C. List the three largest completed accounts for which the applicant has provided goods or services within the last three years.

No projects currently underway

4.D. List the three largest active projects on which your firm is currently working

Yes

Firm/Organization Name	Phone	Location of Performance	Type of Work	Project Start Date	Anticipated Completion Date	Dollar Value of Contract
CBC Inc	8883164123	New York City	Provide Blockchain Service	1/1/2014	1/1/2020	$1,000,000

4.E. Is the firm bonded?

No bonding currently in place

4.F. Are you a Union Shop?

No

5.A. List rented, leased, or owned office facilities.

None

5.B. List rented, leased, or owned warehouse, plant, and yard facilities.

None

5.C. List major equipment or machinery that is owned or leased by the firm.

None

5.D. List vehicles that are owned or leased by the firm.

None

5.E. Identify Bank(s) where all firm's accounts are maintained.

Name of Institution	Address	Contact person	Type of Account
None	None	None	None

5.F. Do you have a line of credit?

No lines and/or letters of credit

5.G. Major current creditors and/or lenders and types of investments and/or loans in the firm.

Yes

Name of Creditor/Lender	Type of Investment/ Credit/ Loan	Original Dollar Value of Investment/ Terms/ Credit/ Loan	Current Balance	Name of Guarantor(s)	Purpose of Loan
Self	Credit Loan	$50,000	$50,000	Self	Run day to day

6.A. Do any of the key personnel perform a management or supervisory function for any other business?

Yes

Person	Title	Business Name	Function
Theo Chino	CEO	CBC Inc	Day to day operations

6.B. At present, or at any time in the past, has your firm consisted of a partnership in which one or more of the partners are other firms?

No

6.C. Do any principals, officers and/or owners of the firm have an affiliation with any other firm?

No

6.D. At present, or at any time in the past, has your firm been a subsidiary of any other firm?

No

6.E. At present, or at any time in the past, has your firm owned any percentage of any other firm?

No

6.F. At present, or at any time in the past, has your firm had any subsidiaries?

Yes

Name of Business	Address	Type of Business
Chino Ltd	Dominican Republic	Blockchain Services

6.G. Has any other firm had an ownership interest in your firm at present or at any time in the past?

No

6.H. Do any of your immediate family members own or manage another company?

No

6.I. Does the firm share office space with any other firm?

No

6.J. Does the firm share yard space/warehouse space with any other firm?

No

6.K. Does the firm share equipment with any other firm?

No

7.A. C.P.A or Accountant for firm

None used

7.B. Attorney for firm

None used

8.A. Has the firm applied for certification as an M/WBE with another governmental agency, department or authority?

No

Mandatory Documents

Document	Status
Certification Application Notarization (New Application) Certification_Application_Notarization.jpg (JPG, 778.40 KB)	**Attached** by Theo Chino on 6/26/2015
Department of State registration for all domestic firms Incorporation.jpg (JPG, 813.57 KB) Delaware Dept of State Certificate	**Attached** by Theo Chino on 6/26/2015

Personal Net Worth Affidavit, Attachment A for each minority or woman upon which certification is based Affidavit.pdf (PDF, 1.81 MB)	**Attached** by Theo Chino on 6/26/2015
Current year business Financial Statements: including Year-To-Date Balance Sheet and Profit & Loss Statement Intuit-2013.pdf (PDF, 7.20 KB) Intuit-Todate.pdf (PDF, 9.12 KB)	**Attached** by Theo Chino on 8/16/2015
Most recent three (3) years of Federal, and State tax returns for the BUSINESS including all statements, schedules, and amendments 2013_Chino_Ltd_Form_1120S_S_Corps_Tax_Return_Filing.pdf (PDF, 243.13 KB) Corp 2013 2014_Chino_Ltd_Form_1120S_S_Corps_Tax_Return_(v2)_Filing.pdf (PDF, 300.45 KB) Return 2014	**Attached** by Theo Chino on 6/26/2015
Most recent two (2) years of Federal and State PERSONAL tax returns; including all schedules, W2s, statements and amendments for each minority or woman upon which certification is based Return-2013.pdf (PDF, 671.03 KB) 2013 Personal Return Return-2014.pdf (PDF, 383.70 KB) Return 2014 W2-2013.pdf (PDF, 86.23 KB) W2 Theo W2-2014.pdf (PDF, 82.54 KB) W2 2014 Theo	**Attached** by Theo Chino on 6/26/2015
Documented proof of sources of capitalization and investments NOBankAccount.jpg (JPG, 286.78 KB)	**Attached** by Theo Chino on 8/16/2015
Bank signature card or letter from the bank identifying persons authorized to conduct transactions, level of authority and limitations, if any, on all business accounts Bank_Account.pdf (PDF, 42.74 KB) Bank Letter is Blockchain Addresses	**Attached** by Theo Chino on 6/26/2015
Proof of US Citizenship or Proof of permanent resident alien status (i.e. permanent resident "green" card.) for each Minority or Woman who has an ownership interest in the applicant firm Passports(1).jpg (JPG, 1.58 MB)	**Attached** by Theo Chino on 6/26/2015
Resumes of all principals, partners, officers and/or key employees of the firm ResumeTheoChino.pdf (PDF, 27.07 KB)	**Attached** by Theo Chino on 6/26/2015
Current, signed lease or Deed for all locations where your firm conducts business ProofOfAddress.pdf (PDF, 3.64 MB)	**Attached** by Theo Chino on 8/16/2015
Articles of Incorporation Article_of_Incorporation.pdf (PDF, 79.26 KB) Article Of Incorporation	**Attached** by Theo Chino on 6/26/2015
Copies of all issued stock certificates; front and back, as well as, next unissued certificate Stock_Certificate_1.pdf (PDF, 1.28 MB) Stock Certificate for 1500 shares	**Attached** by Theo Chino on 6/26/2015
Copy of completed, up-to-date stock ledger Stock_Ledger.jpg (JPG, 423.36 KB) Stock Ledger	**Attached** by Theo Chino on 6/26/2015
Corporation By-Laws Corporation_Bylaws.pdf (PDF, 86.82 KB) Bylaws	**Attached** by Theo Chino on 6/26/2015
Minutes of first corporate organizational meeting and amendments 1st_minutes.pdf (PDF, 29.82 KB) 1st Minutes Minute_of_First_Meeting.pdf (PDF, 1.43 MB)	**Attached** by Theo Chino on 6/26/2015
State filing receipt, including amended receipts State_Filing_Receipt.jpg (JPG, 458.43 KB)	**Attached** by Theo Chino on 6/26/2015

Required Documents

Document	Status
Personal Net Worth Worksheet, Attachment B for each minority or woman upon which certification is based that has a net worth exceeding $1.3 million Affidavit(1).pdf (PDF, 1.81 MB)	**Attached** by Theo Chino on 6/26/2015
Proof of gender (any government-issued identification)	**Not Applicable**, noted by Theo Chino on 6/26/2015
Proof of minority status as described in the definition of MBE under Article 15-A for for each Minority who has an ownership interest in the applicant firm Passports.jpg (JPG, 1.58 MB) Dominican Passport.	**Attached** by Theo Chino on 6/26/2015
All signed third party agreements including equipment rentals, purchase agreements, management, service agreements, etc.	**Not Applicable**, noted by Theo Chino on 6/26/2015
Copies of all licenses, permits, certifications, and/or accreditations utilized by this firm to conduct business, including those held by individual	**Not Applicable**, noted by Theo Chino on 6/26/2015
Copy of the New York State Vendor Tax Registration	**Not Applicable**, noted by Theo Chino on 6/26/2015
Signed lease Agreements or proof of ownership for office space, yard space, warehouse space, and/or equipment	**Not Applicable**, noted by Theo Chino on 6/26/2015
Vehicle registration(s) for all vehicles used for business purposes and/or charged to the Business	**Not Applicable**, noted by Theo Chino on 6/26/2015
Any certification, decertification or denial of certification documentation Oficio_fijción_domicilio.pdf (PDF, 320.91 KB) Certification to do business in the Dominican Republic	**Attached** by Theo Chino on 6/26/2015
Any employment agreements CarlosContract.pdf (PDF, 7.81 MB)	**Attached** by Theo Chino on 8/16/2015
If out-of-state, Certificate of Authority to conduct business in New York State, and any amendments State_Filing_Receipt(1).jpg (JPG, 458.43 KB)	**Attached** by Theo Chino on 6/26/2015
Copies of agreements relating to buy-out rights	**Not Applicable**, noted by Theo Chino on 6/26/2015
Copies of agreements relating to facts pertaining to the value of shares	**Not Applicable**, noted by Theo Chino on 6/26/2015
Copies of agreements relating to restriction on the disposal of stock loan agreements	**Not Applicable**, noted by Theo Chino on 6/26/2015
Copies of agreements relating to restrictions on the control of the corporation	**Not Applicable**, noted by Theo Chino on 6/26/2015
Copies of agreements relating to shareholder voting rights	**Not Applicable**, noted by Theo Chino on 6/26/2015
Copies of agreements relating to shareholders agreements	**Not Applicable**, noted by Theo Chino on 6/26/2015
Copies of agreements relating to stock options	**Not Applicable**, noted by Theo Chino on 6/26/2015
Written request for exemption from disclosure regarding trade secrets	**Not Applicable**, noted by Theo Chino on 6/26/2015
Written request for exemption from public disclosure of certain records maintained by the program Exception.jpg (JPG, 359.93 KB) Written Exception Request	**Attached** by Theo Chino on 6/26/2015
Proof of business activity in the form of a signed contract or purchase order Intro Letter (JPG, 324.70 KB) NewFormat.pdf (PDF, 2.26 MB) OldContracts.pdf (PDF, 2.46 MB)	**Attached** by Theo Chino on 8/16/2015
Addendum for MWBE Certification with County of Erie and City of Buffalo, Joint Certification Committee	**Not Applicable**, noted by Theo Chino on 6/26/2015
Addendum for MWBE Certification with The Port Authority of New York and New Jersey	**Not Applicable**, noted by Theo Chino on 6/26/2015
Addendum for MWBE Certification with New York City Department of Small Business Services NYC_AddendumForMWBECertification.pdf (PDF, 132.18 KB)	**Attached** by Theo Chino on 6/26/2015

Electronic Signature

Signature	**Theo Chino**
Title	**Founder**
Organization	**Chino Ltd**
Date	**8/16/2015**

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

Empire State Development

ATTACHMENT A: NYS MWBE CERTIFICATION
INDIVIDUAL PERSONAL NET WORTH AFFIDAVIT
Division of Minority and Women Business Development

Each individual owner relied upon for certification as a minority or women-owned business enterprise (hereinafter "MWBE") must complete this form and provide the applicable supplemental documentation as referenced below as part of the application for certification or recertification.

The personal net worth of each individual upon which certification is relied upon cannot exceed 3.5 million dollars. For certification purposes, personal net worth shall mean the aggregate adjusted net value of the assets of an individual remaining after total liabilities are deducted. Personal net worth includes the individual's share of assets held jointly with said individual's spouse but does not include the individual's ownership interest in the certified minority and women-owned business enterprise, the individual's equity in his or her primary residence, or up to five hundred thousand dollars of the present cash value of any qualified retirement savings plan or individual retirement account held by the individual less any penalties for early withdrawal.

I, Theo Chino, being duly sworn state that my social security number is: 124 - 52 - 6411 and I am a woman or a member of a minority group as defined in Article 15-A of the Executive Law. I own 100% percent of the equity in CHINO LTD, the business applying for certification or re-certification as an M or WBE with New York State. I have read the definition of net worth set forth in the statement above, and have calculated my net worth to be $ 294.000.

Further, I understand that I am required to provide, with this affidavit, a true, executed copy of my submitted federal and state personal tax returns including all statements and schedules as filed for the prior taxable year. I also understand that in the event my personal net worth *exceeds* 1.3 million dollars at the time of this application, I am also required to submit a complete **Attachment B: Personal Financial Statement Worksheet** in the form or format supplied by the Division of Minority or Women's Business Development online at www.esd.ny.gov/mwbe.html.

I understand the tax returns I have submitted to the Division of Minority and Women Business Development as part of the certification or re-certification process must be true and correct copies of my personal tax returns and include all schedules, statements and amendments which I have submitted to the IRS and the state or, in the event that I have paid taxes in multiple jurisdictions, states where I have filed my most recent state income taxes. By signing below I am attesting that I am providing this as part of the application for certification or re-certification, and acknowledge any false statement made by the applicant will result in the denial of certification and is punishable as a Class E Felony under Section 175.35 of the Penal Law.

(Signature) _____ THEO CHINO (Print)

State of New York, County of New York. On this 24 day of June 20 15, before me appeared

(Name) Theo Chino to me personally known, who being duly sworn, properly did execute the foregoing affidavit and did state that s/he was properly authorized by

(Name of Firm) Chino Ltd. to execute the affidavit and did so as his or her free act and deed.

Notary Public _____

Commission Expires 4/7/16

NICOLE M VUKOSAVLJEVIC
Notary Public - State of New York
NO. 01VU6184910
Qualified in Queens County
My Commission Expires 4/7/16

Print Form

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

Subject: NYS: Application Review In Process
From: New York State Contract System <ny@newnycontracts.com>
Date: 4/14/2017 2:39 PM
To: Theo Chino <nyscontract@vendor.chino.ws>

Certification Application Review In Process

Applicant: **Chino Ltd**
Certifying Agency: **New York State**
Application Type: **New Application**
Application Number: **1109683**
Contact: **Theo Chino**
Date Submitted: **8/16/2015**
Date Received: **4/14/2017**

Dear Theo Chino,

Your application received on **4/14/2017** is now in process. During this time, you may be contacted to supply additional information and/or supporting documentation. The staff person assigned to review your application will contact you to schedule an on-site visit at your principal place of business, if required.

To view your application, visit: https://ny.newnycontracts.com/?GO=677

If you have any questions, please email us at ny@newnycontracts.com.

New York State Contract System
Web: https://ny.newnycontracts.com/
Email: ny@newnycontracts.com

NYS M/WBE Program: http://www.esd.ny.gov/MWBE.html

This message was sent to: "Theo Chino"
Sent on: 4/14/2017 1:39:03 PM
System ReferenceID: 47208210

System Tip: Have you updated your contact information in the system lately?

**Exhibit IX to Amended Verified Complaint -
Application for License to Engage in Virtual Currency
Business Activity of Chino Ltd, dated August 7, 2015
[pp. 88 - 106]**

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

**APPLICATION FOR LICENSE TO ENGAGE IN
VIRTUAL CURRENCY BUSINESS ACTIVITY**

(Before filling out this form read the instructions carefully. All answers should be printed or typed. If additional space is required to complete any statement, prepare and annex a rider. Write "none" or "not applicable" where appropriate.)

August 7, 2015

To the Superintendent of Financial Services of the State of New York:

The undersigned, desiring to engage in Virtual Currency Business Activity pursuant to the provisions of 23 NYCRR 200, does hereby make application for a license in accordance with 23 NYCRR §200.

1. The name and full address of the applicant is (include any trade name, under assumed name (UAN) or doing business as (DBA) name):

CHINO, LTD

2. Type of Application is: (Check type)

De Novo (new licensee) [X] Other (specify) _____ [ ]

3. Form of Organization of Applicant is: (Check type of entity in which business will be conducted)

Individual (Sole Proprietor) [ ] Partnership [ ] Corporation [X]
Limited Partnership [ ] Association [ ]
Limited Liability Company [ ] Other (specify) _____

4. Is the applicant also applying for a money transmission license with the Department at this time? If yes, the applicant must *also* submit an Application for a License to Engage in the Business of Issuing Travelers Checks, Money Orders, Prepaid/Stored Value Cards, and/or Transmitting Money (available at the Department's website). Additionally, note that information or documents recently submitted in connection with an application for a money transmitter license may be used to cross-satisfy information requested as part of this application. Please see section III of the application instructions for more information.

Yes [ ] No [X]

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

5. Is the applicant currently licensed with the Department as a New York money transmitter?

Yes [ ] No [X]

The documents and information attached hereto are hereby referred to and by this reference incorporated herein.

(Authorized Signature)

Theo CHINO
(Name of Applicant)

CEO
(Print Name and Title)

347-209-5002
(Telephone Number)

(Fax Number)

dfslicense@vendor.chino.us
(E-Mail Address)

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

VERIFICATION

The undersigned swears or affirms that the information contained in this application, including the attached information and documents, is true and correct. FALSE WRITTEN STATEMENTS IN THIS APPLICATION ARE PUNISHABLE UNDER SECTION 210.45 OF THE NEW YORK PENAL LAW (making a punishable false written statement). Also, as per the New York Financial Services Law and regulations, the Superintendent of Financial Services may initiate regulatory actions against the licensee.

The undersigned further verifies that he/she is the named person below and that he/she is authorized to attest to and submit this application on behalf of the Applicant.

This application is executed at 640 Riverside drive, New York (or insert name of other jurisdiction) August 7 on _____, 20 17.

Theo Chino
(Applicant Name)

(Authorized Signature)

THEO CHINO, CEO
(Print Name and Title)

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

AUTHORITY TO RELEASE INFORMATION

TO WHOM IT MAY CONCERN:

I hereby authorize any duly authorized representative of the New York State Department of Financial Services (DFS) bearing this release, or copy thereof, within one year of its date, to obtain any information in your files pertaining to any professional license awarded to me (including any grievance records), employment, military, educational records (including, but not limited to academic achievement, attendance, athletic, personal history, and disciplinary records), credit records, and law enforcement records (including, but not limited to any record of charge, prosecution or conviction for criminal or civil offenses). I hereby direct you to release such information upon request to the bearer. This release is executed with full knowledge and understanding that the information is for the official use of the DFS. Consent is granted for the DFS to furnish such information, as is described above, to third parties in the course of fulfilling its official responsibilities. I hereby release you, as the custodian of such records, your employers, officers, employees, and related personnel, both individually and collectively, from any and all liability for damages of whatever kind, which may at any time result to me, my heirs, family or associates because of compliance with this authorization and request to release information, or any attempt to comply with it. I am furnishing my Social Security Account Number on a voluntary basis with the understanding such is not required by statute or regulation. I understand that the DFS will use the number only to assist the Superintendent of Financial Services in making a determination as to whether I meet the standards set forth pursuant to the Financial Services Law and regulations for receiving the license for which I am applying. Should there be any question as to the validity of this release, you may contact me as indicated below:

I have read the above release and agree to the terms and conditions therein.

Social Security Account Number: _____
Date of Birth: _____
Signature of Parent or Guardian (if required): _____
Date: _____
Current Address: _____
Telephone Number: _____
CPA/Bar Membership(s) State: _____
Registration Number: _____
Full Name (Signature): _____
Full Name (Typed or Printed): _____
(Include maiden and any other previously-used name(s)): _____

STATE OF _____} ss.:
COUNTY OF _____}

Before me, a Notary Public in and for said County and State, personally appeared the above-named who acknowledged that s/he did sign the foregoing instrument and that the same is his/her free and voluntary act and deed. IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at, _____ this _____day of_____, 20_____ .

_____
Notary Public

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

BACKGROUND REPORT CERTIFICATION

Re: _____
(Subject of Report)

I, _____, do certify that a background report

on _____, _____
(Name) (Title)

of _____ was ordered
(Applicant's Name)

from _____
(Name of Company)

on _____. If ordered by telephone, the report
(Date Report Was Ordered)

was ordered from _____.
(Name of Person Taking Order)

_____
(Signature)

_____
(Title)

_____
(Date)

THIS FORM MAY BE REPRODUCED

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

PERSONAL FINANCIAL STATEMENT

NAME THEO CHINO
(APPLICANT, OFFICER, DIRECTOR, STOCKHOLDER, OR INDIVIDUAL, AS APPLICABLE)

ADDRESS 640 Riverside drive, NY, 10031

To: THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES (DFS)

The undersigned make(s) the following statement of (my)(our)(its) assets and liabilities at the close of business of the 8 day of August, 2016.

PLEASE ANSWER ALL QUESTIONS USING "NO" OR "NONE" WHERE NECESSARY.

ASSETS		LIABILITIES AND NET WORTH	
Cash on Hand and in Banks (Sch 1)	20	Notes Payable Banks (Sch 1)	27000
Finance Agreements		Notes Payable Others (Sch 4)	
Finance Agreements-Pledged		Due to Principals (Sch 4)	
Notes Receivable		Notes Rec., Discounted (Contra)	
Notes Rec., Discounted (Contra)		Accounts Payable	
Accts and Loans Receivable		Accrued Expenses Payable	
Cash	$1151.00	Accrued Interest Payable	
Securities (Sch 2)	$24127.54	Accrued Taxes and Asses Pay.	
Due from Part, Stkhrs, Off, Empl.		Brokers Margin Account Pay	
Inv. And Adv. –Affil. Or Subsid. Co.		Mortgages Payable (Sch 3)	
Mortgages Owned		Unearned Income	
Real Estate (Sch 3)		Valuation Reserve-Bad Debts	
Furn, Fix, and Equip (Net of Depr)	Ø	Valuation Reserve-Contingencies	
Other Assets (Itemize)		Other Liabilities (Itemize)	

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

		Total Liabilities	27.000
		Preferred Stock	
		Common Stock	
		Surplus	
		Net Worth (Indiv. Or Part.)	
Total Assets	25 298.54	Total Liabilities and Net Worth	27.000

SUPPLEMENTARY SCHEDULES

Sch. 1. Banking Relations (A list of all bank accounts, including savings)

Name and Address of Bank	Balance	Loans, if any	Endorsed, Guaranteed or Secured
TD BANK	$150.		
BANK of AMERICA	$1		
ALASKA USA FCU	$1000		

Sch.2. Securities Owned (Stocks, Bonds, etc., but not mortgages)

Par Val. Or Shs.	Description	Cost	Pres. Mkt. Val	To Whom Pledged
155	Facebook	8044.50	14616.50	
77	Netflix	5005.00	9511.04	

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

Sch.3. Real Estate Owned – Mortgage Payable

Location and Description	Cost	Asses. Val.	Est. Val.	Mortgage Balance	Maturity

NONE

Sch.4. Notes Payable – Due to Principals (Partners, Stockholders, Officers and Others)

Due To	Amount	Due Date	Due To	Amount	Due Date

NONE

CONTINGENT LIABILITY. The undersigned has (have) no contingent liabilities as endorser, guarantor, or otherwise, except the following: (Give details.)

SUITS, JUDGMENTS AND OTHER LEGAL ACTIONS. There are no suits, judgments, or other legal actions outstanding or pending against the undersigned and to the best of the undersigned's knowledge no legal actions are to be started against undersigned, except as follows: (Give details.)

PLEDGE ASSIGNMENT, AND TRANSFER OF TITLE OR ASSETS. As of the date of the statement of assets and liabilities, included in this financial statement, the undersigned has (have) not pledged, assigned, hypothecated, or transferred the title of any of the assets as listed above, except as noted in the various schedules of this financial statement; and the undersigned has (have) not pledged, assigned, hypothecated, or transferred the title of any such assets, except as follows: (Give details.)

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

INSURANCE COVERAGE. - Fidelity Bond: Partners, Officers, Employees $ 0;
Indemnity Coverage: Robbery and Holdup $ 0; Burglary $ 0;
Misplacement $ 0; Forgery $ 0;
Errors and Omissions $ 0; Public Liability $ 0;
Fire Insurance: Furn., Fix., and Equip. $ 0
Other Insurance (describe):

ACCOUNTING DATA. - If books are kept or audited please give name of accountant NONE; Indicate if Certified Public Accountant —; Frequency of Audits ____; Date of Last Audit —; Date of Fiscal Year-End ____; Did the accountant prepare the financial statement submitted herewith? N/A Are the figures shown the same as the auditor's figures? ____ If not, how do the figures differ (give details):

The undersigned has (have) carefully read the foregoing statements, and all printed and written matter therein, and hereby certifies that all the statements are known to me (us) to be true and give a correct showing of the undersigned financial conditions, and that the undersigned has (have) no liabilities, direct, or contingent, business or accommodation, except as set forth in said complete statement, and that the legal and equitable title to all assets therein set forth is in the name of the undersigned solely, except as otherwise noted therein.

Signed this August day of 8, 2016.

CHINO LTD
Name of Entity

By: [signature] By: ____

Title: CEO, CHINO LTD Title: ____

By: ____ By: ____

Title: ____ Title: ____

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

LITIGATION AFFIDAVIT
FOR INDIVIDUALS

STATE OF NEW YORK, }
}
} **ss:**
}

County of New York

I, THOO CHSAO, being duly sworn, depose and say:

That there are no arrests, indictments, criminal information or other criminal proceedings now pending against me as an individual, partner, director or officer of a corporation; that I have never been convicted of a crime in any jurisdiction in any of these capacities, that I have never been sued nor has any judgment been obtained against me in any of these capacities in any civil action in any jurisdiction; and that I have never been the subject of any administrative or disciplinary proceedings initiated by a regulatory or governmental agency in any of these capacities.

Signature

Subscribed and sworn to before me this 7 day of August, 2015.

NICOLE M VUKOSAVLJEVIC
Notary Public - State of New York
NO. 01VU6184910
Qualified in Queens County
My Commission Expires 4/7/16

Notary Public

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

LITIGATION AFFIDAVIT
FOR LICENSEE/APPLICANT

I, Theo Chino (Print or type name), the CEO (Title) of Chino LTD,

being duly sworn, depose and say:

There are no indictments, criminal information or other criminal proceedings now pending against the licensee/applicant, that it has never been sued nor has any judgment been obtained against it in any civil action in any jurisdiction; and that it has never been the subject of any administrative or disciplinary proceedings initiated by a regulatory or governmental agency except as noted below.

N/A

(Signature)

Subscribed and sworn to before me this 7 day of August, 2015.

Notary Public

NICOLE M VUKOSAVLJEVIC
Notary Public - State of New York
NO. 01VU6184910
Qualified in Queens County
My Commission Expires 4/7/16

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES
PERSONAL QUESTIONNAIRE
(Please Print or Type)

Please answer all questions, using "No," "None" or "Not Applicable" where necessary

1. Full Name: Theo B. Chino Soc. Sec. No.: —
First, Middle, Last
Have you ever been known by, or used, any other name? If so, list such name(s):

2. Home Address: 640 Riverside drive 10b
New York, NY 10031
How long at this address: 42 years

3. Previous Home Address(es) (immediately prior to present address for the last 15 years):

How long at this address: _____

4. Present Occupation:

Firm Name: _____
Business Address: _____
Nature of Business: _____
Title: _____
Telephone Number: _____
Email Address: _____
Name of Immediate Superior: _____

5. Date of Birth: 19 Aug 72 Place of Birth: France
Citizenship: USA Right-to-Work in USA: Yes (X) No ( )
Passport No.: N Visa Type: A
Country of Issue: _____ Expiration Date: _____

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

6.

Education Awarded	Name and Address of School	Dates of Attendance	Major Area of Study	Degree Granted and Date
High School				
College, University (Undergraduate)	N/A			
College, University (Graduate)				
Professional or Technical School				

7. Do you have a license to practice any profession: Yes (X) No ( )

If "yes" give details:

(a) Nature of License: New York Taxi & Limousine Comm

(b) Date Issued: 6/11/2016 Number of license (if any): 5535449

(c) Licensing Agency and Address: TLC

8. Employment Record for the last 15 years. Account for all gaps in employment. (Use additional sheets if necessary.)

Name & Address of Employer	Dates of Employment	Position Held & Duties	Immediate Supervisor	Reason for Leaving
Not Disclosed				

9. If self-employed, describe each enterprise, including the name, address, state of incorporation, your percentage of ownership and the type of business of each corporate or other entity which you own or control. (Control means ownership of 10% or more of the stock or the ability to effectively control the management of the corporation or other entity.)

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

List names, addresses and percentage of control and/or ownership of other incorporators, partners, directors or officers of the entity referred to above.

10. Are you employed in any professional capacity, or do you perform any services for or have any business connections with any institution which is subject to the supervision of the Department, or any agency or authority of the State of New York?

Not disclosing — Yes ( ) No ( )

If "yes," indicate name of institution, address and nature of your work.

11. Have you had, or do you now have, any financial interest, direct or indirect, in any institution under the supervision of any authority or agency in New York State, or any other state?

— No — Yes ( ) No ( )

If "yes," give the name of the institution, address and nature of interest.

12. References:

(a) List the names and addresses of three personal references who can attest to your character, fitness and reputation. (State how long you have known each person; do not include relatives or current business associates.)

None —

(b) List the names and addresses of three professional references who can attest to your character, fitness, reputation, professional competence and business skills.

13. List of checking, savings and any borrowing relationships in excess of $10,000, for both personal and business purposes. (Use additional sheets if necessary.)

Name and address of Creditor/ Financial Institution	Account Number	Type of relationship (checking, savings, Personal/ business borrowing and so on)	Account balance / loan outstanding
— None —			

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

14. Answer yes to any of these questions if they apply to you as an individual, or as partner, director or officer of a corporation.

Except for minor traffic violations:

	Yes	No
(a) Are any arrests, indictments, criminal information or other criminal proceedings now pending against you?	( )	(X)
(b) Were you ever convicted for any violation of law?	( )	(X)
(c) Have you or has any partnership of which you were a member or any corporation of which you were a principal officer or major stockholder ever been adjudged a bankrupt or involved in a civil action either as a defendant or plaintiff (within the past 10 years)?	( )	(X)
(d) Have you ever initiated or been named in any administrative or disciplinary proceedings?	( )	(X)
(e) Has your salary ever been garnished (within the past 10 years)?	( )	(X)

If your answer to any of the above questions is "Yes", on a separate sheet of paper list the dates, name and location of the court of jurisdiction or administrative agency and a brief description of each action or charge and its disposition. Report all legal actions, regardless of disposition. Include copies of documents you have which provide information on any matters listed.

15. Has any enterprise in which you were a partner, director or officer been the subject of federal or state administrative proceedings, criminal indictment, criminal information or other criminal proceeding? ( ) (X)

If your answer is "Yes", on a separate sheet of paper provide a description of each administrative or disciplinary proceeding and its disposition. Report all matters, regardless of disposition. Include copies of documents you have which provide information on any matters listed.

16. Have you and/or any enterprise in which you are a partner failed to file required federal, state and local tax returns for the previous three calendar years?

Yes	No
( )	(X)

If your answer is "yes", on a separate sheet of paper, please explain the circumstances and include the date on which any applications for extension have been filed.

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

The undersigned affirms that the statements made and answers given herein are accurate and complete, and hereby authorizes the New York State Department of Financial Services to make any inquiry it deems appropriate in connection with processing this questionnaire. FALSE WRITTEN STATEMENTS IN THIS QUESTIONNAIRE ARE PUNISHABLE UNDER SECTION 210.45 OF THE NEW YORK PENAL LAW (making a punishable false written statement) and also as per the New York Financial Services Law and regulations, the Superintendent of Financial Services may initiate regulatory actions against the licensee.

Date 8/3/2015 Signature

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

STATEMENT OF OWNERSHIP
OF LICENSED ENTITY ENGAGED IN VIRTUAL CURRENCY BUSINESS ACTIVITY

I, Theo CHINO, being duly sworn, depose and state:

I. That I am an officer of the CHINO LTD Corporation,

namely CEO.
(Title)

II. That in my capacity as such I have applied in the name of the corporation for a license to engage in Virtual Currency Business Activity.

III. That the stock ownership of the ~~Kodak~~ CHINO LTD Corporation is distributed as follows:

The CHINO 100 %
_____ %
_____ %
_____ %

and that no other persons will invest any funds in the Corporation nor share in the management or profits of the Corporation, either directly or indirectly.

IV. That I understand that false statements made in this affidavit under oath may result in the revocation of the Virtual Currency Business Activity license of CHINO LTD (entity name) and in prosecution for perjury.

Applicant

Subscribed and sworn to before me this 7 day of August, 20 15.

NICOLE M VUKOSAVLJEVIC
Notary Public - State of New York
NO. 01VU6184910
Qualified in Queens County
My Commission Expires 4/7/18

Notary Public

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

TAXPAYER IDENTIFICATION INFORMATION

Disclosure of this information by you is mandatory in order to complete the processing of your application. The authority to request personal information from you, including identifying numbers, and the authority to maintain such information from you, including identifying numbers, and the authority to maintain such information is found in Section 5 of the Tax Law. The principal purpose for which the information is collected is to enable the Department of Taxation and Finance to identify individuals, businesses and others who have been delinquent in filing tax returns or may have understated their tax liabilities and to generally identify persons affected by the taxes administered by the Commissioner of Taxation and Finance. The information will be used for tax administration purposes and for any other purpose authorized by the Tax Law.

(Print or Type information) (This form may be reproduced as necessary)

1. Social Security Number (complete only if applicant is other than a corporation. A separate form must be completed for each partner or associate).

Not Disclosed

2. Employer Identification Code (for reporting wages of employees)

[redacted]1473

3. Legal Name (individual, partner or associate)

THEO CHINO

4. Trade Name (Doing business as D/B/A in license or application)

5. Street Address of Business (to be licensed or authorized)

640 Riverside Drive 10B

6. City New York 7. State NY

8. Zip and 4 Digit Code 10031

9. County New York

2015.06.24 Version

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

August 8. 2017.

To Whom it may Concern,

With the present Ltr it is requested a waiver of the fee of $5000 as

China LTD is a Small Business entity in New York State and ~~do not~~ the fee represent 5000$ of the current budget of the enterprise.

Sincerely.

The Chairman
CEO China LTD

Exhibit X to Amended Verified Complaint - Receipt for Rehana's Wholesale Indicating Bitcoin Purchase, dated January 4, 2016

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

Conglomerate Business Consultants, Inc.

CBC 40 Wall Street - 28th Fl
New York, NY 10005
(888) 522-5211 - support@cbcna.co

NOBEL 1968 ONE

01/04/2016

Receipt for:
INV-3911418406
Rehana's Wholesale
40 West 31st ST
New York, NY 10001
(212) 532-5271

Current Invoice: $ 279.41
Past due Invoice: $ 0.00
Bitcoin Received: $ 1.94

We received the sum of
$ 277.47
for the payment of the Nobel One invoice.

Received by:

CBC, Inc / Rehana's Wholesale

Date:
January 4 2016

002678

bitcoin

**Exhibit XI to Amended Verified Complaint -
Letter from Maharshi Datta to
Theo Chino, dated January 4, 2016**

FILED: NEW YORK COUNTY CLERK 05/30/2017 06:02 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 4 RECEIVED NYSCEF: 05/30/2017

NEW YORK STATE
DEPARTMENT of
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Shirin Emami
Acting Superintendent

January 4, 2016

Chino Ltd.
640 Riverside Drive, 10B
New York, NY 10031

Attn: Theo Chino
Chief Executive Officer

RE: Chino Ltd.
Application for License to Engage in Virtual Currency Business Activity

Dear Mr. Chino:

The New York State Department of Financial Services (the "Department") has performed an initial review of the Virtual Currency Business Activity license application (the "Application") of Chino Ltd. (the "Company"). The Department notes that the submitted Application documentation is exceptionally limited. Among other issues, the Application does not contain any description of the Company's current or proposed business activity. Therefore, the Department is unable to evaluate whether the Company's current or intended business activity (if any) would be considered Virtual Currency Business Activity that requires licensing under the New York Financial Services Law and regulations (*see* 23 NYCRR Part 200). For that reason, the Application is herewith being returned to you without further processing by the Department.

The Department would emphasize that the instant letter does not offer any opinion as to whether or not any business activity of the Company requires or would require licensing in New York.

Should you have any questions, please contact me at Maharshi.Datta@dfs.ny.gov or (212) 709-1530.

Sincerely,

Maharshi Datta
Supervising Bank Examiner
Capital Markets Division
New York State Department of Financial Services
One State Street, New York, NY 10004-1511

Enclosure: Original Application

Exhibit XII to Amended Verified Complaint -
2013 U.S. Income Tax Return of Chino Ltd
[pp. 109 - 113]

Form **1120S**
Department of the Treasury
Internal Revenue Service

U.S. Income Tax Return for an S Corporation

► **Do not file this form unless the corporation has filed or is attaching Form 2553 to elect to be an S corporation.**
► **Information about Form 1120S and its separate instructions is at *www.irs.gov/form1120s.***

OMB No. 1545-0130
2013

For calendar year 2013 or tax year beginning Nov 19 , 2013, ending Dec 31 , 2013

A S election effective date: 11/19/13	TYPE OR PRINT	Name: Chino Ltd	**D** Employer identification number: [redacted]1473
B Business activity code number (see instrs): 334110		Number, street, and room or suite no. If a P.O. box, see instructions.: 640 RIVERSIDE DR	**E** Date incorporated: 11/19/13
C Check if Schedule M-3 attached ☐		City or town, state or province, country, and ZIP or foreign postal code: APT 10B NY 10031	**F** Total assets (see instructions): $ -4,390.

G Is the corporation electing to be an S corporation beginning with this tax year? ☒ Yes ☐ No If 'Yes,' attach Form 2553 if not already filed

H Check if: **(1)** ☐ Final return **(2)** ☐ Name change **(3)** ☐ Address change **(4)** ☐ Amended return **(5)** ☐ S election termination or revocation

I Enter the number of shareholders who were shareholders during any part of the tax year . . . . . ► 1

Caution. Include **only** trade or business income and expenses on lines 1a through 21. See the instructions for more information.

INCOME	1a	Gross receipts or sales	1a		
	b	Returns and allowances	1b		
	c	Balance. Subtract line 1b from line 1a		1c	
	2	Cost of goods sold (attach Form 1125-A)		2	2,992.
	3	Gross profit. Subtract line 2 from line 1c		3	-2,992.
	4	Net gain (loss) from Form 4797, line 17 (attach Form 4797)		4	
	5	Other income (loss) (see instrs – att statement)		5	
	6	**Total income (loss).** Add lines 3 through 5 ►		6	-2,992.
DEDUCTIONS (SEE INSTRS)	7	Compensation of officers (see instructions - attach Form 1125-E)		7	
	8	Salaries and wages (less employment credits)		8	
	9	Repairs and maintenance		9	84.
	10	Bad debts		10	
	11	Rents		11	
	12	Taxes and licenses		12	71.
	13	Interest		13	24.
	14	Depreciation not claimed on Form 1125-A or elsewhere on return (attach Form 4562)		14	
	15	Depletion **(Do not deduct oil and gas depletion.)**		15	
	16	Advertising		16	32.
	17	Pension, profit-sharing, etc, plans		17	
	18	Employee benefit programs		18	
	19	Other deductions (attach statement) * STMT		19	1,164.
	20	**Total deductions.** Add lines 7 through 19 ►		20	1,375.
	21	**Ordinary business income (loss).** Subtract line 20 from line 6		21	-4,367.
TAX AND PAYMENTS	22a	Excess net passive income or LIFO recapture tax (see instructions)	22a		
	b	Tax from Schedule D (Form 1120S)	22b		
	c	Add lines 22a and 22b (see instructions for additional taxes)		22c	
	23a	2013 estimated tax payments and 2012 overpayment credited to 2013	23a		
	b	Tax deposited with Form 7004	23b		
	c	Credit for federal tax paid on fuels (attach Form 4136)	23c		
	d	Add lines 23a through 23c		23d	
	24	Estimated tax penalty (see instructions). Check if Form 2220 is attached ► ☐		24	
	25	**Amount owed.** If line 23d is smaller than the total of lines 22c and 24, enter amount owed		25	
	26	**Overpayment.** If line 23d is larger than the total of lines 22c and 24, enter amount overpaid		26	
	27	Enter amount from line 26 **Credited to 2014 estimated tax** ►	**Refunded** ►	27	

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

▶ _____ Signature of officer | Date | ▶ CEO Title

May the IRS discuss this return with the preparer shown below (see instructions)? ☐ Yes ☐ No

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN

Firm's name ► Self-Prepared — Firm's EIN ►
Firm's address ► — Phone no.

BAA For Paperwork Reduction Act Notice, see separate instructions. SPSA0112 01/15/14 Form **1120S** (2013)

Schedule B **Other Information** (see instructions)

		Yes	No
1	Check accounting method: **a** [X] Cash **b** [ ] Accrual **c** [ ] Other (specify) ►		
2	See the instructions and enter the: **a** Business activity ► Manufacturing **b** Product or service ► Point of Sale Equipment		
3	At any time during the tax year, was any shareholder of the corporation a disregarded entity, a trust, an estate, or a nominee or similar person? If "Yes," attach Schedule B-1, Information on Certain Shareholders of an S Corporation		X
4a	At the end of the tax year, did the corporation: Own directly 20% or more, or own, directly or indirectly, 50% or more of the total stock issued and outstanding of any foreign or domestic corporation? For rules of constructive ownership, see instructions. If 'Yes,' complete (i) through (v) below		X

(i) Name of Corporation	(ii) Employer Identification Number (if any)	(iii) Country of Incorporation	(iv) Percentage of Stock Owned	(v) If Percentage in (iv) is 100%, Enter the Date (if any) a Qualified Subchapter S Subsidiary Election Was Made

		Yes	No
b	Own directly an interest of 20% or more, or own, directly or indirectly, an interest of 50% or more in the profit, loss, or capital in any foreign or domestic partnership (including an entity treated as a partnership) or in the beneficial interest of a trust? For rules of constructive ownership, see instructions. If 'Yes,' complete (i) through (v) below		X

(i) Name of Entity	(ii) Employer Identification Number (if any)	(iii) Type of Entity	(iv) Country of Organization	(v) Maximum % Owned in Profit, Loss, or Capital

5a	At the end of the tax year, did the corporation have any outstanding shares of restricted stock? If 'Yes,' complete lines (i) and (ii) below.		X
	(i) Total shares of restricted stock ►		
	(ii) Total shares of non-restricted stock ►		
b	At the end of the tax year, did the corporation have any outstanding stock options, warrants, or similar instruments? If 'Yes,' complete lines (i) and (ii) below.		X
	(i) Total shares of stock outstanding at the end of the tax year ►		
	(ii) Total shares of stock oustanding if all instruments were executed ►		
6	Has this corporation filed, or is it required to file, **Form 8918,** Material Advisor Disclosure Statement, to provide information on any reportable transaction?		X
7	Check this box if the corporation issued publicly offered debt instruments with original issue discount ► [ ] If checked, the corporation may have to file **Form 8281,** Information Return for Publicly Offered Original Issue Discount Instruments.		
8	If the corporation: **(a)** was a C corporation before it elected to be an S corporation **or** the corporation acquired an asset with a basis determined by reference to the basis of the asset (or the basis of any other property) in the hands of a C corporation **and (b)** has net unrealized built-in gain in excess of the net recognized built-in gain from prior years, enter the net unrealized built-in gain reduced by net recognized built-in gain from prior years (see instructions) ►$		
9	Enter the accumulated earnings and profits of the corporation at the end of the tax year $		
10	Does the corporation satisfy **both** of the following conditions?		
a	The corporation's total receipts (see instructions) for the tax year were less than $250,000		
b	The corporation's total assets at the end of the tax year were less than $250,000	X	
	If 'Yes,' the corporation is not required to complete Schedules L and M-1.		
11	During the tax year, did the corporation have any non-shareholder debt that was canceled, was forgiven, or had the terms modified so as to reduce the principal amount of the debt?		X
	If 'Yes,' enter the amount of principal reduction $		
12	During the tax year, was a qualified subchapter S subsidiary election terminated or revoked? If 'Yes', see instructions		X
13 a	Did the corporation make any payments in 2013 that would require it to file Form(s) 1099?		X
b	If 'Yes,' did the corporation file or will it file required Forms 1099?		

Schedule K	Shareholders' Pro Rata Share Items		Total amount
Income (Loss)	1 Ordinary business income (loss) (page 1, line 21)	1	-4,367.
	2 Net rental real estate income (loss) (attach Form 8825)	2	
	3a Other gross rental income (loss) 3a		
	b Expenses from other rental activities (attach statement) 3b		
	c Other net rental income (loss). Subtract line 3b from line 3a	3c	
	4 Interest income	4	
	5 Dividends: a Ordinary dividends	5a	
	b Qualified dividends 5b		
	6 Royalties	6	
	7 Net short-term capital gain (loss) (attach Schedule D (Form 1120S))	7	
	8a Net long-term capital gain (loss) (attach Schedule D (Form 1120S))	8a	
	b Collectibles (28%) gain (loss) 8b		
	c Unrecaptured section 1250 gain (attach statement) 8c		
	9 Net section 1231 gain (loss) (attach Form 4797)	9	
	10 Other income (loss) (see instructions) Type ►	10	
Deductions	11 Section 179 deduction (attach Form 4562)	11	
	12a Charitable contributions	12a	
	b Investment interest expense	12b	
	c Section 59(e)(2) expenditures (1) Type ► (2) Amount ►	12c (2)	
	d Other deductions (see instructions) Type ►	12d	
Credits	13a Low-income housing credit (section 42(j)(5))	13a	
	b Low-income housing credit (other)	13b	
	c Qualified rehabilitation expenditures (rental real estate) (attach Form 3468)	13c	
	d Other rental real estate credits (see instrs) Type ►	13d	
	e Other rental credits (see instrs) Type ►	13e	
	f Biofuel producer credit (attach Form 6478)	13f	
	g Other credits (see instructions) Type ►	13g	
Foreign Transactions	14a Name of country or U.S. possession ►		
	b Gross income from all sources	14b	
	c Gross income sourced at shareholder level	14c	
	Foreign gross income sourced at corporate level		
	d Passive category	14d	
	e General category	14e	
	f Other (attach statement)	14f	
	Deductions allocated and apportioned at shareholder level		
	g Interest expense	14g	
	h Other	14h	
	Deductions allocated and apportioned at corporate level to foreign source income		
	i Passive category	14i	
	j General category	14j	
	k Other (attach statement)	14k	
	Other information		
	l Total foreign taxes (check one): ► ☐ Paid ☐ Accrued	14l	
	m Reduction in taxes available for credit (attach statement)	14m	
	n Other foreign tax information (attach statement)		
Alternative Minimum Tax (AMT) Items	15a Post-1986 depreciation adjustment	15a	
	b Adjusted gain or loss	15b	
	c Depletion (other than oil and gas)	15c	
	d Oil, gas, and geothermal properties — gross income	15d	
	e Oil, gas, and geothermal properties — deductions	15e	
	f Other AMT items (attach statement)	15f	
Items Affecting Shareholder Basis	16a Tax-exempt interest income	16a	
	b Other tax-exempt income	16b	
	c Nondeductible expenses	16c	23.
	d Distributions (attach stmt if required) (see instrs)	16d	
	e Repayment of loans from shareholders	16e	

Schedule K	**Shareholders' Pro Rata Share Items** (continued)		**Total amount**
Other Information	**17a** Investment income	**17a**	
	b Investment expenses	**17b**	
	c Dividend distributions paid from accumulated earnings and profits	**17c**	
	d Other items and amounts (attach statement)		
Reconciliation	**18** **Income/loss reconciliation.** Combine the amounts on lines 1 through 10 in the far right column. From the result, subtract the sum of the amounts on lines 11 through 12d and lines 14l	**18**	-4,367.

Schedule L **Balance Sheets per Books**	Beginning of tax year		End of tax year	
Assets	**(a)**	**(b)**	**(c)**	**(d)**
1 Cash				0.
2a Trade notes and accounts receivable				
b Less allowance for bad debts				
3 Inventories				
4 U.S. government obligations				
5 Tax-exempt securities (see instructions)				
6 Other current assets (attach stmt)				
7 Loans to shareholders				-4,390.
8 Mortgage and real estate loans				
9 Other investments (attach statement)				
10a Buildings and other depreciable assets			0.	
b Less accumulated depreciation			0.	0.
11a Depletable assets				
b Less accumulated depletion				
12 Land (net of any amortization)				0.
13a Intangible assets (amortizable only)			0.	
b Less accumulated amortization			0.	0.
14 Other assets (attach stmt)				
15 Total assets				-4,390.
Liabilities and Shareholders' Equity				
16 Accounts payable				0.
17 Mortgages, notes, bonds payable in less than 1 year				
18 Other current liabilities (attach stmt)				
19 Loans from shareholders				0.
20 Mortgages, notes, bonds payable in 1 year or more				
21 Other liabilities (attach statement)				
22 Capital stock				
23 Additional paid-in capital				
24 Retained earnings				-4,390.
25 Adjustments to shareholders' equity (att stmt)				
26 Less cost of treasury stock				
27 Total liabilities and shareholders' equity				-4,390.

Schedule M-1 **Reconciliation of Income (Loss) per Books With Income (Loss) per Return**

Note. Schedule M-3 required instead of Schedule M-1 if total assets are $10 million or more — see instructions

1	Net income (loss) per books	-4,390.	5	Income recorded on books this year not included on Schedule K, lines 1 through 10 (itemize):	
2	Income included on Schedule K, lines 1, 2, 3c, 4, 5a, 6, 7, 8a, 9, and 10, not recorded on books this year (itemize):			a Tax-exempt interest $	
3	Expenses recorded on books this year not included on Schedule K, lines 1 through 12, and 14l (itemize):		6	Deductions included on Schedule K, lines 1 through 12, and 14l, not charged against book income this year (itemize):	
	a Depreciation $			a Depreciation $	
	b Travel and entertainment $ 23.	23.	7	Add lines 5 and 6	
4	Add lines 1 through 3	-4,367.	8	Income (loss) (Schedule K, ln 18). Ln 4 less ln 7	-4,367.

Schedule M-2 **Analysis of Accumulated Adjustments Account, Other Adjustments Account, and Shareholders' Undistributed Taxable Income Previously Taxed** (see instructions)

		(a) Accumulated adjustments account	(b) Other adjustments account	(c) Shareholders' undistributed taxable income previously taxed
1	Balance at beginning of tax year			
2	Ordinary income from page 1, line 21			
3	Other additions			
4	Loss from page 1, line 21	4,367.		
5	Other reductions * STMT	23.		
6	Combine lines 1 through 5	-4,390.		
7	Distributions other than dividend distributions			
8	Balance at end of tax year. Subtract line 7 from line 6	-4,390.		

Exhibit XIII to Amended Verified Complaint -
2014 U.S. Income Tax Return of Chino Ltd
[pp. 114 - 118]

Form **1120S**
Department of the Treasury
Internal Revenue Service

U.S. Income Tax Return for an S Corporation

► **Do not file this form unless the corporation has filed or is attaching Form 2553 to elect to be an S corporation.**
► **Information about Form 1120S and its separate instructions is at *www.irs.gov/form1120s.***

OMB No. 1545-0123
2014

For calendar year 2014 or tax year beginning , 2014, ending ,

A S election effective date: 11/19/13	TYPE OR PRINT	Name: Chino Ltd	**D** Employer identification number: [redacted]1473
B Business activity code number (see instrs): 334110		Number, street, and room or suite no. If a P.O. box, see instructions.: 640 RIVERSIDE DR	**E** Date incorporated: 11/19/13
C Check if Schedule M-3 attached ☐		City or town, state or province, country, and ZIP or foreign postal code: APT 10B NY 10031	**F** Total assets (see instructions): $ 3,040.

G Is the corporation electing to be an S corporation beginning with this tax year? ☐ Yes ☒ No If 'Yes,' attach Form 2553 if not already filed

H Check if: **(1)** ☐ Final return **(2)** ☐ Name change **(3)** ☐ Address change
(4) ☒ Amended return **(5)** ☐ S election termination or revocation

I Enter the number of shareholders who were shareholders during any part of the tax year . . . . . ► 1

Caution. Include **only** trade or business income and expenses on lines 1a through 21. See the instructions for more information.

INCOME	1a	Gross receipts or sales	1a		
	b	Returns and allowances	1b		
	c	Balance. Subtract line 1b from line 1a		1c	
	2	Cost of goods sold (attach Form 1125-A)		2	
	3	Gross profit. Subtract line 2 from line 1c		3	
	4	Net gain (loss) from Form 4797, line 17 (attach Form 4797)		4	
	5	Other income (loss) (see instrs – att statement)		5	
	6	**Total income (loss).** Add lines 3 through 5		► 6	
DEDUCTIONS SEE INSTRS	7	Compensation of officers (see instructions - attach Form 1125-E)		7	
	8	Salaries and wages (less employment credits)		8	6,812.
	9	Repairs and maintenance		9	
	10	Bad debts		10	
	11	Rents		11	137.
	12	Taxes and licenses		12	598.
	13	Interest		13	2,374.
	14	Depreciation not claimed on Form 1125-A or elsewhere on return (attach Form 4562)		14	
	15	Depletion **(Do not deduct oil and gas depletion.)**		15	
	16	Advertising		16	449.
	17	Pension, profit-sharing, etc, plans		17	
	18	Employee benefit programs		18	
	19	Other deductions (attach statement) * STMT		19	49,297.
	20	**Total deductions.** Add lines 7 through 19		► 20	59,667.
	21	**Ordinary business income (loss).** Subtract line 20 from line 6		21	-59,667.
TAX AND PAYMENTS	22a	Excess net passive income or LIFO recapture tax (see instructions)	22a		
	b	Tax from Schedule D (Form 1120S)	22b		
	c	Add lines 22a and 22b (see instructions for additional taxes)		22c	
	23a	2014 estimated tax payments and 2013 overpayment credited to 2014	23a		
	b	Tax deposited with Form 7004	23b		
	c	Credit for federal tax paid on fuels (attach Form 4136)	23c		
	d	Add lines 23a through 23c		23d	
	24	Estimated tax penalty (see instructions). Check if Form 2220 is attached ► ☐		24	
	25	**Amount owed.** If line 23d is smaller than the total of lines 22c and 24, enter amount owed		25	
	26	**Overpayment.** If line 23d is larger than the total of lines 22c and 24, enter amount overpaid		26	
	27	Enter amount from line 26 **Credited to 2015 estimated tax** ►	**Refunded** ►	27	

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

▶ _____ Signature of officer | Date | ▶ CEO Title

May the IRS discuss this return with the preparer shown below (see instructions)? ☐ Yes ☐ No

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN

Firm's name ► Self-Prepared — Firm's EIN ►
Firm's address ► — Phone no.

BAA For Paperwork Reduction Act Notice, see separate instructions. SPSA0112 08/06/14 Form **1120S** (2014)

Schedule B **Other Information** (see instructions)

		Yes	No
1	Check accounting method: **a** [X] Cash **b** [ ] Accrual **c** [ ] Other (specify) ►		
2	See the instructions and enter the: **a** Business activity ► Manufacturing **b** Product or service ► Point of Sale Equipment		
3	At any time during the tax year, was any shareholder of the corporation a disregarded entity, a trust, an estate, or a nominee or similar person? If "Yes," attach Schedule B-1, Information on Certain Shareholders of an S Corporation		X
4	At the end of the tax year, did the corporation: **a** Own directly 20% or more, or own, directly or indirectly, 50% or more of the total stock issued and outstanding of any foreign or domestic corporation? For rules of constructive ownership, see instructions. If 'Yes,' complete (i) through (v) below		X

(i) Name of Corporation	(ii) Employer Identification Number (if any)	(iii) Country of Incorporation	(iv) Percentage of Stock Owned	(v) If Percentage in (iv) is 100%, Enter the Date (if any) a Qualified Subchapter S Subsidiary Election Was Made

		Yes	No
b	Own directly an interest of 20% or more, or own, directly or indirectly, an interest of 50% or more in the profit, loss, or capital in any foreign or domestic partnership (including an entity treated as a partnership) or in the beneficial interest of a trust? For rules of constructive ownership, see instructions. If 'Yes,' complete (i) through (v) below		X

(i) Name of Entity	(ii) Employer Identification Number (if any)	(iii) Type of Entity	(iv) Country of Organization	(v) Maximum % Owned in Profit, Loss, or Capital

		Yes	No
5a	At the end of the tax year, did the corporation have any outstanding shares of restricted stock? If 'Yes,' complete lines (i) and (ii) below. **(i)** Total shares of restricted stock ► **(ii)** Total shares of non-restricted stock ►		X
b	At the end of the tax year, did the corporation have any outstanding stock options, warrants, or similar instruments? If 'Yes,' complete lines (i) and (ii) below. **(i)** Total shares of stock outstanding at the end of the tax year ► **(ii)** Total shares of stock outstanding if all instruments were executed ►		X
6	Has this corporation filed, or is it required to file, **Form 8918,** Material Advisor Disclosure Statement, to provide information on any reportable transaction?		X
7	Check this box if the corporation issued publicly offered debt instruments with original issue discount ► [ ] If checked, the corporation may have to file **Form 8281,** Information Return for Publicly Offered Original Issue Discount Instruments.		
8	If the corporation: **(a)** was a C corporation before it elected to be an S corporation **or** the corporation acquired an asset with a basis determined by reference to the basis of the asset (or the basis of any other property) in the hands of a C corporation **and (b)** has net unrealized built-in gain in excess of the net recognized built-in gain from prior years, enter the net unrealized built-in gain reduced by net recognized built-in gain from prior years (see instructions) ►$		
9	Enter the accumulated earnings and profits of the corporation at the end of the tax year $		
10	Does the corporation satisfy **both** of the following conditions?		
a	The corporation's total receipts (see instructions) for the tax year were less than $250,000		
b	The corporation's total assets at the end of the tax year were less than $250,000 If 'Yes,' the corporation is not required to complete Schedules L and M-1.	X	
11	During the tax year, did the corporation have any non-shareholder debt that was canceled, was forgiven, or had the terms modified so as to reduce the principal amount of the debt? If 'Yes,' enter the amount of principal reduction $		X
12	During the tax year, was a qualified subchapter S subsidiary election terminated or revoked? If 'Yes', see instructions		X
13 a	Did the corporation make any payments in 2014 that would require it to file Form(s) 1099?		X
b	If 'Yes,' did the corporation file or will it file required Forms 1099?		

Schedule K	Shareholders' Pro Rata Share Items		Total amount
Income (Loss)	1 Ordinary business income (loss) (page 1, line 21)	1	-59,667.
	2 Net rental real estate income (loss) (attach Form 8825)	2	
	3a Other gross rental income (loss) 3a		
	b Expenses from other rental activities (attach statement) 3b		
	c Other net rental income (loss). Subtract line 3b from line 3a	3c	
	4 Interest income	4	0.
	5 Dividends: a Ordinary dividends	5a	
	b Qualified dividends 5b		
	6 Royalties	6	
	7 Net short-term capital gain (loss) (attach Schedule D (Form 1120S))	7	
	8a Net long-term capital gain (loss) (attach Schedule D (Form 1120S))	8a	
	b Collectibles (28%) gain (loss) 8b		
	c Unrecaptured section 1250 gain (attach statement) 8c		
	9 Net section 1231 gain (loss) (attach Form 4797)	9	
	10 Other income (loss) (see instructions) Type ►	10	
Deductions	11 Section 179 deduction (attach Form 4562)	11	
	12a Charitable contributions	12a	
	b Investment interest expense	12b	
	c Section 59(e)(2) expenditures (1) Type ► (2) Amount ►	12c (2)	
	d Other deductions (see instructions) Type ►	12d	
Credits	13a Low-income housing credit (section 42(j)(5))	13a	
	b Low-income housing credit (other)	13b	
	c Qualified rehabilitation expenditures (rental real estate) (attach Form 3468, if applicable)	13c	
	d Other rental real estate credits (see instrs) Type ►	13d	
	e Other rental credits (see instrs) Type ►	13e	
	f Biofuel producer credit (attach Form 6478)	13f	
	g Other credits (see instructions) Type ►	13g	
Foreign Transactions	14a Name of country or U.S. possession ►		
	b Gross income from all sources	14b	
	c Gross income sourced at shareholder level	14c	
	Foreign gross income sourced at corporate level		
	d Passive category	14d	
	e General category	14e	
	f Other (attach statement)	14f	
	Deductions allocated and apportioned at shareholder level		
	g Interest expense	14g	
	h Other	14h	
	Deductions allocated and apportioned at corporate level to foreign source income		
	i Passive category	14i	
	j General category	14j	
	k Other (attach statement)	14k	
	Other information		
	l Total foreign taxes (check one): ► ☐ Paid ☐ Accrued	14l	
	m Reduction in taxes available for credit (attach statement)	14m	
	n Other foreign tax information (attach statement)		
Alternative Minimum Tax (AMT) Items	15a Post-1986 depreciation adjustment	15a	
	b Adjusted gain or loss	15b	
	c Depletion (other than oil and gas)	15c	
	d Oil, gas, and geothermal properties — gross income	15d	
	e Oil, gas, and geothermal properties — deductions	15e	
	f Other AMT items (attach statement)	15f	
Items Affecting Shareholder Basis	16a Tax-exempt interest income	16a	0.
	b Other tax-exempt income	16b	
	c Nondeductible expenses	16c	
	d Distributions (attach stmt if required) (see instrs)	16d	
	e Repayment of loans from shareholders	16e	

Schedule K Shareholders' Pro Rata Share Items (continued)			Total amount
Other Information	**17a** Investment income	**17a**	
	b Investment expenses	**17b**	
	c Dividend distributions paid from accumulated earnings and profits	**17c**	
	d Other items and amounts (attach statement)		
Reconciliation	**18** **Income/loss reconciliation.** Combine the amounts on lines 1 through 10 in the far right column. From the result, subtract the sum of the amounts on lines 11 through 12d and 14l	**18**	-59,667.

Schedule L Balance Sheets per Books	Beginning of tax year		End of tax year	
Assets	**(a)**	**(b)**	**(c)**	**(d)**
1 Cash		0.		
2a Trade notes and accounts receivable				
b Less allowance for bad debts				
3 Inventories				
4 U.S. government obligations				
5 Tax-exempt securities (see instructions)				
6 Other current assets (attach stmt) Ln 6 St				2,579.
7 Loans to shareholders		-4,390.		
8 Mortgage and real estate loans				
9 Other investments (attach statement)				
10a Buildings and other depreciable assets	0.		461.	
b Less accumulated depreciation	0.	0.	0.	461.
11a Depletable assets				
b Less accumulated depletion				
12 Land (net of any amortization)		0.		0.
13a Intangible assets (amortizable only)	0.		0.	
b Less accumulated amortization	0.	0.	0.	0.
14 Other assets (attach stmt)				
15 Total assets		-4,390.		3,040.
Liabilities and Shareholders' Equity				
16 Accounts payable		0.		
17 Mortgages, notes, bonds payable in less than 1 year				
18 Other current liabilities (attach stmt) Ln 18 St				785.
19 Loans from shareholders		0.		66,312.
20 Mortgages, notes, bonds payable in 1 year or more				
21 Other liabilities (attach statement)				
22 Capital stock				
23 Additional paid-in capital				
24 Retained earnings		-4,390.		-64,057.
25 Adjustments to shareholders' equity (att stmt)				
26 Less cost of treasury stock				
27 Total liabilities and shareholders' equity		-4,390.		3,040.

Schedule M-1 **Reconciliation of Income (Loss) per Books With Income (Loss) per Return**

Note. The corporation may be required to file Schedule M-3 (see instructions)

1	Net income (loss) per books	-59,667.	5	Income recorded on books this year not included on Schedule K, lines 1 through 10 (itemize):	
2	Income included on Schedule K, lines 1, 2, 3c, 4, 5a, 6, 7, 8a, 9, and 10, not recorded on books this year (itemize):			a Tax-exempt interest $ 0.	0.
3	Expenses recorded on books this year not included on Schedule K, lines 1 through 12, and 14l (itemize):		6	Deductions included on Schedule K, lines 1 through 12 and 14l, not charged against book income this year (itemize):	
	a Depreciation $			a Depreciation $	
	b Travel and entertainment $		7	Add lines 5 and 6	0.
4	Add lines 1 through 3	-59,667.	8	Income (loss) (Schedule K, ln 18). Ln 4 less ln 7	-59,667.

Schedule M-2 **Analysis of Accumulated Adjustments Account, Other Adjustments Account, and Shareholders' Undistributed Taxable Income Previously Taxed** (see instructions)

		(a) Accumulated adjustments account	(b) Other adjustments account	(c) Shareholders' undistributed taxable income previously taxed
1	Balance at beginning of tax year	-4,390.		
2	Ordinary income from page 1, line 21			
3	Other additions * STMT		0.	
4	Loss from page 1, line 21	59,667.		
5	Other reductions			
6	Combine lines 1 through 5	-64,057.	0.	
7	Distributions other than dividend distributions			
8	Balance at end of tax year. Subtract line 7 from line 6	-64,057.	0.	

Exhibit XIV to Amended Verified Complaint -
2015 U.S. Income Tax Return of Chino Ltd
[pp. 119 - 123]

Form **1120S** — Department of the Treasury, Internal Revenue Service

U.S. Income Tax Return for an S Corporation

► Do not file this form unless the corporation has filed or is attaching Form 2553 to elect to be an S corporation.
► Information about Form 1120S and its separate instructions is at *www.irs.gov/form1120s.*

OMB No. 1545-0123

2015

For calendar year 2015 or tax year beginning , 2015, ending ,

A S election effective date: 11/19/13	TYPE OR PRINT	Name: Chino Ltd	**D** Employer identification number: [redacted]1473
B Business activity code number (see instrs): 334110		Number, street, and room or suite no. If a P.O. box, see instructions.: 640 RIVERSIDE DR	**E** Date incorporated: 11/19/13
C Check if Schedule M-3 attached ☐		City or town, state or province, country, and ZIP or foreign postal code: APT 10B NY 10031	**F** Total assets (see instructions): $ 3,509.

G Is the corporation electing to be an S corporation beginning with this tax year? ☐ Yes ☒ No If 'Yes,' attach Form 2553 if not already filed

H Check if: **(1)** ☐ Final return **(2)** ☐ Name change **(3)** ☐ Address change **(4)** ☐ Amended return **(5)** ☐ S election termination or revocation

I Enter the number of shareholders who were shareholders during any part of the tax year . . . . . ► 1

Caution. Include **only** trade or business income and expenses on lines 1a through 21. See the instructions for more information.

INCOME	1a	Gross receipts or sales	1a	-12.	
	b	Returns and allowances	1b		
	c	Balance. Subtract line 1b from line 1a		1c	-12.
	2	Cost of goods sold (attach Form 1125-A)		2	
	3	Gross profit. Subtract line 2 from line 1c		3	-12.
	4	Net gain (loss) from Form 4797, line 17 (attach Form 4797)		4	
	5	Other income (loss) (see instrs – att statement)		5	
	6	**Total income (loss).** Add lines 3 through 5		6	-12.
DEDUCTIONS (SEE INSTRS)	7	Compensation of officers (see instructions - attach Form 1125-E)		7	
	8	Salaries and wages (less employment credits)		8	
	9	Repairs and maintenance		9	
	10	Bad debts		10	
	11	Rents		11	5,568.
	12	Taxes and licenses		12	236.
	13	Interest		13	2,608.
	14	Depreciation not claimed on Form 1125-A or elsewhere on return (attach Form 4562)		14	
	15	Depletion **(Do not deduct oil and gas depletion.)**		15	
	16	Advertising		16	
	17	Pension, profit-sharing, etc, plans		17	
	18	Employee benefit programs		18	
	19	Other deductions (attach statement) * STMT		19	22,164.
	20	**Total deductions.** Add lines 7 through 19		20	30,576.
	21	**Ordinary business income (loss).** Subtract line 20 from line 6		21	-30,588.
TAX AND PAYMENTS	22a	Excess net passive income or LIFO recapture tax (see instructions)	22a		
	b	Tax from Schedule D (Form 1120S)	22b		
	c	Add lines 22a and 22b (see instructions for additional taxes)		22c	
	23a	2015 estimated tax payments and 2014 overpayment credited to 2015	23a		
	b	Tax deposited with Form 7004	23b	0.	
	c	Credit for federal tax paid on fuels (attach Form 4136)	23c		
	d	Add lines 23a through 23c		23d	0.
	24	Estimated tax penalty (see instructions). Check if Form 2220 is attached ► ☐		24	
	25	**Amount owed.** If line 23d is smaller than the total of lines 22c and 24, enter amount owed		25	0.
	26	**Overpayment.** If line 23d is larger than the total of lines 22c and 24, enter amount overpaid		26	
	27	Enter amount from line 26 **Credited to 2016 estimated tax** ► **Refunded** ►		27	

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Signature of officer ____ Date ____ ► CEO Title

May the IRS discuss this return with the preparer shown below (see instructions)? ☐ Yes ☐ No

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN
Firm's name ► Self-Prepared			Firm's EIN ►	
Firm's address ►			Phone no.	

BAA For Paperwork Reduction Act Notice, see separate instructions. SPSA0112 08/13/15 Form **1120S** (2015)

Schedule B **Other Information** (see instructions)

		Yes	No
1	Check accounting method: **a** [X] Cash **b** [ ] Accrual **c** [ ] Other (specify) ►		
2	See the instructions and enter the: **a** Business activity ► Manufacturing **b** Product or service ► Point of Sale Equipment		
3	At any time during the tax year, was any shareholder of the corporation a disregarded entity, a trust, an estate, or a nominee or similar person? If "Yes," attach Schedule B-1, Information on Certain Shareholders of an S Corporation		X
4	At the end of the tax year, did the corporation:		
a	Own directly 20% or more, or own, directly or indirectly, 50% or more of the total stock issued and outstanding of any foreign or domestic corporation? For rules of constructive ownership, see instructions. If 'Yes,' complete (i) through (v) below		X

(i) Name of Corporation	**(ii)** Employer Identification Number (if any)	**(iii)** Country of Incorporation	**(iv)** Percentage of Stock Owned	**(v)** If Percentage in (iv) is 100%, Enter the Date (if any) a Qualified Subchapter S Subsidiary Election Was Made

b	Own directly an interest of 20% or more, or own, directly or indirectly, an interest of 50% or more in the profit, loss, or capital in any foreign or domestic partnership (including an entity treated as a partnership) or in the beneficial interest of a trust? For rules of constructive ownership, see instructions. If 'Yes,' complete (i) through (v) below		X

(i) Name of Entity	**(ii)** Employer Identification Number (if any)	**(iii)** Type of Entity	**(iv)** Country of Organization	**(v)** Maximum % Owned in Profit, Loss, or Capital

5a	At the end of the tax year, did the corporation have any outstanding shares of restricted stock?		X
	If 'Yes,' complete lines (i) and (ii) below.		
	(i) Total shares of restricted stock ►		
	(ii) Total shares of non-restricted stock ►		
b	At the end of the tax year, did the corporation have any outstanding stock options, warrants, or similar instruments?		X
	If 'Yes,' complete lines (i) and (ii) below.		
	(i) Total shares of stock outstanding at the end of the tax year ►		
	(ii) Total shares of stock outstanding if all instruments were executed ►		
6	Has this corporation filed, or is it required to file, **Form 8918,** Material Advisor Disclosure Statement, to provide information on any reportable transaction?		X
7	Check this box if the corporation issued publicly offered debt instruments with original issue discount ► [ ] If checked, the corporation may have to file **Form 8281,** Information Return for Publicly Offered Original Issue Discount Instruments.		
8	If the corporation: **(a)** was a C corporation before it elected to be an S corporation **or** the corporation acquired an asset with a basis determined by reference to the basis of the asset (or the basis of any other property) in the hands of a C corporation **and (b)** has net unrealized built-in gain in excess of the net recognized built-in gain from prior years, enter the net unrealized built-in gain reduced by net recognized built-in gain from prior years (see instructions) ►$		
9	Enter the accumulated earnings and profits of the corporation at the end of the tax year $		
10	Does the corporation satisfy **both** of the following conditions?		
a	The corporation's total receipts (see instructions) for the tax year were less than $250,000		
b	The corporation's total assets at the end of the tax year were less than $250,000	X	
	If 'Yes,' the corporation is not required to complete Schedules L and M-1.		
11	During the tax year, did the corporation have any non-shareholder debt that was canceled, was forgiven, or had the terms modified so as to reduce the principal amount of the debt?		X
	If 'Yes,' enter the amount of principal reduction $		
12	During the tax year, was a qualified subchapter S subsidiary election terminated or revoked? If 'Yes', see instructions		X
13 **a**	Did the corporation make any payments in 2015 that would require it to file Form(s) 1099?		X
b	If 'Yes,' did the corporation file or will it file required Forms 1099?		

Schedule K	Shareholders' Pro Rata Share Items		Total amount
Income (Loss)	**1** Ordinary business income (loss) (page 1, line 21)	**1**	-30,588.
	2 Net rental real estate income (loss) (attach Form 8825)	**2**	
	3a Other gross rental income (loss) **3a**		
	b Expenses from other rental activities (attach statement) **3b**		
	c Other net rental income (loss). Subtract line 3b from line 3a	**3c**	
	4 Interest income	**4**	
	5 Dividends: **a** Ordinary dividends	**5a**	
	b Qualified dividends **5b**		
	6 Royalties	**6**	
	7 Net short-term capital gain (loss) (attach Schedule D (Form 1120S))	**7**	
	8a Net long-term capital gain (loss) (attach Schedule D (Form 1120S))	**8a**	
	b Collectibles (28%) gain (loss) **8b**		
	c Unrecaptured section 1250 gain (attach statement) **8c**		
	9 Net section 1231 gain (loss) (attach Form 4797)	**9**	
	10 Other income (loss) (see instructions) Type ►	**10**	
Deductions	**11** Section 179 deduction (attach Form 4562)	**11**	
	12a Charitable contributions	**12a**	
	b Investment interest expense	**12b**	
	c Section 59(e)(2) expenditures **(1)** Type ► **(2)** Amount ►	**12c (2)**	
	d Other deductions (see instructions) Type ►	**12d**	
Credits	**13a** Low-income housing credit (section 42(j)(5))	**13a**	
	b Low-income housing credit (other)	**13b**	
	c Qualified rehabilitation expenditures (rental real estate) (attach Form 3468, if applicable)	**13c**	
	d Other rental real estate credits (see instrs) Type ►	**13d**	
	e Other rental credits (see instrs) Type ►	**13e**	
	f Biofuel producer credit (attach Form 6478)	**13f**	
	g Other credits (see instructions) Type ►	**13g**	
Foreign Transactions	**14a** Name of country or U.S. possession ►		
	b Gross income from all sources	**14b**	
	c Gross income sourced at shareholder level	**14c**	
	Foreign gross income sourced at corporate level		
	d Passive category	**14d**	
	e General category	**14e**	
	f Other (attach statement)	**14f**	
	Deductions allocated and apportioned at shareholder level		
	g Interest expense	**14g**	
	h Other	**14h**	
	Deductions allocated and apportioned at corporate level to foreign source income		
	i Passive category	**14i**	
	j General category	**14j**	
	k Other (attach statement)	**14k**	
	Other information		
	l Total foreign taxes (check one): ► ☐ Paid ☐ Accrued	**14l**	
	m Reduction in taxes available for credit (attach statement)	**14m**	
	n Other foreign tax information (attach statement)		
Alternative Minimum Tax (AMT) Items	**15a** Post-1986 depreciation adjustment	**15a**	
	b Adjusted gain or loss	**15b**	
	c Depletion (other than oil and gas)	**15c**	
	d Oil, gas, and geothermal properties — gross income	**15d**	
	e Oil, gas, and geothermal properties — deductions	**15e**	
	f Other AMT items (attach statement)	**15f**	
Items Affecting Shareholder Basis	**16a** Tax-exempt interest income	**16a**	
	b Other tax-exempt income	**16b**	
	c Nondeductible expenses	**16c**	
	d Distributions (attach stmt if required) (see instrs)	**16d**	
	e Repayment of loans from shareholders	**16e**	

Schedule K	**Shareholders' Pro Rata Share Items** (continued)		**Total amount**
Other Information	**17 a** Investment income	**17a**	
	b Investment expenses	**17b**	
	c Dividend distributions paid from accumulated earnings and profits	**17c**	
	d Other items and amounts (attach statement)		
Reconciliation	**18 Income/loss reconciliation.** Combine the amounts on lines 1 through 10 in the far right column. From the result, subtract the sum of the amounts on lines 11 through 12d and 14l	**18**	-30,588.

Schedule L **Balance Sheets per Books**	Beginning of tax year		End of tax year	
Assets	**(a)**	**(b)**	**(c)**	**(d)**
1 Cash		0.		70.
2 a Trade notes and accounts receivable				
b Less allowance for bad debts				
3 Inventories				
4 U.S. government obligations				
5 Tax-exempt securities (see instructions)				
6 Other current assets (attach stmt) .Ln 6.St		2,579.		2,579.
7 Loans to shareholders				
8 Mortgage and real estate loans				
9 Other investments (attach statement)				
10 a Buildings and other depreciable assets	461.		860.	
b Less accumulated depreciation	0.	461.	0.	860.
11 a Depletable assets				
b Less accumulated depletion				
12 Land (net of any amortization)		0.		0.
13 a Intangible assets (amortizable only)	0.		0.	
b Less accumulated amortization	0.	0.	0.	0.
14 Other assets (attach stmt)				
15 Total assets		3,040.		3,509.
Liabilities and Shareholders' Equity				
16 Accounts payable				
17 Mortgages, notes, bonds payable in less than 1 year				
18 Other current liabilities (attach stmt) .Ln 18.St		785.		
19 Loans from shareholders		66,312.		98,154.
20 Mortgages, notes, bonds payable in 1 year or more				
21 Other liabilities (attach statement)				
22 Capital stock				
23 Additional paid-in capital				
24 Retained earnings		-64,057.		-94,645.
25 Adjustments to shareholders' equity (att stmt)				
26 Less cost of treasury stock				
27 Total liabilities and shareholders' equity		3,040.		3,509.

Schedule M-1 Reconciliation of Income (Loss) per Books With Income (Loss) per Return

Note. The corporation may be required to file Schedule M-3 (see instructions)

1 Net income (loss) per books	-30,588.	5 Income recorded on books this year not included on Schedule K, lines 1 through 10 (itemize): a Tax-exempt interest $	
2 Income included on Schedule K, lines 1, 2, 3c, 4, 5a, 6, 7, 8a, 9, and 10, not recorded on books this year (itemize):			
3 Expenses recorded on books this year not included on Schedule K, lines 1 through 12, and 14l (itemize): a Depreciation $ b Travel and entertainment $		6 Deductions included on Schedule K, lines 1 through 12 and 14l, not charged against book income this year (itemize): a Depreciation $	
		7 Add lines 5 and 6	
4 Add lines 1 through 3	-30,588.	8 Income (loss) (Schedule K, ln 18). Ln 4 less ln 7	-30,588.

Schedule M-2 Analysis of Accumulated Adjustments Account, Other Adjustments Account, and Shareholders' Undistributed Taxable Income Previously Taxed (see instructions)

	(a) Accumulated adjustments account	(b) Other adjustments account	(c) Shareholders' undistributed taxable income previously taxed
1 Balance at beginning of tax year	-64,057.	0.	
2 Ordinary income from page 1, line 21			
3 Other additions			
4 Loss from page 1, line 21	30,588.		
5 Other reductions			
6 Combine lines 1 through 5	-94,645.	0.	
7 Distributions other than dividend distributions			
8 Balance at end of tax year. Subtract line 7 from line 6	-94,645.	0.	

Exhibit XV to Amended Verified Complaint -
2016 U.S. Income Tax Return of Chino Ltd
[pp. 124 - 128]

Form **1120S**
Department of the Treasury
Internal Revenue Service

U.S. Income Tax Return for an S Corporation

▶ **Do not file this form unless the corporation has filed or is attaching Form 2553 to elect to be an S corporation.**
▶ **Information about Form 1120S and its separate instructions is at *www.irs.gov/form1120s.***

OMB No. 1545-0123
2016

For calendar year 2016 or tax year beginning , 2016, ending , 20

A S election effective date: 11/19/2013	TYPE OR PRINT	Name: Chino Ltd	**D** Employer identification number: [redacted]1473
B Business activity code number (see instructions): 334110		Number, street, and room or suite no. If a P.O. box, see instructions.: 640 RIVERSIDE DR 10B	**E** Date incorporated: 11/19/2013
C Check if Sch. M-3 attached ☐		City or town, state or province, country, and ZIP or foreign postal code: New York NY 10031	**F** Total assets (see instructions): $ 3,509.

G Is the corporation electing to be an S corporation beginning with this tax year? ☐ Yes ☒ No If "Yes," attach Form 2553 if not already filed

H Check if: **(1)** ☐ Final return **(2)** ☐ Name change **(3)** ☐ Address change **(4)** ☐ Amended return **(5)** ☐ S election termination or revocation

I Enter the number of shareholders who were shareholders during any part of the tax year . . . . . ▶ 1

Caution: Include **only** trade or business income and expenses on lines 1a through 21. See the instructions for more information.

Income	1a	Gross receipts or sales	1a			
	b	Returns and allowances	1b			
	c	Balance. Subtract line 1b from line 1a			1c	
	2	Cost of goods sold (attach Form 1125-A)			2	
	3	Gross profit. Subtract line 2 from line 1c			3	
	4	Net gain (loss) from Form 4797, line 17 (attach Form 4797)			4	
	5	Other income (loss) (see instructions—attach statement)			5	
	6	**Total income (loss).** Add lines 3 through 5 ▶			6	
Deductions (see instructions for limitations)	7	Compensation of officers (see instructions—attach Form 1125-E)			7	
	8	Salaries and wages (less employment credits)			8	7.
	9	Repairs and maintenance			9	
	10	Bad debts			10	373.
	11	Rents			11	7,994.
	12	Taxes and licenses			12	1,171.
	13	Interest			13	5,270.
	14	Depreciation not claimed on Form 1125-A or elsewhere on return (attach Form 4562)			14	
	15	Depletion **(Do not deduct oil and gas depletion.)**			15	
	16	Advertising			16	454.
	17	Pension, profit-sharing, etc., plans			17	
	18	Employee benefit programs			18	
	19	Other deductions (attach statement) See Statement			19	37,784.
	20	**Total deductions.** Add lines 7 through 19 ▶			20	53,053.
	21	**Ordinary business income (loss).** Subtract line 20 from line 6			21	-53,053.
Tax and Payments	22a	Excess net passive income or LIFO recapture tax (see instructions)	22a			
	b	Tax from Schedule D (Form 1120S)	22b			
	c	Add lines 22a and 22b (see instructions for additional taxes)			22c	
	23a	2016 estimated tax payments and 2015 overpayment credited to 2016	23a			
	b	Tax deposited with Form 7004	23b	0.		
	c	Credit for federal tax paid on fuels (attach Form 4136)	23c			
	d	Add lines 23a through 23c			23d	0.
	24	Estimated tax penalty (see instructions). Check if Form 2220 is attached ▶ ☐			24	
	25	**Amount owed.** If line 23d is smaller than the total of lines 22c and 24, enter amount owed			25	0.
	26	**Overpayment.** If line 23d is larger than the total of lines 22c and 24, enter amount overpaid			26	
	27	Enter amount from line 26 **Credited to 2017 estimated tax** ▶	**Refunded** ▶		27	

Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Signature of officer | Date: 04/17/2017 | Title: CEO

May the IRS discuss this return with the preparer shown below (see instructions)? ☐ Yes ☐ No

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN
Firm's name ▶ Self-Prepared			Firm's EIN ▶	
Firm's address ▶			Phone no.	

For Paperwork Reduction Act Notice, see separate instructions. Form **1120S** (2016)

BAA REV 04/04/17 TTW

Schedule B **Other Information** (see instructions)

		Yes	No
1	Check accounting method: **a** ☒ Cash **b** ☐ Accrual **c** ☐ Other (specify) ▶		
2	See the instructions and enter the: **a** Business activity ▶ Manufacturing **b** Product or service ▶ Point of Sale Equipment		
3	At any time during the tax year, was any shareholder of the corporation a disregarded entity, a trust, an estate, or a nominee or similar person? If "Yes," attach Schedule B-1, Information on Certain Shareholders of an S Corporation		✕
4	At the end of the tax year, did the corporation:		
a	Own directly 20% or more, or own, directly or indirectly, 50% or more of the total stock issued and outstanding of any foreign or domestic corporation? For rules of constructive ownership, see instructions. If "Yes," complete (i) through (v) below		✕

(i) Name of Corporation	(ii) Employer Identification Number (if any)	(iii) Country of Incorporation	(iv) Percentage of Stock Owned	(v) If Percentage in (iv) is 100%, Enter the Date (if any) a Qualified Subchapter S Subsidiary Election Was Made

b	Own directly an interest of 20% or more, or own, directly or indirectly, an interest of 50% or more in the profit, loss, or capital in any foreign or domestic partnership (including an entity treated as a partnership) or in the beneficial interest of a trust? For rules of constructive ownership, see instructions. If "Yes," complete (i) through (v) below		✕

(i) Name of Entity	(ii) Employer Identification Number (if any)	(iii) Type of Entity	(iv) Country of Organization	(v) Maximum Percentage Owned in Profit, Loss, or Capital

5 a	At the end of the tax year, did the corporation have any outstanding shares of restricted stock?		✕
	If "Yes," complete lines (i) and (ii) below.		
	(i) Total shares of restricted stock ▶		
	(ii) Total shares of non-restricted stock ▶		
b	At the end of the tax year, did the corporation have any outstanding stock options, warrants, or similar instruments?		✕
	If "Yes," complete lines (i) and (ii) below.		
	(i) Total shares of stock outstanding at the end of the tax year ▶		
	(ii) Total shares of stock outstanding if all instruments were executed ▶		
6	Has this corporation filed, or is it required to file, **Form 8918,** Material Advisor Disclosure Statement, to provide information on any reportable transaction?		✕
7	Check this box if the corporation issued publicly offered debt instruments with original issue discount ▶ ☐		
	If checked, the corporation may have to file **Form 8281,** Information Return for Publicly Offered Original Issue Discount Instruments.		
8	If the corporation: **(a)** was a C corporation before it elected to be an S corporation **or** the corporation acquired an asset with a basis determined by reference to the basis of the asset (or the basis of any other property) in the hands of a C corporation **and (b)** has net unrealized built-in gain in excess of the net recognized built-in gain from prior years, enter the net unrealized built-in gain reduced by net recognized built-in gain from prior years (see instructions) ▶ $		
9	Enter the accumulated earnings and profits of the corporation at the end of the tax year. $		
10	Does the corporation satisfy **both** of the following conditions?		
a	The corporation's total receipts (see instructions) for the tax year were less than $250,000		
b	The corporation's total assets at the end of the tax year were less than $250,000	✕	
	If "Yes," the corporation is not required to complete Schedules L and M-1.		
11	During the tax year, did the corporation have any non-shareholder debt that was canceled, was forgiven, or had the terms modified so as to reduce the principal amount of the debt?		✕
	If "Yes," enter the amount of principal reduction $		
12	During the tax year, was a qualified subchapter S subsidiary election terminated or revoked? If "Yes," see instructions		✕
13 a	Did the corporation make any payments in 2016 that would require it to file Form(s) 1099?		✕
b	If "Yes," did the corporation file or will it file required Forms 1099?		

Schedule K		Shareholders' Pro Rata Share Items		Total amount
Income (Loss)	1	Ordinary business income (loss) (page 1, line 21)	1	-53,053.
	2	Net rental real estate income (loss) (attach Form 8825)	2	
	3a	Other gross rental income (loss) 3a		
	b	Expenses from other rental activities (attach statement) 3b		
	c	Other net rental income (loss). Subtract line 3b from line 3a	3c	
	4	Interest income	4	
	5	Dividends: a Ordinary dividends	5a	
		b Qualified dividends 5b		
	6	Royalties	6	
	7	Net short-term capital gain (loss) (attach Schedule D (Form 1120S))	7	
	8a	Net long-term capital gain (loss) (attach Schedule D (Form 1120S))	8a	
	b	Collectibles (28%) gain (loss) 8b		
	c	Unrecaptured section 1250 gain (attach statement) 8c		
	9	Net section 1231 gain (loss) (attach Form 4797)	9	
	10	Other income (loss) (see instructions) Type ▶	10	
Deductions	11	Section 179 deduction (attach Form 4562)	11	
	12a	Charitable contributions	12a	
	b	Investment interest expense	12b	
	c	Section 59(e)(2) expenditures (1) Type ▶ (2) Amount ▶	12c(2)	
	d	Other deductions (see instructions) Type ▶	12d	
Credits	13a	Low-income housing credit (section 42(j)(5))	13a	
	b	Low-income housing credit (other)	13b	
	c	Qualified rehabilitation expenditures (rental real estate) (attach Form 3468, if applicable)	13c	
	d	Other rental real estate credits (see instructions) Type ▶	13d	
	e	Other rental credits (see instructions) Type ▶	13e	
	f	Biofuel producer credit (attach Form 6478)	13f	
	g	Other credits (see instructions) Type ▶	13g	
Foreign Transactions	14a	Name of country or U.S. possession ▶		
	b	Gross income from all sources	14b	
	c	Gross income sourced at shareholder level	14c	
		Foreign gross income sourced at corporate level		
	d	Passive category	14d	
	e	General category	14e	
	f	Other (attach statement)	14f	
		Deductions allocated and apportioned at shareholder level		
	g	Interest expense	14g	
	h	Other	14h	
		Deductions allocated and apportioned at corporate level to foreign source income		
	i	Passive category	14i	
	j	General category	14j	
	k	Other (attach statement)	14k	
		Other information		
	l	Total foreign taxes (check one): ▶ ☐ Paid ☐ Accrued	14l	
	m	Reduction in taxes available for credit (attach statement)	14m	
	n	Other foreign tax information (attach statement)		
Alternative Minimum Tax (AMT) Items	15a	Post-1986 depreciation adjustment	15a	
	b	Adjusted gain or loss	15b	
	c	Depletion (other than oil and gas)	15c	
	d	Oil, gas, and geothermal properties—gross income	15d	
	e	Oil, gas, and geothermal properties—deductions	15e	
	f	Other AMT items (attach statement)	15f	
Items Affecting Shareholder Basis	16a	Tax-exempt interest income	16a	
	b	Other tax-exempt income	16b	
	c	Nondeductible expenses	16c	
	d	Distributions (attach statement if required) (see instructions)	16d	
	e	Repayment of loans from shareholders	16e	

Schedule K		Shareholders' Pro Rata Share Items (continued)		Total amount
Other Information	17a	Investment income	17a	
	b	Investment expenses	17b	
	c	Dividend distributions paid from accumulated earnings and profits	17c	
	d	Other items and amounts (attach statement)		
Reconciliation	18	**Income/loss reconciliation.** Combine the amounts on lines 1 through 10 in the far right column. From the result, subtract the sum of the amounts on lines 11 through 12d and 14l	18	-53,053.

Schedule L	Balance Sheets per Books	Beginning of tax year		End of tax year	
	Assets	(a)	(b)	(c)	(d)
1	Cash		445.		70.
2a	Trade notes and accounts receivable				
b	Less allowance for bad debts	( )		( )	
3	Inventories				
4	U.S. government obligations				
5	Tax-exempt securities (see instructions)				
6	Other current assets (attach statement) Ln 6 St		2,579.		2,579.
7	Loans to shareholders				
8	Mortgage and real estate loans				
9	Other investments (attach statement)				
10a	Buildings and other depreciable assets	859.		860.	
b	Less accumulated depreciation	(0.)	859.	( )	860.
11a	Depletable assets				
b	Less accumulated depletion	( )		( )	
12	Land (net of any amortization)		0.		0.
13a	Intangible assets (amortizable only)	0.		0.	
b	Less accumulated amortization	(0.)	0.	(0.)	0.
14	Other assets (attach statement)				
15	Total assets		3,883.		3,509.
	Liabilities and Shareholders' Equity				
16	Accounts payable				
17	Mortgages, notes, bonds payable in less than 1 year				
18	Other current liabilities (attach statement)				
19	Loans from shareholders		98,528.		151,207.
20	Mortgages, notes, bonds payable in 1 year or more				
21	Other liabilities (attach statement)				
22	Capital stock				
23	Additional paid-in capital				
24	Retained earnings		-94,645.		-147,698.
25	Adjustments to shareholders' equity (attach statement)				
26	Less cost of treasury stock		( )		( )
27	Total liabilities and shareholders' equity		3,883.		3,509.

Schedule M-1 **Reconciliation of Income (Loss) per Books With Income (Loss) per Return**
Note: The corporation may be required to file Schedule M-3 (see instructions)

1	Net income (loss) per books	-53,053.	5	Income recorded on books this year not included on Schedule K, lines 1 through 10 (itemize): a Tax-exempt interest $	
2	Income included on Schedule K, lines 1, 2, 3c, 4, 5a, 6, 7, 8a, 9, and 10, not recorded on books this year (itemize)				
3	Expenses recorded on books this year not included on Schedule K, lines 1 through 12 and 14l (itemize): a Depreciation $ b Travel and entertainment $		6	Deductions included on Schedule K, lines 1 through 12 and 14l, not charged against book income this year (itemize): a Depreciation $	
			7	Add lines 5 and 6	
4	Add lines 1 through 3	-53,053.	8	Income (loss) (Schedule K, line 18). Line 4 less line 7	-53,053.

Schedule M-2 **Analysis of Accumulated Adjustments Account, Other Adjustments Account, and Shareholders' Undistributed Taxable Income Previously Taxed** (see instructions)

		(a) Accumulated adjustments account	(b) Other adjustments account	(c) Shareholders' undistributed taxable income previously taxed
1	Balance at beginning of tax year	-95,018.	0.	
2	Ordinary income from page 1, line 21			
3	Other additions			
4	Loss from page 1, line 21	(53,053.)		
5	Other reductions	( )	( )	
6	Combine lines 1 through 5	-148,071.	0.	
7	Distributions other than dividend distributions			
8	Balance at end of tax year. Subtract line 7 from line 6	-148,071.	0.	

Notice of Cross-Motion by Defendants-Respondents 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 ("DFS") to Dismiss the Amended Verified Complaint and Article 78 Petition, dated June 23, 2017 [pp. 129 - 130]

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 14 RECEIVED NYSCEF: 08/15/2017

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; Anthony Albanese, in his official capacity as Superintendent of the 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 Defendants'-Respondents' Cross-Motion to Dismiss the Amended Verified Complaint and Article 78 Petition

Index No. 101880/2015
Hon. Lucy Billings

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Thomas S. Eckmier, Esq., dated June 23, 2017, the Affirmation of Jonathan Conley, Esq., dated June 23, 2017, and the Memorandum of Law in Support of Defendants'-Respondents' Cross-Motion to Dismiss the Amended Verified Complaint and Article 78 Petition, the undersigned on behalf of defendants-respondents New York State Department of Financial Services and Maria T. Vullo, sued in her official capacity as the Superintendent of the New York State Department of Financial Services (collectively, "DFS"), will move this Court in Room 203, at 71 Thomas Street, New York, New York 10013, on the 31st day of August, 2017, at 9:30 a.m., or as soon thereafter as counsel may be heard, for a judgment pursuant to Rule 3211 and Section 7804 of the New York Civil Practice Law and Rules dismissing this proceeding, in its entirety, and for any and all such other and further relief as this Court deems just and proper; and

PLEASE TAKE FURTHER NOTICE, that pursuant to stipulation by and between the parties, Plaintiffs-Petitioners will serve and file their opposition to this motion, if any, by July 14, 2017; and

1 of 2

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 14 RECEIVED NYSCEF: 08/15/2017

PLEASE TAKE FURTHER NOTICE, that DFS's reply to the Plaintiffs'-Petitioners' opposition, if any, shall be served and filed by July 28, 2017.

Dated: New York, New York
June 23, 2017

Respectfully submitted,

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

By:
Jonathan D. Conley
Assistant Attorney General
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2 of 2

Affirmation of Thomas S. Eckmier, for DFS, in Support of Cross-Motion to Dismiss, dated June 23, 2017 [pp. 131 - 148]

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

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; Anthony Albanese, in his official capacity as Superintendent of the 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.	Index No. 101880/2015 **Affirmation of Thomas S. Eckmier in Support of the Cross-Motion to Dismiss the Amended Verified Complaint and Article 78 Petition**

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

I, Thomas S. Eckmier, an attorney duly admitted to practice law before the courts of the State of New York, and not a party to the above-entitled action, affirm the following to be true to the best of my knowledge and under the penalties of perjury pursuant to New York Civil Practice Law and Rules ("CPLR") § 2106:

1. I am an Associate Attorney (Financial Services) at the New York State Department of Financial Services (the "Department").

2. I submit this affirmation pursuant to CPLR § 7804(e) in support of the Defendants' Respondents' Cross-Motion to Dismiss the Amended Verified Complaint and Article 78 Petition filed by Theo Chino and Chino LTD ("Petitioners") in its entirety.

3. In my capacity as an Associate Attorney (Financial Services), I am fully familiar with the Department's regulation of virtual currency business activity.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

4. This affirmation is based upon my personal knowledge of the matter at issue, based upon a review of related Department records, and my conversations with Department personnel.

Supervision and Regulation of Financial Services by the Department

5. In 2011, drawing on lessons learned from the 2008 financial crisis, the New York State Legislature (the "Legislature") created the Department to implement a comprehensive approach to the regulation of financial products and services in New York.[1] The Superintendent of Financial Services (the "Superintendent") is the head of the Department. FSL § 202(a).

6. By merging the New York State Banking and Insurance Departments, the Legislature created a single agency that could draw on the extensive experience of the staffs of the Department's predecessor agencies in regulating and supervising financial products and services and their providers under the New York Banking Law (cited as the "BL") and Insurance Law. Specifically, the Department regulates and supervises a variety of financial services institutions, including all New York state-chartered banking organizations, such as banks, trust companies, savings banks, and credit unions, as well as branches, agencies, and representative offices of foreign banks. In addition, the Department regulates and supervises such entities as mortgage bankers, brokers, loan originators and servicers, money transmitters, licensed lenders, check cashers, budget

[1] Explaining his vote in favor of legislation creating the Department, Senator James Seward noted: "I'm pleased that the Legislature includes some specific legislative intent recognizing the fact that it is necessary for our regulatory system to be responsive, effective, and innovative in order to compete in this global marketplace. And I see this legislation as being a first step, a big step toward our ultimate goal of transforming and modernizing the regulation of insurance, banking and other financial products in New York State." NY Senate Transcript, Regular Session (Mar. 29, 2011), available at http://open.nysenate.gov/transcripts/floor-transcript-032911v1txt.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

planners, sales finance companies, and all insurance companies and insurance producers that do business in New York.

7. As a complement to the Banking Law and the Insurance Law, the Legislature enacted the Financial Services Law (cited as the "FSL"), which tasked the Department with the regulation and supervision of certain financial products and services and the providers of such products and services. The Legislature declared that the purpose of the Financial Services Law is to "provide for the enforcement of the insurance, banking and financial services laws, under the auspices of a single state agency" that would, among other things, "provide for the regulation of *new* financial services products" and "ensure the continued safety and soundness of New York's banking, insurance and financial services industries, as well as the prudent conduct of the providers of financial products and services, through responsible regulation and supervision," "protect the public interest," and "protect users of banking, insurance, and financial services products and services." FSL §§ 102(f), (i), (j), and (l) (emphasis added).

8. Similarly, the Financial Services Law's "Declaration of policy" section states that it "is the intent of the legislature that the superintendent shall supervise the business of, and the persons providing, financial products and services...." FSL § 201(a).

9. To perform this mandate, the Financial Services Law requires that the Department "take such actions as the superintendent believes necessary" to "ensure the continued solvency, safety, soundness and prudent conduct of the providers of financial products and services" and to "protect users of financial products and services...." FSL §§ 201(b)(2) and (7).

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

10. The Financial Services Law defines a "financial product or service" as "any financial product or financial service offered or provided by any person regulated or required to be regulated by the superintendent pursuant to the banking law or the insurance law or any financial product or service offered or sold to consumers," subject to certain exceptions.[2] FSL § 104(a)(2).

11. The Financial Services Law authorizes the superintendent to promulgate "rules and regulations and issue orders and guidance involving financial products and services, not inconsistent with the provisions of" the Financial Services Law, the Banking Law, the Insurance Law, and "any other law in which the superintendent is given authority." FSL § 302(a).

12. Such regulations may effectuate "any power given to the superintendent" under the Financial Services Law and other enumerated laws; interpret the Financial Services Law and other enumerated laws; and govern "the procedures to be followed in the practice of the department." FSL §§ 302(a)(1) - (3).

13. As discussed below, the Financial Services Law provided the statutory authority for the regulations challenged by Petitioners, namely Part 200 of Chapter 1 of Title 23 of the New York Codes, Rules and Regulations ("NYCRR"). These regulations set requirements for entities engaging in virtual currency business activity involving New York or a New York resident (the "Virtual Currency Regulation"). *See generally* 23 NYCRR Part 200.

[2] For example, a "financial product or service" does not include any financial products or services "regulated under the exclusive jurisdiction of a federal agency or authority"; or "regulated for the purpose of consumer or investor protection by any other state agency, state department or state public authority"; or "where rules or regulations promulgated by the superintendent on such financial product or service would be preempted by federal law." FSL §§ 104(a)(2)(A)(i)–(iii).

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

Virtual Currency and the Department's Regulatory Response

14. Perhaps the most well-known virtual currency, Bitcoin, has been described as a "peer-to-peer version of electronic cash" that allows "online payments to be sent directly from one party to another without going through" a "trusted third party."[3]

15. More generally, virtual currency is widely acknowledged as a medium of exchange. For example, in 2013, the Financial Crimes Enforcement Network, a bureau of the U.S. Department of the Treasury, defined virtual currency as "a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency. In particular, virtual currency does not have legal tender status in any jurisdiction."[4] Similarly, in 2014, the European Banking Authority defined virtual currency as "a digital representation of value that is neither issued by a central bank or a public authority, nor necessarily attached to a … [fiat currency], but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded electronically."[5] Also, in a 2014 "Consumer Advisory," the Consumer Financial Protection Bureau stated that "[v]irtual currencies are a kind of electronic money" that "many people may agree to accept and treat like dollars, euros, or other forms of money."[6]

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[3] Satoshi Nakamoto, "Bitcoin: A Peer-to-Peer Electronic Cash System" (2008), at 1, available at https://bitcoin.org/bitcoin.pdf. Virtual currency first gained major public attention following publication of this paper by the pseudonymous Nakamoto in late 2008.

[4] Financial Crimes Enforcement Network, "Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies" (March 18, 2013), available at https://www.fincen.gov/resources/statutes-regulations/guidance/application-fincens-regulations-persons-administering.

[5] European Banking Authority, "EBA Opinion on 'virtual currencies'" (July 4, 2014 – EBA/Op/2014/08), at 5, available at http://www.eba.europa.eu/documents/10180/657547/EBA-Op-2014-08+Opinion+on+Virtual+Currencies.pdf.

[6] Consumer Financial Protection Bureau, "Consumer Advisory" on "Risks to consumers posed by virtual currencies" (August 2014), at 1, available at http://files.consumerfinance.gov/f/201408_cfpb_consumer-advisory_virtual-currencies.pdf.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

16. Notwithstanding virtual currency's early use as a means of making peer-to-peer payments, a variety of third-party service providers have become an integral part of virtual currency activity.

17. Some third-party service providers facilitate the exchange, between customers, of government-issued fiat currency (such as U.S. dollars or euros) for virtual currency (such as bitcoins), and of virtual currency for government-issued fiat currency.

18. Some third-party service providers provide "wallet" services that hold a customer's virtual currency until the customer wants to draw on the "wallet" to effectuate a payment transaction with the virtual currency.

19. Other third-party service providers use virtual currency to transmit funds domestically and internationally outside of the traditional banking system.

20. Such third-party services are directly analogous to established financial services that are regulated under the Banking Law and the Financial Services Law. For example, virtual currency service providers often accept consumer funds – whether in virtual currency, fiat currency, or both – to be sent to another party.

21. Similarly, money transmitters accept, for example, U.S. dollars to be sent to another party, and money transmission has been regulated in New York as a licensed financial service since the 1960s. *See* BL § 641 ("No person shall engage in the business … of receiving money for transmission or transmitting the same, without a license….").

22. A primary purpose of such regulation is to protect consumers against the loss of their funds as a result of fraud or mismanagement by the third-party service provider. Virtual currency service providers pose similar risks.

23. For example, Mt. Gox, once the largest Bitcoin exchange service, collapsed in early 2014 after a purported security breach led to the loss of more than $450

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

million worth of bitcoins. According to news reports, nearly 90% of the lost bitcoins belonged to Mt. Gox's customers.[7] The CEO of Mt. Gox has since been arrested and charged with embezzlement.[8]

24. Also, in August 2016, it was reported that nearly 120,000 bitcoins worth approximately $60 million were stolen from another virtual currency exchange, Bitfinex, when a hacker gained access to hundreds of customer wallets.[9]

25. In addition to the risk of loss to customers, virtual currency business activity has in some cases involved "dark" online marketplaces, including the Silk Road site, where, between 2011 and 2013, illegal drugs and other illicit items and services worth hundreds of millions of dollars were regularly bought and sold using the virtual currency Bitcoin.[10] For precisely such reasons, the Virtual Currency Regulation is necessary and appropriate to ensure the "prudent conduct of the providers of financial products and services" and "encourage high standards of honesty, transparency, fair business practices and public responsibility." FSL §§ 102(i) and 201(b)(5).

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[7] U.S. customers were among the customers of the Tokyo-based exchange who suffered losses. Jonathan Stempel and Emily Flitter, "Mt. Gox sued in United States over bitcoin losses," Reuters, February 28, 2014, available at http://www.reuters.com/article/bitcoin-mtgox-lawsuit-idUSL1N0LX1QK20140228; Tom Hals, "Failed bitcoin exchange Mt Gox gets U.S. bankruptcy protection," Reuters, June 17, 2014, available at http://www.reuters.com/article/us-bitcoin-mtgox-bankruptcy-idUSKBN0ES2WZ20140617.

[8] Alex Hern, "Mt Gox CEO charged with embezzling £1.7m worth of bitcoin," The Guardian, September 14, 2015, available at http://www.theguardian.com/technology/2015/sep/14/bitcoin-mt-gox-ceo-mark-karpeles-charged-embezzling.

[9] *See, e.g.,* Frances Coppola, "Theft And Mayhem In The Bitcoin World," Forbes, August 6, 2016, available at https://www.forbes.com/sites/francescoppola/2016/08/06/theft-and-mayhem-in-the-bitcoin-world/#5e059b2a644f; *see also,* Gertrude Chavez-Dreyfuss, "Cyber threat grows for bitcoin exchanges," Reuters, August 29, 2016, available at http://www.reuters.com/article/us-bitcoin-cyber-analysis-idUSKCN11411T.

[10] *See, e.g.,* Andy Greenberg, "End Of The Silk Road: FBI Says It's Busted The Web's Biggest Anonymous Drug Black Market," Forbes, October 2, 2013, available at http://www.forbes.com/sites/andygreenberg/2013/10/02/end-of-the-silk-road-fbi-busts-the-webs-biggest-anonymous-drug-black-market/.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

Promulgation of 23 NYCRR Part 200

26. On July 23, 2014, pursuant to the New York State Administrative Procedure Act ("SAPA"), the Department published in the New York State Register (the "Register") the proposed virtual currency regulations to be included at 23 NYCRR Part 200. As the Department stated in the Register, the "Purpose" of the proposed Part was to regulate "virtual currency business activity in order to protect New York consumers and users and ensure the safety and soundness of New York licensed providers of virtual currency products and services."[11]

27. That initial publication in the Register was followed by a 90-day public comment period and Department review of those comments. On February 25, 2015, a substantially revised proposed 23 NYCRR Part 200 was published in the Register.[12]

28. After an additional 30-day comment period and Department review of those comments, limited additional revisions were made. The final version of 23 NYCRR Part 200 was adopted on June 24, 2015.[13]

29. To date, the Department has received approximately 27 license applications to engage in virtual currency business activity.[14] Three licenses have been issued pursuant to the Regulation.[15]

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[11] New York State Register, July 23, 2014 at 14, available at http://docs.dos.ny.gov/info/register/2014/july23/pdf/rulemaking.pdf.
[12] New York State Register, February 25, 2015 at 17-18, available at http://docs.dos.ny.gov/info/register/2015/feb25/pdf/rulemaking.pdf.
[13] New York State Register, June 24, 2015 at 7-9, available at http://docs.dos.ny.gov/info/register/2015/june24/pdf/rulemaking.pdf.
[14] The applications have varied widely in the forms and completeness of the documentation provided.
[15] In addition, two New York chartered trust companies have been authorized to engage in virtual currency business activity.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

30. In addition, approximately 11 applicants are operating in compliance with the virtual currency licensure requirements under the "Transitional Period" provided by 23 NYCRR 200.21.[16]

31. On or about August 10, 2015, Petitioner Chino LTD (the "Company") submitted to the Department an "Application for License to Engage in Virtual Currency Business Activity" under 23 NYCRR Part 200 (the "Application"). According to the Application, the Company is solely owned by Petitioner Theo Chino, its Chief Executive Officer.

32. In a letter to the Company dated January 4, 2016 (the "Letter"), the Department stated that "the submitted Application documentation is exceptionally limited" and "does not contain any description of the Company's current or proposed business activity"; that, therefore, "the Department is unable to evaluate whether the Company's current or intended business activity (if any) would be considered Virtual Currency Business Activity that requires licensing"; and that the Application "is herewith being returned to you without further processing by the Department."

33. The Department has no record of any subsequent correspondence from the Company in regard to the Letter.

[16] 23 NYCRR 200.21 provides, in part: "A Person already engaged in Virtual Currency Business Activity must apply for a license in accordance with this Part within 45 days of the effective date of this regulation. In doing so, such applicant shall be deemed in compliance with the licensure requirements of this Part until it has been notified by the superintendent that its application has been denied, in which case it shall immediately cease operating in this state and doing business with New York State Residents."

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

23 NYCRR Part 200 Applies Existing Regulatory Concepts to Virtual Currency

34. In adopting the Virtual Currency Regulation, the Department largely applied to virtual currency various regulatory concepts that already exist in the Banking Law or the regulations promulgated thereunder.

35. These concepts reflect common requirements imposed across a wide variety of financial services and include, for example: the maintenance of certain books and records; reporting requirements; disclosures to consumers; periodic examination by the Department; maintenance of a surety bond or similar security fund to protect consumers; prior Department approval of changes in control of the licensee; and anti-money laundering requirements.

36. For example, the requirement that entities engaging in Virtual Currency Business Activity maintain books and records sufficient to allow the Superintendent to determine whether the licensee is complying with applicable laws, rules, and regulations (23 NYCRR 200.12) mirrors requirements that broadly apply to entities providing financial services in New York, including banks and trust companies (BL § 128), money transmitters (BL § 651-b), check cashers (BL § 372), and budget planners (BL § 586).

37. Further, a requirement to maintain a surety bond or similar security fund for the protection of customers applies not only to entities engaging in Virtual Currency Business Activity (23 NYCRR 200.9) but also to other financial service providers, including money transmitters (BL § 643), mortgage bankers and brokers (BL §§ 591 and 591-a), check cashers (3 NYCRR 400.12), and budget planners (BL § 580).

38. Also, the requirement in the Virtual Currency Regulation that a licensee maintain an anti-money laundering program (23 NYCRR 200.15) emulates requirements that apply to money transmitters and check cashers (3 NYCRR Parts 416 and 417), as

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

well as to, for example, New York banks and trust companies and the New York branches of foreign banks (3 NYCRR Parts 115 and 116).

39. Moreover, regulatory requirements to submit certain reports, including reports of financial condition, and to be periodically examined apply not only to virtual currency licensees (23 NYCRR 200.13 and 200.14) but also to, for example, money transmitters (3 NYCRR 406.7 and 406.10), check cashers (3 NYCRR 400.3, BL § 372-a), and banking organizations (BL §§ 36, 37, 125, 255, *et al.*).

40. Required disclosures to customers (which may include, for example, disclosures of risks and of the terms of transactions, as well as disclosures on receipts) are another type of regulatory requirement that applies not only to virtual currency licensees (23 NYCRR 200.19) but also, for example, to budget planners (BL § 584-a), money transmitters (3 NYCRR 406.3 and 406.4), and banks and trust companies (3 NYCRR 6.3, 6.8, 9.5, 13.4, *et al.*).

41. In addition, Department approval for a change of control is required not only for virtual currency licensees (23 NYCRR 200.11) but also for money transmitters (BL § 652-a), budget planners (BL § 583-a), check cashers (BL § 370-a), and banks and trust companies (BL § 143-b), among others.

42. The Virtual Currency Regulation not only incorporates existing regulatory concepts that broadly apply to a wide range of financial services providers, but also comports with the legislative intent expressed in the Financial Services Law: to ensure "the prudent conduct of the providers of financial products and services, through responsible regulation and supervision." FSL § 102(i).

43. In addition, the anti-money laundering requirements listed above are, for example, consistent with the Legislature's authorization of the Superintendent to

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

"eliminate financial fraud, other criminal abuse and unethical conduct in the [financial] industry." FSL § 201(b)(6).

44. The examination requirement and the required maintenance of books and records, including records of customer transactions, are also consistent with the Legislature's authorization of the Superintendent to "encourage high standards of honesty, transparency, fair business practices and public responsibility." FSL § 201(b)(5).

45. The required disclosures to consumers that are mandated by the Virtual Currency Regulation are also consistent not only with standards of honesty and transparency but also with the Legislature's authorization of the Superintendent to "educate and protect users of financial products and services and ensure that users are provided with timely and understandable information to make responsible decisions about financial products and services." FSL § 201(b)(7).

46. In sum, the Department has not attempted to make illegal, or ban the use of, virtual currencies. Rather, it has applied the same regulatory principles that are applied to many other providers of financial services within New York, and has done so consistent with its legislatively mandated mission, to ensure that virtual currency businesses that deal with New York residents are safely, soundly, and transparently operated and that their users are protected from fraud and other misconduct.

47. Moreover, under Section 200.4(c) of the Virtual Currency Regulation, the Department has the authority to issue conditional licenses to entities that do not initially meet the full requirements of the Virtual Currency Regulation. As noted on the Department's website, these provisions allow the Department to take into account during

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

the licensing process the particular circumstances that may be faced by, for example, a "small start-up company."[17]

23 NYCRR Part 200 Exclusions and Exemptions

48. In promulgating the Virtual Currency Regulation, the Department was careful to ensure that it did not exceed the authority granted by the Financial Services Law. This caution is reflected, in part, in what is excluded from the requirements of the Virtual Currency Regulation.

49. The Virtual Currency Regulation defines "Virtual Currency" as "any type of digital unit that is used as a medium of exchange or a form of digitally stored value." 23 NYCRR 200.2(p).

50. Consistent with the Department's mandate to regulate only "*financial* products and services" (FSL § 201(a)) (emphasis added), the definition of "Virtual Currency" excludes "digital units" that, among other things, "are used solely within online gaming platforms" and "have no market or application outside of those gaming platforms." 23 NYCRR 200.2(p)(1). Such digital units, which are wholly confined to the game's environment, are not part of a *financial* product or service.

51. Also excluded from the definition of "Virtual Currency" are digital units used in a "customer affinity or rewards program," such as, for example, a frequent flyer program. 23 NYCRR 200.2(p)(2). As with digital units used solely within online gaming

[17] *See* the Department's "BitLicense [*i.e.,* virtual currency license] Frequently Asked Questions," available at http://www.dfs.ny.gov/legal/regulations/bitlicense_reg_framework_faq.htm. It provides, in part: "Question: Is it possible for my small start-up company to receive a BitLicense even if it does not initially meet all the BitLicense regulatory requirements? Answer: After a comprehensive evaluation of, among other things, an applicant's business model and the risks it presents, the Department may, at its discretion, issue a two-year conditional BitLicense. Licensees with conditional BitLicenses may be subject to heightened review."

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

platforms, digital units in such customer affinity or rewards programs "cannot be converted into, or redeemed for," fiat currency or Virtual Currency. 23 NYCRR 200.2(p)(2). Thus, they are not part of a *financial* product or service. They are simply a form of benefit conferred on a customer as part of a merchant transaction.

52. The third and final exclusion from the definition of "Virtual Currency" is for digital units used in "Prepaid Cards," which are narrowly defined as being issued and redeemable *solely* in fiat currency (*e.g.,* a gift card issued in U.S. dollars). *See* 23 NYCRR 200.2(p)(3) and 23 NYCRR 200.2(j). "Prepaid Cards" therefore do not involve virtual currency.[18]

53. The Virtual Currency Regulation defines licensable "Virtual Currency Business Activity" as the conduct of any of the following activities involving New York or a New York Resident:[19]

a. "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";

b. "storing, holding, or maintaining custody or control of Virtual Currency on behalf of others";

c. "buying and selling Virtual Currency as a customer business";

d. "performing Exchange Services as a customer business"; or

e. "controlling, administering, or issuing a Virtual Currency."

[18] Moreover, in some cases such prepaid cards are already regulated by the Department pursuant to the money transmission licensing requirements of BL Article XIII-B.
[19] 23 NYCRR 200.2(h) defines "New York Resident" as "any Person that resides, is located, has a place of business, or is conducting business in New York."

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

23 NYCRR 200.2(q).

54. To narrow the Virtual Currency Regulation to ensure that it is consistent with the Financial Services Law, 23 NYCRR 200.2(q)(1) excludes from Virtual Currency Business Activity a transaction that "is undertaken for *non-financial* purposes and does not involve the transfer of more than a nominal amount of Virtual Currency" (emphasis added).[20] To further ensure that non-financial activity is *not* regulated, the Virtual Currency Regulation also provides that the "development and dissemination of software in and of itself does not constitute Virtual Currency Business Activity." 23 NYCRR 200.2(q).

55. Other exclusions and exemptions contained in the Virtual Currency Regulation are consistent with the Legislature's intent as expressed in the Financial Services Law and with existing regulatory approaches enacted in the Banking Law.

56. For example, the exclusion of persons chartered under the Banking Law from the requirements of the Virtual Currency Regulation emulates the provisions of Banking Law § 641(1), which excludes banks, trust companies, and other entities from the obligation to be licensed as a money transmitter.[21] Nonetheless, chartered entities must still be "approved by the superintendent to engage in Virtual Currency Business Activity." 23 NYCRR 200.3(c)(1).[22]

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[20] *See also* the Department's "BitLicense Frequently Asked Questions," available at http://www.dfs.ny.gov/legal/regulations/bitlicense_reg_framework_faq.htm. It provides, in part: "Question: Is a BitLicense required in order to engage in "non-financial" uses of virtual currency? Answer: Where a transaction is undertaken for non-financial purposes and does not involve more than a nominal amount of virtual currency, a BitLicense is not required."

[21] Chartered banks, trust companies, and other entities excluded from money transmission licensing requirements are already comprehensively regulated under other provisions of law. *See, e.g.,* BL Article III.

[22] Even the requirement that chartered entities obtain prior approval before engaging in "Virtual Currency Business Activity" reflects existing regulatory practice, which includes, among many other requirements, prior-review and approval requirements for new products and services. *See, e.g.,* the Department's July 10, 2007, "All Institutions Letter Concerning Banking Department Procedures for Review and/or Approval of

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

57. Similarly, "merchants and consumers that utilize Virtual Currency solely for the purchase or sale of goods or services or for investment purposes" are also exempt from the Virtual Currency Regulation. 23 NYCRR 200.3(c)(2). For example, a coffee shop that accepts Bitcoin for payment and one of the coffee shop's customers, who pays with Bitcoin, would be exempt from the Virtual Currency Regulation. For the same reason that merchants or consumers that use cash are not required to be licensed under the Banking Law, merchants and consumers that are merely *users* of virtual currency are not persons engaging in activities requiring licensing under the Financial Services Law.

The Legislature Has Not Sought to Pass Any Virtual Currency Legislation

58. The Legislature has passed no legislation governing virtual currency activity nor taken any action that would suggest any inconsistency between the promulgation of the Virtual Currency Regulation and the Legislature's intent as expressed in the Financial Services Law.

59. In fact, the Department's ability to regulate financial products and services is subject to regular legislative review. Specifically, the Financial Services Law requires that the Department "submit a report annually to the governor and to the legislature" containing, among other things, "a general review of the insurance business, banking business, and financial product or service business," as well as details regarding regulations promulgated under the Financial Services Law. FSL § 207(a)(1) and (14).

60. In its 2013 "Annual Report," submitted in June 2014, the Department reported that it had "launched a fact-finding inquiry concerning virtual currency,

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Certain New Products of Banking Organizations," available at http://www.dfs.ny.gov/legal/industry/il070110.htm.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

considering whether further regulations, in addition to current money transmission regulations, are necessary."[23]

61. The 2013 Annual Report further stated: "In August [2013], the Department requested information from over 20 virtual currency participants, ranging from service providers to investors. In November [2013], the Department announced notice of its intent to hold public hearings on virtual currencies and the potential issuance of a 'BitLicense' [*i.e.*, a virtual currency license]. The Department is continuing its fact finding and exploring potential regulatory frameworks."[24]

62. In its 2014 Annual Report, submitted in May 2015, the Department again reported to the Governor and Legislature in regard to virtual currency regulation. Specifically, the Department stated that, following "public hearings that the Department held in January 2014," the Department proposed a "comprehensive regulatory framework for firms dealing in virtual currency, including Bitcoin. The regulatory framework contains key consumer protection, anti-money laundering compliance, and cyber security rules tailored for virtual currency firms."[25]

63. In its 2015 Annual Report, submitted in June 2016, the Department again reported to the Governor and Legislature with respect to virtual currency regulation. The Department noted the risks that can be created where "existing regulatory requirements are bypassed, or regulatory requirements do not keep up with the speed of transactions," and that easier "facilitation of payments and anonymous movements of funds can be dangerous without the compliance and oversight designed to safeguard consumers, and to

[23] New York State Department of Financial Services, *Annual Report – 2013* at 9, available at http://www.dfs.ny.gov/reportpub/annual/dfs_annualrpt_2013.pdf.
[24] New York State Department of Financial Services, *Annual Report – 2013* at 9, available at http://www.dfs.ny.gov/reportpub/annual/dfs_annualrpt_2013.pdf.
[25] New York State Department of Financial Services, *Annual Report – 2014* at 6, available at http://www.dfs.ny.gov/reportpub/annual/dfs_annualrpt_2014.pdf.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 08/15/2017

prevent money laundering and funding illegal activities."[26] In addition, the Department stated that "a regulation requiring a license to engage in virtual currency business" – the Virtual Currency Regulation – "became effective in June 2015."[27]

Conclusion

64. In conclusion, the regulations challenged herein are neither unconstitutional nor arbitrary and capricious. The Department has not sought to ban or outlaw the use of virtual currencies or their future application. Instead, consistent with its mission to "ensure the continued safety and soundness of New York's banking, insurance and financial services industries, as well as the prudent conduct of the providers of financial products and services, through responsible regulation and supervision," the Department has applied the same regulatory principles to virtual currency products, services and providers that it has applied to other financial products, services and providers in New York. FSL § 102(i). Therefore, there is no merit to this Article 78 proceeding and declaratory judgment action, and the entire action should be dismissed.

Dated: New York, New York
June 23, 2017

Thomas S. Eckmier
Associate Attorney (Financial Services)
New York State Department of Financial Services

[26] New York State Department of Financial Services, *Annual Report – 2015* at 9, available at http://www.dfs.ny.gov/reportpub/annual/dfs_annualrpt_2015.pdf.
[27] New York State Department of Financial Services, *Annual Report – 2015* at 10, available at http://www.dfs.ny.gov/reportpub/annual/dfs_annualrpt_2015.pdf.

**Affirmation of Jonathan D. Conley, for DFS,
in Support of Cross-Motion to Dismiss, dated June 23, 2017
[pp. 149 - 150]**

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 16 RECEIVED NYSCEF: 08/15/2017

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; Anthony Albanese, in his official capacity as the Superintendent of the 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.

Affirmation of Jonathan D. Conley in Support of Defendants'-Respondents' Cross-Motion to Dismiss the Amended Verified Complaint and Article 78 Petition

Index No. 101880/2015
Hon. Lucy Billings

Jonathan D. Conley, an attorney admitted to practice in the courts of the State of New York, affirms the following to be true under the penalties of perjury in accordance with Rule 2106 of the New York Civil Practice Law and Rules:

1. I am an Assistant Attorney General in the Office of Eric T. Schneiderman, Attorney General of the State of New York, attorney for defendants-respondents 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, (collectively, "DFS") in this matter.

2. I submit this affirmation in support of DFS's cross-motion to dismiss this action pursuant to Rule 3211 and Section 7803 of the New York Civil Practice Law and Rules.

3. Attached to this affirmation as Exhibit A is a true and accurate copy of the plaintiffs'-petitioners' amended verified complaint and Article 78 petition, dated May 25, 2017, without exhibits.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 16 RECEIVED NYSCEF: 08/15/2017

Dated: New York, New York
June 23, 2017

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Memorandum of Law by DFS in Support of Cross-Motion to Dismiss, dated June 23, 2017 [pp. 151 - 189]

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

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; Anthony Albanese, in his official capacity as Superintendent of the 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.

Index No. 101880/2015
Hon. Lucy Billings

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'-RESPONDENTS' CROSS-MOTION TO DISMISS THE AMENDED VERIFIED COMPLAINT AND ARTICLE 78 PETITION

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FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

TABLE OF CONTENTS

Page

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

TABLE OF AUTHORITIES

CASES **PAGE(s)**

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

Defendants-Respondents the New York State Department of Financial Services and its Superintendent, Maria T. Vullo (collectively, "DFS"), by their attorney, Eric T. Schneiderman, Attorney General of the State of New York, submit this memorandum of law in support of their cross-motion to dismiss the amended verified complaint and Article 78 petition in this hybrid action.[1]

PRELIMINARY STATEMENT

Plaintiffs-Petitioners Theo Chino and Chino LTD bring this hybrid action challenging 23 NYCRR Part 200—a consumer protection regulation that was adopted by the New York State Department of Financial Services in June 2015 to address virtual currency business activity (the "Regulation"). Chino argues that the Regulation is invalid 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 his commercial speech rights under the First Amendment to the United States Constitution.

These claims fail on both procedural and substantive grounds. Procedurally, Chino has failed to allege any facts demonstrating that he has suffered—or is likely to suffer—a cognizable injury because of the Regulation, and thus lacks standing to bring this litigation.

Substantively, Chino's claims fail as a matter of law. Chino first argues that the Regulation violates the separation of powers doctrine. But in promulgating the Regulation, DFS—the state agency charged with regulating New York's financial services industries including, among others, the banking and insurance industries—properly exercised the authority delegated to it by the New York Financial Services Law to prescribe rules and regulations

[1] This action is being brought as both an Article 78 proceeding—challenging DFS's regulation of virtual currencies as arbitrary, capricious, and beyond its jurisdiction—and an action—seeking a declaratory judgment pursuant to CPLR § 3001. *See* Am. Pet'n ¶ 49.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

necessary to protect consumers of financial products and services. N.Y. Fin. Servs. Law (FSL) §§ 301(a), (c)(1); 302 (a)(1). The Regulation fulfills the Governor's and Legislature's mandate, in the wake of the 2008 financial crisis, that the newly-formed Department "provide for the regulation of new financial services products," "protect the public interest," "protect users of banking, insurance, and financial services products and services," and "ensure the continued safety and soundness of New York's banking, insurance and financial services industries, as well as the prudent conduct of the providers of financial products and services, through responsible regulation and supervision." FSL § 102(f), (i), (j), (l). DFS acted legally, constitutionally, and well within its authority in adopting the Regulation.

Chino also asserts a claim under CPLR Article 78 alleging that the Regulation is arbitrary and capricious, but this argument ignores the plain language of the Regulation. As the text makes clear, the Regulation was carefully tailored to only cover uses of virtual currency that are subject to DFS's oversight under the Financial Services Law and to apply existing regulatory concepts that govern the conduct of analogous financial services providers. The Regulation thus has a rational basis, and is not unreasonable, arbitrary, or capricious.

Chino next argues that the Regulation is preempted by the Dodd-Frank Act. That argument fails, however, because the plain language of Dodd-Frank explicitly provides that state governments retain the authority to enact financial consumer protection laws and regulations.

Finally, Chino claims that certain disclosure requirements under the Regulation are impermissible under the First Amendment. But well-established precedent holds that such disclosure mandates in purely commercial contexts need only be reasonable. And the disclosure requirements at issue here easily meet this reasonableness standard since they are rationally related to DFS's interest in protecting the consumers of financial products and services.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

STATEMENT OF FACTS

DFS refers the Court to the amended verified complaint and Article 78 petition attached to the affirmation of Jonathan D. Conley as Exhibit A, and the affirmation of Thomas Eckmier, for a full recitation of the facts and circumstances underlying this litigation. For purposes of considering this cross-motion to dismiss, however, the salient facts are repeated here.

A. The New York State Department of Financial Services and its regulation of virtual currencies

The Creation of DFS and its Mission

In the wake of the financial crisis, the New York State Legislature created the New York State Department of Financial Services to implement a comprehensive approach to the regulation of financial products and services in New York. Eckmier Aff. ¶ 5. The Superintendent of the New York State Department of Financial Services is the head of the Department. FSL § 202(a). By merging the New York State Banking and Insurance Departments, the Legislature created a single agency that could draw on the extensive experience of the staffs of DFS's predecessor agencies in regulating and supervising financial products and services and their providers under the New York Banking Law and Insurance Law. Eckmier Aff. ¶ 6. Specifically, DFS regulates and supervises a variety of financial services institutions, including all New York state-chartered banking organizations—such as banks, trust companies, savings banks, and credit unions—as well as branches, agencies, and representative offices of foreign banks. *Id.* In addition, DFS regulates and supervises mortgage bankers, brokers, loan originators and servicers, money transmitters, licensed lenders, check cashers, budget planners, sales finance companies, and all insurance companies and insurance producers that do business in New York. *Id.*

As a complement to the Banking and Insurance Laws, the Legislature enacted the Financial Services Law in 2011, which tasks DFS with regulating and supervising certain

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

financial products and services and the providers of such products and services. *Id.* ¶ 7. The Legislature declared that the purpose of the Financial Services Law is to "provide for the enforcement of the insurance, banking and financial services laws, under the auspices of a single state agency" that would, among other things, "provide for the regulation of *new* financial services products" and "ensure the continued safety and soundness of New York's banking, insurance and financial services industries, as well as the prudent conduct of the providers of financial products and services, through responsible regulation and supervision." FSL § 102(f), (i) (emphasis added).

The Financial Services Law's "Declaration of policy" section specifically states that it "is the intent of the legislature that the superintendent shall supervise the business of, and the persons providing, financial products and services…." FSL § 201(a); Eckmier Aff. ¶ 8. To perform this mandate, DFS is required by the Financial Services Law to "take such actions as the superintendent believes necessary" to "ensure the continued solvency, safety, soundness and prudent conduct of the providers of financial products and services" and to "protect users of financial products and services…." FSL §§ 201(b)(2), (7); Eckmier Aff. ¶ 9.

The Financial Services Law defines a "financial product or service" as "any financial product or financial service offered or provided by any person regulated or required to be regulated by the superintendent pursuant to the banking law or the insurance law or any financial product or service offered or sold to consumers," subject to certain exceptions.[2] FSL § 104(a)(2).

The Financial Services Law also authorizes the superintendent to promulgate "rules and regulations and issue orders and guidance involving financial products and services, not

[2] These exceptions include any financial product or service that is (i) subject to federal preemption, (ii) regulated under the exclusive jurisdiction of a federal agency or (iii) regulated for the purpose of consumer or investor protection by any other state agency. FSL §§ 104(a)(2)(A)(i)–(iii).

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

inconsistent with the provisions of" the Financial Services Law, the Banking Law, the Insurance Law, and "any other law in which the superintendent is given authority." FSL § 302(a). Such regulations may effectuate "any power given to the superintendent" under the Financial Services Law and other enumerated laws; interpret the Financial Services Law and other enumerated laws; and govern "the procedures to be followed in the practice of the department." *Id.*

The Regulation of Virtual Currencies

Virtual currency is widely recognized as "a medium of exchange that operates like a currency in some environments, but does not have all the attributes of real currency. In particular, virtual currency does not have legal tender status in any jurisdiction." *Id.* ¶ 15. Perhaps the most widely known form of virtual currency, Bitcoin, has been described as a "peer to peer" version of electronic cash that allows "online payments to be sent directly from one party to another without going through" a "trusted third-party." *Id.* ¶ 14. In short, virtual currency is a medium of exchange that may be used to store value or to buy or sell goods or services.

Notwithstanding virtual currency's early use as a means of making peer-to-peer payments, a variety of third-party service providers have become an integral part of virtual currency activity and have fundamentally altered the way in which people use virtual currencies. *Id.* ¶ 16. For example, third-party service providers facilitate the exchange of government-issued fiat currency (such as U.S. dollars or euros) for virtual currency (such as bitcoins), and of virtual currency for government-issued fiat currency. *Id.* ¶ 17. In addition, some third parties provide "wallet" services that hold a customer's virtual currency until the customer wants to draw on the "wallet" to effectuate a payment transaction with the virtual currency. *Id.* ¶ 18. Other third-party service providers use virtual currency to transmit funds domestically and internationally outside of the traditional banking system. *Id.* ¶ 19.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

Such third-party services are directly analogous to established financial services that are regulated under the Banking Law and the Financial Services Law. For example, virtual currency service providers often accept consumer funds—whether in virtual currency, fiat currency, or both—to be sent to another party. *Id.* ¶ 20. Similarly, money transmitters accept U.S. dollars and other fiat currencies for transmission between its customers and third parties, and money transmission has been regulated in New York as a licensed financial service since the 1960s. *Id.* ¶ 21. Money transmission is regulated to protect consumers against the loss of their funds as a result of fraud or mismanagement by the third-party service provider. Virtual currency service providers pose similar risks. Eckmier Aff. ¶ 22. For example, Mt. Gox, once the largest Bitcoin exchange service, collapsed in 2014 and lost more than $450 million worth of bitcoins—nearly 90% of which belonged to Mt. Gox's customers. *Id.* ¶ 23. The CEO of Mt. Gox was later arrested and charged with embezzlement. *Id.*

In addition to the risk of loss to consumers, virtual currency business activity has in some cases involved "dark" online marketplaces, including the Silk Road site, where, between 2011 and 2013, illegal drugs and other illicit items and services worth hundreds of millions of dollars were regularly bought and sold using the virtual currency Bitcoin. *Id.* ¶ 25. For precisely such reasons, DFS is tasked with enacting regulations to ensure the "prudent conduct of the providers of financial products and services" and "encourage high standards of honesty, transparency, fair business practices and public responsibility." *Id.* (quoting FSL §§ 102(i), 201(b)(5)).

The Promulgation of 23 NYCRR Part 200

On July 23, 2014, pursuant to the State Administrative Procedures Act, DFS published the proposed virtual currency regulation in the New York State Register. As stated in the Register, the purpose of the proposed regulation was to regulate "virtual currency business

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

activity in order to protect New York consumers and users and ensure the safety and soundness of New York licensed providers of virtual currency products and services." *Id.* ¶ 26.

That initial publication in the Register was followed by a 90-day public comment period and Department review of those comments. *Id.* ¶ 27. On February 25, 2015, based upon the public comments received, a substantially revised regulation was published in the Register. *Id.* ¶ 27. After an additional 30-day comment period and Department review of those comments, the final version of 23 NYCRR Part 200 was adopted on June 24, 2015. *Id.* ¶ 28.

B. Theo Chino, his businesses, and the commencement of this litigation

2013-2014: Chino establishes Chino LTD and Conglomerate Business Consultants, Inc.

Chino founded Chino LTD in 2013 for the purpose of "install[ing] Bitcoin processing services in the State of New York." Am. Pet'n ¶¶ 2, 73. In March 2014, Chino hired an employee to "sell Chino LTD's Bitcoin-related services" and the employee "distributed surveys to local bodegas and stores to evaluate the Bitcoin landscape and identify potential clients in the Manhattan area." *Id.* ¶¶ 74–75. In December 2014, Chino co-founded a second company, Conglomerate Business Consultants, Inc (CBC). *Id.* ¶ 76. CBC started out distributing "phone minutes" to bodegas for resale to the public, and later entered into contracts with "seven bodegas in New York to offer Bitcoin-processing services." *Id.* ¶¶ 77–78. CBC distributed "phone minutes and the Bitcoin processing service directly to bodegas" and "Chino LTD provided the actual processing services." *Id.* ¶ 81.

More specifically, "Chino LTD provided all the research and development for Bitcoin processing, bought all of the computer [sic] to run the backend of processing Bitcoin, rented all of the hosting equipment to run the front end of processing Bitcoin, and developed custom operating systems to run the Bitcoin processing." *Id.* ¶ 82.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

2015-2016: Chino submits an incomplete application, preemptively shuts down his businesses, and sues DFS

On June 24, 2015, the Regulation went into effect. *Id.* ¶ 1. Two weeks later, Chino filed an application on behalf of Chino LTD with DFS for a license to engage in Virtual Currency Business Activity. *Id.* ¶¶ 5, 88; Ex. IX to Am. Pet'n (Chino's application). In October 2015, Chino commenced this litigation. Am. Pet'n ¶ 6.

In January 2016, DFS advised Chino by letter that it had performed an initial review of his application, but was unable to determine whether Chino LTD needed a license to operate because of the "exceptionally limited" information he had provided. *See* Ex. XI to Am. Pet'n (Jan. 4, 2016 letter). "Among other issues," DFS noted, "the Application does not contain any description of the Company's current or proposed business activity." *Id.* Consequently, DFS was unable to evaluate whether Chino LTD's "current or intended business activity (if any) would be considered Virtual Currency Business Activity that requires licensing under the New York Financial Services Law and regulations." *Id.* (citing 23 NYCRR Part 200).

Because of this lack of information, DFS explained that it was returning Chino's application "without further processing," but "emphasiz[ed] that the instant letter does not offer any opinion as to whether or not any business activity of the Company requires or would require licensing by New York." *Id.* In the event Chino "[s]hould … have any questions" about the letter, DFS provided him with the contact information of the Supervising Bank Examiner for DFS's Capital Markets Division. *Id.*

Chino never followed up with DFS about his application—he never supplemented his application with more information, never communicated with DFS to ascertain whether he needed a license to operate Chino LTD, and never submitted an application on behalf of his other

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

company, CBC. Instead, he immediately shut down CBC on the purported grounds that DFS "did not approve" his application for Chino LTD. *Id.* ¶ 94.

LEGAL STANDARDS

On a motion to dismiss under CPLR Rule 3211 or 7804, the petition or complaint must generally be given a liberal construction, facts must be accepted as true, and the court must determine whether the facts alleged fit any cognizable legal theory. *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994). But "claims consisting of bare legal conclusions with no factual specificity … are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

ARGUMENT

I. Chino's factual allegations are insufficient to establish standing.

To challenge a governmental action, a party must first establish that it has standing to sue. *See N.Y. State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004). The burden of establishing standing is on the party seeking judicial review. *Soc'y of the Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761,769 (1991). Chino has failed to meet that burden here.

Whether an individual "seeking relief from a court is a proper party to request an adjudication is an aspect of justiciability which must be considered at the outset of any litigation." *Roberts v. Health & Hospitals Corp.*, 87 A.D.3d 311 (1st Dep't 2011) (citation and internal quotation marks omitted). Standing is critical since a court "'has no inherent power to right a wrong unless thereby the civil, property or personal right of the plaintiff in the action or the petitioner in the proceeding is affected.'" *Soc'y of the Plastics Indus., Inc.*, 77 N.Y.2d at 772 (*quoting Schieffelin v. Komfort*, 212 N.Y. 520, 530 (1914)).

To establish standing, a plaintiff must demonstrate an "injury in fact." *N.Y. State Assoc. of Nurse Anesthetists*, 2 N.Y.3d at 211, 214-15. As the term implies, an injury in fact means that

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

"the plaintiff will actually be harmed by the administrative action." *Id.* The alleged "injury must be more than conjectural." *Id.* Speculation that a party will likely be injured does not satisfy the "concreteness" required to establish injury in fact. *Id.* "[S]tanding requires a showing of 'cognizable harm,' meaning that an individual member of plaintiff organizations 'has been or will be injured'; 'tenuous' and 'ephemeral' harm … is insufficient to trigger judicial intervention." *Id*. at 214 (quoting *Rudder v. Pataki*, 93 N.Y.2d 273, 279 (1999)). Even though "an issue may be one of … public concern, [that] does not entitle a party to standing." *Soc'y of Plastics Indus., Inc.*, 77 N.Y.2d at 769. Without an injury in fact, a plaintiff's assertions are "little more than an attempt to legislate through the courts." *Rudder*, 93 N.Y.2d at 280.

A. Chino has failed to allege that he suffered an injury-in-fact.

Here, Chino's allegations are inadequate to establish standing for one simple reason: nothing in the petition demonstrates that Chino has suffered—or is likely to suffer—a cognizable injury *because of* the Regulation. This deficiency is fatal to Chino's claims.

Chino's standing argument rests solely on the fact that he voluntarily shut down his businesses after submitting an incomplete application to DFS for a license to engage in virtual currency business activity. Chino commenced this litigation while his application was pending. In January 2015, DFS advised Chino that it had performed an initial review of his application, but was unable to determine whether Chino LTD needed a license to operate because of the "exceptionally limited" information he had provided. *See* Ex. XI to Am. Pet'n. In response to this news about his incomplete application, Chino shut down both of his businesses, which allegedly resulted in financial losses.

In an attempt to establish standing, Chino points to Chino LTD's tax returns from 2013 to 2016, alleging that they demonstrate the financial losses he incurred because of the Regulation.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

Id. ¶¶ 85–87, 91, 94. Specifically, Chino alleges that Chino LTD suffered the following losses:

2013 tax year	Chino LTD suffered losses of $4,367 "due to the cost of purchasing computer equipment to test how to protect Bitcoin and figure out how to monetize it." Am. Pet'n ¶ 85.
2014 tax year	Chino LTD suffered losses of $59,667 "due to the cost of computer hardware required to run Bitcoin warehousing, the cost of renting computer time on the cloud, and marketing the service to bodegas." *Id.*
June 2015	*Regulation promulgated as 23 NYCRR Part 200. Id.* ¶ 1.
August 2015	Chino submitted an application on behalf of Chino LTD for a license to engage in Virtual Currency Business Activity. *Id.* ¶¶ 5, 87.
2015 tax year	Chino LTD suffered losses of $30,588. *Id.* ¶ 87. "These losses were due to the cost of utilities to process Bitcoin (computer time on the internet cloud), the interest on the borrowed capital required to purchase the equipment the previous year, the cost associated with supporting CBC (who entered into the agreements with bodegas), and the cost of litigation." *Id.*
2016 tax year	Chino LTD "no longer offer[ed] Bitcoin services," but "remained an active S-Corporation and suffered losses of $53,053." *Id.* ¶ 94. These "losses were due to the utilities for keeping the equipment to process Bitcoin in the event of successful litigation, the interest on the borrowed capital from the previous three years, and the cost of litigation." *Id.*

Even taking this chronological narrative as true, Chino has failed to establish a connection between the Regulation and his purported "injury in fact"—Chino LTD's financial losses. Indeed, as this chronology shows, most of Chino's financial losses—those arising in 2013, 2014, and the first half of 2015—were incurred before the Regulation was promulgated. This alone belies any claim that they were caused by the Regulation.

But the other alleged financial losses are equally unhelpful to Chino because they are entirely unrelated to the Regulation. As noted above, Chino never ascertained whether his businesses needed a license to operate under the Regulation. He simply assumed they would. And DFS never barred Chino from operating his businesses. To the contrary, DFS told Chino in the clearest possible terms that it would need more information before it could determine whether Chino LTD's business activities fell under the Regulation's purview. *See* Ex. XI to Am.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

Pet'n. And as Chino himself acknowledges, he never provided DFS with enough information to process his application. Am. Pet'n ¶ 94. Instead, he charted a decidedly different course by preemptively halting the operations of CBC and Chino LTD and commencing this litigation.

Chino ascribes the losses he incurred in 2015 and 2016 to the costs of this litigation, utility fees, and the interest paid on borrowed capital. *Id.* But these losses plainly arise from Chino'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. In short, the cause of Chino's seized business operations (and any financial losses that resulted) was Chino—not the Regulation.

Chino shuttered his businesses on the speculative assumption that their operations *might* be impacted by the Regulation, and now argues that the resulting financial losses constitute an injury in fact. This is not enough to confer standing. Standing requires evidence of a concrete, cognizable injury that was *caused by* the challenged law. *See N.Y. State Ass'n of Nurse Anesthetists*, 2 N.Y.3d at 211. Chino makes no such showing here. Instead, Chino presents evidence of a self-inflicted injury that resulted—not from the challenged Regulation—but from his own assumptions about how that Regulation might affect his businesses down the road. Such broad, non-descript allegations of anticipatory harm are far too attenuated to establish standing; the fact that a law or regulation may be enforced does not, on its own, establish an injury in fact.

In sum, Chino fails to show how the Regulation has impacted him in any concrete, material way. As such, he has not alleged "an actual legal stake in the matter being adjudicated," and thus lacks standing. *Soc'y of Plastics Indus., Inc.*, 77 N.Y.2d at 772.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

II. The Regulation is well within DFS's enabling legislation and does not violate the separation of powers doctrine.

A. DFS properly identified virtual currency business activity as a financial product or service subject to its regulatory powers.

Where, as here, an "agency acts in the area of its particular expertise," the "exercise of its rule-making powers is accorded a high degree of judicial deference." *Matter of Consol. Nursing Home v. Comm'r of N.Y. State Dep't of Health*, 85 N.Y.2d 326 (1995). Chino's arguments fail to meet his "heavy burden of showing that the regulation is unreasonable and unsupported by any evidence." *Id.*

1. Virtual currency is a financial product or service.

Chino's argument that the phrase "financial products and services" does not encompass virtual currency business activity, Am. Pet'n ¶¶ 9–11, 29, 36, is based on a contrived and unduly narrow definition of "financial." According to Chino, financial products and services are only those products and services that have the "characteristics of a true currency," and thus the Legislature intended to limit DFS's authority to regulate only those products or services involving "true currency." *Id.* As Chino sees it, because "Bitcoin is not money, and because currencies are representations of money, Bitcoin is not a true currency," and therefore cannot be analogized to a financial product. *Id.* ¶¶ 29, 35.[3]

The foundation of Chino's argument—that virtual currency is not a financial product or service—is plainly incorrect. Virtual currency is a digital form of money—a medium of

[3] Chino asserts that virtual currency, as opposed to a "true currency," is "akin to commodity-like mediums of exchange" that should be treated as property, not money. Am. Pet'n ¶¶ 65–66. In support of this position, he cites guidance from the Internal Revenue Service and the Commodity Futures Trading Commission identifying virtual currency as, respectively, property and a commodity. *Id*. Chino's reliance on these references is misplaced. The fact that something may be subject to the CFTC's jurisdiction does not mean that it is not financial in nature. Quite the contrary. For example, derivatives—a clear financial product and service—are within the CFTC's jurisdiction. Moreover, the IRS, in establishing regulations to clarify tax treatment for virtual currency's use as payment for wages and other transactions, supports DFS's view that virtual currency is a financial product or service.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

exchange that can be substituted for traditional currency.[4] That virtual currency is a new form of currency created by innovation does not mean it is not covered by the Financial Services Law; under this theory, banking laws enacted before the internet was created would not cover online banking—a dubious (and legally unfounded) proposition.

Virtual currency was devised as a substitute for fiat currency (such as U.S. dollars and other legal tender whose value is backed by the government that issued it). Bitcoin, for example, was created as an alternative payment system to the systems offered by traditional financial services providers. In his seminal paper, *Bitcoin: A Peer-to-Peer Electronic Cash System*, Satoshi Nakamoto, the pseudonymous creator of Bitcoin, described virtual currency as a "peer-to-peer version of electronic cash" that would eliminate inefficiencies in online payments.[5]

In short, virtual currencies such as Bitcoin were specifically designed to act as substitutes for money, allowing users to make online payments without incurring the costs associated with the traditional intermediaries of financial services. These traditional intermediaries have long been regulated by DFS, other state banking regulators, and (in the case of national banks) the U.S. Office of the Comptroller of the Currency ("OCC"). Facilitators of online payments, for

[4] *See, e.g., United States v. Faiella*, 39 F. Supp. 3d 544, 545 (S.D.N.Y. 2014) (Rakoff, J.) ("Bitcoin clearly qualifies as 'money' or 'funds' .... Bitcoin can be easily purchased in exchange for ordinary currency, acts as a denominator of value, and is used to conduct financial transactions."; *United States v. Ulbricht*, 31 F. Supp. 3d 540, 548 (S.D.N.Y. 2014) ("[T]he defendant alleges that he cannot have engaged in money laundering because all transactions occurred through the use of Bitcoin and thus there was therefore no legally cognizable 'financial transaction.' The Court disagrees. Bitcoins carry value—that is their purpose and function—and act as a medium of exchange. Bitcoins may be exchanged for legal tender, be it U.S. dollars, Euros, or some other currency. Accordingly, this argument fails."), *aff'd* 2017 WL 2346566, at * 1 (2d Cir. May 31, 2017); *United States v. Murgio*, No. 15-CR-769 (AJN), 2016 WL 5107128, at *3–4 (S.D.N.Y. Sept. 19, 2016) (recognizing that Bitcoin is synonymous with money, as it "can be accepted 'as a payment for goods and services' or bought 'directly from an exchange with [a] bank account.'") (citation omitted); *United States v. 50.44 Bitcoins*, No. CV ELH-15-3692, 2016 WL 3049166, at *1 (D. Md. May 31, 2016) ("Bitcoin is an electronic form of currency unbacked by any real asset and without specie, such as coin or precious metal.") (citation and internal quotation marks omitted); *Sec. & Exch. Comm'n v. Shavers,* 13 Civ. 416, 2013 WL 4028182, at *2 (E.D.Tex. Aug. 6, 2013), at *1 ("It is clear that Bitcoin can be used as money. It can be used to purchase goods or services, and . . . used to pay for individual living expenses. … [I]t can also be exchanged for conventional currencies….").

[5] *See* Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (2008), at 1, available at https://bitcoin.org/bitcoin.pdf (last visited Jun. 21, 2017).

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

example, are generally licensed by DFS as money transmitters.[6] Chino offers no reason to conclude that a company providing payment services denominated in virtual currency is, in any way, less engaged in providing a financial product or service than a company that provides payment services denominated in dollars.

The fact that virtual currency can be used, and sometimes needs to be regulated, as a substitute for fiat currency was acknowledged in 2013 by the Financial Crimes Enforcement Network of the U.S. Treasury Department ("FinCEN").[7] FinCEN's primary purpose is to safeguard the financial system from evolving national security and money laundering threats.[8] Among other things, FinCEN has issued regulations requiring money services businesses—including money transmitters, check cashers, and currency exchangers—to register with FinCEN, implement anti-money-laundering programs, keep records of their customers, and report suspicious transactions. *See, e.g.*, 31 C.F.R. Chapter X.

In rejecting the same argument urged by Chino here, FinCEN has recognized virtual currency's use as a substitute for money. In a 2013 interpretive guidance on virtual currencies, FinCEN observed that virtual currencies are "a medium of exchange that operates like a currency in some environments." *FinCEN Guidance* at 1. Because virtual currency is a stand-in for money, FinCEN clarified that "[t]he definition of a money transmitter does not differentiate between real currencies and convertible virtual currencies," and that "[a]ccepting and transmitting anything of value that substitutes for currency makes a person a money transmitter under the regulations implementing the [Bank Secrecy Act]." *Id*. at 3.

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[6] *See* DFS, *Database of Supervised Financial Institutions*, https://myportal.dfs.ny.gov/web/guest-applications/who-we-supervise (database of financial institutions supervised by DFS organized by name and type of institution).

[7] *See Guidance on the Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*, FinCEN, FIN-2013-G001 (Mar. 18, 2013) ("FinCEN Guidance"), at 1, http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2013-G001.pdf.

[8] U.S. Dep't of the Treasury, FinCEN, *Mission*, https://www.fincen.gov/about/mission (last visited June 22, 2017).

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

FinCEN therefore concluded that a virtual currency "administrator" (a person who issues a virtual currency) and an "exchanger" (a person who exchanges a "virtual currency for real currency, funds, or other virtual currency") are engaged in a "money service business" and must register with the U.S. Treasury Department. *Id.* at 1–2. In reaching this decision, FinCEN explicitly noted that an administrator or exchanger who "(1) accepts and transmits a convertible virtual currency or (2) buys or sells convertible virtual currency for any reason ***is*** a money transmitter under FinCEN's regulations." *Id*. at 3. FinCEN has thus determined that anyone providing certain services involving virtual currency is subject to the same Bank Secrecy Act compliance requirements as money transmitters. *Id.*

2. The regulation of virtual currency business activity is properly within DFS's mandate.

FinCEN's recognition that virtual currency can be used as money, and that certain virtual currency service providers are indistinguishable from transmitters, check cashers and other, more traditional money services businesses, underscores that DFS properly determined within its broad mandate that virtual currency business activity is subject to regulation under the Financial Services Law. "Where an agency has been endowed with broad power to regulate in the public interest, courts generally will uphold reasonable acts that further the regulatory scheme." *Agencies for Children's Therapy Servs. v. N.Y. State Dep't of Health*, 136 A.D.3d 122 at 128 (2d Dep't 2015) (citations omitted). Here, following the 2008 financial crisis, the Governor and the Legislature expressly created an "innovative" regulatory agency that would protect consumers and "ensure the continued safety and soundness of New York's banking, insurance and financial services industries, as well as the prudent conduct of the providers of financial products and services, through responsible regulation and supervision." FSL § 102 (i). Explaining the impetus for creating DFS, Governor Cuomo noted that "Albany was nowhere to be found when the Great

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

Recession hit and our citizens were jolted by the fallout from collected debt obligations, derivatives and other financial products that were allowed to grow out of control with no meaningful government intervention."[9] The solution, the Governor urged, was "a newly formed department … capable of regulating modern financial services organizations." *Id*.

The regulation of virtual currency business activity is precisely the type of regulation envisioned by the Governor and the Legislature when they empowered DFS to regulate banks, insurance companies, *and other financial services industries*—including financial products and services—in the modern, post-financial-crisis era. Before DFS's creation in 2011, some argued that derivatives or other risky financial products could not be regulated, and the Financial Services Law made plain that those arguments no longer can prevail with respect to other new, complex financial products yet to be used or named.

Virtual currency business activity represents a new financial product or service with the potential to benefit consumers, while also exposing them to serious harm, as the Mt. Gox fiasco demonstrated. *See supra* p. 6. Left unregulated, the virtual currency market can also become a haven for black-market transactions, money laundering, and terrorist financing. This is exactly the type of situation where DFS has a compelling policy interest to act, in accord with its mandate, to protect consumers and the market. And that is precisely what DFS did here in adopting a rational, carefully crafted regulatory framework designed to safeguard the public against the potential abuse and misuse of a new financial product and service.

For all of these reasons, DFS's application of the Financial Services Law to virtual currency business activity is fully consistent with its authority to regulate the financial services industries and the financial products and services in New York.

[9] Governor Andrew Cuomo, State of the State Address, (Jan. 5, 2011), http://www.governor.ny.gov/assets/documents/SOS2011.pdf.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

B. The Legislature's empowerment of DFS to regulate financial products and services does not violate the separation of powers doctrine.

For similar reasons, there is no merit to Chino's claim that the Regulation violates the separation of powers doctrine.

Boreali v. Axelrod, 71 N.Y.2d 1 (1987) is the seminal case "for determining whether agency rulemaking has exceeded legislative fiat." *Matter of NYC C.L.A.S.H., Inc. v. N.Y. State Off. of Parks, Recreation & Historic Preserv.*, 27 N.Y.3d 174, 178 (2016). In that case, the Court of Appeals set forth four "intertwined factors for courts to consider when determining whether an agency has crossed the hazy 'line between administrative rule-making and legislative policy-making.'" *Greater N.Y. Taxi Assoc. v. Taxi & Limo. Comm'n*, 25 N.Y.3d 600, 610 (2015).[10]

The **first** *Boreali* factor is whether the agency did more than balance costs and benefits according to preexisting guidelines, but instead made "value judgments entailing difficult and complex choices between broad policy goals to resolve social problems." *Greater N.Y. Taxi Assoc.*, 25 N.Y.3d at 610. There are no broad policy judgments at issue here; virtual currency business activity is not banned or even discouraged under the Regulation. Rather, DFS extended well-established safeguards that apply to a broad range of financial services to new financial services involving virtual currency. And in doing so, DFS fulfilled the legislative intent expressed in the Financial Services Law by (i) "provid[ing] for the regulation of new financial services products;" (ii) "ensur[ing] the continued safety and soundness of New York's banking, insurance and financial services industries, as well as the prudent conduct of the providers of

[10] The Court of Appeals has counseled against treating the *Boreali* factors "as discrete, necessary conditions that define improper policy making by an agency." *Matter of Statewide Coalition of Hispanic Chambers of Comm. v. N.Y.C. Dep't of Health*, 23 N.Y.3d 681, 696–97 (2014). Nor are they criteria to be "rigidly applied in every case in which an agency is accused of crossing the line into legislative territory." *Id.* To the contrary, courts are directed to view them as "overlapping, closely related factors" that may shed light on whether "an agency has crossed that line" between rule making and policy making. *Id.*

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

financial products and services, through responsible regulation and supervision;" and (iii) "protect[ing] users of financial products and services…." FSL §§ 102(f), (i); 201(b)(7).

The **second** *Boreali* factor is "whether the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance." *Greater N.Y. Taxi Assoc.*, 25 N.Y.3d at 611. Far from being written on a clean slate, the Regulation applies well-accepted regulatory concepts to virtual currency that already exist in the Banking Law (or the regulations promulgated thereunder). Eckmier Aff. ¶ 34. These concepts reflect common requirements imposed across a wide variety of financial services, including:

- the maintenance of certain books and records;
- reporting requirements;
- disclosures to consumers;
- periodic examination by DFS;
- maintenance of a surety bond or similar security fund to protect consumers;
- prior Department approval of changes in control of the licensee; and
- anti-money laundering requirements.

See id. ¶¶ 35–40. The application of existing regulatory concepts comports with DFS's mandate to ensure "the prudent conduct of the providers of financial products and services, through responsible regulation and supervision." FSL § 102(i); Eckmier Aff. ¶ 41.

The **third** *Boreali* factor is "whether the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve." *Greater N.Y. Taxi Assoc.*, 25 N.Y.3d at 611–12. Here, the Legislature has not made any attempt to pass legislation governing virtual currency activity or taken any action that would suggest any inconsistency between the promulgation of the Regulation and the Legislature's intent as expressed in the Financial Services Law. Eckmier Aff. ¶ 58.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

In fact, DFS's ability to regulate financial products and services is subject to regular legislative review. Specifically, the Financial Services Law requires that DFS "submit a report annually to the governor and to the legislature" containing, among other things, "a general review of the insurance business, banking business, and financial product or service business," as well as details regarding regulations promulgated under the Financial Services Law. FSL § 207(a)(1), (14); Eckmier Aff. ¶ 57. Consistent with this requirement, DFS has advised the Governor and Legislature annually since 2014 on the events leading up to the Regulation's promulgation and its status since going into effect. *See id.* ¶¶ 59–63. Yet since its promulgation in 2015, no legislation has been introduced seeking to regulate virtual currency business activity or invalidate the framework established by the Regulation.

The **fourth** *Boreali* factor is "whether the agency used special expertise or competence in the field to develop the challenged regulations." *Greater N.Y. Taxi Assoc.*, 25 N.Y.3d at 612. As noted previously, DFS was formed through the consolidation of its long-standing predecessor agencies, the Departments of Banking and Insurance, and is New York's primary financial services regulator. Unquestionably, DFS has extensive expertise in the field of financial services regulation. And given that the Regulation pertains to virtual currency products and services, which are financial products and services, DFS plainly relied on its special expertise in developing the Regulation; thus, the fourth *Boreali* factor is easily satisfied.

In light of the above, *Boreali* fully supports DFS's actions. Courts have consistently refused to hold that *Boreali* prohibits an agency's regulations where, as here, the regulations track the agency's statutory mandate.[11] In precisely the same way, the Regulation implements the

[11] *E.g.*, *NYC C.L.A.S.H., Inc.*, 27 N.Y.3d at 178 (distinguishing *Boreali* and holding that the Office of Parks and Recreation acted within its statutory mandate in passing regulations limiting smoking in outdoor areas); *Matter of Nat'l Restaurant Ass'n v. N.Y.C. Dep't. of Health*, 148 A.D. 3d 169 at 173–78 (1st Dep't 2017) (holding under

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

statutory authority given to DFS by the Legislature to ensure the safety and soundness of financial services and products offered to New Yorkers and that the providers of these products and services institute adequate consumer protections. Accordingly, Chino's separation of powers challenge to the Regulation fails as a matter of law.

III. The Regulation is neither arbitrary nor capricious and has a rational basis.

In exercising its rule-making powers, an administrative agency "is accorded a high degree of judicial deference, especially when the agency acts in the area of its particular expertise." *Matter of Consol. Nursing Home*, 85 N.Y.2d at 331. In such circumstances, as is the case here, "the party seeking to nullify such a regulation has the heavy burden of showing that the regulation is unreasonable and unsupported by any evidence." *Id.* In evaluating whether an agency rule or regulation is arbitrary and capricious under Section 7803 of the CPLR, a court must determine whether there is "a rational basis to support the findings upon which the agency's determination is predicated." *Nat'l Restaurant Assoc.*, 2016 WL 751881, at *3.

Moreover, agencies are presumed to have developed an expertise and judgment that requires the courts to accept the agency judgment if not unreasonable. *Lynbrook v. N.Y. State Pub. Employment Relations Bd.,* 48 N.Y.2d 398, 404 (1979). And when matters of specialized knowledge or judgment are entrusted to an agency, the court may not substitute its own judgment. *In the Matter of Graves v. City of New York*, 53 Misc.3d 895, 38 N.Y.S.3d 741, 746 (Sup. Ct. N.Y. Cnty. 2016) (citing *City Servs., Inc. v. Neiman*, 77 A.D.3d 505 (1st Dep't 2010)). *"*It has been established as a fundamental rule of administrative law that a reviewing court, in dealing with a determination an administrative agency alone is authorized to make, 'must judge the propriety of such action solely by the grounds invoked by the agency.'" *In the Matter of the*

Boreali analysis that the New York City Department of Health did not act outside the bounds of its authority in the area of public health by passing a rule requiring chain restaurants to post sodium warning labels).

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

Brennan Ctr. v. N.Y. State Bd. of Elections, 29 N.Y.S.3d 758, 773–74 (Sup. Ct. Albany Cnty. Mar. 16, 2016) (quoting *Matter of Barry v. O'Connell*, 303 N.Y. 46, 50–51 (1951)).

Chino argues that the Regulation is invalid because it is over-inclusive. *See* Am. Pet'n ¶¶ 43, 45, 105–08. But in making this argument, Chino blatantly misconstrues the Regulation's scope. Chino contends, for example, that the Regulation covers all non-financial uses of blockchain technology—including an artist's use of "blockchain technology to assert ownership over [his or her] works," an insurer's use of "blockchain technology to track diamonds," or a person's use of "blockchain technology to timestamp documents and photos." *Id.* ¶¶ 45–46. Expanding on this general theme, Chino goes so far as to suggest that the Regulation covers the basic exchange of *all* information over the internet. *Id.* ¶ 43. This is patently false.

The definition of "Virtual Currency" under the Regulation is limited to "any type of digital unit that is used as a medium of exchange or a form of digitally stored value." 23 NYCRR 200.2(p); Eckmier Aff. ¶ 47. These terms—"medium of exchange" and "form of digitally stored value"—are commonly used to describe financial products and services.[12]

"Medium of exchange" is defined as "something that is used to pay for goods or services, for example a particular currency."[13] A "form of digitally stored value" includes certain uses of virtual currency that are analogous to stored value cards denominated in fiat currency, such as debit card-like products that are loaded with a set amount of money for use by the holder

[12] *See, e.g.*, *United States v. Faiella*, 39 F. Supp. 3d 544, 545 (S.D.N.Y. 2014) (observing that "money" in ordinary parlance means "something generally accepted as a medium of exchange, a measure of value, or a means of payment"); Paul Krugman, *The Int'l Role of the Dollar: Theory and Prospect in Exchange Rate Theory & Practice* 8.2 (John F. Bilson & Richard C. Marston eds., 1984) (noting that money generally "serves three functions: it is a medium of exchange, a unit of account, and a store of value"); *see also United States v. E-Gold, LTD*, 550 F. Supp. 2d 82, 94 (D.D.C. 2008) (holding that "a 'money transmitting service' includes not only a transmission of actual currency, but also a transmission of the value of that currency through some other medium of exchange").

[13] Cambridge Business English Dictionary, http://dictionary.cambridge.org/dictionary/english/medium-of-exchange (last visited Jun. 22, 2017).

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

of the card. Many such stored value cards are already regulated by DFS as money transmission.[14] Moreover, the definition of "virtual currency" explicitly excludes non-financial uses of virtual currency, such as digital units used solely within online gaming platforms or customer rewards programs, neither of which can be converted into, or redeemed for, fiat currency or virtual currency. *See* 23 NYCRR 202.2(p).

In the same way, the definition of "virtual currency business activity," on its face, is intended to capture "financial product[s] or services[s] offered or sold to consumers" while excluding other, non-financial activity. FSL § 104(a)(2). Thus, "virtual currency business activity" is limited to receiving for transmission and transmitting virtual currency (except for non-financial purposes in nominal amounts); storing, holding or maintaining custody of virtual currency on behalf of others; buying and selling virtual currency as a customer business; performing exchange services; and issuing a virtual currency. 23 NYCRR § 200.2(q). Taken together, the definitions of virtual currency and covered business activity tailor the application of the Regulation to any person who provides financial services—exchange, storage, transmission, and the like—involving virtual currencies that have a financial use as a medium of exchange or as a means of storing value. Accordingly, the Regulation is reasonably crafted to ensure consistency with DFS's legislatively mandated purpose.

Chino also challenges the provisions of the Regulation setting forth recordkeeping requirements, anti-money-laundering requirements, and capital requirements. *See* Am. Pet'n ¶¶ 50–56, 111–21. But each of these provisions was properly crafted with a rational basis.

The record-keeping requirements are not "onerous." *Id.* ¶ 111. Similar record-keeping requirements apply to other licensees or chartered entities including, for example, check cashers,

[14] *See, e.g,* DFS, *Application for a License to Engage in the Business of Issuing Travelers Checks, Money Orders, Prepaid/Stored Value Cards, and/or Transmitting Money*, http://www.dfs.ny.gov/banking/ialfmta.pdf.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

money transmitters and banks. *See* 3 NYCRR § 400.1; N.Y. Banking Law §§ 128, 651-b. Keeping records of transactions is a necessary and sound business practice, and there is nothing arbitrary or capricious about requiring a business that transacts with the public to keep records.

Chino also asserts that virtual currency service providers are subject to different anti-money laundering requirements than money transmitters, Am. Pet'n ¶ 52, but this is mistaken. The suspicious activity report ("SAR") requirement referenced by Chino, *id.* ¶¶ 54, 113, requires any person engaged in virtual currency business activity to file a SAR with DFS if that person is not required to file a report under federal law, 23 NYCRR § 200.15(e)(3)(ii). This provision does not subject virtual currency service providers to different requirements from those that apply to money transmitters. To the contrary, it ensures that virtual currency service providers, money transmitters, and other similar financial services companies are subject to the same requirements in order to protect against illegal activity in the markets. While there is substantial overlap between the virtual currency business activity subject to the Regulation and FinCEN's registration requirements, there are some entities that could be subject to the Regulation but not required to register with FinCEN. By virtue of this provision, those entities must file the same types of SARs that FinCEN requires. It is neither arbitrary nor capricious to require such reporting, because any entity involved in the global transmission of funds—whether denominated in dollars or virtual currency—risks facilitating illegal transactions.

Nor is there anything arbitrary or capricious about the Regulation's minimum capital requirements. *See* 23 NYCRR § 200.8. Financial services companies regulated by DFS generally have to meet minimum standards to obtain a license. For example, licensed lenders need liquid assets of $50,000 and a line of credit of at least $100,000. *Id.* § 401.1(b)(1), (3). Similarly, money transmitters are required to maintain a surety bond of at least $500,000, which can be

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

increased to "such principal amount as the superintendent shall have determined." *Id.* § 406.13; *see also id.* § 400.1(c)(6)(iv), (v) (check cashers must have a $100,000 line of credit and $10,000 in cash at each location). These are commonly applied, basic consumer protection requirements.

Chino also misconstrues the minimum capital requirements under Section 200.8, alleging the Regulation arbitrarily "impose[s] blanket capital requirements on *all* actors subject to the Regulation." Am. Pet'n ¶ 118. Contrary to Chino's argument, rather than imposing a uniform, "one-size-fits-all" capital requirement, the Regulation takes a flexible approach by requiring the licensee to maintain "capital in an amount and form as the superintendent determines is sufficient to ensure the financial integrity of the Licensee and its ongoing operations *based on an assessment of the specific risks applicable to each Licensee.*" 3 NYCRR § 200.8(a) (emphasis added). In determining the amount and form of sufficient capital for each licensee, the Regulation provides a non-exhaustive list of nine factors for DFS's Superintendent to consider, including the composition of the licensee's total assets, the anticipated volume of the licensee's virtual currency business activity, the types of entities to be serviced, and the products or services to be offered by the licensee. *See id.* § 200.8(a)(1), (3), (8), (9). The Regulation is plainly designed to ensure that the minimum capital requirement is rationally based on and calibrated to reflect the virtual currency business activity in which a particular licensee engages, as DFS determines in each case when it processes a license application.

In his efforts to brand the Regulation as arbitrary and capricious, Chino also ignores DFS's authority under Section 200.4(c) to issue conditional licenses to entities that do not meet the full requirements of the Regulation. Similar to the factors provided under Section 200.8 for evaluating a licensee's capital requirements, the Superintendent's discretion to grant a conditional license is informed by eight factors, including "the nature and scope of the

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

applicant's or Licensee's business," "the anticipated volume of business to be transacted by the applicant or Licensee," "the measures which the applicant or Licensee has taken to limit or mitigate the risks its business presents," and "the applicant's or Licensee's financial services or other business experience." *Id.* § 200.4(c)(7)(i), (ii), (iv), (vii). This provision of the Regulation, like the other provisions discussed above, shows the lengths to which DFS went to adopt a set of rational, narrowly tailored rules to govern virtual currency business activity.

Consistent with the mandate imposed under the Financial Services Law, DFS applied existing regulatory concepts to virtual currency business activity to ensure that consumers and the financial system are protected. In the field of financial services, new products are routinely developed and DFS was created precisely to keep pace with new developments. And here, DFS acted fully in keeping with the authority delegated to it under the Financial Services Law in adopting the Regulation.

In sum, the Regulation is reasonable, appropriately focused, and rationally based to attain DFS's legislatively mandated purpose of ensuring the safety and soundness of the financial services and products offered to New Yorkers. Chino's arguments to the contrary are meritless.

IV. The Regulation is Not Preempted by Federal Law.

Chino argues that the Regulation is preempted by the Dodd-Frank Act on three grounds. *See* Am. Pet'n ¶¶ 122–28. First, Chino argues that Dodd-Frank "defines 'financial service or product' in eleven carefully constructed subparagraphs," so it is "sufficiently comprehensive to reasonably infer that Congress left no room for supplementary state regulation." *Id.* ¶¶ 124–25. Second, Chino points to a federal preemption provision of Dodd-Frank, which provides that a state consumer financial law is preempted if that law is otherwise "preempted by a provision of Federal law," to argue that the Regulation is preempted here. *Id.* ¶ 126. And third, Chino asserts that Congress' objectives in enacting Dodd-Frank "was to implement and enforce Federal

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

consumer financial law consistent to ensure that *all consumers* have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." *Id.* ¶ 127 (citing 12 U.S.C. § 5511(a)). Because "the term 'all consumers' establishes a purpose of uniformity in markets for consumer financial products and services," Chino reasons, "New York does not have the authority to define for themselves a term with the history of substantial federal regulation." *Id.*

But this faulty line of reasoning relies on a misreading of Dodd-Frank, which was enacted to *preserve* consumer protection laws, not preempt them. And Dodd-Frank does so explicitly, providing that nothing in its provisions shall exempt a person from complying with state law. *See* 12 U.S.C. § 5551(a). Moreover, laws are considered consistent with Dodd-Frank, and thus are not preempted, if they afford consumers greater protection than otherwise provided under Dodd-Frank. *Id.* For this reason, Congress expressly provided that no part of Dodd-Frank "shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the application of a law in effect in any State with respect to such Federal law." 12 U.S.C. § 5551(b).

It is true that a federal statute may "implicitly override[]state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively … or when state law is in actual conflict with federal law." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (citing *English v. General Elec. Co.,* 496 U.S. 72, 78–79 (1990)). And "implied conflict pre-emption" does exist "where it is 'impossible for a private party to comply with both state and federal requirements,'" *id.* (quoting *English*, 496 U.S. at 79), or "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *id*. (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)). But there is a strong presumption

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

against preemption in areas where states have historically exercised their police powers—such as here, in the area of consumer protection. *N.Y. SMSA LTD P'Ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010); *In re Grand Theft Auto Video Game Consumer Litigation*, 251 F.R.D. 139, 150 (S.D.N.Y. 2008).

Nothing in the provisions of Dodd-Frank evinces a Congressional intent to preempt state consumer protection laws. The CFPB itself has recognized that Dodd-Frank "did not supplant the states' historic role in protecting consumers in the financial marketplace." Brief for the CFPB as Amici Curiae Supporting Defendants-Appellees, *The Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105 (2d Cir. 2014) (No. 13-3769-CV) [hereinafter *CFPB Amicus Brief*]; *see also The Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105 (2d Cir. 2014) (upholding DFS's authority to regulate payday lending by certain Indian tribes to New York residents). In supporting continued state authority in protecting consumers, the CFPB explicitly rejected the notion that Congress intended the CFPB to be the sole voice in consumer protection. Rather, as the CFPB itself has urged, Congress "expressly preserved states' authority to enact and enforce laws that provide consumers greater protections." *CFPB Amicus Brief* at 4 (citing 12 U.S.C. § 5551(a)). Dodd-Frank therefore does not reflect a general interest in "uniform regulation" and does not preempt the Regulation. *Id.* at 8.

Relying on Section 5481(15) of the Dodd-Frank Act, Chino claims that the CFPB is the sole arbiter of what constitutes a financial product or service. So, as Chino reads it, the CFPB's definition of a financial product or service is controlling in all contexts—and thus preempts any state law aimed at regulating a financial product or service. But Chino's reliance on Section

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

5841(15) is misplaced. The provision merely sets forth the CFPB's authority to identify the financial products and services that it—*the CFPB*—may regulate.[15]

Chino nevertheless maintains that Dodd-Frank preempts *all* state consumer financial laws (barring a few exceptions not relevant here). *See* Am. Pet'n ¶ 126. But nothing in Dodd-Frank's text or legislative history supports this view. Indeed, the only way to draw such a mistaken impression of Dodd-Frank's federal preemption standards is to ignore the plain, unambiguous language of the statute. Because under Dodd Frank's federal preemption clause (12 U.S.C. § 25b(b)(1)(c))—expressly titled "State law preemption standards for national banks and subsidiaries clarified"—the only state laws that are subject to preemption are those that apply to national banks and their subsidiaries.[16] As neither of Chino's entities is a national bank or affiliated with any national bank in any way, this provision has no bearing on this case at all.

For these reasons, Chino's preemption argument is without merit and should be rejected.

V. The Regulation's disclosure requirements do not violate Chino's First Amendment rights.[17]

Chino argues that the Regulation violates the First Amendment by requiring licensees to

[15] In fact, the CFPB has partnered with states, including with DFS, to protect consumers by bringing enforcement actions to halt harmful conduct that violates both state and federal law. *See, e.g.,* Complaint at 2–3, *Consumer Fin. Prot. Bureau v. Pension Funding, LLC,* No. 8:15-cv-1329 (C.D. Cal. Aug. 20, 2015); CFPB Amicus Brief at 4.

[16] Notably, Sections 1044(a) and 1045 of the Dodd-Frank Act were enacted in response to the Supreme Court's decision in *Watters v. Wachovia*, 550 U.S. 1 (2007), which upheld a broad interpretation of the OCC's authority to preempt state law. Finding that the courts and the OCC had taken preemption too far, Congress imposed certain restrictions in Dodd-Frank, including a provision that state consumer financial protection laws are only preempted as applied to a national bank if they are discriminatory against a national bank, significantly interfere with the national bank's exercise of a permitted power, or are expressly preempted by federal law. *See Gordon v. Kohl's Dep't Stores*, 172 F.Supp.3d 840, 863, n.10 (E.D. Pa. 2016).

[17] Chino also brings his commercial-speech claims under the New York Constitution on the grounds that it affords "stronger" protection than the U.S. Constitution. Am. Pet'n ¶ 131. This is mistaken. New York courts have, at times, interpreted the protections afforded under the New York Constitution's free speech clause more expansively than those afforded under the First Amendment, but "the New York Court of Appeals has not articulated a stricter standard for regulation of commercial speech than that imposed by the federal Constitution." *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 112 (2d Cir. 2010). Consequently, Chino's commercial speech claims fail under the New York Constitution for the same reasons they fail under the First Amendment.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

disclose certain information to its customers. *See* Am. Pet'n ¶ 14. These challenged disclosure requirements are governed by Section 200.19 of the Regulation, which sets forth a non-exhaustive list of disclosures a licensee must make to its customers. Chino claims that some of these disclosure requirements are unconstitutional. *See id.* ¶ 132. But the government may require a commercial speaker to disclose factual information about its product or service so long as the mandated disclosure is reasonably related to the government's interests. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). And every disclosure required under the Regulation is factual, accurate, and objectively verifiable. Because these disclosures serve New York's significant interest in educating and protecting consumers of financial products and services, Chino has no First Amendment right not to disclose this information to his customers. *See, e.g.*, *Zauderer*, 471 U.S. at 651 (observing that the plaintiff's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal"); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113–14 (2d Cir. 2001) ("Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal."). The Court should therefore dismiss his First Amendment claim.

CONCLUSION

For the reasons set forth in this memorandum, DFS respectfully submits that the petition should be denied and that the cross-motion to dismiss the petition should be granted in its entirety, along with any other relief the Court deems just and proper.

FILED: NEW YORK COUNTY CLERK 08/15/2017 01:30 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 17 RECEIVED NYSCEF: 08/15/2017

Dated: New York, New York
June 23, 2017

Respectfully submitted,

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Attorney for Defendants-Respondents
By:

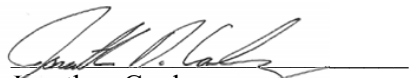

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Exhibit A to Conley Affirmation -
Amended Verified Complaint and Article 78 Petition,
dated May 25, 2017
(Reproduced Herein at pages 25 to 62)

**Memorandum of Law by Plaintiffs-Petitioners
in Opposition to Cross-Motion to Dismiss, dated July 14, 2017
[pp. 191 - 240]**

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

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

THEO CHINO and CHINO LTD,

Plaintiffs-Petitioners,

-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.

Index No. 101880/2015
Hon. Lucy Billings

ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'-RESPONDENTS' CROSS-MOTION TO DISMISS THE AMENDED VERIFIED COMPLAINT AND ARTICLE 78 PETITION

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FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

TABLE OF CONTENTS

Page

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

TABLE OF AUTHORITIES

FEDERAL STATUTES

STATE STATUTES

STATE RULES

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

CASES

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

OTHER AUTHORITIES

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

INTRODUCTION

Plaintiffs-Petitioners Theo Chino ("Chino") and Chino LTD (collectively "Petitioners"), by and through their attorney, respectfully submits this memorandum of law in opposition to the cross-motion to dismiss submitted by the Defendants-Respondents, the New York State Department of Financial Services (the "Department"), and Maria T. Vullo, in her official capacity as the Superintendent of the Department (collectively the "Respondents"). For the reasons set forth below, Respondents' cross-motion to dismiss should be denied. In the alternative, Petitioners respectfully requests leave to amend their pleadings should the Court find any of their pleadings in any way deficient.

STATEMENT OF FACTS

Petitioners challenge the "virtual currency" regulation promulgated by the Department at Part 200 of Chapter 1 of Title 23 of the New York Codes, Rules and Regulations (cited as "NYCRR") (the "Regulation").

In November 2013, Chino incorporated Chino LTD in Delaware and in February 2014, Chino submitted an application for authority to conduct business in the state of New York under § 1304 of the Business Corporation Law as a foreign business corporation. Affidavit of Theo Chino in Support of Plaintiffs'-Petitioners' Opposition to Defendants'-Respondents' Cross-Motion to Dismiss ("Chino Aff.") ¶¶ 2-3. The original purpose of Chino LTD was to install Bitcoin processing services in the State of New York. Chino Aff. ¶ 3.

In 2013, the year Chino LTD was incorporated, it suffered losses of only $4,367. Chino Aff. ¶ 17. The losses were due to the cost of purchasing computer equipment to test how to protect Bitcoin and figure out how to monetize it. Chino Aff. ¶ 17.

In December 2014, Chino co-founded Conglomerate Business Consultants, Inc. (CBC).

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

Chino Aff. ¶ 4. While CBC was a distributor of the Bitcoin processing service (and other services) directly to bodegas, Chino LTD provided the actual Bitcoin processing. Chino Aff. ¶ 8. Chino LTD provided all the research and development for Bitcoin processing, bought all of the computers to run the backend of processing Bitcoin, rented all of the hosting equipment to run the front end of processing Bitcoin, and developed custom operating systems to run the Bitcoin processing. Chino Aff. ¶ 9.

In 2014, Chino LTD suffered losses of $59,667. Chino Aff. ¶ 18. The losses were mainly due to the cost of computer hardware required to run the Bitcoin warehousing, the cost of renting computer time on the cloud, and marketing the service to bodegas. Chino Aff. ¶ 18.

Between December 2014 and May 2015, CBC entered into formal contracts with seven bodegas in New York to offer Bitcoin-processing services. Chino Aff. ¶ 5. The service would allow customers to pay for things like a gallon of milk in Bitcoin instead of with fiat money or a credit card. Chino Aff. ¶ 5.

In August 2015, following the enactment of the Regulation, Chino submitted an application on behalf of Chino LTD for a license to engage in "virtual currency business activity" as required under the Regulation. Chino Aff. ¶ 11. While his application was pending, Chino commenced this action in October 2015 because he realized the Regulation would require significant costs to run his business. Chino Aff. ¶ 12.

In 2015, the year Chino LTD submitted an application for a license to engage in "virtual currency business activity," Chino LTD suffered losses of $30,588. Chino Aff. ¶ 19.The losses were due to the cost of the utilities to process Bitcoin (computer time on the internet cloud), the interest on the borrowed capital required to purchase the equipment the previous year, the cost associated with supporting CBC (who entered into the agreements with bodegas), and the cost of

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

litigation. Chino Aff. ¶ 19.

While Chino's application was pending, in January 2016, one consumer at Rehana's Wholesale made a purchase using Bitcoin which was processed by Chino LTD. Chino Aff. ¶ 13.

After filing suit, in January 2016, Chino's application was returned without further processing after the Department performed an initial review. Chino Aff. ¶ 14. In its response, the Department stated they were unable to evaluate whether Petitioners' current or planned business activity would be considered "virtual currency business activity" that requires licensing under the Regulation. Chino Aff. ¶ 14. Following the response, Chino was forced to abandon his Bitcoin processing business because his application was not approved. Chino Aff. ¶ 15. Chino did not challenge the Department's response because he had already commenced this action, and because he concluded that, since this action could invalidate the Regulation, it was futile for him to continue the application process at this stage. Chino Aff. ¶ 16.

In 2016, even though Chino LTD could no longer offer Bitcoin services because it did not receive a license, Chino LTD remained an active "S Corporation" and suffered losses of $53,053. Chino Aff. ¶ 20. The losses were due to the utilities for keeping the equipment to process Bitcoin in the event of a successful litigation, the interest on the borrowed capital from the previous three years, and the cost of the litigation. Chino Aff. ¶ 20.

The 2016 tax returns for Chino LTD, together with the 2013 to 2015 tax returns for Chino LTD, confirm that Chino expended finances to run Chino LTD. But for the Regulation, Chino would have been able to continue his business and generate income to reimburse his expenses. However the Regulation prevented Chino from generating business activity and income to pay down his investments and Chino LTD's losses have continued since 2015. Therefore, the business losses of Chino LTD for 2015 and 2016 are a direct consequence of the impact of the

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

Regulation. Chino Aff. ¶ 21.

In May 2017, Petitioners filed an amended verified complaint and Article 78 petition. Respondents filled a cross-motion to dismiss this filing on both procedural and substantive grounds. Contrary to Respondents' assertion, this filing is not deficient because Petitioners have standing to challenge the Regulation and they sufficiently demonstrated that they suffered an injury-in-fact.

Furthermore, the Department acted beyond the scope of its authority because the Department is only authorized to regulate "financial products and services." Because Bitcoin and other "virtual currencies" lack the characteristic of a financial product or service, the Department is not authorized to regulate them in the absence of an explicit legislative authorization. The Department is not entitled to administrative deference because the Regulation governs activities that exceed the scope of the Department's authority. The Regulation is preempted by federal law and the Department does not have the authority to imply additional terms. The Regulation is arbitrary and capricious because: (1) the scope of the Regulation is irrationally broad, (2) the Regulation's recordkeeping requirements are without sound basis in reason, (3) the Regulation irrationally treats "virtual currency" transmitters differently than fiat currency transmitters, and (4) there is no rational basis underlying a one-size-fits all Regulation that unreasonably prevents startups and small businesses from participating in "virtual currency business activity," and imposes capital requirements on *all* licensees. Further, the Regulation's disclosure requirements violate Chino's First Amendment rights.

ARGUMENT

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

I. PETITIONERS HAVE STANDING TO CHALLENGE THE DEPARTMENT'S REGULATION

Generally, on a motion to dismiss, "the court must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory'" *Bishop v. Maurer*, 33 A.D.3d 497, 498 (1st Dep't 2006).

Respondents have not submitted any documentary evidence to contradict the facts submitted in Petitioners' complaint, therefore the court must accept the facts alleged, including the facts as to standing, as true, and accord Petitioners the benefit of every possible favorable inference. Under this standard, the court should not dismiss this matter on standing grounds since Petitioners have alleged sufficient facts to establish standing.

New York courts have established a two-prong test for evaluating a petitioner's standing to challenge a governmental agency's actions. *See e.g. N.Y. State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004); *Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 9 (1975). Under this test, a petitioner need only show: (1) that there is "injury in fact," meaning that petitioner will actually be harmed by the administrative action; and (2) that the interest the petitioner asserts falls "within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." *Novello*, 2 N.Y.3d at 211; *Dairylea*, 38 N.Y.2d at 9. The purpose of a standing analysis is to determine whether a party should have access to the court system. *See Soc'y of Plastics Indus. v. Cty. of Suffolk*, 77 N.Y.2d 761, 769, 794 (1991). Its purpose is not to assess the merits of a party's claim. *See Id.*

Courts have relaxed their standing analyses in light of the increasingly pervasive role that administrative agencies play in impacting the daily lives of citizens. *See Dairylea*, 38 N.Y.2d at 10 (noting that "[t]he increasing pervasiveness of administrative influence on daily life…

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

necessitates a concomitant broadening of the category of persons entitled to judicial determination"); *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 69 N.Y.2d 406, 413 (1987) (recognizing that standing principles "should not be heavy handed"). "A fundamental tenant of our system of remedies is that when a government agency seeks to act in a manner adversely affecting a party, judicial review of that action may be had." *Dairylea*, 38 N.Y.2d at 10. Petitioners have largely satisfied their burden under this test.

A. Petitioners sufficiently demonstrated that they suffered an injury-in-fact

Under this prong, a petitioner must demonstrate that he has an "actual legal stake in the matter," in other words, that he has "suffered an injury in fact, distinct from that of the general public." *Novello*, 2 N.Y.3d at 211-12; *Transactive Corp. v. N.Y. State Dep't of Soc. Servs.*, 92 N.Y.2d 579, 587 (1998). A petitioner need not prove actual, present harm. *Police Benevolent Assn. of N.Y. State Troopers, Inc. v. Div. of N.Y. State Police*, 29 A.D.3d 68, 70 (3rd Dep't 2006). Rather, a petitioner need only demonstrate that "it is reasonably certain that the harm will occur if the challenged action is permitted to continue." *Id.* Moreover, a petitioner is not required to describe his injury "with specific quantification." *N.Y. Propane Gas Ass'n v. N.Y. State Dep't of State*, 17 A.D.3d 915, 916 (3rd Dep't 2005). Here, Petitioners have sufficiently alleged that they have been irreparably harmed by the Regulation because it effectively forced Chino to close his Bitcoin processing business, Chino LTD. Chino Aff. ¶¶ 15-19.

i. Before the Regulation was adopted, Chino developed and implemented a Bitcoin processing business, Chino LTD, in New York

Before the Regulation was implemented, Bitcoin-based business activity was unregulated and, accordingly, its minimal participation costs attracted startup developers like Chino. In November 2013, Petitioner incorporated his business, Chino LTD, with the purpose of installing Bitcoin processing services in New York. Chino Aff. ¶¶ 2-3. In December 2014, Chino co-

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

funded Conglomerate Business Consultants, Inc. ("CBC"). Chino Aff. ¶ 4. Between December 2014 and May 2015, CBC entered into formal contracts with seven bodegas in New York to offer Bitcoin-processing services. The service would allow customers to pay for things like a gallon of milk in Bitcoin instead of with fiat money or a credit card. Chino Aff. ¶ 5. While CBC was a distributor of Bitcoin processing services (and other services) directly to bodegas, Chino LTD provided the actual Bitcoin processing. Chino Aff. ¶ 6. Chino LTD provided all the research and development for Bitcoin processing, bought all of the computers to run the backend of processing Bitcoin, rented all of the hosting equipment to run the front end of processing Bitcoin, and developed custom operating systems to run the Bitcoin processing. Chino Aff. ¶ 7.

The bodegas that entered into formal contracts with CBC were given signage to display that they accepted Bitcoin. Chino Aff. ¶ 6. Also, every day, Chino LTD would provide the bodegas the daily exchange rate that would be used for the Bitcoin processing services. Chino Aff. ¶ 7. In January 2016, one consumer at a bodega named Rehana's Wholesale made a purchase using Bitcoin which was processed by Chino LTD. Chino Aff. ¶ 13.

In 2013, the year Chino LTD was incorporated, it suffered losses of only $4,367. Chino Aff. ¶ 17. The losses were due to the cost of purchasing computer equipment to test how to protect Bitcoin and figure out how to monetize it. Chino Aff. ¶ 17. In 2014, Chino LTD suffered losses of $59,667. Chino Aff. ¶ 18. The losses were mainly due to the cost of computer hardware required to run the Bitcoin warehousing, the cost of renting computer time on the cloud, and marketing the service to bodegas. Chino Aff. ¶ 18. In 2015, the year Chino LTD submitted an application for a license to engage in "virtual currency business activity," Chino LTD suffered losses of $30,588. Chino Aff. ¶ 19. The losses were due to the cost of the utilities to process Bitcoin (computer time on the internet cloud), the interest on the borrowed capital required to

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

purchase the equipment the previous year, the cost associated with supporting CBC (who entered into the agreements with bodegas), and the cost of litigation. Chino Aff. ¶ 19.

Thus, Petitioners have established that they clearly developed and implemented a Bitcoin processing business in New York.

ii. Petitioners were required to obtain a license in order to operate their Bitcoin processing business

Petitioners' Bitcoin processing business certainly falls within the "virtual currency business activity" regulated by 23 NYCRR Part 200. The Regulation requires those engaged in "virtual currency business activity" that involves New York or New York residents to obtain a license. 23 NYCRR §§ 200.2(q), 200.3(a). Chino is a New York resident who conducted business in New York with New York residents thus the Regulation applied to Chino and Chino LTD. Furthermore, Petitioners, as a Bitcoin processor performing Bitcoin-based exchange services, are engaged in "virtual currency business activity" as defined in 23 NYCRR § 200.2(q). *See* 23 NYCRR §§ 200.2(p)-(q). Thus, the Regulation applies to Petitioners, and in order to continue offering Bitcoin processing services, Petitioners would be required to obtain a license. Chino Aff, ¶ 11.

iii. The Regulation is the proximate cause of Chino halting his Bitcoin processing business activities.

As required under 23 NYCRR § 200.21, Chino, on behalf of Chino LTD, submitted an application for a license in August 2015 to engage in "virtual currency business activity," as defined in 23 NYCRR § 200.2(q). Chino Aff. ¶ 11. While his application was pending, realizing the significant expenses he would be required to incur beyond his means to comply with the burdensome compliance costs under the Regulation, Chino initiated this lawsuit on October 16, 2015, one week before the expiration of the deadline to challenge the Regulation. Chino Aff. ¶

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

12.

On January 4, 2016, the Department returned Chino LTD's application without further processing after the Department performed an initial review. Chino Aff. ¶14. The Department stated they were unable to evaluate whether Chino LTD's current or planned business activity would be considered "virtual currency business activity" that requires licensing under the Regulation. Chino Aff. ¶ 14. On January 24, 2016, CBC stopped offering Bitcoin processing services when the Department did not approve Chino LTD's application. Chino Aff. ¶ 15. Contrary to Respondents assertions, Chino did not voluntarily shutdown Chino LTD. Chino LTD would have been operating illegally had it continued its Bitcoin processing services without a license and Petitioners would have been required to incur expenses beyond their means, such as hiring a Compliance Officer and Chief Information Security Officer. Chino Aff. ¶ 12; 23 NYCRR §§ 200.7(b), 200.16(c). Also contrary to Respondents assertions, the Department's response does not equate to meaning Petitioners might have been able to continue operation. As established above, Petitioners' activities certainly fall under "virtual currency business activity" requiring a license, because Petitioner knew, based on his technical expertise of his business, that he was storing, holding, and maintaining custody and control of bitcoins on behalf of third-parties, the bodegas. Chino Aff. ¶ 11. Chino Aff. ¶ 22.

In 2016, even though Chino LTD could no longer offer Bitcoin services because it did not receive a license, Chino LTD remained an active S-Corporation and suffered losses of $53,053. Chino Aff. ¶ 20. The losses were due to the maintenance of the equipment to process Bitcoin in the event of a successful litigation, the interest on the borrowed capital from the previous three years, and the cost of the litigation. Chino Aff. ¶ 20.

Petitioners have sufficiently alleged that the Regulation caused particularized and

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

immediate economic harm. Therefore, Petitioners have established injury-in-fact to challenge an administrative action.

B. Petitioners have standing to obtain the declaratory relief they seek

New York courts may grant declaratory relief if a "justiciable controversy" exists. CPLR § 3001. A justiciable controversy exists when there is an actual controversy between adversarial parties who have a stake in the outcome. *Doe v. Coughlin*, 71 N.Y.2d 48, 52 (1987); *Long Is. Light Co. v. Allianz Underwriters Ins. Co.*, 35 A.D.3d 253, 253 (1st Dep't 2006); *United Water New Rochelle, Inc. v. City of N.Y.*, 275 A.D.2d 464, 466 (2nd Dep't 2000). Declaratory relief is appropriate when the challenged regulation proscribes or threatens, or may be interpreted as proscribing or threatening the petitioner's activity. *See Plaza Health Clubs, Inc. v. New York*, 76 A.D.2d 509, 513-14 (1st Dep't 1980). Furthermore, reasonably certain future harm is sufficient to establish standing. *See Police Benevolent Ass'n*, 29 A.D.3d at 70 (finding that petitioners had standing to seek declaratory relief where their harm was not actual or present, but was reasonably certain to occur under the challenged action).

Here, a genuine controversy between adversarial parties who have an interest in the outcome exists. Thus, Petitioners have standing to seek declaratory relief. Petitioners, by taking steps to comply with the Regulation and by filing suit upon realizing that the compliance costs of the Regulation would be exorbitant, recognized that the business they engaged in would effectively be proscribed by the Regulation.

Before the Regulation was enacted, as established above, Petitioners engaged in Bitcoin processing services in New York. As a result of the Regulation, Petitioners are now effectively barred from continuing their business without obtaining a license. Therefore, an actual controversy regarding the legal basis of the Regulation exists, and Petitioners have a genuine stake in the outcome. Therefore, Petitioners have standing to seek declaratory relief.

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

II. THE DEPARTMENT ACTED BEYOND THE SCOPE OF ITS AUTHORITY AND VIOLATED THE SEPARATION OF POWERS DOCTRINE

The New York Legislature has authorized the Department to regulate financial products and services. Nevertheless, the Department has promulgated a Regulation that monitors and controls activities beyond the legislative authority prescribed in the relevant statute.

A. The Department is only authorized to regulate *financial* products and services as defined by proper statutory authority

A delegated agency may *only* adopt regulations that are consistent with its enabling legislation and its underlying purposes. *See Greater N.Y. Taxi Assn. v. N.Y.C. Taxi & Limousine Commn.*, 25 N.Y.3d 600, 608 (2015) (emphasis added). The Department cites eight sections of New York Financial Services Law, which it says authorized it to adopt the Regulation. *See* 23 NYCRR § 200 Notes. However, these statutes only authorize the Department to regulate *financial* products and services as they existed before the promulgation of the 2011 statute authorizing the creation of the Department, and specifically empower the Superintendent to promulgate only those "rules and regulations . . . involving *financial* products and services." N.Y. Fin. Serv. Law (cited as "FSL") §§ 201(a), 302(a); Eckmier Aff. ¶¶ 6-7, 11, 48 (emphasis added).

If the terms of a statute are clear and unambiguous, "the court should construe [them] so as to give effect to the plain meaning of the words used." *Orens v. Novello*, 99 N.Y.2d 180, 185 (2002) (quoting *Auerbach v. Bd. of Educ.*, 86 N.Y.2d 198, 204 (1995)). Financial Services Law defines "financial product or financial service" circularly to mean, subject to a few exceptions, "any financial product or financial service offered or provided by any person regulated or required to be regulated by the superintendent . . . or any financial product or service offered or sold to consumers." FSL § 104(a)(2)(A). Thus, because "financial products and services" is not further defined, it is appropriate to give effect to its plain meaning.

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

A financial product is characterized by its connection with the way in which one manages and uses money. Affirmation of Pierre Ciric in Support of Plaintiffs'-Petitioners' Opposition to Defendants'-Respondents' Cross-Motion to Dismiss ("Ciric Aff.") ¶ 11. Examples of financial products include mortgage loans and car insurance policies. Ciric Aff. ¶ 11. Financial services are facilities "relating to money and investments." Ciric Aff. ¶ 12. Financial service providers essentially "help channel cash from savers to borrowers and redistribute risk." Ciric Aff. ¶ 12. Banks that administer payments systems, for example, are financial service providers. Ciric Aff. ¶ 12.

Because financial products and services rely on the use and transfer of money, the general purpose of financial regulation is "to protect borrowers and investors that participate in financial markets and mitigate financial instability." Ciric Aff. ¶ 13. It therefore follows that the "financial products and services" the Department is authorized to regulate are those products and services that involve the use, management, and movement of money. This is why, as Respondents claim, the Department is able to regulate online banking, since is involves the use, management, and movement of money. It however, does not allow for the regulation of Bitcoin and other virtual currencies, which are not characterized as financial products.

B. Bitcoin does not have the attributes of financial products

Bitcoin was collaboratively developed by an independent community of Internet programmers without any financial backing from any government. Ciric Aff. ¶ 14. Bitcoin is the result of transparent mathematical formulas, which lack the attributes of traditional financial products or transactions. Ciric Aff. ¶ 15. Bitcoin consists of four different components: (1) a decentralized peer-to peer network (the bitcoin protocol), (2) a public transaction ledger (the blockchain), (3) a decentralized mathematical algorithm, and (4) a decentralized verification system (transaction script). Ciric Aff. ¶ 16. Bitcoins are created through the computation of a

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

mathematical algorithm through a process called "mining," which involves competing to find solutions to a mathematical problem while processing bitcoin transactions. Ciric Aff. ¶ 17. Anyone in the bitcoin network may operate as a "miner" by using their computer to verify and record transactions. Ciric Aff. ¶ 17. The bitcoin protocol includes built-in algorithms that regulate this mining function across the network. Ciric Aff. ¶ 18. The protocol limits the total number of bitcoins that will be created. Ciric Aff. ¶ 18. Once bitcoins are created, they are used for bartering transactions using the blockchain technology. Ciric Aff. ¶ 19. This technology relies on data "blocks," which are "a group of transactions, marked with a timestamp, and a fingerprint of the previous block." Ciric Aff. ¶ 19. A blockchain is "[a] list of validated block, each linking to its predecessor all the way to the genesis block." Ciric Aff. ¶ 19. The genesis block is "[t]he first block in the blockchain, used to initialize the cryptocurrency, and the universe of bitcoin transactions in capped at 21 million. Ciric Aff. ¶ 19. Therefore, Bitcoin is the result of transparent mathematical formulas, which lack the attributes of traditional financial products or transactions.

Bitcoin is a primary target of the Regulation. *See* Eckmier Aff. ¶ 62 (noting that the Regulation was proposed to address "firms dealing in virtual currency, including Bitcoin"). However, many states and courts have taken the position that Bitcoin is not money.

Kansas and Texas have taken the position that Bitcoin is not money and have issued memoranda stating this position. Ciric Aff. ¶ 20. California has tried twice to use the legislative process to a pass a bill regulating virtual currency, however, both times the bill has been withdrawn. Ciric Aff. ¶ 21. New Hampshire House of Representatives passed a bill which seeks to exempt virtual currency users from having to register as money service businesses. Ciric Aff.

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

¶ 22. In Texas, a constitutional amended was proposed, which would protect the right to own and use digital currencies like Bitcoin in Texas. Ciric Aff. ¶ 23.

A Florida court recently ruled that Bitcoin is not money. *Florida v. Espinoza*, No. F14-2923 at 6 (Fla. 11th Cir. Ct. July 22, 2016) (concluding that "it is very clear, even to someone with limited knowledge in the area, that Bitcoin has a long way to go before it is the equivalent of money" most notably because it is not accepted by all merchants, the value fluctuates significantly, there is a lack of a stabilization mechanism, they have limited ability to act as a store of value, and Bitcoin is a decentralized system.).

In the bankruptcy proceeding, *Hashfast Technologies, LLC v. Lowe*, Adv. Proc. No. 15-03011 (Bankr. N.D. Ca. filed February 17, 2015), the judge stated, "The court does not need to decide whether bitcoin are currency or commodities for purposes of the fraudulent transfer provisions of the bankruptcy code. Rather, it is sufficient to determine that, despite defendant's arguments to the contrary, *bitcoin are not United States dollars*" (emphasis added).

In the case *United States v. Petix*, 2016 U.S. Dist. LEXIS 165955 (W.D.N.Y., Dec. 1, 2016, No. 15-CR-227A) , Magistrate Judge Scott, in his Report and Recommendation dated December 1, 2016, gave a detailed analysis concluding that Bitcoin is not money or funds under 18 U.S.C. § 1960, a federal statute prohibiting unlicensed money transmitting businesses. Magistrate Judge Scott noted that money and funds must involve a sovereign: "'[m]oney,' in its common use, is some kind of financial instrument or medium of exchange that is assessed value, made uniform, regulated, and protected by sovereign power." (Citation omitted). "Bitcoin is not 'money' as people ordinary understand the term." "Like marbles, Beanie Babies™, or Pokémon™ trading cards, bitcoins have value exclusively to the extent that people at any given time choose privately to assign them value. No governmental mechanisms assist with valuation

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

or price stabilization, which likely explains why Bitcoin value fluctuates much more than that of the typical government-backed fiat currency." *United States v. Petix*, 2016 U.S. Dist. LEXIS 165955 (W.D.N.Y., Dec. 1, 2016, No. 15-CR-227A).

Accordingly, because Bitcoin is not money, and because currencies are representations of money, Bitcoin is not a true currency, and therefore cannot be analogized to a financial product as Respondents argue. Ciric Aff. ¶ 24; *see In re Coinflip, Inc.*, CFTC Docket No. 15-29 at 3 (Sept. 17, 2015). The Code of Federal Regulation defines "currency" as: "[t]he coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance." 31 CFR § 1010.100 (m). True currencies, unlike Bitcoin, "are designated legal tender, [that] circulate and are customarily used and accepted as a medium of exchange in the country of issuance." *In re Coinflip, Inc.*, CFTC Docket No. 15-29 at 3; Ciric Aff. ¶ 25. Accordingly, Bitcoin is not true currency because it is not legal tender in any jurisdiction.

Furthermore, Bitcoin lacks the properties commonly associated with money and true currencies. Unlike true currencies, Bitcoin is neither widely accepted as a medium of exchange nor a stable store of value. *See Espinoza*, No. F14-2923 at 5-6; Ciric Aff. ¶ 26. Additionally, unlike true currencies, Bitcoin is not issued by a government. Ciric Aff. ¶ 26. Because Bitcoin is not issued by a government, no entity is required to accept it as payment. Ciric Aff. ¶ 27. Moreover, while currencies are generally secured by a commodity or a government's ability to tax and defend, Bitcoin is not safeguarded by either. Ciric Aff. ¶ 28; *see Espinoza*, No. F14-2923 at 6. Thus, Bitcoin is not a true currency and therefore lacks the characteristic of financial products. Therefore, it is not subject to regulation by the Department.

Conversely, Bitcoin is akin to commodity-like mediums of exchange. This view is

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

consistent with the positions taken by the IRS and the Commodity Future Trading Commission (CFTC). Ciric Aff. ¶ 29; *In re Coinflip, Inc.*, CFTC Docket No. 15-29 at 3. The IRS has concluded that Bitcoin is property, not currency for tax purposes. Ciric Aff. ¶ 29. Likewise, the CFTC treats Bitcoin as commodities, not currencies. *See In re Coinflip, Inc.*, CFTC Docket No. 15-29. at 3.

As with traditional commodities, like crude oil and gold, the value of Bitcoin is highly volatile and dependent upon supply and demand. *See Espinoza*, No. F14-2923 at 5; Ciric Aff. ¶ 30. Furthermore, acquiring Bitcoin is analogous to acquiring other commodities. A person who wishes to obtain a commodity, like gold, for example, can either purchase gold on the market or can mine the gold himself. Similarly, a person who wishes to obtain bitcoins can either purchase them on the market or "mine" them himself through participation in Bitcoin's transaction verification process. *See* Stephen T. Middlebrook & Sarah Jane Hughes, *Regulating Cryptocurrencies in the United States: Current Issues and Future Directions*, 40 WM. MITCHELL L. REV. 813, 818 (2014). Moreover, like gold, bitcoins are a finite resource. Ciric Aff. ¶ 30.

Because Bitcoin is not a true currency, it therefore follows that not all Bitcoin-based businesses provide financial services. For example, a business that exchanges bitcoins for another type of cryptocurrency cannot be said to provide a financial service because the service does not involve a transmission of true currency. As would be the case if the business exchanged used books for other used books, such a service is analogous to a barter exchange service, not a financial service.

Bitcoin does not qualify as money or true currencies; therefore Bitcoin products are not financial products and Bitcoin services are not financial services. As a result, Bitcoin does not fall within the scope of the Department's regulatory authority. Thus, in promulgating the

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

Regulation to regulate "virtual currency business activity," the Department exceeded the scope of its enabling legislation.

C. The Department does not have the authority to add additional terms

"[A]n ambiguous term may be given more precise content by the neighboring words with which it is associated." *Bilski v. Kappos*, 130 S. Ct. 3218, 3226 (2010) (quoting *United States v. Stevens,* 130 S.Ct. 1577, 1587 (2010)). When a statute includes an explicit definition, then "[i]t is axiomatic that the statutory definition of the term excludes unstated meanings of the term." *Meese v. Keene*, 481 U.S. 465, 484-485 (1987); *see Burgess v. United States,* 553 U.S. 124, 130 (2008) ("When a statute includes an explicit definition, we must follow that definition" (internal quotation marks omitted)).

Further, "[i]t is well established that in exercising its rule-making authority an administrative agency cannot extend the meaning of the statutory language to apply to situations not intended to be embraced within the statute." *Trump-Equit. Fifth Ave. Co. v Gliedman*, 57 N.Y.2d 588, 595 (1982) (citing *Jones v Berman*, 37 N.Y.2d 42 (1975)). "Nor may an agency promulgate a rule out of harmony with or inconsistent with the plain meaning of the statutory language." *Id.* (citing *Finger Lakes Racing Ass'n. v N.Y. State Racing & Wagering Bd.*, 45 N.Y.2d 471 (1978); *Harbolic v Berger*, 43 N.Y.2d 102 (1977)).

Furthermore, under the "expressio unius est exclusio alterius" rule, "the failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended" *Matter of Brown v. N.Y. State Racing & Wagering Bd.,* 2009 NY Slip Op 204, ¶ 6, 60 A.D.3d 107, 116-17, 871 N.Y.S.2d 623, 630 (App. Div.); *Jewish Home & Infirmary v. Comm'r of N.Y. State Dep't of Health*, 84 N.Y.2d 252, 262, 616 N.Y.S.2d 458, 462, 640 N.E.2d 125, 129 (1994); *N.Y. City Council v. City of N.Y.*, 4 A.D.3d 85, 96, 770 N.Y.S.2d 346, 354 (App. Div. 2004) (citing McKinney's Cons Laws of NY, Book 1, Statutes §240, at 411-412, citing *Doyle v.*

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

Gordon, 158 N.Y.S.2d 248 (Sup. Ct. 1954)). If the New York Legislature wanted specific terms to be included in the definition of "financial product or service," it would have expressly referred to them in the FSL§ 104(a)(2)(A) definition. The terms virtual currency or Bitcoin are omitted from the definition of "financial product or service." *See* FSL§ 104(a)(2)(A). Therefore, under the "expressio unius est exclusio alterius" rule, the Legislature indicated that the exclusion was intended.

Furthermore, a "rule of construction is that the expression of one thing implies the exclusion of another." *Biggs v. Zoning Bd. of Appeals of the Town of Pierrepont, N.Y.*, 2016 NY Slip Op 26139, ¶ 2, 52 Misc. 3d 694, 698, 30 N.Y.S.3d 797, 800 (Sup. Ct. 2016). We can infer that the expression of exemptions in a statute indicates an exclusion of other exemptions. *Morales v. Cty. of Nassau*, 94 N.Y.2d 218, 224, 703 N.Y.S.2d 61, 64, 724 N.E.2d 756, 759 (1999). The definition of "financial product or service" makes reference to exclusions. *See* FSL §§ 104(a)(2)(B), 104(a)(2-a)(B). It was the intent of the New York Legislature to limit the scope of the definition of "financial product and service" because it created specific exceptions. Therefore, FSL § 104(a)(2) was not intended to be a catch-all provision. In fact, FSL § 104(a)(2)(B)'s exclusions infer that other "financial product or service" would be excluded from the definition as well. Therefore the New York Legislatures did not intend for Bitcoin to be specifically included in the scope of FSL § 104(a)(2).

Although New York Legislature has authorized the Department to regulate financial products and services, it did not offer any definition which included the concept of virtual currency. *See* FSL § 104(a)(2). Although there is split authority as to whether cryptocurrencies may have characteristics or attributes of money in a criminal context (*United States v. Murgio*, No. 15-cr-769 (AJN), 2016 U.S. Dist. LEXIS 131745 (S.D.N.Y. Sep. 19, 2016)), the absence of

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

any precise definition of "financial product or service" in the present case does not allow the Department to extend the scope of the definition, and include Bitcoin as a "financial product or service" in its Regulation. Therefore, FSL § 104(a)(2) cannot be construed as including "virtual currency" in the definition of "financial product or service". If the New York Legislature wanted to include "virtual currency" in the definition, it could have explicitly made reference to it in the definition. It is beyond the scope of the Department's authority to add the new term "virtual currency." Further, these statutes specifically empower the Superintendent to promulgate only those "rules and regulations… involving financial products and services." FSL §§ 201(a), 302(a); Eckmier Aff. ¶¶ 6-7, 11, 48. The Department cannot extend the meaning of "financial product and service" to Bitcoin. It is up to the New York Legislature to make the determination whether Bitcoin qualifies as a "financial product or service." The New York Legislature's silence does not give the Department the authority to define virtual currencies and regulate Bitcoin. The definition of Bitcoin is not clear because there are significant differences in the interpretation. *See* Ciric Aff. ¶ 31; *In re Coinflip, Inc.*, CFTC Docket No. 15-29 at 3. The Department does not have the authority to make its own assessment beyond the definition. *See Trump-Equit. Fifth Ave. Co.* 57 N.Y.2d at 595.

D. The Department is not entitled to administrative deference because the Regulation governs activities that exceed the scope of the Department's area of expertise

Though administrative agencies are given some degree of deference in adopting regulations, such deference is not absolute. *See N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166-67 (1991). Regulations must be "scrutinized for genuine reasonableness and rationality in [their] specific context[s]…" *Id.* at 166.

Administrative deference is premised on the notion that the agency has acted within its area of expertise. *See Flacke v. Onondaga Landfill Sys., Inc.*, 69 N.Y.2d 355, 363 (1987). Thus,

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

administrative deference is inappropriate when an agency has acted beyond its area of expertise. *See Bd. of Educ. of City Sch. Dist. v. N.Y. State Pub. Emp't Relations Bd.*, 75 N.Y.2d 660, 666 (1990) (recognizing that an agency "is accorded deference in matters falling within its area of expertise"); *Indus. Liaison Comm. v. Williams*, 72 N.Y.2d 137, 144 (1988) (noting that "the principle of deference should be applied only where such expertise is relevant").

The Department has expertise "in regulating and supervising *financial* products and services and their providers." Eckmier Aff. ¶ 6 (emphasis added). The Regulation, however, only exempts non-financial "virtual currency business activity" in one category of regulated activity. *See* 23 NYCRR § 200.2(q)(1) (only exempting non-financial receipt for transmission or transmission of "virtual currency" activity). Thus, the Regulation, extensively governs activities related to "virtual currency," regardless of whether such activities are related to financial products or services. Accordingly, the Department should not be afforded administrative deference.

Administrative deference is inappropriate where an agency has acted arbitrarily and capriciously. *See Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974) (recognizing that court interference is appropriate where "the action complained of is arbitrary and capricious") (citation omitted). As demonstrated below, the Department acted arbitrarily and capriciously when it promulgated a blanket Regulation that governs a wide variety of non-financial activities, effectively allows only well-funded companies to engage in "virtual currency"-related business activity, and subjects virtual currency businesses to requirements that are inconsistent with the Department's fiat currency regulations. Thus, the Department is not entitled to administrative deference.

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

E. Respondents incorrectly rely on *Boreali*

Respondents incorrectly rely on *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987) to support their position. In *Boreali*, the court relied on four factors to determine whether an agency acted beyond the bounds of its delegated authority and engaged in impermissible legislative policymaking: (1) whether the agency did more than balance costs and benefits according to preexisting guidelines, but instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems; (2) whether the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) whether the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) whether the agency used special expertise or competence in the field to develop the challenged regulation. *Matter of NYC C.L.A.S.H., Inc. v. N.Y. State Off. of Parks, Recreation & Historic Preserv.*, 27 N.Y.3d 174, 179-180 (2016) (citations omitted). However, "[a]ny *Boreali* analysis should center on the theme that 'it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends'. The focus must be on whether the challenged regulation attempts to resolve difficult social problems in this manner. That task, policymaking, is reserved to the legislative branch." *Matter of N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y. City Dept. of Health & Mental Hygiene*, 23 N.Y.3d 681, 697 (2014). Nevertheless, the *Boreali* factors at not to be applied rigidly. *Matter of NYC C.L.A.S.H., Inc.,* 27 N.Y.3d at 180 (citing *Matter of N.Y. Statewide Coalition of Hispanic Chambers of Commerce,* 23 N.Y.3d at 696). In fact, the factors are not mandatory, do no need to be weighed evenly, and are just essentially guidelines for conducting an analysis of an agency's

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

exercise of power. *Matter of NYC C.L.A.S.H., Inc*., 27 N.Y.3d at 180 (citing *Greater N.Y. Taxi Assn*., 25 N.Y.3d at 612).

Under the first *Boreali* factor, Respondents argue there is no broad policy judgments at issue and that virtual currency business activity is neither banned nor discouraged under the Regulation. Rather, the Department is applying safeguards. However, the Department absolutely created a Regulation that not only discourages "virtual currency business activity" amongst small business and startups, but also applies stringent "safeguards" that go beyond those applied to fiat money transmitters, as discussed elsewhere in this memorandum.

Under the second *Boreali* factor, Respondents' reliance on legislative guidance in the form of banking law and financial services is misplaced. The pertinent question is not whether there is legislative guidance covering banking and financial services but whether there is legislative guidance covering virtual currency. When considering whether the legislature has given guidance on a particular subject matter one should consider the more specific subject matter rather than the overarching category in which it falls. *Matter of N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 23 N.Y.3d at 700. Additionally, an agency creates an entirely new rule beyond subsidiary matters when the rule significantly changes the manner in which people act. *Id.* The Regulation is not "subsidiary" or filling in any gaps, it is changing the way virtual currency operates and setting new rules on a subject matter that the legislature has not yet provided any guidance. The legislature has not passed any legislative guidance regarding virtual currency, therefore the Department is writing on a clean slate without the benefit of legislative guidance. Further, the Regulation puts burdens on virtual currency businesses that are not imposed on fiat money transmitters. By treating virtual currency differently, the Department

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

is in effect acknowledging that virtual currency is not currently covered by any legislative guidance.

Under the third *Boreali* factor, by acknowledging that the legislature has been silent on the issue of virtual currency, Respondents actually concede that that they are acting in an area without legislative guidance, hence act outside of the legislative mandate.

Under the fourth *Boreali* factor, Respondents do not have special expertise or competence in virtual currency. It is incorrect to assume that because they are experts in the field of financial services that they have expertise in virtual currency as well. In fact, the Department held hearings on the topic of virtual currency on January 28 and January 29, 2014 in New York City ("the Hearings"). Ciric Aff. ¶ 40. The Department invited Mark T. Williams, member of the Finance & Economics Faculty at Boston University, as an expert at the Hearings. Ciric Aff. ¶ 40. In his direct testimony in the written record, he provided an analysis regarding the economic nature of Bitcoin. Ciric Aff. ¶ 40. His written testimony establishes that Bitcoin should be treated as a commodity, and not as a currency. Ciric Aff. ¶ 40. However, the Department did not discuss, probe, or question Williams about his written testimony during the Hearings, and did not seek to discuss under which circumstances Bitcoin should be considered a currency or whether Bitcoin should be considered a "financial product or service" under FSL § 104(a)(2). Ciric Aff. ¶ 41. Furthermore, during the Hearing, no other witness addressed in written or oral testimony, any analysis on the economic nature of Bitcoin. Ciric Aff. ¶ 40.Therefore, contrary to Respondents assertion, *Boreali* does not support Respondent's actions.

III. THE REGULATION IS ARBITRARY AND CAPRICIOUS

Even if the Court finds that Bitcoin is controlled by FSL § 104(a)(2)(A), the Court may still find that the Regulation is arbitrary and capricious.

A regulation may only be upheld "if it has a rational basis, and is not unreasonable,

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

arbitrary or capricious." *Axelrod,* 78 N.Y.2d at 166. The Court must scrutinize administrative regulations "for genuine reasonableness." *Id.*

A. The scope of the Regulation is irrationally broad

A regulation that is irrational is arbitrary and capricious. *See Axelrod,* 78 N.Y.2d at 167-68; *c.f. Bernstein v. Toia*, 43 N.Y.2d 437, 448 (1977) (noting that a regulation should be upheld "if not irrational or unreasonable"). Furthermore, a regulation is irrational, and therefore arbitrary and capricious, if it is excessively broad in scope. *See id.,* 78 N.Y.2d at 165, 169 (reinstated the Supreme Court's declaration that the challenged regulation was null and void because there was no "rational basis for the promulgation of a rule so broad in scope").

i. The fundamental protocol used to conduct most Internet activity falls within the Regulation's definition of "virtual currency"

Subject to three narrow exceptions, "virtual currency" means "*any* type of digital unit that is used as a medium of exchange or a form of digitally stored value." 23 NYCRR § 200.2(p) (emphasis added). Furthermore, 23 NYCRR § 200.2(p) mandates that this definition be "broadly construed." *Id.* Given this instruction and the Regulation's failure to define "digital unit" or "medium of exchange," nearly all Internet activity could be interpreted under the Regulation to involve "virtual currency." Thus, the definition of "virtual currency" is grossly overinclusive and irrational.

Transmission Control Protocol/Internet Protocol (TCP/IP) allows computers to communicate over the Internet. Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815, 821 (2004). People engage the TCP/IP protocol to send emails, visit websites, or download music. Ciric Aff. ¶ 32.

The TCP/IP system takes data, divides it into packets, and then bounces those packets from the starting point to the final destination. Ciric Aff. ¶ 33. A TCP/IP packet is "the smallest

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

unit of transmitted information over the Internet," and is thus a "digital unit." Ciric Aff. ¶ 33. TCP/IP packets are also "the exchange medium used by processes to send and receive data through Internet networks." Ciric Aff. ¶ 33. Accordingly, a TCP/IP packet, which is a "digital unit," is used "as a medium of exchange," and thus falls within the Regulation's definition of "virtual currency." *See* 23 NYCRR § 200.2(p). This means that when people engage in Internet activity, they almost always use "virtual currency," as it is defined in the Regulation, to do so, rendering such activity potentially subject to the Regulation. Therefore, the Regulation's definition of "virtual currency" is irrationally overinclusive, and is thus arbitrary and capricious.

ii. The definition of "virtual currency," even as it applies to the intended targets of the Regulation largely does not distinguish between financial and non-financial uses, and is thus irrationally overinclusive

The Department intended to regulate cryptocurrency financial intermediaries. Ciric Aff. ¶ 34. Many cryptocurrencies, like Bitcoin, are blockchain technologies. Ciric Aff. ¶ 35. Blockchains are essentially public ledgers that record users' entries. Ciric Aff. ¶ 35. For example, when a person exchanges one bitcoin, or a fraction thereof, the transaction is recorded on the Bitcoin blockchain. Ciric Aff. ¶ 35.

Blockchain technologies fall within the "virtual currency" definition because they can be used as a medium or exchange or a form of digitally stored value. *See* 23 NYCRR § 200.2(p). Even non-financial uses of blockchain technology fall within the Regulation's definition of "virtual currency" because, to participate in blockchain technology, a user engages "digital unit[s]," that [are] "used as medium[s] of exchange." Ciric Aff. ¶ 36. It is digital units, like bitcoins, that carry value, and "even non-financial uses require a de minimis amount of currency," a "medium of exchange." *See* 23 NYCRR § 200.2(p); Trevor I. Kiviat, Note, *Beyond Bitcoin: Issues in Regulating Blockchain Transactions*, 65 DUKE L.J. 569, 591, 597 (2016); Ciric

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

Aff. ¶ 36. Because blockchain technologies fall within the Regulation's definition of "virtual currency," they are potentially subject to the Regulation. *See* 23 NYCRR §§ 200.2(p)-200.3.

Blockchain technologies, however, are not inherently financial. Ciric Aff. ¶ 37. People can, and do use blockchain technologies to engage in a slew of non-financially related activities. Ciric Aff. ¶ 37. Artists use blockchain technology to assert ownership over their works, insurers use blockchain technology to track diamonds, and people use blockchain technology to timestamp documents and photos. Ciric Aff. ¶ 37. Additionally, people can use blockchain technology to cast votes, send messages, or enter into contracts. Ciric Aff. ¶ 37.

Yet, the definition of "virtual currency" does not exclude or otherwise exempt these non-financial uses of blockchain technology, rendering such uses potentially subject to the Regulation. *See* 23 NYCRR § 200.2(p). Therefore the definition is irrationally overinclusive, rendering it arbitrary and capricious. Because the Regulation is entirely premised upon an arbitrary and capricious definition of "virtual currency," the entire framework should be nullified.

iii. The Regulation governs "virtual currency business activity," as defined by five irrationally overinclusive, undefined categories of activities including activities that have no rational link to financial products or services

Five categories of activities qualify as "virtual currency business activities." *See* 23 NYCRR §§ 200.2(q), 200.3. Each category is defined by terms that have a broad range of meanings that encompass numerous activities that are entirely unrelated to financial exchanges, services, or products. Furthermore, only one category of activities exempts non-financial uses. *See* 23 NYCRR § 200.2(q).

The Regulation requires anyone engaged in "storing, holding or maintaining custody or control of virtual currency on behalf of others" to obtain a "license" and comply with the Regulation. 23 NYCRR § 200.2(q)(2). However, the Regulation fails to clarify what activities

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

qualify as "storing," "holding," or "maintaining custody or control" of "virtual currency." *See* 23 NYCRR §§ 200.1-200.22. Thus, if a New York citizen established a trust, designated himself as trustee, and funded the trust with his own bitcoins, he would arguably be required to obtain a license, because as a trustee, he could be interpreted as "holding… virtual currency on behalf of others," in this case, the beneficiaries of the trust. Likewise, a bitcoin owner's fiancée would not legally be allowed to hold her fiancé's Bitcoin wallet for safekeeping unless she first obtained a license, because in safekeeping his Bitcoin wallet, she would arguably be "holding…virtual currency on behalf of others."

The Regulation also requires anyone "controlling… a virtual currency" to obtain a license. The Department did not define "controlling," leaving room for expansive interpretation. *See* 23 NYCRR §§ 200.1-200.22. Arguably any Bitcoin owner with a tenuous relationship to New York is subject to the Regulation. A Bitcoin owner "controls" a "virtual currency," regardless of whether that Bitcoin owner uses bitcoins as financial instruments. This means that someone wishing to cast a vote using bitcoins, exercise his freedom of speech using bitcoins, or create digital art using bitcoins would arguably be required to obtain a license and comply with the Regulation in order to do so.

As these scenarios demonstrate, the scope of activities subject to the Regulation is irrationally overinclusive, rendering the Regulation arbitrary and capricious.

B. The Regulation's recordkeeping requirements are without sound basis in reason

A regulation is arbitrary if it is "without sound basis in reason." *See Heintz v. Brown*, 80 N.Y.2d 1998, 1001 (1992) (quoting *Pell v. Bd. of Educ.* 34 N.Y.2d at 231).

The Regulation requires licensees to: (1) record "each transaction, the amount, date, and precise time of the transaction… the names, account numbers, and physical addresses of (i) the party or parties to the transaction that are customers or accountholders of the Licensee; and (ii) to

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

the extent practicable, any other parties to the transaction," and (2) maintain those records "for at least seven years." 23 NYCRR § 200.12(a). These extensive and onerous requirements apply to *all* "virtual currency" transactions, regardless of whether, for example, a Satoshi,[1] worth less than 1 cent, is being transacted, or 100 bitcoins, worth approximately $56,944, are being transacted. *See id*; Ciric Aff. ¶ 6. It is unreasonable to require Licensees to create and maintain records of microtransactions. A Licensee could foreseeably be forced to spend more money to make and retain records than the transaction itself is worth. Thus, the Regulation's recordkeeping requirements are so irrationally untailored that they cannot be said to have any sound basis in reason, rendering them arbitrary and capricious.

C. The Regulation irrationally treats "virtual currency" transmitters differently than fiat currency transmitters

A regulation that is inconsistent with an agency's preexisting regulations is arbitrary and capricious. *See Law Enforcement Officers Union, Dist. Council 82 v. State*, 229 A.D.2d 286, 293, 655 N.Y.S.2d 770, 775 (App. Div. 1997). In that case, the challenged regulation allowed for the double celling of inmates. *Id.* at 289. A preexisting regulation set forth minimum square footage requirements for single and multiple occupancy inmate housing units. *Id.* at 290-91. The challenged regulation did not set a minimum square footage requirement or explain its reason for omitting such a requirement. *Id.* at 291. The court affirmed the lower court's finding that there was "no rational basis for establishing a minimum square footage requirement for single and multiple occupancy housing units while having no such requirement for double occupancy housing units," rendering the regulation arbitrary and capricious. *Id.* at 292.

Here, the Regulation's anti-money laundering provisions are inconsistent with the

[1] A Satoshi is the smallest fraction of a bitcoin that can be transacted. Ciric Aff. ¶ 6. One Satoshi is the equivalent of 0.00000001 bitcoin. Ciric Aff. ¶ 6.

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

Department's preexisting anti-money laundering regulations. The Department has imposed stringent anti-money laundering requirements upon "virtual currency" businesses that it has not imposed on fiat currency transmitters. *See* 23 NYCRR § 200.15; 3 NYCRR § 416.1. There is no rational basis or objective reason provided by Respondents for subjecting fiat money transmitters and "virtual currency" transmitters to different anti-money laundering requirements.

The Department requires money transmitters to comply with federal anti-money laundering laws. 3 NYCRR § 416.1.[2] The Regulation, however, requires "virtual currency" transmitters to comply with anti-money laundering requirements that go beyond those required under federal law. *See* 23 NYCRR § 200.15.

The Regulation requires Licensees to file Suspicious Activity Reports ("SAR") even if they would not be required to do so under federal law. 23 NYCRR § 200.15(e)(3)(ii). This requirement imposes an unreasonable burden on "virtual currency" firms who would not otherwise be subject to federal SAR provisions. Furthermore, this provision subjects such firms to potential liability for submitting SARs because though the federal SAR requirements include a safe harbor provision that extends immunity to disclosing institutions, the Regulation does not contain a comparable provision. 31 U.S.C. § 5318(g)(3); 23 NYCRR § 200.15. Thus, under the Department's regulatory scheme, a money transmitter dealing in fiat currency that is not required to file SARs would be required to file SARs if that transmitter wished to engage in "virtual currency" transmission. *See* 23 NYCRR § 200.15(e)(3)(ii). There is no rational basis to support the Department's inconsistent treatment of money transmitters.

Additionally, the Regulation requires Licensees to retain all records related to their anti-

[2] These regulations were adopted by the Banking Department, which was subsequently assumed by the Department. *See* Eckmier Aff. ¶¶ 5-6.

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

money laundering programs for at least seven years. 23 NYCRR § 200.12(a). By contrast, fiat currency transmitters are only required to retain such records for five years. 3 NYCRR § 416.1(b)(2)(i) (requiring licensees to retain records in accordance with 31 CFR § 103); 31 CFR § 1010.430(d) (formerly at 31 CFR § 103.38(d); requiring licensees to retain records for five years). There is no rational reason or objective rationale to require "virtual currency" transmitters to retain their records two years longer than non-technology based financial transmitters are required to retain their records.

Accordingly, the Regulation is inconsistent with the Department's preexisting anti-money laundering regulation, and there is no rational basis to support the additional requirements included in the Regulation. Thus, the Regulation's anti-money laundering requirements are irrational, arbitrary and capricious to the extent that they require action not otherwise required under federal law.

D. There is no rational basis underlying a one-size-fits all regulation that: (1) unreasonably prevents startups and small businesses from participating in "virtual currency business activity," and (2) imposes capital requirements on *all* "licensees"

A regulation that lacks a rational basis is arbitrary and capricious. *See Axelrod,* 78 N.Y.2d at 167-69. In *Axelrod*, the court nullified a blanket, one-size-fits-all reimbursement reduction rate, finding that the rate was "not based on a rational, documented, empirical determination" that those subject to the blanket reduction were similarly situated; accordingly, the court deemed the regulation arbitrary and capricious. *See id.* The court further noted that the Regulation's disparate impact contributed to its irrationality. *Id.* at 168.

Like in *Axelrod*, the Regulation is an untailored blanket regulation that fails to consider that virtual currency businesses are not all equally situated, and irrational imposes capital requirements on all Licensees.

i. <u>There is no rational basis to support a Regulation that effectively inhibits startups and</u>

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

small businesses from engaging in "virtual currency business activity"

Like the regulation in *Axelrod*, the Regulation has a severe disparate impact on startups and small businesses, which do not have access to the funds and resources the Regulation requires. The cost of applying for a license is exorbitant. *See* 23 NYCRR § 200.5 (requiring a non-refundable $5,000 application fee); Ciric Aff. ¶ 5 (companies have reported spending $50,000-$100,000 when applying for a license). Furthermore, the costs of staying in compliance with the Regulation if granted a license are unwarranted and potentially excessive. Licensees are required to "maintain at all times such capital in an amount and form as the superintendent determines is sufficient." 23 NYCRR § 200.8(a). This vague, open-ended requirement is likely to unreasonably impede cash-strapped startups and small businesses from being able to engage in "virtual currency business activity." The Regulation's requirement that licensees "maintain a surety bond or trust account… in such a form and amount as is acceptable to the superintendent" is similarly prone to effectively prohibit underfunded startups and small businesses from engaging in "virtual currency" related business. *See* 23 NYCRR § 200.9(a).

The tech industry is an increasingly important piece of New York's economy, and digital currency is a prominent emerging technology. Ciric Aff. ¶ 8. Startups are essential to technological innovation and growth, and in 2015, New York City was recognized as being one of the top startup ecosystems in the world. Ciric Aff. ¶ 9. However, the Regulation has transformed this once welcoming New York landscape into an inhospitable environment for digital currency-related startups. Ciric Aff. ¶ 9.

When Superintendent Lawsky announced the final version of the Regulation, he said: "we should not react so harshly that we doom promising new technologies before they get out of the cradle." Ciric Aff. ¶ 10. Yet the Regulation has done just that. Ciric Aff. ¶ 10. The Regulation has effectively forced digital currency-related startups to relocate outside New York

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

and to otherwise severe ties with New York citizens. Ciric Aff. ¶ 10. The Regulation is unjustifiably burdensome on startups and small companies, and has in many instances left businesses with no other option than to flee and otherwise abandon New York. Ciric Aff. ¶ 10.

Chino was able to afford to operate Chino LTD until the Regulation was promulgated. At that point, both the application fee and the compliance costs were overly burdensome. Chino does not run a high volume business, rather offering small processing services for small purchases in retail stores. The capital requirements imposed by the Regulation are disproportionate compared to the profit Chino would make on each transaction or each retail relationship. Having the same standards apply to Chino that apply to large financial institutions is unreasonable, and prevented Chino from maintaining the operation of Chino LTD in New York.

Contrary to Respondents' approach, the State of California has tried twice to use the legislative process to pass a bill regulating virtual currency. Ciric Aff. ¶ 21. Twice the bill has been withdrawn from consideration. Ciric Aff. ¶ 21. Assemblymember Dababneh stated, "Unfortunately, the current bill in print does not meet the objectives to create a lasting regulatory framework that protects consumers and allows this industry to thrive in our state. More time is needed and these conversations must continue in order for California to be at the forefront of this effort." Ciric Aff. ¶ 21.

ii. The Regulation irrationally imposes capital requirements on all licensees

While it may be appropriate to impose minimum capital requirements on select "virtual currency" businesses, it is irrational, arbitrary, and capricious, to impose blanket capital requirements on *all* actors subject to the Regulation. For example, it may be rational to impose minimum capital requirements on cryptocurrency broker-dealers because fiat currency broker-dealers are subject to minimum capital requirements. *See* 23 NYCRR § 200.8 (subjecting all

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

Licensees to capital requirements); N.Y. Gen. Bus. Law § 352-k (imposing minimum capital requirements on broker-dealers). However, there is no rational basis for imposing minimum capital requirements on providers of non-financial services, because such actors do not pose the kinds of risks that minimum capital requirements are employed to mitigate.

Generally, capital requirements serve either to reduce or to manage risk in the financial sector. Ciric Aff. ¶ 7. In the banking field they provide a cushion to "reduce risk and protect against failure," in the insurance arena they "guard against insolvencies," and in the broker-dealer context they serve to "manage failure." Ciric Aff. ¶ 7.

The Regulation, however, applies to a wide range of "virtual currency" businesses that do not pose the same risks banks, insurance companies, and broker-dealers do. Applying capital requirements to such businesses is inappropriate and irrational.

The Regulation requires most actors engaged in "controlling, administering, or issuing a virtual currency" to obtain a license and abide by minimum capital requirements, even if such "controlling, administering, or issuing" has no tie to the financial sector. *See* 23 NYCRR §§ 200.2(p), 200.2(q)(4), 200.3, 200.8. Furthermore, the blanket Regulation subjects those engaged in "transmitting virtual currency" to minimum capital requirements unless "the transaction is undertaken for non-financial purposes *and* does not involve the transfer of more than a nominal amount of virtual currency." 23 NYCRR §§ 200.2(q)(1), 200.3, 200.8 (emphasis added). Therefore, a father who wishes to give his daughter one bitcoin[3] for her birthday would be transmitting a non-nominal amount of "virtual currency," and would thus be required to obtain a license and abide by minimum capital requirements in order to do so. Such an absurd scenario

[3] One bitcoin is worth more than a nominal amount. *See Nominal*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "nominal" as "trifling" in price or amount).

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

highlights the irrationality of the one-size-fits all minimum capital requirements in the one-size-fits all Regulation.

Chino would be forced to maintain a minimum capital requirement even though he is operating at a very low risk. The minimum capital requirement would not protect consumers since Chino LTD is processing small purchases made with bitcoins in small retail stores. Therefore, the minimum capital requirement is disproportionate to risks associated with the activities Chino is conducting. There is no rational basis for imposing minimum capital requirements on every actor engaged in "virtual currency business activity." Accordingly, the Regulation's blanket capital requirements provision is irrational, and thus arbitrary and capricious.

iii. Respondents admitted that the requirements imposed on licensees, which do not apply to other money transmitters, were only a test ground for traditional financial institutions

A number of other requirements imposed on "virtual currency" businesses are not imposed on other money transmitters (keeping records on all transactions, including the identity and physical address of the parties, 23 NYCRR § 200.15(e)(1)(i); reporting and notifying transactions exceeding $10,000 in an aggregate amount, 23 NYCRR § 200.15(e)(2); complying with a Cyber Security Program, including staffing and reporting requirements, 23 NYCRR § 200.16).

Respondents have never provided an objective rationale for these burdensome and arbitrary requirements. In fact, the Superintendent of the Department at the time of the promulgation of the Regulation publicly admitted that the rationale for these different rules not imposed on other institutions was to test them as "models for our regulated banks and insurance companies," and not as a genuine response to a pressing regulatory need. Ciric Aff. ¶ 37. Respondents are not entitled to use a burgeoning industry as a testing ground of unauthorized

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

regulatory power, and the Court should step in to set aside this arbitrary Regulation.

IV. THE REGULATION IS PREEMPTED BY FEDERAL LAW

The federal preemption doctrine provides, when federal law and state law conflict, federal law prevails. *See McCulloch v. Maryland*, 17 U.S. 316, 330 (1819); *N.Y. Bankers Ass'n v. City of N.Y.*, 119 F. Supp. 3d 158, 182 (S.D.N.Y. 2015). There is a strong presumption against federal preemption of state legislation. *Id.* However, this presumption is abandoned in areas of regulation that have been substantially occupied by federal authority for a long period of time. *Id.* National banking is an area that has been substantially occupied by federal authority for a long period of time. *Id.* The National Banking Act of 1864, ch 106, 113 Stat. 99 (codified as amended in scattered section of 12 U.S.C.), gives national banks "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24. Therefore, the presumption against federal preemption does not apply.

Federal law may preempt state law in three ways, express preemption, implied or field preemption, and conflict preemption. *New York v. W. Side Corp.*, 790 F. Supp. 2d 13, 19 (E.D.N.Y. 2011). "… [I]mplied or field preemption exists where 'federal law is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation'" *Id.* (citing *Bedford Affiliates v. Sills*, 156 F.3d 416, 426 (2d Cir. 1998)).

A. Implied preemption exists in the present case

In the absence of any pronouncement by the New York Legislature, implied preemption exists here because the federal law defining "financial service or product" is sufficiently comprehensive to reasonably infer that Congress left no room for supplementary state regulation.

Federal law defines "financial service or product" in eleven carefully constructed subparagraphs. 12 U.S.C. § 5481(15). This provision includes in the "financial service or product" definition "such other financial product or service as may be *defined by the Bureau [of*

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

Consumer Financial Protection], by regulation, for purposes of this title, *if the Bureau finds that* such financial product or service is – (I) entered into… with a purpose to evade any Federal consumer financial law; or (II) permissible for a bank or for a financial holding company to offer or to provide under any provision of a Federal law or regulation applicable to a bank or a financial holding company, and has, or likely will have, a material impact on consumers." 12 U.S.C. § 5481(15)(A)(xi) (emphasis added). Therefore, this catchall provision expressly grants the Bureau of Consumer Financial Protection the exclusive authority to determine if a financial product or service falls into its regulating authority.

B. Under the Dodd-Frank Act, preemption is appropriate

The Dodd-Frank Act states that a "statute, regulation, order, or interpretation . . . in any State is not inconsistent with… this title if the protection that [it] affords to consumers is greater than the protection provided under this title." 12 U.S.C. § 5551. However, under the Dodd-Frank Act, State consumer financial laws are preempted if the State law "is preempted by a provision of Federal law other than title 62 of the Revised Statutes." 12 U.S.C. § 25b(b)(1)(C). Title 62 of the Revised Statutes contains 12 U.S.C. §§ 5133 through 5243, therefore excluding 12 U.S.C. §5481, making preemption appropriate.

iv. <u>It was not Congress' intent for state regulators to freely regulate financial products and services</u>

Congress' intent is the cornerstone of every determination of preemption. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). Congress' intent may be determined through the scope, structure, and purpose of the federal statute. *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010).

Congress' objectives in enacting Title 12 of the United States Code was to implement and

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

enforce Federal consumer financial law consistently to ensure that *all consumers* have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive. 12 U.S.C. § 5511(a) (emphasis added). The term "all consumers" establishes a purpose of uniformity in markets for consumer financial products and services. New York does not have the authority to define for themselves a term with the history of substantial federal regulation. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000).

Further, the New York Legislature recognized that there may be times when regulations promulgated by the New York superintendent on financial products or services would be preempted by federal law. *See* FSL § 104(a)(2)(A)(iii). This is one such time when federal law preempts a New York regulation.

V. THE REGULATION'S DISCLOSURE REQUIREMENTS VIOLATE CHINO'S FIRST AMENDMENT RIGHTS

The Regulation violates the First Amendment of the U.S. Constitution, as applied to the state through the Fourteenth Amendment, under the compelled commercial speech doctrine, as expressed in *Zauderer v. Off. of Disciplinary Counsel of Supreme Ct.*, 471 U.S. 626 (1985), and the restricted commercial speech doctrine, as expressed in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980).

In *Expressions Hair Design v. Schneiderman*, ___US___, 197 L. Ed. 2d 442 (2017), issued on March 29, 2017, a unanimous Court reversed a Circuit Court's decision that the First Amendment was not applicable to a New York statute prohibiting a credit card surcharge, and agreed with the U.S. District Court that the New York statute regulated speech, limiting how merchants could express their differential pricing, and concluded that the statute failed the test for constitutional commercial speech under *Central Hudson Gas & Electric Corp*. This case

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

brings under the restricted commercial speech doctrine a regulation that is so overly broad in its application that the higher intermediate scrutiny test under *Central Hudson & Electric Corp.* applies rather than the traditional rational basis test under *Zauderer*. Some of the Regulation's sections are indeed so overly broad that they fall in the scope of regulations or statutes contemplated by the *Expressions Hair Design* decision.

In *Zauderer*, the U.S. Supreme Court carved out a narrow area of compelled commercial speech that is subject to a lesser level of review. The U.S. Supreme Court held that a commercial speaker may be compelled to disclose "purely factual and uncontroversial information" about its own products as long as those disclosure requirements "are reasonably related to the State's interest in preventing deception of consumers." *Zauderer,* 471 U.S. at 651. However, such requirements cannot be "unjustified or unduly burdensome." *Id.* If the compelled commercial speech does not fit *Zauderer*'s narrow parameters, then a heightened level of review is required.

Under the *Expressions Hair Design* holding, many of the Regulation's sections fall under the *Central Hudson Gas & Electric Corp.* test instead of the *Zauderer* test because the compelled disclosures in the Regulation are not "purely factual and uncontroversial" and because the state governmental interest in preventing consumer deception is extremely doubtful, especially in the case where Respondents do not have the jurisdictional basis to regulate Bitcoin.

In *Central Hudson Gas & Electric Corp.*, the U.S. Supreme Court established an "intermediate scrutiny" level of review for commercial speech. To survive intermediate scrutiny, the government must show that the regulation (i) serves a substantial governmental interest; (ii) directly and materially advances the asserted interest; and (iii) is no more extensive and burdensome than necessary to further that interest. *Central Hudson Gas & Electric Corp*., 447 U.S. at 566.

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

For example, Section 200.19(a) of the Regulation requires "disclosure of material risks." One of the required disclosures is that "the nature of virtual currency may lead to an increased risk of fraud or cyber attack." FSL § 200.19(a)(8). This assertion is blatantly false. Using virtual currencies puts you at no greater risk of fraud or cyber-attack than using a credit card or online shopping, in fact, in recent years, major companies like Target have had the theft of payment details of millions of credit/debit card users. Credit cards are very vulnerable to fraud. Ciric Aff. ¶¶ 43-45. Therefore, the compelled disclosure is subject to a higher level of scrutiny under *Central Hudson.*

Even if the disclosures are considered "purely factual and uncontroversial," the disclosures must still be "reasonably related to the State's interest in preventing deception of consumers" and cannot be "unjustified or unduly burdensome." *Zauderer*, 474 U.S. at 655.

Section 200.19 is not reasonably related to the purpose of the Financial Services Law to "ensure the continued safety and soundness of New York's banking, insurance and financial industries, as well as the prudent conduct of the providers of financial products and services, through responsible regulation and supervision," "protect the public interest," and "protect users of banking, insurance and financial services products and services." FSL §§ 102(i), (j), and (l). At the same time though, the Department is supposed to "provide for the effective and efficient enforcement of the banking and insurance laws" and "promote, advance and spur economic development and job creation in New York." FSL §§ 102(c) and (h). The Financial Services Law's "Declaration of policy" states that it "is the intent of the legislature that the superintendent shall supervise the business of, and the person providing, financial products and services…." FSL § 201(a). The Financial Services Law requires that the superintendent of the Department "take such actions as the superintendent believe necessary" to "ensure the continued solvency,

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

safety, soundness and prudent conduct of the providers of financial products and services" and to "protect users of financial products and serves…" FSL §§ 201(b)(2) and (7). At the same time though, the superintendent is supposed to "foster the growth of the financial industry in New York and spur state economic development through judicious regulation." FSL § 201(b)(1). However, the Regulation cannot be "unjustified or unduly burdensome."

There is no more risk in using a credit card than paying with Bitcoin, in fact Bitcoin is considered a safer system over current payment option for consumers when it comes to the risk of fraud and theft. Ciric Aff. ¶¶ 43-45; Chino Aff. ¶ 23. When a store accepts credit card payments, they are not required to make the same disclosures as they are if they accept Bitcoin. Further, Respondents do not provide evidence that Bitcoin is more risky than credit cards for consumers. Therefore, Petitioner has largely established that the compelled disclosures required by the Regulation are false and overly burdensome.

A compelled disclosure that falls outside of *Zauderer*'s parameters is minimally subject to intermediate scrutiny. The compelled speech under the Regulation also fails this test. The Department's interest to protect consumers is a compelling governmental interest. However, the compelled speech under the Regulation does not directly and materially advance that interest. Nor can Respondents show that the compelled speech under the Regulation is not more extensive and burdensome than necessary to further that interest.

To show that the compelled speech under the Regulation directly and materially advances the Department's interests, Respondents "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (internal citations and quotation marks omitted). "[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

Central Hudson, 447 U.S. at 564. To satisfy these requirements, Respondents would have to show that the use of Bitcoin is more dangerous than other forms of payment such as credit cards.

The compelled speech under the Regulation is also "more extensive than necessary to further the State's interest." *Central Hudson*, 447 U.S. at 569-70. "[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Networks, Inc.,* 507 U.S. 410, 417 n.13 (1993).

The compelled speech under the Regulation is not "narrowly tailored" to promote consumer protection. Rather it requires disclosures that do not benefit consumers or warn of dangers that have been objectively established by Respondents.

There are also less restrictive alternatives to the Department's asserted interests. If Respondents want to make consumers aware of possible danger, they can and should distribute information using their own resources. They could publish materials on the Department's own website, conduct public awareness campaigns, direct consumers to free information sources, or any of another variety of means to promote their views and recommendations on the safest/best practice in using virtual currencies.

Finally, because the First Amendment protection under the New York Constitution is stronger than the one provided in the U.S. Constitution, the First Amendment claims sought by Petitioners under the U.S. constitution are also asserted under the New York Constitution. *Immuno AG v. Moor-Jankowski,* 77 N.Y.2d 235 (1991).

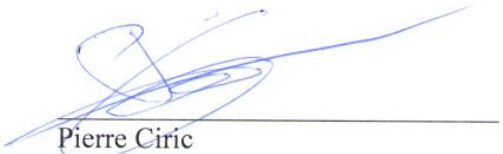
FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 20 RECEIVED NYSCEF: 09/05/2017

CONCLUSION

For all the reasons set forth herein, Respondents' cross-motion to dismiss should be denied in its entirety. In the alternative, Petitioners respectfully request leave to amend their pleadings should the Court find any of their pleadings in any way deficient.

Dated: New York, New York
July 14, 2017

Respectfully Submitted,



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FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 09/05/2017

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

THEO CHINO and CHINO LTD,

Plaintiffs-Petitioners,

-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.

AFFIRMATION OF PIERRE CIRIC IN SUPPORT OF PLAINTIFFS'-PETITIONERS' OPPOSITION TO DEFENDANTS'-RESPONDENTS' CROSS-MOTION TO DISMISS

Index No. 101880/2015
Hon. Lucy Billings

I, Pierre Ciric, an attorney duly admitted to practice law before the courts of the State of New York, and not a party to the above-entitled action, affirm the following to be true to the best of my knowledge and under the penalties of perjury pursuant to New York Civil Practice Law and Rules ("CPLR") § 2106:

1. I am an attorney at the Ciric Law, PLLC and counsel for Plaintiffs-Petitioners Theo Chino and Chino LTD ("Petitioners") in the above-entitled action.

2. I submit this affirmation in support of the Plaintiffs'-Petitioners' Opposition to Defendants'-Respondents' Cross-Motion to Dismiss the Amended Verified Complaint and Article 78 Petition filed by the New York State Department of Financial Services (the "Department") and Maria T. Vullo, in her official capacity as Superintendent of the Department (collectively the "Respondents").

3. In my capacity as counsel for Petitioners, I am fully familiar with the facts and circumstances hereinafter contained, the source of such knowledge being the file materials maintained by my office during the course of the action herein.

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 09/05/2017

Background on Part 200 of Chapter 1 of Title 23 of the New York Codes, Rules and Regulations (the "Regulation")

4. According to the Regulation imposed by the Department, anyone "performing exchange services as a customer business" is required to obtain a license.[1]

5. Companies have reported spending between $50,000 and $100,000 in order to meet the requirements when applying for a license under the Regulation.[2]

6. According to the Regulation, the same requirements apply to all virtual currency transactions, regardless of whether, for example, a Satoshi,[3] worth less than 1 cent, is being transacted, or 100 bitcoins, worth approximately $56,944, are being transacted.[4]

7. The Regulation requires licensees to maintain a capital requirement as determined by the Superintendent.[5] Generally, capital requirements serve either to reduce or to manage risk in the financial sector.[6] In the banking field they provide a cushion to "reduce risk and protect against failure," in the insurance arena they "guard against insolvencies," and in the broker-dealer context they serve to "manage failure."[7]

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[1] *BitLicense Frequently Asked Questions*, N.Y. State Dep't of Fin. Servs., http://www.dfs.ny.gov/legal/regulations/bitlicense_reg_framework_faq.htm.
[2] 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/.
[3] A Satoshi is the smallest fraction of a bitcoin that can be transacted. ALBERT SZMIGIELSKI, BITCOIN ESSENTIALS 33 (2016). One Satoshi is the equivalent of 0.00000001 bitcoin. *Id.*
[4] *See id*; *Bitcoin Calculator*, COINDESK, http://www.coindesk.com/calculator/ (last visited Aug. 2, 2016) (valuing one bitcoin at $565.67 as of August 15, 2016).
[5] 23 NYCRR § 200.8.
[6] *See* Daniel M. Gallagher, *The Philosophies of Capital Requirements*, SEC (Jan. 15, 2014), https://www.sec.gov/News/Speech/Detail/Speech/1370540629644.
[7] *See id*; Robert E. Lewis, *Capital from an Insurance Company Perspective*, 4 ECON. POL'Y REV. 183, 183 (1998).

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 09/05/2017

New York Is An Important Technology Center

8. The technology industry is an increasingly important piece of New York's economy, and digital currency is a prominent emerging technology.[8]

9. Startups are essential to technological innovation and growth, and in 2015, New York City was recognized as being one of the top startup ecosystems in the world.[9] The Regulation has transformed this once welcoming New York landscape into an inhospitable environment for digital currency-related startups.[10]

10. When Superintendent Lawsky announced the final version of the Regulation, he said: "we should not react so harshly that we doom promising new technologies before they get out of the cradle."[11] Yet the Regulation has done just that.[12] The Regulation has effectively forced digital currency-related startups to relocate outside New York and to otherwise severe ties with New York citizens.[13] The Regulation is unjustifiably burdensome on startups and small

[8] *See The New York City Tech Ecosystem*, HR&A ADVISORS (Mar. 2014), http://www.hraadvisors.com/wp-content/uploads/2014/03/NYC_Tech_Ecosystem_032614_WEB.pdf; Brian Forde, *How to Prevent New York from Becoming the Bitcoin Backwater of the U.S.*, MEDIUM (May 12, 2015), https://medium.com/mit-media-lab-digital-currency-initiative/how-to-prevent-new-york-from-becoming-the-bitcoin-backwater-of-the-u-s-931505a54560#.u05t446p2.
[9] Richard Florida, *The World's Leading Startup Cities*, CITYLAB (July 27, 2015), http://www.citylab.com/tech/2015/07/the-worlds-leading-startup-cities/399623/; Emily Edwards, *Financial Technology Startups Are Bringing Underbanked Into the Economy*, MEDIUM (May 16. 2016), https://medium.com/village-capital/financial-technology-startups-are-bringing-the-underbanked-into-the-economy-24978561b9ea#.635lp86ks.
[10] *See* Roberts, *supra* (reporting that in the wake of the Regulation's adoption, scores of bitcoin companies relocated outside the state of New York and severed ties to New York customers).
[11] Ben Lawsky, *The Final NYDFS BitLicense Framework*, MEDIUM (June 3, 2015), https://medium.com/@BenLawsky/the-final-nydfs-bitlicense-framework-d4e333588f04#.akxneegmv.
[12] *See, e.g.*, Roberts, *supra*.
[13] *See id.*; *BitLicense Restrictions for New York Customers*, BITFINEX (Aug. 7, 2015), https://www.bitfinex.com/posts/51.

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 09/05/2017

companies, and has in many instances left businesses with no other option than to flee and otherwise abandon New York.[14]

Characteristics of Financial Products

11. Financial products are characterized by their connection to money management and use.[15] Examples of financial products include mortgage loans and car insurance policies.[16]

12. Financial services are facilities "relating to money and investments."[17] Financial service providers essentially "help channel cash from savers to borrowers and redistribute risk." Banks that administer payments systems, for example, are financial service providers.[18]

13. Because financial products and service involve money, the general purpose of financial regulation is "to protect borrowers and investors that participate in financial markets and mitigate financial instability."[19]

Bitcoin Is Property, Not Money

14. Bitcoin was collaboratively developed by an independent community of Internet programmers without any financial backing from any government.

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[14] *See, e.g. id.*; Joseph Adinolfi, *Some digital-currency startups are fleeing New York,* MARKETWATCH (Aug. 18, 2015), http://www.marketwatch.com/story/some-digital-currency-startups-are-fleeing-new-york-2015-08-18; Everett Rosenfeld, *Company leaves New York, protesting 'BitLicense'*, CNBC (Jun. 11, 2015), http://www.cnbc.com/2015/06/10/company-leaves-new-york-protesting-bitlicense.html; Jamie Redman, *Bitlicense Forces Major Bitcoin Businesses to Leave in Droves*, BITCOIN.COM (Aug. 10, 2015), https://news.bitcoin.com/bitlicense-forces-major-bitcoin-businesses-leave-in-droves/.
[15] *See Financial Product*, CAMBRIDGE BUS. ENG. DICTIONARY, http://dictionary.cambridge.org/us/dictionary/english/financial-product.
[16] Irena Asmundson, *Financial Services: Getting the Goods*, IMF (Mar. 28, 2012), http://www.imf.org/external/pubs/ft/fandd/basics/finserv.htm.
[17] *Financial Services*, CAMBRIDGE ADVANCED LEARNER'S DICTIONARY & THESAURUS, http://dictionary.cambridge.org/us/dictionary/english/financial-services.
[18] Asmundson, *supra*.
[19] Edward V. Murphy, *Who Regulates Whom and How? An Overview of U.S. Financial Regulatory Policy for Banking and Securities Markets*, CONGRESSIONAL RESEARCH SERVICE (Jan. 30, 2015), https://www.fas.org/sgp/crs/misc/R43087.pdf.

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 09/05/2017

15. Bitcoin is the result of transparent mathematical formulas, which lack the attributes of traditional financial products or transactions.

16. Bitcoin consists of four different components: (1) a decentralized peer-to peer network (the bitcoin protocol), (2) a public transaction ledger (the blockchain), (3) a decentralized mathematical algorithm, and (4) a decentralized verification system (transaction script).[20]

17. Bitcoins are created through the computation of a mathematical algorithm through a process called "mining," which involves competing to find solutions to a mathematical problem while processing bitcoin transactions.[21] Anyone in the Bitcoin network may operate as a "miner" by using their computer to verify and record transactions.[22]

18. The bitcoin protocol includes built-in algorithms that regulate this mining function across the network.[23] The protocol limits the total number of bitcoins that will be created.[24]

19. Once bitcoins are created, they are used for bartering transactions using the blockchain technology.[25] This technology relies on data "blocks," which are "a group of transactions, marked with a timestamp, and a fingerprint of the previous block."[26] A blockchain is "[a] list of validated block, each linking to its predecessor all the way to the genesis block."[27] The genesis block is "[t]he first block in the blockchain, used to initialize the cryptocurrency,

[20] ANDREAS M. ANTONOPOULOS, MASTERING BITCOIN: UNLOCKING DIGITAL CRYPTOCURRENCIES (2014).
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 09/05/2017

and the universe of bitcoin transactions in capped at 21 million."[28]

20. Some states have decided that Bitcoin is not money. Kansas and Texas have taken the same position and issued memoranda stating that Bitcoin is not money. [29]

21. California has tried twice to use the legislative process to pass a bill regulating virtual currency.[30] The bill was ordered to become an inactive file on September 11, 2015 at the request of Senator Mitchell.[31] The bill was reintroduced on August 8, 2016.[32] On August 15, 2016, Assembly member Matt Dababneh withdrew the bill from consideration and stated, "Unfortunately, the current bill in print does not meet the objectives to create a lasting regulatory framework that protects consumers and allows this industry to thrive in our state. More time is needed and these conversations must continue in order for California to be at the forefront of this effort." [33]

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[28] *Id.*

[29] *See* Tex. Dep't of Banking, Supervisory Memorandum 1037, Regulatory Treatment of Virtual Currencies Under the Texas Money Services Act 2-3 (Apr. 3, 2014), http://www.dob.texas.gov/public/uploads/files/consumer-information/sm1037.pdf (stating "[Bitcoin] as currently implemented cannot be considered money or monetary value under the Money Services Act."); Kan. Office of the State Bank Commissioner Guidance Document, MT 2014-01, Regulatory Treatment of Virtual Currencies Under the Kansas Money Transmitter Act 2-3 (June 6, 2014), http://www.osbckansas.org/mt/guidance/mt2014_01_virtual_currency.pdf (stating "[Bitcoin] as currently in existence [is] not considered 'money' or 'monetary value' by the [Office of the State Bank Commissioner], [it is] not covered by the [Kansas Money Transmitter Act].").

[30] California introduced AB-1326 to regulate virtual currency business on February 27, 2015. A.B. 1326, 2015-2016 Reg. Sess. (Cal. 2015), History, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB1326.

[31] *Id.*

[32] *Id.*

[33] Aaron Mackey, *California Lawmaker Pulls Digital Currency Bill After EFF Opposition*, ELEC. FRONTIER FOUND. (Aug. 18, 2016), https://www.eff.org/deeplinks/2016/08/california-lawmaker-pulls-digital-currency-bill- after-eff-opposition.

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 09/05/2017

22. New Hampshire's House of Representatives passed HB 436, which seeks to exempt virtual currency users from having to register as money service businesses.[34]

23. In Texas, a constitutional amendment was proposed, Texas House Joint Resolution 89, which would protect the right to own and use digital currencies like Bitcoin in Texas.[35] The constitutional amendment would prevent any government effort to interfere with that use or ownership of digital currencies like Bitcoin.[36]

24. Bitcoin is not money, and because currencies are representations of money, Bitcoin is not true a currency.[37]

25. True currencies, unlike Bitcoin, "are designated legal tender, [that] circulate and are customarily used and accepted as a medium of exchange in the country of issuance."[38]

26. Unlike true currencies, Bitcoin is neither widely accepted as mediums of exchange nor a stable store of value,[39] nor issued by a government.[40]

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[34] Rebecca Campbell, *New Hampshire's Bill to Deregulate Bitcoin Passes House*, CRYPTOCOINSNEWS (Mar. 11, 2017), https://www.cryptocoinsnews.com/new-hampshires-bill-deregulate-bitcoin-passes- house/.
[35] Stan Higgins, Texas Lawmaker Proposes Constitutional Right to Own Bitcoin, COINDESK (Mar. 3, 2017), http://www.coindesk.com/texas-lawmaker-proposes-constitutional-right-bitcoin/.
[36] *Id.*
[37] *See* Leo Haviland, WORD ON THE STREET: LANGUAGE AND THE AMERICAN DREAM ON WALL STREET 294 (2011); *In re Coinflip, Inc.*, CFTC Docket No. 15-29 at 3 (Sept. 17, 2015).
[38] *In re Coinflip, Inc.* at 3; s*ee also* Notice 2014-21, IRS, https://www.irs.gov/pub/irs-drop/n-14-21.pdf (recognizing that bitcoins "[do] not have legal tender status in any jurisdiction").
[39] Dominic Wilson & Jose Ursua, *Is Bitcoin a Currency?,* 21 GOLDMAN SACHS: TOP OF MIND 6, 6 (2014), http://www.paymentlawadvisor.com/files/2014/01/GoldmanSachs-Bit-Coin.pdf.
[40] *See Model State Consumer and Investor Guidance on Virtual Currency*, CONFERENCE OF STATE BANK SUPERVISORS (Apr. 23, 2014), http://www.ncsl.org/documents/summit/summit2014/onlineresources/ModelConsumerGuidance--VirtualCurrencies.pdf; *Virtual Currency: Risks and Regulation*, THE CLEARING HOUSE at 17 (June 23, 2014), https://www.theclearinghouse.org/issues/articles/2014/06/20140623-tch-icba-virtual-currency-paper.

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 09/05/2017

27. Because Bitcoin is not issued by a government, no entity is required to accept it as payment.[41]

28. While currencies are generally secured by a commodity or a government's ability to tax and defend, Bitcoin is not safeguarded by either.[42]

29. Bitcoin is akin to commodity-like mediums of exchange. This view is consistent with the positions taken by the IRS and the Commodity Future Trading Commission (CFTC). The IRS has concluded that bitcoins are property, not currency for tax purposes.[43]

30. As with traditional commodities, like crude oil and gold, the value of Bitcoin is highly volatile and dependent upon supply and demand. Like gold, bitcoins are a finite resource. "[O]nly 21 million bitcoins will ever be created."[44]

31. Even the definition of Bitcoin is not clear because there are significant differences in the interpretation.[45]

The Fundamental Protocol used to Conduct Most Internet Activity Falls within the Regulation's Definition of "Virtual Currency"

32. Transmission Control Protocol/Internet Protocol (TCP/IP) allows computers to communicate over the Internet.[46] People engage the TCP/IP protocol to send emails, visit websites, or download music.[47]

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[41] Karl Whelan, *How is Bitcoin Different from the Dollar?*, FORBES (Nov. 19, 2013), http://www.forbes.com/sites/karlwhelan/2013/11/19/how-is-bitcoin-different-from-the-dollar/#68c676c86d34.
[42] Jonathon Shieber, *Goldman Sachs: Bitcoin Is Not A Currency,* TECHCRUNCH (Mar. 12, 2014), https://techcrunch.com/2014/03/12/goldman-sachs-bitcoin-is-not-a-currency/.
[43] Notice 2014-21, IRS, https://www.irs.gov/pub/irs-drop/n-14-21.pdf.
[44] *Frequently Asked Questions*, BITCOIN, https://bitcoin.org/en/faq#is-bitcoin-a-bubble (last visited Aug. 16, 2016).
[45] *See* Notice 2014-21, IRS, https://www.irs.gov/pub/irs-drop/n-14-21.pdf.
[46] Lawrence B. Solum & Minn Chung, *The Layers Principle: Internet Architecture and the Law*, 79 NOTRE DAME L. REV. 815, 821 (2004).
[47] John Gallaugher, *12.3, Get Where You're Going*, A MANAGER'S GUIDE TO THE INTERNET AND TELECOMMUNICATIONS (2012), http://2012books.lardbucket.org/books/getting-the-most-out-of-

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 09/05/2017

33. The TCP/IP system takes data, divides it into packets, and then bounces those packets from the starting point to the final destination.[48] A TCP/IP packet is "the smallest unit of transmitted information over the Internet," and is thus a "digital unit."[49] TCP/IP packets are also "the exchange medium used by processes to send and receive data through Internet networks."[50]

Blockchain Technologies Are Not Inherently Financial

34. The Department intended to regulate cryptocurrency financial intermediaries.[51]

35. Many cryptocurrencies, like Bitcoin, are blockchain technologies. [52] Blockchains are essentially public ledgers that record users' entries. [53] For example, when a person exchanges a bitcoin,[54] or a fraction thereof, the transaction is recorded on the Bitcoin blockchain.[55]

36. Non-financial uses of blockchain technology fall within the Regulation's

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information-systems-v1.3/s16-a-manager-s-guide-to-the-inter.html; Nick Parlante, *How Email Works*, STANFORD UNIV., https://web.stanford.edu/class/cs101/network-4-email.html (last visited Oct. 25, 2016).

[48] LAWRENCE LESSIG, CODE 43 (2nd ed. 2006).

[49] *See* Roberto Sanchez, *What is TCP/IP and How Does It Make the Internet Work?*, HOSTINGADVICE.COM (Nov. 17, 2015), http://www.hostingadvice.com/blog/tcpip-make-internet-work/; *Digital*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/digital (last accessed Oct. 25, 2016) (defining "digital" as "using or characterized by computer technology").

[50] *TCP/IP Terminology*, IBM KNOWLEDGE CENTER, https://www.ibm.com/support/knowledgecenter/ssw_aix_71/com.ibm.aix.networkcomm/tcpip_terms.htm (last visited Oct. 25, 2016).

[51] *See* Sarah Jane Hughes & Stephen T. Middlebrook, *Advancing a Framework for Regulating Cryptocurrency Payments Intermediaries*, 32 YALE J. ON REG. 495, 536-37 (2015); Nermin Hajdarbegovic, *Lawsky: Bitcoin Developers and Miners Exempt from BitLicense*, COINDESK (Oct. 15, 2014), http://www.coindesk.com/lawsky-bitcoin-developers-miners-exempt-bitlicense/ (noting that the Superintendent clarified, "[w]e are regulating financial intermediaries . . . we do not intend to regulate software or software development").

[52] *E.g.* Steven Norton, *CIO Explainer: What is Blockchain?*, WALL ST. J. (Feb. 2, 2016), http://blogs.wsj.com/cio/2016/02/02/cio-explainer-what-is-blockchain/.

[53] *See, e.g.*, *id.*

[54] When "bitcoin" is not capitalized it "describe[s] units of account." *Some Bitcoin Words You Might Hear*, BITCOIN, https://bitcoin.org/en/vocabulary#block (last visited Oct. 25, 2016). When capitalized, Bitcoin "describe[s] the concept of Bitcoin, or the entire network itself." *Id.*

[55] *See How Does Bitcoin Work?*, BITCOIN, https://bitcoin.org/en/how-it-works (last visited Oct. 25, 2016).

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 09/05/2017

definition of "virtual currency" because to participate in blockchain technology, a user engages "digital unit[s]," that [are] "used as medium[s] of exchange." It is digital units, like bitcoins, that carry value, and "even non-financial uses require a de minimis amount of currency," a "medium of exchange."[56]

37. Blockchain technologies are not inherently financial.[57] People can, and do use blockchain technologies to engage in a slew of non-financially related activities.[58] Artists use blockchain technology to assert ownership over their works, insurers use blockchain technology to track diamonds, and people use blockchain technology to timestamp documents and photos.[59]Additionally, people can use blockchain technology to cast votes, send messages, or enter into contracts.[60]

Virtual Currency Transmitters are Treated Differently Than Money Transmitters

38. A number of requirements imposed on "virtual currency" businesses are not imposed on other money transmitters (keeping records on all transactions, including the identity and physical address of the parties;[61] reporting and notifying transactions exceeding $10,000 in

[56] *See* § 200.2(p); Trevor I. Kiviat, Note, *Beyond Bitcoin: Issues in Regulating Blockchain Transactions*, 65 DUKE L.J. 569, 591, 597 (2016); Jeffrey A. Tucker, *What Gave Bitcoin Its Value?*, FOUND. FOR ECON. EDUC. (Aug. 27, 2014), https://fee.org/articles/what-gave-bitcoin-its-value/.
[57] *See* Luke Parker, *Ten Companies Using the Blockchain for Non-Financial Innovation*, BRAVE NEW COIN (Dec. 20, 2015), http://bravenewcoin.com/news/ten-companies-using-the-blockchain-for-non-financial-innovation/.
[58] *See*, *e.g. id.*
[59] *See id.*
[60] *See Blockchain Technology in Online Voting*, FOLLOW MY VOTE, https://followmyvote.com/online-voting-technology/blockchain-technology/; Naomi O'Leary, *British Traders Have Discovered Bitcoin*, BUS. INSIDER (Apr. 2, 2012), http://www.businessinsider.com/british-traders-have-discovered-bitcoin-2012-4 (noting that the first Bitcoin transaction was used to send a political message); Nik Custodio, *Explain Bitcoin Like I'm Five*, MEDIUM (Dec. 12, 2013), https://medium.com/@nik5ter/explain-bitcoin-like-im-five-73b4257ac833#.ri7s32qfb.
[61] 23 NYCRR 200.15(e)(1)(i)

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 09/05/2017

an aggregate amount;[62] complying with a Cyber Security Program, including staffing and reporting requirements[63]).

39. In fact, during a speech at Benjamin N. Cardozo School of Law, the Superintendent of the Financial Services for the State of New York at the time, Benjamin M. Lawsky, stated: "Moreover, to the extent that there are some specific areas of the regulation that are somewhat stronger or more robust for virtual currency firms than those for other financial institutions – such as our cyber security rules – that is primarily because we are actually considering using them as models for our regulated banks and insurance companies."

The Department Hearing on Virtual Currency

40. The Department held a hearing on the topic of virtual currency on January 28 and January 29, 2014 in New York City ("the Hearing"). The Department invited Mark T. Williams, member of the Finance & Economics Faculty at Boston University, as an expert at the Hearing. In his direct testimony in the written record he provided an analysis regarding the economic nature of Bitcoin. His written testimony establishes that Bitcoin should be treated as a commodity, and not as a currency.[64] During the Hearing, no other witness addressed in written or oral testimony, any analysis on the economic nature of Bitcoin.

41. The Department did not discuss, probe, or question Mark T. Williams' written testimony during the Hearing, and did not seek to discuss under which circumstances Bitcoin

[62] 23 NYCRR 200.15(e)(2)
[63] 23 NYCRR 200.16
[64] New York State Department of Financial Services Hearings on the Regulation of Virtual Currency (2014)(statement of Mark T. Williams, Member of the Finance & Economics Faculty, Boston University), http://www.dfs.ny.gov/about/hearings/vc_01282014/williams.pdf.

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 09/05/2017

should be considered a currency or whether Bitcoin should be considered a "financial product or service" under FSL § 104(a)(2).[65]

Credit Card Risks

42. Credit card fraud is a major problem, [66] yet stores are not required to warn customers about credit card fraud.

43. Gyft is a prime example. Gyft deals with credit card fraud on a daily basis, but the CEO, Vinny Lingham, has stated publically that his company sees zero fraud from accepting bitcoin as a method of payment.[67]

44. In recent years, major companies like Target have had the theft of payment details of millions of credit/debit card users. Credit cards are very vulnerable to fraud.[68]

45. Therefore, Bitcoin technology is considered a safer system over current payment options, such as credit card systems, when it comes to the risk of fraud and theft.[69]

WHEREFORE, for the reasons stated in the Petitioners' opposition to Respondents' cross-motion to dismiss, Petitioners respectfully request Respondents' cross-motion to dismiss be denied.

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[65] *See* New York State Department of Financial Services Hearings on the Regulation of Virtual Currency (2014), http://www.dfs.ny.gov/about/hearings/vc_01282014_indx.htm.
[66] Daniel Cawrey, *Credit Cards Have Not Evolved With the Internet. Enter Bitcoin.*, COINDESK (Jan. 5, 2014), http://www.coindesk.com/credit-cards-not-evolved-enter-bitcoin/.
[67] *Id.*
[68] *Id.*
[69] *Id.*

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 21 RECEIVED NYSCEF: 09/05/2017

Dated: July 14, 2017
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
Attorney for Plaintiffs-Petitioners

Affidavit of Theo Chino, Plaintiff-Petitioner, Opposition to Cross-Motion to Dismiss, sworn to July 14, 2017, with Exhibit List [pp. 254 - 260]

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 22 RECEIVED NYSCEF: 09/05/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTRY 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.

AFFIDAVIT OF THEO CHINO IN SUPPORT OF PLAINTIFFS'-PETITIONERS' OPPOSITION TO DEFENDANTS'-RESPONDENTS' CROSS-MOTION TO DISMISS

Index No. 101880/2015
Hon. Lucy Billings

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

I, Theo Chino, being duly sworn, deposes and states:

1. I am a Plaintiff-Petitioner in the above listed case. The information given in this affidavit is true and correct to the best of my knowledge.

2. On November 19, 2013, I incorporated Chino LTD in Delaware. A copy of the Delaware filing is attached as Exhibit I.

3. On February 24, 2014, I submitted an application for authority to conduct business in the state of New York under § 1304 of the Business Corporation Law as a foreign business corporation. The original purpose of Chino LTD was to install Bitcoin processing services in the State of New York. A copy of the New York filing receipt is attached as Exhibit II.

4. On December 31, 2014, Theo Chino co-founded Conglomerate Business Consultants, Inc. ("CBC"). A copy of the New York Certificate of incorporation is attached as

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 22 RECEIVED NYSCEF: 09/05/2017

Exhibit III.

5. Between December 2014 and May 2015, CBC entered into formal contracts with seven bodegas in New York to offer Bitcoin-processing services. The service would allow customers to pay for things like a gallon of milk in Bitcoin instead of with fiat money or a credit card. A copy of one of the contracts between CBC and a bodega is attached as Exhibit IV.

6. The bodegas were given signage to display that they accepted Bitcoins. A photo of the signage is attached as Exhibit V.

7. Every day, Chino LTD would provide the bodegas the daily exchange rate that would be used for the Bitcoin processing services.

8. While CBC was a distributor of the Bitcoin processing service (and other services) directly to bodegas, Chino LTD provided the actual Bitcoin processing.

9. Chino LTD provided all the research and development for Bitcoin processing, bought all of the computers to run the backend of processing Bitcoin, rented all of the hosting equipment to run the front end of processing Bitcoin, and developed custom operating systems to run the Bitcoin processing.

10. On August 16, 2015, I submitted an application under the New York State Minority Owned/Women Owned Business Enterprise Program for Chino LTD, which is still pending with New York State. A copy of the application and of its status information is attached as Exhibit VI.

11. Following the promulgation of the "Virtual Currency" regulation by the New York State Department of Finance at Part 200 of Chapter 1 of Title 23 of the New York Codes, Rules and Regulations (cited as "NYCRR") (the "Regulation"), and as required under NYCRR § 200.21, I submitted an application on behalf of Chino LTD for a license on August 7, 2015 to

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 22 RECEIVED NYSCEF: 09/05/2017

engage in Virtual Currency Business Activity, as defined in 23 NYCRR § 200.2(q), because I was storing, holding, and maintaining custody and control of bitcoins on behalf of third-parties, the bodegas. My business accepted the bitcoins on behalf of the bodegas and then processed the transactions back to dollars for the bodegas. A copy of the application is attached as Exhibit VII.

12. On October 16, 2015, I commenced this action realizing the Regulation would require significant costs to run my business and the deadline to file such action was within two weeks.

13. In January 2016, one consumer at Rehana's Wholesale made a purchase using Bitcoin which was processed by Chino LTD. A copy of the bill indicating the purchase is attached as Exhibit VIII.

14. On January 4, 2016, the New York State Department of Financial Services (the "Department") returned my application without further processing after they performed an initial review. The stated reason for returning my application was that the New York State Department of Financial Services was unable to evaluate whether Chino LTD's current or planned business activity would be considered Virtual Currency Business Activity that requires licensing under the New York Financial Services Law and regulations. A copy of the January 4, 2016 letter is attached as Exhibit IX.

15. Following the response from the Department, I was forced to abandon my Bitcoin processing business because my application was not approved.

16. I did not challenge the Department's January 04, 2016 response 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.

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 22 RECEIVED NYSCEF: 09/05/2017

17. In 2013, the year Chino LTD was incorporated, it suffered losses of only $4,367. The losses were due to the cost of purchasing computer equipment to test how to protect Bitcoin and figure out how to monetize it. A copy of Chino LTD's 2013 U.S. Income Tax Return, filing as an "S Corporation," is attached as Exhibit X.

18. In 2014, Chino LTD suffered losses of $59,667. The losses were mainly due to the cost of computer hardware required to run the Bitcoin warehousing, the cost of renting computer time on the cloud, and marketing the service to bodegas. A copy of Chino LTD's 2014 U.S. Income Tax Return, filing as an "S Corporation," is attached as Exhibit XI.

19. In 2015, the year Chino LTD submitted an application for a license to engage in Virtual Currency Business Activity, Chino LTD suffered losses of $30,588. The losses were due to the cost of the utilities to process Bitcoin (computer time on the internet cloud), the interest on the borrowed capital required to purchase the equipment the previous year, the cost associated with supporting CBC (who entered into the agreements with bodegas), and the cost of litigation. A copy of Chino LTD's 2015 U.S. Income Tax Return, filing as an "S Corporation," is attached as Exhibit XII.

20. In 2016, even though Chino LTD could no longer offer Bitcoin services because it did not receive a license, Chino LTD remained an active "S Corporation" and suffered losses of $53,053. The losses were due to the utilities for keeping the equipment to process Bitcoin in the event of a successful litigation, the interest on the borrowed capital from the previous three years, and the cost of the litigation. A copy of Chino LTD's 2016 U.S. Income Tax Return, filing as an "S Corporation," is attached as Exhibit XIII.

21. The 2016 tax returns for Chino LTD, together with the 2013 to 2015 tax returns for Chino LTD, confirm that I expended finances to run my business. But for the Regulation, I

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 22 RECEIVED NYSCEF: 09/05/2017

would have been able to continue my business and generate income to reimburse my expenses. However the Regulation prevented me from generating business activity and income to pay down my investments and Chino LTD's losses have continued since 2015. Therefore, the business losses of Chino LTD for 2015 and 2016 are a direct consequence of the impact of the Regulation.

22. I am qualified to make the above statements as to Bitcoin and to the related technologies such as blockchain because I have been a member of the Bitcoin Foundation since 2014 and because I am a Bitcoin protocol programmer. Additionally, I have worked in Silicon Valley technology firms such as credit card payment fraud systems (CyberSource) and television/Internet/phone service providers (Time Warner Cable). Furthermore, I have been a technical expert and advisor to several French Senators and Legislators who were members of relevant technology-related Committees of the French Senate and the French National Assembly, as well as to the French Minister of Digital Affairs between 2014 and 2017.

23. I was also the president of the Student Chapter of the Alaskan Data Processing Management Association (DPMA, Association of Information Technology Professionals) in 1996 and I also have been a C/C++ programmer since 1993.

24. Based on this expertise, I fully agree with the conclusion expressed by Daniel Cawrey in his article, *Credit Cards Have Not Evolved With the Internet. Enter Bitcoin.*, COINDESK (Jan. 5, 2014) (available at http://www.coindesk.com/credit-cards-not-evolved-enter-bitcoin/, a copy of which is attached as Exhibit XIV), according to which the Bitcoin technology is a safer system than credit card systems. Therefore, it is my technical opinion that the required disclosures imposed by the Regulation in 23 NYCRR § 200.19(a)(8) are inaccurate and false. Furthermore, it is my technical opinion that, because the required disclosures imposed by the Regulation in 23 NYCRR § 200.19(a)(9), 23 NYCRR § 200.19(b)(1), 23 NYCRR §

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 22 RECEIVED NYSCEF: 09/05/2017

200.19(b)(2), 23 NYCRR § 200.19(c)(3), 23 NYCRR § 200.19(c)(4) and 23 NYCRR § 200.19(g) rely on the false assumption that using virtual currencies puts the user at greater risk of fraud or cyber-attack than using a credit card or online shopping, those required disclosures imposed by the Regulation in 23 NYCRR § 200.19(a)(9), 23 NYCRR § 200.19(b)(1), 23 NYCRR § 200.19(b)(2), 23 NYCRR § 200.19(c)(3), 23 NYCRR § 200.19(c)(4) and 23 NYCRR § 200.19(g) are also inaccurate, false or overly broad, therefore representing a significant and undue burden on a small business such as Chino, LTD.

Dated: July 14, 2017
New York, NY

Theo Chino
640 Riverside Drive, 10B
New York, NY 10031

PIERRE CIRIC
NOTARY PUBLIC-STATE OF NEW YORK
No. 02CI6233718
Qualified in New York County
My Commission Expires January 03, 2018

SWORN to before me, this 14th day July, 2017

NOTARY PUBLIC

FILED: NEW YORK COUNTY CLERK 09/05/2017 02:40 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 23 RECEIVED NYSCEF: 09/05/2017

Theo Chino Affidavit Exhibit List

EXHIBIT	DOCUMENT DESCRIPTION
I	Chino LTD Delaware Certificate of Incorporation
II	Chino LTD's Filing Receipt for Application for Authority (Foreign Bus)
III	CBC's New York Certificate of Incorporation
IV	Bitcoin Processing Agreement between CBC and Neio Wireless
V	Photo of Signage Given To Stores
VI	Application under the New York State Minority Owned/Women Owned Business Enterprise Program for Chino LTD and Status Report
VII	Chino LTD's Application for License to Engage in Virtual Currency Business Activity
VIII	Receipt from Rehana's Wholesale indicating Bitcoin purchase
IX	January 4, 2016 Letter from New York State Department of Financial Services
X	Chino LTD's 2013 U.S. Income Tax Return, filing as a "S Corporation"
XI	Chino LTD's 2014 U.S. Income Tax Return, filing as a "S Corporation"
XII	Chino LTD's 2015 U.S. Income Tax Return, filing as a "S Corporation"
XIII	Chino LTD's 2016 U.S. Income Tax Return, filing as a "S Corporation"
XIV	Daniel Cawrey, *Credit Cards Have Not Evolved With the Internet. Enter Bitcoin.*, COINDESK (Jan. 5, 2014), http://www.coindesk.com/credit-cards-not-evolved-enter-bitcoin/

Exhibit I to Chino Affidavit -
Certificate of Incorporation of Chino Ltd Delaware
(Reproduced Herein at pages 63 to 64)

Exhibit II to Chino Affidavit -
Filing Receipt for Application for Authority (Foreign Bus) of Chino Ltd
(Reproduced Herein at page 65)

Exhibit III to Chino Affidavit -
Certificate of Incorporation of Conglomerate Business Consultants Inc
(Reproduced Herein at pages 69 to 72)

Exhibit IV to Chino Affidavit -
Bitcoin Processing Agreement between Conglomerate
Business Consultants Inc and Neio Wireless, dated May 28, 2015
(Reproduced Herein at pages 75 to 76)

Exhibit V to Chino Affidavit -
Photo of Signage Given to Stores
(Reproduced Herein at page 77)

Exhibit VI to Chino Affidavit -
Application Under the New York State Minority Owned/Women Owned Business
Enterprise Program for Chino Ltd and Status Report
(Reproduced Herein at pages 78 to 87)

Exhibit VII to Chino Affidavit -
Application for License to Engage in Virtual Currency
Business Activity of Chino Ltd, dated August 7, 2015
(Reproduced Herein at pages 88 to 106)

Exhibit VIII to Chino Affidavit -
Receipt for Rehana's Wholesale Indicating
Bitcoin Purchase, dated January 4, 2016
(Reproduced Herein at page 107)

Exhibit IX to Chino Affidavit -
Letter from Maharshi Datta to Theo Chino, dated January 4, 2016
(Reproduced Herein at page 108)

Exhibit X to Chino Affidavit -
2013 U.S. Income Tax Return of Chino Ltd
(Reproduced Herein at pages 109 to 113)

Exhibit XI to Chino Affidavit -
2014 U.S. Income Tax Return of Chino Ltd
(Reproduced Herein at pages 114 to 118)

Exhibit XII to Chino Affidavit -
2015 U.S. Income Tax Return of Chino Ltd
(Reproduced Herein at pages 119 to 123)

Exhibit XIII to Chino Affidavit -
2016 U.S. Income Tax Return of Chino Ltd
(Reproduced Herein at pages 124 to 128)

Exhibit XIV to Chino Affidavit -
"Credit Cards Have Not Evolved with the Internet.
Enter Bitcoin", *www.coindesk.com*, dated January 5, 2014
[pp. 263 - 265]

Credit Cards Have Not Evolved With the Internet. Enter Bitcoin.

Jan 5, 2014 at 11:57 by Daniel Cawrey

The credit card has a lengthy history. One of the first iterations of plastic was actually made of sheet metal. It was called the Charga-Plate, developed in 1928. It was issued to frequent customers by merchants in the same way that department stores today give out credit cards.

To record a transaction a merchant would place the Charga-Plate into a device that allowed a paper charge slip to be laid on top of it. An inked ribbon would then be run on top of the paper, creating a record of the sale.

This method of credit card processing was used for years until the digital revolution arrived. After that, electronic card readers could harness the information from swiping magnetic strips through a machine, providing easier record keeping.

Then, the internet came along. And it didn't accept cash, only payment information in the form of credit or debit cards. The credit card companies didn't evolve their product along with the internet; they pretty much kept it the same. This has created a number of issues that prove how outdated the credit card has really become.

Transaction Fees

A major challenge in the internet era has been how media companies make money on this new platform. Advertising has played a major part, but its long-term effectiveness has been questioned.

Sure, e-commerce is an effective method of generating money on the web. But paying small amounts for media content has been a much harder challenge.

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Jul 11 | 12:24 Utilizing the
Blockchain i
Sector

Have a breaking stor
Let us know here »

Digital ads are not replacing traditional advertising revenue. Source: The Atlantic

Consider the plight of many media companies that did not anticipate the digital age. If there were an easy way for them to accept tiny payments for their content, they would.

But credit cards don't easily allow for that. Many processors charge a fee of $0.30 plus a percentage off the top of a transaction. And payment processors often consider a microtransaction as a payment of less than $5.00 yet that really does not seem "micro" at all.

Credit card processors must make money in the form of transaction fees. That's their business.

But their ongoing model for small payments is outdated. This is evident when you go to a store that charges a fee for a particular transaction threshold, such as for less than $5.00.

In a world where cash is becoming scarce as more people prefer plastic, credit card companies must learn to adapt to a newer fee model, or be overtaken by digital currencies like bitcoin.

Privacy

Another problem with credit cards is all the information that is contained within them. Companies increasingly want to boost revenues by collecting purchasing information.

The theory goes that with this information they can glean insights on customers that will help to sell more goods and services. More goods and services can mean more revenue, which keeps stockholders happy.

The problem with that is many customers don't want to have that information given out to other companies that then might try to get them to buy additional products and services.

Yet credit card providers already have been selling advertisers credit card purchasing information, a veritable treasure trove of data for marketers to mine through. The Washington Post has previously reported that companies have nicknames for ranking customers:

> *Everytime you buy with a credit card your information is being stored & evaluated http://t.co/mvY3HO77uk via @jurylady5*
>
> *— cinnamon_carter (@cinnamon_carter) December 26, 2013*

Consumers have very little choice in this matter. After all, how can you pay for things on the internet without a credit card?

One company, called MaskMe, allows users to create disposable credit card numbers when making purchases online. But that's a time-consuming method.

Many merchants accept PayPal linked to a bank account, yet many still are uncomfortable with a direct link to their banking data.

Fraud

Credit card fraud continues to be a problem. In fact, this has been an issue since the 1990s when AOL wasn't even confirming credit card numbers at the time of sale.

Vinny Lingham, the CEO of gift card purveyor Gyft, has to deal with credit card scammers all of the time. He has regularly told audiences during events he speaks at that his company sees zero fraud from accepting bitcoin as a method of payment.

Yet Gyft must contend with credit card fraud on a daily basis.

Gift cards are a resource for thieves to transfer the value of stolen credit cards over to something that appears more legitimate. What this means for the consumer is higher costs overall, for everything, because of all of

these scams.

The recent news of the Target theft of payment details from over 40 million credit/debit cards also highlights this problem.

That so much information was stolen shows just how fragile the existing system is as it stands. eWeek reported that the magnetic strip on the credit cards was the Target vulnerability.

> *The #Target security breach could have been avoided had the company made one change to its card readers. http://t.co/QCG2GwF9QK*
>
> *— Wayne Rash (@wrash) December 26, 2013*

Richard Crone, a payment consultant, recently told PaymentsSource regarding the hack:

> *"If the payments industry was starting from scratch today, no one would pass actual payment credentials through the point of sale."*

Conclusion

Credit cards were not built for the digital world that we live in today. Rather, they have been adapted to become the standard that we use for buying things online.

We don't even need the cards to buy things online; this is why digital currencies like bitcoin offer so much promise. Yet in the eyes of the banks and credit card processors, they pose a problem.

> *Banks warn of dangers of bitcoin because people already know of the dangers of banks and are looking for choices.*
>
> *— AndreasMAntonopoulos (@aantonop) December 26, 2013*

The payments industry may have no choice but to start from scratch.

Many credit card companies are now realizing that mobile and contactless payments are the future. Yet the prospect of personal information being sold or even hacked in new and different ways is still a threat with this new paradigm.

This is why the disruptive qualities that bitcoin presents to banks should actually be considered as an opportunity rather than a threat. It's a value proposition for merchants who are fed up with chargebacks.

It can be a more private method of payment than what the credit card companies are currently offering.

The fact of the matter is that there is always going to be that risk of fraud or theft. But as a purchasing method, bitcoin should be considered an innovative framework that could be more successful over current payment options for the internet today.

Credit card machine via Shutterstock

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Privacy Credit Cards Micropayments Microtransactions Gyft Target

Notice of Cross-Motion by Plaintiffs-Petitioners for Limited Discovery and Abeyance of Prior Cross-Motion, dated August 2, 2017, with Exhibit List [pp. 266 - 268]

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 25 RECEIVED NYSCEF: 09/05/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTRY OF NEW YORK

THEO CHINO and CHINO LTD,

Plaintiffs-Petitioners,

-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.

Index No. 101880/2015
Hon. Carmen Victoria St. George

ORAL ARGUMENT REQUESTED

NOTICE OF PLAINTIFFS-PETITIONERS' CROSS-MOTION FOR LIMITED DISCOVERY AND FOR HOLDING DEFENDANTS-RESPONDENTS' CROSS-MOTION TO DISMISS IN ABEYANCE

Upon the Affirmation of Pierre Ciric, Esq., the upon the accompanying Memorandum of Law and Exhibits, and all the pleadings and proceedings heretofore had herein, the undersigned will move this court before the Civil Branch Clerk's Office of the New York State Supreme Court, County of New York, located in room 130 of the Courthouse located at 60 Centre Street, New York, NY, on the 31th day of August, 2017 at 9:30am, or as soon thereafter as counsel may be heard, for an order:

(a) pursuant to CPLR § 408, compelling Paul Krugman to testify before the Court as an expert witness for the purpose of creating an evidentiary record necessary in the instant action, on the grounds that his deposition is material to comply with full disclosure;

(b) pursuant to CPLR § 408, compelling the Defendants-Respondents to produce all internal emails, emails with third-parties, and other written documentation supporting how they reached their regulatory conclusion as to the economic nature of Bitcoin falling into the definition of a "financial product or service," between January 01, 2013 to September 30, 2015, for the purpose of creating an evidentiary record necessary in the instant action, on the grounds that this information is material to comply with full disclosure;

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 25 RECEIVED NYSCEF: 09/05/2017

(c) pursuant to CPLR § 408, compelling Benjamin Lawsky to attend a deposition for the purpose of creating an evidentiary record necessary in the instant action, on the grounds that his deposition is material to comply with full disclosure;

(d) and holding Defendants-Respondents' cross-motion to dismiss dated June 23, 2017 in abeyance until after Plaintiff-Petitioner's motion for limited discovery under CPLR § 408 has been decided and until after the completion of the limited discovery ordered by the Court.

This motion is based on this Notice, the accompanying Affirmation, Memorandum of Law, Exhibits, and such further evidence and arguments that may be presented at the hearing.

An affirmation that a good faith effort has been made to resolve the issues raised in this motion is attached hereto as Exhibit E.

Pursuant to CPLR §§ 2214(b) and 2215, answering papers, if any, are to be served upon the undersigned by August 21, 2017.

Dated: August 02, 2017
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

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 26 RECEIVED NYSCEF: 09/05/2017

Documents In Support Of Plaintiffs-Petitioners' Cross-Motion For Limited Discovery and For Holding Defendants-Respondents' Cross-Motion To Dismiss In Abeyance

TAB	DOCUMENT DESCRIPTION
A	Notice of Plaintiffs-Petitioners' cross-motion for limited discovery and for holding Defendants-Respondents' cross-motion to dismiss in abeyance
B	Affirmation of Pierre Ciric in support of Plaintiffs-Petitioners' cross-motion for limited discovery and for holding Defendants-Respondents' cross-motion to dismiss in abeyance
C	New York State Department of Financial Services Hearings on the Regulation of Virtual Currency (2014)(statement of Mark T. Williams, Member of the Finance & Economics Faculty, Boston University)
D	Affidavit of Jim Harper in support of Plaintiffs-Petitioners' cross-motion for limited discovery and for holding Defendants-Respondents' cross-motion to dismiss in abeyance
E	Affirmation of good faith pursuant to uniform court rule 202.7(f)
F	Affirmation of Service

Affirmation of Pierre Ciric, for Plaintiffs-Petitioners, in Support of Cross-Motion for Limited Discovery, dated August 2, 2017 [pp. 269 - 273]

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 27 RECEIVED NYSCEF: 09/05/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTRY OF NEW YORK

THEO CHINO and CHINO LTD,

Plaintiffs-Petitioners,

-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.

Index No. 101880/2015
Hon. Carmen Victoria St. George

ORAL ARGUMENT REQUESTED

AFFIRMATION OF PIERRE CIRIC IN SUPPORT OF PLAINTIFFS-PETITIONERS' CROSS-MOTION FOR LIMITED DISCOVERY AND FOR HOLDING DEFENDANTS-RESPONDENTS' CROSS-MOTION TO DISMISS IN ABEYANCE

I, Pierre Ciric, an attorney duly admitted to practice law before the courts of the State of New York, and not a party to the above-entitled action, affirm the following to be true to the best of my knowledge and under the penalties of perjury pursuant to New York Civil Practice Law and Rules ("CPLR") § 2106:

1. I am an attorney at the Ciric Law Firm, PLLC and counsel for Plaintiffs-Petitioners Theo Chino and Chino LTD ("Plaintiffs-Petitioners") in the above-entitled action.

2. In my capacity as counsel for Plaintiffs-Petitioners, I am fully familiar with the facts and circumstances hereinafter contained, the source of such knowledge being the file materials maintained by my office during the course of the action herein.

3. I submit this affirmation in support of the Plaintiffs-Petitioners' cross-motion for limited discovery and for holding Defendants-Respondents' cross-motion to dismiss in abeyance, which seeks an Order:

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 27 RECEIVED NYSCEF: 09/05/2017

(a) pursuant to CPLR § 408, compelling Paul Krugman to testify before the Court as an expert witness for the purpose of creating an evidentiary record necessary in the instant action, on the grounds that his deposition is material to comply with full disclosure;

(b) pursuant to CPLR § 408, compelling the Defendants-Respondents to produce all internal emails, emails with third-parties, and other written documentation supporting how they reached their regulatory conclusion as to the economic nature of Bitcoin falling into the definition of a "financial product or service," between January 01, 2013 to September 30, 2015, for the purpose of creating an evidentiary record necessary in the instant action, on the grounds that this information is material to comply with full disclosure;

(c) pursuant to CPLR § 408, compelling Benjamin Lawsky to attend a deposition for the purpose of creating an evidentiary record necessary in the instant action, on the grounds that his deposition is material to comply with full disclosure; and

(d) holding Defendants-Respondents' cross-motion to dismiss dated June 23, 2017 in abeyance until after Plaintiff-Petitioner's motion for limited discovery under CPLR § 408 has been decided and until after the completion of the limited discovery ordered by the Court.

4. This action was filed to challenge the "Virtual Currency" regulation promulgated by the New York State Department of Financial Services at Part 200 of Chapter 1 of Title 23 of the New York Codes, Rules and Regulations (the "Regulation")

5. On October 16, 2015, Theo Chino filed the above-entitled action.

6. Defendants-Respondents filed a cross-motion to dismiss on April 22, 2016. Theo Chino filed his response to the cross-motion to dismiss on October 31, 2016. On January 20, 2017, Defendants-Respondents filed a reply in further support of their cross-motion to dismiss, hereinafter cited to as "Defs.' First Reply Mem."

7. On May 24, Plaintiffs-Petitioners filed an Amended Verified Complaint and Article 78 Petition.

8. Defendants-Respondents filed a cross-motion to dismiss Plaintiffs-Petitioners' Amended Verified Complaint and Article 78 Petition on June 23, 2017.

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 27 RECEIVED NYSCEF: 09/05/2017

9. Plaintiffs-Petitioners filed their response to the cross-motion to dismiss on July 14, 2017.

10. Plaintiffs-Petitioners are now filling this cross-motion for limited discovery under CPLR § 408 because Defendants-Respondents' cross-motion to dismiss filed on June 23, 2017 cannot be resolved without making further factual determination as to whether bitcoin is a "financial product or service" and whether the Regulation was designed and issued by Defendants-Respondents in an arbitrary and capricious fashion.

11. There are significant and irreconcilable factual differences between the arguments presented by Plaintiffs-Petitioners and Defendants-Respondents which can only be resolved through limited discovery under CPLR § 408. Those factual differences and disputes involve whether Bitcoin is a "financial product or service" which impacts whether Defendants-Respondents had the authority to regulate Bitcoin, and whether Defendants-Respondents acted in an arbitrary and capricious fashion when they designed the Regulation.

12. Specifically, during hearings held by the New York State Department of Financial Services on the topic of virtual currency on January 28 and January 29, 2014 in New York City ("the Hearings"), Mark T. Williams, member of the Finance & Economics Faculty at Boston University, was the only witness present at the Hearings who introduced in the written record direct testimony as to an analysis regarding the economic nature of Bitcoin. His testimony establishes that Bitcoin should be treated as a commodity, and not as a currency, reinforcing the position adopted by both the IRS[1] and the CFTC.[2] New York State Department of Financial Services Hearings on the Regulation of Virtual Currency (2014)(statement of Mark T. Williams,

[1] *See* Notice 2014-21, IRS, https://www.irs.gov/pub/irs-drop/n-14-21.pdf (recognizing that bitcoins "[do] not have legal tender status in any jurisdiction").
[2] *In re Coinflip, Inc.*, CFTC Docket No. 15-29 at 3 (Sept. 17, 2015).

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 27 RECEIVED NYSCEF: 09/05/2017

Member of the Finance & Economics Faculty, Boston University), http://www.dfs.ny.gov/about/hearings/vc_01282014/williams.pdf, attached as Exhibit C.

13. However, Defendants-Respondents did not discuss, probe, or question Mark T. Williams' written testimony during the Hearings, and did not seek to discuss under which circumstances Bitcoin should be considered a currency or whether Bitcoin should be considered a "financial product or service" under FSL § 104(a)(2). *See* New York State Department of Financial Services Hearings on the Regulation of Virtual Currency (2014), http://www.dfs.ny.gov/about/hearings/vc_01282014_indx.htm.

14. At the end of the Hearings, Benjamin Lawsky, then Superintendent of Financial Services and head of the Department of Financial Services, indicated that he would be in contact with everyone during the drafting of the Regulation. *Id.*

15. A Florida court recently ruled that Bitcoin is not money. *Florida v. Espinoza*, No. F14-2923 at 6 (Fla. 11th Cir. Ct. July 22, 2016) (concluding that "it is very clear, even to someone with limited knowledge in the area, that Bitcoin has a long way to go before it is the equivalent of money" most notably because it is not accepted by all merchants, the value fluctuates significantly, there is a lack of a stabilization mechanism, they have limited ability to act as a store of value, and Bitcoin is a decentralized system.). In this case, the *Espinoza*, court allowed in an expert witness, Charles Evans, a Barry University economist, to discuss the economic nature of Bitcoin. *See* Mazin Sidahmed, *Bitcoin 'not real money' says Miami judge in closely watched ruling*, THE GUARDIAN (Jul. 26, 2016), https://www.theguardian.com/technology/2016/jul/26/bitcoin-not-real-money-miami-judge.

16. During a meeting held on January 18, 2017 in Miami with counsel to the defendant in the *Espinoza* case, Mr. Frank Andrew Prieto, Esq., I was able to confirm that

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 27 RECEIVED NYSCEF: 09/05/2017

counsel was able to admit the expert witness testimony of Charles Evans on behalf of Michell Abner Espinoza, the defendant in the *Espinoza* case, during the court proceedings.

17. Contrary to Defendants-Respondents' statements that Paul Krugman, as an expert authority, supports the proposition that Bitcoin is money, Defs.' First Reply Mem. 16, Paul Krugman, a prominent figure in the field of economics, an op-ed columnist for *The New York Times*, and a 2008 Nobel Memorial Prize in Economic Sciences recipient, has been adamant that Bitcoin is not money because it must be both a medium of exchange and reasonably stable store of value. Paul Krugman points out that Bitcoin is not a stable store of value. Paul Krugman, *Bitcoin is Evil*, THE NEW YORK TIMES (Dec. 28, 2013), https://krugman.blogs.nytimes.com/2013/12/28/bitcoin-is-evil/.

WHEREFORE, it is respectfully requested that this Court issue the relief requested herein in its entirety, together with such other and further relief as this Court may deem just and proper.

Dated: August 02, 2017
New York, New York

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**Exhibit to Ciric Affirmation -
New York State Department of Financial Services
Hearings on the Regulation of Virtual Currency (2014)
Statement of Mark T. Williams, Member of the Finance
and Economics Faculty, Boston University, dated January 28-29, 2014
[pp. 274 - 286]**

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 28 RECEIVED NYSCEF: 09/05/2017

Testimony of Mark T. Williams[1]
Banking Specialist, Commodities and Risk Management Expert
Boston University Finance Department
To The New York State Department of Financial Services
January 28-29, 2014
Hearing Regarding Virtual Currencies
90 Church Street
New York City, New York

Executive Summary

Since 2009, over seventy-five virtual currencies have been created and are traded globally representing about $11 billion in stated market value. http://coinmarketcap.com/mineable.html. Of these e-currencies, Bitcoin is the leader represents about $10 billion or over 90 percent of total industry market value. Based on its volatile price behavior, **Bitcoin is not a virtual currency but a high-risk virtual commodity, in a hyper-asset bubble that has begun to pop**. Bitcoin the pseudo currency and Bitcoin the low-cost payment system are dependent on each other and inseparable.[2] Over the last year, Bitcoin prices have been artificially inflated through an oligopolistic ownership structure, extreme hoarding practices, unregulated e-exchanges, marketing hype and greater opportunity for market manipulation. The trust and integrity associated with the U.S. Dollar as a transactional currency has been earned over centuries and supported by ongoing monetary and fiscal policy, soundness of central banking systems, regulation and enforcement.[3] There are significant risks and uncertainties associated with virtual currencies that need to be fully measured before they are allowed to proliferate further or be adopted into the financial system. **Bitcoin presents numerous market related risks as it is decentralized, volatile, untraceable, unregulated, and provides no legal protection for consumers.** If Bitcoin, in its embryonic stage, were to replace the U.S. dollar, it would be economically disastrous causing trade to plummet, GDP to fall and unemployment levels and bartering to surge. **Bitcoin is an experiment that needs to remain in the laboratory until it can meet the basic standards required to become a beneficial transactional currency.** As a virtual commodity, Bitcoin remains extremely risky and needs to be closely watched. To transform Bitcoin into a virtual currency would require regulation, centralization, creation of a legal framework and strong regulatory oversight. However, these steps alone would not necessarily guarantee that chronically high price volatility would drop low enough to allow Bitcoin to become a trusted transactional currency.

In conclusion, I hope this testimony will provide additional insight and spur further research and analysis into virtual currencies and the growing risks they pose to U.S. investors, the financial system and to the overall global economy if not properly managed.

[1] Mark T. Williams has no direct or indirect financial interest in either Bitcoin, Bitcoin-related startups or any other
[2] Bitcoin is the equivalent of the locomotive while the payment system is the rails that allow it to move. If the engine does not work no matter how well built the rails, they won't be used.
[3] The Federal Reserve Bank was founded in 1913.

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 28 RECEIVED NYSCEF: 09/05/2017

I. Background

My name is Mark Williams. For the last decade I have taught banking, finance and capital markets at Boston University. My areas of expertise include banking, risk management and commodity trading. Of particular interest is evaluating market bubbles and potential market manipulation schemes. In 2010, through McGraw Hill, I published Uncontrolled Risk, www.uncontrolledrisk.com, a book about the fall of Lehman Brothers and the major factors that caused the real estate bubble.

Prior to Boston University, I was a senior trading floor executive at Citizens Power LLC, a Boston-based commodity-trading firm. Other work experience included stints at the Federal Reserve Bank as a field examiner in Boston and San Francisco. Through my academic and work experiences I have gained a strong understanding of how the capital markets function, the vital role of currency, how financial institutions operate, and how manipulation schemes can be used to distort market prices and harm unsuspecting investors.

For the last year, I have closely followed, evaluated and more recently written on Bitcoin, its market structure and its highly unusual price run-up. During this period it has become increasingly apparent that **structural weaknesses have caused inefficiencies providing greater opportunity for market manipulation**. In this regard, I also bring this matter to your attention for further consideration and review.

II. Creation of Bitcoin

In 2009, a programmer or group of programmers by the pseudo name Satoushi Nakamoto[4] supposedly designed Bitcoin, a computer generated "virtual currency" produced by solving progressively complex mathematical puzzles.[5] The code-protocol for Bitcoin is open source, allowing it to be easily viewed, commented on and if a majority of programmers agree, changes are adopted. In this regard, Bitcoin is very transparent.[6] The Bitcoin infrastructure that includes a payment system is decentralized and based on a peer-to-peer structure. Individuals in numerous locations, using powerful computers to solve predetermined equations, authenticate e-coins and help keep a general ledger of ongoing transactions. This blockchain ledger provides a visible record of all past, current and all future transactions. For their efforts, puzzle solvers are rewarded with blocks of e-coins. This process is referred to as mining and those that do it are called miners. Interestingly, using such terminology also gives the false impression that something of tangible value is being created such as gold being mined out of the ground. Some enthusiasts have claimed that Bitcoin is gold for geeks. Initially, the barrier to entry to become a miner was low. As time has passed this barrier has risen and those who are already mining have a competitive advantage and

[4] This individual (or group of individuals) has never stepped forward to take credit for his work adding to the mystery and mystique but raises the question does this person actually exist. However, others such as Gavin Andersen have stepped forward serving as the Chief Scientist on the board of the Bitcoin Foundation.

[5] Bitcoin has not been recognized by any of the G20 countries as meeting the definition of currency as it lacks price stability and does not provide a stable store of value. As a result it is a speculative virtual commodity with no tangible value.

[6] The Bitcoin community has argued that this open source approach is a strong control as it allows a large community of computer scientists, software engineers and cryptologists to watch over the system and insure its integrity.

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 28 RECEIVED NYSCEF: 09/05/2017

greater market power.[7] To gain a competitive edge, some miners have moved their operations to Iceland to take advantage of the lower cost of geothermal power.

Initially, miners were rewarded with 50 coins per block. More recently, a block is equal to 25 coins. The coin/block ratio will continue to half as time goes on. It takes approximately 10 minutes to mine a block and approximately 4,000 new e-coins are generated globally per day. Presently, over 12.3 million Bitcoins have been minted and by year 2140, the maximum limit of 21 million will be reached. Prescribed quantity limitations create a scarcity that has put upward pressure on prices. This pricing influence works as long as new investors can be recruited to buy newly minted e-coins.

Theoretically, the Bitcoin mining and authenticity process is decentralized, keeping collusion between miners to a minimum. However, in practice, **as prices have skyrocketed, there has been greater economic incentive for miners to ban together in pursuit of greater profits. As a result, this remains a clear weakness in the Bitcoin infrastructure**.[8] As new e-coins are minted they are added to the blockchain and when trades occur, existing e-coins are authenticated against this blockchain. As more Bitcoins are mined, the blockchain grows longer in complexity and the verification time increases.

III. Why Investors Are Motivated to Buy Bitcoin

What convinces individuals to exchange real money for fake or digital money? **Bitcoin is an unusual investment choice as it has no tangible value and is not backed by anything**.[9] Presently, Bitcoin prices have shot up not because of underlying value but because of misinformation, concentrated market power, hoarding, opaque and unregulated exchanges, insufficient trade reporting, elevated marketing hype and greater opportunities for market manipulation.

In addition to mining or buying Bitcoins on e-exchanges, investors can now buy them from Bitcoin ATMs. Such machines are popping up around the globe in alarming numbers. All that is needed prior to investing is to setup an e-wallet account. **With increased ease and access to buying Bitcoins, also comes greater risk to uninformed and less sophisticated investors.** To minimize investor losses, regulation covering Bitcoin ATM buying also needs to be quickly established.

a. What is the Value Proposition?

Bitcoin is not a company where investors can own stock. It is not incorporated, has no CEO, management or a board. It is a concept, an experimental idea, its source code is public and its intellectual property is given away for free. Since inception, Bitcoin has been promoted as a disruptive technology, a virtual payment system and a means to take control away from

[7] On a per coin basis, the estimated cost (time and energy usage) of mining Bitcoins has increased to the $10 to $14 range.

[8] Last month a group of miners by the name of Ghash.io demonstrated this system weakness by pooling their computing power to form one supercomputer and showing how to circumvent the decentralized structure and gain 51 percent control.

[9] Unlike conventional currencies that are backed by the full faith and taxing power of the issuing sovereign.

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 28 RECEIVED NYSCEF: 09/05/2017

irresponsible central bankers and return the power of currency creation to the people. Some Bitcoiners have even compared the coin's birth to the start of the internet revolution. Others have called this period the Bitcoin Revolution.

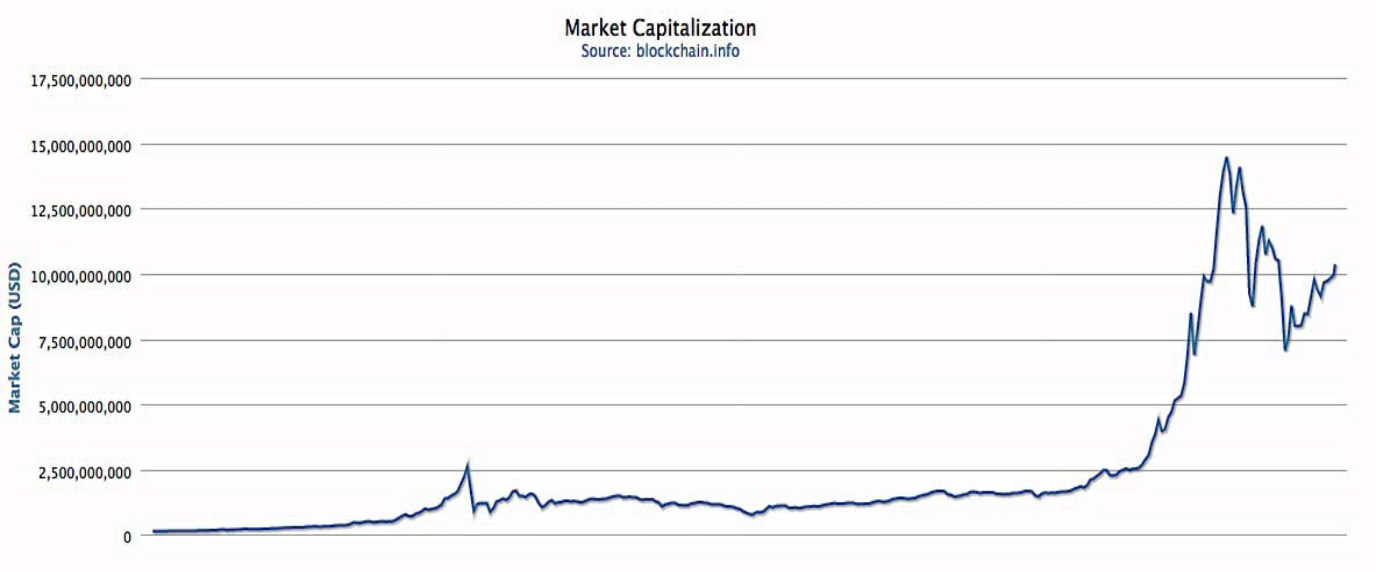
Added factors have enticed investors including rapidly rising prices as well as the mystique associated with the programmer or group of programmers using the pseudo name Satoushi Nakamoto. It is puzzling that few investors have questioned why he (or group of programmers) has not publically stepped forward. Could this be an elaborate hoax to hype investor demand or is it a calculated risk management maneuver to shield the creator from legal liability if the invention is used for unlawful purposes?

Regardless of the reason, investor appetite for Bitcoin remains strong. In general, investor rationale has fallen into the following five categories:

1. Virtual currency – It can't be manipulated by central bankers, has finite quantity and when adopted as a world currency it will have immense value.
2. Virtual commodity – Buy Bitcoin and profit from scarcity of supply of a good that will be in great demand.
3. Payment system – Bitcoin is a payment system that will replace Visa, Mastercard and Western Union.
4. Ownership – Buying Bitcoin is like buying into an internet startup venture.
5. Political Statement – Buying Bitcoin is a vote against central bankers and failed policy that has undermined our economy.

IV. Bitcoin is a Virtual Commodity and **not** a Virtual Currency

Although Bitcoin was purportedly designed as a virtual currency, it is a highly-speculative virtual commodity. Since 2013, prices have skyrocketed from $13 to a December market peak of $1,200. Currently, Bitcoin trades for about $850. There is no major currency on the plant that exhibits this sort of price pattern.



FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 28 RECEIVED NYSCEF: 09/05/2017

a) Why Bitcoin is not a Virtual Currency

Useful transactional currencies are to be saved, lent or spent but not hoarded. Transactional currencies exhibit low price volatility while tradable commodities tend to exhibit high to extreme price volatility. By definition, a currency should have price stability and provide a means of stored value. Faith in and the use of currency for daily activities is a key pump that drives economic prosperity. If a currency has the potential to increase greater than the goods it can buy, owners will natural hoard the currency over ownership of goods. Hard currencies such as the U.S. Dollar, British Pound Sterling and the Euro exhibit low price volatility, providing a dependable means to transact commerce. Gross Domestic Product or GDP is a key economic measurement used to measure goods and services produced. United States, the world's largest economy, has an annual GDP of approximately $15 trillion. If extreme price movements in the U.S. dollar caused its use to fall, commerce would decline, causing GDP and per capita income to also decline. In a contracting economy, unemployment rates rise. In extreme situations, if currency is perceived as having significant appreciation potential, it will be hoarded.

1. Extreme Hoarding

Unlike useful transactional currencies, holders of Bitcoin practice extreme hoarding. Currently, of the approximately 12.3 million e-coins produced, over 90 percent are hoarded and not used (or available) for commerce. The significant daily price fluctuation of Bitcoin including its rapid appreciation, and extreme annual volatility, undermines its ability to serve as a stable, safe and trusted transactional currency.

If the U.S. were to adopt Bitcoin in its current embryonic state as a parallel currency and the same level of hoarding was practiced, it would be economically disastrous, for U.S. trade, the banking system, GDP, standard of living and overall level of employment. Trade would decline as holders of currency would use it as a commodity to speculate and not as a means for transacting business. Given that the U.S. dollar is the world reserve currency with over $1.2 trillion in circulation, it would also have a significantly negative impact on global economy and trade.

2. Tax Implications

Given the high price run-up in Bitcoin, there are significant tax considerations that also influence the level of hoarding versus spending. If an e-coin was purchased for $500 and it now trades for $850, (a $350 taxable profit) the owner is going to be less motivated to use it for transactional purposes, especially if doing so would trigger a tax event. Globally, tax treatment uncertainty persists, as countries are just starting to establish tax rules for virtual currencies. In general the decision will come down to taxing e-currency income either at current income or at capital gains tax rates.

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 28 RECEIVED NYSCEF: 09/05/2017

V. Hyper Price Volatility

In 2013, Bitcoin increased in price by an astonishing 9,000 percent with 150 percent price volatility. In comparison, the U.S. dollar to other hard currencies typically exhibits an annual price movement in the 10 to 12 percent range. To provide perspective, Bitcoin is 7 times more volatile than gold and 8 times more volatile than the S&P 500 Index. In recent months, prices have been on a rollercoaster dropping by 30 percent since the market high. It is not uncommon for daily prices to move by 20 or 30 percent. During the second week of December 2013, in a 48 hour period, prices plummeted by 50 percent only to rise again two weeks later. Since the December low of approximately $535, Bitcoin has gained about $300.

1. Well Established Retailers are not Willing to Accept Bitcoin Price Risk

High daily price risk presents a major hurdle for the adoption of Bitcoin as a viable virtual currency. Large retailers work on tight margins sometimes as little as 10 to 15 percent. Given that daily price movements can be two times greater, a sudden price drop could wipe out retailer profits and even generate a significant loss. **Technically, at present levels, if a large retailer were to accept Bitcoin price risk directly, they would no longer be in the retail business but in the high-risk commodity trading business**. If a publically traded company, shareholder could revolt.

2. Increased Concentration Risk to Financial Middlemen – Growing Regulatory Concern

Given the high daily price risk associated with Bitcoin, retailers have been hesitant to assume this significant market risk. In response, several Bitcoin startups including BitPay and Coinbase have emerged. These financial middlemen sit between customer and retailer, fixing the Bitcoin exchange rate prior to sale. When using such middlemen, retailers might advertise they take Bitcoin, even posting a sticker on their doors, but technically, they are not taking Bitcoin, they are taking U.S. dollars. **Importantly, these types of financial arrangements do not reduce overall market risk but simply concentrates this risk.** Theoretically, if these hard-currency payments are coming directly from the financial middlemen, retailers should be indifferent. However, BitPay and Coinbase have limited balance sheets that restrict the amount of market-price risk they can (and should) safely warehouse. Using current price history, a single day drop of 20 percent on a large enough position could be financially devastating, even causing bankruptcy for these middlemen if not properly managed. Moreover, a derivatives market that would normally help such firms offset or hedge-out this risk has not yet materialized.

Given the growing concentration risk to financial middlemen such as BitPay and Coinbase, and the significant market disruption that would occur by even one firm bankruptcy, regulators will need to rapidly establish prudent minimum capital requirements especially if retailer demand for using such thinly capitalized intermediaries grows.

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 28 RECEIVED NYSCEF: 09/05/2017

3. Virtual Commodity Risk

As a virtual commodity, Bitcoin remains an extremely risky investment and needs to be closely watched[10]. Speculative interest has increased as prices have risen. Many of these investors are U.S. Citizens. Rapidly those that previously mined coins as well as new groups of investors have become speculators. In a perverse way, inflated prices have been used to validate the Bitcoin investment thesis instead of reliance on fundamental analysis, data and hard facts to arrive at a fair market value. Lack of analyst coverage has also inhibited the quality and quantity of market research available before making investment decisions[11].

VI. Could Bitcoin be transformed into a virtual currency?

It is plausible that Bitcoin could be transformed into a virtual currency but it would need to be significantly modified so it encouraged greater transactional use, circulation and less hoarding. Freicoin, a relatively new pseudo currency has attempted to solve this hoarding problem by charging holders a fee, after a set number of days, if the coin has not been used.[12] Present daily, weekly, monthly and annual price swings of Bitcoin have to fall substantially. For example, Bitcoin's annual price volatility would have to drop at least 10 fold, (10 to 15 percent range) from its current stratospheric level of 150 percent. Last, greater regulation, centralization, creation of a legal framework and strong regulatory oversight would also need to be put in place. In this "wild-west" trading atmosphere tighter controls over global e-exchanges and participants would also have to be implemented in an attempt to further discourage market manipulation.

VII. Bitcoin is in a Hyper Asset Bubble That Has Begun to Pop

In an efficient capital market, capital flows to its highest and best use as investors seek tradeoffs between desired risk and desired return. When investors receive timely, accurate and transparent information, the likelihood of an asset bubble is diminished. However, even in efficient, seasoned and well-developed financial markets it is not uncommon to experience bubbles (e.g., Dotcom 2001, Real Estate 2007/8). Historically, asset bubbles have three phases: growth, maturity and pop. Not all bubbles experience rapid price collapses, sometimes prices deflate over an extended period, allowing investors to experience lower losses when exiting[13].

Bitcoin was created in 2009, hitting its growth stage in 2011 and maturity stage in 2013. The pin that began to pop the Bitcoin bubble was the central bank of China decision in December 2013 to crackdown on e-currency. Prices remain about 30 percent lower since this significant market news.

The recent hyper-price run up, investor expectations of a quick gain, weaknesses in efficient market mechanics and increased opportunities for market manipulation have contributed to the Bitcoin asset bubble. **When the Bitcoin hyper-bubble bursts, prices could drop below $10 as soon as**

[10] The U.S. Commodity Futures Trading Commission would be a logical regulator to oversee the commodity attributes of Bitcoin.
[11] Bank of American/Merrill Lynch began coverage in December 2013 stating Bitcoin could rise to $1,300 while Citigroup indicated it could not substantiate the value of Bitcoin.
[12] This fee is paid to e-coin miners.
[13] Investor/speculators can make money in all three phases of an asset bubble.

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 28 RECEIVED NYSCEF: 09/05/2017

June of 2014. This bubble burst prediction has been detailed in several articles, one of which published in December 2013 is attached (http://read.bi/1czm9bz). **If such a price collapse did occur, it would further undermine investor trust and immediately jeopardize the chances of Bitcoin being adopted as a virtual currency.**

The final driving force that will burst the Bitcoin bubble is growing investor awareness that what they bought has greater risk and uncertainty than anticipated. Regulation hearings such as the one being held by the New York State Department of Financial Services on January 28 and 29th of 2014 will also assist Bitcoin investors in better understanding what they are or are not buying. Examples of risks that once factored in will push Bitcoin prices down include a growing regulatory climate, greater oversight, decreased opportunities to influence Bitcoin prices, challenges associated with commercialization, reputational risk linked to illicit activities (e.g, Silk Road), competitive pressure from better designed e-currencies, evidence that existing markets are rigged against smaller investors and/or disclosure of market manipulation.

VIII. Dangerously High Potential for Market Price Manipulation

As a rapidly developing decentralized market with no regulation and oversight, and as profit opportunities increase, the motivation to influence prices has also increases. **The Bitcoin marketplace has several inherent weaknesses that make it ripe for market manipulation schemes.**

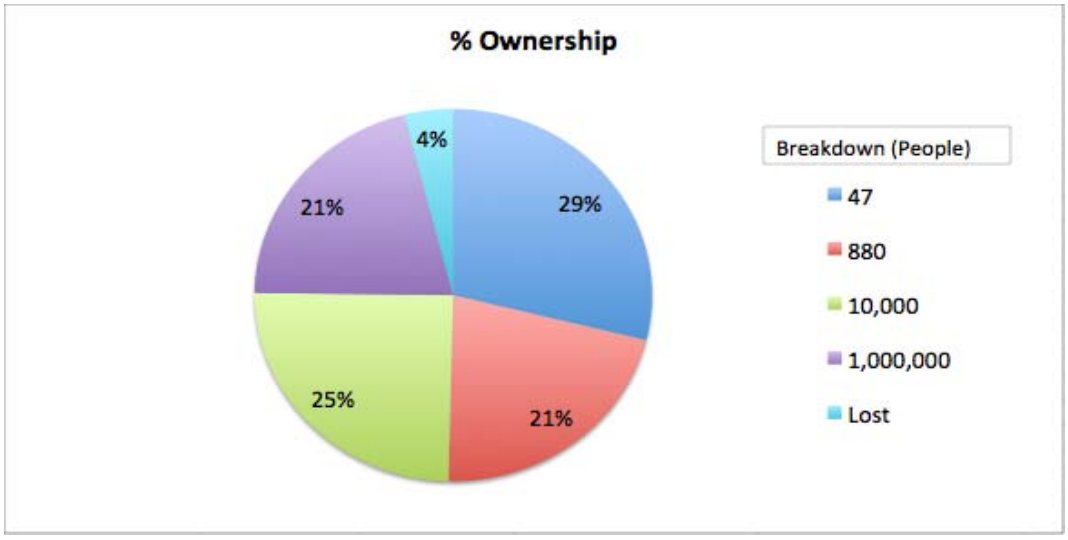
1. Pyramid Ownership Structure – Concentrated Market Power

Bitcoin ownership is concentrated in the hands of a small group of individuals providing them with an immense amount of market power. As of December 2013, 47 individuals controlled 29 percent of outstanding coins, each owning an average of about $60 million worth of Bitcoins. Collectively, 930 individuals controlled 50 percent of e-coins, each owning an average of about $2 million-worth of Bitcoins. This oligopoly of investors has much greater influence over price than the rest of investors. This is particularly the case as e-coin miners and early buyers (2009-2012) represent the majority of holders. More broadly, fewer than 11,000 individuals controlled 75 percent of coins while the remaining 1 million investors (many of them late comers) controlled only a sliver (20.8%) of coins. This pyramid structure allows a tiny number of miners/owners to influence how many coins are hoarded and how many new ones are made available on the market. Creating potentially artificial supply/demand imbalance would also help ensure, as long as more investors are clamoring to buy, that Bitcoin prices remain at overinflated prices. Generating an aggressive and ongoing media buzz could also ensure an adequate crop of new investors.

Breakdown (people)	% Ownership	Total bitcoins	Bitcoins owned(group)	Bitcoins owned (individual)	Market Cap (indiv)	Market Cap (group)
47	28.90%	12,000,000	3,468,000	73,787.23	$ 59,029,787.23	$ 2,774,400,000
880	21.50%	12,000,000	2,580,000	2,931.82	$ 2,345,454.55	$ 2,064,000,000
10,000	24.80%	12,000,000	2,976,000	297.60	$ 238,080.00	$ 2,380,800,000
1,000,000	20.80%	12,000,000	2,496,000	2.50	$ 1,996.80	$ 1,996,800,000
Lost	4.00%	12,000,000	480,000	N/A	N/A	$ 384,000,000
Total	100.00%		12,000,000			$ 9,600,000,000
Value of Bitocoin	$ 800					

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 28 RECEIVED NYSCEF: 09/05/2017

Source: http://www.businessinsider.com/927-people-own-half-of-the-bitcoins-2013-12#ixzz2pJLm4MgQ



2. Hoarding Sets an Artificially Inflated Price Floor

Hoarding is expected when an investor anticipates that the value of the asset held will be worth more in the future than what it is today. Investor hoarding is not uncommon for commodities that are in temporary or permanent low supply and are in high demand. The act of hoarding, if an investor controls enough of an asset, can also move prices higher. In 1979, the Hunt Brothers

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 28 RECEIVED NYSCEF: 09/05/2017

attempted to corner the market in silver[14]. Unlike in the silver market, no single Bitcoin investor has been able to amass control to the level of the Hunt Brothers.

Theoretical Example – Supply-side Manipulation

If I own 100 cokes at $1 each and I have 100 thirsty customers, the market price will remain at $1. However, if I hoard 90 cokes and only allow 10 for sale, the price will be artificially increased as long as 100 thirsty customers remain.

Given the tiny ownership structure of Bitcoin, it is highly probable that this group collectively has used extreme hoarding (intentionally or unintentionally) as a means to set an artificially inflated price floor. Miners of e-coins and holders can help influence the amount of (newly mined and existing) coins that are available for sale. Daily trading volumes on the largest crypto-currency exchanges are only a small percentage (less than 5 percent) of overall Bitcoins minted. As a growing number of buyers enter the market (fueled by marketing hype), this marginal quantity of e-coins for sale, could help set an artificial price floor.

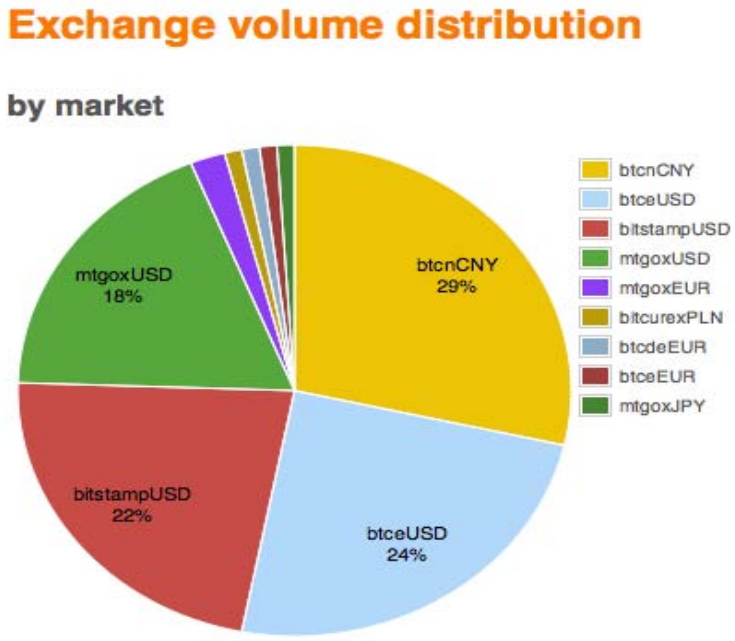
3. E-currency Trading Exchanges - Lack of Openness, Regulation or Oversight

The buying and selling of Bitcoin is controlled by a handful of exchanges in places like China, Japan, Slovenia, and Bulgaria. Trading is done primarily at unregulated exchanges such as BTC China, Mt.Gox, Bitstamp[15] and BTCe. These exchanges handle the bulk of e-currency trading and provide important market pricing signals. More recently, Coinbase[16], a privately held U.S. based startup, has begun facilitating Bitcoin transactions. At these exchanges, it is also not uncommon for certain well-connected buyers and sellers to gain preferential treatment in terms of price execution. Front running is not uncommon. In this "wild-west" atmosphere some exchanges have failed. In November 2013, GBL, based in Hong Kong, closed it's doors, costing investors over $4 million. European Banking Authority has also warned of the dangers of others failing and the lack of investor protection laws.

[14] At the peak in 1979, the Hunt brothers controlled about one-third of the world's estimated silver supply. Initially prices climbed 8 times higher once the hoarding strategy was executed.
[15] Bitstamp is located in London but its bank that transfers currency is located in Slovenia.
[16] This thinly capitalized startup also plays a market risk mitigation role by taking on Bitcoin price risk and fixing the hard currency rate received by retailers.

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 28 RECEIVED NYSCEF: 09/05/2017

Pie chart link: http://bitcoincharts.co



m/charts/volumepie/

In direct conflict with Bitcoin philosophy of open source code, e-exchanges do not practice transparency or level of openness that is standard at other commodity exchanges. As a general rule, fine-grain trading information is not offered, making full price discovery difficult. Although static end-of-day closing price is available, important historical intraday trading statistics including volume, bid/ask spread and price are intentionally withheld from the market.

On several occasions, attempts have been made to obtain such data but these requests have been rebuffed. Without having to disclose such trading data, manipulators have a greater chance to thrive.

4. Market Price Quotes – Suspiciously Large Pricing Differential at Exchanges Remain

At any given time it is not uncommon for the market quote between e-currency exchanges to vary by 10 percent or more. At current pricing, the trading differential on one exchange (e.g., Mt Gox compared to BTC e) can be $85 to $100 or more. Trading fees and currency conversion costs (US dollars/Yen/Euro to Bitcoin), explains only a small portion of this suspiciously large pricing differential.

Lack of transparency, withholding of important intraday trading data, and no regulatory oversight has opened the door for the potential of various market manipulation schemes at the e-currency trading exchanges.

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 28 RECEIVED NYSCEF: 09/05/2017

5. High Potential for False and Misleading Trades

The concentrated ownership structure, lack of regulation or independent controls around e-currency exchanges, increases the opportunity for e-coin holders and exchanges to participate in market manipulation schemes that inflate trade volume, trade price or both.

Given the large ownership concentration and the small amount of minted e-coins that are released to the market, even tiny trades, e.g., 5 coins, on the margin, can have an influence on overall price. Trades that are completed at above market prices or down to given the appearance of greater traded volume can distort market prices. Especially if the market is thinly traded and other investors are not aware of the manipulation.

Theoretical Example – Paint the Tape

If I own 100 e-coins, and if I sell 1 e-coin at an above market price to a willing accomplice, that would increase the overall economic benefit for both participants. In this scheme both seller and buy benefit. The seller gets an inflated value for all 100 e-coins and the buyer, paying above market, loses on 1 e-coin but gains on the 99 others held.

Moreover, if an aggressive Bitcoin promotion campaign is deployed to entice new buyers to enter the market, such practices would generate significant buying traffic and financial gain for those 47 individuals that own 29 percent of all e-coins. As well as to the 930 others that own 50 percent or $5 billion of outstanding e-coins. Other non-academic research has been completed in this area supporting the theory of price fixing.[17]

Based on the high potential for price fixing, the major e-exchanges should be required to demonstrate that such anti-market behavior is not occurring and adequate prevention controls are firmly in place.

VIII. Bitcoin Marketing Blitz

It is a given that investors that have better information make better and more informed investment decisions. The ongoing Bitcoin marketing Blitz is well orchestrated. The number of websites and blogs promoting e-currency, disseminating misinformation and in recruiting new investors has grown significantly. Much focus is placed on positioning Bitcoin as the "New, New Thing," a disruptive technology that will change the world and allow participants to get-rich quick. The trumpeting of stories about newly minted Bitcoin millionaires is commonplace. Presently, much of investor information also fails to disclose the many inherent risks associated with virtual currency /commodity investing. Some Bitcoin investors mistakenly think an e-coin investment is the equivalent of owning stock in a startup.

As virtual currency prices have inflated, the amount of internet-buzz promoting Bitcoin ownership has proliferated. New investors have been influenced by a barrage of web-driven marketing hype and by online message board postings. Some of which, it appears, have been used in an attempt to

[17] Falkvinge & Co., Bitcoin's Vast Overvaluation appears caused by pricing fixing September 13, 2013.

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 28 RECEIVED NYSCEF: 09/05/2017

pump-up prices. Much of this propaganda appears to be linked to some of the largest Bitcoin owners, e-currency exchanges, self-interested venture capital firms and other e-coin dependent businesses. In the stock market it would be the equivalent of the largest investors banning together and aggressively talking-up their book through multiple media channels. However, in the financial markets, there is a combination of transparent financial reporting, regulation, diligent shareholders, stock analysts and financial journalists all acting as important counterbalances. Presently, these market information safeguards and quality controls are lacking. Recently, one of the Winklevoss twins of Facebook fame, who with his brother own an estimated 1 percent of all outstanding Bitcoins or $100 million, prognosticated that Bitcoin would catapult to $40,000. Remarkably, this super-bullish prediction was made when Bitcoin traded at $1,000, yet no creditable rationale was given why this fortyfold increase would happen. Such talking-up-your-book marketing can be particularly dangerous for unsophisticated investors, especially when market information is more one-sided.

More recently, the venture capital community has provided funding upward of $50 million for Bitcoin related companies, growing the involvement of business-savvy groups.[18] As the attempt to commercialize Bitcoin accelerates and the financial stakes get higher, there will be a greater focus on lobbying and industry self-promotion. Organizations such as Bitcoin Foundation, Bitcoin.org, Reddit.com, Coindesk.com, help.org and weusecoins.com remain primarily focused on gaining industry converts. Few Bitcoin websites presently provide investors with detailed, risk-focused and balanced information. **In such an environment, it is understandable how a hyper-asset bubble could have mushroomed so rapidly and why it has been more challenging for investors to make prudent investment decisions.**

In conclusion, I hope this testimony will provide additional insight and spur further research and analysis into virtual currencies and the growing risks they pose to U.S. investors, the financial system and to the overall global economy if not properly managed.

[18] Coinbase receiving the lion's share of this early round of venture capital funding.

**Affidavit of Jim Harper, for Plaintiffs-Petitioners,
in Support of Cross-Motion for Limited Discovery,
sworn to July 28, 2017
[pp. 287 - 290]**

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 29 RECEIVED NYSCEF: 09/05/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTRY OF NEW YORK

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,

Defendants-Respondents.

AFFIDAVIT OF JIM HARPER IN SUPPORT OF PLAINTIFFS-PETITIONERS' CROSS-MOTION FOR LIMITED DISCOVERY AND FOR HOLDING DEFENDANTS-RESPONDENTS' CROSS-MOTION TO DISMISS IN ABEYANCE

Index No. 101880/AFF2015
Hon. Lucy Billings

DISTRICT OF COLUMBIA)
) ss.:
COUNTY OF)

I, Jim Harper, being duly sworn, hereby state:

1. I am a lawyer admitted to the bars of California and Washington, D.C.

2. I submit this affidavit in support of Plaintiffs-Petitioners' motion for limited discovery and for holding defendants-respondents' cross-motion to dismiss in abeyance.

3. As counsel to the U.S. House Judiciary Committee in the late 1990s, I specialized in administrative law, conducting research and hearings that examined U.S. federal agencies' compliance with the requirements of the Administrative Procedure Act and related administrative laws, as well as the sufficiency of those laws. For the past dozen years, I have been director of information policy studies and then a senior fellow at the Cato Institute. At the beginning of February, I joined the Competitive Enterprise Institute as vice president.

4. During 2014, I served as Global Policy Counsel at the Bitcoin Foundation, an organization dedicated to the advancement of Bitcoin and cryptocurrency. In that role, I sought to

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 29 RECEIVED NYSCEF: 09/05/2017

introduce Bitcoin to lawmakers and regulators in Washington, D.C., and Brussels, and I worked in various ways to help them and the Bitcoin business community navigate the substantial challenges in adapting law and regulation to the different functionality and characteristics of Bitcoin.

5. In the New York Department of Financial Services' (NYDFS) rulemaking entitled: DFS-29-14-00015-P, "Regulation of the conduct of virtual currency businesses," I filed preliminary comments for the Bitcoin Foundation dated August 5, 2014. The comments can be found at the NYDFS web site at: http://www.dfs.ny.gov/legal/vcrf_0500/20140805%20-%20VC%20Proposed%20Reg%20Comment%2055%20-%20Bitcoin%20Foundation.pdf. I filed later, more substantive comments on October 8, 2014.

6. One part of the August 5 comments focused on the NYDFS's statement of "needs and benefits" for the proposed regulation, which is a requirement of New York's State Administrative Procedure Act. My comment noted the detailed nature of the law's public disclosure requirements, and the relative lack of information provided by the NYDFS.

7. My comment noted that the European Banking Authority (EBA) had issued a 46-page report a month earlier that used a comprehensive methodology to assess the benefits and risks of Bitcoin. The EBA report can be found at:

https://www.eba.europa.eu/documents/10180/657547/EBA-Op-2014-08+Opinion+on+Virtual+Currencies.pdf.

8. My comment asked the NYDFS to share the "[e]xtensive research and analysis" that it identified in its statement of needs and benefits as supporting the proposed regulation: "The Bitcoin community would like to know—and could comment more helpfully if it did know—what novel aspects of digital currency your research and analysis identified. In the view of your office, what risks exist with digital currencies that don't exist with other currencies?

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 29 RECEIVED NYSCEF: 09/05/2017

There certainly are risks—the community would benefit from understanding how your office frames them. We recommend that you publish the research and analysis referred to in the statement of needs and benefits as soon as possible, but well before the close of the first round of comments." (footnote omitted)

9. My comment also asked for treatment as a request under New York's Freedom of Information Law, N.Y. Pub. Off. Law sec. 84 et seq., "for the opportunity to inspect or obtain copies of any risk management and cost-benefit analysis (or any other systematic assessment) that is a part of the 'extensive research and analysis' referred to in the statement of needs and benefits for the proposed regulation."

10. The NYDFS responded by promising to fulfill my request for these materials within 20 days. A response at the end of that 20-day period would have made the materials available to the Bitcoin community just days before the close of the original comment period, but the NYDFS had signaled elsewhere that it would extend the comment period, which it ultimately did.

11. On September 8, 2014, the NYDFS sent me a brief letter extending its original 20-day deadline to produce the materials, saying "it is anticipated that a response will be forthcoming within 120 days from the date of this letter." That delay, well beyond the five-business-day requirement of the Freedom of Information Law, would give the community access to these materials after the close of the comment period pending at the time.

12. Since September 8, 2014, I have received no further communications from the NYDFS. I did not receive any of the research and analysis cited by the NYDFS in its statement of need and promised in response to my FOIL request.

13. At the end of December 2014, I left the Bitcoin Foundation as an employee. I was

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 29 RECEIVED NYSCEF: 09/05/2017

elected to the Foundation's Board of Directors effective March 15, 2015, and I resigned from the board at the end of 2015. My Bitcoin Foundation email address, on which I had received NYDFS correspondence, was functional for the entire year of 2015.

Dated: July 28, 2017
District of Columbia

Jim Harper
Vice President
Competitive Enterprise Institute
1310 L Street NW, 7th Floor
Washington, DC 20005

SWORN to before me this

28th day of July, 2017

NOTARY PUBLIC

MARCUS SCRIBNER NOTARY PUBLIC MY COMMISSION EXPIRES 10/14/2018 DISTRICT OF COLUMBIA

District of Columbia: SS
Subscribed and Sworn to before me
this 28 day of July, 2017
Marcus Scribner, Notary Public, D.C.
My commission expires October 14, 2018

Affirmation of Good Faith of Pierre Ciric, for Plaintiffs-Petitioners, in Support of Cross-Motion for Limited Discovery, dated August 2, 2017 [pp. 291 - 292]

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 30 RECEIVED NYSCEF: 09/05/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTRY OF NEW YORK

THEO CHINO and CHINO LTD,

Plaintiffs-Petitioners,

-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.

Index No. 101880/2015
Hon. Carmen Victoria St. George

ORAL ARGUMENT REQUESTED

AFFIRMATION OF GOOD FAITH PURSUANT TO UNIFORM COURT RULE 202.7(f)

I, Pierre Ciric, an attorney duly admitted to practice law before the courts of the State of New York, and not a party to the above-entitled action, affirm the following to be true to the best of my knowledge and under the penalties of perjury pursuant to New York Civil Practice Law and Rules ("CPLR") § 2106:

1. I am an attorney at the Ciric Law Firm, PLLC and counsel for Plaintiffs-Petitioners Theo Chino and Chino LTD ("Plaintiffs-Petitioners") in the above-entitled action, and have personal knowledge of the facts and events stated herein based on my representation of Plaintiffs-Petitioners.

2. I respectfully make this affirmation pursuant to 22 NYCRR § 202.7, in support of Plaintiffs-Petitioners' cross-motion for limited discovery and for holding Defendants-Respondents' cross-motion to dismiss in abeyance.

3. I affirm that I undertook a good faith effort to resolve with Defendants-Respondents' counsel the issues raised in the present cross-motion. During a phone conversation

FILED: NEW YORK COUNTY CLERK 09/05/2017 04:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 30 RECEIVED NYSCEF: 09/05/2017

held on July 25, 2017, Defendants-Respondents' counsel advised that he was not willing to stipulate to any of the discovery requests on behalf of his clients.

Dated: August 02, 2017
New York, New York

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Attorney for Plaintiffs-Petitioners

Memorandum of Law by Plaintiffs-Petitioners in Support of Cross-Motion, dated August 2, 2017 [pp. 293 - 314]

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTRY OF NEW YORK

THEO CHINO and CHINO LTD, Plaintiffs-Petitioners, -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.	Index No. 101880/2015 Hon. Carmen Victoria St. George ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF-PETITIONER'S CROSS-MOTION FOR LIMITED DISCOVERY AND FOR HOLDING DEFENDANTS-RESPONDENTS' CROSS-MOTION TO DISMISS IN ABEYANCE

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FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

TABLE OF CONTENTS

Page

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

TABLE OF AUTHORITIES

CASES

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

STATE STATUTES

STATE RULES

OTHER AUTHORITIES

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

PRELIMINARY STATEMENT

Pursuant to Section 408 of the New York Civil Practice Law and Rules ("CPLR"), Plaintiffs-Petitioners, Theo Chino, respectfully submits this memorandum of law in support of Plaintiff-Petitioner's cross-motion for limited discovery, for holding Defendants-Respondents' cross-motion to dismiss in abeyance, and in the alternative for leave to serve and file a sur-reply in further opposition to Defendants-Respondents' cross-motion to dismiss. This cross-motion is necessary because Defendants-Respondents' cross-motion to dismiss filed on June 23, 2017 cannot be resolved without making further factual determination as to whether Bitcoin is a "financial product or service" and whether the "Virtual Currency" regulation promulgated by the New York State 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") was designed and issued by Defendants-Respondents in an arbitrary and capricious fashion.

There are significant and irreconcilable factual differences between the arguments presented by Plaintiffs-Petitioners and by Defendants-Respondents which can only be resolved through limited discovery under CPLR § 408. Those fundamental factual differences and disputes involve whether Bitcoin is a "financial product or service" which impacts whether Defendants-Respondents had the authority to regulate Bitcoin, and whether Defendants-Respondents acted in an arbitrary and capricious fashion when they designed the Regulation.

PROCEDURAL HISTORY

On October 16, 2015, Theo Chino filed the above-entitled action. Defendants-Respondents filed a cross-motion to dismiss on April 22, 2016. Theo Chino filed his response to the cross-motion to dismiss on October 31, 2016, hereinafter cited to as "Pl.'s Mem." On January 20, 2017, Defendants-Respondents filed a reply in further support of their cross-motion to

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

dismiss, hereinafter cited to as "Defs.' First Reply Mem." On May 24, Plaintiffs-Petitioners filed an Amended Verified Complaint and Article 78 Petition. On June 23, 2017, Defendants-Respondents filed a cross-motion to dismiss the Amended Verified Complaint and Article 78 Petition. Plaintiffs-Petitioners filed their response to the current cross-motion to dismiss on July 14, 2017, hereinafter cited to as "Pls.'s Second Mem."

From these filings, it is clear that there are fundamental factual disputes between the parties as to the economic nature of Bitcoin. It is highly disputed between the parties whether Bitcoin should be considered a "financial product or service" as defined in FSL § 104(a)(2). The exact economic nature of Bitcoin, for which considerable legal uncertainty already exists due to divergent determinations made by federal agencies and other courts, requires clarification for the Court to determine whether Defendants-Respondents have the proper regulatory authority under FSL § 104(a)(2) to regulate Bitcoin. Furthermore, there are significant factual issues as to the basis that allowed Defendants-Respondents to reach the decision that it had jurisdiction over Bitcoin. During the hearings on the proposed regulation, Mark T. Williams's written testimony establishes that Bitcoin should be treated as a commodity, and not as a currency, yet Defendants-Respondents did not address Mark T. William's position. Affirmation of Pierre Ciric in support of the Plaintiffs-Petitioners' cross-motion for limited discovery and for holding Defendants-Respondents' cross-motion to dismiss in abeyance ("Ciric Aff.") ¶¶ 12-13. Additionally, Defendants-Respondents argued that they conducted "extensive research and analysis" when they proposed the Regulation. Affidavit of Jim Harper in support of the Plaintiff-Petitioner's cross-motion for limited discovery and for holding Defendants-Respondents' cross-motion to dismiss in abeyance ("Harper Aff.") ¶¶ 8-12. Yet this "research and analysis" has never been produced, even after it was requested through New York's Freedom of Information Law, N.Y.

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

Pub. Off. Law sec. 84 et seq. Harper Aff. ¶ 9. Therefore, there are serious concerns as to how Defendants-Respondents came to the conclusion that they had the power to regulate Bitcoin. Harper Aff. ¶¶ 8-12.

ARGUMENT

A. Plaintiffs-Petitioners have "ample need" for limited discovery

Under Article 78 proceedings, "a petitioner is not entitled to discovery as of right, but must seek leave of the court pursuant to CPLR § 408." *Town of Pleasant Valley v. N.Y. State Bd. of Real Prop. Servs.*, 253 A.D.2d 8, 15 (2d Dep't 1999). The Court should grant a request for leave to conduct discovery where the disclosure "sought [is] likely to be material and necessary to the prosecution or defense of the proceedings." *Stapleton Studios v. City of New York*, 7 A.D.3d 273, 275 (1st Dep't 2004). Discovery is appropriate in Article 78 proceedings when the moving party demonstrates "ample need" for the requested discovery. *N.Y. Univ. v. Farkas*, 121 Misc. 2d 643, 646, 468 N.Y.S.2d 808, 811 (N.Y. Civ. Ct. 1983). Further, courts have granted motions for disclosure because the operative facts necessary for a judicial determination are within the respondent's knowledge and because the petitioner needed the information to mount a proper defense during those proceedings. *Smilow v. Ulrich*, 11 Misc. 3d 179, 183, 806 N.Y.S.2d 392, 396 (N.Y. Civ. Ct. 2005). In fact, "a presumption favors granting disclosure when the opposing party has exclusive possession of material facts." *Id.*

New York courts have followed six factors under *Farkas* in determining whether there is "ample need": (i) whether, in the first instance, the petitioner has asserted facts to establish a cause of action; (ii) whether there is a need to determine information directly related to the cause of action; (iii) whether the requested disclosure is carefully tailored and is likely to clarify the disputed facts; (iv) whether prejudice will result from the granting of an application of

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

disclosure; (v) whether the prejudice can be diminished or alleviated by an order fashioned by the court for this purpose; and (vi) whether the court, in its supervisory role, can structure discovery so that Respondent will not be adversely affected by the discovery requests. *Farkas*, 121 Misc. 2d at 647.

Applying these criteria, it is clear that limited discovery is warranted in this case. First, Plaintiffs-Petitioners have set forth a viable ground to challenge the Regulation as laid out in Plaintiffs-Petitioners' Amended Complaint and in their responses to Defendants-Respondents' cross-motions to dismiss. If Bitcoin is not a "financial product or service," then Defendants-Respondents' recent cross-motion to dismiss must be denied and relief must be granted to Plaintiffs-Petitioners without further review. Furthermore, even if the Court decides Bitcoin is a "financial product or service," this limited discovery will assist the court in evaluating whether the Regulation was promulgated in an arbitrary and capricious fashion.

Second, limited discovery is necessary because Defendants-Respondents' cross-motion to dismiss filed on April 22, 2016 cannot be resolved without making further factual determination as to whether Bitcoin is a "financial product or service" and whether the Regulation was designed and issued by Defendants-Respondents in an arbitrary and capricious fashion.

There are significant and irreconcilable factual differences between the arguments presented by Plaintiffs-Petitioners and by Defendants-Respondents which can only be resolved through limited discovery under CPLR § 408. Those fundamental factual differences and disputes involve whether Bitcoin is a "financial product or service" which impacts whether Defendants-Respondents had the authority to regulate Bitcoin under FSL § 104(a)(2), and whether Defendants-Respondents acted in an arbitrary and capricious fashion when they designed the Regulation.

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

All of the previous briefs exchanged by both parties are an obvious indication that that the Court cannot address the issues raised in Plaintiffs-Petitioners' Amended Complaint or Defendants-Respondents' cross-motion to dismiss the Amended Complaint without issuing an order for limited discovery regarding the economic nature of Bitcoin. The technical and economic characteristics of Bitcoin are factually complex. Pl.'s Mem. 9-12; Pls.'s Second Mem. 12-17. Defendants-Respondents argued that Bitcoin is a substitute for money and therefore needs to be regulated based on the Financial Crimes Enforcement Network of the U.S. Treasury Department ("FinCEN"). Defs.' First Reply Mem. 4-6. In fact, Defendants-Respondents tried to argue that anything of a financial nature can be regulated as a "financial product or service." Defs.' First Reply Mem. 9. This stretches the statutory definition of "financial product or service" beyond the statutory authority conferred by FSL § 104(a)(2). It is a general principle of statutory interpretation that the inclusion of specific categories in a definition forces courts to limit themselves to applying the specified categories to the case at hand. *Iselin v. United States*, 270 U.S. 245, 250 (1926). *See also Lamie v. United States Trustee*, 124 S. Ct. 1023, 1032 (2004) (courts should not add an "absent word" to a statute; "there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted"). *See also Gair v. Peck*, 6 N.Y.2d 97, 126 (1959). Defendants-Respondents stretched reality when they attempted to associate "financial products or services" with anything that "relates to" or is "connected with, the use and management of money." Defs.' First Reply Mem. 9. This approach, contrary to basic tenets of statutory interpretation, is so overly broad that it could include anything you purchase with money. Under Defendants-Respondents' approach, they would be authorized to regulate computers under FSL § 104(a)(2) because one must purchase a computer with money! In fact, FSL§ 104 describes in limitative terms what a

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

"financial product or service" is, since FSL § 104(a)(2)(B) describes in great length asset categories which are not supposed to be considered a "financial product or service." This is contrary to Defendants-Respondents' obligation to limit its regulatory power within the bounds of the statute. This critical determination can only be made by clarifying through a limited discovery order the economic nature of Bitcoin.

Similarly, Defendants-Respondents' do not have the authority to add additional terms or extend the meaning of "financial product or service" to Bitcoin. "[A]n administrative agency cannot extend the meaning of the statutory language to apply to situations not intended to be embraced within the statute." *Trump-Equit. Fifth Ave. Co. v Gliedman*, 57 N.Y.2d 588, 595 (1982) (citing *Jones v Berman*, 37 N.Y.2d 42 (1975)). "Nor may an agency promulgate a rule out of harmony with or inconsistent with the plain meaning of the statutory language." *Id.* (citing *Finger Lakes Racing Ass'n. v N.Y. State Racing & Wagering Bd.*, 45 N.Y.2d 471 (1978); *Harbolic v Berger*, 43 N.Y.2d 102 (1977)). Furthermore, "the failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended" *Matter of Brown v. N.Y. State Racing & Wagering Bd.,* 2009 NY Slip Op 204, ¶ 6, 60 A.D.3d 107, 116-17, 871 N.Y.S.2d 623, 630 (App. Div.). If the New York Legislature wanted specific terms to be included in the definition of "financial product or service," it would have expressly referred to them in the FSL§ 104(a)(2)(A) definition. The terms virtual currency and Bitcoin are omitted from the definition of "financial product or service." *See* FSL§ 104(a)(2)(A). Therefore, the Legislature indicated that the exclusion was intended.

As pointed out in Plaintiffs-Petitioners' responses to the cross-motions to dismiss the Amended Complaint, a Florida court recently ruled that Bitcoin is not money. *Florida v. Espinoza*, No. F14-2923 at 6 (Fla. 11th Cir. Ct. July 22, 2016). To make this determination, the

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

Espinoza court specifically agreed to a discovery process using an expert witness in the course of resolving a motion to dismiss a criminal indictment. Ciric Aff. ¶ ¶ 15-16. Further, states have issued memorandums stating Bitcoin is not money. Pl.'s Mem. 10; Pls.'s Second Mem. 13. Bitcoin lacks the properties commonly associated with money. *See* Pl.'s Mem. 11; Pls.'s Second Mem. 15. Bitcoin is akin to commodity-like mediums of exchange. This view is consistent with the positions taken by the IRS and the Commodity Future Trading Commission (CFTC). Pl.'s Mem. 10; Pls.'s Second Mem. 15-16. Further, in the case *United States v. Petix*, 2016 U.S. Dist. LEXIS 165955 (W.D.N.Y., Dec. 1, 2016, No. 15-CR-227A), Magistrate Judge Scott, in his Report and Recommendation dated December 1, 2016, gave a detailed analysis concluding that Bitcoin is not money or funds under 18 U.S.C. § 1960, a federal statute prohibiting unlicensed money transmitting businesses. Pls.'s Second Mem. 14. Magistrate Judge Scott noted that money and funds must involve a sovereign: "'[m]oney,' in its common use, is some kind of financial instrument or medium of exchange that is assessed value, or price stabilization, which likely explains why Bitcoin value fluctuates much more than that of the typical government-backed fiat currency." *United States v. Petix*, 2016 U.S. Dist. LEXIS 165955 (W.D.N.Y., Dec. 1, 2016, No. 15-CR-227A). Pls.'s Second Mem. 14-15. In the bankruptcy proceeding, *Hashfast Technologies, LLC v. Lowe*, Adv. Proc. No. 15- 03011 (Bankr. N.D. Ca. filed February 17, 2015), the judge stated, "The court does not need to decide whether bitcoin are currency or commodities for purposes of the fraudulent transfer provisions of the bankruptcy code. Rather, it is sufficient to determine that, despite defendant's arguments to the contrary, bitcoin are not United States dollars" (emphasis added). Pls.'s Second Mem. 14.

Specifically, Defendants-Respondents refer to Paul Krugman as an expert authority to support the proposition that Bitcoin is money, which he defines as serving "three functions: it is

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

a medium of exchange, a unit of account, and a store of value" Defs.' Reply Mem. 16. This is, in fact, contrary to public positions expressed by Paul Krugman, who has been adamant that Bitcoin is not money because it must be both a medium of exchange and a reasonably stable store of value, and Bitcoin is currently not a stable store of value. Ciric Aff. ¶ 17. Based on all of the above, it is clear that the court will benefit from a limited discovery process focused on the economic nature of Bitcoin.

Furthermore, there are significant factual issues as to the basis that allowed Defendants-Respondents to reach the decision that it had jurisdiction over Bitcoin. During hearings on the proposed regulation, Mark T. Williams's written testimony establishes that Bitcoin should be treated as a commodity, and not as a currency, yet Defendants-Respondents did not address Mark T. William's position. Ciric Aff. ¶¶ 12-13. Additionally, the Defendants-Respondents argued that they conducted "extensive research and analysis" when they proposed the Regulation, yet the research and analysis has never been produced. Harper Aff. ¶¶ 8-12. It is hard to determine how the Defendants-Respondents came to their conclusion that they could regulate Bitcoin since they did not address Mark T. Williams written testimony and give no indication as to what their research is based on.

Third, the requested disclosures, as detailed below, are carefully tailored to only pertain to the matter of whether Bitcoin is a "financial product or service" and whether the Regulation was issued in an arbitrary and capricious fashion. This limited discovery described in section B, below, will clarify the two critical disputed factual issues as to whether Bitcoin is a "financial product or service" and whether the Regulation was issued in an arbitrary and capricious fashion.

The limited discovery will assist the court in determining the economic characteristics of Bitcoin. During hearings held by the New York State Department of Financial Services on the

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

topic of virtual currency on January 28 and January 29, 2014 in New York City ("the Hearings"), Mark T. Williams, member of the Finance & Economics Faculty at Boston University, was the only witness present at the Hearings who introduced in the written record direct testimony as to an analysis regarding the economic nature of Bitcoin. His written testimony establishes that Bitcoin should be treated as a commodity, and not as a currency, reinforcing the position adopted by both the IRS and the CFTC. Ciric Aff. ¶ 12. However, Defendants-Respondents did not discuss, probe, or question Mark T. Williams about his written testimony during the Hearings, and did not seek to discuss under which circumstances Bitcoin should be considered a currency or whether Bitcoin should be considered a "financial product or service" under FSL § 104(a)(2). Ciric Aff. ¶ 13.

At the end of the Hearings, Benjamin Lawsky ("Lawsky"), then Superintendent of Financial Services and head of the Department of Financial Services indicated that he would be in contact with everyone during the drafting of the Regulation. Ciric Aff. ¶ 14. Because these hearings give no input and provide no guidance or information as to how Defendants-Respondents based their definition of Bitcoin in order to establish that Bitcoin is a "financial product or service," Defendants-Respondents must have operated internally, by either obtaining additional information or discussing and concluding that the economic nature of Bitcoin would fit in the statutory definition of a "financial product or service."

Furthermore, Jim Harper, while serving as Global Policy Counsel at the Bitcoin Foundation, during the comment period for the proposed Regulation, requested Defendants-Respondents share the "'[e]xtensive research and analysis' that it identified in its statement of needs and benefits as supporting the proposed regulation: 'The Bitcoin community would like to know—and could comment more helpfully if it did know—what novel aspects of digital

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

currency your research and analysis identified. In the view of your office, what risks exist with digital currencies that don't exist with other currencies? There certainly are risks—the community would benefit from understanding how your office frames them. We recommend that you publish the research and analysis referred to in the statement of needs and benefits as soon as possible, but well before the close of the first round of comments.'" Harper Aff. ¶ 8. He also requested "the opportunity to inspect or obtain copies of any risk management and cost-benefit analysis (or any other systematic assessment) that is a part of the 'extensive research and analysis' referred to in the statement of needs and benefits for the proposed regulation" under New York's Freedom of Information Law, N.Y. Pub. Off. Law sec. 84 et seq. Harper Aff. ¶ 9. Defendants-Respondents said they would fulfill the request, but after extending their deadline multiple times, they never produced the documents. Harper Aff. ¶ ¶ 10-12. It is clear there was extensive research and analysis under the control of Defendants-Respondents based on their response to Jim Harper.

All records under the control of Defendants-Respondents pertaining to these internal discussions or debates will reveal what information they relied on to determine the economic nature of Bitcoin and conclude that Bitcoin is a "financial product or service" before they promulgated the Regulation. These records must have been incorporated into the rulemaking process, but the rulemaking process to the extent it covered the economic nature of Bitcoin clearly happened behind closed doors and is not readily available to the public.

Fourth, no prejudice will result from granting this application for disclosure. The request has been carefully tailored to focus only on narrow factual questions, which will hopefully clarify the disputed factual issues. The limited discovery is specially tailored to answer the narrow questions as to the economic nature of Bitcoin and as to whether the Regulation was

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

designed and issued in an arbitrary and capricious fashion. The information is not burdensome to obtain and is capable of being produced in a relatively short period of time.

Fifth, any prejudice, whichever small, can be diminished or alleviated by an order fashioned by the Court for this purpose. If the Court believes the limited request is overly broad, the Court can order a more limited discovery.

Sixth, the Court, in its supervisory role, can structure the limited discovery so that Defendants-Respondents will not be adversely affected by the discovery requests. The Court can either adopt a limited order seeking the requested limited discovery, or narrow the order further, easily satisfying this prong of the *Farkas* analysis.

All the factors have been met under *Farkas.* However, not all of the *Farkas* factors need to be satisfied in order for the Court to find ample need. *IA2 Serv. LLC v. Quinapanta*, 51 Misc. 3d 1222(A), 2016 NY Slip Op 50779(U), ¶ 2 (N.Y. Civ. Ct. 2016). As long as the information sought is vital and within the knowledge of the other party or within the knowledge of a nonparty witness, courts have consistently determined that there is ample need for discovery. *Id.* As demonstrated below, the information sought is both critical to the determination of a fundamental question central to the resolution of this case and within the knowledge of the other party and nonparty witnesses.

B. This Court should allow for limited discovery on the economic nature of Bitcoin and whether the Regulation was issued in an arbitrary and capricious fashion.

i. The testimony of Paul Krugman should be granted because it will aid in determining critical facts related to the cause of action.

The scope of discovery is not limited to the parties in the proceeding. *Smilow,* 806 N.Y.S.2d at 400. "The scope may also include nonparties who will aid in determining facts related to the cause of action." *Id.*

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

In *Florida v. Espinoza*, the court allowed in an expert witness, Charles Evans, a Barry University economist, to discuss the economic nature of Bitcoin. Ciric Aff. ¶¶ 15-16. New York courts adhere to the "Frey" standard when considering permitting an expert witness testifying at trial. Under this standard, the expert's opinions much be generally accepted within the expert's field. *Frey v. United States*, 293 F. 1013 (D.C. Cir. 1923). Paul Krugman is a prominent economist. His opinion is generally accepted within his field of economics. As outlined below, he has taught in many top universities on economics and he received the Nobel Memorial Prize in Economic Sciences for 2008.

An "expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert." *De Long v. County of Erie*, 60 N.Y.2d 296, 307 (1983). Economists may be called as experts if they will help clarify an issue. *See id.* Here, Paul Krugman should be subpoenaed as an expert witness to appear before the Court because there are fundamental differences between the parties as to the economic nature of Bitcoin. As stated before, Defendants-Respondents cited to Paul Krugman as an expert source supporting their proposition that Bitcoin is money. Therefore, they must also believe he is a prominent expert in this area. Paul Krugman can testify to the economic nature of Bitcoin and whether or not it qualifies as "financial product or service" based on its economic characteristics. Defendants-Respondents cited Paul Krugman to say Bitcoin is a "financial product or service." Defs.' First Reply Mem. 16. In fact, Defendants-Respondents got his views wrong. The excerpt they cited to is not actually how Paul Krugman would apply his definition of money to Bitcoin. In fact, Defendants-Respondents' argument contradicts Paul Krugman's stance, because he has repeatedly argued that Bitcoin is not money because it is not a stable store of value. Therefore, Paul Krugman should be brought in as an expert witness before the Court to explain this

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

contradiction, and provide an opportunity to explain directly to the Court the economic nature of Bitcoin.

Paul Krugman is a prominent figure in the field of economics. He earned his B.A. in economics from Yale University and his PhD in economics from Massachusetts Institute of Technology (MIT). He was previously a faculty member at the Massachusetts Institute of Technology, worked as a staff member of the President Reagan's Council of Economic Advisers, and has also taught at Princeton University, Stanford University, Yale University, and the London School of Economics. He retired from Princeton, but still holds the title of professor emeritus there and is also a Centenary Professor at the London School of Economics. Paul Krugman has written over 20 books and has published over 200 scholarly articles in professional journals and edited volumes. He has also written several hundred columns on economic and political issues for *The New York Times*, *Fortune* and *Slate.* He is currently an op-ed columnist for *The New York Times*. He received the Nobel Memorial Prize in Economic Sciences for 2008. Paul Krugman has frequently written about Bitcoin and spoken on Bitcoin. *See, e.g.,* Paul Krugman, *Bitcoin is Evil*, THE NEW YORK TIMES (Dec. 28, 2013), https://krugman.blogs.nytimes.com/2013/12/28/bitcoin-is-evil/; Paul Krugman, *Bits and Barbarism*, THE NEW YORK TIMES (Dec. 22, 2013), http://www.nytimes.com/2013/12/23/opinion/krugman-bits-and-barbarism.html; Paul Krugman, *The Long Cryptocon*, THE NEW YORK TIMES (Oct. 4, 2014), https://krugman.blogs.nytimes.com/2014/10/04/the-long-cryptocon/.

ii. The email production should be granted because it will aid in determining how Defendants-Respondents reached their regulatory conclusion as to the economic nature of Bitcoin and whether the Regulation was issued in an arbitrary and capricious fashion.

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

Document production can be requested under CPLR § 408. *See Smilow,* 806 N.Y.S.2d at 394. Since Defendants-Respondents did not address the economic nature of Bitcoin during their hearings on the Regulation held on January 28 and January 29, 2014, they must have obtained additional information internally or must have discussed the economic nature of Bitcoin to conclude Bitcoin would fit in the statutory definition of a "financial product or service." At the end of the public hearings, Lawsky even indicated that he would be in contact with everyone during the drafting of the Regulation. Ciric Aff. ¶ 14. Under the Regulatory Impact Statement published in the NYS Register dated July 23, 2014, Defendants-Respondents say they conducted extensive research and analysis to support their decision to regulate Bitcoin. *See* Harper Aff. ¶ 8. However, Defendants-Respondents never produced this information in response to Harper's request. Harper Aff. ¶ 12. Therefore, the economic nature of Bitcoin must have been discussed either before or after the hearings through email correspondence internally or between the Defendants-Respondents and/or with outside parties. Therefore, internal emails, emails with third-parties, and other written documentation in possession of Defendants-Respondents will show how Defendants-Respondents reached their regulatory conclusion as to the economic nature of Bitcoin and how it falls under the definition of a "financial product or service," even though the only testimony introduced in the written record during the hearings support the notion that Defendants-Respondents did not have the statutory authority to regulate Bitcoin.

Therefore, Plaintiffs-Petitioners are requesting all internal emails, emails with third-parties, and other written documentation in possession of Defendants-Respondents between January 01, 2013 to September 30, 2015, where their personnel discussed the economic nature of Bitcoin and whether it qualifies as a "financial product or service" either internally or with outside parties. There is no chance that prejudice will result from granting the document request

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

since emails extraction by IT Departments is routine and is not a demanding process, and because this request has been carefully tailored to focus in on the economic nature of Bitcoin. This information will be critical in clarifying the disputed factual issues of whether Bitcoin is a "financial product or service" and whether the Regulation was promulgated in an arbitrary and capricious fashion.

iii. The deposition of Lawsky should be granted because it will aid in determining facts related to the cause of action.

The scope of discovery is not limited to the parties in the proceeding. *Smilow,* 806 N.Y.S.2d at 400. "The scope may also include nonparties who will aid in determining facts related to the cause of action." *Id.* In fact, leave for the deposition of nonparty witnesses may expedite matters by clarifying factual issues. *Plaza Operating Partners, Ltd. v. IRM, Inc.*, 143 Misc. 2d 22, 24, 539 N.Y.S.2d 671, 673 (N.Y. Civ. Ct. 1989). Requests to depose nonparty witnesses should be granted if they are relevant, nonprejudicial, and unintrusive. *Smilow,* 806 N.Y.S.2d at 400; *Wei-Hua Wu v. Sanchez*, 32 Misc. 3d 1205(A), 1205A, 932 N.Y.S.2d 764, 764 (N.Y. Civ. Ct. 2011). Like the court in *IA2 Serv. LLC v. Quinapanta* decided, the deposition of Lawsky will clarify and resolve the factual dispute over whether Bitcoin is a "financial product or service," and how Defendants-Respondents determined that Bitcoin was within the statutory authority conferred by FSL § 104(a)(2), which impacts whether Defendants-Respondents had the authority to regulate Bitcoin, and whether Defendants-Respondents acted in an arbitrary and capricious fashion when they designed the Regulation. His deposition will clarify whether the Regulation was issued in an arbitrary and capricious fashion and how he arrived at the conclusion that Bitcoin is a "financial product or service."

Lawsky has exclusive personal knowledge not shared with the Plaintiffs-Petitioners about the basis of Defendants-Respondents' determination of the economic attributes and nature of

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

Bitcoin. Lawsky was the Superintendent of Financial Services at the time of the proposed Regulation and when the Regulation was promulgated. He was central in making the determination that Bitcoin is a "financial product or service." He is the most knowledgeable person on this matter. Under the Regulatory Impact Statement published in the NYS Register dated July 23, 2014, Defendants-Respondents say they conducted extensive research and analysis. NY Reg, Jul. 23, 2014 at 14-16; Harper Aff. ¶ 8. Defendants-Respondents' said they would produce "copies of any risk management and cost-benefit analysis (or any other systematic assessment) that is a part of the 'extensive research and analysis.'" Harper Aff. ¶¶ 9-10. No such documents were produced. Harper Aff. ¶¶ 10-12. As Superintendent of Financial Services, Lawsky must have knowledge of the "extensive research and analysis" that was relied on. His testimony is relevant and necessary for the determination of the economic nature of Bitcoin and basis that allowed Defendants-Respondents to reach the decision that they had jurisdiction over Bitcoin. This is information that Plaintiffs-Petitioners do not have access to, yet it would clarify an important factual issue. The deposition of Lawsky should not prejudice Defendants-Respondents since Lawsky no longer works for the New York State Department of Financial Services. Further the scope of the deposition would be specifically tailored only to answer the limited questions on the economic nature of Bitcoin and whether the Regulation was issued in an arbitrary and capricious fashion. The deposition would not be burdensome on Defendants-Respondents and could be produced in a relatively short period of time.

Furthermore, a deposition of Lawsky is the most adequate discovery tool available to the court as compared to other devices, such as interrogatories or bills of particulars, because a deposition would represent a "useful and reasonable" method to obtain testimony "which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

reasonable." *Allen v. Crowell-Collier Publishing Co.,* 21 N.Y.2d 403, 406-407 (N.Y. 1968) (*citing* 3 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 3101.07, p. 31-13). Specifically, a deposition of Lawsky, through a broader range of questioning than an interrogatory, would allow the Court to further understand the process by which Defendants-Respondents reached the conclusion that Bitcoin is within the purview of the controlling statute when they designed and finalized the Regulation.

C. This Court should hold Defendants-Respondents' current cross-motion to dismiss in abeyance until after Plaintiffs-Petitioners' cross-motion for discovery has been decided.

In Article 78 proceedings, courts have allowed abeyance of pending proceedings until petitioners have had the opportunity to conduct limited discovery on the issues subject to a CPLR § 408 order. *Matter of Soc. Serv. Empls. Union, Local 371, AFSCME, AFL-CIO v. City of N.Y.*, 2010 NY Slip Op 33326(U), ¶ 7 (N.Y. Sup. Ct. 2010). This is especially true where facts necessary to oppose a motion may exist but are within the exclusive knowledge or control of the moving party. *Id.*

Therefore, Plaintiffs-Petitioners respectfully request that the Court holds Defendants-Respondents' current cross-motion to dismiss in abeyance pending the outcome of this motion for limited discovery and time to complete this limited discovery. Defendants-Respondents' cross-motion to dismiss cannot be decided without limited discovery on the economic nature of Bitcoin and whether the Regulation was promulgated in an arbitrary and capricious fashion. As stated before, there is a significant disagreement as to the nature of Bitcoin and whether or not it should be considered a "financial product or service." This is at the heart of the issue in determining whether the cross-motion to dismiss should be granted or denied. Further, the items being requested are under the exclusive knowledge or control of Defendants-Respondents. This

FILED: NEW YORK COUNTY CLERK 10/02/2017 06:48 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 36 RECEIVED NYSCEF: 10/02/2017

motion for limited discovery will clear up matters that could cause the cross-motion to dismiss to be denied. Therefore, we believe abeyance pending the outcome of this motion for limited discovery and time to complete the limited discovery should be allowed.

Therefore, Plaintiffs-Petitioners respectfully request that the Court hears this cross-motion first on August 31, 2017, when the Court is scheduled to hear Defendants-Respondents' current cross-motion to dismiss. Furthermore, would the Court grant this cross-motion for limited discovery, Plaintiffs-Petitioners respectfully requests that a hearing on Defendants-Respondents' current cross-motion to dismiss be scheduled at a later date, once Plaintiffs-Petitioners have had an opportunity to honor the Courts' discovery order pursuant to this cross-motion for limited discovery.

In the alternative, Plaintiffs-Petitioners respectfully requests that, during the August 31, 2017 hearing, the Court hears this cross-motion for limited discovery before hearing Defendants-Respondents' cross-motion to dismiss.

CONCLUSION

For the reasons set forth above, Plaintiffs-Petitioners respectfully requests that the Court grants this motion for limited discovery in its entirety.

Dated: August 2, 2017
New York, New York

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Reply Memorandum of Law by DFS in Further Support of Cross-Motion, dated August 11, 2017 [pp. 315 - 345]

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

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; Anthony Albanese, in his official capacity as Superintendent of 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.

Index No. 101880/2015

Hon. Victoria St. George

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS'–RESPONDENTS' CROSS-MOTION TO DISMISS THE AMENDED VERIFIED COMPLAINT AND ARTICLE 78 PETITION

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FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

TABLE OF CONTENTS

Page

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

TABLE OF AUTHORITIES

CASES **Page(s)**

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

MISCELLANEOUS AUTHORITIES

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS'–RESPONDENTS' CROSS-MOTION TO DISMISS THE AMENDED COMPLAINT AND VERIFIED PETITION

Defendants-Respondents the New York State Department of Financial Services and its Superintendent, Maria T. Vullo (collectively, "DFS" or the "Department"), by their attorney, Eric T. Schneiderman, Attorney General of the State of New York, submit this reply memorandum of law in further support of their cross-motion to dismiss the petition in this hybrid action.

Preliminary Statement

In its moving papers, DFS demonstrated that petitioner Theo Chino's challenge to 23 NYCRR Part 200 (the "Regulation") should be dismissed on both procedural and substantive grounds. *See* Defs.'–Resps.' Mem. of Law in Support of Cross-Motion to Dismiss the Am. Compl. & Ver. Pet'n, dated June 23, 2017 ("DFS Moving Br."). None of Chino's arguments in his opposition papers adequately refutes DFS's arguments. Procedurally, Chino has failed to allege any facts demonstrating that he has suffered—or is likely to suffer—a cognizable injury because of the Regulation, and thus lacks standing to bring this litigation. *Id.* at 9–13.

Substantively, Chino's claims fail as a matter of law. In promulgating the Regulation in June 2015, DFS—the state agency charged with regulating New York's financial services industries—properly exercised the authority granted to it by the New York Financial Services Law to prescribe rules and regulations necessary to protect consumers of financial products and services. N.Y. Fin'l Servs. Law (FSL) §§ 301(a), (c)(1); 302(a)(1). The Regulation fulfills the Governor's and the Legislature's mandate, in the wake of the 2008 financial crisis, that the newly-formed Department "provide for the regulation of new financial services products," "protect the public interest," "protect users of banking, insurance, and financial services products

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

and services," and "ensure the continued safety and soundness of New York's banking, insurance and financial services industries, as well as the prudent conduct of the providers of financial products and services, through responsible regulation and supervision." FSL §§ 102(f), (i), (j), (l).

Chino does not meet the heavy burden he bears in challenging "an agency's exercise of rule-making powers … in the area of its particular expertise," because he does not, and cannot, show "that the regulation is unreasonable and unsupported by any evidence." *Matter of Spence v. Shah*, 136 A.D.3d 1242, 1246 (3d Dep't 2016) (citations omitted). While acknowledging that DFS has the inherent authority to regulate financial products and services, Chino argues that virtual currency is not financial in nature because it is not a government-backed currency. This argument is meritless, and is belied by Chino's own statements, the straightforward text of the Financial Services Law, and common sense.

Chino's claim that the promulgation of the Regulation violated the separation-of-powers doctrine fails for the same reason: DFS properly exercised the power delegated to it by the Legislature. And Chino's preemption argument fares no better, as it is based on a misreading of the Dodd-Frank Act, which expressly preserves state laws that provide the same or greater protection to consumers. 12 U.S.C. § 5551(a).

Chino also claims that the Regulation is arbitrary and capricious. This claim likewise fails because, as the text of the Regulation makes clear, it was carefully tailored to only cover uses of virtual currency that are subject to DFS's oversight under the Financial Services Law and to apply existing regulatory concepts that govern the conduct of analogous financial services providers.

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

Finally, Chino claims that certain disclosure requirements under the Regulation violate his First Amendment rights. But well-established precedent holds that such disclosure mandates in purely commercial contexts need only be reasonable. And the disclosure requirements at issue here easily meet this reasonableness standard since they are rationally related to DFS's interest in protecting the consumers of financial products and services. Accordingly, the petition should be dismissed.

ARGUMENT

I. Chino lacks standing to challenge the Regulation.

As demonstrated in DFS's moving papers, Chino's allegations are inadequate to establish standing to bring this challenge because nothing in the petition demonstrates that he has suffered—or is likely to suffer—a cognizable injury *because of* the Regulation.

To establish standing, a plaintiff must demonstrate an "injury in fact." *See N.Y. State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 214–15 (2004). The basis of Chino's standing argument is that he has "been irreparably harmed by the Regulation because it effectively forced [him] to close his Bitcoin processing business, Chino LTD." Chino's Memo. of Law in Opp'n to DFS's Cross-Mot. to Dismiss the Am. Ver. Compl. & Article 78 Pet'n, dated July 14, 2017 ("Opp'n Br.") 6 (citing Chino Aff. ¶¶ 15–19). But as detailed in DFS's cross-motion to dismiss, Chino has failed to allege any facts demonstrating that the Regulation caused him to halt Chino LTD's business operations. *See* DFS's Moving Br. 10–12.

In his opposition, Chino maintains that he "did not voluntarily shut down Chino LTD" because it "would have been operating illegally had it continued its Bitcoin processing services without a license …." Opp'n Br. 8; *see also id.* at 9 (alleging that "Chino LTD could no longer offer Bitcoin services" in 2016 "because it did not receive a license." (citing Chino Aff. ¶ 20)).

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

But this argument is founded on the faulty premise that DFS denied his request for a license to operate Chino LTD under the Regulation. DFS never denied Chino's application. To the contrary, DFS advised Chino that it had performed an initial review of his application, but was unable to determine whether Chino LTD needed a license to operate because of the "exceptionally limited" information he had provided. *See* Ex. XI to Am. Pet'n.[1]

Chino alleges that the "Regulation is the proximate cause [for] halting his Bitcoin processing business activities," Opp'n Br. 8–9, but the Regulation plainly had nothing to do with Chino's decision to close his business. Chino never ascertained whether Chino LTD needed a license to operate under the Regulation. He simply assumed it would. And DFS never barred Chino from operating his business. Indeed, DFS told Chino in the clearest possible terms that it would need more information before it could determine whether Chino LTD's business activities fell under the Regulation's purview. *See* Ex. XI to Am. Pet'n.

In sum, the cause of Chino's halted business operations (and any financial losses that resulted) was Chino—not the Regulation. Chino closed his business on the speculative assumption that its operations *might* be impacted by the Regulation, and now argues that the resulting financial losses constitute an injury in fact.

This is not sufficient to confer standing. Standing requires evidence of a concrete, cognizable injury that was *caused by* the challenged law. *See Novello*, 2 N.Y.3d at 211. Chino makes no such showing here. Instead, Chino presents evidence of a self-inflicted injury that

[1] "Among other issues," DFS noted, "the Application does not contain any description of the Company's current or proposed business activity." Ex. XI to Am. Pet'n. Consequently, DFS was unable to evaluate whether Chino LTD's "current or intended business activity (if any) would be considered Virtual Currency Business Activity that requires licensing under the New York Financial Services Law and regulations." *Id.* (citing 23 NYCRR Part 200). Because of this lack of information, DFS explained that it was returning Chino's application "without further processing," but "emphasiz[ed] that the instant letter does not offer any opinion as to whether or not any business activity of the Company requires or would require licensing by New York." *Id.*

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

resulted—not from the challenged Regulation—but from his own assumptions about how that Regulation might affect his businesses down the road. Such broad, non-descript allegations of anticipatory harm are far too attenuated to establish standing; the fact that a law or regulation may be enforced does not, on its own, establish an injury in fact.

Chino has failed to allege any facts showing that the Regulation injured him in a concrete, material way, and therefore lacks standing to bring this litigation. *See Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 772 (1991) (to establish an injury in fact, the plaintiff must allege "an actual legal stake in the matter being adjudicated").

II. The Regulation is authorized by DFS's enabling legislation.

In its moving papers, DFS established that Chino's separation-of-powers claim is devoid of merit. *See* DFS's Moving Br. 13–21. In his opposition papers, Chino does not refute any of the arguments raised in DFS's cross-motion to dismiss, and instead simply reasserts the same flawed reasoning already contained in his petition. Consequently, Chino's claims fail as a matter of law for the same reasons set forth in DFS's moving papers.

A. DFS properly identified virtual currency business activity as a financial product or service subject to its regulatory powers.

The basis for Chino's separation-of-powers claim is that virtual currency is not a financial product or service, and therefore falls outside of DFS's regulatory authority. Ver. Pet'n ¶¶ 99–102. But as demonstrated in DFS's moving papers, Chino's myopic interpretation of DFS's authority is based on a contrived and unduly narrow definition of "financial," and runs counter to the explicit text of the Financial Services Law. *See* DFS's Moving Br. 13–21. As numerous courts have recognized,[2] virtual currency is a digital form of money—a medium of

[2] *See, e.g., United States v. Faiella*, 39 F. Supp. 3d 544, 545 (S.D.N.Y. 2014) (Rakoff, J.) ("Bitcoin clearly qualifies as 'money' or 'funds' .... Bitcoin can be easily purchased in exchange for ordinary currency, acts as a denominator of value, and is used to conduct financial transactions."); *United States v.*

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

exchange that can be substituted for traditional currency.

Virtual currencies were specifically designed to act as substitutes for money, allowing users to make online payments without incurring the costs associated with the traditional intermediaries of financial services.[3] These traditional intermediaries have long been regulated by DFS, other state banking regulators, and (in the case of national banks) the U.S. Office of the Comptroller of the Currency. Facilitators of online payments, for example, are generally licensed by DFS as money transmitters.[4]

As DFS noted in its moving papers—and which Chino ignored in his opposition—the Financial Crimes Enforcement Network of the U.S. Treasury Department ("FinCEN") has recognized that virtual currency can be used, and sometimes needs to be regulated, as a substitute for fiat currency.[5] *See* DFS's Moving Br. 15. In a 2013 interpretive guidance on virtual

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Ulbricht, 31 F. Supp. 3d 540, 548 (S.D.N.Y. 2014) ("[T]he defendant alleges that he cannot have engaged in money laundering because all transactions occurred through the use of Bitcoin and thus there was therefore no legally cognizable 'financial transaction.' The Court disagrees. Bitcoins carry value—that is their purpose and function—and act as a medium of exchange. Bitcoins may be exchanged for legal tender, be it U.S. dollars, Euros, or some other currency. Accordingly, this argument fails."), *aff'd* 2017 WL 2346566, at * 1 (2d Cir. May 31, 2017); *United States v. Murgio*, No. 15-CR-769 (AJN), 2016 WL 5107128, at *3–4 (S.D.N.Y. Sept. 19, 2016) (recognizing that Bitcoin is synonymous with money, as it "can be accepted 'as a payment for goods and services' or bought 'directly from an exchange with [a] bank account.'") (citation omitted); *United States v. 50.44 Bitcoins*, No. CV ELH-15-3692, 2016 WL 3049166, at *1 (D. Md. May 31, 2016) ("Bitcoin is an electronic form of currency unbacked by any real asset and without specie, such as coin or precious metal.") (citation and internal quotation marks omitted); *Sec. & Exch. Comm'n v. Shavers,* 13 Civ. 416, 2013 WL 4028182, at *2 (E.D.Tex. Aug. 6, 2013), at *1 ("It is clear that Bitcoin can be used as money. It can be used to purchase goods or services, and . . . used to pay for individual living expenses. … [I]t can also be exchanged for conventional currencies….").
Chino does not attempt to distinguish or address this extensive legal authority in his opposition.

[3] *See* Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System* (2008), at 1, available at https://bitcoin.org/bitcoin.pdf (last visited Jun. 21, 2017).

[4] *See* DFS, *Database of Supervised Financial Institutions*, https://myportal.dfs.ny.gov/web/guest-applications/who-we-supervise (database of financial institutions supervised by DFS organized by name and type of institution).

[5] *See Guidance on the Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*, FinCEN, FIN-2013-G001 (Mar. 18, 2013) ("FinCEN Guidance"), at 1, http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2013-G001.pdf.

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

currencies, FinCEN observed that virtual currencies are "a medium of exchange that operates like a currency in some environments." *FinCEN Guidance* at 1. Because virtual currency is a stand-in for money, FinCEN clarified that "[t]he definition of a money transmitter does not differentiate between real currencies and convertible virtual currencies," and that "[a]ccepting and transmitting anything of value that substitutes for currency makes a person a money transmitter under the regulations implementing the [Bank Secrecy Act]." *Id*. at 3.

FinCEN therefore determined that a virtual currency "administrator" (a person who issues a virtual currency) and an "exchanger" (a person who exchanges a "virtual currency for real currency, funds, or other virtual currency") are engaged in a "money service business" and must register with the U.S. Treasury Department. *Id.* at 1–2. In reaching this conclusion, FinCEN explicitly noted that an administrator or exchanger who "(1) accepts and transmits a convertible virtual currency or (2) buys or sells convertible virtual currency for any reason ***is*** a money transmitter under FinCEN's regulations." *Id*. at 3. FinCEN has thus determined that anyone providing certain services involving virtual currency is subject to the same Bank Secrecy Act compliance requirements as money transmitters. *Id.*

FinCEN's recognition that virtual currency can be used as money, and that certain virtual currency service providers are indistinguishable from money transmitters, check cashers and other, more traditional money services businesses, underscores that DFS properly determined within its broad mandate that virtual currency business activity is subject to regulation under the Financial Services Law.

Chino offers no reason to conclude that a company providing payment services denominated in virtual currency is, in any way, less engaged in providing a financial product or

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

service than a company that provides payment services denominated in dollars. [6] In essence, Chino posits that the Legislature intended that otherwise identical transactions be treated differently depending on whether they are conducted in dollars or virtual currency. By Chino's logic, a company that processes purchases denominated in dollars from an internet retailer can be regulated by DFS as a money transmitter to protect consumers against a risk of loss, but the same consumers are left completely unprotected when a virtual currency service provider is used to purchase those same goods and services. This line of reasoning is specious and defies common sense.

Indeed, virtual currency arguably is more risky to the consumer and can result in clear financial harm. Chino's interpretation of the phrase "financial products and services" to exclude virtual currency is incompatible with both the language and the clear intent of the Financial Services Law to protect consumers of financial products and services, existing or emerging.

The regulation of virtual currency business activity is precisely the type of regulation envisioned by the Governor and the Legislature when they empowered DFS to regulate banks, insurance companies, *and other financial services industries*—including financial products and services—in the modern, post-financial-crisis era. Virtual currency business activity represents a

[6] In support of his argument that virtual currency is not a financial product or service, Chino alleges that several states "have taken the position that Bitcoin is not money." Opp'n Br. 13. Chino claims, for example, that "Kansas and Texas have taken the position that Bitcoin is not money and have issued memoranda stating this position." *Id.* But the Kansas and Texas memoranda cited by Chino merely provide that virtual currencies do not fall under those states' respective pre-existing statutes governing money-transmission activities. Neither memorandum takes a position on whether virtual currency is a financial product or service, or whether virtual currency business activity should be regulated. Similarly, Chino alleges that California has twice tried (and failed) "to use the legislative process to pass a bill regulating virtual currency, " that "New Hampshire House of Representatives passed a bill which seeks to exempt virtual currency users from having to register as money service businesses," and that the Texas legislature proposed a constitutional amendment protecting the rights of those who own and use virtual currencies. *Id.* But the legislative efforts of other states have no bearing on whether DFS acted within its statutory authority when it promulgated the Regulation, and thus lend no support to Chino's claims.

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

new financial product or service with the potential to benefit consumers, while also exposing them to serious harm, as the Mt. Gox fiasco demonstrated.[7] Left unregulated, the virtual currency market can also become a haven for black-market transactions, tax evasion, money laundering, and terrorist financing. This is precisely the type of situation where DFS has a compelling policy interest to act, in accord with its mandate, in order to protect consumers and the market. Accordingly, DFS appropriately promulgated its Regulation of virtual currency business activity to safeguard against the abuse and misuse of a new financial product.

B. Application of the *Boreali* factors compels the conclusion that DFS did not violate the separation-of-powers doctrine.

Boreali v. Axelrod, 71 N.Y.2d 1 (1987) is the seminal case "for determining whether agency rulemaking has exceeded legislative fiat." *Matter of NYC C.L.A.S.H., Inc. v. N.Y. State Off. of Parks, Recreation & Historic Preserv.*, 27 N.Y.3d 174, 178 (2016). In that case, the Court of Appeals explained that the confluence of four circumstances led it to conclude that the challenged administrative rules violated the separation-of-powers doctrine: (1) the agency carved out exceptions that reflected the weighing of stated goals with competing social concerns, (2) the agency did not merely fill in the gaps of broad legislation, but enacted what amounted to a detailed code on an entirely clean slate with no legislative guidance, (3) the agency acted in an area in which the Legislature had tried and failed to reach agreement in the face of public debate and vigorous lobbying, and (4) the agency had no special expertise or technical competence in the area it purported to regulate. *Boreali*, 71 N.Y.2d at 12–14. These "factors are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an

[7] As referenced in DFS's moving papers (DFS's Cross-Mot. Br. 7), Mt. Gox, once the largest Bitcoin exchange service, collapsed in early 2014 after a purported security breach led to the loss of more than $450 million worth of bitcoins. *See, e.g.,* Carter Dougherty and Grace Wang, *Mt. Gox Seeks Bankruptcy After $480 Million Bitcoin Loss*, Bloomberg, Feb. 28, 2014, http://www.bloomberg.com/news/articles/2014-02-28/mt-gox-exchange-files-for-bankruptcy.

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

agency's exercise of power." *Greater N.Y. Taxi Assoc. v. Taxi & Limo. Comm'n*, 25 N.Y.3d 600, 610 (2015). None of the *Boreali* factors supports Chino's challenge. *See* DFS's Moving Br. 18–21.

As addressed more fully in its moving papers, *id.*, DFS made no "difficult choices between public policy ends" in promulgating the Regulation. *Greater N.Y. Taxi Assoc.*, 25 N.Y. at 610; *see also Matter of N.Y. Statewide Coal. of Hispanic Chambers of Comm. v. N.Y.C. Dep't of Health*, 23 N.Y.3d 681, 700–01 (2014) (holding that under the factors set forth in *Boreali*, "an administrative agency exceeds its authority when it makes difficult choices between public policy ends, rather than finds means to an end chosen by the legislature"). Nor did DFS exercise "value judgments entailing difficult and complex choices between broad policy goals to resolve social problems," or create "its own comprehensive set of rules without benefit of legislative guidance." *Greater N.Y. Taxi Assoc. v. N.Y.C. Taxi & Limousine Comm'n*, 25 N.Y.3d 600, 610–11 ("The Second *Boreali* factor is whether the agency merely filled in details of a broad policy or if it 'wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance." (quoting *Boreali*, 71 N.Y.2d at 13)).

Rather, the Regulation dovetails with the stated purpose of the Financial Services Law, to respond in a timely and effective way to an innovative and risky financial product or service, ensuring that consumers and financial markets are protected from harm. Consistent with the mandate imposed by the Financial Services Law, DFS's Regulation only applies to "financial" uses of virtual currency and requires that persons engaged in such activities comply with well-established safeguards that apply to a broad range of financial services industries. Accordingly, there is no separation-of-powers issue here, as DFS is acting fully within its authority under the Financial Services Law to "provide for the regulation of new financial services products" and

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

"ensure the continued safety and soundness of New York's banking, insurance and financial services industries, as well as the prudent conduct of the providers of financial products and services, through responsible regulation and supervision." FSL §§ 102(f), (i).

In sum, application of the *Boreali* factors compels the conclusion that DFS did not violate the separation-of-powers doctrine in promulgating the Regulation. DFS's Regulation is faithful to the guiding principles the Legislature established in the Financial Services Law. Accordingly, this Court should reject Chino's separation-of-powers challenge to the Regulation and declare that DFS acted within its statutory authority in promulgating 23 NYCRR Part 200.

III. The Regulation is neither arbitrary nor capricious and has a rational basis.

As explained in its cross-motion to dismiss, Chino's claim that the Regulation is arbitrary and capricious is meritless. *See* DFS's Moving Br. 21–26. The Regulation is reasonable, rationally based, and carefully crafted in accordance with DFS's legislatively mandated purpose of ensuring the safety and soundness of the financial products and services offered to New Yorkers. Lacking any legal basis for his claims, Chino opposes DFS's cross-motion papers by simply repeating the same arguments he made in his petition. But for the same reasons provided in DFS's cross-motion to dismiss, these arguments are devoid of merit, and should be rejected. *See* DFS's Moving Br. 21–26.

Chino maintains that the scope of the Regulation is irrationally broad, *see* Opp'n Br. 23–27, but in making this argument, he blatantly misrepresents the Regulation's reach. Chino claims, for example, that the Regulation covers all non-financial uses of blockchain technology—including an artist's use of "blockchain technology to assert ownership over [his or her] works," an insurer's use of "blockchain technology to track diamonds," or a person's use of "blockchain technology to timestamp documents and photos." *Id.* at 25; *see also* Am. Pet'n

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

¶¶ 45–46. Chino goes so far as to suggest that the Regulation covers the basic exchange of *all* information over the internet. *Id.* at 24–25; Am. Pet'n ¶ 43. This is false.

The definition of "Virtual Currency" under the Regulation is limited to "any type of digital unit that is used as a medium of exchange or a form of digitally stored value." 23 NYCRR 200.2(p). These terms—"medium of exchange" and "form of digitally stored value"—are commonly used to describe financial services and products.[8] Moreover, the definition of "virtual currency" explicitly excludes non-financial uses of virtual currency, such as digital units used solely within online gaming platforms or customer rewards programs, neither of which can be converted into, or redeemed for, fiat currency or virtual currency. *See* 23 NYCRR 202.2(p).

In a similar vein, the definition of "virtual currency business activity," on its face, is intended to capture "financial product[s] or services[s] offered or sold to consumers" while excluding other, non-financial activity. FSL § 104(a)(2). Thus, "virtual currency business activity" is limited to receiving for transmission and transmitting virtual currency (except for non-financial purposes in nominal amounts); storing, holding or maintaining custody of virtual currency on behalf of others; buying and selling virtual currency as a customer business; performing exchange services; and issuing a virtual currency. 23 NYCRR § 200.2(q).

Taken together, the Regulation's definitions of virtual currency and covered business activity tailor its application to any person who provides financial services—exchange, storage, transmission, and the like—involving virtual currencies that have a financial use as a medium of

[8] *See, e.g.*, *United States v. Faiella*, 39 F. Supp. 3d 544, 545 (S.D.N.Y. 2014) (observing that "money" in ordinary parlance means "something generally accepted as a medium of exchange, a measure of value, or a means of payment"); Paul Krugman, *The Int'l Role of the Dollar: Theory and Prospect in Exchange Rate Theory & Practice* 8.2 (John F. Bilson & Richard C. Marston eds., 1984) (noting that money generally "serves three functions: it is a medium of exchange, a unit of account, and a store of value"); *see also United States v. E-Gold, LTD*, 550 F. Supp. 2d 82, 94 (D.D.C. 2008) (holding that "a 'money transmitting service' includes not only a transmission of actual currency, but also a transmission of the value of that currency through some other medium of exchange").

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

exchange or as a means of storing value. *See, e.g.*, 23 NYCRR 200.2(p), (q). As the text of these provisions show, the Regulation is reasonably crafted to ensure consistency with DFS's legislatively mandated purpose. *See* DFS's Moving Br. 21–26.

Chino also challenges the Regulation's recordkeeping requirements, anti-money-laundering requirements, and capital requirements. *See* Opp'n Br. 27–35; *see also* Am. Pet'n ¶¶ 50–56, 111–21. But each of these requirements was properly crafted with a rational basis.

The record-keeping requirements are not "onerous" or "irrationally untailored." Opp'n Br. 27–28. Comparable record-keeping requirements apply to other licensees or chartered entities including, for example, check cashers, money transmitters and banks. *See* 3 NYCRR § 400.1; N.Y. Banking Law §§ 128, 651-b. Keeping records of transactions is a necessary and sound business practice, and there is nothing arbitrary or capricious about requiring a business that transacts with the public to keep records.

Nor is there anything arbitrary and capricious about the Regulation's anti-money-laundering requirements. Chino claims that the Regulation requires licensees "to file Suspicious Activity Reports ("SAR") even if they would not be required to do so under federal law." Opp'n Br. 29–30. According to Chino, this "requirement imposes an unreasonable burden on 'virtual currency' firms who would not otherwise be subject to federal SAR provisions." *Id.* at 29. But as explained in DFS's moving papers, the Regulation does not subject virtual currency service providers to different requirements from those that apply to money transmitters. To the contrary, it ensures that virtual currency service providers, money transmitters, and other similar financial services companies are subject to the same requirements in order to protect against illegal activity in the markets. Although there is substantial overlap between the virtual currency business activity subject to the Regulation and FinCEN's registration requirements, DFS

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

recognized that, in some cases, entities could potentially be subject to the Regulation but not required to register with FinCEN. The challenged reporting requirement simply ensures that those entities are required to file the same types of SARs that FinCEN requires. This provision is neither arbitrary nor capricious because any entity involved in the global transmission of funds—whether denominated in dollars or virtual currency—risks facilitating illegal transactions.

Chino also takes issue with the Regulation's minimum capital requirements, arguing that they "unreasonably prevent[] startups and small businesses from participating in 'virtual currency business activity,'" and are improperly imposed on all licensees. Opp'n Br. 30. But there is nothing arbitrary or capricious about these requirements. Financial services companies regulated by DFS are typically required to meet minimum standards to obtain a license. *See, e.g.*, 23 NYRCRR §§ 401(b)(1), (3) (licensed lenders must maintain liquid assets of $50,000 and a line of credit of at least $100,000); 400.1 (c)(6)(iv), (v) (check cashers must have a $100,000 line of credit and $10,000 in cash at each location); 406.13 (money transmitters must maintain a surety bond of at least $500,000). These are commonly applied, basic consumer protection requirements.

Chino argues that the Regulation imposes a "blanket," "one-size-fits-all" capital requirement on licensees that fails to take into account a licensee's size or the nature of its business activities. Opp'n Br. 30–32. Elsewhere in his papers, Chino characterizes these same capital requirements as improperly "vague" and "open-ended." *Id.* Neither of these self-contradicting descriptions of the Regulation's minimum capital requirements is accurate. The Regulation does not impose a uniform, "one-size-fits-all" capital requirement. To the contrary, the Regulation adopts a flexible approach, requiring the licensee to maintain "capital in an amount and form as the superintendent determines is sufficient to ensure the financial integrity of

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

the Licensee and its ongoing operations *based on an assessment of the specific risks applicable to each Licensee.*" 3 NYCRR § 200.8(a) (emphasis added). Nor does the Regulation impose capital requirements that are "vague" and "open-ended." In determining the amount and form of sufficient capital for each licensee, the Regulation provides a non-exhaustive list of nine factors for DFS's Superintendent to consider, including the composition of the licensee's total assets, the anticipated volume of the licensee's virtual currency business activity, the types of entities to be serviced, and the products or services to be offered by the licensee. *See id.* § 200.8(a)(1), (3), (8), (9). The Regulation is plainly designed to ensure that the minimum capital requirement is rationally based on and calibrated to reflect the virtual currency business activity in which a particular licensee engages, as DFS determines in each case when it processes a license application.

Chino argues that the Regulation imposes a minimum capital requirement on his business that is "disproportionate to risks associated with the activities Chino is conducting" because Chino LTD "is processing small purchases made with bitcoins in small retail stores." Opp'n Br. 34. But this argument is based on nothing but speculation. Chino failed to provide DFS with enough information to ascertain whether his business needed a license to operate under the Regulation—let alone enough information to assess the amount and form of capital that would be needed to ensure his Chino LTD's financial integrity. Chino simply assumes that *if* he had properly applied for a license, he would have eventually been required to maintain a minimum capital requirement that was "disproportionate" to the risks he was taking. This entire line of reasoning is premised on a chain of hypothetical events that never occurred, and has no basis in the text of the Regulation or in the facts and circumstances giving rise to this litigation.

Moreover, in his attempts to portray the Regulation as arbitrary and capricious, *see* Opp'n

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

Br. 30–32, Chino (once again) overlooks DFS's authority under Section 200.4(c) to issue conditional licenses to entities that do not meet the full requirements of the Regulation. *See* DFS's Moving Br. 25–26. Similar to the factors provided under Section 200.8 for evaluating a licensee's capital requirements, the Superintendent's discretion to grant a conditional license is informed by eight factors, including "the nature and scope of the applicant's or Licensee's business," "the anticipated volume of business to be transacted by the applicant or Licensee," "the measures which the applicant or Licensee has taken to limit or mitigate the risks its business presents," and "the applicant's or Licensee's financial services or other business experience." *Id.* § 200.4(c)(7)(i), (ii), (iv), (vii). This provision of the Regulation, like the other provisions discussed above, shows the lengths to which DFS went to adopt a set of rational, narrowly tailored rules to govern virtual currency business activity.

In sum, the Regulation is reasonable, appropriately focused, and rationally based to attain DFS's legislatively mandated purpose of ensuring the safety and soundness of the financial services and products offered to New Yorkers. Chino's arguments to the contrary are meritless.

IV. The Regulation is not preempted by federal law.

As detailed in DFS's cross-motion papers, Chino's argument that the Regulation is pre-empted by federal law relies on a complete misreading of the Dodd Frank Act. *See* DFS's Moving Br. 26–29. Dodd-Frank was enacted to *preserve* consumer protection laws, not preempt them. And Dodd-Frank does so explicitly, providing that nothing in its provisions shall exempt a person from complying with state law. *See* 12 U.S.C. § 5551(a). Moreover, laws are considered consistent with Dodd Frank, and thus are not preempted, if they afford consumers greater protection than otherwise provided under Dodd-Frank. *Id.* For this reason, Congress expressly provided that no part of Dodd Frank "shall be construed as modifying, limiting, or superseding

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

the operation of any provision of an enumerated consumer law that relates to the application of a law in effect in any State with respect to such Federal law." 12 U.S.C. § 5551(b).

In his opposition, Chino argues that implied preemption exists in this case because Dodd Frank's definition of "'financial service or product' is sufficiently comprehensive to reasonably infer that Congress left no room for supplementary state regulation." Opp'n Br. 35. But there is a strong presumption against preemption in areas where states have historically exercised their police powers—such as here, in the area of consumer protection, *see, e.g.*, *N.Y. SMSA LTD P'Ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010)—and nothing in the provisions of Dodd-Frank evinces a Congressional intent to preempt state consumer protection laws. *See* DFS's Moving Br. 27–29.

Chino nevertheless claims that the Consumer Financial Protection Board (CFPB) "has exclusive authority" under Dodd Frank "to determine if a financial product or service falls into its regulating authority." Opp'n Br. 36. But as the CFPB itself has acknowledged, Dodd Frank "did not supplant the states' historic role in protecting consumers in the financial marketplace," and Congress "expressly preserved states' authority to enact and enforce laws that provide consumers greater protection." Brief for the CFPB as Amici Curiae Supporting Defendants-Appellees, *The Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105 (2d Cir. 2014) (No. 13-3769-CV) .

For these reasons, as well as those outlined in DFS's cross-motion papers, Chino's federal-preemption claim is meritless, and should be dismissed.

V. The Regulation's disclosure requirements do not violate First Amendment rights.

Chino argues that the Regulation violates the First Amendment by requiring licensees to disclose certain information to their customers. *See* Am. Pet'n ¶ 14; Opp'n Br. 37–42. As

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

demonstrated in DFS's cross-motion papers, Chino's First-Amendment claim is baseless. DFS's Moving Br. 29–30. Under well-settled precedent, the government may require a commercial speaker to disclose factual information about its product or service so long as the mandated disclosure is reasonably related to the government's interests. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Here, every disclosure required under the Regulation is factual, accurate, and objectively verifiable. And since these disclosures serve New York's significant interest in educating and protecting consumers of financial products and services, Chino has no First Amendment right not to disclose this information to his customers. *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113–14 (2d Cir. 2001).

In his opposition, Chino disputes the applicable standard of review governing his First-Amendment claim, arguing that "many of the Regulation's sections fall under the" intermediate scrutiny level of review established in "*Central Hundson Gas & Electric Corp.* test instead of the *Zauderer* test," which is akin to rational-basis review. Opp'n Br. 38.

As support, Chino cites the United States Supreme Court's recent decision in *Expressions Hair Design v. Schneiderman*, __ U.S. __, 137 S.Ct. 1144 (2017). *Id.* 37–38. Chino's reliance on *Expressions Hair Design* is perplexing, however, as it is wholly irrelevant to Chino's First-Amendment claim. Chino argues that the Regulation violates the First Amendment by compelling licensees to make certain disclosures. Yet *Expressions Hair Design* has nothing to do with compelled disclosures. It merely holds that the First Amendment is implicated by a New York statute that prohibits merchants from imposing a surcharge on credit card users. *See* 137 S.Ct. 1144. Here, there is no dispute that the First Amendment is implicated by the challenged

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

disclosures. The issue instead is whether those disclosures withstand First Amendment scrutiny. And because *Expressions Hair Designs* does not reach this issue, it is inapplicable here.

Chino asserts that the *Expressions Hair Designs* Court "concluded that the statute failed the test for constitutional commercial speech under *Central Hudson Gas*." Opp'n Br. 37. This is false. The Supreme Court expressly declined to reach the question of whether the challenged statute violates the First Amendment, instead "remand[ing] for the Court of Appeals to analyze [the statute] as a speech regulation." 137 S.Ct. 1144, at *5. When analyzed under the standard for regulations requiring the disclosure of commercial speech, Chino's challenge to the Regulation fails.

A. *Zauderer* sets the standard for regulations requiring the disclosure of commercial speech.

Zauderer sets the standard for regulations requiring the disclosure of commercial speech. *See, e.g.*, 471 U.S. at 651. Under *Zauderer*, the government may require a commercial speaker to disclose factual information about its product or service so long as the mandated disclosure is reasonably related to the government's interests. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). This deferential standard is similar to rational basis review. *See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (citing *Zauderer*, 471 U.S. at 651); *Safelite Group, Inc. v. Jepsen*, 764 F.3d 258, 262 (2d Cir. 2014); *CTIA - The Wireless Assoc. v. City of Berkeley*, 139 F.Supp.3d 1048 (N.D. Cal. Sept. 21, 2015) (collecting cases), *aff'd* 2017 WL 141650, (9th Cir. Apr. 21, 2017).

Zauderer's deferential standard aligns with the purposes animating the First Amendment's commercial speech generally—"the value *to consumers* of the information such speech provides." *Zauderer*, 471 U.S. at 651 (emphasis added); *see also Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *Cent. Hudson*, 447 U.S. at 563

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

("The First Amendment's concern for commercial speech is based on [its] informational function"). Commercial speech holds a "subordinate position ... in the scale of First Amendment values." *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 104 (2d Cir. 2010) (citations and internal quotation marks omitted). It is protected not because of any liberty or autonomy interest of the speaker, but because "the free flow of commercial information" promotes "intelligent and well informed" "private economic decisions." *Va. State Bd. of Pharmacy*, 425 U.S. at 764–65. In short, commercial speech is a listener-focused, rather than a speaker-focused, protection.

This reason for protecting listeners' interests in information explains the difference between the lenient scrutiny afforded to mandatory disclosures by *Zauderer* and the more exacting scrutiny of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). *Central Hudson* prescribes a more exacting scrutiny for restricting or silencing commercial speech—allowing for regulation, but only where the government has a sufficiently strong reason to quell the information. *Zauderer*, by contrast, mandates only that a factual disclosure—which by its nature gives the consumer more information rather than less—must bear a "reasonable relationship" to an important state interest. 471 U.S. at 651; *see also Milavetz*, 559 U.S. at 249. *Zauderer's* lenient standard reflects the principle that a commercial speaker's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." 471 U.S. at 651; *see also Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113–14 (2d Cir. 2001) ("Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal.").

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

B. The Regulation easily meets *Zauderer's* reasonableness standard because the challenged disclosures are factual and accurate.

Under *Zauderer's* reasonableness standard, the Regulation's disclosure requirements are constitutional. The disclosures are "factual" and "reasonably related" to the substantial state interest of informing New Yorkers about the transactional risks of virtual currencies and the terms and conditions of the licensee's business products and services. Chino has not demonstrated how a simple requirement to disclose such information could possibly be deemed burdensome. Nor has he even tried to show that the disclosures "chill" his protected speech. And as shown below, every challenged disclosure is factual, accurate, and objectively verifiable.

"The nature of Virtual Currency may lead to an increased risk of fraud or cyber attack."

This statement is factual and obviously true. While virtual currencies represent a new financial product or service with the potential to benefit consumers, they also expose consumers to an increased risk of serious harm, as the Mt. Gox incident demonstrated.

Chino argues that this disclosure "is blatantly false" because "[u]sing virtual currencies puts [people] at no greater risk of fraud or cyber-attack than using a credit card or online shopping." Am. Pet'n ¶ 134. But Chino mischaracterizes what the disclosure actually says. The disclosure provides that the nature of virtual currency *may* lead to an increased risk of fraud or cyber attack for those who use it—*not* that virtual currency is more or less susceptible to fraud or cyber attacks than other mediums of exchange. Chino implies that DFS must demonstrate that the use of Bitcoin is more dangerous than other forms of payment to survive First Amendment scrutiny, but the First Amendment plainly does not require the State to establish the accuracy of statements it does not compel others to make.

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

"There is no assurance that a Person who accepts a Virtual Currency as payment today will continue to do so in the future."

There is no dispute that a business or individual who accepts a virtual currency as payment today may not do so in the future. Indeed, the same is true for any medium of exchange. Chino argues that "[t]his compelled disclosure is speculative because using Bitcoin does not trigger a business continuity risk higher or lower than using other forms of payment." Am. Pet'n 136. But this misses the point.

Nothing in this disclosure draws a comparison between the "business continuity risk" of virtual currencies and other forms of payment. To the contrary, it simply states that people who accept a virtual currency as a form of payment today may decline to do so tomorrow—a fact that Chino readily admits. *See Id.* ¶ 33 ("[B]ecause Bitcoin is not issued by a government, no entity is required to accept it as payment.").

Even so, Chino maintains that the "disclosure is both unjustified and unduly burdensome because [he] contracted with each bodega customer to provide Bitcoin processing services for each transaction, which is no more or less riskier [sic] than any other service used by [his] customers …." *Id.* ¶ 136. Yet the disclosure is objectively accurate and one sentence long. To suggest that it is unjustified or unduly burdensome is baseless. And as noted above, the disclosure does not compare the risks of conducting transactions in virtual currencies versus other mediums of exchange. It merely addresses the use of virtual currencies as a method of payment using incontrovertible language.

"The volatility and unpredictability of the price of virtual currency relative to fiat currency may result in significant loss over a short period of time."

There is no dispute that virtual currencies are susceptible to dramatic fluctuations in price. In fact, Chino himself repeatedly recognizes this fact in his petition. Am. Pet'n ¶¶ 27 ("the value of Bitcoin is highly volatile and dependent on supply and demand."), 32 ("Bitcoin value

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

fluctuates much more than that of the typical government-backed fiat currency." (quoting *United States v. Petix*, No. 15-CR-227A, 2016 WL 7017919, at *5 (W.D.N.Y. Dec. 1, 2016))).

Chino nevertheless claims this disclosure is irrelevant, unduly burdensome, and unjustified because he "contracted with each bodega customer to eliminate the exchange rate risk from the bodega customer." Am. Pet'n ¶ 137. But this argument fails for two reasons. First, the mandated disclosure is factual, accurate, and one sentence long, so Chino's claim it is unduly burdensome and unjustified is far-fetched. Second, Chino overlooks the fact that these required disclosures are not exhaustive. So to the extent Chino disputes the relevance of this disclosure in the context of his business operations, nothing in the Regulation prevents him from providing his customers with information beyond what is required under the mandated disclosures. *See CTIA-The Wireless Assoc. v. City of Berkeley*, 2017 WL 1416507, at *11 (9th Cir. Apr. 21, 2017) (in rejecting First Amendment challenge, observing that "[i]f the retailer is concerned … that the term 'RF radiation' is inflammatory and misleading, the retailer may add to the compelled disclosure any further statement it sees fit to add."); *Conn. Bar Ass'n v. United States*, 620 F.3d 81, 98 (2d Cir. 2010) (rejecting argument that a "statute compels inaccurate or misleading disclosures" because, among other reasons, nothing in the statute precluded the plaintiffs from providing an individual with more information "to ensure accurately informed choice").

Licensees must disclose the relevant terms and conditions associated with their products, services, and activities, and any transactions made for, on behalf of, or with their customers.

Chino also claims it is unconstitutional to require him to make specific disclosures about:

- The customer's liability for an unauthorized Bitcoin transaction;
- The customer's right to stop a pre-authorized Bitcoin transaction;
- The type and nature of a Bitcoin transaction; and
- The ability to undo a Bitcoin transaction.

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

See Am. Pet'n ¶¶ 136–142 (citing 23 NYCRR § 200.19(b)(1)–(2), (c)(3)–(4)). Chino argues these disclosures are invalid for two reasons. First, Chino posits that the disclosures relating to a customer's liability for unauthorized Bitcoin transactions and the type and nature of a Bitcoin transaction are overly broad and unduly burdensome "because [he] would be unable to identify specifically a given customer liability when the bodega customer uses Bitcoin as compared to using other forms of payment," and "cannot guarantee more than what the bodega provides to its current customer under existing New York law." Am. Pet'n ¶¶ 139, 141. Put differently, Chino argues these disclosure requirements are unconstitutional because he—as a licensee—would have no knowledge of or control over the policies and procedures that his customers—as merchants—would impose on their customers. But Chino misconstrues the reach of these requirements, which cover what a licensee must disclose to its customers—*not* what a licensee's customer must disclose to *its* customers.

Second, Chino argues that the disclosures concerning a customer's right to undo a Bitcoin transaction and to stop a pre-authorized Bitcoin transaction are irrelevant and overly broad because they do not apply to the products and services being offered by his businesses. *Id.* ¶¶ 137, 139. But this argument rests on fundamental misunderstanding of what the disclosures actually require. These particular disclosures are not blanket requirements. In fact, licensees only have to make these disclosures *when they apply* to their products, services, or activities. *See* 23 NYCRR 200.19 (providing that "each Licensee shall disclose … all relevant terms and conditions with its products, services, and activities … including at a minimum, the following, *as applicable*" (emphasis added)). So to the extent the disclosures are inapplicable to the products and services being offered by a licensee, the Regulation imposes no burden on the licensee to make them.

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

Finally, Chino suggests that the very flexibility afforded by these disclosures renders the Regulation impermissibly vague because they "hamper[] his ability to market Bitcoin processing services." Am. Pet'n ¶ 139. This argument is meritless. The provisions provide explicit notice of the disclosures required, and, to the extent they afford flexibility, nothing in the Regulation prevents a licensee from providing its customers with *more* information than is contained in the mandated disclosures. *See CTIA-The Wireless Assoc.*, 2017 WL 1416507, at *11; *Conn. Bar Ass'n*, 620 F.3d at 98. In light of the fact that the challenged disclosures do not purport to be exhaustive, Chino's argument that they hamper the ability of his businesses to advertise their services is baseless.[9]

CONCLUSION

DFS respectfully submits that the petition should be denied and that the cross-motion to dismiss the petition should be granted in its entirety, along with any other relief the Court deems just and proper.

[9] Chino also argues that the Regulation requires him "to make a specific disclosure about fraud prevention," and that this "compelled disclosure" is irrelevant, overbroad, and "would trigger enormous administrative" costs. Am. Pet'n ¶ 143. The challenged provision (23 NYCRR § 200.19(g)) requires licensees to establish and maintain a written anti-fraud policy. It does not compel licensees to disclose anything. Thus, Chino's argument—which essentially challenges a "compelled disclosure" that does not exist on the grounds that it is invalid under a constitutional provision that does not apply—is devoid of merit.

FILED: NEW YORK COUNTY CLERK 09/06/2017 04:49 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 33 RECEIVED NYSCEF: 09/06/2017

Dated: New York, New York
August 11, 2017

Respectfully submitted,

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Memorandum of Law by DFS in Opposition to Cross-Motion for Limited Discovery, dated September 6, 2017 [pp. 346 - 363]

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

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; Anthony Albanese, in his official capacity as Superintendent of 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.	Index No. 101880/2015 Hon. Victoria St. George

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS–PETITIONERS' CROSS-MOTION FOR LIMITED DISCOVERY AND FOR HOLDING DEFENDANTS–RESPONDENTS' CROSS-MOTION TO DISMISS IN ABEYANCE

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FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

TABLE OF CONTENTS

Page

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

TABLE OF AUTHORITIES

Cases **Page(s)**

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

State Statutes, Rules, and Regulations

Miscellaneous Authorities

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

Preliminary Statement

Plaintiffs-Petitioners Theo Chino and Chino LTD (collectively "Chino") commenced this hybrid Article 78 proceeding, which also includes a declaratory judgment claim, alleging that the New York State Department of Financial Services ("DFS") exceeded the scope of its regulatory authority and acted arbitrarily and capriciously in promulgating a regulation that addresses virtual currency business activity in New York—claims that turn exclusively on the application of settled principles of law to undisputed facts. In June 2017, DFS filed a dispositive cross-motion to dismiss these claims for lack of standing and failure to state a cause of action. Two months later, Chino brings the present application, seeking wide-ranging discovery under Section 408 of the New York Civil Practice Law and Rules, and requesting that DFS's cross-motion be held in abeyance until that motion is decided. Pets.' Not. of Mot. 1–2.

As a threshold matter, proceeding with discovery before this Court's review of the underlying merits of Chino's claims would be futile because it would serve only to delay the inevitable dismissal of his claims. In its moving papers, DFS raises threshold issues concerning Chino's standing to bring this litigation and demonstrates that he has failed to state a cause of action upon which relief can be granted. Moreover, all of the claims raised by Chino can be resolved in favor of DFS as a matter of law, obviating the need for discovery.

In this case, Chino argues that DFS exceeded its authority in promulgating a regulation covering virtual currency business activity, and that aspects of that regulation's design and scope are arbitrary and capricious. In other words, Chino raises questions of law that this Court can fully and fairly review by looking to the regulation itself (23 NYCRR Part 200), the enabling legislation (New York Financial Services Law), and applicable precedent. Yet Chino moves the Court for an order under CPLR § 408 compelling: (1) Paul Krugman—the Nobel Prize-winning economist and New York Times columnist—to testify on the economic nature of Bitcoin;

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

(2) DFS to produce an assortment of emails and other written documentation circulated internally over a three-year period; and (3) the former Superintendent of the New York State Department of Financial Services to attend a deposition. *Id.*[1] These facially unreasonable requests are a quintessential example of a party seeking permission to embark on a "fishing expedition" based on the mere hope of uncovering *something* of possible relevance. But such requests—premised on conjecture and speculation—are legally impermissible.

In sum, Chino has failed to meet his burden of establishing that discovery is necessary or warranted with respect to any of his claims, and his motion should be denied in its entirety.

Argument

I. Chino is not entitled to discovery in this hybrid Article 78 proceeding.

Discovery is presumptively improper in Article 78 proceedings, which are designed to facilitate a summary disposition of the legal issues presented. "Article 78 proceedings are indeed designed for the prompt resolution of largely legal issues, rather than for discovery, trials, and 'credibility judgments.'" *Council of N.Y. v. Bloomberg*, 6 N.Y.3d 380, 389 (2006) (citation omitted); *see also Town of Pleasant Valley v. N.Y. State Bd. of Real Prop. Servs.*, 253 A.D.2d 8, 15 (2d Dep't 1999) ("Because discovery tends to prolong a case, and is therefore inconsistent with the summary nature of a special proceeding, discovery is granted only where it is demonstrated that there is need for such relief"); *In the Matter of Kellenberg Mem'l High Sch. v.*

[1] Chino's discovery requests are made under CPLR § 408—the statutory provision governing discovery in Article 78 proceedings. But in a hybrid Article 78 proceeding and declaratory judgment action, courts must apply the "usual rules relating to discovery to them as if they were separate matters." *Price v. N.Y.C. Bd. of Educ.*, 16 Misc. 3d 543, 550 (Sup. Ct. N.Y. Cnty. 2007) (denying the petitioners' motion for discovery in a hybrid action), *aff'd* 51 A.D.3d 27 (1st Dep't 2008), *lv.denied*, 11 N.Y.3d 702 (2008). The distinction between standards makes little difference here, however, because Chino's discovery requests are wholly irrelevant and unnecessary to the Court's determination of his claims. *See* CPLR § 3101 (in the context of an action for a declaratory judgment, discovery must be "material and necessary in the prosecution or defense of an action"). Thus, for the reasons set forth in this memorandum, Chino's discovery requests are fatally flawed under either standard.

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

Section VIII of N.Y. Pub. High Sch. Ath. Ass'n, 255 A.D.2d 320, 320 (2d Dep't 1998) ("The petitioners argue ... that they are entitled to discovery. This argument ignores ... the summary nature of a special proceeding."); *see also Price*, 16 Misc. 3d at 550 ("Because most matters under CPLR article 78 are commenced to review an existing record, discovery is not common in such proceedings.").

Discovery in an Article 78 proceeding is allowed only by leave of the Court. CPLR §§ 408, 7804(a); *see also* CPLR § 3214(b) (providing that a CPLR 3211 motion to dismiss "stays disclosure until determination of the motion unless the court orders otherwise"). In determining whether discovery should be granted, courts first consider whether the petitioners have "a need to determine information directly related to the cause of action" and then whether the scope of the request is narrowly tailored to resolve disputed material facts. *Lonray, Inc. v. Newhouse*, 229 A.D.2d 440, 440–41 (2d Dep't 1996); *In re Shore*, 109 A.D.2d 842, 843–44 (2d Dep't 1985) (denying pre-hearing discovery under CPLR § 408 where the movant had not demonstrated "ample need," discovery would be "burdensome" for producing party, and requests were "not readily capable of being produced in a relatively short period of time"). To direct discovery, the court must deem the information sought to be "material and necessary." *Tivoli Stock LLC v. N.Y.C. Dep't of Hous. Pres. & Dev.*, 14 Misc. 3d 1207(A) (Sup. Ct. N.Y. Cnty. 2006) (citations omitted); *City of Glen Cove Indus. Dev. Agency v. Doxey*, 79 A.D.3d 1038, 1038 (2d Dep't 2010) (upholding denial of the "appellant's cross motion for disclosure as the information sought was not material or necessary to its claims").

Where, as here, the discovery sought is neither material nor necessary to resolve the claims asserted, the petitioner's discovery requests must be denied. *CRP/Extell Parcel I, L.P. v. Cuomo*, 101 A.D.3d 473, 474 (1st Dep't 2012) (denying discovery in Article 78 proceeding that

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

was neither material nor necessary to determine "whether [the respondent's] determinations were affected by an error of law or arbitrary and capricious"); *In re Protect the Adirondacks! Inc.*, 38 Misc. 3d 1235(A), (Sup. Ct. Albany Cnty. 2013) (In evaluating a motion under CPLR § 408, the court "must determine whether the movant has established that the information it seeks is material and necessary."), *aff'd* 121 A.D.3d 63 (2014).

Moreover, a court's assessment of a motion for discovery in an Article 78 proceeding is not divorced from its consideration of the merits of the underlying petition. "[It] is appropriate for a court to consider whether a petitioner would be entitled to Article 78 relief while considering a request for discovery." *Urquia v. Cuomo*, 18 Misc. 3d 1110(A), 2007 N.Y. Slip Op. 52489(U), at *29 (Sup. Ct. N.Y. Cnty. 2007) (citing *Stapleton Studios LLC v. City of New York*, 7 A.D.3d 273, 275) (1st Dep't 2004)). This is especially so where, as here, the respondent challenges the petitioners' standing to even assert their claims. *See Brown v. N.Y.C. Landmarks Pres. Comm'n*, 32 Misc. 3d 1213(A), 2011 N.Y. Slip. Op. 51273(U), at *2–3 (Sup. Ct. N.Y. Cnty. Jul. 7, 2011) (considering whether the petitioners have standing before deciding motion for discovery in Article 78 proceeding); *Soc. Serv. Emps. Union v. City of New York*, Index No. 117885/09, 2010 WL 5044082 (Sup. Ct. N.Y. Cnty. Nov. 23, 2010).

Consequently, the Court should first consider the merits of Chino's claims—and whether he has standing to assert them—before it entertains his discovery requests, and should not delay the hearing on the underlying claims.[2]

[2] In accordance with CPLR § 406, pre-hearing motions in an Article 78 proceeding—including those seeking discovery—"shall be noticed to be heard" on the same date the petition itself is scheduled to be heard, not before. *See* CPLR 406.

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

A. The motion should be denied because Chino lacks standing and his claims fail as a matter of law.

Chino's request for discovery fails, in the first instance, because he is not entitled to any of the relief he seeks as a matter of law. DFS's moving papers demonstrate that Chino lacks standing to challenge DFS's regulatory authority, and his claims otherwise fail to state a cause of action. *See generally* DFS's Cross-Mot. Br.; DFS's Reply Br. "Where a court determines a petition does not state a cause of action, discovery is properly denied." *Rice v. Belfiore*,15 Misc. 3d 1105(A), 2007 N.Y. Slip. Op. 50511(U), at *25 (Sup. Ct. Westchester Cnty. 2007) (citing *Matter of O'Connor v. Stahl*, 306 A.D.2d 286 (2d Dep't 2003)). Chino's requests for discovery could not save his claims from dismissal, and should therefore be denied. The Court should not entertain Chino's requests for irrelevant, unnecessary discovery before it reviews the merits of the litigation and determines whether he even has standing to assert his claims in the first place. *See Price*, 51 A.D.3d at 293.

B. Chino has failed to demonstrate the discovery sought is material and necessary.

Chino's requests for discovery must also be denied because he has failed to meet the heavy burden of proving that the information sought is "material and necessary" to his claims. *See Allocca v. Kelly*, 44 A.D.3d 308, 309 (1st Dep't 2007); *City of Glen Cove Indus. Dev. Agency* 79 A.D.3d at 1038; *Stapleton Studios, LLC v. City of New York*, 7 A.D.3d 273, 275 (1st Dep't 2004).

1. Chino has failed to demonstrate why his request to subpoena Paul Krugman as an expert witness in this litigation is material and necessary to his claims.

Chino argues that Paul Krugman "should be subpoenaed as an expert witness to appear before the Court because there are fundamental differences between the parties as to the economic nature of Bitcoin." Pets.' Disc. Br. 12. This argument has no basis in fact or law.

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

Chino's claim that DFS cites to Paul Krugman "as an expert source supporting their proposition that Bitcoin is money," *id.*, relies on a single citation in DFS's cross-motion papers to a scholarly article written by Paul Krugman over thirty years ago,[3] *see* DFS's Cross-Mot. Br. 22–23. Taken in context, this citation was clearly intended to support the narrow proposition that money has historically been understood to serve as a medium of exchange and a store of value.[4] *Id.* In plucking this single citation from DFS's cross-motion papers, Chino attempts to transform its meaning into something wildly different, arguing that DFS relies on "Paul Krugman as an expert authority to support the proposition that Bitcoin is money," but gets his "views wrong" because he has "repeatedly argue[d] that Bitcoin is not money because it is not a stable store of value." Pets.' Disc. Br. 8, 12. Consequently, Chino contends, "Paul Krugman should be brought in as an expert witness before the Court to explain this contradiction, and provide an opportunity to explain directly to the Court the economic nature of Bitcoin." *Id.* at 12–13.

But DFS did not cite Krugman for his views on Bitcoin. In fact, the sole reference to Krugman's work in DFS's moving papers is to an article published in 1984—over two decades before Bitcoin was even invented. Moreover, that article was cited as support for the limited (and

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[3] *See* Paul Krugman, *The Int'l Role of the Dollar: Theory and Prospect in Exchange Rate Theory & Practice* 8.2 (John F. Bilson & Richard C. Marston eds., 1984).

[4] The citation to Mr. Krugman's article was taken from the following passage in DFS's opening brief:

> These terms—"medium of exchange" and "form of digitally stored value"—are commonly used to describe financial products and services. *See, e.g.*, *United States v. Faiella*, 39 F. Supp. 3d 544, 545 (S.D.N.Y. 2014) (observing that "money" in ordinary parlance means "something generally accepted as a medium of exchange, a measure of value, or a means of payment"); Paul Krugman, *The Int'l Role of the Dollar: Theory and Prospect in Exchange Rate Theory & Practice* 8.2 (John F. Bilson & Richard C. Marston eds., 1984) (noting that money generally "serves three functions: it is a medium of exchange, a unit of account, and a store of value"); *see also United States v. E-Gold, Ltd.*, 550 F. Supp. 2d 82, 94 (D.D.C. 2008) (holding that "a 'money transmitting service' includes not only a transmission of actual currency, but also a transmission of the *value* of that currency through some other medium of exchange") (emphasis added).

DFS's Cross-Mot. Br. 22–23.

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

seemingly uncontroversial) proposition that money is typically understood to serve as a medium of exchange and a store of value—a proposition that neither party disputes here. And while Chino emphasizes that Mr. Krugman finds Bitcoin to be a poor store of value, this is wholly irrelevant because DFS did not cite Mr. Krugman for his opinions about virtual currency.[5]

In sum, Chino has utterly failed to show how Mr. Krugman's testimony would be relevant—let alone material and necessary—to his claims. And lacking any legitimate basis or "ample need" for his request, Chino should be denied leave under CPLR § 408 to subpoena Paul Krugman.

2. Chino has failed to demonstrate why his requested document production is material and necessary to his claims.

Chino seeks leave from the Court under CPLR § 408 to request that DFS disclose certain internal emails and other written documentation about its internal deliberations leading up to the promulgation of 23 NYCRR Part 200 (the "Regulation"). Pets.' Disc. Br. 14. Specifically, Chino requests an order requiring DFS to disclose "all internal emails, emails with third-parties, and other written documentation" in DFS's possession "between January 1, 2013 and September 30, 2015" regarding "the economic nature of Bitcoin and whether it qualifies as a 'financial product or service.'" *Id.*

Chino contends this discovery request is warranted because "the only testimony introduced in the written record during the hearings" on the Regulation "support the notion that Defendants-Respondents did not have the statutory authority to regulate Bitcoin." *Id.* Given this alleged lack of supporting testimony, Chino surmises that "the economic nature of Bitcoin must

[5] Chino makes much of the fact that Mr. Krugman considers Bitcoin to be a poor store of value, but this does not speak to whether virtual currency business activity is properly viewed as a "financial product or service" subject to DFS's regulatory authority, and thus does not run counter to DFS's position in this litigation.

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

have been discussed either before or after the hearings through email correspondence internally or between the Defendants-Respondents and/or with outside parties." *Id.* Put differently, Chino argues that document discovery is necessary under CPLR § 408 because—in his view—the testimony at the public hearings on the Regulation did not sufficiently address whether Bitcoin is a "financial product or service," so DFS must have had internal deliberations on the issue through email and other written documents.

This baseless argument is rooted in nothing but speculation and conjecture.[6] As Chino recognizes, parties must seek leave from the court to conduct discovery under CPLR § 408, which will only be granted if the requesting party demonstrates an "ample need" for the disclosure that would likely be material and necessary to a claim or defense in the proceedings. *See* Pets.' Disc. Br. 3–4; *see also Tivoli Stock LLC*, 14 Misc. 3d 1207(A). And here, Chino's requested document discovery would be neither material nor necessary to his claims.[7] Whether

[6] By Chino's strained logic, document discovery would be warranted in any summary proceeding where the petitioner argues there must be relevant, discoverable documents central to its claims on the grounds that the respondent has alleged failed to show that it acted reasonably. In other words, document discovery would *always* be warranted. Such an expansive reading of CPLR § 408—which would effectively render the statute superfluous—is plainly erroneous. *See, e.g.*, *N.Y. State Superfund Coal., Inc. v. N.Y. State Dep't of Envtl. Conservation*, 18 N.Y.3d 289, 296 (2011) (applying "the well-settled rule of statutory construction that 'effect and meaning must, if possible, be given to the entire statute and every part and word thereof'" (quoting McKinney's Cons. Laws of NY, Book 1, Statutes § 98)).

[7] Chino also suggests that discovery is warranted here because Jim Harper—who is former counsel for the Bitcoin Foundation and submitted an affidavit in support of the instant motion—filed a request under New York's Freedom of Information Law seeking certain information from DFS about the Regulation, but that no documents were ever produced. Harper Aff. ¶¶ 9–12; Pets.' Disc. Br. 2–3, 8–10, 14, 16. This does not support Chino's motion for discovery. A motion for discovery in an unrelated hybrid Article 78 proceeding brought by a different individual is not the proper remedy to challenge an agency's response (or lack thereof) to a FOIL request by a third party. *See, e.g.*, *N.Y. Times Co. v. City of N.Y. Police Dep't*, 103 A.D.3d 405, 406 (1st Dep't 2013). In short, Chino cannot use this litigation as a vehicle to collaterally challenge the results of Mr. Harper's FOIL request. Moreover, the New York Court of Appeals has long recognized that the scope of disclosure under CPLR article 31 is more restrictive than under FOIL, *see Farbman & Sons v. N.Y.C. Health & Hosps. Corp.*, 62 N.Y.2d 75, 80–81 (1984)), so regardless of the results of Mr. Harper's FOIL requests, they do not support Chino's cross-motion for discovery.

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

DFS acted within the authority conferred to it under the Financial Services Law in promulgating the Regulation is a purely legal question, rendering discovery unnecessary. *See, e.g.*, *Mayfield v. Evans*, 93 A.D.3d 98, 103 (1st Dep't 2012) ("ascertaining whether a regulation is consistent with the statute that it is based on" involves "'the interpretation of statutes and pure questions of law'" (quoting *Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v. Mills*, 4 N.Y.3d 51, 59 (2004))). Similarly, the question of whether certain aspects of the Regulation's design and scope are "arbitrary and capricious" is a purely legal question to which internal DFS communications have no relevance. *See, e.g.*, *Humane Soc'y of N.Y. v. City of New York*, 188 Misc. 2d 735, 737–38 (Sup. Ct. N.Y. Cnty. 2001) ("judicial review is [] confined to whether there was 'any evidence' to support the agency's rule," so "[m]atters outside the record before the agency, including the motivations or thought processes of the agency's members in approving the rule, are … beyond the scope of review"). Therefore, Chino fails to meet his burden, and his motion should be denied.[8]

[8] Even if Chino could meet this heavy burden, which he cannot, the information he seeks here would be protected from disclosure under the deliberative process privilege. *See, e.g.*, *N.Y. Tel. Co. v. Nassau Cnty.*, 54 A.D.3d 368, 369–70 (2d Dep't 2008). The deliberative process privilege protects from disclosure inter-agency and intra-agency information that relates to a government agency's substantive decision-making process. *See, e.g.*, *Matter of World Trade Ctr. Disaster Site Litig.*, 2009 WL 4722250, at *2–3 (S.D.N.Y.2009) (explaining that the common-law privilege shields documents containing "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" for the purpose of "enhanc[ing] the quality of agency decisions, by protecting open and frank discussion among those who make them within the Government"); *N.Y. State Joint Comm'n on Pub. Ethics v. Campaign for One N.Y., Inc.*, 53 Misc. 3d 983, 991–92 (Sup. Ct. Albany Cnty. Sept. 8, 2016) (discussing scope of the deliberative process privilege in the context of a discovery request). Chino's discovery requests fall squarely within this privilege. *See, e.g.*, Pets.' Disc. Br. 12 (seeking internal DFS emails and other internal documents on the grounds that DFS employees "must have obtained additional information internally or must have discussed the economic nature of Bitcoin to conclude Bitcoin would fit in the statutory definition of 'financial product or service'"); 14 (seeking to depose the former Superintendent to determine "how he arrived at the conclusion that Bitcoin is a 'financial product or service'").

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

3. Chino has failed to demonstrate why his request to depose the former Superintendent of DFS is material and necessary to his claims.

In addition to his requests for Paul Krugman's testimony and wide-ranging documentary discovery, Chino also seeks to depose the former Superintendent of DFS. Without citing to a single case allowing a deposition to be taken in this context,[9] Chino alleges that the former Superintendent "has exclusive personal knowledge not shared with the Plaintiff-Petitioner about the basis of Defendants-Respondents' determination of the economic attributes and nature of Bitcoin" because he was the Superintendent of DFS "at the time of the proposed Regulation and when the Regulation was promulgated." Pets.' Disc. Br. 15–16. Consequently, Chino reasons, the former Superintendent "was central in making the determination that Bitcoin is a 'financial product or service,'" and "[h]is testimony is relevant and necessary for the determination of the economic nature of Bitcoin." *Id.* This indefensible request must be denied for numerous reasons.

First, as explained above, discovery is not needed to resolve a purely legal question about DFS's authority to regulate virtual currencies under the Financial Services Law. Second, the former Superintendent's deposition is entirely unnecessary to determine whether certain aspects of the Regulation's design and scope are arbitrary and capricious, and it would be unprecedented to allow the deposition of the former head of an executive agency in this type of proceeding.

[9] To support his request to depose the former Superintendent, Chino cites to one case, *IA2 Serv. LLC v. Quinapanta*, 51 Misc. 3d 1222(A), 2016 N.Y. Slip Op. 50779(U) (N.Y. Civ. Ct. 2016). In that case, the court granted leave to the respondent to depose a non-party witness in a consolidated holdover proceeding. *Id.* The *Quinanpanta* court was tasked with determining whether a building was eligible for rent-stabilization, which turned on a disputed question of fact—the number of residential units in the building at issue. *Id.* Given the building's landlord was "in possession of the essential facts bearing on the number of residential units in the premises," the court concluded there was "ample need" for the "vital" information being sought, and granted the respondents' motion to depose him. *Id.* The court's decision in *Quinapanta* does not support Chino's discovery requests: there, the court granted a motion to depose a non-party witness to answer a straightforward question of fact—the number of residential units in a building. Here, Chino moves to depose the former Superintendent to clarify a pure question of law—whether DFS acted within its authority under the Financial Services Law when it promulgated the Regulation—by making subjective inquiries into his thoughts, motives, and opinions.

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

Furthermore, Chino's contention that the former Superintendent has "exclusive personal knowledge" about the economic nature of Bitcoin is facially impossible given he is seeking to subpoena Paul Krugman to testify on the exact same issue. *See* Pets.' Disc. Br. 9 (requesting to subpoena Krugman "to explain directly to the Court the economic nature of Bitcoin"). Indeed, the financial or economic nature of Bitcoin and other virtual currencies is observable by anyone, and is plainly not secret knowledge in the exclusive possession of any particular DFS employee. Whether this information is in the former Superintendent's exclusive possession is ultimately irrelevant, however, because Chino has not demonstrated a need for the requested discovery.

II. No legitimate grounds exist for holding DFS's cross-motion in abeyance pending resolution of Chino's motion for limited discovery.

Chino requests that DFS's cross-motion to dismiss be held in abeyance pending resolution of his request for limited discovery. There are no legitimate grounds for this request. DFS filed a dispositive motion in June 2017 seeking to dismiss the amended petition under Rule 3211(a)(7) and Section 7804 of the CPLR for lack of standing and failure to state a claim upon which relief can be granted. *See* DFS's Cross-Mot. Br. If DFS prevails on that motion, it would fully resolve this litigation.

Under CPLR 3214(b), all discovery is automatically stayed pending resolution of a dispositive motion to dismiss. *See* 7 Weinstein-Korn-Miller, N.Y. Civil Practice § 3214.02 (explaining that CPLR 3214(b) is designed to prevent unnecessary discovery after a CPLR 3211 motion is made). In this vein, courts have recognized that a plaintiff's mere hope that pre-trial discovery will yield helpful information will not forestall the determination of a motion under CPLR 3211. *See Cracolici v. Shah*, 127 A.D.3d 413, 413 (1st Dep't 2015). This reasoning holds especially true here given the judiciary's interest in the prompt and efficient resolution of summary proceedings under Article 78.

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

Although courts have held that motions under CPLR 3211 may be held in abeyance where the plaintiff argues that limited discovery is needed on the issue of personal jurisdiction, *see, e.g.*, *Goel v. Ramachandran*, 111 A.D.3d 783, 788 (2d Dep't 2013), Chino does not seek to hold DFS's cross-motion in abeyance on jurisdiction-related issues. *See* Pets.' Disc. Br. Instead, he requests it be held in abeyance on the basis that "there is significant disagreement as to the nature of Bitcoin and whether or not it should be considered a 'financial product or service,' which is "at the heart of the issue in determining whether the cross-motion to dismiss should be granted or denied." *Id.* at 17. Chino further alleges that "the items being requested are under the exclusive knowledge or control of Defendants-Respondents," and that his "motion for limited discovery will clear up matters that could cause the cross-motion to dismiss to be denied." *Id.* at 17–18.

But these arguments do not justify holding DFS's cross-motion in abeyance. DFS's cross-motion to dismiss raises jurisdictional and substantive defects in the petition that are dispositive, and discovery is not needed for the Court to rule on the issues before it. Chino's discovery requests are based on speculation and would not clarify any relevant issue in this case. Although the parties disagree on whether virtual currency business activity falls within DFS's regulatory authority, the discovery Chino seeks would not shed light on that (or any other) germane issue.

In sum, Chino has failed to show good cause for discovery, and his requests should be denied.

FILED: NEW YORK COUNTY CLERK 09/06/2017 05:00 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 34 RECEIVED NYSCEF: 09/06/2017

Conclusion

DFS respectfully submits that Chino's cross-motion for limited discovery must be denied, along with any other relief the Court deems just and proper.

Dated: New York, New York
September 6, 2017

Respectfully submitted,

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Reply Memorandum of Law by Plaintiffs-Petitioners in Further Support of Cross-Motion, dated September 18, 2017 [pp. 364 - 379]

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTRY OF NEW YORK

THEO CHINO and CHINO LTD, Plaintiffs-Petitioners, -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.	Index No. 101880/2015 Hon. Victoria St. George ORAL ARGUMENT REQUESTED

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-PETITIONERS' CROSS-MOTION FOR LIMITED DISCOVERY AND FOR HOLDING DEFENDANTS-RESPONDENTS' CROSS-MOTION TO DISMISS IN ABEYANCE

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FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

TABLE OF CONTENTS

Page

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

TABLE OF AUTHORITIES

CASES

STATE STATUTES

STATE RULES

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

PRELIMINARY STATEMENT

On August 2, 2017, pursuant to Section 408 of the New York Civil Practice Law and Rules ("CPLR"), Plaintiffs-Petitioners Theo Chino and Chino LTD (collectively "Plaintiffs-Petitioners") submitted a Cross-Motion for Limited Discovery, hereinafter cited to as "Pls.'s Disc. Mem." On September 6, 2017, Defendants-Respondents The New York Department of Financial Services ("DFS") and Maria T. Vullo, in her official capacity as the Superintendent of DFS (collectively "Defendants-Respondents") filed an opposition to the Cross-Motion for Limited Discovery.

This Cross-Motion for Limited Discovery is necessary because Defendants-Respondents' Cross-Motion to Dismiss filed on June 23, 2017 cannot be resolved without making further factual determination as to whether Bitcoin is a "financial product or service" and whether the "Virtual Currency" regulation promulgated by the New York State 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") was designed and issued by Defendants-Respondents in an arbitrary and capricious fashion.

PROCEDURAL HISTORY

On October 16, 2015, Theo Chino filed the above-entitled action. Defendants-Respondents filed a Cross-Motion to Dismiss on April 22, 2016. Theo Chino filed his response to the Cross-Motion to Dismiss on October 31, 2016, hereinafter cited to as "Pl.'s Mem." On January 20, 2017, Defendants-Respondents filed a reply in further support of their Cross-Motion to Dismiss, hereinafter cited to as "Defs.' First Reply Mem." On May 24, Plaintiffs-Petitioners filed an Amended Verified Complaint and Article 78 Petition. On June 23, 2017, Defendants-Respondents filed a Cross-Motion to Dismiss the Amended Verified Complaint and Article 78

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

Petition. Plaintiffs-Petitioners filed their response to the current Cross-Motion to dismiss on July 14, 2017, hereinafter cited to as "Pls.' Second Mem."

ARGUMENT

A. Plaintiffs-Petitioners should be granted leave to conduct the requested limited discovery.

According to Defendants-Respondents' response to Plaintiffs-Petitioners' Cross-Motion for Limited Discovery, they should be entitled to live in a legal world where virtually no one has standing to challenge a regulation involving new technology or new markets, and where no plaintiff ever has grounds to seek limited discovery.

Although discovery is not always granted in Article 78 proceedings, this Court should grant a request for leave to conduct discovery where the disclosure "sought [is] likely to be material and necessary to the prosecution or defense of the proceedings." *Stapleton Studios v. City of New York*, 7 A.D.3d 273, 275 (1st Dep't 2004). Discovery is appropriate in Article 78 proceedings when the moving party demonstrates "ample need" for the requested discovery. *N.Y. Univ. v. Farkas*, 121 Misc. 2d 643, 646, 468 N.Y.S.2d 808, 811 (N.Y. Civ. Ct. 1983). Furthermore, courts have granted motions for disclosure because the operative facts necessary for a judicial determination are within the respondent's knowledge and because the petitioner needed the information to mount a proper defense during those proceedings. *Smilow v. Ulrich*, 11 Misc. 3d 179, 183, 806 N.Y.S.2d 392, 396 (N.Y. Civ. Ct. 2005). In fact, "a presumption favors granting disclosure when the opposing party has exclusive possession of material facts." *Id.* This threshold issue has largely been met here because Defendants-Respondents' motion to dismiss cannot be decided without making a factual determination as to Bitcoin's economic nature, and without clarifying the circumstances surrounding the preparation of the Regulation,

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

given the direct conflicts between the evidence brought up during DFS's hearings on the Regulation held on January 28 and January 29, 2014 and the Regulation's promulgation.

i. Plaintiffs-Petitioners have largely satisfied any standing test.

Contrary to Defendants-Respondents' arguments, Plaintiffs-Petitioners have largely established standing and New York's two-prong test for evaluating a petitioner's standing to challenge a governmental agency's actions. *See e.g. N.Y. State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004); *Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 9 (1975). Under this test, a petitioner need only show: (1) that there is "injury in fact," meaning that petitioner will actually be harmed by the administrative action; and (2) that the interest the petitioner asserts falls "within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." *Novello*, 2 N.Y.3d at 211; *Dairylea*, 38 N.Y.2d at 9. The purpose of a standing analysis is to determine whether a party should have access to the court system. *See Soc'y of Plastics Indus. v. Cty. of Suffolk*, 77 N.Y.2d 761, 769, 794 (1991). Its purpose is not to assess the merits of a party's claim. *See id.*

Courts have relaxed their standing analyses in light of the increasingly pervasive role that administrative agencies play in impacting the daily lives of citizens. *See Dairylea*, 38 N.Y.2d at 10; *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 69 N.Y.2d 406, 413 (1987). "A fundamental tenant of our system of remedies is that when a government agency seeks to act in a manner adversely affecting a party, judicial review of that action may be had." *Dairylea*, 38 N.Y.2d at 10. Plaintiffs-Petitioners have largely satisfied their burden under this test.

Defendants-Respondents' claim that Plaintiffs-Petitioners have not established standing is mind-boggling. Plaintiffs-Petitioners have sufficiently alleged that they have been irreparably harmed by the Regulation because it effectively forced Theo Chino to close his Bitcoin

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

processing business, Chino LTD. Theo Chino implemented a Bitcoin-processing business before the Regulation was promulgated. His business certainly falls within "virtual currency business activity" under the Regulation, so he would have been required to obtain a license to continue offering Bitcoin processing services. Theo Chino, on behalf of Chino LTD, submitted an application for a license to engage in "virtual currency business activity," as defined in 23 NYCRR § 200.2(q), but DFS returned Chino LTD's application without further processing after DFS performed an initial review. Plaintiffs-Petitioners immediately stopped offering Bitcoin-processing services when DFS did not approve Chino LTD's application. Chino LTD suffered losses due to not being able to offer Bitcoin processing services. The Regulation caused particularized and immediate economic harm to Plaintiffs-Petitioners.

As previously established in Plaintiffs-Petitioners Amended Verified Complaint and Article 78 Petition and in their response to Defendants-Respondents' Cross-Motion to Dismiss, the interests that the Plaintiffs-Petitioners 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." *Novello*, 2 N.Y.3d at 211; *Dairylea*, 38 N.Y.2d at 9. Here, it has been widely established that a genuine controversy between adversarial parties who have an interest in the outcome exists. Plaintiffs-Petitioners, by taking steps to comply with the Regulation and by filing suit promptly upon realizing that the compliance costs of the Regulation would be exorbitant, recognized that the business they engaged in would effectively be proscribed by the Regulation. Before the Regulation was enacted, Plaintiffs-Petitioners engaged in Bitcoin-processing services in New York. As a result of the Regulation, Plaintiffs-Petitioners are now effectively barred from continuing their business without obtaining a license. Therefore, an actual controversy regarding the legal basis of the Regulation exists, and Plaintiffs-Petitioners have a genuine stake

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

in the outcome. Therefore, Plaintiffs-Petitioners have standing to seek declaratory relief.

In fact, Defendants-Respondents have not submitted any documentary evidence to contradict the facts submitted in Plaintiffs-Petitioners' complaint supporting standing. Therefore, the court must accept the facts alleged as to standing, as true, and accord Plaintiffs-Petitioners the benefit of every possible favorable inference. Under this standard, Plaintiffs-Petitioners have set forth viable grounds to challenge the Regulation. Therefore, the Court should not dismiss this matter on standing grounds since Plaintiffs-Petitioners have alleged sufficient facts to establish standing.

According to Defendants-Respondents' misconstrued approach, if Plaintiffs-Petitioners do not have standing, then no Plaintiff ever would. If the Court were to side with Defendants-Respondents' position, anyone challenging a regulation involving new technology or involving brand new markets would never have their day in court, because plaintiffs would not have time to establish their business to the extent Defendants-Respondents argues is required before the limited window to challenge new regulation expired. In essence, such a position would allow a regulator to completely escape judicial scrutiny just because a plaintiff does not behave like a firmly established ongoing business in an industry which requires someone to take the first risk in a new technology. The Court cannot allow such a result where current or future plaintiffs would never be able to ever challenge new regulations or regulations involving new technologies, which would allow the government to exercise unchecked and unlimited power to implement arbitrary regulations.

ii. Plaintiffs-Petitioners have set forth viable grounds to challenge the Regulation.

Defendants-Respondents cannot have it both ways -- have the Court believe that Plaintiffs-Petitioners discovery motion should be thrown out just because of the absence of any

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

merit to Plaintiffs-Petitioners' case and argue Plaintiffs-Petitioners' petition should be dismissed on an unresolved threshold issue. Either Defendants-Respondents should not have filed their Cross-Motion to Dismiss or limited discovery is necessary on the threshold issue as to the economic nature of Bitcoin. Although not a regulatory challenge, the court in *Florida v. Espinoza*, No. F14-2923 (Fla. 11th Cir. Ct. July 22, 2016), was faced with the same situation. When deciding a motion to dismiss criminal charges, the *Espinoza* court agreed to allow limited discovery on whether Bitcoin is money through an expert witness prior to deciding whether the criminal charges could be dismissed. This Court is facing a similar situation.

Under the first *Farkas* factor, Plaintiffs-Petitioners have established a cause of action. Plaintiffs-Petitioners have established that DFS acted beyond the scope of its authority because DFS is only authorized to regulate "financial products and services." As laid out more extensively in Plaintiffs-Petitioners' Amended Verified Complaint and Article 78 Petition and in their responses to Defendants-Respondents' Cross-Motion to Dismiss, if Bitcoin is not a "financial product or service," then Defendants-Respondents' recent Cross-Motion to Dismiss must be denied and relief must be granted to Plaintiffs-Petitioners without further review. Even if the Court decides Bitcoin is a "financial product or service," this limited discovery will assist the court in evaluating whether the Regulation was promulgated in an arbitrary and capricious fashion.

Plaintiffs-Petitioners have established that the Regulation is arbitrary and capricious because: (1) the scope of the Regulation is irrationally broad, (2) the Regulation's recordkeeping requirements are without sound basis in reason, (3) the Regulation irrationally treats "virtual currency" transmitters differently than fiat currency transmitters, and (4) there is no rational basis underlying a one-size-fits all Regulation that unreasonably prevents startups and small

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

businesses from participating in "virtual currency business activity," and imposes capital requirements on all licensees. And finally, the Regulation's disclosure requirements violate Theo Chino's First Amendment rights.

iii. Plaintiffs-Petitioners have demonstrated that the discovery sought is material and necessary.

New York courts have determined that "material and necessary" should be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Smilow,* 11 Misc. 3d at 190 (citing *Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968)). The term necessary has even been given a broad interpretation to mean "needful and not indispensable. *Allen*, 21 N.Y.2d at 407 (citing *Taylor* v. *L. C. Smith & Corona Typewriters, Inc.*,179 Misc. 290, 292 (Sup. Ct., Herkimer County 1942). All of the information sought is material and necessary.

All of the previous memoranda of law exchanged by both parties are an obvious indication that that the Court cannot address the issues raised in Plaintiffs-Petitioners' Amended Verified Complaint and Article 78 Petition or Defendants-Respondents' Cross-Motion to Dismiss without issuing an order for limited discovery regarding Bitcoin's economic nature. It is obvious by now that there are fundamental factual disputes between the parties as to the economic nature of Bitcoin. It is highly disputed between the parties whether Bitcoin should be considered a "financial product or service" as defined in FSL § 104(a)(2). The exact economic nature of Bitcoin, for which considerable legal uncertainty already exists due to divergent determinations made by federal agencies and other courts, requires clarification for the Court to determine whether Defendants-Respondents have the proper regulatory authority under FSL § 104(a)(2) to regulate Bitcoin. Furthermore, there are significant factual issues as to the basis that

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

allowed Defendants-Respondents to reach the decision that it had jurisdiction over Bitcoin. During the hearings on the proposed regulation, Mark T. Williams's written testimony establishes that Bitcoin should be treated as a commodity, and not as a currency, yet Defendants-Respondents did not address Mark T. William's position. Pls.' Second Mem. 23. Additionally, supposedly, the Defendants-Respondents conducted "extensive research and analysis" when they proposed the Regulation, yet the research and analysis has never been produced so it is unclear how Defendants-Respondents came to the conclusion that Bitcoin could be regulated by them. Pls.' Disc. Mem. 16.

a. **Plaintiffs-Petitioners have demonstrated that the subpoena of Paul Krugman is material and necessary.**

Defendants-Respondents' theory that Paul Krugman's testimony is not material and necessary is misplaced. Krugman should be subpoenaed as an expert witness to appear before the Court because there are fundamental differences between the parties as to the economic nature of Bitcoin. Krugman is a prominent figure in the field of economics and has written extensively on Bitcoin. Defendants-Respondents cited to Krugman as an expert source supporting their proposition that Bitcoin is money. Defs.' First Reply Mem. 16. Therefore, they must also believe he is a prominent expert in this area. Krugman can testify to the economic nature of Bitcoin and whether or not it qualifies as "financial product or service" based on its economic characteristics, which is a critical fact related to the cause of action. Therefore, the testimony of Krugman is material and necessary.

b. **Plaintiffs-Petitioners have demonstrated that the email production is material and necessary.**

Similarly, Defendants-Respondents are wrong in claiming that the email production is not material and necessary. This production will assist the Court in determining how Defendants-Respondents reached their regulatory conclusion that they had the power to regulate Bitcoin.

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

Defendants-Respondents did not address the issue of Bitcoin's economic nature during their hearings on the Regulation so they must have obtained additional information internally or must have discussed the economic nature of Bitcoin to conclude Bitcoin would fit in the statutory definition of a "financial product or service." Additionally, under the Regulatory Impact Statement, Defendants-Respondents state they conducted extensive research and analysis to support their decision to regulate Bitcoin, however, the research and analysis has never been produced despite several requests under New York's Freedom of Information Law, N.Y. Pub. Off. Law sec. 84 et seq. Bitcoin's economic nature must have been discussed either before or after the hearings through email correspondence internally or between the Defendants-Respondents and/or with outside parties. These correspondences will show how Defendants-Respondents reached the conclusion that they had the power to regulate Bitcoin and how it falls under the definition of a "financial product or service" since the only testimony introduced in the written record during the hearings support the notion that Defendants-Respondents did not have the statutory authority to regulate Bitcoin. Therefore, the email production is material and necessary.

c. **Plaintiffs-Petitioners have demonstrated that the deposition of Benjamin Lawsky is material and necessary.**

Finally, Defendants-Respondents are wrong in stating that the deposition of Benjamin Lawsky is not material and necessary because it will aid in determining facts related to the cause of action. Lawsky's deposition will clarify and resolve the factual dispute over whether Bitcoin is a "financial product or service," and how Defendants-Respondents determined that Bitcoin was within the statutory authority conferred by FSL § 104(a)(2), which impacts whether Defendants-Respondents had the authority to regulate Bitcoin, and whether Defendants-Respondents acted in an arbitrary and capricious fashion when they designed the Regulation. His

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

deposition will clarify whether the Regulation was issued in an arbitrary and capricious fashion and how he arrived at the conclusion that Bitcoin is a "financial product or service." Lawsky has exclusive personal knowledge not shared with the Plaintiffs-Petitioners about the basis of Defendants-Respondents' determination of the economic attributes and nature of Bitcoin. As Superintendent of Financial Services when the Regulation was promulgated, he was central in making the determination that Bitcoin is a "financial product or service" and must have knowledge of the "extensive research and analysis" that was relied on. His testimony is material and necessary for the determination of the economic nature of Bitcoin and basis that allowed Defendants-Respondents to reach the decision that they had jurisdiction over Bitcoin.

iv. Plaintiffs-Petitioners have not "embarked on a 'fishing expedition.'"

When the discovery requested bears directly on disputed critical facts and is carefully tailored in scope to address those facts, such request does not constitute a "fishing expedition." *Smilow,* 11 Misc. 3d at 186. When the discovery is carefully tailored in scope, a court does not consider the request to be a fishing expedition. *See Classon Vil. LP v. Lewis*, 2009 N.Y. Misc. LEXIS 2614, at *5-6 (Sup. Ct., Kings Cnty. Aug. 12, 2009). Even when the court believes it is a fishing expedition, the court can limit the discovery in scope in order to still allow the discovery. *See Cambridge Dev. v. McCarthy*, 2003 NY Slip Op 51433[U], *26 (Civ. Ct. Bronx Cnty. 2003).

Despite Defendants-Respondents' claim, this is a not a fishing expedition. There is a need to determine information directly related to the claim, the requested disclosure is carefully tailored, and it is likely to clarify the disputed facts. The information sought could resolve the factual dispute over whether Bitcoin is a "financial product or service," and how Defendants-Respondents determined that Bitcoin was within the statutory authority conferred by FSL § 104(a)(2), which impacts whether Defendants-Respondents had the authority to regulate Bitcoin,

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

and whether Defendants-Respondents acted in an arbitrary and capricious fashion when they designed the Regulation.

Furthermore, if the court should find that the request is not narrowly tailored enough to clarify the dispute facts, it can limit the disclosure instead of outright denying it. *See Cambridge Dev.,* 2003 NY Slip Op 51433[U], *26.

B. Legitimate grounds exist for holding Defendants-Respondents' Cross-Motion to Dismiss in abeyance pending the resolution of Plaintiffs-Petitioners' Cross-Motion for Limited Discovery

Here again, Defendants-Respondents appear to describe a misconstrued legal theory. Contrary to Defendants-Respondents' arguments that abeyance is strictly granted in personal jurisdiction challenges, courts have granted abeyance in a variety of situations where discovery under CPLR 408 is conducted. *See*, e.g., *Genger v. The Arie Genger 1995 Life Ins. Trust*, 2009 NY Slip Op 30902[U] (Sup. Ct. N.Y. Cnty. 2009) (abeyance was granted to allow discovery to resolve threshold issues of fact); *Matter of Social Serv. Empls. Union, Local 371, AFSCME, AFL-CIO v. City of NY*, 2010 NY Slip Op 33326[U] (Sup. Ct. N.Y. Cnty. 2010) (abeyance was granted to allow discovery to resolve factual issues of whether layoffs were made in bad faith).

In fact, in another hybrid Article 78 proceeding, limited discovery and abeyance were granted when the petitioners were seeking information from persons involved in the decision-making process for amendments to the New York Health Code. In that case, limited discovery was applied to the decision to grant or deny applications involving transgender individuals seeking amendment to their birth certificates to change the designated "sex". *Prinzivalli v. Farley*, 2012 NY Slip Op 32011[U] (Sup. Ct. N.Y. Cnty. 2012).

As addressed above, threshold factual issues exist in this matter. The Defendants-Respondents' motion to dismiss cannot be decided without the requested limited discovery.

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

There are factual disputes over whether Bitcoin is a "financial product or service," whether Defendants-Respondents had the authority to regulate Bitcoin, and whether Defendants-Respondents acted in an arbitrary and capricious fashion when they designed the Regulation. All of these issues could be resolved through the requested limited discovery.

Finally, contrary to Defendants-Respondents' argument that Lawsky's testimony is impermissible because of his prior job as Superintendent of DFS, such a status as prior agency head does not confer immunity from testimony. In fact, courts have allowed such testimony to be introduced in limited discovery proceedings. Our request is similar to *Prinzivalli*, where some of the information Plaintiffs-Petitioners were seeking was related to the decision-making process of the Defendants-Respondents' former employees. *Prinzivalli,* 2012 NY Slip Op 32011[U] at *11-12.

Accordingly, Plaintiffs-Petitioners' request to hold Defendants-Respondents Cross-Motion to Dismiss in abeyance pending the completion of limited discovery, which is largely justified by the factual issues before the Court and the supporting case law. Therefore, Plaintiffs-Petitioners' Motion for Limited Discovery should be granted and their request to hold Defendants-Respondents' Cross-Motion to Dismiss in abeyance pending the completion of discovery should be granted.

CONCLUSION

For the reasons set forth in the above and in Plaintiffs-Petitioners' Cross-Motion for Limited Discovery, Plaintiffs-Petitioners respectfully requests that the Court grants its Cross-Motion for Limited Discovery and for Holding Defendants-Respondents' Cross-Motion to Dismiss in Abeyance in its entirety.

FILED: NEW YORK COUNTY CLERK 09/18/2017 09:21 PM INDEX NO. 101880/2015
NYSCEF DOC. NO. 35 RECEIVED NYSCEF: 09/18/2017

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CERTIFICATION PURSUANT TO CPLR § 2105

I, Pierre Ciric, of The Ciric Law Firm, PLLC, attorneys for Plaintiffs-Petitioners-Appellants, hereby certify pursuant to Section 2105 of the CPLR that the foregoing papers constituting the Record on Appeal have been personally compared by me with the originals, and have been found to be true and complete copies of said originals, and the whole thereof, all of which are now on file in the office of the Clerk of the Supreme Court, County of New York.

Dated: August 30, 2018

THE CIRIC LAW FIRM, PLLC

By: _____

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