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

THEO CHINO, pro se.
Plaintiff-Petitioner,

- against -

THE DEPARTEMENT OF FINANCIAL SERVICES; Anthony J. Albanese, in his Official Capacity as the Acting Superintendent of the Department of Financial Services.

Defendants-Respondents.

NOTICE OF VERIFIED PETITON

Index 101880-15.

PLEASE TAKE NOTICE that upon the annexed Verified Article 78 & Declaratory Judgement Petition, sworn to on October 16, 2012, the Affirmation of Theo Chino and exhibits attached thereto, an application will be made to this Court, by the Plaintiff-Petition, at the Courthouse located 60 Centre Street, New York, NY in the Motion Support Courtroom – Submissions Part, Room 130, on November 5th, 2015 at 9:30 am, for an order and judgement, pursuant to Articles 78 and 30 of the Civil Practice Law and Rules ("CPLR"), granting the relief demanded in the Verified Petition as follows:

1. Enjoining and permanently restraining Defendants and any of their agents, officers, and employees from implementing or enforcing Title 23, Chapter I, Part 200 of the New York Codes, Rules and Regulations, as purportedly amended by DFS in June 2015, on the basis that it is unlawfully *ultra vires*, and declaring Title 23, Chapter I, Part 200 invalid;

2. Alternatively, declaring that § Title 23, Chapter I, Part 200 of the of the New York Codes, Rules and Regulations are unconstitutional because they violate the separation-of-powers doctrine to the extent they are found to have delegated and/or authorized Defendants to promulgate § Title 23, Chapter I, Part 200 of the of the New York Codes, Rules and Regulations;

3. Alternatively, enjoining and permanently restraining Defendants and any of their agents, officers and employees from implementing or enforcing § Title 23, Chapter I, Part 200 of the of the New York Codes, Rules and Regulations, as purportedly amended by DFS in June 2015, on the basis that it is unlawfully arbitrary and capricious;

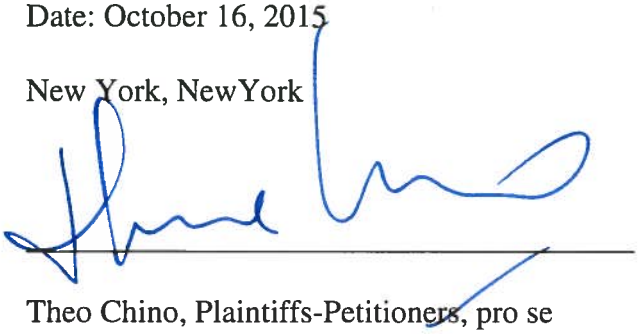
4. Granting such other and further relief as the Court deems just and proper, including fees and the costs and disbursement of this Proceeding pursuant to CPLR § 8101.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR § 7804(c), any answer and supporting affidavits shall be served and filed at least five (5) days before the return date of this application, and any reply shall be serviced and filed at least one day before the return date of this application.

PLEASE TAKE FURTHER NOTICE that New York County is designated as the venue of this Proceeding pursuant to CPLR § 506(b) and 7804(b) as it is the County in which the material events giving rise to this Proceeding took place.

Date: October 16, 2015

New York, NewYork



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VERIFIED ARTICLE 78 & DECLARORY JUDGEMENT PETITION
ORAL ARGUMENT REQUESTED

INDEX 101880-15

Plaintiff-Petitioner, Theo Chino, as and for their Verified Petition, respectfully allege as follow:

PRELIMINARY STATEMENT

1. This case is about the New York State Department of Finance (DFS), appointed by the Governor, bypassing proper legislative process for governing the State.

2. The New York State Department of Finance decision to impose by executive fiat, usurps the role of the State Legislature, violating core principles of democratic government and ignoring the rights of the people of the State of New York.

3. The regulation at issue in this case unfairly harms consumers and unfairly harms small businesses.

4. Defendants do not have the legal authority to define Virtual Currencies and therefore to regulate it without the express mandate from the New York State Legislature. The regulation is arbitrary and capricious in its design and application. The regulation should be struck down.

5. Plaintiff filed three FOIL requests to understand the DFS scientific process of framing the regulation. [1] [2] [3]

6. Defendants defined Virtual Currencies arbitrarily, with a definition that has no scientific basis or research, and is riddled with loopholes and is contrary to the specific framework given to the DFS by the legislature.

7. "Virtual Currencies" is an oxymoron since the word "Virtual" express the lack of existence, and Currency mean "Legal Tender" and § Title 23, Chapter I, Part 200.19 (a)(1) instruct the licensee to include the following verbiage: "virtual currency is not legal tender, is not backed by the government, and accounts and value balances are not subject to Federal Deposit Insurance Corporation or Securities Investor Protection Corporation protections;" Defendants recognize by their own logic that it is not Legal Tender and the legislature clearly frame the DFS mission to regulate what is created by the states or its federation *(legal tender; the existence of a corporation and the securities created by the issuance of stock certificate, regulation of Insurance brokers.)*

8. The Blockchain technology is intricately tied to Encryption Technology and any discussion on its applications are tied to those on Encryptions. Public Policy makers cannot look at this technology without talking about Encryption technology.

9. The Blockchain technology was collaboratively developed by and independent community of Internet programmers without any financial backing from any government using Encryption

[1] FOIL Request 14-222 : *"Copies of Proposed Drafts Relative to Transitional Bit License and Small Business"* hereto attached as Exhibit A.
[2] FOIL Request 2015-061176: *"Expenses incurred by NYDFS while reviewing applications for Bit Licenses"* hereto attached as Ex. B.
[3] FOIL Request 2015-061185: *"phone inquiries to the NYSDFS concerning Bit Licenses"* hereto attached as Ex. C.

technologies that were already protected as free speech and the Ninth Circuit of Appeals rules that software source code was speech protected by the First Amendment. See Bernstein v. U.S. Dep't of Justice, 922 F. Supp. 1426 (N.D. Cal. 1996); Bernstein v. U.S. Dep't of Justice, 945 F. Supp. 1279 (N.D. Cal. 1996)

10. Plaintiff has not shown any effort to regulate the "Ithaca Hours" [4] which is a widely known Local Currency in upstate New York and which is a precursor of the Bitcoin ideology.

11. The United States Supreme Court has ruled several about the use of "something that look and feel like but isn't" such as "Virtual" or "Synthetic", and always side on the side of liberties. See Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) or McFadden v. United States 576 U.S. ___ (2015)

12. On August 12, 2013, published a Notice of Inquiry on Virtual Currencies to see how it was related to Criminal Activity, "such as drug smuggling, money laundering, gun running, and child pornography." [5]

13. New York County District Attorney, Cyrus Vance Jr. monopolized the hearing by :

a. Urging the DFS panel to place strident safeguards on the regulations without a single shred of scientific evidence;

b. Published on the Manhattan DA website are his remark to the DFS states that: "Law enforcement must be given appropriate updated tools to address criminal behavior as it actually exists today." [6]

c. Sent as a written comment to the DFS, Cyrus Vance Jr. arguing that "should bear the burden of ensuring that its services are not being used or illegitimate and unlawful

[4] See Wiki Page on Ithaca Hours at https://en.wikipedia.org/wiki/Ithaca_Hours, attached hereto as Ex. D.
[5] See Notice of Inquiry on Virtual Currencies, August 12, 2013, attached hereto as Ex. E.
[6] See Manhattan District Attorney Web Site at http://manhattanda.org/sites/default/files/1.29.14%20DA%20Vance%20Testimony%20on%20digital%20currency.pdf, attached hereto as Ex. F

means." [7] Mr. Vance Jr. is therefore urging the DFS to forgo his burden as an agency of the Executive branch.

d. Cyrus Vance Jr. opinion on the subject can clearly be read in an August 11, 2015 New York Times opinion[8] he co-wrote with other prosecutors and notably from France where they blames Apple and Google for offering full encryption. The premise of those companies is to prevent anyone; that would also include the criminals, from accessing the user's private information. The French Cabinet Member publicly denounced Cyrus Vance Jr. and his cowriter publicly in a tweet.[9]

e. In his opinion in the New York Times he makes where he makes the dubious link of the inability of solving a Chicago murder with the inability of the French police to prevent the Charlie Hebdo terrorist attack.

f. Cyrus Vance Jr. clearly consider every citizen a potential criminal and that there should be safeguard in place and the DFS quickly obliged in the final rules of the regulation.

14. The DFS working group seems to have accepted Cyrus line of reasoning when legislators in Canada, California, France, and England have concluded the opposite. "However, the report said excessive alarmism is not needed at this stage" [10] [11] [12]

[7] See Manhattan District Attorney written comments to the DFS http://www.dfs.ny.gov/legal/vcrf_0500/20141023%20VC%20Proposed%20Reg%20Comment%20268%20-%20Cyrus%20Vance%20NY%20DA.pdf as Ex. G

[8] See Cyrus Vance Jr.'s OpEd on August 12, 2015 New York Times, http://www.nytimes.com/2015/08/12/opinion/apple-google-when-phone-encryption-blocks-justice.html, attached hereto as Ex. H.

[9] See https://twitter.com/AurelienPerol/status/638990604777725952, attached hereto as Ex. I.

[10] See article from CoinDesk: *French Senate: "Bitcoin offers multiple opportunities for the future"* - http://cointelegraph.com/news/112228/french-senate-bitcoin-offers-multiple-opportunities-for-the-futureas Ex. J.

[11] See Reports from French Senate: "*Regulation & Innovation: Republic Authorities and the development of Virtual Currencies*" as Ex. K.

[12] See Report from Canadian Senate: *"Digital Currency: You can't Flip this coin!"* as Ex. L.

15. Defendant lives in constant fear that he could inadvertently commit a criminal act and therefore fears the New York State government when it should feel protected by it. A UN report [13] on the promotion and protection of the right to freedom of opinion and expression concludes that

> "Encryption and anonymity, and the security concepts behind them, provide the privacy and security necessary for the exercise of the right to freedom of opinion and expression in the digital age. Such security may be essential for the exercise of other rights, including economic rights, privacy, due process, freedom of peaceful assembly and association, and the right to life and bodily integrity. Because of their importance to the rights to freedom of opinion and expression, restrictions on encryption and anonymity must be strictly limited according to principles of legality, necessity, proportionality and legitimacy in objective. The Special Rapporteur therefore recommends the following […]
>
> States should revise or establish, as appropriate, national laws and regulations to promote and protect the rights to privacy and freedom of opinion and expression. […]
>
> Discussions of encryption and anonymity have all too often focused only on their potential use for criminal purposes in times of terrorism. But emergency situations do not relieve States of the obligation to ensure respect for international human rights law. Legislative proposals for the revision or adoption of restrictions on individual security online should be subject to public debate and adopted according to regular, public, informed and transparent legislative process. […]
>
> States should promote strong encryption and anonymity. National laws should recognize that individuals are free to protect the privacy of their digital communications by using encryption technology and tools that allow anonymity online. Legislation and regulations protecting human rights defenders and journalists should also include provisions enabling access and providing support to use the technologies to secure their communications.

16. Defendant argues that the Legislature would have reached a similar conclusion had they had the opportunity to legislate.

17. Prior to the department releasing the adopted rules, many people have already being incarcerated for money laundering, and law enforcement officials for corruption. [14]

[13] See UN Report by Office of the High Commissioner for Human Rights Council titled "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye" http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A.HRC.29.32_AEV.doc hereto as exhibit M

[14] See FBI press release on "*Former Federal Agents Charged with Bitcoin Money Laundering and Wire Fraud*" https://www.fbi.gov/sanfrancisco/press-releases/2015/former-federal-agents-charged-with-bitcoin-money-laundering-and-wire-fraud as Ex. N.

18. Tide Detergent is even used as currency for illicit exchanges mitigating the DFS belief that Bitcoin will automatically be used for illicit commerce and the DFS must come to the same realization has Officer Thompson.

> "Thompson realized that since the supply of Tide would be hard to curb, he had to figure out how to stem the illicit demand. Working from leads provided by inmates and parolees offering to share details about their own Tide dealings in exchange for a good word with their judge or parole officer, he and his fellow officers pieced together a loose network of middlemen—barbershops, nail salons, and drug houses that were taking in bottles to either sell on the side to their clients or at a deep discount to willing corner stores and pawn shops." [15]

19. Prior to the department releasing the adopted rules, many companies decided to leave New York State; and the only corporation chartered in New York State prior to the promulgation of the Bitlicense, applies fees that are 20% higher than the rest of the businesses around the world; and is currently the sole participant.

20. The real cost of getting licensed is in the hundred thousand dollars which clearly show the lack of understanding of the DFS in handling the NYS Small Community :

> "Applying for the BitLicense is an expensive and difficult process, as many have noted. Some other firms have chosen to abandon the New York market entirely, rather than comply. We do not fault them for doing so," said George Frost, executive VP and chief legal officer at Bitstamp.
>
> Frost estimated the application cost Bitstamp roughly $100,000, including time allocation, legal and compliance fees. [16]

21. The DFS made no provision to safeguard the data handled out in the application from Hackers that could use the DFS information to breach the licensee companies using. DFS absolve itself by even forcing the licensee to release DFS by signing an "Authority to Release Information" [17]:

> "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

[15] See Article from NY Mag titled *"Suds for Drug"* - http://nymag.com/news/features/tide-detergent-drugs-2013-1/index2.html hereto as Ex. O
[16] See CoinDesk (Bitcoin Trade EZine) article on Cost of Bitlicense at http://www.coindesk.com/real-cost-applying-new-york-bitlicense as Ex. P.
[17] See Application "Application forms for: License to Engage in Virtual Currency Business Activity" – hereto as Ex. Q.

> 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."

The information requested in the application is Arbitrary and Capricious and has no scientific basis or research, and is riddled with loopholes.

22. The Application process doesn't distinguish any size or type of business engaged in Virtual Currency Business Activity even when the DFS has contended that it would in all the official DFS documents.

23. The DFS in his haste to publicize its regulation proclaimed the Trust Company iBit as the first Licensed Bitcoin Company when it was in fact a Trust; further establishing that the Bitlicense is not required to regulate enterprise entities.

24. The DFS essentially created monopolies for those operating in New York State that is contrary to the mission given by legislature.

25. Defendant in the New York State Register uses Circular Logic to circumvent regulatory requirements imposed by the New York State Constitution and Legislature about the required impacts statements.

In DSF-29-14-00015-P [18] DFS states:

> "At this time, because virtual currency technology is relatively new, there exists no comprehensive estimate of the number of small businesses in New York that would be impacted by the proposed regulation."

And then in the revised rules in DFS-29-14-00015-RP [19] states:

> "At this time, because virtual currency technology is relatively new, there exists no comprehensive estimate of the number of small businesses in New York that would be impacted by the proposed regulation."

And finally in DFS-29-14-00015-F [20] concludes that:

[18] See NYS Register dated July 23, 2014 page 15 hereto as Ex. R.
[19] See NYS Register dated February 25, 2015 page 17 hereto as Ex. S.
[20] See NYS Register dated June 24, 2015 page 8 hereto as Ex. T.

> "A Revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement is not required because the revisions to the proposed regulation do not change the substance or conclusions set forth in the previously published Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area flexibility Analysis and Job Impact Statement."

26. Defendant pride itself in having received thousands of public comment and it should be clear that the DFS should also have amended the impact statements but as stated in his on speech because Blockchain technology was not a legal currency; he urges regulator to be creative [21] when Creativity is not a function given by the NYS constitution to the Executive Branch:

> "Attempting to force novel technologies and business models into existing regulatory boxes – simply because "that is the way it has always been done" – may not be a sensible approach. We need, at times, to be more creative than that as regulators – even if it takes us outside our comfort zone."

27. Plaintiff employed one person that he let go around July 2014 due to the uncertainty of the field, a fact that plaintiff told DFS superintendent in person and has been illustrated in hundreds of the thousand public comment received by DFS.

28. During the subsequent month, the Blockchain community responded with thousand of comments which the DFS brushed away in its assessment of the Public Comments in the February 2015 New York State Register.

29. Only the comments of publicly traded corporations or law enforcements prompted for further loopholes in the regulations as is this clear example from Amazon's comments where the words "digital units used as part of Prepaid Cards" was added to final version of the regulation:

As amended in the original proposal of the regulation of Section 200.2 (m): [22]

> Virtual Currency means any type of digital unit that is used as a medium of exchange or a form of digitally stored value or that is incorporated into payment system technology. Virtual Currency shall be broadly construed to include digital units of exchange that (i)

[21] See Announcement of Final Bitlicense Framework from DFS Superintendent at the BITS Emerging Payment Forum in Washington, DC on June 3rd 2015 - http://www.dfs.ny.gov/about/speeches/sp1506031.htm hereto as as Ex U.
[22] See DFS Proposed NYCRR Title 23 as Ex. V.

> have a centralized repository or administrator; (ii) are decentralized and have no centralized repository or administrator; or (iii) may be created or obtained by computing or manufacturing effort. Virtual Currency shall not be construed to include digital units that are used solely within online gaming platforms with no market or application outside of those gaming platforms, nor shall Virtual Currency be construed to include digital units that are used exclusively as part of a customer affinity or rewards program, and can be applied solely as payment for purchases with the issuer and/or other designated merchants, but cannot be converted into, or redeemed for, Fiat Currency;

As written in the DFS letter: [23]

> Amazon urges the DFS to clarify in its final rulemaking that the definition of "virtual currency" does not include digital units that can be applied solely as payment for purchases with the issuer and/or other designated merchants, but cannot be converted into, or redeemed for, fiat currency. [...] The broad definition of "virtual currency" may also inadvertently capture prepaid access products, stored value cards, or prepaid cards that are denominated in fiat currency and addressed under New York's Transmitters of Money statute (N.Y. Bank. Law, Article XIII-B).

As amended in the final regulation: [24]

> Virtual Currency means any type of digital unit that is used as a medium of exchange or a form of digitally stored value. Virtual Currency shall be broadly construed to include digital units of exchange that (i) have a centralized repository or administrator; (ii) are decentralized and have no centralized repository or administrator; or (iii) may be created or obtained by computing or manufacturing effort. Virtual Currency shall not be construed to include any of the following:
>
> (1) digital units that (i) are used solely within online gaming platforms, (ii) have no market or application outside of those gaming platforms, (iii) cannot be converted into, or redeemed for, Fiat Currency or Virtual Currency, and (iv) may or may not be redeemable for real-world goods, services, discounts, or purchases.
>
> (2) 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, but cannot be converted into, or redeemed for, Fiat Currency or Virtual Currency; or
>
> (3) digital units used as part of Prepaid Cards;

[23] See Amazon's comments to the DFS as Ex.W.
[24] See DFS Final NYCRR Title 23 as Ex. Y.

30. Historically, New York State laws are very detailed on the power of when it comes to role of its agencies. The law goes as far as defining how the fee for papers copies charged to the public is determined. (Banking Law § 18)

31. Assessment of a fee is defined in BNK § 18-a (5)(6) and should be five hundred dollars, and provided a waiver for the small businesses that can't afford the high price of the regulation.

32. When defendant requested the application of such waiver, he was told that none existed.

33. When enacting Penal Code § 470, the legislature specifically defined money laundering terms extensively and DFS regulations Part 200.15, "Anti Money laundering program" as defined by the DFS does nothing to strengthen the Penal Code, but actually create a serious privacy issue that should be debated in the State Legislature since the Blockchain is a public document.

34. By requiring Small Business to keep detailed records of his customers transactions (from a fraction of a penny to several million dollars indiscriminately), create a serious encroachment to the privacy of customers.

35. By requiring as set forth in Part 200.15 (d)(1) to keep and record a transaction, the DFS is actually encroaching the right of privacy of individuals.

> "The proposal would infringe the privacy rights of casual users and digital currency innovators, as well as fundamentally burden freedom of speech and association." [25]

36. If a Licensee record is breached by a cyber criminal, as it was by the company Ashley Madison, it would make it easier to blackmail individuals.

37. Prior to the promulgation of the regulation, several individuals engaged in Blockchain technology have been arrested and convicted.

[25] See EFF's comments to the DFS as Ex. X and Z.

38. In United States v. Ulbricht, 31 F. Supp. 3d 540, Ulbricht has been sentenced for life in prison under existing laws.

- United States v. Faiella, 39 F. Supp. 3d 544, the defendants were charged under existing criminal law of corruption.
- The legislature clearly defined what a "Financial Product or Service" shall mean, is and is not in enacting FIS § 104.

39. Blockchain Technology is not defined in FIS § 104(B)(2a)(A).

40. Blockchain Technology is simply the application of a simple mathematical formula repeated several million times in a short period of time.

41. The cost of entry to for any provider of illegal activity in New York State would be around $100 whereas the cost of entry for any provider of legal activity would be in the hundred thousand dollars in application cost and mandated verification which have no bearing in protecting customers and the DFS regulations do not make any provisions for protecting what need to be protected. It's akin asking a locksmith to be licensed to provide a personal bond in the amount of the asset of his customers, requiring him to hire a security company to secure his customer property from her/him, and require her/him to have his establishment inspected by a third party to insure that he can't use his tools outside the presence of a customer. As ridiculous as it sound, this is the overreach of the DFS current regulation.

42. The State of California and the State of New Jersey currently have introduced bills in their legislature and New York citizen should be given the same opportunity and let the State Legislature the opportunity to do so.

43. California Version of AB 129 [26] was signed into law by the governor of California after being submitted by the legislature. In New York, the DFS is clearly usurping it's authority.

[26] See California Law AB129 as Ex AA.

44. Plaintiff believe that the New York State legislature will come to the proper conclusions if given the opportunity as with AB 1326 [27] in California which can be summoned by the Governor if need be.

PARTIES

45. Plaintiff-Petitioner is Theo Chino, a New York State citizen resident at 640 Riverside Drive, Apt10B, New York County and his 100% owner of Chino, LTD, a Delaware Sub S C-corporation, authorized to do business in New York and operating at the same address. Theo Chino is also a member of the protected Hispanic class and waiting for the certification from the Division of Minority and Women's Business Development (DMWBD.)

46. Defendant-Respondent the New York State Department of Financial Services ("Department of Financial Services" or "DFS") is an administrative agency in the executive branch of the New York State government. The Department of Financial Services superintendent is appointed by and serving at the pleasure of the Governor as defined in FIS §202(a).

47. Defendant-Respondent, Anthony J. Albanese , if the Acting Superintendent of Financial Services, which is the head of the Department of Financial Services and is a "body or officer" within the meaning of Article 78 of the Civil Practice Law and Rules.

HARM TO PLAINTIF-PETITIONER

48. If required to comply with the Regulation, Theo Chino, will be irreparably harmed since covered business will be unable to meet the unreasonable and capricious rules set forth by the Department of Financial Services and consumers using the technology will either patronize businesses that are not covered by the regulation, rather than covered establishments.

[27] See California Law AB1326 as Ex AB.

JURISDICTION AND VENUE

49. This Court has subject matter jurisdiction to decide this Petition pursuant to CPLR § 7803 because the rule adopted by Defendants is a final determination made in violation of lawful procedure, affected by an error of law, and is arbitrary and capricious. This Court also has jurisdiction to render a declaratory judgment pursuant to CPLR § 3001.

50. This Court has personal jurisdiction over Plaintiffs pursuant to CPLR § 301.

51. This Court has personal jurisdiction over Defendants pursuant to CPLR § 302(a)(1).

52. Venue lies in New York County pursuant to CPLR § 506(b), § 7804(b) because it is where material events giving rise to the regulation took place.

FIRST CAUSE OF ACTION

Request for Relief under Article 78 of the CPLR

53. Plaintiff incorporate by reference the allegations set forth in Paragraphs 1 to 52 of this Petition as if fully set forth herein.

54. The New York State Constitution art. III, § 1 simply state "The legislative power of this state shall be vested in the senate and assembly."

55. None of these sections of the New York State Law authorizes Defendants to go beyond their administrative role and engage in unprecedented act of policy-making at issue here, nor is there any support that an agency can bypass the legislature and create policy based on its purported "historic power."

56. Generalized, enabling language authorizing an agency to "make reasonable 'rules and regulations for the conduct of his office or department to carry out its powers and duties'" is insufficient to support sweeping policy-based rule-making. Thrift Wash, Inc. v. O'Connell, 11 Misc.

2d 318, 322 (Sup. Ct. N.Y. County 1958) (citations omitted); see also Subcontractors Trade Ass'n, 62 N.Y.2d at 429-30 (the Mayor's "General Charter-conferred powers and City Council resolutions … in no way purport to authorize the" power to issue executive orders and implementing rules and regulations that promote awarding of city contracts to small and local businesses, as that "executive action must be deemed an unlawful usurpation of the legislative function").

57. An administrative agency in the executive branch cannot rely upon its own mandate "as a basis for engaging in inherently legislative activities" or promulgating rules "embodying its own assessment of what public policy ought to be." Boreali, 71 N.Y.2d at 9. 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. *Id.*

58. To interpret Defendants' generally delegated authority in a manner that would grant them the power to create out of whole cloth new policy for the State would violate the separation-of-powers doctrine. (courts reject "administrative actions undertaken under otherwise permissible enabling legislation where the challenged action could not have been deemed within the legislation without giving rise to a constitutional separation of powers problem"); People ex rel. Spitzer v. Grasso, 54 A.D.3d 180, 183 (1st Dep't 2008) (interpreting statute "in accordance with our obligation to construe a statute whenever reasonably possible so as to avoid serious constitutional questions").

59. In Boreali, the Court of Appeals held that a broad grant of authority to the New York Public Health Council ("PHC") was insufficient to support the agency's unilateral limitations on smoking in public areas, even though such actions were aimed at social ills and may have been appropriate had they been legislatively authorized. 71 N.Y.2d at 9.

60. The grant of authority at issue in Boreali is virtually the same type and scope of rule-making authority the Board of Health here possesses under N.Y.C. Charter § 558. The Boreali court explained

that “the agency stretched [its authority under Pub. Health Code § 225] beyond its constitutionally valid reach when it used the statute as a basis for drafting a code embodying its own assessment of what public policy ought to be.” 71 N.Y.2d at 9. The same conclusion must be reached here.

61. The Boreali court considered four factors in determining that the PHC had gone beyond mere administrative action and passed a rule that was legislative in nature and hence beyond the scope of its authority. Each of these factors compels the conclusion here that the Regulation similarly lies outside the scope of power granted to DFS because it crosses the line of administrative rule-making into the forbidden realm of legislative action.

62. First, the Boreali court noted that the rule passed by the PHC was “laden with exceptions based solely upon economic and social concerns” with no basis or foundation in public health. Id. at 11-12. The Regulation here similarly is laden with arbitrary exceptions that have no connection to the purported purpose for the rule.

63. These include: (1) the exemption for game providers; (2) the exemption for loyalty cards and (3) the phone cards industry (3) the exclusion from the requirement previously licensed entities by the DFS regardless of their understanding of the technology. See supra ¶¶ 5-7; infra ¶¶ 81-112 (Third Cause of Action).

64. Moreover, the Regulation does not prohibit individuals and criminals from using and developing blockchain technology for their own purposes. None of these distinctions bears any meaningful relationship to the purported purpose rule— “to combat drug smuggling, money laundering, gun running, and child pornography”. Where exceptions have “no foundation in considerations of public health", they “demonstrate the agency’s own effort to weigh the goal of promoting healt against its social cost and to reach a suitable compromise.” Boreali, 71 N.Y.2d at 12.

It is "particularly compelling" that these exclusions and loopholes "run counter to [Defendants'] goals and, consequently, cannot be justified as simple implementations of legislative values." Id.

65. Second, the Boreali court found that the PHC wrote the smoking ordinance on a "clean slate, creating its own comprehensive set of rules without benefit of legislative guidance"; it "did not merely fill in the details of broad legislation describing the over-all policies to be implemented." Id. at 13. So too here. Defendants make no pretense of merely implementing legislative policy, and instead openly acknowledge that the regulation implements their own "innovative policy." Defendants have acted unilaterally in the absence of any legislative guidance. Defendants have relied entirely on generalized notions of the Departments' power, acting on their own preferences, just as the PHC did in Boreali. The Regulation is undeniably "a far cry from the 'interstitial' rule making that typifies administrative regulatory activity." Boreali, 71 N.Y.2d at 13.

66. Third, the Boreali court explained that "the fact that the agency acted in an area in which the Legislature had repeatedly tried—and failed—to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions" demonstrated that it exceeded the scope of its authority. Id. Similarly here, Defendants have attempted an end-run around the legislative branch. Defendant has not even tried to bring the issue to the State Legislature to have the opportunity to vigorously debate such legislation. "Manifestly, 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." Boreali, 71 N.Y.2d at 13.

67. Finally, the Boreali court noted that the PHC did not exercise any special expertise or technical competence. Rather, the PHC drafted a "simple code describing the locales in which smoking would be prohibited and providing exemptions for various special interest groups," see id. at 14, and was not

asked to "flesh out details of the broadly stated legislative policies embodied in the Public Health Law," for which it possessed technical competence.

68. Like its counterpart, the DFS here has merely promulgated its own "definition" on virtual currency with numerous "interest group" carve-outs. It has not fleshed out any "legislative policies," because the legislature has not established such policies, but has instead adopted wholesale a proposal handed to it by the Superintendent, thereby enacting new social policy that cannot be traced to any State legislation. As explained further infra ¶¶ 81-112 (Third Cause of Action), the Regulation is riddled with exclusions that lack any scientific or technical basis or justification and evince pure policy judgments by Defendants.

69. By authorizing iBit which was incorporated as a Trust Company and publicized as a Bitcoin Company, this inconsistent treatment reflects policy judgments that are not DFS's to make.

70. By setting up a $5000 fee and the justifications asserted by DFS confirm that it is usurping the legislature legislative, policy-making role rather than acting in a proper administrative capacity. First, DFS seeks to justify the Regulations arbitrary fees as to ease small companies in the process when the legislature clearly stated it should be free. This inconsistent treatment reflects policy judgments that are not DFS's to make.

71. DFS claims that it has not applied its regulation to other currency or securities because it belong to another has jurisdiction. But this is clearly an arbitrary pretext that masks a political decision to exclude those under the banking law for other reasons. DFS has exercised jurisdiction over those in other contexts and even promulgated regulations associated with Banking and Insurance in the state (issued pursuant to laws adopted by the legislature). Its inconsistent treatment of currency in this context evinces the precise type of political, economic, and social calculus forbidden under Boreali.

72. Because Defendants have engaged in legislative policy-making without a proper statutory basis, their promulgation of the Regulation constitutes an ultra vires, invalid action in excess of their jurisdiction and authority. This conclusion is compelled by well-established principles of constitutional avoidance. See Boreali, 71 N.Y.2d at 14; State v. Enrique T., 93 A.D.3d 158, 167 (1st Dep't 2012); Grasso, 54 A.D.3d at 183.

73. Because Defendants do not have the authority to pass the regulation, Defendants and their agencies, officers and employees should be enjoined from enforcing the Regulations pursuant to CPLR sections 7803 and 7806, and the regulation should be declared invalid.

SECOND CAUSE OF ACTION

Request for Declaratory Relief under Article 30 of the CPLR

74. Plaintiff incorporate by reference the allegations set forth in Paragraphs 1 to 52 of this Petition as if fully set forth herein.

75. To the extent that this Court declines to interpret § Title 23, Chapter I, Part 200 of the of the New York Codes, Rules and Regulations so as to preclude defendants from enacting the Regulation, it should issue a declaratory judgment finding that such a broad delegation of authority violates the separation-of-powers doctrine.

76. As officers and/or agencies of the executive branch, Defendants cannot engage in legislative policy-making and may only act pursuant to valid legislative authority. See, e.g., Under 21, 65 N.Y.2d at 356 ("[N]o matter how well-intentioned his actions may be, the Mayor may not unlawfully infringe upon the legislative powers reserved to the City Council."). "In the absence of such specific authority, the executive action must be deemed an unlawful usurpation of the legislative function." Subcontractors Trade Ass'n, 62 N.Y.2d at 429-30.

77. While the legislature may, with reasonable safeguards and standards, delegate certain of its powers to executive agencies to administer the law as enacted by the legislature, it is an "oft-recited principle" in New York "that the legislative branch of government cannot cede its fundamental policy-making responsibility to an administrative agency." Boreali, 71 N.Y.2d at 9.

78. This principle applies with equal force to the separate branches of the New York state government, which are divided based on this same principle of governance. N.Y. Const. art. III, § 1.

79. Any authorization under the State Constitution to Defendants to act in a core legislative capacity in promulgating the regulation constitutes an unconstitutional delegation of the "fundamental policy-making responsibility" of the New York State legislature, in violation of the separation-of-powers doctrine. Cf. Boreali, 71 N.Y.2d at 9.

80. Accordingly, to the extent this Court finds that § Title 23, Chapter I, Part 200 of the of the New York Codes, Rules and Regulations authorized Defendants to promulgate the Regulation, the Court should issue a declaratory judgment pursuant to CPLR 3001 finding these delegations to be unconstitutional as in violation of the separation-of-powers doctrine, and further that the Defendants' actions taken pursuant to them are invalid.

THIRD CAUSE OF ACTION

Request for Relief under Article 78 of the CPLR

81. Plaintiff incorporate by reference the allegations set forth in Paragraphs 1 to 52 of this Petition as if fully set forth herein.

82. In the New York State Register dated June 24, 2015[28], defendant mention that a safe harbor for small entities, however, the language is so vague that the Superintendent defacto decides which small business is entitle to operate wich is arbitrary and capricious.

[28] Register … Exhibit #XXX

83. The $5000 fee has been established without any previous study of cost and is completely arbitrary since BNK § 18-a(4)(d) explicitly state it shall be $3’000 since Blockchain Technology companies are not Banking institutions.

84. Plaintiff requested 3 different FIOL which has been answered with “No Documents”- Exhibit X. Regardless if DFS has the documents and lied on producing them, or did not create a study, the rules need to be set aside. Either way, the rules need to be set aside until proper studies can be conducted.

85. § Title 23, Chapter I, Part 200 section 15 requires applicants to have a Anti-Money laundering which goes beyond the mandate given to the DFS by FIS, BNK, or INS; which show that the DFS takes arbitrary and capricious decisions.

86. Those with a Banking Licenses do not have to comply with this regulation making it capricious.

87. § Title 23, Chapter I, Part 200 section 16 is capricious and leave it to the decision of the superintendent creating an unjust system. The Small Business ecosystem is based on equality in front of the law and with rules that are known and are the same for all participants.

88. The Superintended with § Title 23, Chapter I, Part 200 section 6 (a) gives himself all powers and doesn’t have to explain to anyone any reasoning which is contrary to the NYS constitution. This is arbitrary, capricious and unjust.

89. The DFS by it’s own admission in § Title 23, Chapter I, Part 200 section 9 (1) state that “Virtual Currency is not legal tender, is not backed by the government.” It clearly show that it can’t be regulated without legislative authority to the DFS, doing so is arbitrary and capricious.

90. In addition to having been adopted without authority, the Regulation is substantively invalid because it is riddled with arbitrary exclusions, exemptions, and classifications that are unrelated to the

stated purpose of the rule. Defendants should be enjoined from enforcing such an arbitrary and capricious regulation. CPLR §§ 7803, 7806.

91. An administrative regulation will be upheld only if it has a "rational basis, and is not unreasonable, arbitrary or capricious." N.Y. State Ass'n of Counties v. Axelrod, 78 N.Y.2d 158, 166 (1991); CPLR § 7803(3). Agency rules "are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." N.Y. State Ass'n of Counties, 78 N.Y.2d at 166.

92. The arbitrary or capricious standard chiefly "'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974) (citation omitted). Agency action is arbitrary when it is "without sound basis in reason" or "taken without regard to the facts." Id.

93. Agency rules and classifications will be invalidated unless they "bear some rational relationship to the goals sought to be achieved, and must otherwise be factually based." Kelly v. Kaladjian, 155 Misc. 2d 652, 655 (Sup. Ct. N.Y. County 1992).

94. In making this assessment, courts are limited to considering the reasons an agency "gives for its action, at the time that it takes the action." Street Vendor Project v. City of N.Y., 10 Misc. 3d 978, 986 (Sup. Ct. N.Y. County 2005). "'If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.'" Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 N.Y.2d 753, 758 (1991) (citation omitted); see also Gabriele v. Metro. Suburban Bus Auth., 239 A.D.2d 575, 577 (2d Dep't 1997).

Application of the Regulation to Some Industry But Not Others is Arbitrary

95. It is wholly irrational to prohibit selected businesses under the regulation, to consumers, those regulated by the Banking regulation will not have to adhere to the Bitlicense requirements.

96. The economic harm to these small businesses will serve no purpose, because by frequenting other, non-covered businesses consumers will still be able to purchase the services they want in the any other states they want. The DFS therefore is merely choosing winners and losers among businesses, distorting the Blockchain market in New York State, and placing every covered business (many of which are small corporations) at a competitive disadvantage with every big bank on their block.

97. Defendants defend their irrational and nonsensical scheme. See Law Enforcement Officers Union Dist. Council 82 v. State, 229 A.D.2d 286, 291 (3d Dep't 1997) (where similar circumstances are regulated differently, "distinction in treatment is arbitrary and capricious"); Kaladjian, 155 Misc. 2d at 655 (distinction "must bear some rational relationship to the goals sought to be achieved").

98. Lack of legal authority to promulgate a rule in a rational way does not give license to promulgate a rule that is wholly irrational in its application and will fail to achieve any useful purpose. It is arbitrary to adopt a rule that will cause significant economic harm to a large number of businesses while not achieving any useful purpose. See Kaladjian, 155 Misc. 2d at 655-58; see also Rubin v. Coors Brewing Co., 514 U.S. 476, 488-89 (1995) (regulatory scheme is irrational where "exemptions and inconsistencies" will "directly undermine and counteract its effects" and "ensure[] that the . . . ban will fail to achieve" its objective).

The exclusion of Banks is Arbitrary

99. The exclusion of those regulated under the NYS banking law and the distinction has no rational basis and is entirely arbitrary.

100. Those regulated under the Banking Laws are not required to disclose to the state their Anti Laundering activity, as it is a Federal Regulation.

101. The DFS has made it known that this rule is a stepping stone to include in the future banks to disclose to the state those activities.

The Department of Financial Service's failure to present any coherent justification for setting the regulation is arbitrary

102. The Department of Financial Service has presented no defensible explanation in the administrative record as to why it chose to apply the regulation to small businesses. In reality, DFS was requested by the New York City District Attorney the request to include Money Laundering provision in the law. And Defendants now seek to cobble together a defense of this bright-line standard on the basis of their subjective views that any business will use the Blockchain technology to commit illegal activity and renders the regulation arbitrary. See N.Y. State Ass'n of Counties, 78 N.Y.2d at 166; Jewish Mem'l Hosp. v. Whalen, 47 N.Y.2d 331, 343 (1979); Kaladjian, 155 Misc. 2d at 655.

103. Moreover, on the very same day Defendants published the regulation, the price of bitcoins became unstable and underscores the arbitrary and truly unscientific manner in which Defendants seek to regulate blockchain technology in New York State.

104. The DFS's selection without setting hard limits for the standard for regulation is equally arbitrary. No coherent justification for this standard is contained in the administrative record.

105. As noted above, such "balancing" moves the regulation beyond the interstitial, gap-filling role that regulations may lawfully serve and into the realm of pure legislating. The DFS has presented no rational basis for treating these companies differently nor has the DFS explained why a limit would not be just as effective to accomplish its objectives as the limit that has been adopted. There is nothing in the administrative record to show that the DFS even considered any other options, much less any explanation for why other options were not adopted.

106. The final rule also presents no justification for applying the same size limit to cans, bottles based on the erroneous and unsupported assumption that they always represent a single portion is arbitrary.

107. The result is to make services offered in New York State more expensive than the rest of the world but for no legitimate or reason.

108. Failure to present any science-based d justification for the bright lines drawn in the rule confirms this is far from the "rational, documented, empirical" analysis that underlies sound agency rule-making. N.Y. State Ass'n of Counties, 78 N.Y.2d at 168. The absence of a "justification" with "support in the record" demands that these standards be rejected as arbitrary and capricious. See Metro. Taxicab Bd. of Trade v. N.Y. City Taxi & Limousine Comm'n, 18 N.Y.3d 329, 334 (2011).

The Rule Contains Other Arbitrary Provisions That Render It Invalid.

109. The rule contains no restrictions whatsoever for customers to use services that are out of state via a Web Site.

110. These loopholes ensure that consumers will continue to be able to buy bitcoins anywhere outside New York States or under the table in New York States making casting a cloath of illegality to those who want to use it.

111. And as already noted, those who want to stick with their preferred size container can simply go to the New Jersey, Pennsylvania, Vermont, meaning that economic harm will be imposed on some businesses at the expense of others for no valid purpose. These exceptions cannot be grounded in science, and suggest a weighing of purely economic or political factors rather than scientific or economics concerns, and are not valid bases for agency rule-making. See N.Y. State Ass'n of Counties, 78 N.Y.2d at 168.

112. The rule thus irrationally interferes with consumer choices that have nothing to do with the DFS' stated objective.

PRIOR APPLICATION

113. No prior application has been made for the relief requested herein.

RELIEF REQUESTED

WHEREFORE, Petitioners request that this Court enter an Order:

(a) Enjoining and permanently restraining Defendants and any of their agents, officers, and employees from implementing or enforcing Title 23, Chapter I, Part 200 of the New York Codes, Rules and Regulations, as purportedly amended by DFS in June 2015, on the basis that it is unlawfully *ultra vires*, and declaring Title 23, Chapter I, Part 200 invalid;

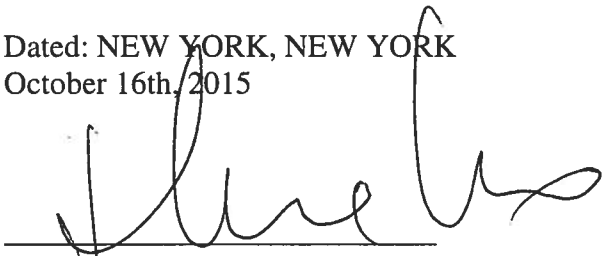
(b) Alternatively, declaring that § Title 23, Chapter I, Part 200 of the of the New York Codes, Rules and Regulations are unconstitutional because they violate the separation-of-powers doctrine to the extent they are found to have delegated and/or authorized Defendants to promulgate § Title 23, Chapter I, Part 200 of the of the New York Codes, Rules and Regulations;

(c) Alternatively, enjoining and permanently restraining Defendants and any of their agents, officers and employees from implementing or enforcing § Title 23, Chapter I, Part 200 of the of the New York Codes, Rules and Regulations, as purportedly amended by DFS in June 2015, on the basis that it is unlawfully arbitrary and capricious;

(d) Awarding Plaintiffs costs and disbursements against Defendants pursuant to CPLR § 8101; and

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

Dated: NEW YORK, NEW YORK
October 16th, 2015



THEO CHINO, Defendant

640 Riverside Drive, 10B
New York, NY 10031
(212) 694.9968

VERIFICATION

Theo Chino, being duly sworn, deposes and says:

I am the plaintiff 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 state 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 sixteen day of October 2015

YURY KABAKOV
Notary Public - State of New York
NO. 01KA6328781
Qualified in Kings County
My Commission Expires Aug 10, 2019

Notary Public: _____

My Commission expires: August 10, 2019