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

THEO CHINO, Plaintiff-Petitioner, -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.	Index No. 101880/2015 Hon. Lucy Billings ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF-PETITIONER'S CROSS-MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Pursuant to section 3025(b) of the New York Civil Practice Law and Rules ("CPLR"), Plaintiff-Petitioner, Theo Chino, respectfully submits this memorandum of law in support of Plaintiff-Petitioner's Cross-Motion for Leave to File an Amended Complaint.

PROCEDURAL HISTORY

On October 16, 2015, Plaintiff-Petitioner filed the above-entitled action pro se, hereinafter cited as "Pl.'s Compl." Defendants-Respondents filed a cross-motion to dismiss on April 22, 2016. Plaintiff-Petitioner 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.' Reply Mem." On March 4, 2017, Plaintiff-Petitioner filed a 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. As of now, Defendants-Respondents' April 22, 2016 cross-motion to dismiss and Plaintiff-Petitioner's March 4, 2017 cross-motion for limited discovery are pending before the court. Following the Plaintiff-Petitioner's March 4, 2017 cross-motion for limited discovery, new developments have come to light impacting this case.

First, the client filed his 2016 tax returns on April 18, 2017, which, together with his prior 2013 to 2015 tax returns, confirm significant and ongoing business losses due to the impact of 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"). Plaintiff-Petitioner filed his 2016 taxes after his March 4, 2017 cross-motion for limited discovery. Affidavit of Theo Chino in Support of Plaintiff-Petitioner's Cross-Motion For Leave to Amend His Complaint ("Chino Aff.") ¶¶ 16, 17. Plaintiff-Petitioner also went through

his records and discovered he had not included in his initial petition a Bitcoin transaction that took place in January 2016. Chino Aff. ¶ 11. Second, it only became clear from the financial statements and the tax returns that Chino LTD should be included as a Plaintiff-Petitioner because all of the investments into the Bitcoin processing services were done through Chino LTD. Affirmation of Pierre Ciric in Support of Plaintiff-Petitioner's Cross-Motion for Leave to Amend His Complaint ("Ciric Aff.") ¶ 7.

Third, a viable first amendment claim, which was not initially brought up by Plaintiff-Petitioner in his pro se petition, resulted from the March 29, 2017 U.S. Supreme Court decision in *Expressions Hair Design v. Schneiderman*, ___US___, 197 L. Ed. 2d 442 (2017). Ciric Aff. ¶ 8.

Fourth, there have been significant legislative and judicial developments across the United States on how certain states and courts are treating and categorizing Bitcoin. These developments have occurred in New Hampshire and Texas, and a New York federal magistrate judge in the U.S. Western District of New York has provided an economic analysis of Bitcoin contrary to the analysis of Defendants-Respondents. Ciric Aff. ¶¶ 11-13. None of this information was available when Plaintiff-Petitioner's filed his March 4, 2017 cross-motion for limited discovery.

Fifth, Plaintiff-Petitioner, in his October 27, 2016 answer to Defendants-Respondents' cross-motion to dismiss his initial petition, argued that the Regulation was preempted by Federal law. Therefore, Plaintiff-Petitioner is seeking to rectify the initial petition by adding the preemption claim to his complaint. Ciric Aff. ¶ 14.

For these reasons, Plaintiff-Petitioner is seeking to diligently and promptly amend the record through this CPLR § 3025(b) motion.

Finally, Plaintiff-Petitioner has not previously amended his complaint as of right under CPLR § 3025(a), and Plaintiff-Petitioner has also not previously requested leave to file an amended complaint under CPLR § 3025(b).

ARGUMENT

I. Plaintiff-Petitioner Request for Leave to File an Amended Complaint shall be Freely Given

It is well settled that motions for leave to amend pleadings shall be freely given. CPLR § 3025(b); *Valdes v. Marbrose Realty Inc.*, 289 A.D.2d 28, 29 (1st Dep't 2001). In the absence of prejudice or surprise resulting directly from the delay in seeking leave, or if the proposed amendment is palpably insufficient or clearly devoid of merit, the court should grant leave to a party seeking to amend his or her pleadings. *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dep't 2010) (citations omitted).

A. Plaintiff-Petitioner is not Requesting Leave following a Long Delay.

Mere lateness is not is not a per se bar to granting leave to amend a complaint. *See Suarez v. New York*, 169 A.D.2d 540, 541 (1st Dep't 1991). In *Suarez v. New York,* the plaintiff failed to explain his 10-year delay in seeking an amendment to his pleadings. Prejudice must be shown instead.

Here, Plaintiff-Petitioner is not asking for leave following a 10-year delay. Plaintiff-Petitioner originally filed this action on October 16, 2015 pro se and hired counsel in October 2016. Defendants-Respondents filed a cross-motion to dismiss on April 22, 2016. Since the original filing of the complaint, Plaintiff-Petitioner has produced or identified new records directly relevant to his claims, including tax records, and a receipt relevant to his Bitcoin processing activities. Chino Aff. ¶¶ 11, 13-17. Furthermore, the U.S. Supreme Court issued a decision on March 29, 2017 in *Expressions Hair Design v. Schneiderman*, ___US___, 197 L. Ed.

2d 442 (2017), which makes a First Amendment claim viable. Ciric Aff. ¶ 8. Furthermore, Plaintiff-Petitioner, in his October 27, 2016 answer to Defendants-Respondents' cross-motion to dismiss his initial petition, argued that the Regulation was preempted by Federal law. Therefore, Plaintiff-Petitioner is seeking to rectify the initial petition by adding the preemption claim to his complaint. Ciric Aff. ¶ 14.

For these reasons, Plaintiff-Petitioner now asks for leave, less than two years after the original filing to amend his complain for the purpose of adding new causes of action under the First Amendment and under federal law preemption, as well as to supplement facts relevant to Plaintiff-Petitioner's petition which he could not originally include in his complaint when he filed pro se.

Further, this is not a situation where a long delay is coupled with the proximity of the trial. *See e.g., Cseh v. NY City Tr. Auth.*, 240 A.D.2d 270, 272 (1st Dep't 1997). A statement of readiness for trial has not been filed. In fact, there has only been one brief hearing held in the case so far on March 16, 2017. Nothing has been decided at this point on any of the pending motions before the court.

Since there has not been a substantial unexplained delay in amending the pleadings, and since there is no close proximity to trial, the court should not deny the motion for leave to file an amended complaint unless Defendants-Respondents can prove prejudice.

B. Permitting Plaintiff-Petitioner to Amend His Complaint Would Not Result in Any Undue Prejudice to Defendants-Respondents.

In order to demonstrate prejudice, the opposing party must show that they have been hindered in the preparation of their case. Prejudice does not occur because a defendant has to expend additional time preparing its case. *Jacobson v. McNeil Consumer & Specialty Pharms.*, 68 A.D.3d 652, 654 (1st Dep't 2009). Rather, prejudice occurs when the defendant has been

prevented from taking some measure in support of their position or that "some significant trouble or expense … could have been avoided had the original pleading contained what the amended one wants to add." *Fogal v. Steinfeld*, 163 Misc. 2d 497, 504-505 (Sup. Ct., NY County 1994) (citations omitted). Absent a demonstration of surprise or undue prejudice from Defendants-Respondents, courts have routinely granted leave. *Abdelnabi v New York City Tr. Auth*., 273 A.D.2d 114, 115 (1st Dep't 2000).

Here there is no undue prejudice. It is still early in the process so Defendants-Respondents will not been hindered in the preparation of their case. Likewise, they will not be prevented from taking some measure in support of their position if the amendment is allowed. There will also not be significant trouble or expense. Only one plaintiff is added, and a few additional facts and two additional claims are being added. Therefore, Defendants-Respondents will not be suffering any prejudice from the granting of this motion.

C. The Jurisprudence Supports the Addition of a Plaintiff

Plaintiffs may be added to an amended complaint. *See Stuart v. N.Y. City Health & Hosps. Corp.*, 7 Misc. 3d 225 (Sup. Ct., Queens County 2005); *Patrician Plastic Corp. v. Bernadel Realty Corp.*, 30 A.D.2d 574 (2nd Dep't 1968); *Allied Bank v. Fireman's Fund Ins. Co.*, 137 Misc. 2d 721 (Sup. Ct., NY County 1987). The proposed amended complaint contains the name of an additional plaintiff. Plaintiff-Petitioner is seeking the addition of Chino LTD as a party to the action because Chino LTD was the business entity which made the actual investments in the Bitcoin processing services, and which sought the license under the Regulation. Ciric Aff. ¶ 7.

It was not until counsel received the 2016 tax returns from Plaintiff-Petitioner that we realized that all of the investments into his Bitcoin processing services enterprise were made by Chino LTD and not directly by Plaintiff-Petitioner. Ciric Aff. ¶ 7.

D. Plaintiff-Petitioner's New Claims Are Not Without Merit

Plaintiff-Petitioner intends to raise two causes of action because the Regulation both restricts and compels speech in violation of the First Amendment, and because the Regulation is preempted by Federal law.

The First Amendment claim relies on violations by Defendants-Respondents of both the compelled commercial speech doctrine as expressed in , and of 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). Plaintiff-Petitioner intends to argue that that the following sections of the Regulation violate both the compelled commercial speech and the restricted commercial speech doctrine. Ciric Aff. ¶ 8. 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*. Therefore, this case may bring in under the restricted commercial speech doctrine more regulations that are so overly broad in their application that the higher intermediate scrutiny test under *Central Hudson* may apply than the traditional rational basis test under *Zauderer*. Some of the Regulation's sections are indeed so overly broad that they may fall in the scope of regulations or statutes contemplated by the *Expressions Hair Design* decision. Counsel is justified in raising

the addition of this new claim at this point in the litigation because the new *Expressions Hair Design* decision came out after Plaintiff-Petitioner's filing of his March 4, 2017 cross-motion for limited discovery

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.

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 that Plaintiff-Petitioner seeks to challenge may 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 Defendants-Respondents do not have the jurisdictional basis to regulate Bitcoin.

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). Plaintiff-Petitioner contends that 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.

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, DFS 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 superintendent of DFS "take such actions as the superintendent believe 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 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. When a store accepts credit card payments, they are not required to make the same disclosures as they are if they accept Bitcoin. There is no data that Bitcoin is more risky than credit cards.

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. DFS'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 Defendants-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 DFS's interests, Defendants-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." *Central Hudson*, 447 U.S. at 564. To satisfy these requirements, Defendants-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 real dangers.

There are also less restrictive alternatives to DFS's asserted interests. If Defendants-Respondents want to make consumers aware of possible danger, they can and should distribute information using their own resources. They could publish materials on DFS'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.

Similarly, 23 NYCRR § 200.19(a)(6) requires Plaintiff-Petitioner 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. 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. This disclosure is both unjustified and unduly burdensome because Plaintiff-Petitioner 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 Plaintiff-Petitioner's customers, especially if Defendants-Respondents do not have the jurisdictional basis to regulate Bitcoin.

Similarly, 23 NYCRR § 200.19(a)(7) requires Plaintiff-Petitioner to make a specific disclosure about the volatility of Bitcoin's value. This compelled disclosure is irrelevant, since

Plaintiff-Petitioner guarantees an exchange rate to the bodega's customer for that day, and has agreed to take the exchange rate risk away from the bodega's customer. 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." This disclosure is both unjustified and unduly burdensome because Plaintiff-Petitioner contracted with each bodega customer to eliminate the exchange rate risk from the bodega customer.

Similarly, 23 NYCRR § 200.19(a)(9) requires Plaintiff-Petitioner to make a specific disclosure about the technological difficulties which Plaintiff-Petitioner may encounter in delivering his 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 Plaintiff-Petitioner's commercial speech rights, because he can no longer make any statements as to the reliability of a payment using Bitcoin. Even if the disclosures are considered "purely factual and uncontroversial," the disclosures must still be "reasonably to the State's interest in preventing deception of consumers" and cannot be "unjustified or unduly burdensome." This disclosure is both untrue, and is also unjustified and unduly burdensome because Plaintiff-Petitioners speech is severely restricted AND his ability to market Bitcoin processing services is severely restricted.

Similarly, 23 NYCRR § 200.19(b)(1) requires Plaintiff-Petitioner to make a specific disclosure about the customer's liability for unauthorized Bitcoin transactions. This compelled disclosure is overly broad, because Plaintiff-Petitioner would be unable to identify specifically a

given customer liability when he uses Bitcoin as compared to using other forms of payments. Even if the disclosures are considered "purely factual and uncontroversial," the disclosures must still be "reasonably to the State's interest in preventing deception of consumers" and cannot be "unjustified or unduly burdensome." This disclosure is unjustified and unduly burdensome because Plaintiff-Petitioner's 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.

Similarly, 23 NYCRR § 200.19(b)(2) requires Plaintiff-Petitioner 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 Plaintiff-Petitioner guarantees a return policy at least equivalent to the return policy of the bodega to the bodega's customers. Therefore, this disclosure is overly broad, because Plaintiff-Petitioner cannot guarantee more than what the bodega provides to its current customer under existing New York law. Even if the disclosures are considered "purely factual and uncontroversial," the disclosures must still be "reasonably to the State's interest in preventing deception of consumers" and cannot be "unjustified or unduly burdensome." This disclosure is unjustified and unduly burdensome because Plaintiff-Petitioner cannot guarantee more than what the bodega provides to its current customers under existing New York law.

Similarly, 23 NYCRR § 200.19(c)(3) requires Plaintiff-Petitioner to make a specific disclosure about the type and nature of the Bitcoin transaction. This compelled disclosure is overly broad, since Plaintiff-Petitioner would be unable to identify specifically the extent to which this information should be provided when he uses Bitcoin as compared to using other forms of payments. Even if the disclosures are considered "purely factual and uncontroversial,"

the disclosures must still be "reasonably to the State's interest in preventing deception of consumers" and cannot be "unjustified or unduly burdensome." This disclosure is unjustified and unduly burdensome because Plaintiff-Petitioner cannot guarantee more than what the bodega provides to its current customer under existing New York law.

Similarly, 23 NYCRR § 200.19(c)(4) requires Plaintiff-Petitioner to make a specific disclosure about the ability to undo the Bitcoin transaction. This compelled disclosure is both irrelevant and overly broad, since Plaintiff-Petitioner 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. Even if the disclosures are considered "purely factual and uncontroversial," the disclosures must still be "reasonably to the State's interest in preventing deception of consumers" and cannot be "unjustified or unduly burdensome." This disclosure is both irrelevant and unduly burdensome because Plaintiff-Petitioner cannot guarantee more than what the bodega provides to its current customer under existing New York law.

Similarly, 23 NYCRR § 200.19(g) requires Plaintiff-Petitioner to make a specific disclosure about fraud prevention. This compelled disclosure is both irrelevant and overly broad, since Plaintiff-Petitioner is already required to engage in fraudulent prevention activity under New York law, and because this requirement would trigger enormous administrative burdens well in excess of the Plaintiff-Petitioner's ability to generate income from Bitcoin processing services. Even if the disclosures are considered "purely factual and uncontroversial," the disclosures must still be "reasonably to the State's interest in preventing deception of consumers" and cannot be "unjustified or unduly burdensome." This disclosure is both irrelevant and unduly burdensome because Plaintiff-Petitioner would be subject to an enormous

administrative burden well in excess of his ability to generate income from Bitcoin processing services.

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 Plaintiff-Petitioner under the U.S. constitution are re-asserted under the New York Constitution. Ciric Aff. ¶ 9. *Immuno AG v. Moor-Jankowski,* 77 N.Y.2d 235 (1991).

ATTACHED PROPOSED COMPLAINT

As required by New York courts, Plaintiff-Petitioner is attaching a copy of the proposed Complaint and its exhibits to this affirmation. *Sirohi v. Lee*, 222 A.D.2d 222 (1st Dep't 1995). For purposes of clarity for the Court, rather than providing black-lined changes to the initial petition, which was filed pro se by Plaintiff-Petitioner, the new proposed complaint shows any new legal argument or factual allegation indicated in red ink in the attached exhibit.

AFFIDAVIT OF MERITS NOT REQUIRED

The First Department adopted the position that an affidavit of merits is not required in a CPLR § 3025(b) motion, as long as the attorney's affirmation and the exhibits to the motion provide a "show[ing] that the proffered amendment is not palpably insufficient or clearly devoid of merit," and that the submission contains "relevant documents supporting their new allegations." *Yoon Jung Kim v. Gahee An*, 2013 NY Slip Op 32006[U], *3 (Sup. Ct., NY County 2013) (citations omitted). Therefore, since Plaintiff-Petitioner has provided detailed documentation supporting the new claims, the new factual allegations, and the addition of a new plaintiff, an affidavit of merits is not required.

CONCLUSION

For the reasons set forth above, Plaintiff-Petitioner respectfully requests that the Court grants Plaintiff-Petitioner's Motion for Leave to File an Amended Complaint.

Dated: April 27, 2017
New York, New York

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