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 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 COMPLAINT AND VERIFIED ARTICLE 78 PETITION**

Plaintiff-Petitioner Theo Chino, by and through his 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").

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. 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.

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 half 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. 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.

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

8. 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 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.

9. The Regulation is preempted by federal law and NYDFS does not have the authority to imply additional terms.

10. 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.

11. 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 doctrine because some of the required disclosures under the Regulation are false, overly broad or unduly burdensome.

PARTIES

12. 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, New York.

13. Plaintiff-Petitioner Theo Chino is a New York State resident, residing at 640 Riverside Drive, Apt10B, New York, New York. He is the owner of Chino LTD.

14. 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.

15. 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.

JURISDICTION AND VENUE

16. 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

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

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

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

19. 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

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

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

22. 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).

23. 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.*

24. 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).

25. Bitcoin is not money, and because currencies are representations of money, Bitcoin is not true a 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).

26. 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").

27. 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.

28. In the case *US v. Petix*, Case No. 15-CR-227, currently in the United States District Court, Western District of New York. In his Report and Recommendation, Magistrate Scott gave a detailed analysis that Bitcoin is not money or funds under 18 U.S.C. § 1960. He noted that money and funds involve a sovereign. "'Money,' 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."

29. 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.

Regulation

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

31. 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).

32. Compliance costs resulting from the Regulation have been reported between $50,000 and $100,000. 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/.

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

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

35. Chino LTD's Bitcoin processing business certainly falls within the "virtual currency business activity" under the Regulation and Plaintiffs-Petitioners are New York residents who conduct business in New York with New York residents.

36. However, Bitcoin is not a financial product or service, and therefore should not be regulated by the Defendants-Respondents.

37. Between November 2014 and June 2015, Theo Chino filed five Freedom of Information Law ("FOIL") requests to understand NYDFS's scientific process of framing the Regulation.

38. 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 exempt from disclosure.

Other States, Agencies, and Jurisdictions

39. 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).

40. 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.

41. Texas and Kansas have taken the position that Bitcoin is not money and issues 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 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.

42. 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.

43. New Hampshire 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/.

44. 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 ownership of digital currencies like Bitcoin. *Id.*

45. 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

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

47. 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.

48. The original purpose of Chino LTD was to install Bitcoin processing services in the State of New York.

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

50. 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.

51. 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.

52. CBC started out by purchasing phone minutes from E-Sigma Online LLC, and latter from NobelCom LLC. CBC would distribute the phone minutes to bodegas who would in turn sell the phone minutes to customers. A copy of the distribution agreement with NobelCom LLC is attached as Exhibit V.

53. 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. A copy of one of the contracts between CBC and a bodega is attached as Exhibit VI. 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.

54. The bodegas were given signage to display that they accepted Bitcoins. A photo

of the signage is attached as Exhibit VII.

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

56. 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 run the Bitcoin processing.

57. 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.

58. As required under NYCRR § 200.21, Theo Chino, on half 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). A copy of the application is attached as Exhibit IX.

59. In January 2016, one person 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 X

60. 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.

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

62. 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.

63. 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.

64. 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.

65. 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

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

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

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

69. 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.

70. 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).

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

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

73. 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

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

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

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

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

78. 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.

79. 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." 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).

80. 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.

81. 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

82. 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 of thousands of dollars worth are being transacted. It is unreasonable to require Licensees to create and maintain records of microtransactions

83. 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. 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.

84. 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.

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

86. 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).

87. 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).

88. 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.

89. 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. 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

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

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

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

THIRD CAUSE OF ACTION
Federal Preemption

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

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

95. Federal law defines "financial service or product' in eleven carefully constructed subparagraphs of 12 U.S.C. § 5481(15).

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

97. 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.

98. 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.

99. 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

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

101. 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.

102. 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), and 200.19(g).

103. The disclosures are not purely factual and uncontroversial.

104. 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.

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

106. 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. 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.

107. 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, and has agreed to take the exchange rate risk away from the bodega's customer. 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.

108. 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. 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.

109. 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. 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.

110. 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 customer. 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. 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.

111. 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. 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.

112. 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. 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.

113. 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 activity prevention 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. 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.

114. 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;

(f) Setting aside the Regulation and declaring it without lawful authority, and in violation of law;

(g) Declaring that Defendants-Respondents proceeded in excess of jurisdiction;

(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 Plaintiff-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: April 27, 2017
New York, New York

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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 _____ day April, 2017

_____
NOTARY PUBLIC