SUPREME COURT OF THE STATE OF NEW YORK
COUNTRY OF NEW YORK

THEO CHINO and CHINO LTD, Plaintiffs-Petitioners, -against- THE NEW YORK DEPARTMENT OF FINANCIAL SERVICES and MARIA T. VULLO, in her official capacity as the Superintendent of the New York Department of Financial Services, Defendants-Respondents.	Index No. 101880/2015 Hon. Carmen Victoria St. George ORAL ARGUMENT REQUESTED

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF-PETITIONER'S CROSS-MOTION FOR LIMITED DISCOVERY AND FOR HOLDING DEFENDANTS-RESPONDENTS' CROSS-MOTION TO DISMISS IN ABEYANCE

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PRELIMINARY STATEMENT

Pursuant to Section 408 of the New York Civil Practice Law and Rules ("CPLR"), Plaintiffs-Petitioners, Theo Chino, respectfully submits this memorandum of law in support of Plaintiff-Petitioner's cross-motion for limited discovery, for holding Defendants-Respondents' cross-motion to dismiss in abeyance, and in the alternative for leave to serve and file a sur-reply in further opposition to Defendants-Respondents' cross-motion to dismiss. This cross-motion is necessary because Defendants-Respondents' cross-motion to dismiss filed on June 23, 2017 cannot be resolved without making further factual determination as to whether Bitcoin is a "financial product or service" and whether the "Virtual Currency" regulation promulgated by the New York State Department of Financial Services at Part 200 of Chapter 1 of Title 23 of the New York Codes, Rules and Regulations (cited as "NYCRR") (the "Regulation") was designed and issued by Defendants-Respondents in an arbitrary and capricious fashion.

There are significant and irreconcilable factual differences between the arguments presented by Plaintiffs-Petitioners and by Defendants-Respondents which can only be resolved through limited discovery under CPLR § 408. Those fundamental factual differences and disputes involve whether Bitcoin is a "financial product or service" which impacts whether Defendants-Respondents had the authority to regulate Bitcoin, and whether Defendants-Respondents acted in an arbitrary and capricious fashion when they designed the Regulation.

PROCEDURAL HISTORY

On October 16, 2015, Theo Chino filed the above-entitled action. Defendants-Respondents filed a cross-motion to dismiss on April 22, 2016. Theo Chino filed his response to the cross-motion to dismiss on October 31, 2016, hereinafter cited to as "Pl.'s Mem." On January 20, 2017, Defendants-Respondents filed a reply in further support of their cross-motion to

dismiss, hereinafter cited to as "Defs.' First Reply Mem." On May 24, Plaintiffs-Petitioners filed an Amended Verified Complaint and Article 78 Petition. On June 23, 2017, Defendants-Respondents filed a cross-motion to dismiss the Amended Verified Complaint and Article 78 Petition. Plaintiffs-Petitioners filed their response to the current cross-motion to dismiss on July 14, 2017, hereinafter cited to as "Pls.'s Second Mem."

From these filings, it is clear that there are fundamental factual disputes between the parties as to the economic nature of Bitcoin. It is highly disputed between the parties whether Bitcoin should be considered a "financial product or service" as defined in FSL § 104(a)(2). The exact economic nature of Bitcoin, for which considerable legal uncertainty already exists due to divergent determinations made by federal agencies and other courts, requires clarification for the Court to determine whether Defendants-Respondents have the proper regulatory authority under FSL § 104(a)(2) to regulate Bitcoin. Furthermore, there are significant factual issues as to the basis that allowed Defendants-Respondents to reach the decision that it had jurisdiction over Bitcoin. During the hearings on the proposed regulation, Mark T. Williams's written testimony establishes that Bitcoin should be treated as a commodity, and not as a currency, yet Defendants-Respondents did not address Mark T. William's position. Affirmation of Pierre Ciric in support of the Plaintiffs-Petitioners' cross-motion for limited discovery and for holding Defendants-Respondents' cross-motion to dismiss in abeyance ("Ciric Aff.") ¶¶ 12-13. Additionally, Defendants-Respondents argued that they conducted "extensive research and analysis" when they proposed the Regulation. Affidavit of Jim Harper in support of the Plaintiff-Petitioner's cross-motion for limited discovery and for holding Defendants-Respondents' cross-motion to dismiss in abeyance ("Harper Aff.") ¶¶ 8-12. Yet this "research and analysis" has never been produced, even after it was requested through New York's Freedom of Information Law, N.Y.

Pub. Off. Law sec. 84 et seq. Harper Aff. ¶ 9. Therefore, there are serious concerns as to how Defendants-Respondents came to the conclusion that they had the power to regulate Bitcoin. Harper Aff. ¶¶ 8-12.

ARGUMENT

A. Plaintiffs-Petitioners have "ample need" for limited discovery

Under Article 78 proceedings, "a petitioner is not entitled to discovery as of right, but must seek leave of the court pursuant to CPLR § 408." *Town of Pleasant Valley v. N.Y. State Bd. of Real Prop. Servs.*, 253 A.D.2d 8, 15 (2d Dep't 1999). The Court should grant a request for leave to conduct discovery where the disclosure "sought [is] likely to be material and necessary to the prosecution or defense of the proceedings." *Stapleton Studios v. City of New York*, 7 A.D.3d 273, 275 (1st Dep't 2004). Discovery is appropriate in Article 78 proceedings when the moving party demonstrates "ample need" for the requested discovery. *N.Y. Univ. v. Farkas*, 121 Misc. 2d 643, 646, 468 N.Y.S.2d 808, 811 (N.Y. Civ. Ct. 1983). Further, courts have granted motions for disclosure because the operative facts necessary for a judicial determination are within the respondent's knowledge and because the petitioner needed the information to mount a proper defense during those proceedings. *Smilow v. Ulrich*, 11 Misc. 3d 179, 183, 806 N.Y.S.2d 392, 396 (N.Y. Civ. Ct. 2005). In fact, "a presumption favors granting disclosure when the opposing party has exclusive possession of material facts." *Id.*

New York courts have followed six factors under *Farkas* in determining whether there is "ample need": (i) whether, in the first instance, the petitioner has asserted facts to establish a cause of action; (ii) whether there is a need to determine information directly related to the cause of action; (iii) whether the requested disclosure is carefully tailored and is likely to clarify the disputed facts; (iv) whether prejudice will result from the granting of an application of

disclosure; (v) whether the prejudice can be diminished or alleviated by an order fashioned by the court for this purpose; and (vi) whether the court, in its supervisory role, can structure discovery so that Respondent will not be adversely affected by the discovery requests. *Farkas*, 121 Misc. 2d at 647.

Applying these criteria, it is clear that limited discovery is warranted in this case. First, Plaintiffs-Petitioners have set forth a viable ground to challenge the Regulation as laid out in Plaintiffs-Petitioners' Amended Complaint and in their responses to Defendants-Respondents' cross-motions to dismiss. If Bitcoin is not a "financial product or service," then Defendants-Respondents' recent cross-motion to dismiss must be denied and relief must be granted to Plaintiffs-Petitioners without further review. Furthermore, even if the Court decides Bitcoin is a "financial product or service," this limited discovery will assist the court in evaluating whether the Regulation was promulgated in an arbitrary and capricious fashion.

Second, limited discovery is necessary because Defendants-Respondents' cross-motion to dismiss filed on April 22, 2016 cannot be resolved without making further factual determination as to whether Bitcoin is a "financial product or service" and whether the Regulation was designed and issued by Defendants-Respondents in an arbitrary and capricious fashion.

There are significant and irreconcilable factual differences between the arguments presented by Plaintiffs-Petitioners and by Defendants-Respondents which can only be resolved through limited discovery under CPLR § 408. Those fundamental factual differences and disputes involve whether Bitcoin is a "financial product or service" which impacts whether Defendants-Respondents had the authority to regulate Bitcoin under FSL § 104(a)(2), and whether Defendants-Respondents acted in an arbitrary and capricious fashion when they designed the Regulation.

All of the previous briefs exchanged by both parties are an obvious indication that that the Court cannot address the issues raised in Plaintiffs-Petitioners' Amended Complaint or Defendants-Respondents' cross-motion to dismiss the Amended Complaint without issuing an order for limited discovery regarding the economic nature of Bitcoin. The technical and economic characteristics of Bitcoin are factually complex. Pl.'s Mem. 9-12; Pls.'s Second Mem. 12-17. Defendants-Respondents argued that Bitcoin is a substitute for money and therefore needs to be regulated based on the Financial Crimes Enforcement Network of the U.S. Treasury Department ("FinCEN"). Defs.' First Reply Mem. 4-6. In fact, Defendants-Respondents tried to argue that anything of a financial nature can be regulated as a "financial product or service." Defs.' First Reply Mem. 9. This stretches the statutory definition of "financial product or service" beyond the statutory authority conferred by FSL § 104(a)(2). It is a general principle of statutory interpretation that the inclusion of specific categories in a definition forces courts to limit themselves to applying the specified categories to the case at hand. *Iselin v. United States*, 270 U.S. 245, 250 (1926). *See also Lamie v. United States Trustee*, 124 S. Ct. 1023, 1032 (2004) (courts should not add an "absent word" to a statute; "there is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted"). *See also Gair v. Peck*, 6 N.Y.2d 97, 126 (1959). Defendants-Respondents stretched reality when they attempted to associate "financial products or services" with anything that "relates to" or is "connected with, the use and management of money." Defs.' First Reply Mem. 9. This approach, contrary to basic tenets of statutory interpretation, is so overly broad that it could include anything you purchase with money. Under Defendants-Respondents' approach, they would be authorized to regulate computers under FSL § 104(a)(2) because one must purchase a computer with money! In fact, FSL§ 104 describes in limitative terms what a

"financial product or service" is, since FSL § 104(a)(2)(B) describes in great length asset categories which are not supposed to be considered a "financial product or service." This is contrary to Defendants-Respondents' obligation to limit its regulatory power within the bounds of the statute. This critical determination can only be made by clarifying through a limited discovery order the economic nature of Bitcoin.

Similarly, Defendants-Respondents' do not have the authority to add additional terms or extend the meaning of "financial product or service" to Bitcoin. "[A]n administrative agency cannot extend the meaning of the statutory language to apply to situations not intended to be embraced within the statute." *Trump-Equit. Fifth Ave. Co. v Gliedman*, 57 N.Y.2d 588, 595 (1982) (citing *Jones v Berman*, 37 N.Y.2d 42 (1975)). "Nor may an agency promulgate a rule out of harmony with or inconsistent with the plain meaning of the statutory language." *Id.* (citing *Finger Lakes Racing Ass'n. v N.Y. State Racing & Wagering Bd.*, 45 N.Y.2d 471 (1978); *Harbolic v Berger*, 43 N.Y.2d 102 (1977)). Furthermore, "the failure of the Legislature to include a matter within a particular statute is an indication that its exclusion was intended" *Matter of Brown v. N.Y. State Racing & Wagering Bd.,* 2009 NY Slip Op 204, ¶ 6, 60 A.D.3d 107, 116-17, 871 N.Y.S.2d 623, 630 (App. Div.). If the New York Legislature wanted specific terms to be included in the definition of "financial product or service," it would have expressly referred to them in the FSL§ 104(a)(2)(A) definition. The terms virtual currency and Bitcoin are omitted from the definition of "financial product or service." *See* FSL§ 104(a)(2)(A). Therefore, the Legislature indicated that the exclusion was intended.

As pointed out in Plaintiffs-Petitioners' responses to the cross-motions to dismiss the Amended Complaint, a Florida court recently ruled that Bitcoin is not money. *Florida v. Espinoza*, No. F14-2923 at 6 (Fla. 11th Cir. Ct. July 22, 2016). To make this determination, the

Espinoza court specifically agreed to a discovery process using an expert witness in the course of resolving a motion to dismiss a criminal indictment. Ciric Aff. ¶ ¶ 15-16. Further, states have issued memorandums stating Bitcoin is not money. Pl.'s Mem. 10; Pls.'s Second Mem. 13. Bitcoin lacks the properties commonly associated with money. *See* Pl.'s Mem. 11; Pls.'s Second Mem. 15. Bitcoin is akin to commodity-like mediums of exchange. This view is consistent with the positions taken by the IRS and the Commodity Future Trading Commission (CFTC). Pl.'s Mem. 10; Pls.'s Second Mem. 15-16. Further, in the case *United States v. Petix*, 2016 U.S. Dist. LEXIS 165955 (W.D.N.Y., Dec. 1, 2016, No. 15-CR-227A), Magistrate Judge Scott, in his Report and Recommendation dated December 1, 2016, gave a detailed analysis concluding that Bitcoin is not money or funds under 18 U.S.C. § 1960, a federal statute prohibiting unlicensed money transmitting businesses. Pls.'s Second Mem. 14. Magistrate Judge Scott noted that money and funds must involve a sovereign: "'[m]oney,' in its common use, is some kind of financial instrument or medium of exchange that is assessed value, or price stabilization, which likely explains why Bitcoin value fluctuates much more than that of the typical government-backed fiat currency." *United States v. Petix*, 2016 U.S. Dist. LEXIS 165955 (W.D.N.Y., Dec. 1, 2016, No. 15-CR-227A). Pls.'s Second Mem. 14-15. In the bankruptcy proceeding, *Hashfast Technologies, LLC v. Lowe*, Adv. Proc. No. 15- 03011 (Bankr. N.D. Ca. filed February 17, 2015), the judge stated, "The court does not need to decide whether bitcoin are currency or commodities for purposes of the fraudulent transfer provisions of the bankruptcy code. Rather, it is sufficient to determine that, despite defendant's arguments to the contrary, bitcoin are not United States dollars" (emphasis added). Pls.'s Second Mem. 14.

Specifically, Defendants-Respondents refer to Paul Krugman as an expert authority to support the proposition that Bitcoin is money, which he defines as serving "three functions: it is

a medium of exchange, a unit of account, and a store of value" Defs.' Reply Mem. 16. This is, in fact, contrary to public positions expressed by Paul Krugman, who has been adamant that Bitcoin is not money because it must be both a medium of exchange and a reasonably stable store of value, and Bitcoin is currently not a stable store of value. Ciric Aff. ¶ 17. Based on all of the above, it is clear that the court will benefit from a limited discovery process focused on the economic nature of Bitcoin.

Furthermore, there are significant factual issues as to the basis that allowed Defendants-Respondents to reach the decision that it had jurisdiction over Bitcoin. During hearings on the proposed regulation, Mark T. Williams's written testimony establishes that Bitcoin should be treated as a commodity, and not as a currency, yet Defendants-Respondents did not address Mark T. William's position. Ciric Aff. ¶¶ 12-13. Additionally, the Defendants-Respondents argued that they conducted "extensive research and analysis" when they proposed the Regulation, yet the research and analysis has never been produced. Harper Aff. ¶¶ 8-12. It is hard to determine how the Defendants-Respondents came to their conclusion that they could regulate Bitcoin since they did not address Mark T. Williams written testimony and give no indication as to what their research is based on.

Third, the requested disclosures, as detailed below, are carefully tailored to only pertain to the matter of whether Bitcoin is a "financial product or service" and whether the Regulation was issued in an arbitrary and capricious fashion. This limited discovery described in section B, below, will clarify the two critical disputed factual issues as to whether Bitcoin is a "financial product or service" and whether the Regulation was issued in an arbitrary and capricious fashion.

The limited discovery will assist the court in determining the economic characteristics of Bitcoin. During hearings held by the New York State Department of Financial Services on the

topic of virtual currency on January 28 and January 29, 2014 in New York City ("the Hearings"), Mark T. Williams, member of the Finance & Economics Faculty at Boston University, was the only witness present at the Hearings who introduced in the written record direct testimony as to an analysis regarding the economic nature of Bitcoin. His written testimony establishes that Bitcoin should be treated as a commodity, and not as a currency, reinforcing the position adopted by both the IRS and the CFTC. Ciric Aff. ¶ 12. However, Defendants-Respondents did not discuss, probe, or question Mark T. Williams about his written testimony during the Hearings, and did not seek to discuss under which circumstances Bitcoin should be considered a currency or whether Bitcoin should be considered a "financial product or service" under FSL § 104(a)(2). Ciric Aff. ¶ 13.

At the end of the Hearings, Benjamin Lawsky ("Lawsky"), then Superintendent of Financial Services and head of the Department of Financial Services indicated that he would be in contact with everyone during the drafting of the Regulation. Ciric Aff. ¶ 14. Because these hearings give no input and provide no guidance or information as to how Defendants-Respondents based their definition of Bitcoin in order to establish that Bitcoin is a "financial product or service," Defendants-Respondents must have operated internally, by either obtaining additional information or discussing and concluding that the economic nature of Bitcoin would fit in the statutory definition of a "financial product or service."

Furthermore, Jim Harper, while serving as Global Policy Counsel at the Bitcoin Foundation, during the comment period for the proposed Regulation, requested Defendants-Respondents share the "'[e]xtensive research and analysis' that it identified in its statement of needs and benefits as supporting the proposed regulation: 'The Bitcoin community would like to know—and could comment more helpfully if it did know—what novel aspects of digital

currency your research and analysis identified. In the view of your office, what risks exist with digital currencies that don't exist with other currencies? There certainly are risks—the community would benefit from understanding how your office frames them. We recommend that you publish the research and analysis referred to in the statement of needs and benefits as soon as possible, but well before the close of the first round of comments.'" Harper Aff. ¶ 8. He also requested "the opportunity to inspect or obtain copies of any risk management and cost-benefit analysis (or any other systematic assessment) that is a part of the 'extensive research and analysis' referred to in the statement of needs and benefits for the proposed regulation" under New York's Freedom of Information Law, N.Y. Pub. Off. Law sec. 84 et seq. Harper Aff. ¶ 9. Defendants-Respondents said they would fulfill the request, but after extending their deadline multiple times, they never produced the documents. Harper Aff. ¶ ¶ 10-12. It is clear there was extensive research and analysis under the control of Defendants-Respondents based on their response to Jim Harper.

All records under the control of Defendants-Respondents pertaining to these internal discussions or debates will reveal what information they relied on to determine the economic nature of Bitcoin and conclude that Bitcoin is a "financial product or service" before they promulgated the Regulation. These records must have been incorporated into the rulemaking process, but the rulemaking process to the extent it covered the economic nature of Bitcoin clearly happened behind closed doors and is not readily available to the public.

Fourth, no prejudice will result from granting this application for disclosure. The request has been carefully tailored to focus only on narrow factual questions, which will hopefully clarify the disputed factual issues. The limited discovery is specially tailored to answer the narrow questions as to the economic nature of Bitcoin and as to whether the Regulation was

designed and issued in an arbitrary and capricious fashion. The information is not burdensome to obtain and is capable of being produced in a relatively short period of time.

Fifth, any prejudice, whichever small, can be diminished or alleviated by an order fashioned by the Court for this purpose. If the Court believes the limited request is overly broad, the Court can order a more limited discovery.

Sixth, the Court, in its supervisory role, can structure the limited discovery so that Defendants-Respondents will not be adversely affected by the discovery requests. The Court can either adopt a limited order seeking the requested limited discovery, or narrow the order further, easily satisfying this prong of the *Farkas* analysis.

All the factors have been met under *Farkas.* However, not all of the *Farkas* factors need to be satisfied in order for the Court to find ample need. *IA2 Serv. LLC v. Quinapanta*, 51 Misc. 3d 1222(A), 2016 NY Slip Op 50779(U), ¶ 2 (N.Y. Civ. Ct. 2016). As long as the information sought is vital and within the knowledge of the other party or within the knowledge of a nonparty witness, courts have consistently determined that there is ample need for discovery. *Id.* As demonstrated below, the information sought is both critical to the determination of a fundamental question central to the resolution of this case and within the knowledge of the other party and nonparty witnesses.

B. This Court should allow for limited discovery on the economic nature of Bitcoin and whether the Regulation was issued in an arbitrary and capricious fashion.

i. The testimony of Paul Krugman should be granted because it will aid in determining critical facts related to the cause of action.

The scope of discovery is not limited to the parties in the proceeding. *Smilow,* 806 N.Y.S.2d at 400. "The scope may also include nonparties who will aid in determining facts related to the cause of action." *Id*.

In *Florida v. Espinoza*, the court allowed in an expert witness, Charles Evans, a Barry University economist, to discuss the economic nature of Bitcoin. Ciric Aff. ¶¶ 15-16. New York courts adhere to the "Frey" standard when considering permitting an expert witness testifying at trial. Under this standard, the expert's opinions much be generally accepted within the expert's field. *Frey v. United States*, 293 F. 1013 (D.C. Cir. 1923). Paul Krugman is a prominent economist. His opinion is generally accepted within his field of economics. As outlined below, he has taught in many top universities on economics and he received the Nobel Memorial Prize in Economic Sciences for 2008.

An "expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert." *De Long v. County of Erie*, 60 N.Y.2d 296, 307 (1983). Economists may be called as experts if they will help clarify an issue. *See id.* Here, Paul Krugman should be subpoenaed as an expert witness to appear before the Court because there are fundamental differences between the parties as to the economic nature of Bitcoin. As stated before, Defendants-Respondents cited to Paul Krugman as an expert source supporting their proposition that Bitcoin is money. Therefore, they must also believe he is a prominent expert in this area. Paul Krugman can testify to the economic nature of Bitcoin and whether or not it qualifies as "financial product or service" based on its economic characteristics. Defendants-Respondents cited Paul Krugman to say Bitcoin is a "financial product or service." Defs.' First Reply Mem. 16. In fact, Defendants-Respondents got his views wrong. The excerpt they cited to is not actually how Paul Krugman would apply his definition of money to Bitcoin. In fact, Defendants-Respondents' argument contradicts Paul Krugman's stance, because he has repeatedly argued that Bitcoin is not money because it is not a stable store of value. Therefore, Paul Krugman should be brought in as an expert witness before the Court to explain this

contradiction, and provide an opportunity to explain directly to the Court the economic nature of Bitcoin.

Paul Krugman is a prominent figure in the field of economics. He earned his B.A. in economics from Yale University and his PhD in economics from Massachusetts Institute of Technology (MIT). He was previously a faculty member at the Massachusetts Institute of Technology, worked as a staff member of the President Reagan's Council of Economic Advisers, and has also taught at Princeton University, Stanford University, Yale University, and the London School of Economics. He retired from Princeton, but still holds the title of professor emeritus there and is also a Centenary Professor at the London School of Economics. Paul Krugman has written over 20 books and has published over 200 scholarly articles in professional journals and edited volumes. He has also written several hundred columns on economic and political issues for *The New York Times*, *Fortune* and *Slate.* He is currently an op-ed columnist for *The New York Times*. He received the Nobel Memorial Prize in Economic Sciences for 2008. Paul Krugman has frequently written about Bitcoin and spoken on Bitcoin. *See, e.g.,* Paul Krugman, *Bitcoin is Evil*, THE NEW YORK TIMES (Dec. 28, 2013), https://krugman.blogs.nytimes.com/2013/12/28/bitcoin-is-evil/; Paul Krugman, *Bits and Barbarism*, THE NEW YORK TIMES (Dec. 22, 2013), http://www.nytimes.com/2013/12/23/opinion/krugman-bits-and-barbarism.html; Paul Krugman, *The Long Cryptocon*, THE NEW YORK TIMES (Oct. 4, 2014), https://krugman.blogs.nytimes.com/2014/10/04/the-long-cryptocon/.

ii. The email production should be granted because it will aid in determining how Defendants-Respondents reached their regulatory conclusion as to the economic nature of Bitcoin and whether the Regulation was issued in an arbitrary and capricious fashion.

Document production can be requested under CPLR § 408. *See Smilow,* 806 N.Y.S.2d at 394. Since Defendants-Respondents did not address the economic nature of Bitcoin during their hearings on the Regulation held on January 28 and January 29, 2014, they must have obtained additional information internally or must have discussed the economic nature of Bitcoin to conclude Bitcoin would fit in the statutory definition of a "financial product or service." At the end of the public hearings, Lawsky even indicated that he would be in contact with everyone during the drafting of the Regulation. Ciric Aff. ¶ 14. Under the Regulatory Impact Statement published in the NYS Register dated July 23, 2014, Defendants-Respondents say they conducted extensive research and analysis to support their decision to regulate Bitcoin. *See* Harper Aff. ¶ 8. However, Defendants-Respondents never produced this information in response to Harper's request. Harper Aff. ¶ 12. Therefore, the economic nature of Bitcoin must have been discussed either before or after the hearings through email correspondence internally or between the Defendants-Respondents and/or with outside parties. Therefore, internal emails, emails with third-parties, and other written documentation in possession of Defendants-Respondents will show how Defendants-Respondents reached their regulatory conclusion as to the economic nature of Bitcoin and how it falls under the definition of a "financial product or service," even though the only testimony introduced in the written record during the hearings support the notion that Defendants-Respondents did not have the statutory authority to regulate Bitcoin.

Therefore, Plaintiffs-Petitioners are requesting all internal emails, emails with third-parties, and other written documentation in possession of Defendants-Respondents between January 01, 2013 to September 30, 2015, where their personnel discussed the economic nature of Bitcoin and whether it qualifies as a "financial product or service" either internally or with outside parties. There is no chance that prejudice will result from granting the document request

since emails extraction by IT Departments is routine and is not a demanding process, and because this request has been carefully tailored to focus in on the economic nature of Bitcoin. This information will be critical in clarifying the disputed factual issues of whether Bitcoin is a "financial product or service" and whether the Regulation was promulgated in an arbitrary and capricious fashion.

iii. The deposition of Lawsky should be granted because it will aid in determining facts related to the cause of action.

The scope of discovery is not limited to the parties in the proceeding. *Smilow,* 806 N.Y.S.2d at 400. "The scope may also include nonparties who will aid in determining facts related to the cause of action." *Id*. In fact, leave for the deposition of nonparty witnesses may expedite matters by clarifying factual issues. *Plaza Operating Partners, Ltd. v. IRM, Inc.*, 143 Misc. 2d 22, 24, 539 N.Y.S.2d 671, 673 (N.Y. Civ. Ct. 1989). Requests to depose nonparty witnesses should be granted if they are relevant, nonprejudicial, and unintrusive. *Smilow,* 806 N.Y.S.2d at 400; *Wei-Hua Wu v. Sanchez*, 32 Misc. 3d 1205(A), 1205A, 932 N.Y.S.2d 764, 764 (N.Y. Civ. Ct. 2011). Like the court in *IA2 Serv. LLC v. Quinapanta* decided, the deposition of Lawsky will clarify and resolve the factual dispute over whether Bitcoin is a "financial product or service," and how Defendants-Respondents determined that Bitcoin was within the statutory authority conferred by FSL § 104(a)(2), which impacts whether Defendants-Respondents had the authority to regulate Bitcoin, and whether Defendants-Respondents acted in an arbitrary and capricious fashion when they designed the Regulation. His deposition will clarify whether the Regulation was issued in an arbitrary and capricious fashion and how he arrived at the conclusion that Bitcoin is a "financial product or service."

Lawsky has exclusive personal knowledge not shared with the Plaintiffs-Petitioners about the basis of Defendants-Respondents' determination of the economic attributes and nature of

Bitcoin. Lawsky was the Superintendent of Financial Services at the time of the proposed Regulation and when the Regulation was promulgated. He was central in making the determination that Bitcoin is a "financial product or service." He is the most knowledgeable person on this matter. Under the Regulatory Impact Statement published in the NYS Register dated July 23, 2014, Defendants-Respondents say they conducted extensive research and analysis. NY Reg, Jul. 23, 2014 at 14-16; Harper Aff. ¶ 8. Defendants-Respondents' said they would produce "copies of any risk management and cost-benefit analysis (or any other systematic assessment) that is a part of the 'extensive research and analysis.'" Harper Aff. ¶¶ 9-10. No such documents were produced. Harper Aff. ¶¶ 10-12. As Superintendent of Financial Services, Lawsky must have knowledge of the "extensive research and analysis" that was relied on. His testimony is relevant and necessary for the determination of the economic nature of Bitcoin and basis that allowed Defendants-Respondents to reach the decision that they had jurisdiction over Bitcoin. This is information that Plaintiffs-Petitioners do not have access to, yet it would clarify an important factual issue. The deposition of Lawsky should not prejudice Defendants-Respondents since Lawsky no longer works for the New York State Department of Financial Services. Further the scope of the deposition would be specifically tailored only to answer the limited questions on the economic nature of Bitcoin and whether the Regulation was issued in an arbitrary and capricious fashion. The deposition would not be burdensome on Defendants-Respondents and could be produced in a relatively short period of time.

Furthermore, a deposition of Lawsky is the most adequate discovery tool available to the court as compared to other devices, such as interrogatories or bills of particulars, because a deposition would represent a "useful and reasonable" method to obtain testimony "which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial

reasonable." *Allen v. Crowell-Collier Publishing Co.,* 21 N.Y.2d 403, 406-407 (N.Y. 1968) (*citing* 3 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 3101.07, p. 31-13). Specifically, a deposition of Lawsky, through a broader range of questioning than an interrogatory, would allow the Court to further understand the process by which Defendants-Respondents reached the conclusion that Bitcoin is within the purview of the controlling statute when they designed and finalized the Regulation.

C. This Court should hold Defendants-Respondents' current cross-motion to dismiss in abeyance until after Plaintiffs-Petitioners' cross-motion for discovery has been decided.

In Article 78 proceedings, courts have allowed abeyance of pending proceedings until petitioners have had the opportunity to conduct limited discovery on the issues subject to a CPLR § 408 order. *Matter of Soc. Serv. Empls. Union, Local 371, AFSCME, AFL-CIO v. City of N.Y.*, 2010 NY Slip Op 33326(U), ¶ 7 (N.Y. Sup. Ct. 2010). This is especially true where facts necessary to oppose a motion may exist but are within the exclusive knowledge or control of the moving party. *Id.*

Therefore, Plaintiffs-Petitioners respectfully request that the Court holds Defendants-Respondents' current cross-motion to dismiss in abeyance pending the outcome of this motion for limited discovery and time to complete this limited discovery. Defendants-Respondents' cross-motion to dismiss cannot be decided without limited discovery on the economic nature of Bitcoin and whether the Regulation was promulgated in an arbitrary and capricious fashion. As stated before, there is a significant disagreement as to the nature of Bitcoin and whether or not it should be considered a "financial product or service." This is at the heart of the issue in determining whether the cross-motion to dismiss should be granted or denied. Further, the items being requested are under the exclusive knowledge or control of Defendants-Respondents. This

motion for limited discovery will clear up matters that could cause the cross-motion to dismiss to be denied. Therefore, we believe abeyance pending the outcome of this motion for limited discovery and time to complete the limited discovery should be allowed.

Therefore, Plaintiffs-Petitioners respectfully request that the Court hears this cross-motion first on August 31, 2017, when the Court is scheduled to hear Defendants-Respondents' current cross-motion to dismiss. Furthermore, would the Court grant this cross-motion for limited discovery, Plaintiffs-Petitioners respectfully requests that a hearing on Defendants-Respondents' current cross-motion to dismiss be scheduled at a later date, once Plaintiffs-Petitioners have had an opportunity to honor the Courts' discovery order pursuant to this cross-motion for limited discovery.

In the alternative, Plaintiffs-Petitioners respectfully requests that, during the August 31, 2017 hearing, the Court hears this cross-motion for limited discovery before hearing Defendants-Respondents' cross-motion to dismiss.

CONCLUSION

For the reasons set forth above, Plaintiffs-Petitioners respectfully requests that the Court grants this motion for limited discovery in its entirety.

Dated: August 2, 2017
New York, New York

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