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

THEO CHINO Plaintiff-Petitioner, -against- THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES and ANTHONY J. ALBANESE, in his official capacity as Superintendent of the Department of Financial Services. Defendants-Respondents.	Index No. 101880/2015 Hon. Lucy Billings

AFFIRMATION OF PIERRE CIRIC IN SUPPORT OF PLAINTIFF-PETITIONER'S 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

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

1. I am an attorney at the Ciric Law Firm, PLLC and counsel for Plaintiff-Petitioner Theo Chino ("Plaintiff-Petitioner") in the above-entitled action.

2. In my capacity as counsel for Plaintiff-Petitioner, I am fully familiar with the facts and circumstances hereinafter contained, the source of such knowledge being the file materials maintained by my office during the course of the action herein.

3. I submit this affirmation in support of the Plaintiff-Petitioner's 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, which seeks an Order:

(a) pursuant to CPLR § 408, compelling Paul Krugman to testify before the Court as an expert witness for the purpose of creating an evidentiary record necessary in the instant action, on the grounds that his deposition is material to comply with full disclosure;

(b) pursuant to CPLR § 408, compelling the Defendants-Respondents to produce all internal emails, emails with third-parties, and other written documentation supporting how they reached their regulatory conclusion as to the economic nature of Bitcoin falling into the definition of a "financial product or service," between January 01, 2013 to September 30, 2015, for the purpose of creating an evidentiary record necessary in the instant action, on the grounds that this information is material to comply with full disclosure;

(c) pursuant to CPLR § 408, compelling Benjamin Lawsky to attend a deposition for the purpose of creating an evidentiary record necessary in the instant action, on the grounds that his deposition is material to comply with full disclosure;

(d) holding Defendants-Respondents' cross-motion to dismiss dated April 22, 2016 in abeyance until after Plaintiff-Petitioner's motion for limited discovery under CPLR § 408 has been decided and until after the completion of the limited discovery ordered by the Court, and

(e) in the alternative, granting Plaintiff-Petitioner's request for leave to serve and file a sur-reply in further opposition to Defendants-Respondents' cross-motion to dismiss.

4. This action was filed to challenge the "Virtual Currency" regulation promulgated by the New York State Department of Financial Services at Part 200 of Chapter 1 of Title 23 of the New York Codes, Rules and Regulations (the "Regulation")

5. Defendants-Respondents filed a cross-motion to dismiss Plaintiff-Petitioner's complaint on April 22, 2016.

6. Plaintiff-Petitioner filed his response to the cross-motion to dismiss on October 31, 2016.

7. On January 20, 2017, Defendants-Respondents filed a reply in further support of their cross-motion to dismiss.

8. Plaintiff-Petitioner is now filling this motion for limited discovery under CPLR § 408 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.

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

10. Specifically, during hearings held by the New York State Department of Financial Services on the topic of virtual currency on January 28 and January 29, 2014 in New York City ("the Hearings"), Mark T. Williams, member of the Finance & Economics Faculty at Boston University, was the only witness present at the Hearings who introduced in the written record direct testimony as to an analysis regarding the economic nature of Bitcoin. His testimony establishes that Bitcoin should be treated as a commodity, and not as a currency, reinforcing the position adopted by both the IRS[1] and the CFTC.[2] New York State Department of Financial Services Hearings on the Regulation of Virtual Currency (2014)(statement of Mark T. Williams,

[1] *See* Notice 2014-21, IRS, https://www.irs.gov/pub/irs-drop/n-14-21.pdf (recognizing that bitcoins "[do] not have legal tender status in any jurisdiction").
[2] *In re Coinflip, Inc.*, CFTC Docket No. 15-29 at 3 (Sept. 17, 2015).

Member of the Finance & Economics Faculty, Boston University), http://www.dfs.ny.gov/about/hearings/vc_01282014/williams.pdf, attached as Exhibit C.

11. However, Defendants-Respondents did not discuss, probe, or question Mark T. Williams' written testimony during the Hearings, and did not seek to discuss under which circumstances Bitcoin should be considered a currency or whether Bitcoin should be considered a "financial product or service" under FSL § 104(a)(2). *See* New York State Department of Financial Services Hearings on the Regulation of Virtual Currency (2014), http://www.dfs.ny.gov/about/hearings/vc_01282014_indx.htm.

12. At the end of the Hearings, Benjamin Lawsky, then Superintendent of Financial Services and head of the Department of Financial Services, indicated that he would be in contact with everyone during the drafting of the Regulation. *Id.*

13. A Florida court recently ruled that Bitcoin is not money. *Florida v. Espinoza*, No. F14-2923 at 6 (Fla. 11th Cir. Ct. July 22, 2016) (concluding that "it is very clear, even to someone with limited knowledge in the area, that Bitcoin has a long way to go before it is the equivalent of money" most notably because it is not accepted by all merchants, the value fluctuates significantly, there is a lack of a stabilization mechanism, they have limited ability to act as a store of value, and Bitcoin is a decentralized system.). In this case, the *Espinoza*, court allowed in an expert witness, Charles Evans, a Barry University economist, to discuss the economic nature of Bitcoin. *See* Mazin Sidahmed, *Bitcoin 'not real money' says Miami judge in closely watched ruling*, THE GUARDIAN (Jul. 26, 2016), https://www.theguardian.com/technology/2016/jul/26/bitcoin-not-real-money-miami-judge.

14. During a meeting held on January 18, 2017 in Miami with counsel to the defendant in the *Espinoza* case, Mr. Frank Andrew Prieto, Esq., I was able to confirm that

counsel was able to admit the expert witness testimony of Charles Evans on behalf of Michell Abner Espinoza, the defendant in the *Espinoza* case, during the court proceedings.

15. Contrary to Defendants-Respondents' statements that Paul Krugman, as an expert authority, supports the proposition that Bitcoin is money, Defs.' Reply Mem. 16, Paul Krugman, a prominent figure in the field of economics, an op-ed columnist for *The New York Times*, and a 2008 Nobel Memorial Prize in Economic Sciences recipient, has been adamant that Bitcoin is not money because it must be both a medium of exchange and reasonably stable store of value. Paul Krugman points out that Bitcoin is not a stable store of value. Paul Krugman, *Bitcoin is Evil*, THE NEW YORK TIMES (Dec. 28, 2013), https://krugman.blogs.nytimes.com/2013/12/28/bitcoin-is-evil/.

16. No previous application or motion has been made to this or any other court regarding the relief sought herein.

WHEREFORE, it is respectfully requested that this Court issue the relief requested herein in its entirety, together with such other and further relief as this Court may deem just and proper.

Dated: February 17, 2017
New York, New York

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