

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

**AFFIRMATION OF PIERRE CIRIC IN
SUPPORT OF PLAINTIFF-
PETITIONER'S CROSS-MOTION FOR
LEAVE TO AMEND HIS COMPLAINT**

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 cross-motion for leave to amend his complaint.
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. Plaintiff-Petitioner is filing this cross-motion for leave to amend his complaint under CPLR § 3025(b).

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

7. The proposed amendments to the complaint include an additional Plaintiff-Petitioner, Chino LTD. Chino LTD is a Delaware corporation founded in 2013 by Plaintiff-Petitioner for the purpose of providing Bitcoin processing services to customers. Chino LTD is the entity which made the technology-related investments necessary for its business purpose, and is the entity on behalf of which Plaintiff-Petitioner applied for a license under the Regulation. Counsel is justified in raising the addition of this new Plaintiff-Petitioner at this point in the litigation because it was not until we received Plaintiff-Petitioner's 2016 tax returns on April 18, 2017 that we realized that all of the technology and business-related investments were made by Chino LTD and not directly by Plaintiff-Petitioner.

8. The proposed amendments to the complaint include an additional claim for a First Amendment violation under both the compelled commercial speech doctrine as expressed in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), and 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) of several sections of the Regulation. Plaintiff-Petitioner intends to argue that that the following sections of the Regulation violate either the compelled commercial speech or the restricted commercial speech doctrine: 23 NYCRR §§ 200.19, 23 NYCRR §§ 200.19(a)(6), 23 NYCRR §§ 200.19(a)(7), 23 NYCRR §§ 200.19(a)(8), 23 NYCRR §§ 200.19(a)(9), 23 NYCRR §§ 200.19(b)(1), 23 NYCRR

§§ 200.19(b)(2), 23 NYCRR §§ 200.19(c)(3), 23 NYCRR §§ 200.19(c)(4), 23 NYCRR §§ 200.19(g). Counsel is justified in raising the addition of this claim at this point in the litigation because of the U.S. Supreme Court's recent decision in *Expressions Hair Design v. Schneiderman*, ___ US ___, 197 L. Ed. 2d 442 (2017).

9. 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.

10. The proposed amendments to the complaint include additional facts on Plaintiff-Petitioner's tax filings for the year 2016 to show the losses he has incurred due to the promulgation of the Regulation. The 2016 tax returns for Chino LTD, together with the 2013 to 2015 tax returns for Chino LTD, confirm that the Regulation prevented Plaintiff-Petitioner from generating business activity and income, since Chino LTD's losses had continued since 2015. Counsel is justified in raising the addition of these new facts at this point in the litigation because it was not until we received Plaintiff-Petitioner's 2016 tax returns on April 18, 2017 that we realized the impact of the business losses on Plaintiff-Petitioner.

11. The proposed amendments to the complaint include additional facts regarding recent legislative developments pertinent to Bitcoin which have occurred in New Hampshire and in Texas. Since Plaintiff-Petitioner's last filing, 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/>. 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.*

12. These legislative developments, although not binding on the Court, nevertheless demonstrate that the legislative landscape in other jurisdictions shows significant differences in legislative approaches and considerable legal uncertainty as to how other U.S. jurisdictions approach and define the economic nature of Bitcoin and the legal standard which should apply to crypto-currencies.

13. The proposed amendments to the complaint include additional facts about a recent recommendation of Magistrate Judge Hugh B. Scott 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.”

14. 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.

15. A copy of the complaint thus amended is attached as Exhibit I.

16. Defendants-Respondent will not suffer any prejudice from the filing of the proposed amended complaint as proposed, because no prejudice can be reasonably argued because of this filing. It is still early in the process so Defendants-Respondents will not be 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 a few additional facts are being added and three additional claims are being proposed. Therefore, Defendants-Respondents will not be able to demonstrate prejudice.

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: April 27, 2017
New York, New York



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