Chino v New York Dept. of Fin. Servs.
2017 NY Slip Op 32700(U)
December 21, 2017
Supreme Court, New York County
Docket Number: 101880/2015
Judge: Carmen Victoria St. George
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 34

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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,

Respondents,

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Index No. 101880/2015

Decision, Order and Judgment

Motion Sequence No. 001

CARMEN VICTORIA ST. GEORGE, J.S.C.:

In this Article 78 proceeding, motion sequence number 001, plaintiffs-petitioners Theo Chino and Chino Ltd (collectively, petitioner) seek the following relief against defendants-respondents The New York Department of Financial Services and Maria T. Vullo, in her capacity as the Superintendent of the Department (collectively, respondent): a) an order enjoining and permanently restraining DFS from enforcing Title 23, Chapter 1, Part 200 of the New York Codes, Rules, and Regulations (NYCRR), which went into effect on June 24, 2015; b) a declaration that Part 200, which regulates virtual currency, violates the separation-of-powers doctrine in that it delegates to DFS the authority to promulgate the regulation; c) an order enjoining and restraining implementation of the regulation on the ground that it is arbitrary and capricious; d) an order enjoining and restraining implementation on the ground that federal law preempts the regulation; e) an order setting aside the regulation as being made in violation of law; f) a declaration that DFS exceeded its jurisdiction; g) a declaration that the law is preempted; and h) granting Chino

monetary relief, attorney's fees, costs, and interest. DFS makes a pre-answer motion to dismiss on the bases that 1) petitioner lacks standing to challenge the legislation, 2) the challenged regulation is not arbitrary and capricious, and 3) federal law does not preempt the regulation. Separately, as motion sequence number 003, Chino moves to compel limited discovery and to hold DFS's cross-motion to dismiss in abeyance pending the completion of that discovery.[1] For the reasons below, the Court grants the cross-motion to dismiss the petition and denies the motion for limited discovery as moot.

BACKGROUND

Bitcoin is an electronically based and mathematically created currency, or cryptocurrency, which was invented by Satoshi Nakamoto,[2] following the publication of Satoshi Nakamoto's essay titled "Bitcoin: A Peer-to-Peer Electronic Cash System" (https://bitcoin.org/bitcoin.pdf). Bitcoins are released into cyberspace according to a mathematically predetermined system. Under the current protocol, bitcoin circulation will be capped at 21 million. A peer-to-peer user network regulates bitcoin, eliminating central entities such as banks. In addition, to ensure the legitimacy of transactions, individuals or entities called "miners" identify and verify the bitcoins used in the transactions. Miners block groups of these verified transactions together in "blockchains," recording the blockchains online on a shared public ledger. According to *Mastering Bitcoin: Unlocking Digital Cryptocurrencies* (Andreas M. Antonopoulos [2014] [avail at http://chimera.labs.oreilly.com/books/1234000001802/ch01.html]), to which petitioner cites for various principles, the formulas and algorithms "form the basis of a digital money ecosystem" that

[1] Chino refers to this as a "cross-motion," but it is a separately filed motion. The Court also has before it pleadings and documents filed by Chino prior to his retention of counsel, but they are not relevant to the resolution of the cross-motion

[2] Nakamoto is a pseudonym, and the actual identity of the author remains unknown.

can "do just about anything that can be done with conventional currencies, including buy and sell goods, send money to people or organizations, or extend credit" (*Id.*, Chapter 1, Introduction: What is Bitcoin?).

According to respondents, the State legislature merged the State's banking and insurance departments, creating DFS, in 2011 in reaction to the 2008 financial crisis. The Financial Services Law (FSL) empowers DFS to regulate and supervise specified financial products and services as well as those who provide them. Among other things, DFS used this power to create a regulation governing virtual money businesses (Title 23, Chapter 1, Part 200 of the NYCRR [the regulation]). The regulation went into effect on June 24, 2015.

The regulation defines virtual currency broadly, and includes all digital units of exchange that:

> (1) have a centralized repository or administrator;
> (2) are decentralized and have no centralized repository or administrator; or
> (3) may be created or obtained by computing or manufacturing effort. Virtual currency shall not be construed to include any of the following:
> (i) digital units that:
> *(a)* are used solely within online gaming platforms;
> *(b)* have no market or application outside of those gaming platforms;
> *(c)* cannot be converted into, or redeemed for, Fiat Currency[3] or Virtual Currency; and
> (ii) may or may not be redeemable for real-world goods, services, discounts, or purchases; digital units that can be redeemed for goods, services, discounts, or purchases as part of a customer affinity or rewards program with the issuer and/or other designated merchants or can be redeemed for digital units in another customer affinity or rewards program; or
> (iii) digital units used as part of Prepaid Cards.

[3] Fiat Currency includes any currency that is recognized by the government as legal tender but is not backed by a physical commodity such as gold.

(Regulations of the Superintendent of Financial Services: Virtual Currency [23 NYCRR] § 200.1 [p]).

Virtual currency business activity includes the following conduct involving New York or a resident of New York:

> (1) receiving Virtual Currency for Transmission or Transmitting Virtual Currency, except where the transaction is undertaken for non-financial purposes and does not involve the transfer of more than a nominal amount of virtual currency;
> (2) storing, holding, or maintaining custody or control of Virtual Currency on behalf of others;
> (3) buying and selling Virtual Currency as a customer business;
> (4) performing Exchange Services as a customer business; or
> (5) controlling, administering, or issuing a Virtual Currency.

(*Id.*, at § q).

In addition, pursuant to 23 NYCRR § 200.3 (a), anyone engaged in virtual currency business activity must first obtain a license. The following section, 23 NYCRR § 200.4 (a), states that the application, which must be accompanied by a $5,000 fee (*see* 23 NYCRR § 200.5), must include:

> (1) the exact name of the applicant, including any doing business as name . . .;
> (2) a list of all the applicant's Affiliates and an organization chart illustrating [their] relationship [to] the applicant . . .;
> (3) a list of . . . each individual applicant and each director . . . including such individual's name, physical and mailing addresses, and information and documentation regarding such individual's personal history, experience, and qualification, which shall be accompanied by a form of authority, executed by such individual, to release information to the Department;
> (4) a background report prepared by an independent investigatory agency acceptable to the superintendent for each individual applicant, and each Principal Officer, Principal Stockholder, and Principal Beneficiary of the applicant, as applicable;

(5) for each individual applicant . . . and for all individuals to be employed by the applicant who have access to any customer funds, whether denominated in Fiat Currency or Virtual Currency:
(i) a set of completed fingerprints. . . for submission to the State Division of Criminal Justice Services and the Federal Bureau of Investigation;
(ii) if applicable, . . . processing fees [prescribed by the Superintendent] . . .; and
(iii) two portrait-style photographs of the individuals . . .;
(6) an organization chart of the applicant and its management structure . . .;
(7) a current financial statement for the applicant and each Principal Officer, Principal Stockholder, and Principal Beneficiary of the applicant, as applicable, and a projected balance sheeting and income statement for the following year of the applicant's operation;
(8) a description of the proposed, current, and historical business of the applicant . . .;
(9) details of all banking arrangements;
(10) all written policies and procedures required . . .;
(11) an affidavit describing any pending or threatened [actions or proceedings of any kind]
(12) verification from the New York State Department of Taxation and Finance that the applicant is compliant with all . . . tax obligations . . .;
(13). . . a copy of any insurance policies maintained for the benefit of the applicant, its directors or officers, or its customers;
(14) an explanation of the methodology used to calculate the value of Virtual Currency in Fiat Currency; and
(15) such other additional information as the superintendent may require.

A verification that the applicant has complied with the above requirements is considered part of the application (*see id.*, § 200.4 [b]). The Superintendent is required to rule on applications

within 90 days from the date on which the filing is "deemed by the superintendent to be complete" (*See id.*, § 200.6 [b]). The remaining provisions regulate the approved virtual currency business, requiring mandatory compliance with anti-money laundering rules, the maintenance of adequate books and records and the obligation to allow the Superintendent to inspect such records, minimum capitalization requirements, and the obligation to protect its customers' assets in several enumerated respects (*See generally* 23 NYCRR §§ 200.7-200.22).

According to petitioner, many of the requirements for virtual currency businesses do not exist in the rules applicable to "fiat currency transmitters" (Amended Verified Complaint and Article 78 Petition [Petition], ¶ 52]. These include the requirement that it maintain records of anti-money laundering programs for seven, as opposed to five, years; the requirement that it provide the identity and physical address of parties to transactions; and the requirement to report all transactions with an aggregate amount of more than $10,000. Petitioner claims that Superintendent Benjamin Lawsky, who held the position before the current Superintendent Maria T. Vullo, acknowledged that his goal was not in response to a pressing need and instead was intended to create a working model for regulated banks and insurance companies.[4]

FACTS

On November 19, 2013, petitioner, a New York resident, incorporated Chino LTD (LTD) in Delaware. With the corporation, petitioner intended to set up a business in New York that was to install Bitcoin processing services in bodegas in New York State. He applied to conduct business in New York under Business Corporation Law § 1304, as an out-of-state corporation. In addition, in March 2014, he hired an employee to sell the LTD's services. On December 31, 2014, he co-founded Conglomerate Business Consultants, Inc. (CBC), which was incorporated in New York,

[4] For the purposes of this order, the Court need not address the accuracy of this statement.

and which purchased phone minutes and created phone calling cards the bodegas also could sell using LTD's bitcoin processing services. Petitioner submits copies of his tax returns showing that LTD lost $4,367 in 2013, $59, 667 in 2015, and $30,588 in 2016. He alleges these losses are attributable to start-up costs including computer equipment, as well as marketing and other ongoing costs.

As the Court noted above (*see supra*, at p 3), the regulations governing virtual currency businesses became effective on June 24, 2015.[5] Petitioner applied for a Virtual Currency Business license on behalf of LTD on August 7, 2015. Petitioner annexes a copy of the application as Exhibit IX to his petition. He provided the name but not the address of LTD. He did not provide an authorization as required by 23 NYCRR § 200.3 (a) (3); instead, he wrote on the form that he did not authorize the release of information. He filled out some but not all financial information on the form requested, and he indicated that he had no insurance and kept no financial or accounting books. For his background report certification, he wrote: "[Could] not obtain in time." He filled out a personal information form but he refused to disclose his employment history for the last fifteen years, and he did not provide the names and addresses of past employers. He did not disclose whether he was employed by, performed services for, or had business connections with any agency or authority of the State of New York, or any institutions subject to DFS supervision. He stated he had no financial interest in any agency or authority in New York or any other state. He provided none of the required references. He stated that his high school, college, and professional or technical school information was not applicable. He refused to disclose his social

[5] In advance of the regulation's effective date, between November 2014 and June 2015, petitioner filed several Freedom of Information Law requests, hoping to clarify DFS' "process for framing the Regulation" (Petition, ¶ 62). According to the petition, DFS did not provide any information, stating the material either did not exist or was exempt from disclosure.

security number. Along with his application, he submitted a handwritten letter which requested a waiver of the $5,000 application fee based on his characterization of the size of the business, its budget, and its financial status.[6]

Petitioner initiated this proceeding, pro se, on October 16, 2015, before he received any response from DFS; he states that he did so because he realized "he would be required to incur expenses beyond his means to comply with the burdensome compliance costs under the Regulation" (Petition, ¶ 91). On January 4, 2016, DFS returned his August 7, 2015 application without processing it. The letter states that DFS could not evaluate the application because it contained "extremely limited" information and, among other things, did not describe the business in which LTD was or would be engaged and did not specify in what respect, if any, the business involved virtual currency (DFS Jan. 4, 2016 letter [Exh. XI to Petition]). The letter explained that because of this DFS could not determine whether LTD was a virtual currency business subject to the regulations. Petitioner states that CDC discontinued its bitcoin processing services at that time but LTD continued as a nonoperating business. He states LTD lost $53,053 in 2016 because of its inability to provide bitcoin services. He provides tax returns for LTD for 2016 as well as for 2013-15 to substantiate his allegation that LTD lost money during these years.

The Ciric Law Firm, PLLC, appeared on behalf of petitioner on October 31, 2016. On May 26, 2017, the parties stipulated to convert the proceeding to e-filing. Accordingly, all papers submitted on or after that date are e-filed. Petitioner amended the action/proceeding around that time, and submitted a supplement summons on August 10, 2017. Respondent filed its notice of cross-motion and supporting papers on August 15, 2017.[7] The matter was argued before this Court

[6] The petition refers to this as a request for a fee waiver under Banking Law § 18-a (6) (a).
[7] Respondents previously had cross-moved in response to the original pleadings.

on October 10, 2017, and the parties were directed to order and provide copies of the transcript, which they did the following week.

ARGUMENTS REGARDING STANDING

In their cross-motion, respondents first argue the threshold issue of standing. They point to the January 2016 letter of DFS, which not only stated that it could not determine whether LTD was engaged in a virtual currency business activity but that, by returning the application, DFS did not "offer any opinion as to whether. . . any business activity of the Company requires or would require licensing by New York" (DFS Jan. 4, 2016 letter [Exh. XI to Petition]). The letter provided petitioner with contact information for the Supervising Bank Examiner for DFS' Capital Markets Division. Respondents state that after he received the letter, petitioner did not supplement the application, did not submit a new application for CBC, and did not contact the Supervising Bank Examiner or anyone else at DFS with questions. Instead, he treated the letter as a de facto denial of his application and shut down CBC.

Based on the facts in the petition and on the January 4, 2016 letter, respondents argue, petitioner has not shown standing. They note that petitioner has the burden to establish standing (*Society of the Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 769 [1991]) and that without standing, this matter is not justiciable (*Roberts v Health & Hosp. Corp.*, 87 AD3d 311 [1st Dept 2011]). The party must demonstrate an injury in fact – which, in turn, requires a showing of actual harm due to the administrative action (*N.Y. State Assoc. of Nurse Anesthetists v Novello*, 2 NY3d 207, 214-15 [2004] [Novello]). Actual harm, by definition, cannot be conjectural or ephemeral, and cannot be based on a general harm but must be specific to the individual or entity asserting the claim (*Id.*). Absent such a showing, the Court of Appeals has stated, the lawsuit is "little more than an attempt to legislate through the courts" (*Rudder v Pataki*, 93 NY2d 273, 280 [1999]).

According to respondents, petitioner's failure lies in his inability to demonstrate that he has suffered an injury in fact. He has not shown that he has or is likely to sustain a cognizable injury due to the regulation, they argue, because he submitted an incomplete license application which made adequate review impossible, he began his lawsuit before DFS responded to his application, and he did not attempt to pursue his application when DFS stated he had provided insufficient information to them and they could not evaluate his application. Petitioner cannot assert standing, respondents argue, before DFS even determined whether an application was required. Instead of proceeding with the application process, respondents state, petitioner "charted a decidedly different course by preemptively halting the operations of CBC and Chino LTD and commencing this litigation" (Mem. of Law in Support of Defendants'-Respondents' Cross-Motion to Dismiss the Amended Verified Complaint and Article 78 Petition [Respondents' Mem. in Support], at p 12). Petitioner's decision to shut down his businesses does not confer standing, respondents argue, because petitioner based his decision "on the speculative assumption that their operations *might* be impacted by the Regulation" (*Id.* [emphasis in original]).

Furthermore, respondents argue that LTD's tax returns do not show any causal connection between the regulation and petitioner or LTD's financial losses, because the returns were for 2013 through 2015, and the regulation did not go into effect until the second half of the last of these three years. Thus, LTD's losses of $4,367 in 2013 and $59,667 in 2014 were entirely unrelated to the regulation. The losses of $30,588 in 2015 partly occurred prior to the effective date of the regulation and partly were due to litigation expenses. As for LTD's loss of $53,053 in 2016, respondents note that this purportedly was partly due to litigation expenses, partly because LTD remained an active business and retained its equipment operational in case it prevails in this lawsuit, and partly due to interest on the loan he used to establish his business. Respondents argue

that "these losses plainly arise from [petitioner's] decision to challenge the legality of the Regulation before determining whether it even applied to his businesses, and cannot be plausibly attributed to the Regulation going into effect" (*Id.*).

In opposition, petitioner contends that he has standing. He reiterates the arguments he set forth originally in support of his proceeding. He states that he commenced the petition/action before he received a determination from DFS because he could not afford the regulatory costs of running a virtual currency business, and that he did not respond to the January 4, 2016 letter he received from DFS "because I had already commenced this action in October 2015 and I knew this action could invalidate the Regulation. Therefore, I concluded that it was futile for me and for my business to continue the application process at this stage" (Theo Chino Aff. in Support of Opposition to Cross-Motion [Chino Aff.], at ¶ 16). He states that the January 4, 2016 "response from the Department" forced him "to abandon my Bitcoin processing business because my application *was not approved*" (*Id.*, at ¶ 15 [emphasis supplied]). Petitioner further states that respondents have not submitted documentary evidence which refutes his statement of facts. Therefore, he states, the Court must accept his asserted facts as to standing as true and rule in his favor on this threshold issue. He states that he satisfies the two-pronged test the Court of Appeals set forth in *Novello* (2 NY3d at 211). He states that the closure of his businesses demonstrates his actual harm because "it is reasonably certain that the harm will occur if the challenged action is permitted to continue" (*Police Benevolent Ass'n of N.Y. State Troopers, Inc. v Division of N.Y. State Police*, 29 AD3d 68, 70 [3rd Dept 2006] [Police Benevolent Ass'n]). Citing *New York Propane Gas Ass'n v N.Y. State Dep't of State* (17 AD3d 915, 916 [3rd Dept 2005]), he argues that he need not quantify his loss with particularity. Furthermore, he asserts, the drastic increase in LTD's financial losses following the implementation of the regulations and its accompanying

application process establishes a causal connection, and that his realization that the cost of compliance with the regulation would be prohibitive is causally connected to his decision to shutter his business. He states that he did not shut his business voluntarily but was compelled to do so by the burdens of the application process and the anticipated burden of compliance. He suggests that it was unnecessary for DFS to determine that his business qualified as a virtual currency business under the regulation because he, an expert in the field, knew that LTD was subject to the regulation.

Petitioner also claims standing with respect to his claim for declaratory relief. Relying on *Plaza Health Clubs, Inc. v New York* (76 AD2d 509 [1st Dept 1980] [finding no standing because plaintiffs contended they did not engage in any business activities proscribed by the statute]) for the proposition that the possible threat to his business activity is sufficient to confer standing with respect to this claim. The reasonable certainty of future harm, he states, is enough (*Police Benevolent Ass'n*, 29 AD3d at 70 [finding that standing existed because, due to the petitioners' violations of court orders and the court's warning that they would be held in contempt for their alleged misconduct, the asserted harm was more than speculative]).

In reply, respondents reiterate their earlier arguments. They emphasize that petitioner did not complete the application process or allow DFS to reach a final determination. They contend that petitioner's entire argument rests on the fallacy that DFS' January 4, 2016 letter constitutes a denial of petitioner's application. They challenge petitioner's proximate cause argument because petitioner stopped operating his business before DFS even determined that a license and the accompanying compliance requirements applied. DFS also did not order LTD to cease its operations, respondents point out. Moreover, they contend that petitioner's statement that compliance with the regulation would be unduly burdensome is a speculative allegation regarding anticipatory harm.

DISCUSSION

After careful consideration, the Court concludes that petitioner has no right to commence an Article 78 proceeding and lacks standing to challenge the underlying regulation.

I. Petition

Petitioner did not complete LTD's application, and did not respond to DFS' January 2016 letter which notified him of his failure to do so. Petitioner acknowledges that he abandoned the application process because of the pendency of this hybrid action/proceeding challenging the regulation (Chino Aff. in Opp. To Cross-Motion, at ¶ 16). CPLR § 7803 provides a petitioner with a means to challenge "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR § 7808 [3]). Moreover, "one who objects to the acts of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*DiBlasio v Novello*, 28 AD3d 339, 341 [1st Dept 2006] [citations and internal quotation marks omitted]). Courts cannot "interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency" (*Id.*). In the proceeding at hand, DFS did not reach a final decision. Indeed, it did not reach any decision. Accordingly, there is nothing for this Court to review.

The Court notes that an exception exists to the exhaustion requirement when the action "is challenged as either unconstitutional or wholly beyond its grant of power, when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury" (*Martinez 2001 v New York City Campaign Finance Bd.*, 36 AD3d 544, 548 [1st Dept 2007]). The exception does not apply in this instance. Again, petitioner's failure to complete his application precludes him from raising this argument. Because of his failure, the agency did not take any action

– constitutional or otherwise, and neither within nor exceeding its grant of power. The DFS letter stating more information was necessary is not an action or decision within the meaning of the governing law. Instead, it is the legislation itself that petitioner challenges here. Any irreparable injury petitioner alleges is a result of the underlying law and not of any agency action.

Moreover, even if an ultra vires or unconstitutional action were at issue, petitioner has not shown that DFS has caused it irreparable harm. LTD's tax returns show three-and-a-half years of losses prior to the initiation of this action, and show comparable losses in 2014 – prior to the existence of the regulation – due to ongoing operation expenses. Petitioner attributes the 2016 losses to ongoing operation expenses and litigation costs resulting from this proceeding. Petitioner only shows one sale dated January 4, 2016 with a $279.41 invoice to support his contention regarding lost profits. Petitioner has not shown DFS would have determined the business was subject to the regulation. Although LTD appears to have engaged in a virtual currency business and petitioner claims that it was such a business, DFS never had the opportunity to evaluate the issue because petitioner did not provide it with most of the information it sought and the application obstructed DFS' efforts to obtain further information about him or LTD.

Similarly, petitioner's application for mandamus relief under Article 78 must fail. To the extent that he brings an Article 78 proceeding it is based on a challenge to DFS' action. Here, the purported action relates to petitioner's virtual currency business certification application. Not only did he fail to complete his application, but he does not seek an order mandating the granting of the license. Instead, he challenges the underlying regulation. Article 78 is not the proper vehicle for a challenge to the constitutionality of a regulation (*Westhampton Beach Assoc., LLC v Village of Westhampton Beach*, 151 AD3d 793 [2nd Dept 2017]).

II. Action

Next, the Court examines the question of whether petitioner has standing to challenge the constitutionality of the regulation. This presents a much closer issue than that of his Article 78 proceeding. To establish standing, a plaintiff must show injury in fact, which, "[a]s the term itself implies, . . . must be more than conjectural" (*Quast v Westchester County Bd. of Elections*, 155 AD3d 674, 674 [2nd Dept 2017]). In addition, the plaintiff must establish that he or she falls within the zone of interest which the regulation impacts (*See id.*). Moreover, "personal disagreement and speculative financial loss are insufficient to confer standing" (*Roulan v County of Onandaga*, 21 NY3d 902, 905 [2013] [rejecting plaintiff's standing argument that he sustained financial harm because challenged plan caused him to be assigned fewer criminal cases]; *see New York State Psychiatric Assoc., Inc. v Mills*, 29 AD3d 1058, 1059 [3rd Dept 2006] [asserted financial harm to psychiatrists was speculative]). The issue of standing, when applicable, must be considered at the outset of the litigation (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]). If there is no standing, a court cannot issue a declaration as to the validity of a regulation (*See Roulan*, 21 NY3d at 905).

In the proper circumstances, the argument that a regulation imposes "an unacceptable burden" on an individual or business is sufficient to establish standing (*See Doe v Axelrod*, 136 AD2nd 410 [1st Dept 1988] [concerning regulations on pharmaceutical and medical professions that allegedly interfered with ability to provide medical case, invaded patients' privacy, and violated interstate commerce clause]). If, for example, this matter involved the issue of organizational standing, or, as in *Doe v Axelrod*, a large coalition of business owners who showed harm to their business under the regulation, or an individual or business that could show the probability of financial harm, there might be a strong argument in favor of standing. Here,

however, petitioner did not apply for certification,[8] and has not shown sufficient economic loss. Any argument as to the $5,000 application fee was waived because petitioner did not pay the fee or pursue the application. His economic loss argument is otherwise insufficient because LTD has never made a profit and petitioner showed proof of only one $279.41 sale. Moreover, its losses in 2016, once petitioner thought LTD was subject to the regulation, are not inconsistent with LTD's prior financial history.

III. Motion for Limited Discovery

Petitioner's motion for limited discovery is denied as moot. The discovery petitioner requested included depositions of Nobel Prize-winning New York Times columnist Paul Krugman and former DFS chair Benjamin Lawsky, and any documentary evidence relevant to respondents' conclusion that bitcoin is a financial product or service within the meaning of the regulation. None of the proposed discovery relates to the standing issue. Moreover, the Court notes that even if it had reached the issue of whether bitcoin should be governed by the regulation, it would have concluded that this discovery was unwarranted. It was not necessary to depose Paul Krugman and Benjamin Lasky, or to examine the entire history behind DFS' determination that bitcoin is a financial product governed by the regulation. Instead, the issue is the impact of the regulation on petitioner and other virtual currency businesses, and the discovery he seeks is not relevant to that issue. Petitioner has not provided – or argued that he attempted to provide – any pertinent evidence supporting this critical contention.

[8] The application form he submits here, with so much of the critical information absent and without allowing for further examination by DFS, cannot be considered an application, especially when petitioner abandoned his attempt to obtain certification prior to his receipt of the DFS January 2016 letter.

CONCLUSION

For the reasons above, the Court need not reach the other issues. Accordingly, it is

ORDERED that the cross-motion to dismiss which is part of motion sequence number 001 is granted and therefore the petition, also part of motion sequence number 001, is dismissed; and it is further

ORDERED that motion sequence number 003, which seeks limited pre-joinder discovery, is denied as moot.

Dated: 12/21, 2017

ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE
J.S.C.