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

In the Matter of the Inquiry of LETITIA JAMES, Attorney General of the State of New York, Petitioner, *—against—* iFINEX INC., BFXNA Inc., BFXWW INC., TETHER HOLDINGS LIMITED, TETHER OPERATIONS LIMITED, TETHER LIMITED, TETHER INTERNATIONAL LIMITED, Respondents.	Index No.: 450545/2019 Part 3 Justice Cohen Motion Seq.: 003

RESPONDENTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS AND FOR AN IMMEDIATE STAY

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May 21, 2019

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INTRODUCTION

The Office of the New York Attorney General ("OAG") initiated this special proceeding ostensibly "to protect New York investors." (Doc. 4, at 1-2.) But OAG chose to target two virtual currency businesses that have nothing to do with New York investors — the businesses do not allow New Yorkers on their platforms and do not advertise or otherwise do business here. OAG has not identified, even in a general sense, any "victim" in New York (or, it should be noted, anywhere else). Making matters worse, OAG has proceeded under a statute, the Martin Act, governing "securities" and "commodities," neither of which describes the product bought by the supposed "victims" here, a "stablecoin" called tether.

In light of these indisputable facts, Respondents respectfully request that the entire proceeding be dismissed for lack of personal and subject matter jurisdiction. While the Court is considering those issues, Respondents also respectfully request that the onerous document production demands looming over Respondents be immediately stayed, so that any resulting dismissal will not be issued too late to have meaningful effect.

By way of background, the Court may recall that this special proceeding was brought under a provision of the Martin Act, Gen. Bus. L. § 354, authorizing OAG to petition a court for discovery and an injunction relating to claims that OAG has "determined" it will bring. The Respondents to OAG's petition in this case are affiliated companies in the virtual currency business: iFinex Inc., BFXNA Inc., and BFXWW Inc. (collectively, "Bitfinex," which operates a virtual currency exchange) and Tether Holdings Limited, Tether Operations Limited, Tether Limited and Tether International Limited (collectively "Tether," which issues tethers).

The gist of OAG's application, which was premised on an erroneous legal standard, was that Tether and Bitfinex engaged in an allegedly undisclosed and conflicted line-of-credit

transaction giving Bitfinex access to Tether funds to the detriment of tether holders. (These allegations are false, but they need not be disproven for purposes of this motion.)

Upon learning that OAG sought and obtained an *ex parte* injunction — which OAG promptly trumpeted in a press release — the first order of business for Bitfinex and Tether was to mitigate the harm wrought by OAG's precipitous conduct. Last week, after Bitfinex and Tether had an opportunity to be heard on their motion to vacate the *ex parte* Order, the Court significantly narrowed the injunction.

Bitfinex and Tether made clear in their papers challenging the injunction that they were preserving their jurisdictional objections for purposes of the overall proceeding, which are among the multiple grounds for dismissal here.

First, the Court lacks personal jurisdiction. There are very particular service requirements under Gen. Bus. L. § 354 (personal service of a certified copy of the order resulting from the petition) that OAG has simply ignored. Under First Department precedent, this alone is grounds to dismiss.

Moreover, Bitfinex and Tether are foreign corporations that have no offices or other presence in New York, no customers here, and conduct no business in the state. There is accordingly no basis for "general" personal jurisdiction over them under CPLR 301. Nor is there a basis for "specific" personal jurisdiction under CPLR 302. The key factor under CPLR 302 is "purposeful availment": if a company directs its conduct to a particular state, it can expect to be dragged to court there for matters relating to that conduct. What Tether and Bitfinex have done here is the opposite. They have steered clear of New York (and of the United States), and so cannot fairly be expected to defend legal proceedings here.

Second, the Court lacks subject matter jurisdiction. The Martin Act regulates "commodities" and "securities," but tethers are neither. The definition of "commodities" refers to various tangible items (such as metals and grains) that do not describe tether. And "stablecoins" like tether do not qualify as securities because they are purchased for their functionality — to facilitate other virtual currency transactions — and not with an expectation of profit.

Third, the Court should dismiss this proceeding because the Respondents maintain custody and control over the documents OAG seeks outside the U.S., and the statutory provision at issue, Gen. Bus. L. § 354, does not apply extraterritorially. Statutes are presumed to apply only within New York, and that presumption can be overcome only with a clear indication to the contrary. Here, there is no reason to believe Gen. Bus. L. § 354 applies outside New York. In fact, its service provisions presume only a domestic application.

Finally, the Court should immediately stay any document production obligations while considering the motion to dismiss. If OAG is allowed to continue enforcing the Gen. Bus. L. § 354 Order for documents, any subsequent dismissal of the proceeding will be meaningless. On the other side of the ledger, there is no prejudice to OAG from a brief delay. This request, in fact, is made with some urgency, as the Special Referee has indicated that, absent a stay by 1:00 p.m. on Thursday, May 23, 2019, Bitfinex and Tether will be directed to promptly thereafter begin producing material to OAG. In the alternative, the Court should allow for a brief stay to allow for an emergency appeal, if necessary.

BACKGROUND

Bitfinex and Tether

Bitfinex is among the largest virtual currency trading platforms in the world. (Doc. 24 ¶ 3.) Tether, an affiliate of Bitfinex, operates a platform to store, send, and make purchases of a

digital token known as tether, and is also responsible for issuing tether. (*Id*. ¶¶ 4, 25.) Tethers are a form of "stablecoins," which means their value is pegged to traditional currency like U.S. Dollars and Euros. (*Id.* ¶ 6.) With certain restrictions, tethers can be redeemed on a one-to-one basis for the traditional currency in which they are denominated. (*Id*.) Tether tokens do not constitute an ownership interest in Tether. Stablecoins are generally not bought for investment purposes; their main function is to facilitate other virtual currency transactions. (*Id*. ¶ 9.)

OAG's Investigation

In November 2018, Bitfinex and Tether learned that OAG was conducting an investigation relating to their businesses, and counsel for the companies proactively reached out to OAG to offer their voluntary cooperation. (Doc. 34 ¶ 5.) Bitfinex and Tether cooperated extensively with OAG between November 2018 and April 2019. (*Id*. ¶¶ 5-48.)

OAG Initiates This Special Proceeding

Without any prior warning or notice to Bitfinex and Tether, on April 24, 2019, OAG filed its *ex parte* petition in this matter under Gen. Bus L. § 354 to require Bitfinex and Tether to produce huge volumes of information and for a preliminary injunction. (Docs. 1-20.) The focus of the application was an allegedly undisclosed and "conflicted" line-of-credit transaction between Tether and Bitfinex which, according to OAG, depleted the "reserves" backing tether. (Doc. 1 ¶¶ 72-93.) In fact, the transaction was conducted at arm's length and Tether has disclosed since February (before the transaction closed) that its reserves could be deployed for loans to affiliated entities. (Doc. 24 ¶¶ 25, 31-32.) OAG nonetheless sought a broad injunction prohibiting either company from (among other things) "access[ing]" or making any "claim" on Tether's reserves. (Doc. 35, at 4.) Justice Debra A. James signed OAG's proposed *ex parte* order largely unchanged. (*Id*. at 5.) For purposes of OAG's document demands, Justice James referred the matter to Special Referee Steven E. Liebman. (*Id*. at 2.)

The Respondents Challenge the Injunction

On April 30, 2019, the third business day after the *ex parte* Order, Bitfinex and Tether moved, by Order to Show Cause, to vacate or modify it. (Docs. 23-52.) In doing so, Bitfinex and Tether made clear that they were not consenting to jurisdiction, "because, among other reasons, they do not operate in the United States, and because both companies bar New York residents from doing business on their platforms." (Doc. 52, at 17 n.1.)

On May 16, 2019, the Court granted the motion, in part, substantially narrowing the preliminary injunction, both in scope and duration. (Doc. 76.) The Court did not address any issues of personal jurisdiction. (*Id.*)

The document demands remained unchanged. On Friday, May 17, 2019, Special Referee Liebman informed Bitfinex and Tether that if a stay of the Order was not issued by 1:00 p.m. on Thursday, May 23, 2019, he would require Bitfinex and Tether to begin promptly producing documents to OAG.

The Respondents Lack Minimum Contacts with New York

Bitfinex and Tether have decentralized operations in various different countries including Hong Kong, Switzerland, and Taiwan. (Affirmation of Stuart Hoegner, dated May 21, 2019 ("Hoegner Aff.") ¶ 6.) Neither maintains any office in the United States. (*Id.*)

Bitfinex and Tether do not advertise or market to individuals or entities in New York, or the United States generally. (*Id.* ¶ 16.)

Quite the contrary, Bitfinex, via its Terms of Service, has since January 30, 2017 barred New York customers from its platform altogether; Bitfinex extended that ban to all U.S. individual customers in August 2017 and to U.S. entity customers as of August 2018. (*Id.* ¶¶ 8-10.) The term U.S. Person is defined broadly to include U.S. citizens, residents, U.S. business entities, or foreign entities controlled by U.S. citizens, residents or U.S. business entities. (*Id.* ¶

11.) Moreover, the Terms of Service expressly provide that any person that "resides, is located, has a place of business, or conducts business in the State of New York" is prohibited from being a Bitfinex customer. (*Id.* ¶ 10.)

Tether similarly stopped servicing U.S. Persons (defined the same as above) on November 23, 2017, and thus no longer provides issuances or redemptions of tether to any United States customers. (*Id.* ¶ 12.) In addition, the Tether Terms of Service expressly provide that any person that "resides, is located, has a place of business, or conducts business in the State of New York" is prohibited from being a Tether customer and, accordingly, cannot obtain, purchase tethers from, or redeem tethers from, Tether. (*Id.* ¶ 13.) Bitfinex and Tether conduct screening to prevent U.S. customers from opening accounts, and if a customer is later determined to be a U.S. person in violation of the Terms of Service, that customer's access to services on the platform through the account is terminated. (*Id.* ¶¶ 11; 14.) To the extent that tethers may be traded on other platforms in the United States operated by unaffiliated third-parties, any such trading is part of a secondary tether market over which Bitfinex and Tether have no control and which is independent of the business of Bitfinex or Tether. (*Id.* ¶ 22.)

STANDARDS FOR DISMISSING THE PROCEEDING

"Pursuant to CPLR 103(b), the procedures to be followed in special proceedings . . . 'shall be the same as in actions, and the provisions of the [CPLR] applicable to actions shall be applicable to special proceedings.' The procedures for special proceedings are found in CPLR article 4, which permits a motion to dismiss in lieu of an answer." *Matter of Slisz v. Beyer*, 92 A.D.3d 1238, 1241 (4th Dep't 2012).

Under CPLR 3211(a)(8), a defendant may move to dismiss a case where the court lacks "jurisdiction of the person." This provision may be used to "raise any defect relating to personal

jurisdiction," including that the initiating papers "were served defectively." CPLR 3211, Practice Commentaries § C3211:28 (2018).

CPLR 3211(a)(8) may also be used to dismiss cases in which New York courts lack "general jurisdiction" under CPLR 301 or "specific jurisdiction" under CPLR 302. *Id.* A court may also dismiss a case where the "nexus" between the litigation and the defendants is so attenuated that asserting jurisdiction would violate the Due Process Clause of the U.S. Constitution. David D. Siegel, N.Y. Practice § 58 (6th ed. 2018).

In cases where "jurisdiction and service of process are questioned, plaintiffs have the burden of proving satisfaction of statutory and due process prerequisites." *Stewart v. Volkswagen of Am., Inc.*, 81 N.Y.2d 203, 207 (1993).

Personal jurisdiction is required for a special proceeding like this one, just the same as if it were a plenary action. *Vento v. Alliance Holding Companies, Ltd*, 139 A.D.3d 530 (1st Dep't 2016) (dismissing special proceeding for lack of personal jurisdiction). In a special proceeding, the petitioner bears the "burden of proof by a preponderance of evidence that personal jurisdiction was obtained over respondent[s]." *In re Pickman Brokerage,* 184 A.D.2d 226, 226-27 (1st Dep't 1992); *see also In re Theodore T.*, 78 A.D.3d 955, 956 (2d Dep't 2010) (petitioner bears the "burden of establishing that the court has personal jurisdiction over the respondent").

CPLR 3211(a)(2) authorizes a motion to dismiss where "the court has no[] jurisdiction of the subject matter" of the proceeding. The party "asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence, that it exists." *Hollingsworth v. Regional Transit Service,* 20 Misc. 3d 224, 228 n.10 (N.Y. City Ct. 2008).

DISCUSSION

I. THIS COURT LACKS PERSONAL JURISDICTION OVER BITFINEX AND TETHER

The Court lacks personal jurisdiction over Bitfinex and Tether because OAG failed to properly serve them, and because they lack sufficient contacts with New York to justify dragging them into a court proceeding here.[1]

A. Service Was Defective

The Martin Act specifies exactly how an Order under N.Y. Gen. Bus. L. § 354 should be served: "The order shall be served upon the person named in the endorsement aforesaid by delivering to and leaving with him a certified copy thereof, endorsed as above provided, subject to the payment of witness fees and mileage as and when provided to be paid . . . in connection with attendance pursuant to subpoenas authorized to be issued . . . ." N.Y. Gen. Bus. L. § 355. OAG did not follow any of these steps. It did not "deliver[]" or "leav[e]" with the Respondents a "certified copy" of the Order, nor provide any witness or mileage fees. (Doc. 34 ¶ 49 & Exs. 14, 15.) Instead, a pdf version of the Order was sent by email. (*Id*.) Counsel for Bitfinex and Tether gave no indication that email service would suffice. (*Id*.)

The First Department's decision in *Abrams v. Lurie*, 176 A.D.2d 474 (1st Dep't 1991), is exactly on point and mandates dismissal of this proceeding. In *Abrams*, OAG obtained an *ex parte* order under N.Y. Gen. Bus. L. § 354 purporting to authorize service "by registered mail and overnight express mail." *Id*. at 474. The First Department found that the order had to be vacated because it did not comply with the statute: "The words 'delivering' and 'leaving' connote a clear legislative intent that service of a General Business Law § 354 order be made in

[1] The Respondents' challenge to the preliminary injunction was not a waiver of jurisdictional defenses. *Matter of Town of Clarkstown v. Howe*, 206 A.D.2d 377, 377 (2d Dep't 1994) (holding that "appearance in opposition to the petitioner's application for a preliminary injunction did not constitute a waiver of his jurisdictional objection").

accordance with CPLR 308 (1) [for personal delivery]; a liberal construction might also permit service in accordance with CPLR 308 (2) [delivery at a person's dwelling or business]; a very liberal construction might even permit service in accordance with CPLR 308 (4) [leave-and-mail]; but no reasonable construction would permit service by mailing." *Id*. at 475.

Here, just as in *Abrams*, OAG did not bother to follow the statute. OAG simply decided to take a shortcut by drafting the Order in a manner that purported to authorize service by a method OAG preferred — in this case, by email service on counsel. Under *Abrams*, service was improper, and the proceeding must be dismissed.

B. There Is No Basis for Jurisdiction Under CPLR 301 or 302, And Asserting Jurisdiction Would In All Events Violate the Due Process Clause

Even apart from the service problem, there is no basis for personal jurisdiction over Bitfinex or Tether.

1. The Court Lacks General Jurisdiction Over Bitfinex and Tether

CPLR 301 states: "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." CPLR 301. This carried forward the common law grounds for general jurisdiction that existed when the CPLR was adopted in 1963, including jurisdiction based on a foreign company "doing business" in the state. 2 Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶ 301.00 (2019). Until recently, an entity was considered to be "doing business" if there were "sufficient regular and systematic contacts with the state to fairly permit the court to exercise jurisdiction over it." *Id*.

The Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), however, "significantly impacted the 'doing business' test." 2 Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶ 301.07 (2019). In *Daimler*, the Supreme Court held the Due Process Clause allowed for jurisdiction only where the "corporation's affiliations with the State

are so continuous and systematic as to render it essentially at home in the forum State." 134 S. Ct. at 761 (alterations and quotations omitted). The "paradigm forum" under this standard is either the corporation's place of incorporation or its principal place of business. *Id*. at 760. Another jurisdiction will qualify only in the "exceptional" case. *Id*. at 761 n.19.

Here, Bitfinex and Tether are foreign corporations with no permanent and continuous presence in New York. (Hoegner Aff. ¶¶ 3-6.) They are not remotely "at home" in New York — with neither a place of incorporation nor a principal place of business in New York — and so there is no basis for general jurisdiction.

2. The Court Lacks Specific Jurisdiction Over Bitfinex and Tether

CPLR 302(a)(1) authorizes specific jurisdiction over defendants who "transact[] any business within the state." CPLR 302(a)(1). Under this provision, "a 'substantial relationship' must be established between a defendant's transactions in New York and a plaintiff's cause of action." *Johnson v. Ward*, 4 N.Y.3d 516, 519 (2005). Contact with New York that is "merely coincidental" is insufficient. *Id*. at 520.

Moreover, a plaintiff must also show "some act by which the defendant purposefully avails itself of the privilege of conducting activities within" New York. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007). Jurisdiction is proper in those circumstances because the defendant has "invoked the benefits and protections of" New York law. *Id*. (alteration omitted).[2]

Here, Bitfinex and Tether have hardly "purposely availed" themselves of the privilege of conducting activities in New York, nor have they in any sense "invoked the benefits and

[2] OAG has not specified the exact statutory basis for specific jurisdiction here. While there are other bases for specific jurisdiction under CPLR 302 (such as property ownership), the transacting business subsection appears to be what OAG is intending to invoke.

protections of" New York law. As discussed, they actually *prohibit* New Yorkers and other U.S. Persons from using their platforms. (Hoegner Aff. ¶¶ 8-14.)

That the Bitfinex and Tether platforms may be accessible via the internet from New York does not suffice. In *Paterno v. Laser Spine Institute*, 24 N.Y.3d 370 (2014), a New York plaintiff read an online advertisement for a laser surgery center in Florida, but the Court of Appeals held that the plaintiff's merely accessing the "website in New York is insufficient to establish CPLR 302(a)(1) personal jurisdiction over defendants." *Id.* at 378. If the rule were otherwise, then "personal jurisdiction in Internet-related cases would almost always be found in any forum in the country." *GTE New Media Services Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000).

That New Yorkers may end up holding tethers by purchasing them in the secondary market on competitor exchanges is likewise not a basis for personal jurisdiction. Businesses (including internet businesses) do not become subject to jurisdiction just because their products may end up in the forum. In *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011), the Supreme Court held that New Jersey's state courts could not "exercise jurisdiction over a foreign manufacturer of a product" merely on the theory that the manufacturer "knows or reasonably should know that its products" would end up in New Jersey. As the Supreme Court explained, the manufacturer's knowledge that its products might end up in New Jersey did not amount to "conduct purposefully directed" at that state. *Id.* at 886. This is highly analogous to the situation here. While, for example, tethers may end up in the hands of New Yorkers, Tether the company does not direct any of its business to New York.

The court's ruling in *Triple Up Limited v. Youku Tudou Inc.*, 235 F. Supp. 3d 15, 25 (D.D.C. 2017), is also instructive on this point. There, the plaintiff in a copyright case argued

that the defendant, which operated a Chinese website for uploading videos, was subject to U.S. court jurisdiction because the defendant could have affirmatively blocked all access to its website from the United States, but did not do so. The court agreed that affirmative conduct aimed at blocking U.S. users would suffice to avoid jurisdiction, but found such measures were not required. It was enough that the Chinese website's business was not "'expressly aimed' at the United States"; its focus was on China. *Id.* at 30. The facts here point further against jurisdiction than in *Triple Up* because Bitfinex and Tether have affirmatively chosen to ban U.S. Persons — expressly including New Yorkers — from their platforms. Put simply, what Bitfinex and Tether have done is purposeful *avoidance*, which is the antithesis of purposeful availment.

OAG in its petition has relied on various stray and conclusory allegations to show a New York connection, but none suffice to justify jurisdiction.

First, OAG argues that New Yorkers transacted on the Bitfinex and Tether platforms in the time periods before they were banned. (Doc. 1 ¶ 24.) But those contacts are irrelevant because they are unrelated to the claims at issue here (which is required for specific jurisdiction). To be sure, OAG has not specified exactly what Martin Act claims it is alleging, but a prerequisite to bringing its petition under Gen. Bus. L. § 354 was that OAG "has determined to commence an action under" the Martin Act. Gen. Bus. L. § 354. And the only possible claim at issue, based on the allegedly "undisclosed" line of credit between Bitfinex and Tether, arose only in recent months, long after U.S. Persons were banned. (*See* Doc. 1 ¶ 85.)

Second, OAG claims it has "reason to believe" New York investors still use Bitfinex. (Doc. 1 ¶ 24.) But that bare allegation is untrue, and will not suffice. As the proponent of jurisdiction, OAG must "come forward with evidence to support the existence of a basis upon

which to predicate the exercise of personal jurisdiction." *Roldan v. Dexter Folder Co.*, 178 A.D.2d 589, 590 (2d Dep't 1991).

Third, OAG claims that certain foreign entities known as "Eligible Contract Participants" (or ECPs) have operations in New York through which they transact via Bitfinex or Tether. (Doc. 1 ¶¶ 24, 39.) But under Bitfinex's and Tether's Terms of Service, the only permitted ECPs are foreign entities, headquartered outside the United States. (Hoegner Aff. ¶ 15.) If their shareholders or officers from time to time transact business with Bitfinex or Tether on behalf of a foreign entity from New York, that is a matter entirely outside the Respondents' control. (*Id.*) Regardless, the counterparty in any such transaction is the foreign entity, and the Court should not conflate the location or residence of corporate officials with the location or residence of the ECP itself. *See Duravest, Inc. v. Viscardi, A.G.*, 581 F. Supp. 2d 628, 636 n.6 (S.D.N.Y. 2008) (residence of corporate shareholders is not sufficient to establish personal jurisdiction over corporation).

C. Assertion of Jurisdiction Here Would Violate Due Process

Even if the Court were to conclude that the conduct of Bitfinex and Tether fell within the CPLR standards, OAG would still have to show that "the exercise of jurisdiction comports with due process." *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 214 (2000). This requires a showing that they have sufficient contacts with New York that they "should reasonably anticipate being haled into court" here. *Id.* at 217 (citation omitted). Due Process is not satisfied unless maintaining the suit comports with "traditional notions of fair play and substantial justice." *Id.* (citation omitted). Here, as discussed, Bitfinex and Tether do not transact any business in New York and they prohibit New York customers from using their services. Far from anticipating litigation in New York, Bitfinex and Tether have organized their affairs to

avoid this jurisdiction entirely. Forcing them to defend proceedings here would thus offend any notion of fair play and substantial justice.

On this independent basis, the proceeding must be dismissed.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION UNDER THE MARTIN ACT

Even if the Court had personal jurisdiction over Bitfinex and Tether — which, respectfully, it does not — the proceeding should be dismissed for lack of subject matter jurisdiction because the cryptocurrency tether does not fall within the ambit of the Martin Act. N.Y. Gen. Bus. Law 23-A (§§ 352 *et seq.*).

As is pertinent here, the Martin Act prohibits "fraud, deception, [and] concealment . . . where engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase **within or from this state of any securities or commodities**." N.Y. Gen. Bus. L. § 352-c(1) (emphasis added). Yet the Attorney General has not claimed, and cannot claim, that Bitfinex or Tether have purposely directed any advertisement of tether to, or directed the purchase or sale of tether within, New York. To the contrary, as discussed, Bitfinex and Tether have deliberately avoided New York.

In addition, the OAG has made no showing that tether — the instrument whose holders were allegedly defrauded — is a commodity or a security under the Martin Act. The OAG has only claimed in general terms that tether has some undefined "characteristics of securities and commodities." (Doc. 1 ¶ 28.)

A "commodity" is defined as "any agricultural, grain, animal, chemical, metal or mineral product or byproduct, any gem or gemstone (whether characterized as precious, semi-precious or otherwise), any fuel (whether liquid, gaseous or otherwise), any foreign currency, and any other good, article, or material." N.Y. Gen. Bus. L. § 359-e(14)(a). Tether does not match any of the items listed. It is not, for example, an "animal" or "metal," or even any type of tangible "good,

article, or material."[3] The definition's closest item is a "foreign currency," but the qualifier "foreign" indicates a currency issued by a foreign sovereign government, which tether is not.[4] And numerous U.S. authorities have correctly recognized that virtual currencies are not foreign currencies.[5]

Tether is also not a security. For these purposes, New York courts apply the "*Howey* test," derived from the Supreme Court's opinion in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946). *People v. First Meridian Planning Corp.*, 201 A.D.2d 145, 151 (3d Dep't 1994). The *Howey* test provides that an instrument is a security if it involves: (i) an investment of money; (ii) in a common enterprise; and (iii) with profits to come substantially from the efforts of the promoter or third party. *Id*. at 150. Tethers cannot satisfy *Howey* because they are a form of "stablecoin" used to perform the administrative function of facilitating transactions in other virtual currencies. (Doc. 24 ¶¶ 6-10.) Their reason to exist is to be redeemable at exactly par

[3] While at least two federal courts have found Bitcoin to be a commodity under the federal Commodity Exchange Act, *see CFTC v. McDonnell*, 287 F. Supp. 3d 213, 228 (E.D.N.Y. 2018); *CFTC v. Gelfman Blueprint, Inc.*, No. 17-7181, 2018 WL 6320656, at *1 (S.D.N.Y. Oct. 15, 2018), the relevant federal definition is far more expansive than the Martin Act's definition. Instead of being limited to tangible items, commodities under federal law include "all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(9); *see also McDonnell*, 287 F. Supp. 3d at 225 (emphasizing the phrasing concerning "services, rights, and interests").

[4] Clearly the Legislature did not have in mind privately-issued, virtual "currencies" when the Martin Act was adopted in 1921.

[5] *See In the Matter of Coinflip, Inc.*, CFTC Docket No. 15-29, 2015 WL 5535736, at *5 n.2 (Sept. 27, 2015) ("Bitcoin and other virtual currencies are distinct from 'real' currencies, which are the coin and paper money of the United States or another country that are designated as legal tender, circulate, and are customarily used and accepted as a medium of exchange in the country of issuance."); *Virtual Currency Guidance*, I.R.S. Notice 2014-21 (Apr. 14, 2014) ("[V]irtual currency is not treated as currency that could generate foreign currency gain or loss for U.S. federal tax purposes . . . ."); *Application of FinCen's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies*, FIN-2013-G001 (Mar. 18, 2013) ("Virtual currency does not meet the criteria to be considered 'currency' under the BSA, because it is not legal tender.").

with the U.S. dollar, so that they can be used as an easy and reliable medium of exchange when purchasing or selling other cryptocurrencies. (*Id.* ¶ 7.) As such, there is no expected "profit" from the purchase or sale of tethers. (*Id.* ¶ 9.) Moreover, unlike a share of stock, tethers do not create any ownership or profit interest in, or any rights to participate in the governance of, the company Tether or any of its affiliates. (Hoegner Aff. ¶ 19.) Holders of tethers also do not participate in any revenue generated by the company Tether. (*Id.*)

Courts have found that instruments that function in an analogous fashion — as a medium of exchange between markets — are not securities under the *Howey* test. In *Lehman Bros. Comm'l Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 159, 164 (S.D.N.Y. 2001), the court found that foreign currency exchange transactions and interest rate swaps did not meet the definition of a security. In both cases, the value is based on "market forces," and not on the issuer's "entrepreneurial efforts." *Id*. (citation omitted).

Because tethers are neither commodities nor securities under the Martin Act, and because Bitfinex and Tether have not directed advertisement, purchase, or sale of tethers within New York, this special proceeding should be dismissed for lack of subject matter jurisdiction.

III. THE MARTIN ACT CANNOT COMPEL BITFINEX AND TETHER TO PRODUCE DOCUMENTS LOCATED OUTSIDE OF THE UNITED STATES

Even if this court were to find that it has both personal and subject matter jurisdiction, Bitfinex and Tether still cannot be compelled to produce documents located outside of the United States because the Martin Act has no extraterritorial reach.

The Court of Appeals has recognized the "established presumption . . . against the extraterritorial operation of New York law." *Global Reins. Corp.-U.S. Branch v. Equitas Ltd.*, 18 N.Y.3d 722, 725 (2012); *see also Goshen v. Mut. Life Ins. Co.*, 286 A.D.2d 229, 230 (1st Dep't 2001), *aff'd*, 98 N.Y.2d 314 (2002) (describing the "settled rule of statutory interpretation,

that unless expressly stated otherwise, 'no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state . . . enacting it.'") (citation omitted).

The Supreme Court's decision in *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016), recognizes the same presumption under federal law, and provides a two-part test for the extraterritorial application of a statute that is instructive here.

First, the court must ask, "whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. We must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction." *Id.* Second, "[i]f the statute is not extraterritorial . . . [the court must ask] whether the case involves a domestic application of the statute . . . by looking to the statute's 'focus.' If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.*

Applying the *RJR Nabisco* test here, it is clear that the Order would result in an impermissible extraterritorial application of the Martin Act.

For the first part of the *RJR Nabisco* test, and pursuant to *Equitas Ltd*., Gen. Bus. L. § 354 does not give any clear, affirmative indication that it applies extraterritorially. To the contrary, with one exception (discussed below), orders under that provision are to be served by personal delivery, with mileage and witness fees tendered in the same manner as a subpoena, *see* Gen. Bus. L. § 355 — which *presumes* that the target of the order is within New York. After all, New York courts lack subpoena power outside the State's borders. *Wiseman v. Am. Motors*

Sales Corp., 103 A.D.2d 230, 234 (2d Dep't 1984) (subpoena service "outside this State is void").

Aside from personal delivery, Gen. Bus. L. § 355 authorizes only one other type of service: that is, service via Gen. Bus. L. § 352-b, which refers to out-of-state brokers who register to do business in New York, and designate the Secretary of State to receive process. Again, this presumes the target has a domestic presence. Notably, Gen. Bus. L. § 355 nowhere refers to service of an order under any provisions for persons or entities that are located in another state or country and that lack a New York presence.

The focus of these types of proceedings on New York is consistent with the broader proscriptions of the Martin Act, which address securities and commodities sales "within or from this state." Gen. Bus. L. § 352-c(1). Far from suggesting extraterritorial application, these provisions confirm that the reach of Gen. Bus. L. § 354 is domestic only.

For the second part of the *RJR Nabisco* test, the "focus" of the Martin Act's investigatory power is the production of documents to enable the OAG's fact-gathering efforts. 136 S. Ct. at 2101. Indeed, as this Court noted in the May 16, 2019 Decision & Order, "the dominant purpose of section 354 is to facilitate Petitioner's gathering of facts." (Doc. 76 at 8.) Accordingly, the conduct relevant to the focus of the statute — production of documents — would in these circumstances occur in various foreign countries, where the Respondents maintain custody and control of the documents sought by the Attorney General. (Hoegner Aff. ¶ 23.) This, too, points against any extraterritorial application.

Under somewhat similar circumstances, in *Matter of Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.*, the Second Circuit applied this two-part test to analyze the extraterritorial reach of the Stored Communications Act as it related to data

held in Ireland. 829 F.3d 197, 210 (2d Cir. 2016). The Second Circuit found that (i) the Act did not contain a clear indication of extraterritorial application and (ii) the "focus" of the Act is protecting the privacy of users' stored electronic communications. *Id.* at 216; 219. Therefore, because the execution of the warrant in question — and invasion of the privacy of the customer at issue — would require seizure of data stored in a Dublin datacenter, the court concluded that application of a warrant to data in Ireland would have an impermissible extraterritorial effect. *Id.* at 220-21. This was true, "regardless of the customer's location and regardless of Microsoft's home in the United States." *Id.* at 220. (The *Microsoft* case was appealed to the Supreme Court (*United States v. Microsoft*, 138 S. Ct. 1186 (2018)) and subsequently mooted by legislation.)

Here, as in *Microsoft*, the statute at issue should not be applied extraterritorially. On this independent ground, these proceedings should be dismissed.

IV. THIS COURT SHOULD STAY THE DISCLOSURE REQUIREMENTS PENDING ITS DECISION ON THE MOTION TO DISMISS OR, ALTERNATIVELY, PENDING AN EMERGENCY APPEAL

Bitfinex and Tether must appear before the Special Referee on May 23, 2019 and be prepared to produce documents immediately if a stay of the Order's discovery requirements has not been secured. Because production pursuant to the Order would essentially moot this motion to dismiss, Bitfinex and Tether respectfully request that the Court stay enforcement of the document demands while considering whether to dismiss the entire proceeding.

Absent an immediate stay, Bitfinex and Tether would suffer irreparable harm. OAG, on the other hand, would suffer no prejudice with a stay because the Court has entered an injunction to forestall the allegedly conflicted line-of-credit transaction that was the subject of the OAG's application, and because the injunction directs the preservation of the requested documents.

The CPLR recognizes the virtue of pausing discovery in these circumstances. Under CPLR 3214, discovery is automatically stayed pending a dispositive motion, "unless the court

orders otherwise." CPLR 3214(b). While the Commercial Division Rules state that the "court will determine, upon application of counsel, whether discovery will be stayed pursuant to CPLR 3214(b)," Comm'l Div. R. 11(d), that does not mean that stays are barred or disfavored. Rather, "all the rule directs is a change in initiative," and, "[u]nder either standard, the ultimate determiner of what happens is the judge." David D. Siegel, CPLR 3214 Suspends Disclosure While A Motion To Dismiss Pends; Can Commercial Rule 12 Provide Otherwise? 121 Siegel's Prac. Rev. 1 (Mar. 2002) (discussing predecessor rule).

Courts routinely stay discovery where the motion at issue is "potentially dispositive, and appears to be not unfounded in the law," and where there is no suggestion that the plaintiffs "will be unfairly prejudiced by a stay." *Gandler v. Nazarov*, 94 Civ. 2272 (CSH), 1994 WL 702004, at *4 (S.D.N.Y. Dec. 14, 1994). A stay is particularly appropriate where the pending motion "could be dispositive of [the] entire action," *Am. Booksellers Ass'n, Inc. v. Houghton Mifflin Co.*, 94 CIV. 8566 (JFK), 1995 WL 72376, at *1 (S.D.N.Y. Feb. 22, 1995), and where the pending motion raises purely legal issues, as opposed to "issues relating to the 'sufficiency' of the allegations" that could be expected to be cured with an amended pleading, *United States v. Cty. of Nassau*, 188 F.R.D. 187, 188 (E.D.N.Y.1999). Those factors are all present here. This proceeding could be dismissed in short order on purely legal grounds, sparing Bitfinex and Tether the burden of the onerous document production OAG seeks.

If the Court is not inclined to grant such a stay, Bitfinex and Tether intend to file an emergency appeal and seek a stay from the Appellate Division. Accordingly, Bitfinex and Tether request that the Court at least grant a stay pending resolution of such an appeal.

CPLR 5519(c) authorizes a court to "stay all proceedings to enforce the judgment or order appealed from pending an appeal." CPLR 5519(c). A determination as to whether or not

to grant a stay pending appeal rests in the sound discretion of the Court. *Matter of Grisi v. Shainswit*, 119 A.D.2d 418, 421 (1st Dep't 1986). In determining whether to grant a request for a stay pending appeal, New York courts have considered the following factors: (1) whether the appeal has merit, (2) whether any prejudice will result from granting or denying a stay, (3) whether the stay is designed to delay proceedings, and (4) whether the stay will serve the public interest. *See Herbert v. City of New York*, 126 A.D.2d 404, 406 (1st Dep't 1987); *Russell v. New York City Hous. Auth.*, 160 Misc.2d 237, 239 (N.Y. Sup. Ct. 1992).

A stay of disclosure is warranted here in order to avoid mooting the relief sought by Bitfinex and Tether in their motion while the Court considers the significant legal issues they have raised. This is not designed to delay proceedings, but simply to give the Court adequate time to address the complex legal issues and to avoid imposing onerous disclosure requirements on Bitfinex and Tether that the Court may, and should, ultimately determine are not legally valid.

The document demands in this matter are not simply a part of discovery in an ordinary civil action; they are a primary focus of the *ex parte* Order and OAG's purpose in instituting this Martin Act proceeding. Requiring Bitfinex and Tether to continue with the mandated disclosure while their motion to dismiss is pending would be analogous to requiring a party to respond to document requests in a subpoena while the party's motion to quash that very subpoena is pending. *See Van Amburgh v. Curran*, 73 Misc.2d 1100, 1100 (N.Y. Sup. Ct. 1973) (granting a stay pending appeal of petition to modify subpoenas to attend hearings on grounds that without a stay, the appeal would be "rendered academic").

OAG would suffer no prejudice from a stay of disclosure pending a decision on the motion to dismiss. There is no risk that the materials and information sought will be destroyed during this period, as the injunction requires Bitfinex and Tether to preserve all materials

responsive to the document demands in the Order. And to the extent OAG alleges that conflicted transactions between Bitfinex and Tether are against the public interest, such transactions have been enjoined.

In addition, any stay would be brief. Bitfinex and Tether would concur in an expedited briefing schedule, and would welcome a hearing on the motion as promptly as possible. Bitfinex and Tether also would seek to expedite any appeal from an adverse decision.

Finally, a stay of disclosure during the pendency of the motion to dismiss would conserve judicial resources. Special Referee Liebman's time at the scheduled May 23, 2019 conference, as well as any subsequent conferences and work with the parties, would be rendered wholly unnecessary if the motion to dismiss is granted. Judicial resources would thus be preserved by staying disclosure while the motion to dismiss and any appeal is pending.

CONCLUSION

For the reasons stated above, the Court should dismiss this proceeding. In addition, while it considers the motion to dismiss, the Court should stay the production demands in the April 24, 2019 Order.

Dated: New York, New York
May 21, 2019

Respectfully submitted,

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RULE 17 CERTIFICATION

I am the attorney who is filing this document. I hereby certify that this document, exclusive of the caption, table of contents, table of authorities, and signature block contains 6,989 words as counted by the word-processing system used to prepare the document.

/s/ Zoe Phillips
Zoe Phillips