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By NYSCEF

Hon. Joel M. Cohen
Supreme Court, New York County
60 Centre Street, Room 570
New York, New York 10007

Re: *In re Letitia James v. iFinex Inc., et al.*, Index No.: 450545/2019 (N.Y. Sup. Ct.)

Dear Justice Cohen:

We write on behalf of respondents Bitfinex and Tether, as the Court directed (Doc. 131), to summarize why the two requests from the petitioner ("OAG") in its letter of September 8, 2020 (Doc. 130) should be denied.

First, OAG's request that Bitfinex and Tether produce *every* document encompassed by the *ex parte* Order entered by Justice James in April 2019 under Gen. Bus. L. § 354 (Doc. 35 (the "§ 354 Order")) within 60 days should be denied because the Court and the Special Referee have repeatedly recognized that the § 354 could be subject to challenge, and certain requests are impossibly overbroad or otherwise improper. The parties should be directed to discuss scope issues over the next 30 days, with briefing on any open points thereafter. Bitfinex and Tether would produce documents not subject to dispute on a rolling basis in the meantime.

Second, OAG's request to extend the preliminary injunction should be denied because the alleged disclosure concern giving rise to the injunction has been fully rectified. The allegedly concealed facts have been out in the open for **17 months**, during which consumers have been free to redeem their tethers without restriction. Instead, they have chosen to buy, with tethers' market cap growing **six-fold** (to over $14 billion). The markets' confidence in tethers shows that whatever justification existed before for an injunction has been overtaken by subsequent events.

I. The § 354 Order Should Be Narrowed to a Reasonable Scope

The Martin Act does not give OAG a blank check for discovery. Rather, after determining to file a Martin Act action, OAG may request documents "concerning the alleged fraudulent practices to which the action which [OAG] has determined to bring relates." Gen. Bus. L. § 354. In addition, because the CPLR governs § 354 proceedings, *see* Gen. Bus. L. § 357, the Court may issue protective orders against "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." CPLR 3103.

The Court recognized this point when it granted the Special Referee the power to "work with the parties **with respect to the scope** and timing of compliance" of the document requests,

(Doc. 76, at 8 (emphasis added)), and when the Court stated on the record that requests that were "unreasonable or not terribly relevant" could be challenged. (Doc. 125 at 63.) The Court added that it did not "read the statute to mean that we're sort of potted plants here." (*Id*. at 67.) Special Referee Liebman agreed with this view, too, because in our last appearance he refused to sign a proposed "produce-all-documents" order from OAG that mirrors what OAG requests again here.

Several aspects of the § 354 Order are plainly unreasonable, including the following:

First, the request for "[a]ll documents and communications regarding any transaction, of any nature, to purchase, borrow, disperse or loan tethers . . . wherever located." (Doc. 35 at 3 (Request vii)), is impossibly overbroad since Tether's business is to issue tethers. Asking Tether for all documents about transactions in tethers is akin to asking GM for all documents about cars.

Second, 11 of the 15 requests seek material without regard to the location of the customer or transaction, and thus far exceed what the Martin Act covers: fraudulent transactions "**within or from this state**." N.Y. Gen. Bus. L. § 352-c(1)(c) (emphasis added). OAG claims to have started this case to "protect the interest **of New York** tether holders and Bitfinex clients," (Doc. 1 ¶ 97 (emphasis added)), and should not be granted discovery as if it were a worldwide regulator.[1]

Third, three requests require Bitfinex and Tether to generate reports, accountings, or answer questions. (Doc. 35 at 3 (Request ii) (referring to "information" in a February 26, 2019 letter (Doc. 15)); *id.* at 4 (Requests x, xiii) (requesting a "report" and an "accounting").) But the statute allows only for the production of documents to the extent they are "in [the respondent's] possession or under his control." N.Y. Gen. Bus. L. § 355. Interpreting similar wording in the civil discovery rules, "courts have consistently held that the recipient of a [discovery] demand is not required to create new documents and is only obligated to produce 'preexisting and tangible' items." CPLR 3120, Practice Commentaries ¶ C3120:2B.

Fourth, there is no statutory or other basis to force Bitfinex and Tether to produce, as OAG demands, information into the indefinite future. Just as subpoena targets have "no obligation to supplement the production at a later date," CPLR 3101, Practice Commentaries ¶ C3101:49, so should Bitfinex and Tether not be subjected to indefinite discovery burdens.

Fifth, OAG's "catch-all" request for "[a]ll other documents that may be requested by the Attorney General or a designated assistant" (Doc.35, at 4 (Request xvi)), would elevate OAG's desires into court orders, backed by the power of contempt. This is plainly improper.

In anticipation of OAG's arguing that Bitfinex and Tether are delaying its investigation, the Court should be aware that after the § 354 Order issued Bitfinex and Tether produced 70,000

[1] Courts have rejected OAG's attempts to pursue relief for out-of-state transactions. *State v. Samaritan Asset Mgmt. Services*, 22 Misc.3d 669, 677 (N.Y. Sup. Ct. 2008) (dismissing claims relating to transactions engaged in by out-of-state hedge funds using out-of-state brokers); *Spitzer v. Coventry First LLC*, No. 0404620/2006, 2007 WL 2905486 (N.Y. Sup. Ct. Sep. 25, 2007), *aff'd in relevant part*, 52 A.D.3d 354 (1st Dep't 2008) (dismissing claims pertaining to "transactions that have no identified connection with . . . alleged misconduct in New York").

pages of documents, including all responsive material concerning customers with any New York operations or controlling shareholders—in other words, the material most pertinent to a proper scope of OAG's investigation. Bitfinex and Tether also voluntarily produced extensive information to OAG, even while the First Department stay was in effect, including via two multi-hour presentations and a series of other communications aimed at answering directly the questions OAG indicated it was most interested in having answered.

II. OAG Cannot Show Good Cause to Extend the Injunction

The Court's preliminary injunction effectively prohibits related-party transactions outside the ordinary course of business involving tethers' reserves. (Doc. 76 at 17.) While Bitfinex and Tether do not intend to engage in transactions of that nature, they should not suffer from the reputational taint of a Court-ordered injunction any longer, and should not be forced to bear the risk of contempt sanctions for otherwise lawful activity.

The injunction has been in place for ***17 months***, and any further extension would fly in the face of the Court's statement that it should "expire within a reasonable period." (*Id*. at 16.)

In addition, OAG bears the burden to show why an extension is warranted (*id*. at 16 n.8), and cannot do so, given that the alleged wrongdoing the Court cited to justify the injunction—that the March 2019 loan from Tether to Bitfinex "undermine[d] representations regarding tether upon which investors and traders rely" concerning the backing of tethers (*id*. at 12)—has been fully rectified by updated disclosures and by 17 months of press coverage and public knowledge about the relevant events. Customers fully aware of the supposedly concealed facts have been free to redeem without restrictions or penalties, but instead tethers' market capitalization has increased from $2.5 billion when the injunction issued to over $14 billion today. The markets' confidence stands in stark contrast to the reckless, sky-is-falling rhetoric OAG used in seeking the injunction. (Doc. 1 ¶¶ 76, 98 (expressing concern about Bitfinex "as an ongoing concern" and arguing it would be too risky to even give Bitfinex and Tether notice of the § 354 petition).)

Consumers are well protected today, and do not need OAG's injunction. The loan transaction supposedly impairing tethers' reserves was over 25% of tethers' backing at the time of the injunction, but, thanks to Bitfinex's repayments and tethers' growth, the balance now is less than 4% of tethers' backing. Tethers' assets exceed the outstanding tethers by over $160 million, and earnings on the $14 billion in reserves add to that cushion with each passing day.

Finally, it bears emphasizing that it has now been almost *three years* since Bitfinex and Tether have banned New York customers. (Doc. 78 ¶¶ 7-16.) While we respect this Court's ruling that there has historically been enough "minimum contacts" with New York for jurisdictional purposes, that does not change the fact that a government agency ostensibly representing a constituency that Bitfinex and Tether have chosen to *ban* is the one agency across the world that has secured a court order governing the daily business of Bitfinex and Tether. Whatever justification there may have been for this peculiar state of affairs in the immediate aftermath of the Crypto Capital events (and closer in time to when New Yorkers were allowed on the platforms) has surely diminished by now. It is time for the injunction to end.

Steptoe

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We look forward to Thursday's conference.

Respectfully,

/s/ Charles Michael

Charles Michael

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