SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **63M**

Justice

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IFINEX INC.,BFXNA INC.,BFXWW INC.,TETHER HOLDINGS LIMITED, TETHER OPERATIONS LIMITED, TETHER LIMITED, TETHER INTERNATIONAL LIMITED,

Petitioners,

- v -

STATE OF NEW YORK, OFFICE OF THE ATTORNEY GENERAL, KATHRYN SHEINGOLD,

Respondent.

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INDEX NO. 158119/2021

MOTION DATE 11/09/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, the instant Petition is resolved as follows:

In a settlement agreement entered into on February 18, 2021, Petitioners, iFinex Inc., BFXNA Inc., BFXWW Inc., (collectively "Bitfinex") Tether Holdings Limited, Tether Operations Limited, Tether Limited, and Tether International Limited (collectively "Tether") and the Office of the Attorney General of the State of New York ("OAG") settled an OAG investigation pursuant to New York General Business Law § 352 et. seq. (the "Martin Act") and Executive Law § 63(12) regarding fraud in connection with the Bitfinex trading platform. Said settlement found as follows: Bitfinex operates an online platform for exchanging and trading virtual currency. Bitfinex is a virtual currency trading platforms that allows traders to deposit and withdraw so-called "fiat" currency, including U.S. dollars and exchange same for cryptocurrencies. In August 2017, Bitfinex announced it would no longer permit U.S.-based users to access the trading platform and this

exclusion was expanded to include all U.S.- based entities, except those entities or organizations that maintained an incorporation address outside of the United States in August 2018. Tether, a company closely related to Bitfinex is the issuer of a virtual currency known as "tether," a "stablecoin," intended to always be valued at one U.S. dollar. Tethers are listed on virtual currency trading platforms under the symbol "USDT." From its inception in 2014 until late February 2019, Tether represented that every outstanding tether was "backed" by, and thus should be valued at, one U.S. dollar. In late February 2019, Tether changed its representation, stating on its website that "[e]very tether is always 100% backed by our reserves, which include traditional currency and cash equivalents and, from time to time, may include other assets and receivables from loans made by Tether to third parties, which may include affiliated entities (collectively, 'reserves'). Every tether is also 1-to-1 pegged to the dollar, so 1 USDT is always valued by Tether at 1 USD." Tether did not have a significant bank relationship in its name from at least March 2017 until September 15, 2017, and as such it could not directly process any fiat deposits for purchases of Tethers by customers on either the Tether website or via the Bitfinex trading platform. On the morning of September 15, 2017, Tether opened an account at Noble Bank. Later that day, Bitfinex transferred $382,446,847.71 from Bitfinex's account at Noble Bank into Tether's account at Noble Bank and that day, its accountant conducted a verification of Tether's assets and on September 30, 2017, a post to the Tether website was made, entitled "Transparency Update," in which Tether representing that Tethers were fully backed by US dollars, omitting that from at least June 1, 2017 until September 15, 2017, tethers were not in fact not backed "1-to-1" by USD. Thereafter, in 2019, Bitfinex and Tether misrepresented the status of the Tether reserves after Bitfinex suffered a massive loss of funds. Based upon same, the OAG found that Bitfinex and Tether violated New York General Business Law § 352 *et. seq*. and Executive Law § 62(12). As a result, Petitioners

were fined $18,500,000.00, were required to repay a line of credit in full, were required to implement, maintain, and improve internal controls and procedures in a manner reasonably designed to ensure the soundness of the companies' prohibitions against use of its products and services by New York persons and entities, and provide a quarterly report to OAG. Petitioners were further required to report quarterly documents substantiating Tether's reserve account(s), verification that Bitfinex and Tether have appropriately segregated client, reserve, and operational accounts, documents and information reflecting transfers of funds between and among Bitfinex and Tether and publish quarterly the categories of assets backing Tether. Bitfinex and Tether were further required to report quarterly to OAG a list of payment processors whom they utilize, along with location and contact information for those entities and provide said information to users of the platforms.

In a letter dated June 29, 2021, OAG notified Bitfinex and Tether that Respondent-Intervenor, Coindesk, had submitted a FOIL request seeking material associated with the Settlement Agreement and providing Petitioners a response pursuant to Public Officer's Law §89(5)(b)(2). Petitioners responded in a letter dated July 13, 2021 detailing their objections under § 87(2). Specifically Petitioners objected to the disclosure of

1. **a May 19, 2021 "Quarterly Report Under Settlement"** in its entirety under § 87(2)(e) as it reveals OAG's methodology and approach in their investigation
    a. **Section I. Measures to Prohibit New York Customers**, disclosure of same could defeat Petitioners' attempts to exclude U.S. based customers, allow competitors of Petitioners to gain a competitive advantage and allow bad actors to defeat the objectives of the settlement agreement.

b. **Section IV. Transfers of Funds Between Bitfinex and Tether (p. 4) and Exhibit B – Q1 Transfers of Funds Between Bitfinex and Tether** as said sections describe Petitioners' banking relationships and internal transactions and disclosure would provide detailed data to Tether's competitors regarding Tether's costs and profitability.

c. **Exhibit A – Assets Backing USDT as of March 31, 2021 (p. 5)** as said section identifies all of Tether's financial accounts and the values of the assets held therein as disclosure of same may affect Petitioners' banking relationships and provide a competitive advantage to Tether's competitors.

2. **June 4, 2021 Letter to OAG** in its entirety under § 87(2)(e)

   a. **Section I. Measures to Prohibit New York Customers**

   b. **Section IV. Account Segregation**

   c. **Exhibit A – Assets Backing USDT as of March 31, 2021** for the reasons detailed in item 1.

3. **Attachment 1 - Account On-Hold & Termination Procedure and Attachment 2 – Tether AML Program** as said policies contain the specific steps taken by Bitfinex and Tether to identify and investigate suspicious customers and other customer compliance violations.

4. **Attachment 3 – Bitfinex Terminated Accounts and Attachment 4 – Tether Terminated Accounts**, as said customer lists, if disclosed, would provide competitors with an advantage, constitutes an invasion of privacy of those customers and assist bad actors.

5. **Attachment 5 – Tether Lending** as this data constitutes Tether's most sensitive financial information, as it contains the allocation and type of Tether's assets, upon which Tether's

profitability and competitive advantage relies and as such transactions would be traceable to specific Tether customers.

6. **June 25, 2021 Letter to OAG** in its entirety under § 87(2)(e).
    a. **Section I. Commercial Paper and Reverse Repos, ¶¶ 3-6 and Bullets 1-3 (pp. 2- 3); and Section III** as disclosure of Tether's banking relationships would allow competitors to freeride on Tether's efforts to cultivate said relationships.
    b. **Section IV. Miscellaneous, Bullet 1** as it reveals Tether's CIO's name.
    c. **Section IV. Miscellaneous, Bullets 2-4** as said bullet points contain the names of Tether's asset storage partners as disclosure would aid Tether's competitors.
    d. **Exhibit A – Tether Lending Collateral Wallet Addresses** as disclosure of wallet addresses would cause substantial damage to Tether's competitive position by revealing the specific collateral used in the lending program.
7. **Attachment A, Attachment B, Attachment C, BFX-THR_NYAG1304139, and BFXTHR_NYAG1304140** as said documents contain Tether's profitability strategy, including the non-public names of Tether's banking partners, and highly detailed information regarding Tether's investments, including specific investment vehicles, maturity dates, interest rates, and other data.

In a letter dated July 21, 2021, the OAG denied the portion of Petitioners' request based upon interference with a law enforcement investigation as same is an exemption reserved for OAG, but granting redaction of all other information requested. Coindesk appealed same in an e-mail dated July 29, 2021 and Petitioners responded to same on August 6, 2021. In a final agency appeal determination letter dated August 13, 2021, the FOIL Appeals Officer determined as follows:

1. Data identifying individual customers is properly redacted to avoid an unwarranted invasion of personal privacy under Public Officers Law §§ 87(2)(b) and 89(2)(b)(iv).
2. The account numbers of institutional customers can properly be redacted under Public Officers Law § 87(2)(i), as information shared with the OAG that, if disclosed, would jeopardize the capacity of the Companies to guarantee the security of its information technology assets.
3. As to Petitioners objections based upon trade secrets and injury to competitive position under Public Officers Law § 87(2)(d), said information is not a "trade secret" and Petitioners failed to establish "actual competition and the likelihood of substantial competitive injury." *Encore Coll. Bookstores v. Auxiliary Serv. Corp*., 87 N.Y.2d 410, 421 (1995).

The instant Article 78 action followed said letter.

In determining whether the agency's determination was affected by an error in law, it is Petitioners' burden to establish that the requested materials are exempt from disclosure "by articulating a particularized and specific justification for denying access" (*Matter of Data Tree, LLC v Romaine*, 9 NY3d 454, 463 [2007] [internal quotation marks and citation omitted]; see also *Matter of West Harlem Bus. Group v Empire State Dev. Corp*., 13 NY3d 882, 885 [2009]; *Church of Scientology of N.Y. v State of New York*, 46 NY2d 906, 908 [1979]. Public Officers Law § 87 (2)(d), permits a State agency to "deny access to records or portions thereof that . . . are trade secrets or are submitted . . . by a commercial enterprise . . . and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." In *Matter of Encore Coll. Bookstores v Auxiliary Serv. Corp. of State Univ. of N.Y. at Farmingdale* (87 NY2d 410 [1995]),

the Court of Appeals adopted the test set forth by the federal court in *Worthington Compressors, Inc. v Castle* (662 F2d 45, 51 [DC Cir 1981], which held that

> "[W]hether 'substantial competitive harm' exists for purposes of FOIL's exemption for commercial information tums on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise."
> "Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here" (id. at 420).

As discussed in *Matter of Verizon N.Y., Inc. v. New York State Pub. Serv. Commn.*, 137 A.D.3d 66 (3d Dept. 2016), trade secrets are 'formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it' and if this definition is met, the Court must consider

> whether the alleged trade secret is truly secret by considering: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the business in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others" (*Marietta Corp. v Fairhurst*, 301 AD2d at 738 [internal quotation marks, brackets and citation omitted]). '

Petitioners contend that the contested materials consist of exempt trade secrets and that disclosure risks substantial competitive injury as described in the affirmation of Stuart Hoegner, the General Counsel to Petitioners and the affidavit of Abe Chernin, Petitioners' financial expert. Specifically, Petitioners argue that even the identities of the financial institutions that Petitioners use are extremely valuable to competitors as there is limited support in the financial industry for cryptocurrency companies. Petitioners further contend that even within the Companies, detailed

banking and investment information is known only by the Companies' accounting personnel and the Companies' highest-level executives. Petitioners "do not publicly disclose the specific assets they hold or the exact compositions of those assets because such information would reveal the Companies expected profitability and investment strategy" and disclosure of same would cause injury by revealing the Companies' asset allocation. Petitioners contend that disclosure of internal compliance programs and procedures offers an avenue for competitors to duplicate those policies and allows bad actors to overcome them. Finally, Petitioners contend that Exhibits B and C are entitled to protection as they contain the names of former customers and Tether personnel. The Chernin Affidavit further supports this argument by analogizing to the management of hedge funds and mutual funds (although Petitioners are cryptocurrency exchanges and not remotely similar to such companies). The Court notes that the submitted affidavits fall woefully short of the standards for establishing a trade secret.

Respondent OAG's first objection is that the proper procedure for determining whether certain records fall within a statutory exemption under FOIL is an in-camera review of those records by the Court. See *Verizon New York Inc. v. New York State Pub. Serv. Comm'n*, 46 Misc. 3d 858, 867–68, 991 N.Y.S.2d 841, 850 (Sup. Ct., Albany Cty. 2014), aff'd, 137 A.D.3d 66, 23 N.Y.S.3d 446 (3d Dept. 2016). Said records were subsequently submitted to this Court for in-camera review and the Court has conducted same. OAG further objects to an award of attorney's fees in this matter.

Respondent-Intervenor, CoinDesk argues that Petitioners do not even address the factors needed to establish that the requested information qualifies as a trade secret, submitting only generalized and speculative statements, which as noted *supra* is entirely accurate. CoinDesk further argues that Petitioners have failed to show that the requested documents would cause

substantial competitive harm, as they fail to submit "specific, persuasive evidence" of such likelihood. Again, based upon Petitioners papers, same is undeniable. There is functionally no evidence submitted to establish same. CoinDesk further highlights that the Chernin affidavit analogizes the disclosure requirements for hedge funds to Petitioners herein despite their complete lack of relation. Despite Petitioners' failure to establish that the requested documents are protected trade secrets, this Court will still conduct an *in-camera* review of said documents.

Petitioners submitted three attachments for *in-camera* review, entitled 2021.05.19 – Quarterly Report Under Settlement PROPOSED REDACTIONS, 2021.06.04 – Letter to OAG PROPOSED REDACTIONS, and 2021.06.25 – Letter to OAG PROPOSED REDACTIONS. Petitioners also submit redacted copies of all three documents.

As to Petitioners' "Measures to Prohibit New York Customers," without disclosing the contents of same in the event of possible appellate review, a review of said measures reveals absolutely no items that could be described as unpredictable or proprietary. The Court doubts that Petitioners could develop a more boilerplate protocol if they tried.

As to Petitioners' lists of financial institutions holding the assets backing USDT and the related table further identifying percentages of asset class by account, as previously discussed, Petitioners failed to identify the extent of measures taken by the business to guard the secrecy of the information; the value of the information to the business and its competitors; the amount of effort or money expended by the business in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others. Although there may be limited support in the financial industry for cryptocurrency companies, Petitioners fail to detail the amount of potential harm which would result from the disclosure of the names of said financial institutions, the amounts on deposit which allegedly fully back Tethers, and a general

breakdown of asset class based upon each account. Further, the details of any specific assets held by said financial institutions has not been provided for *in-camera* review and as such is waived to the extent it was disclosed to OAG.

Petitioners having failed to establish a that substantive competitive injury requirement under FOIL has been here met, the Court notes that there is a strong public interest in the disclosure of the requested information, See¸ GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1115 (9th Cir. 1994), 33 F.3d 1109, 1115 (9th Cir. 1994). Petitioners have at all times represented to the public that that every outstanding tether was "backed" by, and thus should be valued at, one U.S. dollar or later that "[e]very tether is always 100% backed by our reserves, which include traditional currency and cash equivalents and, from time to time, may include other assets and receivables from loans made by Tether to third parties, which may include affiliated entities (collectively, 'reserves'). Every tether is also 1-to-1 pegged to the dollar, so 1 USDT is always valued by Tether at 1 USD." However, said statements have been found by OAG to be misleading. As established by Respondents' papers, not only OAG but multiple federal agencies are concerned with Petitioners' lack of transparency and possible commission of crimes. As such, it is hereby

ORDERED that the instant Petition is hereby DENIED and DISMISSED in its entirety.

2/10/2023
DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**