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5 David Scotese, IN PRO PER

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7 UNITED STATES DISTRICT COURT  
8 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
9 EASTERN DIVISION

10  
11 UNITED STATES OF AMERICA

12 Plaintiff,

13 vs.

14 \$15,000.00 IN U.S. CURRENCY,

15 Defendant

) Case No.: CV 16-01166-DSF (KK)

)  
) CLAIMANT DAVID SCOTESE'S RENEWED  
) STATEMENT OF GENUINE DISPUTES OF  
) MATERIAL FACT IN RESPONSE TO  
) PLAINTIFF'S RENEWED MOTION FOR  
) SUMMARY JUDGMENT

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21 Pursuant to Local Rule 56-2 of the Local Rules for the Central  
22 District of California, CLAIMANT sets forth the following genuine  
23 disputes of material fact disputing assertions made in plaintiff's  
24 [PROPOSED] STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF  
25 LAW (Dkt. 39).

26 **Disputes regarding plaintiff's CONCLUSIONS OF LAW**

27 Several of the assertions plaintiff makes in the CONCLUSIONS OF  
28 LAW section are in dispute. To the extent that they can be

1 regarded as material facts, they are in dispute as described  
2 below.

3 **Conclusion of Law 11** of plaintiff's [PROPOSED] STATEMENT OF  
4 UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW (henceforth,  
5 "STATEMENT"), referencing FinCEN guidance, includes this text:

6 "... and in exchange sends 'value that substitutes for currency'  
7 (i.e., bitcoin) to the electronic ..." See STATEMENT, p. 7:25 - p.  
8 8:3. To the extent that FinCEN considers the quoted text to  
9 address bitcoin can be regarded as a material fact, is disputed  
10 (DISPUTE 1).

11 **Conclusion of Law 12** of STATEMENT includes this text:

12 "All three elements of Section 5330(d)(1) are satisfied here,  
13 Claimant was required under 18 U.S.C. § 1960 to register with  
14 FinCEN." See plaintiff's STATEMENT, p. 8:23-25. To the extent that  
15 that all three elements are satisfied can be regarded as a  
16 material fact, it is disputed (DISPUTE 2). To the extent that  
17 claimant was required to register with FinCEN can be regarded as a  
18 material fact, is disputed (DISPUTE 3).

19 The definition of the term "unlicensed money transmitting  
20 business" provides three requirements, ("Requirement (A)",  
21 "Requirement (B)", and "Requirement (C)"), at least one of which  
22 must be met. See 18 U.S.C. 1960(b)(1). Plaintiff asserts that  
23 claimant meets Requirement (B), "fails to comply with the money  
24 transmitting business registration requirements under section 5330  
25 of title 31, United States Code, or regulations prescribed under  
26 such section." To the extent that this assertion can be regarded  
27 as a material fact, it is disputed (DISPUTE 4).

28 Plaintiff asserts that the requirement at 31 C.F.R. 1010.311

1 (which "requires the reporting of transactions in excess of  
2 \$10,000") applies to claimant. See plaintiff's STATEMENT, p. 8:9-  
3 11. To the extent that this assertion can be regarded as a  
4 material fact, it is disputed (DISPUTE 5).

5 **Concise Reasons for Disputes**

6 1. The quoted section of page 4 of *Application of FinCEN's Regulations*  
7 *to Persons Administering, Exchanging, or Using Virtual Currencies*,  
8 FIN-2013-G001, Department of the Treasury, Financial Crimes  
9 Enforcement Network, March 18, 2013 ("GUIDANCE") is about  
10 Centralized Virtual Currencies and bitcoin is not a Centralized  
11 Virtual Currency. This is explained in detail below for the Court's  
12 convenience if there is interest, and so that the record will  
13 reflect it.

14 2. The second element of Section 5330(d)(1) of 31 U.S.C. 5330(d)(1)  
15 was not satisfied because the requirement to file reports under 31  
16 U.S.C. 5313 does not apply to claimant, but to "Each financial  
17 institution other than a casino" (See 31 C.F.R. 1010.311), and  
18 whether or not claimant is a financial institution has not been  
19 established. Claimant denies being a financial institution, and a  
20 justification of that denial is provided below for the Court's  
21 convenience if there is interest, and so that the record will  
22 reflect it.

23 3. The reason for dispute 2 is the same as the reason for dispute 3,  
24 that only financial institutions are required to file reports under  
25 31 U.S.C. 5313.

26 4. Claimant does not meet "Requirement B" because claimant is not a  
27 person "who owns or controls a **money transmitting business**",  
28 because he does not meet the second element of the definition of

1 "money transmitting business". An exploration of plaintiff's  
2 possible arguments against this dispute is provided below for the  
3 Court's convenience if there is interest, and so that the record  
4 will reflect it.

5 5. The requirement at 31 C.F.R. 1010.311 hinges on previously disputed  
6 assertion number 2.

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8 **Extended Analysis and Justifications for Disputes**

9 **Analysis regarding DISPUTE 1:** GUIDANCE, on page four, has more  
10 than what plaintiff has written:

11 " ... **to another location**, namely from the user's account at one  
12 location (e.g., a user's real currency account at a bank) to the  
13 user's convertible virtual currency account **with the**  
14 **administrator**." (First emphasis in original, second emphasis  
15 added). See GUIDANCE, p. 4.

16 The added emphasis here is important for three reasons. First,  
17 the word "the" suggests that there is only one administrator.  
18 This is because plaintiff has quoted from a section of the  
19 guidance which is about *Centralized Virtual Currencies*. Bitcoin is  
20 not a centralized virtual currency. This shows that plaintiff's  
21 parenthetical "(i.e., bitcoin)" at STATEMENT, p. 8:1 is, at best,  
22 misleading.

23 Second, under the section of GUIDANCE that more appropriately  
24 applies to bitcoin, *De-Centralized Virtual Currencies*, the last  
25 paragraph explains two methods through which "[a] person that  
26 creates units of this convertible virtual currency" may or may not  
27 be a money transmitter, and lastly explains that "a person [who  
28 may not have created such units] is an exchanger and a money

1 transmitter if the person accepts such de-centralized convertible  
2 virtual currency from one person **and** transmits it to another  
3 person as part of the acceptance and transfer of currency, funds,  
4 or other value that substitutes for currency." See GUIDANCE, p.  
5 5. There is no evidence that claimant has created any units of  
6 bitcoin. There is no evidence that claimant has accepted bitcoin  
7 "from one person **and** transmit[ted] it to another person as part of  
8 the acceptance and transfer." Emphasis has been added to match  
9 the regulation on which GUIDANCE was based. See 31 C.F.R.  
10 1010.100(ff)(5)(i)(A) and footnote 11 of GUIDANCE, p. 3.

11 Third, FinCEN recognizes that when an administrator, even an  
12 administrator of a de-centralized virtual currency, creates units,  
13 that administrator is facilitating the transfer of the virtual  
14 currency from one party to another, a fundamental property of  
15 virtual currencies:

16 A person that creates units of this convertible virtual  
17 currency and uses it to purchase real or virtual goods and  
18 services is a user of the convertible virtual currency and  
19 not subject to regulation as a money transmitter. By  
20 contrast, a person that creates units of convertible virtual  
21 currency and sells those units to another person for real  
22 currency or its equivalent is engaged in transmission to  
23 another location and is a money transmitter. (GUIDANCE, page  
24 5, second paragraph of section c. De-Centralized Virtual  
25 Currencies)

26 These two situations contain more insight into the distinction  
27 that the regulation at 31 C.F.R. 1010.100(ff)(5)(ii)(F) makes  
28 between money transmission as the essence of a service, and money

1 transmission as "integral to the sale of goods". In the first  
2 situation, the creator of the units uses the currency he generates  
3 to purchase goods and services (a sale to himself), and in order  
4 to make those purchases, the administrator must first create the  
5 units of virtual currency, which requires the "money transmission"  
6 that is fundamental to the creation of such units. In the second,  
7 he is essentially being paid by whoever purchases the units he  
8 creates to transmit virtual currency on behalf of others.

9 Claimant necessarily relies on such administrators to perform  
10 the "transmission" to which plaintiff refers: "Under Section  
11 5330's implementing regulations the element of 'transmission' is  
12 satisfied by a transfer to 'another location or person by any  
13 means.' 31 C.F.R. § 1010.100(ff)(5)(i) (emphasis added)."  
14 STATEMENT, p. 7:22-25.

15 **Analysis regarding DISPUTES 2-5:** The law states "Whoever  
16 knowingly conducts, controls, manages, supervises, directs, or  
17 owns all or part of an **unlicensed money transmitting business**,  
18 shall be fined in accordance with this title or imprisoned not  
19 more than 5 years, or both." (emphasis added) See 18 U.S.C.  
20 1960(a). The definition of the term "unlicensed money  
21 transmitting business" provides three requirements, (herein called  
22 "Requirement (A)", "Requirement (B)", and "Requirement (C)"), at  
23 least one of which must be met. See 18 U.S.C. 1960(b)(1).  
24 Plaintiff asserts that claimant meets Requirement (B). See  
25 STATEMENT, p. 8:9-11. To the extent that this assertion can be  
26 regarded as a material fact, it is disputed as follows:

27 Requirement (B) is that the business "fails to comply with the  
28 money transmitting business registration requirements under

1 section 5330 of title 31, United States Code, or regulations  
2 prescribed under such section." Specifically, the "money  
3 transmitting business registration requirements" are at 31 U.S.C.  
4 5330(a)(1) which says "Any person who owns or controls a **money**  
5 **transmitting business** shall register the business," and 31 C.F.R.  
6 1022.380, which says "each **money services business** (whether or not  
7 licensed as a money services business by any State) must register  
8 with FinCEN." (emphasis added) Clearly, only those who own or  
9 control a "money transmitting business" and those who are **money**  
10 **services businesses** can "fail to comply" with these registration  
11 requirements. In order to suggest that claimant falls into at  
12 least one of these categories, plaintiff claims to show that  
13 claimant fits the definition at 31 U.S.C. 5330(d)(1) of "Money  
14 transmitting business". See STATEMENT, p. 8:23. To the extent that  
15 this claim can be regarded as a material fact, it is disputed as  
16 follows:

17 Plaintiff admits that for claimant to fit the definition at 31  
18 U.S.C. 5330(d)(1), claimant must be "required to file reports  
19 under 31 U.S.C. § 5313." See STATEMENT, p. 6:14-15, 18. Plaintiff  
20 asserts that the requirement at 31 C.F.R. 1010.311 (which  
21 "requires the reporting of transactions in excess of \$10,000")  
22 applies to claimant. See plaintiff's STATEMENT, p. 8:9-11. To the  
23 extent that this assertion can be regarded as a material fact, it  
24 is disputed as follows:

25 Plaintiff fails to consider that the implementing regulation  
26 places such a requirement only on "[e]ach financial institution  
27 other than a casino," (See 31 C.F.R. 1010.311) and that claimant  
28 is not a financial institution. Plaintiff may be counting on the

1 Court's inference that claimant is a financial institution, based  
2 on plaintiff's characterization of claimant as a "currency  
3 exchange," which is listed as one of the things that fits the  
4 definition of "financial institution" at 31 U.S.C. 5312(a)(2)(J).  
5 However, this would require that claimant be exchanging  
6 "currency", or "coin [or] paper money of the United States, U.S.  
7 silver certificates, U.S. notes, Federal Reserve notes, or  
8 official foreign bank notes" for "coin [or] paper money of the  
9 United States, U.S. silver certificates, U.S. notes, Federal  
10 Reserve notes, or official foreign bank notes". See 31 C.F.R.  
11 1010.100(m).

12 This is an obvious dispute with plaintiff's assertion that  
13 claimant owns or controls a "Money transmitting business" as  
14 defined at 31 U.S.C. 5330(d)(1). Thus, there is no evidence that  
15 Requirement (B) is met.

16 Requirement (A) is that such business be "in a State where such  
17 operation is punishable as a misdemeanor or a felony under State  
18 law." There is no evidence that this requirement is met.

19 Requirement (C) is that the business "otherwise involves the  
20 transportation or transmission of funds that are known to the  
21 defendant to have been derived from a criminal offense or are  
22 intended to be used to promote or support unlawful activity." No  
23 evidence has been offered that claimant transported or transmitted  
24 any funds claimant knew to have been derived from a criminal  
25 offense or intended to be used to promote or support unlawful  
26 activity. Thus, there is no evidence that Requirement (C) is met.

27 Plaintiff may alternatively be counting on the Court's inference  
28 that claimant fits the definition of Money Services Business at 31



1 C.F.R. 1010.100(ff)(5). This contention has been addressed in  
2 previous filings (Dkt. 25 and Dkt. 30), the relevant parts of  
3 which are repeated here for the convenience of the Court, slightly  
4 edited to make it appropriate with this Statement of Genuine  
5 Disputes:

6 GUIDANCE, on page 3, states:

7 An administrator or exchanger that (1) accepts and transmits  
8 a convertible virtual currency or (2) buys or sells  
9 convertible virtual currency for any reason is a money  
10 transmitter under FinCEN's regulations, **unless a limitation**  
11 **to** or exemption from **the definition applies to the person.**

12 (emphasis added)

13 The regulations on which this guidance is based explain further  
14 why the emphasis added is important at 31 C.F.R. 1010.100(ff)(5)  
15 Money Transmitter -

16 (i) In General. (A) A person that provides money transmission  
17 services. The term "money transmission services" means the  
18 acceptance of currency, funds, or other value that  
19 substitutes for currency from one person *and* the transmission  
20 of currency, funds, or other value that substitutes for  
21 currency to another location or person by any means.

22 Emphasis of the word "*and*" is in the original.<sup>1</sup>

23 Filed with claimant's previous statement of genuine dispute,  
24 both under the same docket number, is a sworn affidavit (Dkt. 25,

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26 <sup>1</sup>In its section on *Decentralized Virtual Currencies* (where Bitcoin  
27 best fits), FinCEN's guidance also indicates that (if the person  
28 does not create the units of virtual currency) a person must both  
accept the virtual currency from one person **and** transmit it to  
another person as part of the acceptance and transfer in order to  
be a Money Transmitter. (See FIN-2013-G001)

1 PACER pp. 5-7) showing that CLAIMANT is not a Money Transmitter  
2 according to the relevant law because he has not created units of  
3 bitcoin, has not accepted bitcoins and transferred them to another  
4 person or location as part of the acceptance, has ensured that he  
5 sent bitcoin only to the person purchasing it from him, and has  
6 not sold anyone else's bitcoin (Dkt. 25, PACER p. 6:13-19).

7 Plaintiff may attempt to show that Claimant is a "money  
8 transmitter" according to 31 C.F.R. 1010.100(ff)(5)(i)(B) ("Subsection  
9 (B)"), which identifies "Any other person engaged in the transfer of  
10 funds" as a "Money Transmitter." Plaintiff agrees that "the transfer of  
11 funds" is synonymous with "Funds Transfer" (See Plaintiff's Reply  
12 Memorandum in Support of Summary Judgement, Dkt. 29, at p. 2:19-20 and p.  
13 3:1.), and acknowledges that a "Funds Transfer" is "[t]he series of  
14 transactions, beginning with the originator's payment order, made for the  
15 purpose of making payment to the beneficiary of the order" (31 C.F.R.  
16 1010.100(w)). In a tacit admission that the explicit definition<sup>2</sup> of  
17 "Funds Transfer" does not apply to Claimant's activities, plaintiff may  
18 cite In re Koreag, Controle et Revision S.A., 961 F.2d 341, 355(2d Cir.  
19 1992). The citation was previously used to allege that "a 'transfer' and  
20 an 'exchange' are synonymous," See Dkt. 29, p. 3:5-8. A careful reading  
21 of the cited paragraph shows that the McKinney court used the term

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23 <sup>2</sup> "When a statute includes an explicit definition, we must follow  
24 that definition, even if it varies from that term's ordinary  
25 meaning." *Stenberg v. Carhart* 530 U.S. 914 (2000); "It is  
26 axiomatic that the statutory definition of the term excludes  
27 unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465  
28 (1987); "Of course statutory definitions of terms used therein  
prevail over colloquial meanings. *Fox v. Standard Oil Co.*, 294  
U.S. 87.95, 55 S.Ct: 333, 336." *Western Union Telegraph Co. v.*  
*Lenroot*, 323 U.S.490 (1945); "[W]e are not at liberty to put our  
gloss on the definition that Congress provided by looking to the  
generally accepted meaning of the defined term." *Tenn. Prot. &*  
*Advocacy Inc. v. Wells*, 371 F.3d 342 (6th Cir. 2004).

1 "transfer" to indicate the sending of goods, whether such goods be money  
2 or something else ("each party is a seller of the goods which he is to  
3 transfer.", citing N.Y.U.C.C. § 2-304(1) (McKinney 1964)), rather than  
4 the origination of a "payment order" and the series of transactions  
5 between banks that effect payment to a beneficiary.

6 A "payment order" is "An instruction of a sender to a *receiving*  
7 *bank*, transmitted orally, electronically, or in writing, to pay,  
8 or to cause another bank or foreign bank to pay, a fixed or  
9 determinable amount of money to a beneficiary" under specific  
10 conditions (31 C.F.R. 1010.100(11)) (emphasis added). To be a  
11 "Funds Transfer," the first transaction must be a "payment order"  
12 and therefore involve a "receiving bank." Thus, in the context of  
13 the relevant statute, an exchange cannot be a "Funds Transfer" if  
14 it does not involve a "receiving bank." Any exchange that does not  
15 involve a receiving bank is therefore not an activity referenced  
16 in Subsection (B).

17 Plaintiff acknowledges that the defendant currency was sent by  
18 Ochle to Claimant without any "receiving bank" (Dkt. 29, p. 4:1-  
19 2), and that Claimant provided 32 bitcoins to Ochle in exchange  
20 for the defendant currency, also without any "receiving bank"  
21 (Dkt. 29, p.3:13-15.). Since the "receiving bank" element imputed  
22 to the part of the definition of "Money Transmitter" at Subsection  
23 (B) by the definition of "Funds Transfer" at 31 C.F.R.  
24 1010.100(11) was not present, Subsection (B) does not apply to  
25 claimant's trade with Ochle.

26

27 **Analysis Against the Motion for Summary Judgement**

28 The defects in plaintiff's CONCLUSIONS OF LAW can be viewed with

1 respect to guidance from FinCEN in 2014. In January of 2014, in  
2 response to and in reference to a company that requested guidance,  
3 FinCEN wrote "...to the extent that the Company limits its  
4 activities strictly to investing in virtual currency **for its own**  
5 **account**, it is not acting as a money transmitter and is not an MSB  
6 under FinCEN's regulations."<sup>3</sup> (emphasis added) Because claimant has  
7 limited claimant's activities to investing in virtual currency for  
8 his own account, he has not been acting as a money transmitter and  
9 is not an MSB under FinCEN's regulations according to this  
10 guidance. This shows again that plaintiff's conclusions of law  
11 numbered 10, 11, and 12 are genuinely disputed.

12 The guidance from FinCEN also states that "In addition, should  
13 the Company begin to engage as a business in the exchange of  
14 virtual currency against currency of legal tender (or even against  
15 other convertible virtual currency), the Company would become a  
16 money transmitter under FinCEN's regulations."<sup>4</sup> Because the  
17 activities comprising engagement "as a business in the exchange of  
18 virtual currency against currency of legal tender" can be easily  
19 confused with "investing in virtual currency **for [one's] own**  
20 **account**," as plaintiff has apparently done, the distinction is  
21 very important.

22 FinCEN explains, "To the extent that the Company purchases and  
23 sells convertible virtual currency, paying and receiving the  
24 equivalent value in currency of legal tender to and from  
25 counterparties, all exclusively as investments **for its own**  
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27 <sup>3</sup>see <https://www.fincen.gov/sites/default/files/shared/FIN-2014->  
28 [R002.pdf](https://www.fincen.gov/sites/default/files/shared/FIN-2014-R002.pdf), page 4, lines 7-10 of paragraph 1

<sup>4</sup>Ibid., page 4, lines 5-8 of paragraph 2

1 **account**, it is not engaged in the business of exchanging  
2 convertible virtual currency for currency of legal tender for  
3 other persons.”<sup>5</sup> This is contrasted with the fact that it can  
4 “engage as a business in the exchange” of currency (virtual or  
5 real). This is a roundabout way of referring to the inclusion of  
6 “currency exchange” as a financial institution at 31 U.S.C.  
7 5312(a)(2)(J), which makes currency exchanges therefore required  
8 to file reports according to 31 C.F.R. 1010.311. “Currency  
9 exchange” as an institution can be compared to what a “stock  
10 exchange” is. A stock exchange is a business that accepts deposits  
11 of both money and stocks and maintains records of what customers  
12 hold, updating them according to trades made between customers or  
13 with customers of other exchanges. There is a clear interest in  
14 protecting the customers of such businesses by requiring them to  
15 be licensed because they have custody of customer property. This  
16 explains FinCEN’s emphasis on trading “*for its own account*” when  
17 describing situations in which the company would not be acting as  
18 a money transmitter.

19 There is no evidence that claimant has ever had custody of any  
20 property but his own, and thus no evidence that claimant is a  
21 currency exchange or therefore a financial institution which would  
22 be “required to file reports under 31 U.S.C. § 5313.”

23 DATED: February 3, 2017

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<sup>5</sup> *ibid.*, page 4, lines 1-5 of paragraph 1

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VERIFICATION

I, David Scotese, certify and declare that I have read the foregoing Plaintiff's [PROPOSED] STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW and know its contents.

I am a party to this action and I make this verification for that reason. I am informed and allege on that ground that the disputes provided above are true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January \_\_\_, 2017 at Murrieta, California.

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David Scotese  
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PROOF OF SERVICE BY MAILING

I am over the age of 18 and not a party to the within action. I own and operate Mail Center & More. My business address is [redacted].

On January \_\_\_\_, 2017, I served a copy of CLAIMANT DAVID SCOTESE'S RENEWED STATEMENT OF GENUINE DISPUTES OF MATERIAL FACT IN RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT and CLAIMANT DAVID SCOTESE'S AFFIDAVIT, on each person or entity named below by enclosing a copy in an envelope addressed as shown below and placing the envelope for collection and mailing on the date and at the place shown below following our ordinary office practices.

TO: FRANK D. KORTUM  
312 NORTH SPRING STREET  
LOS ANGELES, CALIFNORNIA 90012

I am familiar with the practice of this office for collection and processing correspondence for mailing. on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: January \_\_\_\_, 2017 at Murrieta, California.

\_\_\_\_\_  
Charles Hannum