UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 93551 / November 10, 2021

ADMINISTRATIVE PROCEEDING

File No. 3-20650

In the Matter of **American CryptoFed DAO LLC,** **Respondent.**	**RESPONDENT AMERICAN CRYPTOFED DAO LLC'S MOTION TO LIFT THE ORDER THAT STAYS THE EFFECTIVENESS OF RESPONDENT'S FORM 10.**

On November 10, 2021, the Securities and Exchange Commission ("Commission") issued an order instituting administrative proceedings ("OIP") against American CryptoFed DAO LLC ("American CryptoFed" or "Respondent") pursuant to Section 12(j) of the Securities Exchange Act of 1934. The OIP's Section IV included an order stating, "IT IS FURTHER ORDERED that the institution of these proceedings stays the effectiveness of the Respondent's Form 10 filed on September 16, 2021." ("Stay Order"). Pursuant to *Rule 250 (a) Motion for a ruling on the pleadings*, Respondent hereby moves the Commission to lift the Stay Order as a matter of law.

The Legal Information Institute (LII), a non-profit, public service of Cornell Law School, provides the following definition of **Stay of Proceedings**, attached as Exhibit 1:

A ruling by a court to **stop or suspend a proceeding** or trial temporarily or indefinitely. A court may later lift the stay and continue the proceeding. Some stays are automatic, but others are up to judicial discretion. Usually, the pendency of an appeal usually

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stays proceedings in the court below. In *Long v. Robinson, 432 F.2d 977 (4th Circuit, 1970)* the court held that a party seeking a stay must show: (1) that he will likely prevail on the merits of the appeal; (2) **that he will suffer irreparable injury if the stay is denied;** (3) **that the other parties will not be substantially harmed;** and (4) that the public interest will be served by granting the stay.(Emphasis Added)

Respondent's Form 10 filed on September 16, 2021, would automatically become effective, on November 15, 2021 if the Commission had not issued the Stay Order. It is indisputable that the Stay Order suspended the effective date of Respondent's Form 10 filing, without the due process of first obtaining the Stay Order from a judge, by showing cause of any of the four elements outlined in the case *Long v. Robinson*, 432 F.2d 977 (4th Circuit, 1970) cited above. The clock of the registration statement of the Form 10 has been stopped by the Stay Order. However, Section 12 (j) prohibits the Commission from issuing such a Stay Order without a hearing conducted "on the record." The statute's plain text is below:

> The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, **to suspend the effective date of**, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, **on the record after notice and opportunity for hearing,** that the issuer, of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder." (15 U.S.C. § 78l(j)) (Emphases added).

The statute's plain text in Section 12 (j) explicitly mandates a hearing "on the record," granting Respondent an absolute right to a hearing in this case where the Commission seeks to **suspend the effective date of** a security registration as stated in this OIP. An order to stay Respondent's Form 10 filing can only be made after a hearing "on the record" is held before an **administrative law judge ("ALJ") designated by the Commission**, under which the administrative law judge shall ensure that all evidence is recorded in written form, wholly considered, and submitted to the Commission. As of today, the ALJ has not been designated yet, although more than one month ago, in the press release dated November 10, 2021, attached as Exhibit 2, the Commission announced to the world "American CryptoFed's registration of the two tokens is stayed pending a determination by **an administrative law judge** whether to deny or suspend the registration of the tokens." (Emphasis added). It is

indisputable that a hearing "on the record" has not yet been conducted. Therefore, on November 18, 2021, Respondent wrote an email, attached as Exhibit 3, to request the Division of Enforcement ("Division") to withdraw the Stay Order:

> In summary, as a matter of law, the Commission should immediately withdraw the order which has stayed Respondent's Form 10 filing, because i) there is no genuine issue as to any material fact, and ii) the order does not meet the requirements of the plain text of Section 12 (j) of the Securities Exchange Act of 1934.

Surprisingly, the Division admitted that the Commission has not suspended the registration in a letter to Respondent dated November 22, 2021, attached as Exhibit 4, p.2, stating as follows:

> The Order Instituting Proceedings makes clear that **the Commission has not** denied the registration statement, **suspended it,** or revoked it; rather it states that the Commission has instituted proceedings to determine "whether it is necessary and appropriate for the protection of investors to deny, or suspend the effective date of the" securities registered by the Form 10.

In the next sentence, the Division contradicts its own admission seconds above by stating the following:

> Additionally, as stated in the Order Instituting Proceedings, "the institution of these proceedings ***stays*** the effectiveness of the Respondent's Form 10" (emphasis added).

In the next sentence, in order to justify the Stay Order, the Division deliberately twists the facts and the meaning of the Supreme Court's ruling in *SEC v. Jones (1936):*

> The Division notes that this stay is consistent with the Supreme Court's ruling in SEC v. Jones, 298 U.S. 1 (1936) regarding the legal effect of the SEC instituting proceedings to review a registration statement. There, the Supreme Court noted that a Commission order instituting proceedings to review a registration statement *automatically* stayed that registration statement from becoming effective, **even without an order from the Commission specifying that such a stay was being put in place**: "When proceedings were instituted by the commission and the registrant was notified and called upon to show cause why a stop order should not be issued, the practical effect was to suspend, pending the inquiry, all action of the registrant under his statement." Id. at 18. (Emphasis added).

Again, in their justification to Respondent, the Division had to admit that the Stay Order should not be put in place by stating **"even without an order from the Commission specifying that such a stay was being put in place."** The Supreme Court's ruling in *SEC v.*

Jones, 298 U.S. 1 (1936) does not support the Division's arguments. Instead, it proves the opposite. Two consecutive paragraphs of the decision including the Division's citation should be read in context in order to understand the spirit of the Supreme Court's ruling. All emphasis are added.

> The conclusion to be drawn from all the cases is that after a defendant has been notified of the pendency of a suit seeking an injunction against him, **even though a temporary injunction be not granted**, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided. 1 High on Injunctions (4th ed.), § 5(a).
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> We hold the principle of this rule to be applicable to the present case. When proceedings were instituted by the commission and the registrant was notified and called upon to show cause why a stop order should not be issued, the practical effect was to suspend, pending the inquiry, all action of the registrant under his statement. Unless the registration statement is effective, the issuer of a security who makes use of the mails or of the instrumentalities of interstate commerce to sell the security or to carry the same for the purposes of sale or delivery after sale, § 5 (a) of the act, is liable to severe penalties of fine and imprisonment. § 24. The word "effective," as here employed, connotes completeness of operative force and freedom to act. **And a registration statement which, while still *in fieri,*** is brought under official challenge in respect of its validity and subjected to an official proceeding aimed at its destruction, cannot be so characterized until the challenge is determined in favor of the registrant. In the meantime, since he can act only at his peril, the registration statement can in no real sense be called effective." *SEC v. Jones*, 298 U.S. 1, 18 (1936)

The Supreme Court's ruling clearly indicates the following four points which Respondent already conveyed to the Division via email on November 26, 2021, attached as Exhibit 5, but the Division failed to provide any substantive response.

i. "a temporary injunction be not granted"

In *SEC v. Jones*, an injunction had not been issued. The clock of the registration statement was still running. In contrast, the Commission's Stay Order in the OIP against American CryptoFed was immediately effective. It is the equivalent of a temporary injunction. The clock of the registration statement of the Form 10 has been stopped by the Stay Order.

ii. "When proceedings were instituted by the commission and the registrant was notified and called upon to show cause why a stop order should not be issued, the practical effect was to suspend, pending the inquiry, all action of the registrant under his statement."

In *SEC v. Jones*, the defendant was required "to show cause why a stop order should not be issued," before the stop order was issued. The "practical effect" of a Commission order instituting proceedings was discussed under the condition that the stop order was not actually issued. Through the discussion, the Supreme Court had to find out "whether due regard to the public interest and the protection of investors requires that the withdrawal be denied" *SEC v. Jones,* 298 U.S. 1, 22 (1936) at 22. Due to the "practical effect," on "June 18, in a written communication to the commission, petitioner formally withdrew his application for registration, assigning as a reason, among others, that the commission's action had been given widespread publicity and placed him in a situation to be severely damaged" *Id.* at 13.

Petitioner emphatically says that no steps had been taken looking to the issue of the securities; and this is not denied. So far as the record shows, there were no investors, existing or potential, to be affected. The conclusion seems inevitable that an abandonment of the application was of no concern to anyone except the registrant. The possibility of any other interest in the matter is so shadowy, indefinite, and equivocal that it must be put out of consideration as altogether unreal. Under these circumstances, the right of the registrant to withdraw his application would seem to be as absolute as the right of any person to withdraw an ungranted application for any other form of privilege in respect of which he is at the time alone concerned." *Id*. at 23.

The "practical effect" of a Commission order instituting proceedings was already painful and damaging to the registrant in *SEC v. Jones*, 298 U.S. 1 (1936), even before the stop order was actually issued. The Supreme Court did not provide any opinions to further enhance the Commission's authority to allow a Stay Order or Stop Order to be included in its order instituting proceedings "to show cause why a stop order should not be issued." The clock of the registration statement was still running in *SEC v. Jones*. In contrast, here the

Commission already included the Stay Order in the OIP against American CryptoFed. The clock of the registration statement of the Form 10 has been stopped by the Stay Order.

iii. "And a registration statement which, while still *in fieri*, is brought under official challenge in respect of its validity and subjected to an official proceeding aimed at its destruction, cannot be so characterized until the challenge is determined in favor of the registrant."

In *SEC v. Jones*, the registration statement was "still *in fieri.*" The clock of the registration statement was still running. In contrast, here, the Commission already included the Stay Order in the OIP against American CryptoFed, which makes the Form 10 filing impossible to be "*still in fieri.*" The clock of the registration statement of the Form 10 has been stopped by the Stay Order.

iv. Conclusion

The Supreme Court's ruling in *SEC v. Jones*, 298 U.S. 1 (1936) clearly does not provide authority to the Commission for including a Stay Order in its OIP as the Commission has done against American CryptoFed. The Supreme Court's ruling only discussed the "practical effect" on a registration statement, "while still *in fieri,*" before a stop order is issued. Nowhere does the Supreme Court ruling discuss the authority by which the Commission could include a Stay Order to stop or suspend a registration statement via the Commission's order instituting proceedings.

In *SEC v. Jones*, 298 U.S. 1 (1936), the clock of the registration statement was still running, despite "a Commission order instituting proceedings to review a registration statement". As a matter of fact, the registration statement of "while still *in fieri*" was also confirmed as effective in the dissenting opinion of Justice Cardozo, Justice Brandeis and

Justice Stone, stating "The statement now in question **had been effective for over twenty days**, and the witness did not couple his notice of withdrawal with an affidavit or even a declaration that securities had not been sold." *Id*. at 30 (Emphasis added). The Supreme Court's ruling in *SEC v. Jones* does not support the statement of the Division "a Commission order instituting proceedings to review a registration statement *automatically* stayed that registration statement from becoming effective, even without an order from the Commission specifying that such a stay was being put in place," because the clock of the registration statement was still running and was not ***automatically*** stayed. As such, in order to comply with the Supreme Court's ruling in *SEC v. Jones,* the clock in American CryptoFed's Form 10 filing should be kept running, despite "a Commission order instituting proceedings to review a registration statement."

The spirit of the Supreme Court's ruling in *SEC v. Jones*, 298 U.S. 1 (1936) was clearly and explicitly expressed in the opinion below, which are also relevant in this case of American CryptoFed:

> The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest — that this shall be a government of laws —, because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in Boyd v. United States, 116 U.S. 616, 635, should never be forgotten: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis." *Id.* at 24.
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> A general, roving, offensive, inquisitorial, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an inquisition would be destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end." *Id.* at 27.

For the reasons set forth above, Respondent respectfully requests that the Commission act promptly to lift the Stay Order.

Dated: December 15, 2021

Respectfully submitted,

[redacted]

By /s/ Marian Orr

Marian Orr

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Motion was filed by eFAP and was served on the following on this 15th day of December 2021, in the manner indicated below:

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