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'S REPLY TO THE DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT'S MOTION TO CONFIRM THE TEXT OF SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934 AND MANDATE PROCEDURE

American CryptoFed DAO LLC ("American CryptoFed" or "Respondent"), respectfully submits this reply to The Division of Enforcement ("Division")'s Opposition ("Division's Opposition") to Respondent's Motion to Confirm the Text of Section 12(j) of the Securities Exchange Act of 1934 ("Exchange Act") and Mandate Procedure ("Respondent's Motion").

Instead of admitting their omission of the key concept raised by Respondent's motion, the omission of the phrase "on the record" clearly present in the statute, the Division's Opposition chooses silence on the issue. To this extent, the Division's Opposition is unable to provide any substantial opposition argument. Logically, it can be concluded that the Division's Opposition is intentionally silent as to why the Division omitted, in its assertion of the Paragraph 11 of the OIP, the specific phrase "on the record" which is a key concept for the statute of Section 12(j). The implication is that the Division intentionally manipulated the text of the statute to strengthen

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its allegations and prosecution in the OIP. By their omission of the key phrase "on the record" in the OIP which initiated Respondent's "MOTION TO CONFIRM THE TEXT OF SECTION 12(j) OF THE SECURITIES EXCHANGE ACT OF 1934 AND MANDATE PROCEDURE", as well as the Division's failure to address this omission in their Opposition, it is apparent that the Division's legerdemain is intentional. The Division deliberately seeks to create arbitrary power to avoid a cross-examination for a hearing "on the record" as mandated by a logical chain of statutes of 5 U.S. Code § 554 (a) and (c) as well as 5 U.S. Code § 556 (a) and (d). The Supreme Court in *SEC v. Jones, 298 U.S. 1 (1936)* were aware the incremental intrusion of arbitrary power of the Commission and made their opinion clear, as shown in the excerpt from the Court's decision below:

> Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day — "there is no place in our constitutional system for the exercise of arbitrary power." Garfield v. Goldsby, 211 U.S. 249, 262. …And if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments — even petty encroachments — upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties. *SEC v. Jones, 298 U.S. 1, 22 (1936)* at 25.

Furthermore, instead of arguing directly and substantially against Respondent's motion whether a chain of statutes of 5 U.S. Code § 554 (a) and (c) as well as 5 U.S. Code § 556 (a) and (d), logically lead a hearing "on the record" to a cross-examination at an oral hearing, the Division's Opposition intentionally twisted the intent of Respondent's Motion by stating the following:

> American CryptoFed has submitted the Motion (one of several recent motions ostensibly described as seeking judgment on the pleadings), seeking to have the Commission issue a ruling

that summary disposition can never be used in administrative proceedings and that there must always be an in-person hearing with cross examination.

By this additional legerdemain, the Division mischaracterizes Respondent's motion to be applied to all administrative hearings. However, Respondent's Motion has a laser focus on a hearing "on the record" as required by statute Exchange Act Section 12(j), not all administrative proceedings. For those administrative proceedings without a statute's requirement for a hearing "on the record", Respondent's Motion takes no position. For a hearing "on the record" required by statute, such as Exchange Act Section 12(j), Investment Advisers Act 203(f), etc. the Supreme Court clearly indicates the path leading to a cross-examination at an oral hearing. In Respondent's Motion, the following research by Professor Alexander Platt was provided:

In fact, the Supreme Court had specifically recognized that an action brought by the SEC under Investment Advisers Act § 203(f) was "clearly 'a case of adjudication' within 5 U.S.C. § 554"— thus triggering the APA's formal adjudication rules, including Section 556. (Exhibit 6, p. 292),

However, as the Division's Opposition cannot present a solid legal argument in opposition, it seeks to dismiss Professor Alexander Platt's research by stating at the footnote (p.2) "Respondent relies on a journal article criticizing Kornman. It is axiomatic that an article from a law professor cannot overturn a ruling from a court." The Division even did not bother to review the Supreme Court ruling in *Steadman v. SEC, 450 U.S. 91, 96 n.13 (1981)* raised by Professor Alexander Platt below.

Steadman v. SEC, 450 U.S. 91, 96 n.13 (1981) (holding that an SEC administrative action filed under the authority of Investment Advisers Act 203(f) was "clearly a 'case of adjudication' within 5 U.S.C. § 554" because the statute required the hearing be "conducted 'on the record. (Exhibit 6, p. 249, footnote 35).

The securities laws provide for judicial review of Commission disciplinary proceedings in the federal courts of appeals and specify the scope of such review. Because they do not indicate which standard of proof governs Commission adjudications, however, we turn to § 5 of

the Administrative Procedure Act (APA), 5 U. S. C. § 554, which "applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," except in instances not relevant here. Section 5 (b), 5 U. S. C. § 554 (c) (2), makes the provisions of § 7, 5 U. S. C. § 566, applicable to adjudicatory proceedings. *Steadman v. SEC, 450 U.S. 91, 96 n.13 (1981)* at 97.

What the Division's Opposition relies on is solely the case of *Kornman v. SEC (D.C. Circuit)* which failed to even consider 5 U.S. Code § 556 Section (d) — likely because it was not raised by the parties — and therefore these opinions of *Kornman v. SEC (D.C. Circuit)* cannot be regarded as probative into the issue of whether in a hearing "on the record", the statutes would permit an administrative summary disposition skipping over the procedure of in-person oral hearing for cross-examination.

To the extent that the Division does not analyze the Supreme Court opinion regarding a hearing conducted "on the record" in *Steadman v. SEC, 450 U.S. 91, 96 n.13 (1981)* which triggers a chain of statutes of 5 U.S. Code § 554 (a) and (c) as well as 5 U.S. Code § 556 (a) and (d), leading to a cross-examination at an oral hearing, it does not provide a substantial opposition to Respondent's Motion.

For the reasons set forth above, Respondent respectfully requests that the Commission confirms that (i) Section 12(j) of the Exchange Act contains the specific phrase "on the record" and (ii) cross-examination is mandated by a chain of statutes of 5 U.S. Code § 554 (a) and (c) as well as 5 U.S. Code § 556 (a) and (d), as a matter of law.

Dated: December 21, 2021

Respectfully submitted,

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Marian Orr
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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 21st day of December 2021, in the manner indicated below:

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