UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-20650

In the Matter of

American CryptoFed DAO LLC,

Respondent.

DIVISION OF ENFORCEMENT'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO LIFT THE ORDER THAT STAYS THE EFFECTIVENESS OF RESPONDENT'S FORM 10

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OS Received 12/22/2021

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PRELIMINARY STATEMENT

The Division of Enforcement ("Division") of the U.S. Securities and Exchange Commission ("Commission") respectfully submits this memorandum in opposition to American CryptoFed DAO LLC's ("Respondent" or "American CryptoFed") Motion to Lift the Order That Stays the Effectiveness of Respondent's Form 10 (the "Motion").

On September 16, 2021, American CryptoFed filed a Form 10 ("Respondent's Form 10") seeking to register two tokens (Ducat and Locke) as securities pursuant to Section 12(g) of the Securities Exchange Act of 1934 ("Exchange Act"). Respondent's Form 10 is facially defective and materially deficient. Among other things, it completely lacks audited financial statements—a fact American CryptoFed does not dispute. It is also undisputed that the Form 10 claims the tokens sought to be registered as securities are not securities. This is inherently contradictory and materially misleading. Investors deserve an accurate—and consistent—description from American CryptoFed regarding whether the tokens are or are not securities.

Despite being repeatedly informed of these and numerous other defects in its registration statement, American CryptoFed refused to withdraw the statement. That refusal prompted the Commission to issue the Order Instituting Proceedings ("OIP"). In accordance with the Supreme Court's decision in *Jones v. SEC*, 298 U.S. 1, 18 (1936), the Commission included in the OIP an order staying the effectiveness

of Respondent's Form 10, which otherwise would have become automatically effective under Section 12(g) on November 15, 2021.

American CryptoFed claims that *Jones* does not permit the Commission to issue such a stay. But, as set forth below, Respondent misreads *Jones*, ignores the consequences of their interpretation on the Commission's important mission to protect investors, and overlooks the fact that even if the Division were subject to the type of analysis required for a preliminary injunction, it would easily prevail in this case. For all those reasons, the stay should remain in place.

BACKGROUND

On September 16, 2021, American CryptoFed filed a Form 10 seeking to register its Ducat and Locke tokens as classes of securities pursuant to Exchange Act Section 12(g). Between October 4 and October 29, 2021 staff in the Division and the Division of Corporation Finance ("Corporation Finance") communicated to American CryptoFed that its Form 10 was deficient. Staff explained that the Form 10 failed to comply with the Exchange Act and the rules thereunder because it omitted numerous required items, such as audited financial statements, and further contained materially misleading statements. Corporation Finance staff detailed numerous deficiencies in writing.[1] Division staff urged American CryptoFed to consider withdrawing the Form 10 due to these deficiencies.[2] American CryptoFed refused. And its subsequent October 6, 2021 filing did nothing to remedy the

[1] *See, e.g.,* Exhibit 1 (Oct. 8 Letter from Corporation Finance to American CryptoFed).

[2] *See, e.g.,* Exhibit 2 (Letter from Deborah Tarasevich to American CryptoFed dated October 28).

defects. Under the provisions of Section 12(g), Respondent's Form 10 was due to automatically become effective on November 15, 2021.

On November 10, 2021, before Respondent's Form 10 became effective, the Commission issued the OIP and stayed the automatic effectiveness of American CryptoFed's Form 10 pending the outcome of this proceeding.[3] Counsel for the Division emailed a copy of the OIP to American CryptoFed on November 10, 2021, and Respondent's CEO acknowledged that they were aware of it that same day.[4] The OIP was then officially served by U.S. Mail on November 22, 2021.

The Division has made numerous attempts to move this proceeding forward to a hearing as quickly as possible. In contrast, American CryptoFed has sought delay at each opportunity. The timeline of events in this litigation below makes this contrast clear:

- On November 10, 2021, the Division sent a copy of the OIP to American CryptoFed by email.[5]
- On November 14, 2021, American CryptoFed filed a motion seeking to extend the amount of time it had to file an Answer in these Proceedings.
- On November 15, 2021, the Division made its investigative file available pursuant to Rule 230, fourteen days earlier than required.[6]
- On November 22, 2021, the Division inquired whether American CryptoFed wished to expedite these proceedings.[7]

[3] OIP, Section IV.

[4] Exhibit 3, email from Marian Orr dated November 10, 2021.

[5] Exhibit 4, email from Christopher Bruckmann dated November 10, 2021.

[6] Exhibit 5, Letter from Michael C. Baker to Marian Orr dated November 15, 2021.

[7] Exhibit 6, Letter from Christopher Bruckmann to Marian Orr dated November 22, 2021 at 2-3.

- On November 26, 2021, American CryptoFed responded that "it would be inappropriate to ask 'the Commission to take this matter under consideration on an expedited basis.'"[8]

- On November 29, 2021, the Division informed American CryptoFed that the Division "may nonetheless choose to seek an expedited resolution to this matter."[9]

- On December 6, 2021,[10] American CryptoFed filed an Answer in which it claimed it was unable to admit or deny even some of the most basic allegations in the OIP, and accompanied that Answer with seven duplicative motions for more definite statement.

- Also on December 6, 2021 the Division confirmed that American CryptoFed and the Division had the same understanding that the Commission had ordered a prehearing conference to take place within 14 days of the Answer being filed, meaning here by December 20, 2021. Despite that, American CryptoFed insisted that "[w]e would like to wait for the timing of the Commission's orders regarding our seven Motions for More Definite Statement" before it would agree to a prehearing conference.[11]

- On December 7, 2021, the Division proposed five different dates on which it could conduct the prehearing conference.[12]

- On December 8, 2021, American CryptoFed responded that "we do not think it is appropriate to have the prehearing conference before our seven Motions of [sic] More Definite Statement are considered."[13]

- Also on December 8, 2021, American CryptoFed filed a motion regarding a prehearing conference stating that the conference should not take place until after its seven earlier motions were ruled on.[14]

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[8] Exhibit 7, Email from Marian Orr dated November 26, 2021 at 1.

[9] Exhibit 8, Letter from Christopher Bruckmann to Marian Orr dated November 29, 2021 at 3.

[10] The filing was submitted after hours on Friday December 3, and is therefore deemed filed on December 6, 2021, which was still timely given the previous order granting American CryptoFed's request for an extension.

[11] Exhibit 9, Email from Marian Orr dated December 6, 2021.

[12] Exhibit 10, Email from Christopher Bruckmann dated December 7, 2021.

[13] Exhibit 11, Email from Marian Orr dated December 8, 2021 at 1.

[14] *See* Motion for a Procedure to Determine the Date and Time for the Prehearing Conference at 2-3.

- On December 10, 2021, the Division opposed the motion to delay the prehearing conference, stressing its desire to move this case forward, and offering to hold an additional prehearing conference at a later time if needed.

- Also on December 10, 2021, American CryptoFed filed two additional motions regarding the prehearing conference that made clear its intent to create further delay: Motion for Scheduling the Prehearing Conference After the Securities and Exchange Commission's Ruling on Motion for More Definite Statement No. 2; Motion for a Confirmation that the Prehearing Conference Must Be Conducted Before a Motion for Summary Disposition Is Allowed No. 3.

- On December 12, 2021, American CryptoFed filed two replies in support of its three motions for a prehearing conference, reiterating its desire to delay these proceedings.

- On December 15, 2021, thirty-five days after learning of the OIP and the Stay Order, American CryptoFed filed a motion to lift the stay.

- On December 17, 2021, American CryptoFed filed a Motion to Confirm the Text of Section 12(j) of Securities Exchange Act of 1934 and Mandate Procedure.

- Also on December 17, 2021, American CryptoFed indicated its intent to continue to file additional motions in this proceeding, promising it would be "filing more necessary motions to remove the uncertainties and narrow down the issues."[15]

- On December 18, 2021, American CryptoFed filed two motions: Motion to Confirm the Operation of Form 10, Section 12(g), 12(b) and 12(h) of Securities Exchange Act of 1934; and Motion to Confirm the Operation of Form 10, Rule12b-20 and Section 12 (c) of Securities Exchange Act of 1934.

- On December 19, 2021, American CryptoFed filed a Motion to Dismiss the Order Instituting Administrative Proceedings.

Many of the fifteen motions American CryptoFed has filed over the past several weeks are frivolous and designed to slow down these proceedings. Thus, despite

[15] Exhibit 12, Email from Marian Orr dated December 17, 2021 at 2.

claiming to want a hearing, American CryptoFed has taken repeated steps to avoid a hearing, delay this proceeding, and obfuscate the record.

ARGUMENT

I) The Commission Acted Appropriately in Staying the Automatic Effectiveness of Respondent's Form 10.

Section 12(j) grants the Commission the power to deny, suspend or revoke the registration of securities that are registered with the Commission pursuant to the other provisions of Section 12. Respondent asserts that during the pendency of an administrative proceeding to determine whether to deny a registration statement that has not yet become effective, the Commission is powerless to stay or pause that statement's effectiveness, no matter how deficient it is. That cannot be the case. And such a twisted interpretation is inconsistent with Supreme Court precedent and other case law.

A) The Supreme Court Has Held That a Proceeding to Determine Whether to Deny a Not-Yet-Effective Registration Statement Automatically Stays Its Effectiveness.

In *Jones v. SEC*, 298 U.S. 1 (1936), the Supreme Court explored the limits on the Commission's ability to deny an issuer's request to withdraw a registration statement. In so doing, the Court held that initiating proceedings under Section 8(d) of the Securities Act of 1933 ("Securities Act") stays the effectiveness of a registration statement that would otherwise automatically become effective:

> [W]hat was the status of the registration statement pending the inquiry under § 8 (d)? Notwithstanding the provision of § 8 (a), that the effective date of a registration statement shall be the twentieth day after it is filed, did this intervening action of the commission nevertheless have the effect of suspending the effective operation of the

> statement pending the hearing and determination of the stop-order proceeding?
>
> We are of opinion that it did have that effect. The rule is well settled, both by the courts of England and of this country, that where a suit is brought to enjoin certain acts or activities, for example, the erection of a building or other structure, of which suit the defendant has notice, the hands of the defendant are effectually tied pending a hearing and determination, even though no restraining order or preliminary injunction be issued.

Jones v. SEC, 298 U.S. at 15-16. Here, under the analogous provisions of Section 12(j), the same rule should hold true. Where a registration statement is not yet effective, the Commission's order instituting proceedings to determine whether to deny or suspend the effective date of the registration statement has the automatic effect of pausing the effectiveness of the statement. Thus, the OIP stopped the clock on Respondent's Form 10 five days before it became effective. And the OIP would have done so even if the Commission had not expressly ordered the stay. The Commission's stay order in Section IV of the OIP simply made the stay explicit, and provided clearer notice to Respondent of the effect of the Commission instituting proceedings.

By contrast, if Respondent's reading of *Jones* is correct, and the Commission is powerless to stay a registration statement before a hearing takes place, then the following is true as well: An issuer could file a Form 10 with the Commission, entirely blank but for the name of the security it wishes to register. The issuer could then refuse to withdraw the registration statement (as American CryptoFed refused to do). When the Commission instituted proceedings to deny the registration statement, the issuer could bog down those proceedings by filing duplicative and

meritless motions (as American CryptoFed has), all the while exposing itself, persons assisting it, and (as explained below) even investors who resell the securities to significant legal sanctions. Through these actions, the essentially blank registration statement could become effective. Section 12(j)'s language permitting the Commission to deny or suspend registration statements would be gutted by such a reading. This would also significantly diminish the Commission's role in ensuring adequate disclosures to investors and protecting a well-regulated marketplace. The only sensible reading of *Jones* and Section 12(j) is to permit the Commission to stay not-yet-effective registration statements during the pendency of proceedings to determine whether to deny the effectiveness of those statements.[16]

B) The Administrative Procedure Act Does Not Guarantee a Hearing When There Are No Disputed Facts.

Relying on Section 556 of the Administrative Procedure Act, 5 U.S.C. § 556, American CryptoFed insists it is entitled to an evidentiary hearing before the Commission can deny, suspend, or even stay the effectiveness of, its registration statement. Respondent's motion says nothing about what evidence it would put forth in such a hearing, or what factual issues are disputed and would need to be resolved by a hearing. The motion lists no witnesses Respondent would call, specifies no documents Respondent would enter into evidence, and proffers no facts

[16] Additionally, the Division hopes the Commission will permit it to file its motion for summary disposition soon. The Commission has "repeatedly observed that summary disposition is typically appropriate in proceedings pursuant to Exchange Act Section 12(j) because the issues to be decided are narrowly focused and the facts not genuinely in dispute." *Healthway Shopping Network, et al.*, Exchange Act Release No. 89374, 2020 SEC LEXIS 2893 at *7 (July 22, 2020) (quotations omitted). The Division believes that this case is appropriate for summary disposition. A ruling on a motion for summary disposition could also potentially moot the stay issue.

Respondent would attempt to prove. These omissions are telling: ***American CryptoFed does not dispute the essential factual allegations in the OIP and has no evidence to put forth in its defense.***

American CryptoFed cannot deny that its registration statement lacks required information such as audited financials. Indeed, it has admitted they are not included. Its sole argument in this proceeding is that American CryptoFed is somehow exempt from the federal securities laws.

Because this proceeding can be resolved on the basis of undisputed facts, no evidentiary hearing is needed, either before the Commission issued the stay in the OIP or before the Commission issues a final order in this matter.[17] "The case law . . . is clear that an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose. In such a circumstance, denial of a hearing may be proper even though adjudicatory proceedings are provided for by statute." *Indep. Bankers Asso. v. Bd. of Governors of Fed. Res. Sys.*, 170 U.S. App. D.C. 278, 516 F.2d 1206, 1220 (1975); *see also Nat'l Classification Comm. v. United States*, 250 U.S. App. D.C. 297, 779 F.2d 687, 693 (1985) ("A hearing is required only when it would serve some purpose.") (collecting cases).

Nowhere in any of American CryptoFed's filings to date in this proceeding has Respondent raised any issue of fact that would be dispositive of this motion.

[17] The Division acknowledges that the latter issue is not yet ripe, as the Division has not yet filed a Motion for Summary Disposition.

Nowhere has Respondent claimed, much less put forth evidence, to dispute the following critical allegations:

- Respondent's Form 10 lacked audited financial statements;
- Respondent's Form 10 did not contain a management discussion and analysis of American CryptoFed's financial statements and conditions;
- Respondent's Form 10 simultaneously claimed the tokens were and were not securities; or
- Respondent's Form 10 announces a plan to use a Form S-8 to engage in a mass distribution of token to persons that American CryptoFed deems to be consultants, but who only provide the service of receiving tokens.[18]

Rather, American CryptoFed has admitted that "much of the information required by Paragraphs 5, 6, 12, 13, 16 and 17 [of the OIP] does not exist and will never exist."[19] Any one of these deficiencies would be a basis to deny registration of the Form 10. Because American CryptoFed has not disputed these facts, they are not entitled to a hearing on the stay order. And it is too late for them to dispute these facts now, as arguments raised for a first time in a reply brief should not be entertained. *See Altman v. SEC*, 666F.3d 1322, 1329 (D.C. Cir. 2011).

[18] There are some disputes of fact in this proceeding. For example, there appears to be a factual dispute regarding whether Respondent's Form 10 disclosed plans to illegally use a Form S-8 to distribute securities to more than 500 persons ***and*** entities, or just to more than 500 persons. To the extent there are such disputes, the Division is not asking, in this Opposition, that the Commission rely on the disputed allegations. The issue is not whether there is a disputed fact. The issue is whether there is a disputed fact material to the outcome of the proceeding or this motion. Because the undisputed facts provide more than a sufficient basis to deny registration and keep the stay in place, there is no need for a hearing.

[19] Respondent's Motion for More Definite Statement #4 ("Motion #4") at 2.

1) American CryptoFed Has Admitted It Did Not Provide Audited Financials.

Item 13 of Form 10 requires registrants to furnish audited financial statements that are in compliance with Article 3 or 8 of Regulation S-X.[20] But Respondent's Form 10 does not contain any financial statements, audited or otherwise. American CryptoFed has specifically admitted that it did not provide audited financial information. In its Motion for More Definite Statement #4, American CryptoFed stated that in its "Form 10 filing, we clearly explain CryptoFed does not have and will never have any revenue or costs . . . ***there are [sic] no financial information or statement to be provided or audited***."[21] That admission alone renders a factual hearing completely unnecessary. American CryptoFed's only path to avoiding having its registration statement denied requires it to show as a matter of law that it did not need to include audited financials in its registration statement. As discussed below, they cannot prevail on that basis.

2) American CryptoFed Has Admitted That It Did Not Provide a Management Discussion and Analysis of Its Financial Statements.

Item 2 of Form 10 requires a registrant to include management's discussion and analysis of the registrant's financial condition / results of operations pursuant to Item 303 of Regulation S-K.[22] As with its audited financial information, American CryptoFed has admitted that it did not provide the information required by this

[20] *See* 17 C.F.R. § 210.3-01 *et seq.;* § 210.8-01 *et seq.*

[21] Motion #4 at 3 (emphasis added).

[22] 17 C.F.R. § 229.303.

item, baldly stating only that "there are [sic] no financial information or statement to be provided."[23] Accordingly, there is no factual dispute regarding this allegation.

3) American CryptoFed Does Not Dispute That It Has Simultaneously Claimed the Tokens Were and Were Not Securities.

Respondent's Form 10 purports to register the Ducat and Locke tokens as securities, while simultaneously denying that the tokens are securities. This is inherently misleading and deceptive. The very purpose of Form 10, as stated on the cover page, is to serve as a "General Form For Registration of Securities."[24] The cover section of Respondent's Form 10 lists the Ducat and Locke tokens as "***Securities*** to be registered pursuant to Section 12(g) of the Act."[25] Respondent's Form 10 then states in multiple places that these tokens are not securities, such as on page 5, where it claims that "CryptoFed is registering Locke and Ducat tokens with the SEC as utility tokens, ***not as securities***."[26]

American CryptoFed's Amendment No. 1 to Form 10 filed with the Commission on October 6, 2021 similarly states in the cover section that Ducat and Locke are "***Securities*** to be registered pursuant to Section 12(g) of the Act" but

[23] Motion #4 at 3 (emphasis added).

[24] Exhibit 13 (SEC Form 10 and Instructions).

[25] Exhibit 14 at 2 (Respondent's Form 10) (emphasis added).

[26] *See, e.g.,* Exhibit 14 at 3, 5 (Respondent's Form 10) (emphasis added); also stating "Section 2.9 of Item 1: Business entitled '2.9. Locke and Ducat as Utility Tokens' explains why the Locke and Ducat tokens are utility tokens, not securities."

then contradicts that on the next page with a bold heading proclaiming "**Ducat and Locke Are Not Securities.**"[27]

American CryptoFed's filings in this proceeding have only exacerbated these misstatements. American CryptoFed asserts that the Commission should allow its Form 10 registering the tokens as securities to become effective,[28] but simultaneously claims that American CryptoFed "***does not issue any securities.***"[29] These statements are inherently inconsistent and misleading.[30] Although American CryptoFed may have legal arguments that its tokens are not (or are) securities, there is no factual dispute: Respondent's Form 10 and amendment claims that the tokens both are securities and are not securities.

4) Although American CryptoFed Is Not Entitled to a Hearing, the Division Is Prepared to Conduct One.

As discussed above, American CryptoFed is not entitled to an evidentiary hearing. They have presented no issue of fact to be resolved at a hearing, and they have repeatedly sought to delay this proceeding. But if there were a hearing, the Division would be ready to present evidence regarding the omissions and misstatements in Respondent's Form 10 as outlined above, specified in the OIP, and

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[27] *Compare Exhibit* 15 at 2 (Oct. 6 filing) (emphasis added) *with* Exhibit 15 at 3 (Oct. 6 filing) (emphasis in original).

[28] Answer at Section IV; December 15, 2021 Motion to Lift the Order That Stays the Effectiveness of Respondent's Form 10 at 1.

[29] Motion #4 at 5. See also Motion for More Definite Statement #3 at 2. Compare that with Exhibit 14 at 8 (Respondent's Form 10 Item 2.2), where Respondent asserts "To accomplish its mission, [American] CryptoFed issues two utility tokens called Ducat and Locke . . ."

[30] The Commission need not decide whether the Ducat and Locke tokens are securities to rule on this motion. It only need to find that it is materially misleading for an issuer to both describe a token as a security, and insist that it is not a security.

discussed in this memorandum. Whether at a hearing, or through the undisputed facts addressed in this memorandum, the Division has a prevailing argument that the stay should remain in place.

C) The Division Would Prevail at a Hearing Similar to a Preliminary Injunction Hearing.

Respondent relies on *Long v. Robinson*, 432 F.2d 977 (4th Cir. 1970) for the proposition 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. However, the *Long* case, which concerned the stay of a proceeding while a matter was being appealed, is inapposite to the present matter.

First, this proceeding against American CryptoFed has not been stayed, nor appealed, so the formulation of the traditional injunction standard in *Long* does not apply.

Second, when the Commission seeks an injunction, it is not held to the traditional standard of a private litigant. Instead, the Commission only needs to make a substantial showing as to the likelihood of success as to a current violation and a reasonable likelihood that the violation will continue (or be repeated). As a court recently observed in another digital asset case where the Commission sought (and obtained) an injunction:

> The required proper showing depends on the nature of the relief sought. A preliminary injunction enjoining violations of the securities laws is appropriate if the SEC makes a substantial showing of likelihood of success as to a current violation. If the SEC seeks to

> enjoin an ongoing violation of the securities laws, as is the case here, it must make a proper showing of a risk of future harm, but does not need to show a risk of repetition. The sole function of an action for injunction is to forestall future violations. All it takes to make the cause of action for relief by injunction is a real threat of future violation or a contemporary violation of a nature likely to continue or recur.

SEC v. Telegram Grp. Inc., 448 F. Supp. 3d 352, 364 (S.D.N.Y. 2020) (cleaned up) (quoting *SEC v. Gonzalez de Castilla*, 145 F. Supp. 2d 402, 414-15 (S.D.N.Y. 2001); *SEC v. Cavanagh*, 155 F.3d 129, 132 (2d Cir. 1998); *SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990); *United States v. Or. St. Med. Soc'y*, 343 U.S. 326, 333, 72 S. Ct. 690, 96 L. Ed. 978 (1952)).[31]

This proceeding is not one where the Division should be held to either the traditional preliminary injunction standard, or the preliminary injunction standard applied when the Commission brings cases in district court. But if the Division were held to either standard, it would prevail.

1) The Division Has Made a Substantial Showing of a Likelihood of Success.

(a) American CryptoFed Violated the Exchange Act and Rules Thereunder by Not Including Audited Financial Information in Its Form 10.

The Division has made substantial showing that American CryptoFed violated the federal securities laws. Exchange Act Section 12(g) requires that issuers registering a security pursuant to Section 12 do so by "filing with the Commission a registration statement . . . containing such information and

[31] *See also SEC v. Bravata*, 763 F. Supp. 2d 891, 918-19 (E.D. Mich. 2011); *Unique Fin. Concepts, Inc.*, 196 F.3d 1196 (11th Cir. 1999); *SEC v. Thibeault*, 80 F. Supp. 3d 288, 291 (D. Mass. 2015). *SEC v. Schiffer*, 97 Civ. 5853, 1998 U.S. Dist. LEXIS 8579, at *3-5 (S.D.N.Y. June 10, 1998).

documents as the Commission may specify." 18 U.S.C. § 78l(g). The Commission promulgated articles 3 and 8 of Regulation S-X to require that issuers registering under Section 12(g) provide a Form 10 that includes audited financial statements and other financial information. 17 C.F.R. § 210.3-01 *et seq.;* § 210.8-01 *et seq*. It is undisputed that Respondent's Form 10 lacks audited financial statements. Thus, American CryptoFed has violated Section 12(g). The Division has therefore made a substantial showing that Respondent has violated the federal securities laws.

Moreover, the information American CryptoFed failed to provide is material. Indeed, the Commission has long recognized that audited financials are one of the most critical pieces of information in a registration statement. *See, e.g., Queensboro Gold Mines, Ltd.*, 2 S.E.C. 860, 862-863 (1937) (suspending registration statement under Securities Act Section 8(d) due to failure to include fully audited financial information). As recently as this year, a Commission Administrative Law Judge reiterated how important financial statements are to investors, finding that "the materiality of this type of information 'relating to financial condition, solvency and profitability is not subject to serious challenge.'" *Reg. Statements of Crest Radius et al.*, Initial Dec. Rel. No. 1406 2021 SEC LEXIS 42, at *10 (Jan. 5, 2021) (suspending registration statement under Securities Act Section 8(d) due in part to the fact that information required by under Regulation S-K and Regulation S-X was false) (quoting *SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980)).

Independent auditors would validate (or not) American CryptoFed's claims regarding its financial statements. In particular, auditors would validate now (and

on an annual basis going forward) that American CryptoFed has operated without expenses, which is critical to its stated plans and therefore highly material to any potential investor. Such verification is particularly important here, given Respondent's vague plan to revolutionize the entire world's monetary system (while preserving $250 billion worth of this purported trillion-dollar monetary system for the backers of the venture).

A registration statement that lacks audited financials is fatally defective, and the Commission has repeatedly found issuers to have violated the federal securities laws when registration statements lack audited financials. For example in *Citizens Capital Corp.*, the Commission found the filings to be "materially deficient" because they "lacked audited financial statements." Exchange Act Release No. 67313, 2012 SEC LEXIS 2024 at *21-22 (June 29, 2012); *see also Calais Resources, Inc.,* Exchange Act Release No. 67312, 2012 SEC LEXIS 2023 at *25-26 (Jun. 29, 2012) (revoking registration under Section 12(j) and citing the lack of audited financial statements as one basis). Courts have also stressed how critical audited financials are. For example in *SEC v. Diversified Growth Corp*., the court found that the "failure to provide audited financials is so material that even if this were the only problem it would render the filings inadequate." 595 F. Supp. 1159, 1166 (D.D.C. 1984).

(b) American CryptoFed Violated the Federal Securities Laws by Not Including a Discussion and Analysis of Financial Information in Its Form 10.

It is also undisputed that Respondent's Form 10 lacks the discussion and analysis required by Item 303 of Regulation S-K. This is an additional violation of

the federal securities laws. And these are also material omissions. In *SEC v. Diversified Growth Corp.*, the court found that an issuer's financial statements were deficient because "[w]hile 17 CFR § 229.303 [Regulation S-K 303] calls for a thorough discussion and analysis of the results of operations, liquidity, and capital resources in the Management Discussion and Analysis Section, [the] 10-Ks only provide one sentence expressing a decrease in general and administrative expenses." 595 F. Supp. at 1166-1167. Similarly, in *Reg. Statement of Hiex Dev. USA, Inc.*, Exchange Act Release No. 26722, 1989 SEC LEXIS 1013 at *10-12 (April 13, 1989), the Commission cited misstatements in the management discussion and analysis required by Item 303 of Regulation S-K as one of the reasons a Form 10 was materially deficient and therefore revoked registration under Section 12(j).

(c) American CryptoFed Violated the Federal Securities Laws When It Misleadingly Claimed That Its Tokens Both Were and Were Not Securities.

There is also no dispute that American CryptoFed has claimed that its tokens both are and are not securities. This is inherently contradictory and misleading. Exchange Act Section 12(g) requires issuers to file a registration statement with the Commission when certain circumstances are met. When there is a requirement to file a form with the Commission, it is self-evident that the form cannot contain materially misleading statements. *See SEC v. Kalvex*, 425 F. Supp. 310, 316 (S.D.N.Y. 1975) ("Clearly the requirement that an issuer file reports under Section 13(a) embodies the requirement that such reports be true and correct, and a failure to comply with such section would result in violations of the securities laws.").

The statements in the Form 10 that the tokens both are and are not securities are inherently deceptive. Investors deserve an accurate—and consistent—description from American CryptoFed regarding whether the tokens are or are not securities. Instead, in an effort to cloak itself in a veneer of legitimacy, American CryptoFed seeks to claim that its tokens have been registered with the Commission, while at the same time denying that its tokens are securities and disclosing only the information that it has unilaterally decided to provide. If the tokens are securities,[32] then any forms American CryptoFed files with the Commission as part of an effort to register and distribute the tokens must contain all information required by the Commission. And if the tokens are not securities, then American CryptoFed cannot and should not be permitted to use the Commission's forms to disclose information to the public or to purportedly validate a mass distribution of the tokens.

The Commission has previously found that including misleading information in a registration statement is a violation of the federal securities laws. *See Reg. Statement of Hiex*, 1989 SEC LEXIS 1013 at *13-14 (Where a Form 10 contained "inaccurate and/or inadequate disclosures regarding certain transactions" the issuer "violated Section 12(g) of the Exchange Act and Rule 12b-20 thereunder."); *Reg. Statements of Crest Radius et al.*, Initial Dec. Rel. No. 1406 2021 SEC LEXIS 42, at *9 (Jan. 5, 2021) (suspending registration statement under Securities Act Section 8(d) due in part to material misstatements).

[32] The Division is not conceding that the tokens are not securities.

Accordingly, the Division has made a clear and substantial showing that American CryptoFed has violated the federal securities laws and that the violation is ongoing.

(d) There Is Risk of Future Harm Without a Stay.

Absent a stay, American CryptoFed clearly intends to begin "mass distribution" of its tokens. This will cause harm for several reasons.

First, without a stay there will be harm through a potential violation of Securities Act Section 5, 18 U.S.C. §77e, by American CryptoFed and the individuals assisting it in an unregistered securities offering. American CryptoFed's Form 10 states that after it becomes effective, American CryptoFed is planning a "mass distribution"[33] to more than 500 persons[34] through a Form S-8 that would be automatically effective upon filing.[35] The Form 10 further claims that each of these token recipients would be a "consultant" or an "advisor" because "[b]y holding Locke tokens *per se*, token holders by definition perform services to [American] CryptoFed, because the [American] CryptoFed token economy needs a network effect of mass token holders to overcome the inherent hurdles of collective action."[36]

But contrary to American CryptoFed's assertions, this distribution is not a valid use of Form S-8. Among other problems, American CryptoFed only classifies these token recipients as contractors or advisors because they are providing the

[33] Exhibit 14 at 5-6 (Respondent's Form 10).

[34] The Division is assuming, for the purposes of this motion, that the distribution is only to persons, not entities.

[35] *See* 17 C.F.R. § 230.462.

[36] Exhibit 14 at 5 (Item 1) and 25 (Item 2.7) (Respondent's Form 10).

"service" of receiving the tokens in the mass distribution. Persons who perform such a service are expressly prohibited from receiving securities via a Form S-8 distribution. Rather, Form S-8 has a specifically limited purpose and scope, as the court in *SEC v. iBIZ Tech. Corp* explained:

> Form S-8 is an abbreviated registration statement that companies can use to register shares the company offers or sells to its employees or consultants, provided they are natural persons, provide bona fide services to the company, and are not involved in capital raising transactions. ***Companies can use Form S-8 only to issue stock as compensation for consultants for bona fide services not connected with capital raising.***

2008 U.S. Dist. LEXIS 107297, at *6-7,CV 06-502-PHX-JAT (D. Ariz. July 21, 2008) (emphasis added) (cleaned up). The court continued: "Companies cannot use consultants who receive S-8 stock as conduits to the public market. They cannot misuse Form S-8 to 'circumvent the registration requirement by devious and sundry means.'" *Id.* at *7-8 (quoting *North Am. Research and Dev. Corp.*, 424 F.2d 63, 71 (2d Cir. 1970)); *see also SEC v. Phan*, 500 F.3d 895, 903-904 (9th Cir. 2007).

Because American CryptoFed plans an offering pursuant to Form S-8 that cannot be covered by a Form S-8, if the Locke token is a security as the cover section of Respondent's Form 10 claims,[37] then American CryptoFed is planning a securities offering that is not covered by any registration statement. *See SEC v. Cavanagh,* 155 F.3d at 133 ("A registration statement permits an issuer, or other persons, to make ***only*** the offers and sales described in the registration statement.") (emphasis added). Accordingly, the first harm that would result without a stay is

[37] Exhibit 14 at 2 (Respondent's Form 10).

that American CryptoFed—***and all those persons providing substantial assistance to American CryptoFed regarding the distribution***—could violate Section 5 of the Securities Act by engaging in an unregistered securities offering. The *Telegram* court recently found that a planned mass token distribution would cause harm for similar reasons: "The Court also finds that the delivery of Grams to the Initial Purchasers, who would resell them into the public market, represents a near certain risk of a future harm, namely the completion of a public distribution of a security without a registration statement." 448 F. Supp. 3d at 382.

Second, without a stay there will be harm because token recipients will be deceived about their ability to legally resell the tokens. If American CryptoFed distributes the tokens via a Form S-8 as planned, the recipients will receive tokens that they will believe were offered and sold to them legally pursuant to a valid registration statement. In fact, as described above, the offering will not be properly registered. Therefore, the recipients would be receiving restricted securities that would need to comply with Securities Act Rule 144, 17 C.F.R. § 230.144 or otherwise be eligible for a resale exemption before the recipients resold the tokens. But, because American CryptoFed's Form 10 does not alert them of this problem, the recipients could unknowingly violate Section 5's prohibition against unregistered offerings. This is a harm to the recipients, who are investors.

Third, without a stay there will be a harm to the Commission's ability to regulate a well-ordered marketplace. If issuers are permitted to engage in mass distribution of securities while blatantly disregarding the Exchange Act and failing

to provide required information, then the Commission's ability to ensure that investors receive adequate information before making investment decisions will be seriously impaired. American CryptoFed's argument that there will be no secondary market trading until after the Form S-1 is declared effective is a red herring. Even if true, this still means that American CryptoFed could distribute ***hundreds of billions*** of Locke tokens that (1) are registered as securities by a document that denies they are securities, (2) are registered by a document that omits critical required information, and (3) are illegally distributed by a Form S-8 to persons who do not meet the specified definition of employee, contractor or advisor. That is harm.

2) The Division Also Prevails Under the Preliminary Injunction Standard.

Even if the Division's case were analyzed under the (inapplicable) traditional standard for preliminary injunctions, the stay would still be correct. The correct standard for a temporary restraining order or preliminary injunction is:

> 1. Whether the movant has shown a substantial likelihood of success on the merits;
>
> 2. Whether the movant would suffer irreparable injury if the injunction is not granted;
>
> 3. Whether the issuance of a preliminary injunction would cause substantial harm to other interested parties; and
>
> 4. Whether the public interest would be served by the issuance of an injunction.

See, e.g., Weiss v. Kempthorne, 580 F. Supp. 2d 184, 187 (D.D.C. 2008).

(a) The Division Has Shown a Substantial Likelihood of Success on the Merits.

As discussed above, the Division has a substantial likelihood of success on the merits of proving that American CryptoFed violated the federal securities laws.

(b) The Public Will Suffer Irreparable Injury if Respondent's Form 10 Becomes Effective.

Because the Commission acts as a regulator, to the extent the Commission (or the Division) has to show harm, the harm is not to the Commission, but to the public. The harm described above from the planned "mass distribution" is likely to be irreparable. Once American CryptoFed distributes billions of tokens to investors, it will either be impossible to unwind all those transactions, or so difficult and expensive that is functionally the same thing. Thus, the harm from the mass distribution will be irreparable.

(c) American CryptoFed Will Not Be Harmed by a Stay.

American CryptoFed has not claimed, much less shown, what harm it is suffering from the stay being in place. Nor can it. The stay simply maintains the status quo. Should American CryptoFed prevail in this proceeding, it can begin its planned mass distribution at a later date. The Motion makes no mention of any harm that would be caused by such a delay. Additionally, even if there was no stay, American CryptoFed could not legally distribute the securities. Its Form S-1 will not become effective until the Commission declares it effective, and its Form S-8 is not legally available for the distribution American CryptoFed intends (*see supra).* Thus, the stay causes no harm to American CryptoFed.

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(d) Public Interest Demands a Stay.

For many of the same reasons outlined above, a stay is in the public interest. The public is best served by a well-regulated securities market and registration statements that make adequate disclosures regarding the securities they seek to register. Staying the automatic effectiveness of the fatally flawed registration statement at issue here serves those interests.

CONCLUSION

For the reasons set forth above, the Commission should deny Respondent's motion and keep the stay in place.

Dated: December 22, 2021

Respectfully submitted,

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CERTIFICATE AS TO LENGTH

Although this Opposition is longer than 15 pages, it complies with SEC Rule of Practice 154 because, exclusive of table of contents, table of authorities, and the supporting exhibits, it contains 6,980 words, as indicated by Microsoft Word.

/s/ Christopher Bruckmann
Christopher Bruckmann

CERTIFICATE OF SERVICE

I hereby certify that I caused true copies of the Division of Enforcement's Memorandum in Opposition to Respondent's Motion to Lift the Order That Stays the Effectiveness of Respondent's Form 10 to be served on the following on December 22, 2021, in the manner indicated below:

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