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

American CryptoFed DAO LLC ("American CryptoFed" or "Respondent"), respectfully submits this reply to the Division of Enforcement ("Division")'s Memorandum ("Memorandum") in Opposition to Respondent's Motion ("Motion") to Lift the Order That Stays the Effectiveness of Respondent's Form 10 ("Stay Order"). Respondent's Motion was filed pursuant to Rule 250 (a) below.

> (a) Motion for a ruling on the pleadings. No later than 14 days after a respondent's answer has been filed, any party may move for a ruling on the pleadings on one or more claims or defenses, asserting that, **even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor, the movant is entitled to a ruling as a matter of law.** The hearing officer shall promptly grant or deny the motion. (Emphasis added).

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Therefore, in this reply, Respondent does not argue with the Division regarding facts in dispute, but solely focuses on rebutting the Division's false legal arguments.

The Division's False Argument No.1

Division's Memorandum states at I) A) (p.7)[1] the following:

"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."** (Emphasis added).

The Division's statement above is false and self-contradictory. If the Division believes that its statement was true, it would have agreed to Respondent's motion to lift the Stay Order. Conversely, the Division submitted a 25-page memorandum, far exceeding the 15-page length limit in Rule 154(c), 3 times more than Respondent's Motion, to argue why the inclusion of the Stay Order is not unlawful. The truth is that without including the Stay Order in the OIP, the OIP would be unable to stop the clock on Respondent's Form 10 five days before it became effective. The Division took an additional but unlawful step to include the Stay Order in the OIP, because the OIP without the Stay Order would be insufficient to stop the clock on Respondent's Form 10 five days before it became effective automatically.

The Division's False Argument No.2

The Division's Memorandum states at I) A) (p.6) the following:

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

The fact is the opposite was determined by the Supreme Court in *SEC v. Jones, 298 U.S. 1 (1936)* at 18:

[1] Respondent has to guess the page from the Table of Contents because the Division's Memorandum does not include pagination.

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> 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. (Emphasis added).

In *SEC v. Jones, 298 U.S. 1 (1936*), the clock did not stop. As a matter of fact, it was because the clock could not be stopped by "a Proceeding to Determine Whether to Deny a Not-Yet-Effective Registration Statement", that the petitioner requested permission to withdraw his registration:

> On June 27, counsel for petitioner appeared again before the examiner, and filed a dismissal signed by petitioner dismissing "his registration statement heretofore filed" and withdrawing "all application for consideration thereof or action thereon." At the same time, petitioner's counsel filed a motion to dismiss and for an order from the commission permitting the withdrawal of the registration statement and dismissing the registration proceeding and all matters pertaining thereto at petitioner's cost, and also a motion to quash the subpoena which had been issued and served on petitioner. **The examiner acting for the commission denied the motions and refused to allow the withdrawal**, no reason for his action being assigned. (Emphasis added). *SEC v. Jones, 298 U.S. 1 (1936*) at 13.

As a result, in *SEC v. Jones, 298 U.S. 1 (1936)* at 30, the dissenting opinion of Justice Cardozo, Justice Brandeis and Justice Stone confirmed the effectiveness of the registration statement:

> **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. (Emphasis added).

In *SEC v. Jones,* the petitioner's Form 10 registration was recognized as being automatically effective after 60 days. The withdrawal of an active registration was in contest.

The Division's False Argument No.3

The Division's Memorandum states at I) A) (p.7) the following:

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"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… **Through these actions, the essentially blank registration statement could become effective.**"

However, the Division contradicted their own argument below.

"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."** (Emphasis added).

If **"the OIP would have done so even if the Commission had not expressly ordered the stay"**, why does the Division need to worry about **"the essentially blank registration statement could become effective"** without including a Stay Order in the OIP? This contradiction between the Division's own statements highlights a fact that the Division knows that it had to include the Stay Order to stop the effectiveness of American CryptoFed's Form 10 registration statement.

However, the Commission is not powerless even if the registration statement becomes effective without the Stay Order. In *SEC v. Jones, 298 U.S. 1 (1936)* at 13, the Commission's proceedings without a Stay Order were so powerful that the petitioner had to withdraw his application for registration:

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.

Also, in *SEC v. Jones, 298 U.S. 1 (1936)* at 18, the Supreme Court was fully aware the power of the Commission's proceedings without a Stay Order and was comfortable to allow the registrant to "act only at his peril":

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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. (Emphasis added).

The Division's False Argument No.4

"The stay simply maintains the status quo" the Division's Memorandum states at I) C) 2) c) (p.24). This statement is false. The Stay Order unlawfully stopped clock of Respondent's Form 10 registration statement, which should run towards the effectiveness. The true status quo should be that Respondent's Form 10 was effective as of November 15, 2021.

The Division's False Argument No.5

The Division's Memorandum states at the footnote of I) B) 1) (p.10) the following:

"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 t**o 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." (Emphasis added).

However, the Division contradicts itself. Form S-8 related disputes are considered so critically important to the Division that it had to allocate Paragraph 8 and Paragraph 9 of the OIP and 15% of this Division's Memorandum at I) C) 1) (d) (p.20-23) to outline and justify its allegations.

The Division's False Argument No.6

The Division's Memorandum states at the footnote of I) B) 1) (p.8) the following:

"Additionally, **the Division hopes the Commission will permit it to file its motion for summary disposition soon**. The Commission has "repeatedly observed that summary

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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.**" (Emphasis added).

However, the Supreme Court ruling was opposite in *Steadman v. SEC, 450 U.S. 91, 96 n.13 (1981)* at 97 and its note [14]:

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. (Emphasis added).

Section 5 (b), 5 U. S. C. § 554 (c) (2), provides that "[t]he agency shall give all interested parties opportunity for . . . hearing and decision on notice and in accordance with **sections 556** and 557 of this title." (Emphasis added).

Thus, for a hearing "on the record" explicitly required by a statute such as Section 12(j), the Supreme Court in *Steadman v. SEC,* provides a chain of statutes from **5 U. S. C. § 554** to **5 U. S. C. § 556** which inevitably leads to cross-examination at an oral hearing, prohibiting summary disposition:

A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such **cross-examination** as may be required for a full and true disclosure of the facts (5 U. S. C. § 556(d)) (Emphasis added).

Conclusion

Six false arguments of the Division's opposition are highlighted above, but these are only a sample of the ongoing false arguments in the Division's Memorandum. Respondent does not

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need to list all of them to prove how wrong the Division is, but wants to emphasize the following three key points.

1). Through the 25-page Memorandum, the Division failed to provide one single precedent case, out of the Commission's entire 87-year history, to demonstrate that the Commission did issue an OIP which included a Stay Order against a Form 10 registration's automatic effectiveness.

2). The Supreme Court in *SEC v. Jones, 298 U.S. 1 (1936)* confirmed that: i) the registration statement, despite the Commission's proceedings, **"while still in fieri"**, did become effective automatically, ii) no Stay Order was included in the Commission's proceedings, iii) The Commission's proceedings without a Stay Order did have a practical effect, which led to the petitioner's voluntary withdrawal, and iv) the registrant could still act at his peril during the Commission's proceedings. Thus, the Stay Order included in the OIP issued against American CryptoFed is not supported by *SEC v. Jones, 298 U.S. 1 (1936)* and is unlawful.

3). The Supreme Court in *Steadman v. SEC, 450 U.S. 91, 96 n.13 (1981)* provided a clear chain of statutes for a hearing "on the record" required by a statute, from 5 U. S. C. § 554 to 5 U. S. C. § 556 which inevitably leads to cross-examination at an oral hearing, prohibiting summary disposition. The Division's Memorandum states at the footnote of I) B) 1) (p.8) "A ruling on a motion for summary disposition could also potentially moot the stay issue." However, Supreme Court in *Steadman v. SEC* prohibits the Division and the Commission from doing so. Also, "Rule 250 (a) Motion for a ruling on the pleadings" does not allow the Commission to delay this Respondent's Motion, because of the requirement "The hearing officer shall promptly grant or deny the motion."

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In a nutshell, the spirit of the Exchange Act explicitly expressed in its plain text and upheld by the two Supreme Court rulings above clearly demarcates the power boundary of the Commission in order to ensure that disclosure and transparency are not halted by the Commission's arbitrary decisions. When, and only when the due process of "**on the record after notice and opportunity for hearing**" (15 U.S.C. § 78l(j)) is satisfied, can the Division and Commission be allowed to take actions to enforce the sanctions defined in Section 12(j). The Stay Order included in the OIP is against the spirit of statute of Section 12(j) and has far surpassed the power boundary authorized by the statute defining the Commission as a disclosure agency. Respondent appreciates that the Division cited, at I) A) (p.7), the Supreme Court's opinion below in *Jones v. SEC, 298 U.S.* at 16 to support its argument:

> 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.** (Emphasis added).

Despite all the differences, both the Division and Respondent have reached a shared agreement regarding the Supreme Court's ruling in *Jones v. SEC*: "no restraining order or preliminary injunction be issued." That is what is needed for the Rule of Law.

For the reasons set forth above, Respondent respectfully requests that as a matter of law, the Commission act promptly to lift the Stay Order.

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Dated: December 25, 2021

Respectfully submitted,

By /s/ Marian Orr

Marian Orr

CEO, American CryptoFed DAO LLC

1607 Capitol Ave Ste 327

Cheyenne, WY. 82001

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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 25th day of December 2021, in the manner indicated below:

By Email:

Christopher Bruckmann, Trial Counsel

Division of Enforcement – Trial Unit

U.S. Securities and Exchange Commission

100 F Street, N.E.

Washington, D.C. 20549-5949

202-551-5986

bruckmannc@sec.gov

DocuSigned by:
Marian Orr
AE52AD38E6AC4EC...

By /s/ Marian Orr

Marian Orr

CEO, American CryptoFed DAO LLC

1607 Capitol Ave Ste 327

Cheyenne, WY 82001

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