UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
FILE No. 3-21243

In the Matter of

The Registration Statement of

American CryptoFed DAO LLC,

Respondent.

DIVISION OF ENFORCEMENT'S BRIEF IN OPPOSITION TO RESPONDENT AMERICAN CRYPTOFED'S PETITION FOR REVIEW

Christopher M. Bruckmann
Christopher J. Carney
Martin Zerwitz
Michael Baker
Counsel for the Division of Enforcement
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549
(202) 551-5986 (Bruckmann)
(202) 551-2379 (Carney)
bruckmannc@sec.gov
carneyc@sec.gov
zerwitzm@sec.gov
bakermic@sec.gov

September 20, 2023

OS Received 09/20/2023

TABLE OF CONTENTS

OS Received 09/20/2023

TABLE OF AUTHORITIES

Cases **Page**

OS Received 09/20/2023

OS Received 09/20/2023

Statutes

Rules and Regulations

Other Authorities

The Division of Enforcement ("Division") respectfully submits this brief in opposition to Respondent American CryptoFed DAO LLC's ("Respondent" or "American CryptoFed") Petition for Review. For the reasons set forth below, the Commission should, under Section 8(d) of the Securities Act of 1933 ("Securities Act"), issue a stop order suspending the effectiveness of Respondent's September 17, 2021 Form S-1 registration statement ("Registration Statement").

PRELIMINARY STATEMENT

The Commission should issue a stop order halting the effectiveness of American CryptoFed's fatally flawed Form S-1 Registration Statement. That Registration Statement is a prime example of what Section 8(d) of the Securities Act was created to stop: a murky offering, not reviewed by auditors or attorneys, which claims the ability to reinvent banking and commerce, and suggests it will create great wealth—all the while hiding who is actually involved, how it will actually work, and what cut of the proceeds the people in charge plan to take.

American CryptoFed's Registration Statement omits the required audited financial statements, an opinion of counsel, and other material information. And it contains material misstatements regarding both the nature of Respondent's business and whether its proposed offerings of "Ducat" and "Locke" tokens are being registered as securities transactions. When the Division sought to conduct a Section 8(e) examination ("the Examination") of this deficient Registration Statement, American CryptoFed and its officers obstructed that examination. In its opening brief, Respondent does not even attempt to contest these points, which the Commission should deem conceded and established. Rather, Respondent seeks to avoid a stop order through a series of convoluted and counterfactual procedural arguments. Contrary to Respondent's assertions, this proceeding is fair and provided due process. A stop order must issue to halt the effectiveness of this materially misleading registration statement.

FACTUAL BACKGROUND

A. Relevant Persons and Entities

Respondent American CryptoFed is organized as a Wyoming decentralized autonomous organization limited liability company. (Dx. 1C).[1] Its claimed mission is to create and maintain a monetary system with zero inflation, zero deflation, and zero transaction costs using the Ducat and Locke tokens. (Dx. 1 at 13). The Ducat token will supposedly be used to purchase goods and services, while the Locke token is described as a governance token. (*Id.* at 4-5). Mr. Moeller is American CryptoFed's President and Chief Executive Officer, and Mr. Zhou is its Chief Operating Officer. (Tr. 171:18-172:3, 174:13-21, 217:16-22 (Moeller); 823:2-7 (Zhou)). They are each authorized to represent American CryptoFed for all matters and sign all documents. (Dx. 7). Marian Orr was American CryptoFed's Chief Executive Officer from at least September 15, 2021 until January 2022. (Dx. 1 at 36; Tr. 192:13-18 (Moeller)). MShift, Inc. is a Delaware corporation and is the sole member of American CryptoFed. (Dx. 7, Dx. 1 at 32; Tr. 861:7-8 (Zhou)). American CryptoFed has assigned 25% of all Locke tokens to be issued to Mshift. (Dx. 1 at 16, 32). American CryptoFed's plan in part calls for (1) issuing 10 trillion Locke tokens, (2) increasing their value to $0.10 each, (3) Mshift receiving $250 billion worth of these tokens, and (4) an undisclosed percentage of that amount going to Mr. Moeller and Mr. Zhou personally. (Dx. 1 at 16, 26, 32; Tr. 241:9-243:8).

[1] "Dx." refers to the Division's exhibits admitted during the hearing in this proceeding. "Rx." refers to Respondent's exhibits admitted during the hearing. "Tr." refers to the transcript of the hearing and is followed by an indication of which witness's testimony is cited (unless already apparent). ACF Br. refers to Respondent's August 20, 2023 Brief in Support of Its Petition for Review. ACF PHBr. refers to Respondent's April 2, 2023 Post-hearing brief. "ID" refers to the Initial Decision.

OS Received 09/20/2023

B. Timeline of Key Events

September 16, 2021: Respondent filed a Form 10 registration statement ("Form 10") with the Commission seeking to register the Ducat and Locke tokens as securities. (Dx. 2).[2] Respondent's Form 10 was filed under Exchange Act Section 12(g) and absent Commission action would have become effective in sixty days. The Form 10 stated that as soon as it was effective American CryptoFed would use a "Form S-8 filling [that] will enable [American CryptoFed] to grant restricted and untradeable Locke tokens to more than 500 persons." (Dx. 2 at 6; *see also* Dx. 1A at 12-13).[3]

September 17, 2021: Respondent filed the Form S-1 Registration Statement with the Commission seeking to register the offer and sale of the Ducat and Locke tokens under the Securities Act. (Dx. 1). The Registration Statement contained a delaying Amendment. (Dx. 1 at 3). Consistent with its usual practice, the Division of Corporation Finance assigned a team, including Erin Purnell, to review the Form 10 and the Registration Statement. (Tr. 540:21-541:7 (Purnell)). Justin Dobbie was the person in charge of the review team and had ultimate responsibility for reviewing both documents. (Tr. 32:10-33:7 (Dobbie), 490:2-6, 541:4-7 (Purnell)).

October 4, 2021: Ms. Purnell and another member of Corporation Finance had a phone call with Mr. Moeller and Mr. Zhou that lasted nearly an hour. During that call, Ms. Purnell told Mr. Moeller and Mr. Zhou that both the Registration Statement and Form 10 were materially

[2] Although the content of the Form 10 is not at issue in this proceeding, certain events regarding the Form 10 may be relevant to Respondent's claim that it did not receive due process. (*See* ACF Br. at 22-23). In making this claim, Respondent inaccurately portrayed certain facts. Accordingly, the Division is including some information relating to the Form 10 here.

[3] Respondent's proposed use of a Form S-8 (which is solely for employee benefit plans) was improper and illegal, but that issue need not be decided in this proceeding.

deficient for many reasons, including that they each lacked audited financial statements. She also informed them that Corporation Finance would not conduct any further review until American CryptoFed amended the Registration Statement and Form 10 to contain audited financial statements. (Tr. 504:10-507:1, 513:13-514:22, 541:8-14). Ms. Purnell explained that even though American CryptoFed claimed it had no assets or liabilities, it would still need to include audited financial statements reflecting the lack of assets and liabilities. (Tr. 513:24-514:16). Ms. Purnell further explained that American CryptoFed needed to retain an attorney to, at a minimum, provide the required legal opinion before the Commission would declare the Registration Statement effective. (Tr. 514:17-22).

October 6, 2021: Respondent filed a purported amendment to its Form 10 that consisted nearly entirely of legal arguments that the Ducat and Locke tokens are not securities. This amendment does not include any of the information that Corporation Finance had informed Respondent was missing. (Rx. 68).

October 8, 2021: Corporation Finance sent two letters to Respondent reiterating that the Registration Statement and Form 10 were deficient. (Dx. 17 and 18). One letter itemized the deficiencies in the Form 10, including that it lacked audited financial statements. Although only the letter about the Form 10 included an itemized list, Ms. Purnell testified that during the October 4, 2021 call she informed Mr. Moeller and Mr. Zhou that both forms had the same deficiencies. (Tr. at 541:15-542:13). Mr. Moeller and Mr. Zhou understood this as they later described their subsequent response to Ms. Purnell as applying to both documents. (*See* Dx. 11 at 9).

October 12, 2021: American CryptoFed sent a letter to the Chair, the Commissioners, and Ms. Purnell, in which American CryptoFed purported to address the deficiencies in the Form 10 and Registration Statement. (Dx. 19). Corporation Finance staff subsequently attempted multiple

times to have additional calls with American CryptoFed's representatives, but American CryptoFed's representatives refused to have those telephone conversations and asked that all communication be in writing. (Tr. 68:20-69:9, 128:12-130:13 (Dobbie), 544:20-545:2, 546:7-12 (Purnell)).

October 28, 2021: Division staff had a telephone call with Ms. Orr and other representatives from American CryptoFed. Later that day, Deborah Tarasevich, Assistant Director of the Division's Crypto Assets and Cyber Unit, sent a letter to Ms. Orr (copying Mr. Moeller and Mr. Zhou), stating in part that:

> We have read the Company's filings and subsequent correspondence purporting to respond to the identified deficiencies. ***Because the Company's Form 10 still contains material deficiencies***, and due to the upcoming effective date, we would like the Company to confirm by Monday, November 1, 2021, whether it will be withdrawing the Form 10.

(Dx. 20 (emphasis added)).

October 29, 2021: Ms. Orr sent an email to Ms. Tarasevich claiming that the Form 10 was not deficient. (Rx. 13). Later that day, Ms. Tarasevich emailed Ms. Orr (copying Mr. Moeller and Mr. Zhou) stating in part that:

> The material deficiencies in American CryptoFed DAO LLC's Form 10 were spelled out, point-by-point, in the letter from Division of Corporation Finance staff, dated October 8, 2021, and discussed with you and other representatives from the Company on October 4, 2021. ***The Company's responses have not remedied the deficiencies in any way.***

(Rx. 14 at 2-3 (emphasis added)). American CryptoFed then sent additional letters reiterating its belief that its Form 10 and Registration Statement were not deficient. (Rx. 14 and 15). None of Respondent's communications from October 4, 2021 through November 3, 2021 contained audited financial statements, represented that Respondent was taking steps to compile audited financial statements, or sought to withdraw the Registration Statement or Form 10. (Dx. 19, Rx. 13, 14, 15).

November 9, 2021: The Commission issued the non-public 8(e) Order regarding the Registration Statement, which authorized the Examination. (Rx. 5).

November 10, 2021: The Commission instituted proceedings regarding the Form 10 under Exchange Act Section 12(j) and stayed the effectiveness of the Form 10 in *American CryptoFed DAO LLC*, AP File No. 3-20650 ("the 12(j) Proceeding"). (Rx. 187).

November 22, 2021: The Division offered to work with American CryptoFed to seek to expedite the 12(j) Proceeding. (Rx. 52 at 3). But four days later, American CryptoFed rejected any effort to expedite the 12(j) Proceeding, and Ms. Orr stated that "it would be inappropriate to ask 'the Commission to take this matter under consideration on an expedited basis.'" (Rx. 205 at 19). Subsequently, there was extensive motion practice in the 12(j) Proceeding. (*See* docket for that proceeding at https://www.sec.gov/litigation/apdocuments/ap-3-20650.xml). In connection with those motions, Respondent repeatedly opposed the Division's efforts to move the proceeding forward and instead bogged the proceeding down with duplicative, meritless filings. *See* Respondent's Opposition to Division of Enforcement's Motion for Briefing Schedule (December 27, 2021); Respondent American CryptoFed DAO LLC's Opposition to the Division of Enforcement's Motion for Leave to File a Motion to Set an Expedited Briefing Schedule (June 9, 2022); *American CryptoFed DAO LLC*, Rel. No. 34-93922 (Jan. 6, 2022) (Commission Order imposing restrictions on motions due to Respondent's repetitive improper filings) (all available on website listed above).

May 30, 2022: Mr. Moeller sent a letter to the Division stating that American CryptoFed "will distribute" the Locke token in "Q3 2022," and asking the Division to send American CryptoFed a "Cease-and-Desist Order" if the Division believed American CryptoFed's planned distribution violated the securities laws. (Dx. 13 at 1-2; *see also* Tr. 814:1-6 (Zhou)).

June 3, 2022: The Division informed Respondent of the Examination. (Rx. 96 at 2).

June 6, 2022: Respondent filed an application requesting to withdraw the Registration Statement. (Rx. 18).

June 15, 2022: The Division sent a subpoena for documents to American CryptoFed pursuant to the 8(e) Order. (Dx. 3).

June 17, 2022: The Commission issued an order denying withdrawal of Respondent's Registration Statement. (Rx. 20).

June 21, 2022: In response to the June 15, 2022 subpoena, American CryptoFed sent a letter to the Division containing partial narrative responses to certain subpoena requests, but failed to provide substantive responses to most of the requests and did not produce any documents called for by the subpoena. (Dx. 4.).

July 7, 2022: Mr. Moeller provided limited sworn testimony in response to a subpoena issued pursuant to the 8(e) Order. (Dx. 5 and 6).

August 4, 2022: The Division sent a letter to Respondent making clear the Division's position that Respondent had failed to produce documents and information pursuant to the Division's subpoenas and had not cooperated with the Examination. (Dx. 9).

August 7, 2022: Respondent sent another letter regarding the subpoena, but still did not produce the requested documents or information. (Dx. 10).

October 27, 2022: American CryptoFed stated their intention to pull the delaying amendment from the Registration Statement, "American CryptoFed is planning to file the 'Amendment No. 1 to Form S-1' to remove the delaying amendment, ***right after*** we receive your response to this letter..." (Dx. 15 at 13) (emphasis added).

November 1, 2022: American CryptoFed sent a letter to the Division again stating their intention to pull the delaying amendment: "American CryptoFed is planning to file the "Amendment No.1 to Form S-1" to remove the Delaying Amendment, after we receive your responses (or non-responses) to this letter..." (Dx. 16 at 6).

November 6, 2022: American CryptoFed sent a letter to the Division reiterating that American CryptoFed was close to removing the delaying Amendment from the Registration Statement because it disagreed with the Division's legal analysis:

> Our approach is to do our best in good faith, to let the Division of Corporation Finance and/or the Division of Enforcement exhaust all possible legal arguments, while the Delaying Amendment is still in place. When, and only when both Divisions have no more legal arguments (or refuse to provide legal arguments), to further justify the need of the Delaying Amendment, will we remove the Delaying Amendment. ***We are close to that critical moment.***

(Dx. 11 at 15 (emphasis added)).[4]

November 18, 2022: The Commission issued the OIP in this proceeding.

December 1-2, 6, 2022; January 18-19, 2023: The hearing in this matter was conducted.

May 17, 2023: Following briefing by the parties, the Administrative Law Judge ("ALJ") issued the Initial Decision finding the Registration Statement was deficient and issuing a stop order.

[4] Respondent asserts (ACF Br. at 3) that these statements were "not interpreted correctly" by the Division. The letters speak for themselves, and in addition to the May 30, 2022 letter, were clear threats to begin distribution of the tokens.

C. The Omissions and Misstatements in Respondent's Registration Statement.

1. The Registration Statement Omits Required Information.

(a) Respondent's Registration Statement Does Not Contain Audited Financial Statements.

Form S-1 Item 11(e) requires a registrant to furnish all financial statements required by Regulation S-X. Regulation S-X Articles 3 and 8 require that a Form S-1 contain audited annual and unaudited interim financial statements. (Dx. 12 at 5; Tr. 38:6-15 (Dobbie); 17 C.F.R. § 210.3-01 *et seq.* and § 210.8-01 *et seq.*). Respondent's Registration Statement does not contain any financial statements, audited or otherwise. (Dx. 14 at 2; Tr. 39:6-15 (Dobbie)). Respondent's officers have confirmed this. (Tr. 204:4-6 (Moeller); 645:21-646:2, 830:22-831:9 (Zhou)).

(b) The Registration Statement Lacks the Required Opinion of Counsel.

Form S-1 Item 16(a) requires a registrant to furnish the information required by Regulation S-K Item 601, which requires issuers to include an opinion of counsel as to the legality of the securities being registered. (Dx. 12 at 6; Tr. 56:13-16 (Dobbie); 17 C.F.R. § 229.601(b)(5)). The Registration Statement does not contain such an opinion of counsel. (Dx. 1; Tr. 56:22-25 (Dobbie)). Respondent and its CEO have admitted the Registration Statement does not contain the required opinion of counsel. (Tr. 316:9-22 (Moeller); ACF PHBr. at 5).

(c) The Registration Statement Lacks a Management Discussion and Analysis of Financial Information.

Form S-1 Item 11(h) requires a registrant to furnish the information required by Regulation S-K Item 303, which requires disclosure of management's discussion and analysis of the registrant's financial condition and results of operations. (Dx. 12 at 5; Tr. 39:17-40:11 (Dobbie); 17 C.F.R. § 229.303). Respondent's Registration Statement has no substantive

discussion of financial results or how the Respondent intends to execute its business plan. (Dx. 1 at 29; Tr. 40:12-42:10 (Dobbie)).

(d) The Registration Statement Lacks an Ownership Table.

Form S-1 Item 11(m) requires the registrant to furnish the information required by Regulation S-K Item 403, which requires a tabular disclosure of security ownership of directors, executive officers, and greater than 5% holders (including the total number of shares beneficially owned and the percentage of the class so owned for each such beneficial owner). (Dx. 12 at 5; Tr. 43:10-23 (Dobbie); 17 C.F.R. § 229.403). Respondent's Registration Statement does not contain the table or information required by Item 403, as Mr. Moeller admitted. (Tr. 43:24-46:24 (Dobbie), 240:17-243:8 (Moeller)).

(e) The Registration Statement Lacks Compensation Information.

Form S-1 Item 11(l) requires a registrant to furnish the information required by Regulation S-K Item 402, which requires a summary compensation table that quantifies the salary, bonus, stock and option awards, non-equity incentive plan compensation, and all other compensation paid to the registrant's named executive officers. (Dx. 12 at 5; Tr. 48:3-24 (Dobbie); 17 C.F.R. § 229.402). Respondent's Registration Statement provides a brief reference to the salary and certain Locke tokens promised to Ms. Orr as compensation and a reference to Locke tokens to be granted to Mr. Moeller and Mr. Zhou. The Registration Statement does not contain compensation disclosure for Mr. Moeller or Mr. Zhou. Nor does it contain a table with any of the required information, such as the required quantification of the grant date fair value of any stock or option awards, including any Locke tokens awarded as compensation to American CryptoFed's named executive officers. (Dx. 1 at 31-32; Tr. 48:25-51:3 (Dobbie)). Mr. Moeller admitted that the Registration Statement only provided incomplete information about the compensation to Ms. Orr. (Tr. 282:15-285:21 (Moeller)).

OS Received 09/20/2023

(f) The Registration Statement Lacks Required Exhibits.

Regulation S-K Item 601 also requires the registrant to file certain documents as exhibits, including material contracts, such as any management contract or other compensatory plans, or other related party agreements. (Dx. 12 at 6; Tr. 55:22-56:16 (Dobbie); 17 C.F.R. § 229.601). The Registration Statement does not contain any material contracts, including any agreements between Respondent and MShift, or other related party agreements that govern the tokens reserved for American CryptoFed's organizers. (Dx. 1 at 34; Tr. 56:17-21 (Dobbie)).

2. The Registration Statement Does Not Include Key Elements in the Description of Business Section, Which Renders the Included Information Misleading.

Form S-1 Item 11(a) requires a registrant to furnish the information required by Regulation S-K Item 101, which requires a description of the general development of the registrant's business. In particular, Item 101 requires the registrant to describe its principal products or services and their markets, the need for any government approval of principal products or services, and the effect of existing or probable government regulations on the business. (Dx. 12 at 4; Tr. 51:8-18 (Dobbie); 17 C.F.R. § 229.101).

Additionally, development-stage issuers need to provide "a balanced discussion explaining to a reader what they have done to date, [and] what the current state of their operations are." (Tr. 51:19-52:19 (Dobbie)). For any future business that they plan to conduct, an issuer must "provide a reader with an understanding of what – what it is that they intend to do or what the timeline would be for that, what the costs associated with developing the business would be so a reader can understand the prospects of the business." (*Id.*).

(a) The Business Description Is Too General and Lacks Critical, Specific Information.

The "Business" section in Respondent's Registration Statement contains none of the disclosures required by Item 101, and instead refers to the business section in the Form 10. (*See* Dx. 1 at 31; Dx. 2 at 6 to 29). As an initial matter, Respondent cannot incorporate required disclosure by reference to another filing made with the Commission.[5] Even if it could, much of the business disclosure in the Form 10 consists of general discussions of inflation, deflation, and monetary policy copied from external sources. Overall, the disclosures in the Form 10—and the Registration Statement—fail to provide a clear and complete discussion of American CryptoFed's business. They do not sufficiently describe (1) the current state of operations, including the status of discussions with potential partners (or lack thereof) in the launch of the business plan, (2) how the business intends to operate in the future, or (3) the impact of existing or probable government regulation on the business. Thus, even if Respondent could incorporate the business disclosure by reference to the Form 10, the "Business" section does not contain key information, including the information discussed below. (Dx. 1 at 31; Dx 2 at 6-29; Tr. 52:20-55:16 (Dobbie)).

(b) The Business Description Misleadingly Depicts American CryptoFed's Ephemeral Plans as Presently Operational.

The Registration Statement presents American CryptoFed as a presently functioning entity and Ducat and Locke as presently functioning tokens, with statements like "CryptoFed ***issues*** two utility tokens called Ducat and Locke" and "Ducat ***is used*** to price goods and

[5] General Instruction VII to Form S-1 lists the requirements to be eligible to incorporate required disclosure by reference to another filing. *See* Dx. 12 at 3, noting that one such requirement is: "C. The registrant has filed an annual report required under Section 13(a) or Section 15(d) of the Exchange Act for its most recently completed fiscal year," making new filers such as Respondent ineligible to incorporate by reference.

services." (Dx. 2 at 8) (emphasis added). In truth, these statements are aspirational at best because, as described below, no software for the tokens has been created and American CryptoFed has not even decided how the tokens will be used or deployed.

(i) The General Aspirational State of the Business.

American CryptoFed is a nascent concept dreamt up by Mr. Moeller and Mr. Zhou, neither of whom has taken any meaningful steps to determine whether their idea has even the slightest chance of success. Mr. Moeller admitted that American CryptoFed's business plan is entirely aspirational and that Respondent has no contracts with any potential partners. (Tr. 291:9-19). He further admitted that not one entity has indicated that they might accept Ducat as payment (Tr. 293:2-6), and that Respondent had not even spoken with a single exchange about listing Ducat and Locke. (Tr. 314:19-315:9).

Mr. Zhou similarly admitted that essentially no work had been done to get American CryptoFed operational and that hypothetical contributors such as merchants and banks will need to do essentially all that work. He explained that these third parties will need to come together, "cover the costs," and "modify the [American CryptoFed] constitution." (*See* Tr. at 764:9-25, 806:9-20).

The Registration Statement fails to disclose to potential investors Respondent's nascent status, including that it has not even spoken with a single exchange about listing Ducat or Locke, and that not a single merchant, bank, or government has indicated that they might accept Ducat as payment for anything. (Dx. 1). Rather, the Registration Statement repeatedly states that Ducat and Locke "will" be listed and sold on exchanges and "participating banks, exchanges and organizations will…issue CryptoFed co-branded wallets bearing their name that can be used by individuals or entities to hold and transact in Ducat and Locke." (Dx. 1 at 5-7, 13-16, 18, 23-25).

(ii) The Lack of Software and Ducat Functionality.

Mr. Moeller and Mr. Zhou admitted that Respondent has not written any of the new software that will be required for merchants to be able to accept Ducat for payment, another step that is left for hypothetical contributors to handle. (Tr. 297:13-299:2 (Moeller); 764:9-25 (Zhou).

The Registration Statement fails to disclose that Respondent has not written any of this necessary software and instead describes the Ducat as something that already exists and is functional: "Ducat ***is*** an inflation and deflation protected stable token with unlimited issuance, constrained by algorithms targeting zero inflation and zero deflation. Ducat ***is used*** to price goods and services, for daily transactions, accounting and as a store of value." (Dx. 1 at 13 (emphasis added)).

(iii) The Process for Selling Ducat and Locke.

One area about which the Division tried to gather information during the Examination was exactly how American CryptoFed's proposed refundable auction plan to sell Ducat and/or Locke would work. (*See* Dx. 1 at 6 referring to, but not explaining, a refundable auction). On June 21, 2022, Respondent sent a letter to the Division, signed by Mr. Moeller and Mr. Zhou, explaining that essentially they have no idea how the refundable auctions will work. Among other things, the letter stated that "what American CryptoFed can say is that the refundable auction plan is ***still in the brainstorming stage***, and ***nothing has been decided*** except the principles of the refundable auction…" (Dx. 4 at 8 (emphasis added)). Mr. Zhou similarly testified: "We may also consider Ethereum and for the Locke token, but ***a lot of things are still in brainstorming***. We need to gather our community like – like we – a lot of the exhibit, we have so many community [sic], people we need to gather, and we need to sit down and talk together and after this proceedings." (Tr. 828:15-22 (emphasis added)).

OS Received 09/20/2023

The Registration Statement fails to convey that the auction is still in the brainstorming stage and that American CryptoFed has decided nothing except principles. Instead, the Registration Statement describes the auctions as though American CryptoFed already has a specific (though undisclosed) plan for them:

> For Locke token's price discovery purposes, CryptoFed may conduct refundable auctions from time to time on compliant crypto exchanges. Refundable auctions will not start until the SEC declares this Form S-1 filing is effective. All proceeds in USD-pegged stablecoins from Locke token auction sales will be reserved in order to provide refunds upon purchaser request at the original purchase prices via smart contracts.

(Dx. 1 at 6).

(c) The Information Regarding MShift Is Misleading.

The Registration Statement states that Respondent is financially reliant on MShift, which is presently the sole member of, and completely controls, American CryptoFed. (Dx. 1 at 26; Dx. 2 at 24). MShift is presently in some degree of financial distress, no longer having any employees or generating any revenue. (*See* Tr. 194:5-10 (Moeller); 825:15-19 (Zhou)).

The Registration Statement fails to disclose:

- that MShift no longer has any revenue or employees,
- that MShift may no longer be able to cover American CryptoFed's costs as promised, or
- any MShift financial information.

It fails to disclose this information despite American CryptoFed being so reliant on MShift at present that Mr. Zhou described American CryptoFed as an unborn child within the belly of MShift. (Dx. 1, Tr. 872:20-873:2 (Zhou)).

(d) The Registration Statement Misleadingly Describes American CryptoFed as Operating as a DAO.

The description of American CryptoFed in the Registration Statement as a "Decentralized Autonomous Organization" is misleading. (Dx. 1 at 27). Indeed, Respondent has conceded that the description of American CryptoFed as a DAO is false, admitting that "***the decentralization*** of American CryptoFed ***cannot begin*** prior to Locke token distribution." (ACF PHBr. at 4) (emphasis added). Rather, at present, Mr. Moeller and Mr. Zhou, as American CryptoFed's officers, maintain and exercise complete control over Respondent's operations, contradicting Respondent's claim that it is decentralized. For example, Mr. Zhou has sole and unfettered discretion to decide to grant himself and/or Mr. Moeller up to 20% of the Locke tokens, which will purportedly increase in worth to $200 billion. (Dx. 1 at 16, 26; Tr. 241:12-243:8 (Moeller); *see also* Dx. 7, Tr. 177:20-22, 178:23-180:16, 187:3-188:13 (Moeller); 843:15-18 (Zhou)). Additionally, MShift, which is also operated by Mr. Moeller and Mr. Zhou, has paid Respondent's ongoing expenses, contrary to Respondent's claim that it is decentralized. (Tr. 185:11-186:17 (Moeller); Rx. 289; Tr. 860:18-861:9 (Zhou)).

3. Respondent's Registration Statement Contains Contradictory Statements Regarding Whether the Tokens Are Securities and Whether the Offering Is Being Registered as a Securities Offering.

Respondent listed the Ducat and Locke tokens in the Registration Statement's introductory pages under the heading "Title of Each Class of Securities to be Registered" and referred to the Ducat and Locke tokens as "securities" in other sections of the Registration Statement. (Dx. 1 at 3). Later in the Registration Statement, Respondent stated that it "is registering both Locke and Ducat tokens with the SEC as utility tokens, not as securities," even though the Form S-1 is a form to register ***only*** an offering of securities. (Dx. 1 at 4).

D. Respondent Failed to Cooperate with, and Deliberately Obstructed, the Examination.

On June 15, 2022, Division staff issued a document subpoena to Respondent pursuant to the 8(e) Order. (Dx. 3). The June 15, 2022 subpoena contained fifteen document requests seeking several categories of documents including: a) documents concerning the identification of and communications with several third parties who are or may be involved in the offering, including those described as "Contributors" in the Registration Statement; b) documents related to the mechanics of the offering, including the refundable auctions; c) documents related to the custody of assets; and d) communications with "crypto asset exchanges." (Dx. 3 at 8-9).

Respondent did not produce any documents to the Division pursuant to the June 15, 2022 subpoena. (Dx. 4; Tr. 339:13-340:5; 372:17-374:7 (Moeller)). On June 21, 2022, Respondent sent a letter to the Division via email. In that letter, Respondent objected to each request in the June 15, 2022 subpoena on the basis that each request was:

> not reasonably calculated to lead to the discovery of relevant, admissible evidence which can rebut American CryptoFed's assertion that American CryptoFed has **No Fund Raising, No Revenue, No Costs, No Profits and No Assets** and therefore there is no traditional balance sheet equation of **Assets = Liabilities + Shareholder's Equities** to generate securities subject to the SEC's jurisdiction

(Dx. 4 at 2, 5-8, 10-15 (emphasis in original)).

Respondent did provide narrative responses to twelve of the fifteen requests in the subpoena, but many of those narratives failed to address the subpoena's requests. (Dx. 4). For instance, subpoena Requests 2 and 3 sought documents related to the identification of certain Contributors and communications with those Contributors. After objecting to the request, Respondent pointed to the Registration Statement and the Form 10 filed by Respondent as containing the relevant information. (Dx. 3 at 8, Dx. 4 at 5-6). Neither the Registration Statement

nor the Form 10 contain identifying information for Contributors, nor do they contain communications with those Contributors. (Dx. 1, Dx. 2).

Respondent did not act in good faith in response to this subpoena. Mr. Moeller claimed he could not even remember what search, if any, he conducted for documents responsive to the subpoena. (Tr. 346:18-347:23, 348:3-349:20). And Mr. Zhou confessed during the hearing that Respondent ***deliberately withheld documents*** in response to Request 2 (regarding Contributors), and continued to refuse to provide information during the hearing:

> Q: Mr. Zhou, at the time of the subpoena you didn't want to provide the names of the contributors, right?
>
> ***A: No. We don't want at all.***
>
> Q: And you don't want to provide those names now, right?
>
> ***A: Not now. After this proceeding we will disclose that.***

(Tr. 867:4-11 (emphasis added)). Mr. Zhou further explained that Respondent withheld the Contributor' names because "***we don't want to get them into trouble***" for their role in American CryptoFed. (Tr. 865:8-866:9; *see also* Tr. 866:10-867:3 (confirming there are undisclosed Contributors)). The information has never been provided.

On July 7, 2022, Division staff took testimony from Mr. Moeller pursuant to the 8(e) Order. During his testimony, Mr. Moeller objected to many of the staff's questions (including questions seeking to determine whether the Locke and Ducat tokens are securities), asserting lengthy objections similar to the to the objections raised in response to the requests in the June 15, 2022 subpoena. (Dx. 5, Dx. 6). During his testimony, Mr. Moeller sometimes followed up with an answer notwithstanding this objection, though his answers frequently did not completely or directly answer the questions. For example, he pointed to the "principles" found in the Registration Statement rather than answer the specific question about how mechanically the

Locke token refundable auctions might work. These references to the "principles" in the Registration Statement did not provide substantive responses to the questions asked. (Dx. 6 at 79:20-81:24).

During his testimony, Mr. Moeller refused to provide the names of the up to fifteen people to whom the Registration Statement states Locke tokens have been granted or promised, stating that he would provide the names in response to a written request. (Dx. 6 at 182:12-184:20).

On August 4, 2022, Division staff sent a letter to Mr. Moeller 1) expressing concern that Respondent and Mr. Moeller had failed to meet their obligations to respond fully and accurately to the subpoenas, 2) asking that he review the June 15, 2022 subpoena requests and provide all documents covered by the requests in the subpoena to the Division, and 3) requesting that he provide to the Division the names of the up to fifteen people to whom Locke tokens have been granted or promised, as disclosed in the Registration Statement. (Dx. 9).

Mr. Moeller's response to that letter failed to provide the requested documents and information and instead asserted for the first time that "The Subpoenas pursuant to the 8(e) Order Are Unlawful" and "The Order Denying American CryptoFed's Form S-1 Withdrawal Is Unlawful." (Dx. 10). Other than the June 21, 2022 letter, Respondent did not produce any documents to the Division staff pursuant to the June 15, 2022 subpoena and still has not done so. (Tr. 340:2-5 (Moeller)).

ARGUMENT

I. A Stop Order Should Issue Because the Registration Statement Is Deficient and Respondent Obstructed the Examination.

A. The Applicable Legal Framework.

1. Registration of Securities Offerings under the Securities Act.

A fundamental purpose of the securities laws is "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor...*" *SEC v. Capital Gains Research Bureau, Inc*., 375 U.S. 180, 186 (1963). Accordingly, Securities Act Sections 5(a) and 5(c) prohibit the offer or sale, directly or indirectly, of securities in interstate commerce, unless a registration statement containing certain required disclosures has been filed with the Commission and declared effective (unless certain exemptions apply). *SEC v. Cavanagh*, 445 F.3d 105, 111 n.13 (2d Cir. 2006); 15 U.S.C. § 77e(a) and (c). "The purpose of the registration requirements is to 'protect investors by promoting full disclosure of information thought necessary to informed investment decisions.'" *World Trade Fin. Corp.*, Rel. No. 34-66114, 2012 SEC LEXIS 56, at *16 (Jan. 6, 2012) (quoting *SEC v. Ralston Purina*, 346 U.S. 119, 124 (1953)).

2. The Commission Can Suspend the Effectiveness of Registration Statements with Material Misstatements or Omissions.

To secure the investor protections described above, Section 8(d) permits the Commission—after due notice to the issuer and the opportunity for a hearing—to issue a stop order to suspend the effectiveness of a registration statement containing materially false information or omissions. 15 U.S.C. § 77h(d). For a stop order to issue, the untrue statements or omissions must be material. "Rule 405 under the Securities Act defines 'material' in connection with the furnishing of information on registration forms as 'those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether

to purchase the security registered.'" *Advanced Chem. Corp.*, Rel. No. 33-6507, 1984 SEC LEXIS 2246, at *15 (Feb. 9, 1984).

3. Neither Scienter Nor Injury Are Required Before a Stop Order Issues.

For a stop order to issue, the Division need not prove injury, or even that offers or sales have taken place. The material defects in the Registration Statement alone provide the basis for a stop order to issue. "We are not required to find injury to the public or offers or sales of securities before we can issue that order.… Such an order…is generally the most effective means of warning the investing public that unreliable statements have been filed and counteracting the false and misleading information publicized by the filings." *Petrofab Int'l, Inc.*, Rel. No. 33-6769, 1988 SEC LEXIS 782 at *18 (April 20, 1988) (cleaned up). Similarly, Respondent's scienter and potential claims of good faith are immaterial. "If an untrue material fact is included in a registration statement or a material fact is omitted, the registrant's good faith or lack of scienter does not influence whether a stop order should issue." *Reg. Statement of Life Sci. Holdings*, *Inc.*, Initial Decision Rel. No. 1412, 2022 SEC LEXIS 434 at *8 (Feb. 11, 2022).

At no point in the hearing did Respondent make any serious showing that its Registration Statement contained the required information that the OIP alleged was missing. Nor has Respondent made this argument in its brief to the Commission. To the extent Respondent argues that such requirements should not apply to it because it claims to be decentralized, or the type of security it wishes to distribute (crypto tokens) is different, the claim falls flat. If Respondent wishes exemptive relief from present regulations, the Commission informed Respondent that there is a separate process for that. *American CryptoFed*, Rel. No. 34-93905, 2022 SEC LEXIS 5, at n.13 (Jan. 5, 2022). No such exemptive relief has been sought—let alone granted—and a stop order must issue against Respondent's misleading and fatally flawed Registration Statement.

B. The Omissions in Respondent's Registration Statement Are Material.

1. Respondent's Omission of Audited Financial Statements Is Material.

(a) Precedent Establishes That Audited Financials Are Material.

Since the Commission's earliest days, a bedrock principle has been that registration statements must contain audited financial information. *See, e.g.*, *Queensboro Gold Mines, Ltd.*, Rel. No. 33-1617, 1937 SEC LEXIS 893, at *2-3 (November 17, 1937) (suspending registration statement under Section 8(d) for failure to include fully audited financial information). The Commission also explained in *Cornucopia Gold Mines* the reasons that audited financial statements were essential to the registration process:

> A certification [by an auditor] is a material fact. It signifies that the contents of the financial statements to which it is appended have been checked and verified within the limits stated in the certificate…. The insistence of the Act on a certification by an "independent" accountant signifies the real function which certification should perform. That function is the submission to an independent and impartial mind of the accounting practices and policies of registrants…. Accordingly, the certification gives a minimum of protection against untruths and half-truths which otherwise would more easily creep into financial statements.… It is a material fact, for it gives meaning and reliability to financial data and makes less likely misleading or untrue financial statements.

Rel. No. 33-720, 1936 SEC LEXIS 1018, at *6-7 (March 28, 1936). This fundamental requirement to include audited financial statements in registration statements is codified in Regulation S-X Rules 3 and 8, 17 C.F.R. §§ 210.3-01 *et seq*. and 210.8-01 *et seq*.

Over the years, the Commission and its ALJs[6] have reiterated how important audited 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) (issuing stop order due in part to the fact that information required by under

[6] ALJ decisions are not binding precedent for the Commission but can be informative.

Regulation S-K and Regulation S-X was false) (quoting *SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980)); *see also Reg. Statement of Apollo Publ'n Corp.*, Initial Dec. Rel. No. 302, 2005 SEC LEXIS 3205, at *13 (Dec. 7, 2005); *Military Robot Corp.*, Rel. No. 33-6640, 1986 SEC LEXIS 2356, at *3-4 (Apr. 15, 1986).

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). And even the Supreme Court has highlighted the importance of the Commission's requirements for audited financial statements. In *United States v. Arthur Young & Co.*, the Court observed that "corporate financial statements are one of the primary sources of information available to guide the decisions of the investing public" and noted that the Commission requires that "the auditor…issues an opinion as to whether the financial statements, taken as a whole, fairly present the financial position and operations of the corporation for the relevant period." 465 U.S. 805, 810-11 (1984) (cleaned up).

(b) Respondent's Self-Assessment That It Has No Revenue, Assets, or Liabilities Is No Substitute for Audited Financial Statements.

At times, Respondent has claimed that it could not provide audited financial statements because it had no revenue, assets, or liabilities, sometimes styling this as a claim that the required information "does not exist and shall never exist." (ACF Br. at 13 (quoting Rx. 34)).

First, Respondent attempts a sleight-of-hand here to avoid the requirement to submit audited financial statements. Respondent claims it does not have and never will have revenue,

assets, or liabilities. Even if this were true (which the Division seriously doubts[7]), that does not preclude Respondent from preparing financial statements and hiring an independent accountant to audit the financial statements and express an opinion as to whether the financial statements are presented in conformity with generally accepted accounting principles. Put another way, even if Respondent will never have revenue, assets, or liabilities, it can still have audited financial statements showing that. New registrants who have no assets or revenue routinely submit audited financials showing that to be the case. (Tr. 42:11-43:2 (Dobbie), 513:24-514:16 (Purnell)).

Second, the claim that the required information "does not exist and shall never exist" is based on the opinion of Respondent's officers, neither of whom are accountants, rather than that of an independent external auditor. (Tr. 218:11-221:11 (Moeller) 663:19-20; 847:17-848:6 (Zhou)). The requirement that management prepare financial statements and then have them independently audited is not a mere technicality. The expertise of independent and qualified auditors cannot be replaced by the amateur judgment of in-house non-accountants. In fact, "the federal securities laws make 'independent auditors the "gatekeepers" to the public securities markets. This statutory framework gives auditors…an important public trust. Within this statutory framework, the independence requirement is vital to our securities markets.'" *KPMG*

[7] Respondent's present assets likely include the intellectual property it has licensed (Dx. 1 at 32 (Item 16)) and the website Respondent uses to advertise Ducat and Locke and attract potential purchasers (Tr. 857:16-859:23 (Zhou)). If American CryptoFed begins operating, it will potentially have a stablecoin reserve, another likely asset. (*See* Dx. 1 at 6 "After refund rights expire, the corresponding proceeds will be transferred to CryptoFed's USD-pegged stablecoin reserve." *See also* Tr. 849:21-850:2 (Zhou) (admitting Locke token holders could vote to use the stablecoin reserve for whatever they wanted to)). If American CryptoFed begins operating, it will potentially have revenue from token sales. (*See* Dx. 1 at 5 "CryptoFed will only sell Ducat via crypto compliant exchanges for compliant USD-pegged stablecoins"). Respondent's likely liabilities include, or have included, $25,000 for the 2022 Mayors Business Council dues (Rx. 289) and regulatory filing fees (Dx. 1 at 26). If Respondent begins operating, its likely future liabilities include the obligation to send additional Ducat tokens to merchants. (Tr. 776:18-777:8 (Zhou)).

Peat Marwick LLP, Rel. No. 34-43862, 2001 SEC LEXIS 98, at *36 n.54 (Jan. 19, 2001); *see also Marrie v. SEC*, 374 F.3d 1196, 1200-01 (D.C. Cir. 2004) (noting "the particularly important role played by accountants in preparing and certifying the accuracy of financial statements of public companies that are so heavily relied upon by the public in making investment decisions…").

Respondent's two officers are, by definition, not independent from Respondent and therefore cannot exercise the proper degree of disinterested professional skepticism required of an independent auditor. *See Anton & Chia, LLP*, Rel. No. 34-87033, 2019 SEC LEXIS 2864, at *56, (Sept. 20, 2019) ("'Professional skepticism is an attitude that includes a questioning mind and a critical assessment of audit evidence' (PCAOB Standard AU § 230.07, Due Professional Care in the Performance of Work), and requires auditors to 'neither assume[] that management is dishonest nor assume[] unquestioned honesty' (AU § 230.09).").

To allow an issuer to avoid having to submit audited financial statements based solely on the assessment of its non-accountant officers that it did not have revenue, assets, or liabilities would eviscerate the protections put in place by this fundamental Form S-1 requirement. Registration statements submitted to the Commission must include audited financial information, and Respondent has shown no valid reason why it should be excused from this requirement.

Accordingly, the Initial Decision correctly found that this was a material omission requiring the issuance of a stop order. (ID at 4, 6-7). Despite this finding and despite being repeatedly told that audited financial statements were required, Respondent has neither provided them nor even addressed this issue in their brief. The omission of audited financial statements alone is sufficient basis to compel the issuance of a stop order. But there are many more material

flaws, and to protect the integrity of the Commission's processes, the stop order should be based on all of them and Respondent's deliberate obstruction of the Examination.

2. Respondent's Failure to Include an Opinion of Counsel Is Another Material Omission.

The opinion of counsel required by Item 601 is a material element of a registration statement. *See SEC v. Ramoil Mgmt., Ltd.*, 2007 U.S. Dist. LEXIS 79581, at *20-21 (S.D.N.Y. Oct. 25, 2007) (finding the opinion to be material and noting that "the 'opinion of counsel as to the legality of the securities being registered, indicating whether they will, when sold, be legally issued, fully paid and non-assessable' is required when a company issues new shares."); *see also SEC v. Blackburn*, No. 15-2451, 2020 U.S. Dist. LEXIS 18652, at *27-28 (E.D. La. Feb. 5, 2020) (noting the "opinion of counsel" is required and finding that an attorney who issued false opinion letters was a "necessary participant and substantial factor" in a Section 5 violation.).

Like auditors, attorneys safeguard investors during the securities registration process:

> The role of attorneys in the disclosure process provided for in the Securities Act of 1933 is critical to the purposes of the Act. Since the Commission under the statutory scheme does not approve or pass upon the accuracy of the various statements and reports filed with it, it is particularly important that attorneys who prepare and verify these materials, such as the notification and offering circular involved in this proceeding, assume the obligation and responsibility of diligently verifying the accuracy and completeness of such documents.

Germaise and Quinn, AP File No. 3-2606, 1971 SEC LEXIS 3974, at *32-33, (Oct. 29, 1971); *see also Carter and Johnson*, Rel. No. 34-17597, 1981 SEC LEXIS 1940, at *8-9 (Feb. 28, 1981) ("The important role which professionals, particularly attorneys and accountants, play in assuring adherence to the federal securities laws has long been recognized."). Thus, when Mr. Moeller defended the failure to include an opinion of counsel by stating that "[t]here are no hired experts, accounting firms or law firms involved in this Form S-1 filing" he missed the point

entirely. (Tr. 316:15-17). The Securities Act ***requires*** the involvement of certain gatekeepers, among them attorneys and accountants.

3. Other Missing Material Information Also Compels the Issuance of a Stop Order.

The other omitted information both is self-evidently the type of information a reasonable investor would want to know and has been recognized as material by the Commission or courts. This is true for:

Management discussion and analysis: *See, e.g.*, *Diversified Growth*, 595 F. Supp. at 1166-1167 (finding an issuer's financial statements deficient because 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, [but the] 10-Ks only provide one sentence expressing a decrease in general and administrative expenses."); *Reg. Statement of Hiex Dev. USA, Inc.*, Rel. No. 34-26722, 1989 SEC LEXIS 1013, at *10-12 (Apr. 13, 1989) (citing misstatements in the management discussion and analysis as one of the reasons a Form 10 was materially deficient and revoking registration under Exchange Act Section 12(j)).

Beneficial Ownership Information: *See SEC v. Honig*, 18-cv-8175 (ER), 2021 U.S. Dist. LEXIS 15587, at *25-26 (S.D.N.Y. Jan. 27, 2021) (declining to find beneficial ownership misstatements immaterial, especially where they may conceal who actually controls an entity).

Executive Compensation: *See Polycom, Inc.*, Rel. No. 34-74613, 2015 SEC LEXIS 1168, at *5-6 (Mar. 31, 2015) (settled case finding a proxy statement was materially misleading because it failed to properly disclose certain executive compensation as required by Item 402).

C. The Misstatements in Respondent's Registration Statement Are Material.

1. American CryptoFed's Misleading Description of Its Business Is Material.

Similar to financial information, the materiality of robust disclosure of an issuer's business plan is not subject to serious challenge. "Other than a corporation's financials, its leadership, the nature of its operations, and its plan for the future would seem to be ***the most*** important pieces of information available to an investor." *Crest Radius*, 2021 SEC LEXIS 42 at *11 (quoting *SEC v. Husain*, No. 2:16-cv-3250, 2017 U.S. Dist. LEXIS 29131, at *21-22 (C.D. Cal. Mar. 1, 2017)) (emphasis in original).

Respondent's description of its business, even if it were allowed to incorporate other documents by reference (and it is not), is inadequate. In sum, the Registration Statement presents Ducat and Locke as presently existing and the Ducat economy as something that will happen, without disclosing any specific plan for how it will happen, or sufficiently disclosing the nascent and aspirational stage at which the business presently stands.

When registration statements have offered similarly vague business descriptions such that it is unclear what the issuer is offering, the Commission has issued stop orders. *See Northwest Petroleum*, Rel. No. 33-3393, 1950 SEC LEXIS 8, at *8 (Oct. 6, 1950) (granting stop order where it was "not possible to determine either from the registration statement or the record in this proceeding what the precise legal or financial characteristics attaching to the shares might be"); *see also Augion-Unipolar Corp.*, Rel. No. 33-5161, 1971 SEC LEXIS 475, at *3-*9 (July 5, 1971) (granting stop order in part due to deficient description of business and use of proceeds).

2. The Contradictory Statements About Whether Ducat and Locke Are Being Offered as Securities Are Materially Misleading.

As described above, Respondent repeatedly described the Ducat and Locke tokens as securities in portions of its Registration Statement, but elsewhere in the Registration Statement

claimed that Ducat and Locke were not securities. Respondent filed the Registration Statement to register an offering of securities, but then stated in the Registration Statement that it only sought to register an offering of "utility tokens" not securities. Contrary to the Initial Decision's finding, these statements inherently contradict each other, and one must be false. (*See* ID at 8). This is self-evidently material, as a reasonable investor would want to know whether the tokens that they are buying are securities or not, and whether the offering being registered in fact involves securities or not.[8] Indeed, if Respondent's Registration Statement were allowed to become effective as is, what would the offering of Ducat and Locke be registered as? These misstatements also highlight the materiality of the missing opinion of counsel as to the legality of the securities being offered.

D. A Stop Order Is Appropriate Because Respondent Failed to Cooperate with, and Deliberately Obstructed, the Examination.

Issuing a stop order is also appropriate because American CryptoFed failed to cooperate with, and obstructed, the Examination. Section 8(e) provides that "if the issuer…shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order." 15 U.S.C. § 77h(e). The Commission and its ALJs have issued stop orders on this ground in prior cases. *See, e.g.*, *Crest Radius*, 2021 SEC LEXIS 42 at *5-6, *13 (finding a stop order was warranted because respondent's incomplete responses to subpoenas constituted failure to cooperate); *Augion-Unipolar Corp.*, 1971 SEC

[8] This is not a circumstance where an issuer filed a registration statement seeking to register crypto assets as securities and provided all the required information, but also included a disclaimer preserving their right to assert elsewhere that the crypto assets are not securities. The Commission need not decide the legality of a registration statement in that hypothetical scenario in order to find that it is misleading to file a registration statement that simultaneously seeks to register an offering of securities while claiming to only register an offering of non-security "utility tokens."

LEXIS 475 at *10-12 (issuing stop order based in part on issuer's failure to provide documents and testimony).

1. Respondent Deliberately Withheld Material Documents and Information.

American CryptoFed refused to provide any documents responsive to the requests contained in the June 15, 2022 subpoena, and Mr. Moeller refused to provide meaningful responses to multiple questions posed to him in testimony during the Examination. Even worse, Mr. Zhou confessed during the hearing that American CryptoFed ***deliberately withheld materials*** regarding Contributors that the subpoena requested because it did not "want to get them into trouble." (Tr. 866:2-9). This information is material because the Contributors' described role makes them "promoters" under the securities laws.

Promoters include "[a]ny person who, acting alone or in conjunction with one or more other persons, directly or indirectly takes initiative in founding and organizing the business or enterprise of an issuer." 17 C.F.R. § 240.12b-2. That aligns with Mr. Zhou's description of American CryptoFed's Contributors. (*See* Tr. 764:3 to 767:3, including the following):

> American CryptoFed was on track to build up Ducat economic zone which consists of supporting entities, including, individuals, merchant, government, et cetera. The supporting entities cover all the costs. Not American CryptoFed. They will receive tokens of Locke, generate benefit of Ducat economic zone for each other and work together to set up a standard and develop software…. So, the Blockchain cannot operate until we have necessary people to produce block…. So, we need multiple, multiple peoples to join us using that software to produce block. And that software still needs to customize…

"Misrepresenting who is a promoter or control person or, as here, failing to disclose a promoter or control person, is material." *Crest Radius*, 2021 SEC LEXIS 42 at *11 (citing *SEC v. Fehn,* 97 F.3d 1276, 1290 (9th Cir. 1996); *Am. Fin. Co.*, Rel. No. 33-4465, 1962 SEC LEXIS 632, at *6 (Mar. 19, 1962)).

Additionally, the names of, and communications with, potential contributors would allow the Division to investigate what potential contributors were told about how Ducat and Locke would operate. That is relevant to determining whether the tokens will be offered and sold as securities and whether American CryptoFed and its officers are violating other provisions, including Exchange Act Section 10(b) and Securities Act Section 17(a).

The other documents requested from American CryptoFed and the questions that Mr. Moeller refused to answer during his July 7, 2022 testimony are also material and well-within the scope of the 8(e) Order. Respondent's repeated refusal to provide the information and documents sought pursuant to the Division's subpoenas hampered the Division's ability to examine whether the Ducat and Locke tokens are securities. The Initial Decision correctly found that Respondent failed to cooperate through its "adamant refusal to provide documents." (*See* ID at 9). But the Initial Decision then erroneously concluded that Mr. Moeller's partial, incomplete responses to questions during testimony mitigated that failure, when in fact they exacerbated it. (*Id.*). A partial failure to cooperate is a failure to cooperate. *See, e.g., Nat'l Car Care*, Inc. Rel. No. 33-6875, 1990 SEC LEXIS 3160, at *4 (Sept. 27, 1990) (Section 8 does "not require a finding that the issuer or the underwriter gave no cooperation whatsoever. It is sufficient that there has been a material failure to cooperate") (citations omitted); *Crest Radius*, 2021 SEC LEXIS 42 at *5 (Respondent's incomplete responses were failure to cooperate); *Reg. Statements of Go Ez Corp. et al*. Initial Decisions Rel. No. 1132, 2017 SEC LEXIS 1362 at *30-31 (May 9, 2017) (production of some, but not all, documents was failure to cooperate).

2. Respondent Had No Valid Basis to Withhold Documents or Information.

Respondent's objections are not valid bases to refuse to provide the requested documents and information. Respondent's first objection was that the requests were

> not reasonably calculated to lead to the discovery of relevant, admissible evidence which can rebut American CryptoFed's assertion that American CryptoFed has **No Fund Raising, No Revenue, No Costs, No Profits and No Assets** and therefore there is no traditional balance sheet equation of **Assets = Liabilities + Shareholder's Equities** to generate securities subject to the SEC's jurisdiction

(Dx. 4 at 2) (emphasis in original). This objection is not valid. Commission subpoenas are valid so long as: (1) the inquiry has a legitimate purpose, (2) the subpoena was issued in accordance with the required administrative procedures, and (3) the information sought is reasonably relevant to some subject of the inquiry. *United States v. Powell*, 379 U.S. 48, 57-58 (1964). Once these threshold criteria are met, the burden shifts to the party refusing to provide information to establish that the subpoena is unreasonable. *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973). The burden of showing unreasonableness "is not easily met." *Id.* Further, Congress gave the Commission authority to investigate "any facts, conditions, practices or matters" that, in its discretion, the Commission deems necessary or proper to aid in enforcing the federal securities laws. 15 U.S.C. § 78u(a)(1).

As the Supreme Court found in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), an agency can investigate upon mere suspicion that the law has been violated, without showing probable cause. The Court explained that:

> [An agency] has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

Id. at 642-43. Consequently, the Commission is acting within the scope of its Congressionally granted authority even where it bases an examination on nothing more than official curiosity. *See, e.g.*, *SEC v. Arthur Young*, 584 F.2d 1018, 1023-24 & n.45 (D.C. Cir. 1978) (recognizing that "even if one were to regard a request for information…as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy

themselves that corporate behavior is consistent with the law and public interest") (quoting *Morton Salt*, 338 U.S. at 652).

Here, an examination of the Registration Statement was a legitimate inquiry and the information sought was well-within its ambit. Additionally, the Commission's jurisdiction here was established when Respondent filed the Registration Statement with the Commission. It is unreasonable for Respondent to file a registration statement with the Commission and then assert that the Commission or Division cannot conduct an examination of that registration statement without first proving that the registration statement relates to securities. Indeed, if a registration statement does not relate to securities, that would be yet another reason to issue a stop order, as Form S-1 is only for the offering of securities, and it would be misleading to use it to register the offering of something that was not a security.

Thus, Respondent had no valid basis to withhold the requested documents and information. Its failure to cooperate with the Examination is another basis for a stop order.

II. This Proceeding Is Lawful and Comports With Due Process.

Instead of arguing that its Registrant Statement meets the requirements of the Securities Act and the regulations thereunder, Respondent appears to argue that the Commission should not issue the Stop Order because of various procedural defects. None of its arguments, each of which are addressed below, have any merit. To the extent Respondent makes additional arguments not readily apparent from a plain reading of its brief, the Division does not concede them. This proceeding has been fair and comported with due process in all respects.

A. Section 8(b) Does Not Prohibit the Commission from Proceeding Under Sections 8(d) and 8(e).

American CryptoFed asserts that because Securities Act Section 8(b) permits the Commission to act to block pre-effective registration statements that are defective on their face,

the Commission may not act under Sections 8(d) or 8(e). (ACF Br. at 14-17). This argument, which amounts to Respondent saying, "*our Registration Statement is so materially deficient you cannot stop it*," is meritless, contrary to statutory language, and has previously been rejected by the Commission.

Respondent's argument disregards the statute's plain language. Section 8(b) reads in relevant part:

> If it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission ***may***…issue an order prior to the effective date of registration refusing to permit such statement to become effective.

15 U.S.C. § 77h(b) (emphasis added).

Section 8(d) reads in relevant part:

> If it appears to the Commission ***at any time*** that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may…issue a stop order suspending the effectiveness of the registration statement.

15 U.S.C. § 77h(d) (emphasis added).

Section 8(e) reads:

> The Commission is empowered to make an examination ***in any case*** in order to determine whether a stop order should issue under subsection (d).

15 U.S.C. § 77h(e) (emphasis added).

Nothing about Section 8(b)'s permissive language that the Commission "***may***" act earlier deprives the Commission of the ability to exercise its jurisdiction "***at any time***" or "***in any case***" as provided in Sections 8(d) and 8(e). Respondent's citation to various inapposite Supreme Court opinions about an entirely different district court venue provision do not compel a different result. Indeed, the Commission has previously addressed this issue, and despite Respondent's misreading of those cases, they did specifically reject the argument Respondent makes here.

In *Red Bank Oil*, the Commission rejected the notion that a stop order proceeding under 8(d) was limited to already effective registration statements:

> That Congress meant its language regarding the time of commencing actions under Section 8 to be taken literally is shown by comparing Section 8(b) with Section 8(d). Section 8(b) is expressly limited in its operation to the period ***prior*** to effectiveness. Having so worded Section 8(b) any intention to limit Section 8(d) to the period ***after*** effectiveness would have been manifest in similarly precise language … it is manifest that Congress affirmatively intended that the phrase "at any time" should be given its full and usual meaning.

Rel. No. 33-3095, 1945 SEC LEXIS 204, *6 n.4 (Oct. 11, 1945) (emphasis in original). The Commission further found that limiting Section 8(d) as Respondent requests here "would lead to absurd and inequitable results from the point of view of decent administration and investor protection." *Id.* at *6. The Commission then noted, "[w]e think it utterly repugnant to the objectives of the Act to interpret it to require us to sit by until a false and misleading registration statement becomes effective before commencing action under Section 8(d)." *Id.* at *7.

None of Respondent's arguments change this analysis, which has been repeatedly upheld in the more than 75 years since the *Red Bank Oil* decision. *See Petrofab*, 1988 SEC LEXIS 782 at *17 (issuing stop order regarding registration statement that had never become effective); *Registration Statement of Canso Enterprises Ltd*., Initial Decision Rel. No. 1155, 2017 SEC LEXIS 2215 at *32-33 (July 26, 2017); *see also* William R. McLucas, *Stop Order Proceedings Under the Securities Act of 1933: A Current Assessment*, 40 Bus. L. 515, 530-31 (1985) (noting that courts have implicitly upheld the Commission's position); 15 U.S.C. § 77e(c) (registration statements can be subject to examination and proceeding under Section 8 prior to becoming effective).

B. Corporation Finance Acted Properly and Provided Written Comments.

Respondent claims that Corporation Finance failed to comply with its filing review process (and somehow violated the law) by not responding in writing to American CryptoFed's October 12, 2021 letter. (ACF Br. at 21).

1. Corporation Finance's Filing Review Program.

Corporation Finance has made available to the public on the SEC's website certain information about the filing review process its staff generally follows when reviewing Securities Act or Exchange Act filings. (*See* https://www.sec.gov/divisions/corpfin/cffilingreview; *see also* Rx.3). Although some issuers hopefully find that information useful, general information provided on the Commission's website cannot supersede statutes or regulations. Respondent cites no authority for the proposition that a general description of the staff's typical process can override the statutory text of Sections 8(d) and (e), and any contention that it could do so is nonsensical.

Corporation Finance staff engage with issuers, their attorneys, and their independent auditors regarding accounting and disclosure issues in the ordinary course, including through the filing review process as well as through issuer requests for interpretations, accommodations, or waivers of certain reporting requirements. One of the primary goals of the filing review program is for the staff in Corporation Finance to communicate with issuers about their filings in order to enhance compliance with the applicable disclosure and accounting requirements. At all times, however, it remains the ***issuer's*** obligation to file complete and accurate information with the Commission. *See* 15 U.S.C. § 78z.

2. The Staff Responded in Writing.

Respondent was repeatedly told that it needed to amend its Registration Statement to, at a minimum, include the required information such as audited financial statements, and that

Corporation Finance would not conduct any further review until the Registration Statement was amended to include this information. (Tr. 541:8-14 (Purnell)). Indeed, Corporation Finance provided ***written*** comments on the Form 10 and Registration Statement, specifying the deficiencies, on October 8, 2021. (Dx. 17 and 18). Respondent's October 12, 2021 letter did nothing to remedy those deficiencies, as Mr. Dobbie explained:

> I reviewed the response submitted on October 12th [Dx. 19] which appeared primarily to be directed to – to members of the Commission who were not participating in the filing review, but also copied the staff. None of the responses that were provided resulted in[9] any of the comments that we had issued. We subsequently reached out a number of times to communicate that and were – were told – and, again, this is consistent with the filing review process that you've put up on the screen that we're always willing to speak if there's a request for clarification of our comments. And we were told that [American CryptoFed] didn't want to engage with us over the phone. So, [American CryptoFed] had all of our written comments and none of them were resolved.

(Tr. 117:19-118:15).

Respondent claims that Corporation Finance violated the law by not responding to its October 12, 2021 letter in writing. (ACF Br. at 21-22). This is absurd. To be clear, American CryptoFed's October 12, 2021 letter (Dx. 19) is utterly devoid of merit, does nothing to address the deficiencies in the Registration Statement, consists almost entirely of various claims that law and rules should not apply to American CryptoFed, and warranted no response whatsoever.

[9] It is possible that "resulted in" should read "resolved," but any discrepancy is not material.

Nonetheless, Corporation Finance reached out to American CryptoFed by phone to attempt to continue a dialogue. American CryptoFed refused to take the calls.[10]

Later in October 2021, the Division communicated with American CryptoFed both by phone ***and in multiple letters*** and made clear that: "***The Company's responses have not remedied the deficiencies in any way.***" (Rx. 14 at 2-3 (emphasis added)).

3. Respondent Did Not Engage in Good Faith.

At all times, Respondent and its officers were aware that they could contact either Erin Purnell or Justin Dobbie regarding Corporation Finance's review of the Registration Statement. (Dx. 18; *see also* Tr. at 68:20-69:9 (Dobbie)). The problem is not that Respondent lacked fair notice, did not know who it could communicate with, or lacked a written explanation of the

[10] American CryptoFed now claims that it did not want to have telephone calls with Corporation Finance staff because of a 2017 OIG report. (ACF Br. at 21-22). This is a disingenuous post-hoc rationale that Respondent never previously mentioned in these lengthy proceedings. Rather, at the hearing Respondent asserted that it did not want to have telephone calls because Mr. Zhou was not a native English speaker. (Tr. 97:24-98:3). Additionally, the OIG recommendation at issue concerned situations where Corporation Finance staff delivered an "oral comment" as part of a disclosure review, concluding that in such instances the oral comments should be better documented in an internal system to permit internal review later. Corporation Finance had addressed that recommendation prior to March 31, 2019 through its implementation of an internal workflow tracking database that was in place prior to the filing of the Registration Statement. All of this, though, is unequivocally irrelevant to the present matter. First, the OIG report was focused on internal documentation of certain oral comments for later internal use, and thus would provide no basis upon which a registrant could demand that all communications with it being in writing. Second, in this matter, written comments itemizing the deficiencies and establishing a record of the staff's comments were in fact delivered to Respondent in the October 8, 2021 letters. Third, not every conversation or communication with Corporation Finance staff is a review process "comment" requiring internal tracking. Indeed, because American CryptoFed's October 12, 2021 letter did not resolve the prior written comments in any way, the phone calls that Mr. Dobbie subsequently attempted to have with American CryptoFed were not filing review comments, but courtesy clarifications that all of the prior comments were unresolved and to discuss whether American CryptoFed planned to provide substantive amendments and responses or seek to withdraw their filings.

issues. The problem is that Respondent refused to provide the information clearly required by Form S-1 even after being told in writing what was missing.

Since October 2021, Corporation Finance (and subsequently the Division) have attempted to engage with Respondent and repeatedly made clear to Respondent that, among other things, the Registration Statement must include financial statements prepared by Respondent and audited by an independent, PCAOB-registered accountant. (Tr. 504:10-505:1, 513:13-514:22, 541:8-14 (Purnell), Dx. 17, and 18). But American CryptoFed's officers simply refuse to acknowledge feedback that they do not like.

C. The Division Does Not Need to Prove That Ducat and Locke Are Securities.

1. The Division Has Met Its Burden of Proof.

Respondent claims that the Division violated the Administrative Procedure Act, 5 U.S.C. § 556, by not meeting its burden of proof. (ACF Br. at 26-27). Respondent misunderstands the APA. The Division has the burden in this case, but only to prove sufficient material issues of fact and law to support a stop order. Indeed, Section 556(d) begins: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof…but the agency as a matter of policy ***shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence*** …" (emphasis added). Moreover, that provision should be read in conjunction with Section 557(c)(3)(A), which requires that decisions include "findings and conclusions, and the reasons or basis therefor, on all the ***material*** issues of fact, law, or discretion presented on the record." Immaterial issues need not be proven or decided in administrative hearings, as the Supreme Court has found:

> Appellants challenge the Commission's failure to make a number of other subsidiary findings, all of which have been considered, but we find that they relate to contentions that are so collateral or immaterial that the law did not require specific findings upon them. By the express terms of § 8 (b), the

> Commission is not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are "material."

Minneapolis & S. L. R. Co. v. United States, 361 U.S. 173, 193-194 (1959).

In this proceeding, whether Ducat and Locke are securities is immaterial. To be clear, that issue might be important to American CryptoFed generally, or material in a different case or context. But it is not material to a decision about whether to issue the requested stop order. If an issuer filed a Form S-1 with the Commission seeking to register the offering of refrigerators as appliances and did not include audited financials in the Form S-1, the Division could seek (and the Commission could issue) a stop order without having to prove whether the refrigerators were securities, appliances, or both. Respondent's Registration Statement is fatally flawed. The Commission should issue a stop order. And it need not determine whether Ducat and Locke are securities to do so. American CryptoFed's repeated refusal to cooperate with the Examination makes its argument even more absurd. Respondent seeks to hold the Division to a standard that would require the Division to prove that the Ducat and Locke tokens are securities despite American CryptoFed's steadfast refusal to provide the subpoenaed documents and information that would allow Division staff to conduct a fully informed analysis.

True, in some cases, the Commission's jurisdiction to bring an action will depend on whether a financial instrument is a security. But here, Respondent established and conceded the Commission's jurisdiction to bring this action under Securities Act Section 8(d) when Respondent ***voluntarily*** filed the Registration Statement with the Commission that ***seeks to register an offering of securities***. In such an instance, the Division need not prove that the tokens are securities for a stop order to issue.

2. The Division Followed the Law.

Respondent claims that the Division failed to follow *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), by referring to form over substance and failing to prove that Ducat and Locke are securities. (ACF Br. 25). As discussed above, the Division has no obligation to prove that Ducat and Locke are securities in this proceeding. And Respondent completely misunderstands the use of the word "form" in the *Howey* case's requirement that "[f]orm [is] disregarded for substance and emphasis was placed upon economic reality." *Id.* at 298. As used there, "form" refers to the name of the thing being analyzed (whether it is called a contract, a note, or a token). Nothing about that use of the word "form" prevents the Division or Commission from considering, in any future *Howey* analysis, the statements made by Respondent in its registration form. Such statements are valid evidence of whether Respondent's tokens are securities.

3. Respondent Received Fair Notice.

Respondent appears to claim that it did not get fair notice of what it needed to include in the Registration Statement. (ACF Br. at 23-25). This claim is simply untrue.[11] As set forth above, Respondent has been informed by regulations, Form S-1's instructions, telephone, and letter that it needed to include audited financial statements and other information. Respondent has been given fair notice and precise guidance about what it needs to do—its officers just do not like the message they have received.

[11] To support its claim that laws and regulations do not provide it with fair notice of what must be included in a registration statement, Respondent cites *SEC v. Ripple Labs, Inc.*, 2022 U.S. Dist. LEXIS 43537, at *9 (S.D.N.Y. Mar. 11, 2022). (ACF Br. at 24). That decision, which was made at the pleading stage, is inapposite because (a) it concerned a completely different fair defense claim—relating to whether certain crypto assets were securities under *Howey*—and (b) that court ultimately rejected the defendants' fair notice and vagueness defenses. *SEC v. Ripple Labs, Inc.*, 2023 U.S. Dist. LEXIS 120486, at *42-44 (S.D.N.Y. July 13, 2023). *See also SEC v. Terraform Labs Pte. Ltd.*, No. 23-CV-1346 (JSR), 2023 U.S. Dist. LEXIS 132046, at *29-30 (S.D.N.Y. July 31, 2023) (similarly rejecting crypto defendants' fair notice defense).

Respondent has received more than fair notice, as courts have found that the language of the statutes and rules, including their "common usage and understanding," can alone provide adequate certainty and clarity to a regulated party. *See Sproles v. Binford*, 286 U.S. 374, 393 (1932); *see also United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 221 (4th Cir. 1997) (in evaluating whether regulated person was on notice courts "begin with the plain language of the regulations."). The language of the relevant regulations is clear. *See, e.g.*, 17 C.F.R. § 210.3-01(a) ("There shall be filed, for the registrant and its subsidiaries consolidated, audited balance sheets as of the end of each of the two most recent fiscal years. If the registrant has been in existence for less than one fiscal year, there shall be filed an audited balance sheet as of a date within 135 days of the date of filing the registration statement."); *SEC v. Commonwealth Equity Servs., LLC*, 1:19-cv-11655-IT, 2023 U.S. Dist. LEXIS 61489, at *24-28 (D. Mass. Apr. 7, 2023) (finding that court decision, statute, and SEC forms provided sufficient fair notice under the Investment Advisers Act).

Further, at least one Court has examined Regulation S-K and found that it "is unambiguous and provides [the defendant] with fair notice of what is required of him." *United States v. Yeaman*, 987 F. Supp. 373, 381 (E.D. Pa. 1997). Indeed, Respondent has not pointed to any language in Regulation S-X or Regulation S-K, or in the instructions for Form S-1, that Respondent alleges is ambiguous or otherwise does not provide fair notice.

Respondent does not lack fair notice of what is required. Respondent appears to misunderstand the difference between regulations that provide fair notice and guidance, and a person or entity providing legal advice. The regulations cited above provide fair notice and guidance. Commission staff can work with issuers who are operating in good faith to seek to

comply with those regulations. But it is not the obligation of the Commission or its staff to serve as American CryptoFed's attorneys or accountants. *See SEC v. Carebourn Capital, L.P.*,

> A due process defense is not available when it is premised on the absence of the SEC's guidance on how to comply with a securities statute. *See, e.g., SEC v. River North Equity LLC*, 415 F. Supp. 3d 853, 859 (N.D. Ill. 2019) (rejecting the defendants' argument that allowing the SEC's unregistered-dealer claims to go forward would violate their due process rights based on the breadth of the statutory definition and absence of SEC guidance on its interpretation of the statute); *SEC v. Falstaff Brewing Corp.*, No. 77-894, 1978 U.S. Dist. LEXIS 14669, 1978 WL 1120, at *28 (D.D.C. Oct. 28, 1978) ("The defendants do not have the right to rely on the Commission's assistance to tell them how to comply with the securities laws, nor can they successfully assert the absence of such assistance as a defense.")

No. 21-cv-2114, 2022 U.S. Dist. LEXIS 67596, at *6-7 n.5 (D. Minn. Apr. 12, 2022) (citing *SEC v. Fife*, No. 20-cv-5226, 2021 U.S. Dist. LEXIS 242126, (N.D. Ill. Dec. 20, 2021); *SEC v. Fierro*, No. 20-cv-2104, 2020 U.S. Dist. LEXIS 238936, (D.N.J. Dec. 18, 2020); *SEC v. Keener*, No. 20-cv-21254, 2020 U.S. Dist. LEXIS 146256, (S.D. Fla. Aug. 14, 2020).

D. *Jones* Does Not Preclude a Stop Order.

Respondent claims that this proceeding is unlawful under *Jones v. SEC*, 298 U.S. 1, 18 (1936). (ACF Br. at 28). Not so. First, there is a critical factual difference between the *Jones* registrant and American CryptoFed. The *Jones* registrant wanted to withdraw his registration statement because he ***no longer planned to conduct the offering and there were no potential investors***. 298 U.S. at 23. In contrast, American CryptoFed asserted in writing that if the Form S-1 were withdrawn, American CryptoFed intended to offer the Ducat and Locke tokens to the public. (Dx. 13 at 1-2). The statement in Respondent's brief that it is "perfectly identical" to the *Jones* petitioner (ACF Br. at 28) is simply not true. American CryptoFed fully intends to distribute and sell Ducat and Locke if permitted to withdraw the Registration Statement—its non-attorney officers have just decided to assert that their tokens are not securities. But, when the

Division tried to gather evidence in the Examination to test that assertion, Mr. Moeller and Mr. Zhou deliberately obstructed those efforts.

Moreover, in the more than eighty years since the *Jones* decision was issued, there have been significant changes in the law that call into question the validity of *Jones'* holding that there is an unqualified right to withdraw a pre-effective registration statement. Among these are the 1954 amendment to Securities Act Section 5, which allows registrants to make and solicit offers to buy and sell securities after the filing of a registration statement but before it becomes effective. In large part because of these amendments, the Fifth Circuit noted that:

> *Jones* has no application when withdrawal would frustrate the purposes of the Act, cripple the investigative functions of the SEC, and allow the registration procedure itself to be used for fraud or deception. We hold, therefore, that an applicant has no absolute right to withdraw his registration statement after it has been filed—whether or not there are existing investors.

Peoples Sec. Co. v. SEC, 289 F.2d 268, 274 (5th Cir. 1961); *see also Wolf Corp. v. SEC*, 317 F.2d 139, 141-42 (D.C. Cir. 1963) (rejecting claim that SEC has no ability to reject request to withdraw pre-effective registration statement). Here, the Division attempted to ascertain what efforts American CryptoFed had taken (beyond filing the Registration Statement) to offer Ducat and Locke to investors, but was again stymied by American CryptoFed's obstruction.

Additionally, allowing a registrant to withdraw a materially defective registration statement would allow that registrant to later utilize certain exemptions from registration under Regulation D and Regulation A, which would not be available to registrants who have been subject to a stop order. *See* Securities Act Rules 506(d)(1)(vii) and 262(a)(7). This weighs against an unqualified right to withdraw, as the Commission and courts have noted. *See Comico Corp.*, Rel. No. 33-4050, 1959 SEC LEXIS 25, at *11-12 (Apr. 27, 1959); *Columbia Gen. Inv.*

Corp. v. SEC, 265 F.2d 559, 564 (5th Cir. 1959); *see also* 17 C.F.R. § 230.477(b) (Commission ability to deny request to withdraw registration statement).

E. The Section 12(j) Proceeding Is Not Part of This Petition for Review.

Throughout its brief, Respondent makes various claims about the Form 10, the Section 12(j) Proceeding, and the Commission's actions (or alleged lack of action) in that proceeding. This proceeding is only about the Form S-1. That said, as Respondent casts some of its references to the Form 10 in terms of denial of due process relating to the Form S-1 Registration Statement, the Division has corrected above some of Respondent's fallacious factual and legal arguments. Respondent's contention that alleged delay in the 12(j) Proceeding left it with "no choice" but to threaten to begin distributing the tokens is absurd. (ACF Br. at 7). In any event, as noted above, the delay in the Section 12(j) Proceeding is Respondent's fault. (*See supra* at 6). Other arguments relating to the Form 10 or Section 12(j) Proceeding are not properly part of this proceeding and do not warrant a response at this time.

III. Respondent's Concluding Requests Should Be Rejected.

In concluding its brief, Respondent makes numerous requests, many of which have no support elsewhere in its brief. The Commission should reject each of them for the reasons set forth above and because several of the requests are outside the scope of this proceeding.

CONCLUSION

The Registration Statement lacks audited financial statements and other material required information. It also contains materially misleading statements. And Respondent failed to cooperate with the Examination. For these reasons, a stop order must issue.

Dated: September 20, 2023

Respectfully submitted,

/s/ Christopher Bruckmann

Christopher Bruckmann (202) 551-5986
Christopher Carney (202) 551-2379
Martin Zerwitz (202) 551-4566
Michael Baker (202) 551-4471
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-5949
bruckmannc@sec.gov
carneyc@sec.gov
zerwitzm@sec.gov
bakermic@sec.gov

COUNSEL FOR
DIVISION OF ENFORCEMENT

OS Received 09/20/2023

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on the following on this 20th day of September 2023, in the manner indicated below:

By Email:

Scott Moeller
scott.moeller@americancryptofed.org
President
American CryptoFed DAO LLC

Zhou Xiaomeng
zhouxm@americancryptofed.org
Chief Operating Officer
American CryptoFed DAO LLC

/s/ Christopher Bruckmann
Christopher Bruckmann

CERTIFICATE OF COMPLIANCE WITH RULE 450(c)

This brief complies with Rule 450(c) in that, exclusive of cover page, table of contents, table of authorities, Certificate of Service, and Certificate of Compliance, it contains 13,955 words, as indicated by Microsoft Word.

/s/ Christopher Bruckmann
Christopher Bruckmann