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 OPPOSITION TO RESPONDENT'S MOTION TO REQUEST THE DIVISION OF ENFORCEMENT TO PRODUCE A WITNESS

The Division of Enforcement ("Division"), by counsel, respectfully submits this opposition to Respondent American CryptoFed DAO LLC's ("Respondent" or "American CryptoFed") Motion to Request the Division of Enforcement to Produce a Witness ("Motion").

BACKGROUND

In the Joint Report submitted in this matter, Respondent indicated that it wished to call as a witness one of the Division attorneys who were named in the Section 8(e) Order of Examination. The only description of the subject matter of the requested testimony was "Non-public Section 8 (e) Order." (Joint Report at 6). The Division objected to this on the grounds that it "would violate, at a minimum, the work-product doctrine, the deliberative process privilege, and/or the attorney-client privilege." (Joint Report at 4-5).

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During the hearing on Friday, December 2, 2022, the Division raised the issue that it objected to calling one of its trial counsel as a witness.[1] The Court then requested that Respondent proffer what questions they would ask of the Division attorney. Despite repeated requests from the Court, Respondent could not (or would not) proffer a single question that they intended to ask the Division attorney. The closest they came to a proffer were statements by Mr. Zhou referencing "thousands" of pages of communications between the Division and Respondent, which is too vague a statement to constitute a proffer.

After these repeated failures, and in light of Respondent's numerous attempts to question Division of Corporation Finance Acting Chief Justin Dobbie about improper matters during his testimony, the Court ordered that Respondent should file a motion by the "afternoon" of Monday, December 5, 2022, that included the "topics" about which Respondent wished to question the Division attorney.

Sometime after 10:00 pm on Monday, December 5, 2022, Respondent filed the Motion. The Motion (on page 7) argues that because the Division of Enforcement

[1] Of the nine attorneys listed on the Order of Examination three (Jonathan Austin, Pei Chung, and Elizabeth Doisy) never worked on this matter (it is not unusual to include staff whose assistance may be needed on an order of examination or investigation, but for those staff to never actually be asked to assist). One additional attorney, John Lucas, only worked on this matter for a limited period of time. Kristina Littman supervised this matter as the Chief of the Division's Cyber Unit, but left the Division for private practice several months ago. Thus, none of them would have sufficient knowledge to testify about the topics listed in the Motion. This means that if required to produce a witness, the Division would be forced to choose between Martin Zerwitz, Michael Baker, or Christopher Bruckmann, who are all trial counsel in this matter, or Deborah Tarasevich, who supervises Mr. Zerwitz and Mr. Baker in this matter. As a practical matter, the Motion is a request for testimony from opposing trial counsel.

responded to a letter sent to the Division of Corporation Finance ***and copied to*** the Division of Enforcement, the Division of Enforcement is subject to the Filing Review Process on the SEC's website, which in the Respondent's view waives all privileges. This argument is absurd and warrants no further response.

The Motion then ignores this Court's clear order that Respondent had to describe, at a minimum, the topics about which it wished to question the Division attorney. The Motion includes no proposed topics and no proposed questions. Instead, it states that "American CryptoFed's questions for the witness produced by the Division of Enforcement will not exceed the 'non- privileged portion of its investigative file' and 'Rule 230 production' which already have a large volume of data." (Motion at 8). Describing the topics for testimony by vaguely referencing the entirety of the discovery file does not come close to the level of specificity required by the Court's order during the hearing on Monday, or by the case law governing attempts to call opposing counsel as a witness.

American CryptoFed has not shown a proper basis for its extraordinary request to call opposing counsel as a witness. The Motion should be denied.

ARGUMENT

I) American CryptoFed Has Not Met Its Burden to Demonstrate a Need to Call Opposing Counsel as a Witness.

Both federal courts and SEC Administrative Law Judges have noted that calling opposing counsel as a witness is expressly disfavored. This is because any attempts to question opposing counsel implicate the work-product doctrine and attorney-client privilege, and here also implicate the deliberative process privilege.

The seminal case on calling opposing counsel as a witness is *Shelton v. Am. Motors Corp.,* 805 F.2d 1323 (8th Cir.1986). There, the Eighth Circuit noted that courts take a dim view of attempts to take testimony from opposing counsel:

> The practice of forcing trial counsel to testify as a witness, however, has long been discouraged . . . Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony. Finally, the practice of deposing opposing counsel detracts from the quality of client representation. Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent. Moreover, the "chilling effect" that such practice will have on the truthful communications from the client to the attorney is obvious.

Id. at 1327 (citing *Hickman v. Taylor*, 329 U.S. 495 (1947). The court then set forth a three-part test that has since been endorsed by numerous courts (regarding both deposition and trial testimony from opposing counsel). To force testimony from opposing counsel, the party seeking the testimony must show:

1. no other means exist to obtain the information;
2. the information sought is relevant and nonprivileged; and
3. the information is crucial to the preparation of the case.

Shelton, 805 F.3d at 1327; *see also Sec. & Exch. Comm'n v. Johnson*, No. CV 05-36 (GK), 2007 WL 9702653, at *1 (D.D.C. Aug. 22, 2007) (endorsing *Shelton* test and refusing to require DOJ attorney to testify); *Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 263 F.R.D. 1, 8 (D.D.C. 2009) (applying *Shelton* test and refusing to require attorney to testify).

In applying this test to requests for trial testimony for opposing counsel, the First Circuit noted that "[a]lthough not strictly forbidden, ***the procurement of trial testimony from opposing counsel is generally disfavored***." *Bogosian v. Woloohojian Realty Corp.*, 323 F.3d 55, 66 (1st Cir. 2003) (approving *Shelton* test and affirming district court ruling that quashed subpoena) (emphasis added).

And to be clear, Respondent has the burden here. The burden is ***not*** on the Division to prove that testimony is improper. Rather, Respondent must proffer questions or topics and meet the three-part test above.

> Normally, the party seeking to modify or quash a subpoena bears the burden of showing an undue burden, and that burden of proof is particularly great when the party seeks to prevent a deposition entirely rather than merely modify it. However, the burden shifts when the potential deponent is opposing counsel. Depositions of opposing counsel are generally disfavored in federal courts. Thus, when seeking to depose opposing counsel, the cards are stacked against the requesting party from the outset and they must prove the deposition's necessity.

Guantanamera Cigar, 263 F.R.D. at 8 (D.D.C. 2009) (citations omitted)

Here, Respondent has not (and cannot) come close to meeting the three factors. *First*, to the extent they wish to question the Division about information in the correspondence between the Division and Respondent, they can (and to a large part already have) put the correspondence into evidence, and thus already have another way to obtain the same evidence. *Second*, to the extent they wish to question the Division about why the Division responded (or did not respond) to questions posed by Respondent in the correspondence, or to ask the Division what its legal theory about certain issues is, they seek information protected by the

deliberative process privilege, the work-product doctrine, and/or attorney-client privilege. *Third*, since the issue in this case is whether Respondent's Form S-1 is so defective that a stop order should issue, nothing about the vaguely described topics for testimony is crucial to Respondent's defense. This is especially true because Respondent has already questioned one attorney for the Division of Corporation Finance (and been given permission to question a second) regarding the review of the Form S-1.

Thus, this case is like past cases where Commission Administrative Law Judges have denied requests to call Division attorneys as witnesses. *See Christopher M. Gibson*, AP Rulings Release No. 6615, 2019 SEC LEXIS 1544, (June 28, 2019), at *5 to *12 (applying *Shelton* test, granting Division motion to preclude Respondent from calling Division attorneys as witnesses, and noting that "trying to obtain trial testimony from opposing counsel is generally disfavored") (citations and quotations omitted); *Laurie Bebo and John Buono, CPA*, AP Rulings Release No. 2490, 2015 SEC LEXIS 1205 (April 3, 2015) at *4 n.3 (denying request to call Division attorney as witness and noting that "demanding the deposition or examination of opposing trial counsel is almost always pure gamesmanship.").

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CONCLUSION

American CryptoFed has not met its burden to show a need to call opposing counsel as a witness, and the Motion should be denied.

Dated: December 6, 2022

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

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Division of Enforcement's Opposition to Respondent's Motion to Request the Division of Enforcement to Produce a Witness was served on the following on this 6th day of December 2022, 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