UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 11134 / November 18, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-21243

In the Matter of **The Registration Statement of American CryptoFed DAO LLC** **Respondent**	**RESPONDENT AMERICAN CRYPTOFED DAO LLC'S REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW OF INITIAL DECISION**

Table of Contents and Table of Authorities are 4 pages (i – iv) in total.

DocuSign signatures are at page 15, and Certificate of Service is at the bottom.

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OS Received 10/03/2023

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Pursuant to Rule 450 of the Securities and Exchange Commission ("Commission" or "SEC"), American CryptoFed DAO LLC ("Respondent" or "Am. CryptoFed") respectfully submits this Reply Brief in support of its Petition for Review of Initial Decision ("Initial Decision") issued by Administrative Law Judge Carol Foelak ("ALJ Foelak") on May 17, 2023 in this stop order proceeding ("Form S-1 OIP") under Section 8(d) of the Securities Act of 1933 ("Securities Act"), which suspends the effectiveness of the Form S-1 registration statement of Am. CryptoFed filed on Sep. 17, 2021 ("Form S-1" or "Registration Statement", Dx.1) [1].

1. PRELIMINARY STATEMENT

The Division's Opposition Brief states (Emphasis added):

> Respondent's citation to various inapposite **Supreme Court opinions** about an entirely **different district court** venue provision do not compel a different result. (p.34).
>
> 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. (p.44).
>
> In this proceeding, **whether Ducat and Locke are securities is immaterial.** (p.40).

These statements demonstrate the surprising level of ignorance which the Division of Enforcement ("Division") has regarding the fundamental principles and basic operations of the US legal system and makes it impossible for the Division to logically and consistently rebut Am. CryptoFed's factual and legal position. The US "**Supreme Court opinions"** govern all **"different district court[s]",** as Article III of the US Constitution states "The judicial Power of

[1] "Division's Findings and Brief" refers to the Division of Enforcement's February 17, 2023 Proposed Findings and Brief in Support of Issuing a Stop Order. "Am. CryptoFed Opposition Brief" refers to Am. CryptoFed's April 2, 2023 Opposition to the Division's Findings and Brief. "Am. CryptoFed Brief" refers to Am. CryptoFed's August 20, 2023 Brief in Support of Its Petition for Review. "Division's Opposition Brief" refers to the Division of Enforcement's September 20, 2023 Brief in Opposition to the Am. CryptoFed Brief. "Dx." refers to the Division's exhibits, and "Rx." Respondent's exhibits, admitted during the hearing. "Tr." refers to the transcript of the hearing.

OS Received 10/03/2023

the United States, shall be vested in one supreme Court…" As a result, the validity of the US "**Supreme Court opinions",** such as *Jones*, cannot be overridden by any authorities other than the US Supreme Court itself. Furthermore, the due process protection provided by both the US Constitution's Fifth Amendment stating, "no person… shall be deprived of life, liberty, or property, without due process of law", and by the Administrative Procedure Act ("APA") codified in 5 U.S. Code § 556 (d) stating, "the proponent of a rule or order has the burden of proof", requires the Commission prior to issuance of orders, to provide clarity as to jurisdiction and to fulfill burden of proof obligation, especially after the Form S-1 withdrawal request solely on the grounds that "Locke token and Ducat token are not securities" (Rx.37, p.1) was denied by the Commission.

2. THE SECTION 8(b) AS A SPECIFIC PROVISION MUST BE GIVEN EFFECT OVER CONFLICTING SECTION 8(d) AS A GENERAL PROVISION.

2.1. There is No Factual Dispute between the Division and Am. CryptoFed

The Division's Opposition Brief correctly observed that, prior to any actions taken by the Commission pursuant to Section 8(d) and (e), i) "The Registration Statement contained a delaying Amendment." (p.3), meaning that the Registration Statement was not effective; ii) As early as Oct. 4, 2021, Ms. Purnell of the Division of Corporation Finance ("CorpFin"), via a Webex call, "told Mr. Moeller and Mr. Zhou that both the Registration Statement and Form 10 were materially deficient for many reasons, including that they each lacked audited financial statements" (p.3-4), and iii) On Oct. 8, 2021, CorpFin "sent two letters to Respondent reiterating that the Registration Statement and Form 10 were deficient." (p.4). Therefore, both the Division and Am. CryptoFed agreed to the facts that the Registration Statement contained the two specific conditions of Securities Act Section 8(b), which are Condition i) "on its face incomplete or inaccurate in any material respect", and Condition ii) "prior to the effective date of registration".

2.2. There Is No Legal Dispute that Section 8(d) and 8(e) Are Permissive If Only Condition ii) "prior to the Effective Date of Registration" Is Present, While Condition i) "on Its Face Incomplete or Inaccurate in Any Material Respect" Is Absent

The Division's Opposition Brief correctly observed that when Condition i) "on its face incomplete or inaccurate in any material respect" is absent:

> In *Red Bank Oil*, the Commission rejected the notion that a stop order proceeding under 8(d) was limited to already effective registration statements (p.35).
> *See Petrofab*, 1988 SEC LEXIS 782 at *17 (issuing stop order regarding registration statement that had never become effective) (p.35).

The Division cited three cases *Petrofab Int'l, Inc.,* Rel. No. 33-6769, 1988 SEC LEXIS 782, (April 20, 1988), *Canso Enterprises Ltd*., Initial Decision Rel. No. 1155, 2017 SEC LEXIS 2215 (Jul. 26, 2017), and *Red Bank Oil Co.*, Rel. No. 33-3095, 1945 SEC LEXIS 204, (Oct.11, 1945), all of which only met Condition ii) "prior to the effective date of registration". None of these three cases met Condition i) "on its face incomplete or inaccurate in any material respect". In *Petrofab Int'l, Inc*., (p. 6) the Commission, after a lengthy discussion to resolve the dispute as to which accounting standards were applicable to the R&D arrangements, concluded "The failure of the registration statement to disclose the auditors' limitation on the use of their opinion, standing alone, justifies our issuance of a stop order." In *Canso Enterprises Ltd*., (p.4-5) with "assistance from the Ontario Securities Commission in locating the thirty-nine individuals", the Division "ultimately found Canso's claim to have thirty-nine shareholders to be false." In *Red Bank Oil Co.*, (p.1) the Commission concluded "About 90 deficiencies are alleged, most of them dealing with material aspects of the history, business, accounts and control of the registrant, only few of them apparent from the face of the statement."

Furthermore, in the case of Am. CryptoFed's Form S-1, there has been no such situation that required the Commission "to sit by until a false and misleading registration statement becomes effective", as Division's Opposition Brief (p.35) stated via a citation to *Red Bank Oil Co.* To the

contrary, Am. CryptoFed sent multiple letters on Oct. 27, 2022, Nov. 1, 2022 and Nov. 6, 2022 respectively, to the Division, copying CorpFin, to repeatedly emphasize that the delaying Amendment would not be removed unless the Division and/or CorpFin exhausted all possible legal arguments (Dx.15, p. 13; Dx.16, p.6; Rx.19, p.15). Even if Am. CryptoFed, pursuant to 17 CFR § 230.473 (b), had filed an amendment to remove the delaying Amendment after repeatedly requesting the Division and/or CorpFin to exhaust all possible legal arguments, the Commission would still have had ten (10) days pursuant to Section 8(b), to "issue **an order** prior to the effective date of registration **refusing to permit such statement to become effective** until it has been amended in accordance with such order." (Emphasis added, "Refusal Order"), because such an amendment filing would have reset the clock pursuant to Securities Act Section 8(a).

2.3. Section 8(b) Must Be Applied to a Registration Statement Which Simultaneously Meets the Two Specific Conditions: i) "on Its Face Incomplete or Inaccurate" and ii) "prior to the Effective Date of Registration"

The specific Condition i) of Section 8(b) "on its face incomplete or inaccurate in any material respect" is so critical that the Commission underlined the following in *Red Bank Oil Co.* at 865 (Emphasis in original):

> It is clear from the Act that the procedure of Section 8 (b), to determine whether to issue an order refusing effectiveness to a statement, was intended to be used only when the inadequacy or incompleteness is plain on the "face" of the statement.

Whenever the two specific conditions of Section 8(b) which are Condition i) "on its face incomplete or inaccurate" and Condition ii) "prior to the effective date of registration", are simultaneously met, however inclusive Section 8(d) and Section 8(e) of the Securities Act may be, they will not be held to apply to a matter specially dealt with in Section 8(b) of the same Securities Act, in accordance with the US Supreme Court opinions which have repeatedly upheld

the application of a canon of statutory interpretation that if there is a conflict between a general provision (statute) and a specific provision (statute), the specific provision (statute) prevails.

The US Supreme Court stated in *Ginsberg & Sons v. Popkin*, 285 U. S. 204 (1932) at 208:

> General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. *United States v. Chase*, 135 U.S. 255, 260. Specific terms prevail over the general in the same or another statute which otherwise might be controlling. *Kepner v. United States*, 195 U.S. 100, 125. In re *Hassenbusch*, 108 Fed. 38. *United States v. Peters*, 166 Fed. 613, 615. The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. *Market Co. v. Hoffman*, 101 U.S. 112, 115. *Ex parte Public National Bank*, 278 U.S. 101, 104.

Since then, the US Supreme Court has repeatedly confirmed the opinion above in *MacEvoy Co. v. United States*, 322 U. S. 102 (1944) at 107, in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957) at 229, in *Preiser v. Rodriguez*, 411 U. S. 475 (1973) at 489-490, and in *Busic v. United States*, 446 U.S. 398 (1980) at 407. For example, below is the U.S. Supreme Court's opinion in *Fourco Glass Co.*, at 229:

> We think it is clear that § 1391 (c) is a **general** corporation venue statute, whereas § 1400 (b) is a **special** venue statute applicable, specifically, to all defendants in a particular type of actions, i. e., patent infringement actions. In these circumstances **the law is settled** that "**However inclusive may be the general language of a statute, it `will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling**.' *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208." *MacEvoy Co. v. United States*, 322 U. S. 102, 107.
>
> **We hold that 28 U. S. C. § 1400 (b) is the sole and exclusive provision controlling venue in patent infringement actions, and that it is not to be supplemented by the provisions of 28 U. S. C. § 1391 (c).** (Emphasis added).

The specific language in Section 8(b) stating, i) "on its face incomplete or inaccurate in any material respect" and ii) "prior to the effective date of registration", left no room for Section 8(d) or Section 8(e) to be applied to Am. CryptoFed's Registration Statement. Section 8(b) is "the sole and exclusive provision controlling" (*Fourco Glass Co.*, at 229) the situation in which a Form S-1 registration statement is "on its face incomplete or inaccurate in any material respect,

…prior to the effective date of registration…" Although the Division's Opposition Brief (p.35) also cited 15 U.S. Code § 77e(c), the provision explicitly stating "the registration statement is the subject of a refusal order or stop order…", could be applied either under Section 8(d) or under Section 8(b), and does not challenge Section 8(b) which is "the sole and exclusive provision controlling" (*Fourco Glass Co.,* at 229*)* the situation "that a registration statement is on its face incomplete or inaccurate in any material respect, …prior to the effective date of registration…"

As a result, the only option which the Commission was allowed under the Securities Act, was to comply with Section 8(b) to issue a "Refusal Order" rather than a Stop Order, to Am. CryptoFed. As cited above, there were at least five (5) cases of the US Supreme Court opinions supporting Am. CryptoFed's position that Section 8(b) was "the sole and exclusive provision controlling" (*Fourco Glass Co.,* at 229) Am. CryptoFed's Registration Statement, in addition to the Commission's own opinion in *Red Bank Oil Co.* Neither facts nor statutes and case law support the following statements of the Division's Opposition Brief:

> 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. (p.34).
>
> Respondent's citation to various inapposite **Supreme Court opinions** about an entirely **different district court** venue provision do not compel a different result." (p.34).

2.4. Section 8(b) Does Not Grant the Commission and the Division Any Statutory Examination and Investigation Power

Section 8(b) is a specific provision and "the sole and exclusive provision controlling" (*Fourco Glass Co.,* at 229) a specific situation in which a Form S-1 registration statement is "on its face incomplete or inaccurate in any material respect, …prior to the effective date of registration…"**,** meaning that no examination / investigation power, such as examination / investigation power of Section 8(e) or 15 U.S.C. § 78u(a)(1) or any other statutes, is needed, or is allowed to find additional information. Thus, Section 8(b) does not provide the Commission with

any such statutory examination / investigation power. The Division's Opposition Brief (p.32-33) attempted to justify examination / investigation power with the US Supreme Court opinion in *United States v. Morton Salt Co.,* 338 U.S. 632 (1950), but, as quoted by the Division's Findings and Brief on p.31-32 below, the opinion explicitly requires a statutory authorization.

> "When **investigative and accusatory duties are delegated by statute to an administrative body**, it, too, may take steps to inform itself as to whether there is probable violation of the law." (Emphasis added).

No such "investigative and accusatory duties are delegated by statute to an administrative body" under Section 8(b) of the Securities Act, whatsoever. No languages in Section 8(b) authorize the Commission to conduct any examination / investigation, prior to the issuance of a Refusal Order. Therefore, the Supreme Court opinion in *United States v. Morton Salt Co*., does not support the Division's position. Section 8(b) simply requires the Commission to issue a Refusal Order without allowing it to conduct any examination / investigation.

2.5. All Evidence Derived from Unlawful Search and Seizure Should Be Stricken Pursuant to the Exclusionary Rule

The Commission's own Rule 460, 17 C.F.R. § 201.460, specifically mandates "The Commission shall determine each matter on the basis of the record." As a factual matter, there is no evidence on the record to show that the Division sent any subpoenas for documents or testimonies to Am. CryptoFed pursuant to any statutes other than a non-public examination order (Rx. 5) pursuant to Securities Act Section 8(e) ("Section 8(e) Examination Order"). Therefore, all arguments in section "D. A Stop Order Is Appropriate Because Respondent Failed to Cooperate with, and Deliberately Obstructed, the Examination" (Division's Opposition Brief, p. 29-32) which were not based on Section 8(e) Examination Order, such as argument pursuant to 15 U.S.C. § 78u(a)(1), should not be considered.

Furthermore, given that Section 8(b) does not grant the Commission and the Division any statutory examination and investigation power, such as the Section 8(e) examination power, all evidence derived from the unlawful Section 8(e) Examination Order, such as subpoena (Dx.3) and testimony (Dx.6), should be stricken from the record pursuant to the exclusionary rule, as the US Supreme Court stated below in *Weeks v. United States*, 232 U.S. 383 (1914) at 393:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

This Form S-1 OIP, while civil in form, is potentially criminal in nature due to unknown future developments, given that the Division stated "your letter appears to announce a plan to willfully violate Section 5 of the Securities Act" (Rx.16, p.1), "willful violations of the Securities Act can result in criminal penalties" (Rx.208, p.2) and "So, my first question, Mr. Moeller, is, isn't this paragraph describing the collapse of the ponzi scheme?" (Bruckmann, Tr.393:22-25).

2.6. Section 8(b) Encourages Disclosures, While Deterring the Commission's Abuses of Its Examination / Investigation Power

The Division's Opposition Brief stated:

> 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. (p.33).
>
> 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. (p.33).

Not So.

As soon as CorpFin decided on Oct. 4, 2021, that "a registration statement is on its face incomplete or inaccurate in any material respect……prior to the effective date of registration…," the only action the Commission was allowed to take under the Securities Act was to issue a Refusal Order pursuant to Section 8(b), in compliance with the interpretation established by the Commission's own opinion in *Red Bank Oil Co,* and the US Supreme Court opinions in *Ginsberg & Sons, MacEvoy Co, Fourco Glass Co, Preiser and Busic.* Since Oct. 4, 2021, Section 8(b) has prohibited the Commission from any further examination or investigation or other actions. Therefore, both the non-public Section 8(e) Examination Order issued on Nov. 9, 2021, more than one month after the Oct. 4, 2021 Webex conversation, and this Form S-1 OIP pursuant to Section 8(d) issued on Nov. 18, 2022, more than one year later, were unlawful. If the Commission, the Division, and CorpFin had complied with Section 8(b), endeavors of crypto industry's disclosure could have been encouraged, simply because the Commission's abuses of its examination / investigation power could have been deterred. Approximately 87-years ago, the US Supreme Court ruling in *Jones v SEC*, 298 U.S. 1 (1936) at 28-29 already made it crystal clear that the Commission's arbitrary and discretional examination and investigation power must be constrained:

> Exercise of "such a power would be more pernicious to the innocent than useful to the public"; and approval of it must be denied, if there were no other reason for denial, because, like an unlawful search for evidence, it falls upon the innocent as well as upon the guilty and unjustly confounds the two. *Entick* v. *Carrington*, 19 Howell's St. Trials, 1030, 1074 — followed by this court in *Boyd* v. *United States*, 116 U.S. 616, 629-630. No one can read these two great opinions, and the opinions in the *Pacific Ry. Comm'n* case, from which the foregoing quotation is made, without perceiving how closely allied in principle are the three protective rights of the individual — that against compulsory self-accusation, that against unlawful searches and seizures, and that against unlawful inquisitorial investigations. They were among those intolerable abuses of the Star Chamber, which brought that institution to an end at the hands of the Long Parliament in 1640. Even the shortest step in the direction of curtailing one of these rights must be halted *in limine,* lest it serve as a precedent for further advances in the same direction, or for wrongful invasions of the others.

3. THE COMMISSION, THE DIVISION AND CORPFIN VIOLATED LAWS AND REGULATIONS

3.1. The Commission's Violation of 17 C.F.R. § 201.250(a), the Commission's Own Rule 250(a), Amounts to an Admission that the Locke and Ducat Tokens in Am. CryptoFed's Monetary System Are Not Securities, and that the Commission Has No Jurisdiction over the Locke and Ducat Tokens.

The Division's Opposition Brief stated (p.45):

> 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.

Not So.

By its own admission, **in the entire 89-years after the Exchange Act became law in 1934**, the Commission is aware of only **one case** "in which the Commission instituted a Section 12(j) proceeding as to a not-yet-effective Exchange Act registration statement" and "the Form 10 became automatically effective" **without a Stay Order included in the proceeding** (*American CryptoFed*, Rel. No. 97659 / June 7, 2023, p.3). Therefore, if Locke and Ducat tokens were securities, the Stay Order included in the Commission's Section 12(j) proceeding against Am. CryptoFed ("Form 10 OIP") which prevented the Form 10 from automatically becoming effective 60-days after filing, would have been unlawful and contrary to the binding precedents and the 60-day statue's requirements. The fact that Locke and Ducat tokens are not securities, can also be evidenced by the Commission's indecision and non-decision for more than 21-months, on Am. CryptoFed's Motion to Lift the Stay Order filed on Dec. 15, 2021 pursuant to 17 C.F.R. § 201.250(a), the Commission's own Rule 250 (a), which requires that "even accepting all of the non-movant's factual allegations as true and drawing all reasonable inferences in the non-movant's favor, the movant is **entitled to a ruling as a matter of law**. **The hearing officer**

shall promptly grant or deny the motion." (Emphasis added). For clarity, Am. CryptoFed never requested the Commission to postpone a decision on this Motion to Lift the Stay Order.

Given that, as of today, the Commission still has not made a decision on Am. CryptoFed's Motion to Lift the Stay Order, the only viable path to liberate the Commission from its continual and willful violation of the Commission's own Rule 250 (a), is to accept the request of Am. CryptoFed's Oct. 12, 2021 letter, confirmed by the Initial Decision (p.5-6), to "declare that CryptoFed is not subject to the SEC's jurisdiction" and to dismiss both proceedings of Form 10 OIP and Form S-1 OIP in their entirety. As ALJ Foelak repeatedly confirmed during the hearing (Tr. 477:14 -19; Tr. 486:18-21; Tr. 486:18-21; Tr. 539:23-25 - 540:1-10), CorpFin did not provide a written response requested by Am. CryptoFed, to this October 12, 2021 letter. A written response would effectively eliminate the issue that "examiners and reviewers inconsistently documented oral comments to companies" (p.i, Executive Summary, the SEC's Office of Inspector General, Report No. 542, Sep. 13, 2017).

3.2. The Commission, the Division and CorpFin Violated 5 U.S. Code § 556 (d), the Fair Notice / Void for Vagueness Doctrine, and *SEC v. Howey Co*.

The Division's Opposition Brief stated (p.40):

> 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.

Not so.

Citing APA, 5 U.S. Code § 556 (d), Am. CryptoFed, on Jun. 8, 2022, requested the Division to provide substantive legal justification to classify Locke and Ducat tokens as Securities, other

than by filing a registration statement with the Commission per se (Rx.21, p.4). On Jun. 13, 2022, the same day CorpFin requested Am. CryptoFed to withdraw its Form S-1 withdrawal request voluntarily with a threat of an order denying the withdrawal request, in response, Am. CryptoFed demanded CorpFin to substantially prove that Locke and Ducat tokens are securities (Rx.18, p.1-2), emphasizing again the burden of proof obligation mandated by APA, 5 U.S. Code § 556 (d): "Except as otherwise provided by statute, **the proponent of a rule or order has the burden of proof** " (Emphasis added)". However, both the Division and CorpFin have failed to fulfill the APA's obligation of **burden of proof**. On Jun. 17, 2022, the Commission issued an order ("Denial Order", Rx.20) which denied the Form S-1 withdrawal request without proving under the *Howey* test that Locke and Ducat tokens are securities. All of the SEC's operations, including but not limited to this Form S-1 OIP, are governed by APA, 5 U.S. Code § 556 (d), which grants an absolute right to Am. CryptoFed to request the Commission to fulfill its Burden of Proof obligation prior to its issuance of the Denial Order. Once the Commission issued the Denial Order denying the Form S-1 withdrawal request, the Commission's obligation to prove that Locke and Ducat tokens are securities, was firmly established, because the only reason for the Form S-1 withdrawal request was that "Locke token and Ducat token are not securities" (Rx.37, p.1). In the FOREWORD for APA legislative history, Chairman Pat McCarran of the US Senate Judiciary Committee, emphasized APA's purpose:

> It is intended as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority. It upholds law and yet lightens the burden of those on whom the law may impinge. It enunciates and emphasizes the tripartite form of our democracy and **brings into relief the ever essential declaration that this is a government of law rather than of men.** (Emphasis added).

Despite the repeated requests by Am. CryptoFed (Rx.18 p.1-2, Rx.21 p.4), the Commission, the Division and CorpFin all failed to fulfill the **Burden of Proof** obligation

mandated by APA, 5 U.S. Code § 556 (d), willfully and knowingly acting as **a government of men rather than of law.** The Division's character of **rule of men** was further demonstrated by its following insistence of arbitrary power to decide when the *Howey* analysis will be done, further violating the APA's sequence and timing requirements of Burden of Proof.

> 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.

However, the US Supreme Court opinion in *Jones v SEC*, 298 U.S. 1 (1936) at 24-25 completely denied the Commission's arbitrary power, stating "Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict." In order to maintain this unconstitutional arbitrary power, the Commission, the Division and CorpFin refused to provide timely *Howey* analysis mandated by APA. The refusal to provide clarity as to whether Locke and Ducat tokens are securities, created an "impermissibly vague" situation, confirmed by ALJ Foelak, "I understand that you're referring to the Catch 22 situation where if you're a security you want to register and if you're not, you're going to move forward." (Tr.815:19-23), and clearly violated the fair notice / void for vagueness doctrine upheld by the US Supreme Court's opinion in *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) at 2317:

> A fundamental principle in our legal system is that **laws which regulate persons or entities must give fair notice of conduct that is forbidden or required**. See *Connally v. General Constr. Co.*, 269 U. S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms **so vague that men of common intelligence** must necessarily guess at its meaning and differ as to its application, **violates the first essential of due process of law**"); *Papachristou v. Jacksonville*, 405 U. S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids' " (quoting *Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939); alteration in original)). **This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the**

> **Fifth Amendment**. See *United States v. Williams*, 553 U. S. 285, 304 (2008). **It requires the invalidation of laws that are impermissibly vague.** (Emphasis added).

With that being said, the Commission make it clear, based on the information provided by Am. CryptoFed's Form 10 filing, that Locke and Ducat tokens are not securities, through the Commission's action to include a stay order in the Form 10 OIP which has prevented Am. CryptoFed's Form 10 from automatically becoming effective 60-days after filing. If Locke and Ducat tokens were securities, and if the rule of law had prevailed, Am. CryptoFed's Form 10 should have become automatically effective around Nov. 15, 2021.

The Division's Opposition Brief's statement (p.40) "Respondent established and conceded the Commission's jurisdiction" was no longer true once Am. CryptoFed filed its Form S-1 withdrawal request. To the extent that the Division never provided a substantial *Howey* test, it directly violated US Supreme Court opinion in *SEC v. Howey Co*., 328 U.S. 293 (1946) at 298 stating "Form was disregarded for substance and emphasis was placed upon economic reality."

3.3. The Commission, the Division and CorpFin Violated *Jones v. SEC*

To the extent that the Commission, through a stay order included in Form 10 OIP, prevented Am. CryptoFed's Form 10 from automatically becoming effective 60-days after filing, Locke and Ducat tokens are not securities. To the extent that the Commission, the Division and CorpFin, failed or refused, to fulfill their APA obligation to prove that Locke and Ducat tokens are securities, the Denial Order was unlawful. If the Denial Order had not been issued, the Form S-1 would have been withdrawn, and subsequently, the Form S-1 OIP seeking for a stop order would have been unnecessary. As a result, the issuance of Locke and Ducat tokens based on Am. CryptoFed's business model even after Form S-1 was withdrawn, should not be considered as issuance of securities, and Am. CryptoFed's situation was perfectly identical to the registrant's situation confirmed by the US Supreme Court's opinion in *Jones v. SEC*, 298 U.S. 1 (1936) at 23

stating "Petitioner emphatically says that no steps had been taken looking to the issue of the securities; and this is not denied." Therefore, the Denial Order and the Initial Decision must be reversed, in compliance with the opinion in *Jones v. SEC*, 298 U.S. 1 (1936) at 23-24:

> Under these circumstances, the right of the registrant to withdraw his application would seem to be as absolute as the right of any person to withdraw an ungranted application for any other form of privilege in respect of which he is at the time alone concerned.
>
> An additional reason why the action of the commission and of the court below cannot be sustained is that the commission itself had challenged the integrity of the registration statement and invited the registrant to show cause why its effectiveness should not be suspended. In the face of such an invitation, it is a strange conclusion that the registrant is powerless to elect to save himself the trouble and expense of a contest by withdrawing his application. **Such a withdrawal accomplishes everything which a stop order would accomplish**, as counsel for the commission expressly conceded at the bar. (Emphasis added).

The Division's Opposition Brief (p.44) attempted to deny the validity of *Jones v. SEC*, but "When the Supreme Court rules on a constitutional issue, that judgment is virtually final; its decisions can be altered only by the rarely used procedure of constitutional amendment or by a new ruling of the Court." (https://www.supremecourt.gov/about/constitutional.aspx, the Court and Constitutional Interpretation).

4. CONCLUSION

For the reasons set forth above and in the Am. CryptoFed Brief filed on Aug. 20, 2023 (effective on Aug. 21, 2023), all the requests in Am. CryptoFed Brief must be granted.

Dated: October 3, 2023

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this, Respondent American CryptoFed DAO LLC's **Reply Brief** in Support of Petition for Review of Initial Decision, was filed by eFAP and was served on the following on this 3rd day of October 2023, in the manner indicated below:

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