IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CHASE WILLIAMS AND WILLIAM ZHANG, individually and on behalf of all others similarly situated, Plaintiffs, v. BLOCK.ONE, BRENDAN BLUMER, and DANIEL LARIMER, Defendants.	Civ. No. 1:20-cv-2809-LAK CLASS ACTION
CRYPTO ASSETS OPPORTUNITY FUND LLC and JOHNNY HONG, individually and on behalf of all others similarly situated, Plaintiffs, v. BLOCK.ONE, BRENDAN BLUMER, DANIEL LARIMER, IAN GRIGG, and BROCK PIERCE, Defendants.	Civ. No.: 1:20-cv-3829 CLASS ACTION

MEMORANDUM OF LAW OF LEAD PLAINTIFF CRYPTO ASSETS OPPORTUNITY FUND IN OPPOSITION TO JEFFREY DERRICK ANDERSON'S MOTION TO SUBSTITUTE LEAD PLAINTIFF AND TO APPROVE LEAD COUNSEL

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Crypto Assets Opportunity Fund ("CAOF") files this memorandum in opposition to the Motion to Substitute Lead Plaintiff and to Approve Lead Counsel ("Anderson Motion") filed by JD Anderson ("Anderson").

PRELIMINARY STATEMENT

Ignoring that CAOF has, for two years, vigorously prosecuted claims against Block.one, Brendan Blumer and Daniel Larimer ("Defendants"), and misconstruing this Court's Order dated August 15, 2022 (ECF. No. 146) (the "Settlement Order"), Anderson now comes to disrupt this Court's decision which, two years ago, appointed CAOF as Lead Plaintiff (ECF No. 57) (the "Lead Plaintiff Order"). Anderson – who two years ago was denied lead plaintiff appointment in that same lead plaintiff contest (*id.* at 6) – essentially seeks to re-open the lead plaintiff process here, by arguing that he has the purported "largest loss of all viable lead plaintiffs" and otherwise satisfies the requirements of Rule 23. Anderson Motion at 12. But there is no basis to relitigate the lead plaintiff motion, which was decided after fair notice and robust argument two years ago, when this Court determined that CAOF and its counsel met all the requirements to represent investors harmed by Defendants' fraud. Further, Anderson seeks to roll back all of the progress made in this action by filing a new complaint and beginning the litigation process from scratch. Anderson Motion at 1. Nothing in the Settlement Order occasions this drastic result.

In the Lead Plaintiff Order, the Court determined that CAOF had suffered the "largest financial interest of any lead plaintiff applicant in the outcome of this lawsuit," satisfied the requirements of Rule 23 for purposes of the PSLRA, and had selected counsel that was "up to the task" of managing the litigation. ECF No. 57 at 3. By contrast, the Court stated that "several defects" in the Williams Group's application "raise[d] significant doubts about its competency to lead the lawsuit," and raised concern that the Williams Group's decisions would be "driven by the lawyers." *Id.* at 4. With respect to Anderson, in particular, the Court observed that his "relatively

small" losses rendered his motivation to spend "potentially years" managing the litigation "doubtful." *Id.* at 6.

Anderson defines his current motion as one to "substitute" lead plaintiff, but he does not come close to establishing that substitution is warranted here. Indeed, such substitution only occurs in the instance where the class is in *need* of a new lead plaintiff, usually because of voluntary withdrawal. That is not the case here. There is nothing in the record or in the Anderson Motion demonstrating that CAOF is not adequate to represent the class of investors who have securities claims against Defendants as this litigation proceeds, nor does CAOF seek to withdraw.

Anderson premises his motion on a misreading of the Court's Order dated August 15, 2022, denying Lead Plaintiff's Motion for Final Approval of Settlement (ECF No. 146). There, the Court took issue with CAOF's representation of a *proposed settlement class* that included both foreign and domestic purchasers, under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) ("*Morrison*"), particularly in light of CAOF's disclosure that the settlement amount was discounted in light of foreign purchasers. *Id.* at 20. But the Court expressly stated that there was nothing intrinsic about CAOF, or its counsel that rendered them inadequate. Rather, it expressly held that it "implies no misconduct or criticism of Lead Plaintiff or its experienced and well regarded Lead Counsel." *Id.* at 25.

Meanwhile, the Court's doubts about the ability of Anderson and his counsel to adequately represent the Class were validated last week when allegations surfaced concerning Anderson's chosen counsel, Kyle Roche, who has apparently been initiating and litigating class action lawsuits against cryptocurrency issuers \one for his own personal gain and against the interests of the classes he purports to represent. Although he now has purportedly "withdrawn" his application to serve as lead counsel, his intention to apply for counsel fees betrays that Roche's motion to withdraw as

counsel (ECF. No. 145) is nothing more than a fig leaf designed to obscure his intended involvement in the litigation. *See infra*, § I.C.

Now that the settlement has been denied, the only relevant inquiry in determining lead-plaintiff eligibility is which plaintiff is most adequate to represent the class *in the litigation*. The class that CAOF represents in this litigation is necessarily comprised only of investors whose purchases qualify as domestic under *Morrison*. The proportion of CAOF's foreign versus domestic transactions in the EOS Tokens is irrelevant to the inquiry, just as would be the proportion of its transactions in a wholly different security. CAOF is, and always has been, adequate to represent that class because it is a domestic purchaser, having purchased EOS Tokens on a US exchange.

CAOF has suffered losses as a result of its transactions that qualify as domestic under *Morrison.* Thus, just as before, CAOF is the most adequate plaintiff to represent the class of investors who have actionable claims against Defendants, and the Court has no reason to reconsider this. Anderson's motion must be denied.

PROCEDURAL BACKGROUND

On August 4, 2020, this Court issued an order appointing CAOF as Lead Plaintiff, approving CAOF's selection of Grant & Eisenhofer P.A. as Lead Counsel, and denying the parallel motion for lead plaintiff of a group of plaintiff-movants that included Anderson, amongst others. ECF No. 57.

Once appointed lead plaintiff, CAOF faithfully and zealously litigated this action on behalf of the proposed class. This representation included drafting a significantly improved complaint that solidified the allegations in the initial complaint filed on April 3, 2020; excluded certain meritless claims; and added claims pursuant to Section 12(a)(2) of the Securities Act for selling the EOS securities pursuant to a materially false and misleading prospectus, Section 10(b) of the

Exchange Act and Rule 10b-5 promulgated thereunder for disseminating materially false and misleading statements concerning the EOS securities during the Class Period, and Section 15 of the Securities Act and Section 20(a) of the Exchange Act for Control Person Liability. Additionally, the representation included investigating allegations with the help of a paid, private investigator; arduously opposing Defendants' motion to dismiss; retaining and working with a damages expert experienced in cryptocurrency to assess damages; serving foreign defendants; and engaging in extensive settlement negotiations. ECF No. 111 at 3-5. Neither Anderson nor his chosen counsel had any involvement whatsoever in any of these representative efforts, nor have they been at all involved in the litigation process since the Court's appointment of CAOF as Lead Plaintiff.

On June 11, 2021, while Defendants' motion to dismiss was still pending, Lead Plaintiff alerted this Court that it had reached a settlement agreement with Defendants. ECF No. 110. On June 23, 2021, the Court granted Lead Plaintiff's unopposed motion for approval of notice to class members. ECF No. 115. The June 23rd order also scheduled a Settlement Hearing at which the Court would determine, amongst other things whether "***for purposes of the proposed Settlement only***, the Action should be certified as a class action on behalf of the Settlement Class, Lead Plaintiff should be certified as Class Representative for the Settlement Class, and Lead Counsel should be appointed as Class Counsel for the Settlement Class." *Id.* (emphasis added). At the same time, this Court denied Defendants' motion to dismiss without prejudice to renewal in the event that the proposed settlement were not approved. ECF No. 114.

In the Settlement Order, the Court denied Lead Plaintiff's motion for final approval of the proposed settlement, citing "a structural problem having roots in the unusual market the case

concerns." ECF No. 146 at 25. The Settlement Order emphasized that its decision "implie[d] no misconduct or criticism of Lead Plaintiff or its experienced and well regarded Lead Counsel." *Id.*

On August 22, 2022, Anderson moved the Court to substitute himself as Lead Plaintiff, approve his selection of co-lead counsel, and grant leave to file a Second Amended Complaint. ECF No. 148. In the wake of news of allegations of professional misconduct against one of Anderson's chosen co-lead counsel, Roche Freedman LLP ("RF") moved to withdraw from the action. ECF No. 154. The following day, Anderson filed a nearly identical motion to substitute lead plaintiff, simply omitting the request that RF serve as co-lead counsel. ECF No. 156. For the following reasons, Anderson's motion must be denied.

ARGUMENT

I. SUBSTITUTION OF LEAD PLAINTIFF IS NOT WARRANTED

"Courts have generally restricted appointment of substitute and additional lead plaintiffs to those instances where it is necessary to maintain representation of the prospective class." *In re NYSE Specialists Sec. Litig.*, 240 F.R.D. 128, 139-140, 143 (S.D.N.Y. 2007) (denying motion to substitute lead plaintiff filed over two years after the lead plaintiff was appointed). This straightforward standard is simply not met here because the class remains adequately represented by CAOF. Indeed, most lead plaintiff substitution motions – including those cited by Anderson – occur when the lead plaintiff has withdrawn for some reason, and there would otherwise be no one left to litigate the claims on behalf of the class. *See Endress v. Gentiva Health Servs., Inc.*, 276 F.R.D. 62, 64 (E.D.N.Y. 2011) (denying motion to be designated as lead plaintiff where "no motion to withdraw [was] presently pending" nor was there "a motion to disqualify"). Thus, Anderson's authority is inapposite. See *In re Initial Pub. Offering Sec. Litig.*, 214 F.R.D. 117 (S.D.N.Y. 2002) (lead plaintiff withdrew); *In re NYSE Specialists Sec. Litig.*, 240 F.R.D. 128 (S.D.N.Y. 2007) (motion to disqualify); *In re SLM Corp. Sec. Litig.*, 258 F.R.D. 112 (S.D.N.Y.

2009) (lead plaintiff moved for relief from appointment); *In re Tezos Sec. Litig.*, (N.D. Cal. Apr. 8, 2019) (motion to withdraw) (cited by Anderson Motion at 11). Because CAOF does not seek to withdraw, the Court has no occasion to consider a motion for substitution.

Notwithstanding Anderson's misrepresentation that "[t]he Court held that, because the majority of CAOF's purchases were made in foreign transactions, CAOF was not an adequate class representative," Anderson Motion at 6, nothing about the Settlement Order impacts CAOF's ability to represent investors with claims against Defendants *in this litigation.* Indeed, CAOF's ability to continue as Lead Plaintiff was not at issue in the Settlement Order. The Court's analysis of Lead Plaintiff's adequacy in the Settlement Order relates only to Lead Plaintiff's October 17, 2021 Settlement Motion, in which it requested that the Court certify the proposed settlement class and appoint Lead Plaintiff as a class representative for the *settlement class*. ECF No. 118. The Court noted that the proposed settlement class was a "conditionally certified class of persons who purchased ERC-20 and EOS tokens . . . over a period of about two years. Some of those class members are in the United States. Others are not. Some of those transactions were subject to the securities laws of the United States. Others were not." ECF 146 at 4. Approval of the proposed settlement, the Court held, "depend[ed] upon whether the proportion of the plaintiff's purchases that were subject to the federal securities laws is the same as, or representative of, the proportion of such purchases by absent class members." *Id.*

None of these considerations matter now that the Court has denied Lead Plaintiff's motion for final approval of the proposed settlement, and the litigation process is set to resume. *See* ECF No. 113 at 11 ("In the event that the Settlement is not approved by the Court or the Settlement Agreement is terminated or fails to become effective in accordance with its terms, the Settling Parties shall be restored to their respective positions in the Action as of May 9, 2021."); ECF No.

114 (denying Defendants' motion to dismiss without prejudice to renew if the settlement was not approved); ECF No. 153 (joint stipulation regarding next steps).

The class in this litigation necessarily includes only investors who have meritorious claims against Defendants; i.e., among other things, only investors whose purchases of EOS Tokens qualify as domestic under *Morrison*. The proposed settlement class, however, included investors with non-domestic purchases **because Defendants insisted upon that as a condition of settlement**. As represented to the Court during the hearing for final approval of the settlement on November 17, 2021, "if [CAOF] wanted to settle this case, [it] had to settle for complete peace with respect to everyone who acquired these coins domestic or nondomestic." *See* ECF No. 141 (Hearing Transcript dated November 17, 2021) at 4:18-22. However, the parties will now pick up the litigation where they left off, and there is no issue about nondomestic purchases of EOS Tokens. As in the beginning of this litigation, CAOF is the lead plaintiff for the class of investors who have viable claims against Defendants, which, according to the Court, includes only those whose EOS Token purchases qualify as domestic under *Morrison*. *See id.* at 5:2-5 ("if I approve the settlement, that insofar as it relates to claims by people who don't have causes of action under U.S. law…"); *see also id.* at 10:3-5 ("I understand that the Second Circuit seems to say that you can settle even worthless claims."). Thus, the proportion of Lead Plaintiff's purchases of EOS Tokens that are not subject to the securities laws of the United States matters no more than the proportion of its purchases in securities that are not subject to this litigation.[1] The issue of Lead Plaintiff's adequacy to act as settlement class representative is now moot, and Lead Plaintiff is poised and ready to continue litigating this action on behalf of the Class.

[1] Like CAOF, Anderson also traded EOS securities on non-domestic exchanges as well as domestic exchanges. *See* Exhibits A and B to the substitution motion.

Anderson's citation to *In re Imax Securities Litig.*, 2011 WL 1487090 (S.D.N.Y. Apr. 15, 2011) is inapt. In *Imax*, the court had declined the lead plaintiff's motion for class certification on the grounds that the lead plaintiff had a previously undisclosed, personal relationship with its representative counsel. See *In re IMAX Sec. Litig.*, 272 F.R.D. 138, 156 (S.D.N.Y. 2010). This adequacy determination related directly to the lead plaintiff's ability to adequately represent the class's interests *in the litigation*. *Id.* The Settlement Order here, by contrast, dealt only with Lead Plaintiff's adequacy to represent the proposed settlement class, per the terms of the proposed settlement.

II. CAOF IS ADEQUATE TO REPRESENT A CLASS OF DOMESTIC INVESTORS IN BLOCK.ONE

The Court determined that CAOF was the most adequate plaintiff to represent the Class by applying the rebuttable presumption set forth in the PSLRA that the most adequate plaintiff is the one who (1) has moved for appointment; (2) has the largest financial interest in the relief sought; and (3) otherwise meets the requirements of Rule 23. ECF No. 57; 15 U.S.C. §78u-4(a)(3)(B)(iii). Specifically, the Court found that CAOF had the largest verifiable loss of any proposed lead plaintiff applicant and had "made a *prima facie* showing that it will be able to satisfy the requirements of Rule 23," which concern "the typicality of the class representatives and the adequacy of the representatives and their counsel to represent the interests of the absent class members." ECF No. 57 at 3. Its counsel, which included "a law firm with a long track record of representing plaintiffs in securities class actions and a complex litigation clinic at a leading law school led by an experienced practitioner" were found to be "up to the task of managing this lawsuit." *Id.*

CAOF's and its counsel's record in robustly prosecuting this action on behalf of aggrieved EOS investors does nothing but confirm that this Court's Lead Plaintiff Order was correct. Their

efforts on behalf of aggrieved Block.one investors includes preparing a significantly improved complaint that solidified the allegations made in CAOF's initial complaint filed on April 3, 2020 (ECF No. 1); excluding certain meritless claims set forth by Anderson and his counsel (*id.*); adding claims pursuant to Section 12(a)(2) of the Securities Act for selling the EOS securities pursuant to a materially false and misleading prospectus, Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder for disseminating materially false and misleading statements concerning the EOS securities during the Class Period, and Section 15 of the Securities Act and Section 20(a) of the Exchange Act for Control Person Liability; investigating allegations with the help of a paid, private investigator (*id.*); going to significant lengths during the Covid pandemic to serve the individual defendants, who were attempting to avoid service or who resided abroad (ECF No. 100); arduously opposing Defendants' motion to dismiss (ECF No. 92); retaining and working with a damages expert experienced in cryptocurrency to assess damages (ECF No. 119 at 5); and engaging in extensive settlement negotiations (ECF No. 119 at 16). Neither Anderson nor his chosen counsel had any involvement whatsoever in any of these efforts, nor have they been at all involved in the litigation process since the Court's appointment of CAOF as Lead Plaintiff.

Further, CAOF has standing to represent purchasers whose transactions qualify as domestic under *Morrison*. CAOF purchased 24,362.40 EOS Tokens on the exchange, Tagomi, during the Class Period. ECF No. 137 at ¶ 5 (summarizing purchases on Tagomi) and 137-2 (Exhibit B) at 3 (showing detail purchases on Tagomi). At the end of the Class Period, it continued to hold approximately 1,351 of those EOS Tokens. *Id.*; *see also* ECF No. 40 (showing that CAOF's net EOS Tokens purchased were 1,351.32). It therefore has damaged tokens which qualify as domestic under Morrison. As previously indicated to the Court in connection with its Settlement Motion, Tagomi is a United States exchange under the framework outlined by the SEC in *In re*

Poloniex, SEC Rel. No. 92607 (Aug. 9, 2021); ECF No. 136 at 2. During the Class Period, Tagomi was located in the United States, operated primarily out of New Jersey; and was founded by U.S. domiciles. *Id.* Further, Tagomi (1) brings together orders of securities from multiple buyers and sellers and (2) uses established, non-discretionary methods under which such orders interact with each other. *Id.*; ECF Nos. 138-3, 138-4.

Anderson argues that "appointing Anderson as Lead Plaintiff is the only way to allow this action to proceed and for class members potentially to recover under the Securities Act." ECF No. 149 at 4. But this is false. Nothing in the Settlement Order disqualifies Lead Plaintiff from carrying this action forward and allowing class members to potentially recover under both the Securities and Exchange Acts. It does not matter that CAOF also purchased EOS tokens via methods that may not qualify as domestic under *Morrison* any more than that CAOF purchased other kinds of securities.

III. ANDERSON IS NOT AN ADEQUATE LEAD PLAINTIFF BECAUSE OF ITS SELECTION OF COUNSEL

In denying Anderson's original motion for lead plaintiff, this Court observed "several defects" indicating a "lack of diligence on behalf of these plaintiffs and their counsel" and raised "significant doubts" about the Williams Group's (of which Anderson was a member) competency to lead the lawsuit. ECF No. 57 at 4. The Court also expressed concern that the Williams Group's application was driven by lawyers, rather than the plaintiffs. *Id.*

The Court's concern regarding Anderson's choice of counsel and the motivations behind the Anderson Motion have proven warranted by recent revelations. A whistleblower from within the cryptocurrency company Ava Labs ("Ava") recently alleged that Kyle Roche, a founding member of Roche Freedman LLP ("RF") and (until last week) head of its class action practice, formed a "secret pact" with Ava wherein he agreed to sue competitors of Ava in exchange for

large quantities of Ava stock and of Ava tokens, known as AVAX. While the substance of the allegations against Roche has not been verified, video evidence included in the leak casts serious doubt on Anderson's choice of counsel and on the motivations underlying the Anderson Motion. *See* Exhibit 1 to the Declaration of Daniel L. Berger, dated September 6, 2022 ("Ava Labs (Avalanche) Attacks Solana & Cons SEC in Evil Conspiracy With Bought Law Firm, Roche Freedman," *Crypto Leaks* (August 26, 2022) (video accessible at https://cryptoleaks.info/case-no-3) ("Crypto Leaks Video")). Most troubling, there is evidence suggesting that Roche settles cases for less than their value. *Id.*

As part of damage control, RF moved to withdraw as counsel. ECF No. 154. But this "withdrawal" is nothing more than a feeble fig leaf which fails to conceal Roche's intent to remain involved in the litigation should Anderson be appointed lead plaintiff. RF and Selendy Gay Elsberg PLLC ("SGE")[2] have been partners in this process since their initial lead plaintiff motion was filed in June of 2020, ECF No. 20, and in other cases, ECF No. 149 (noting that RF and SGE were co-lead counsel in *In re Tether & Bitfinex Crypto Asset Litig.*, No. 19-cv-9236 (S.D.N.Y.)). In fact, SGE openly acknowledged in its most recent motion that RF intends to seek attorneys' fees at the conclusion of this case, presumably to compensate it for its planned role in the litigation. ECF No. 156 at 6 n.2.

IV. ANDERSON'S REMAINING ARGUMENTS ARE WITHOUT MERIT

Anderson argues that he is the "only class member that could replace CAOF as Lead Plaintiff to bring claims under the Securities Act." ECF No. 156. This is immaterial because CAOF does not need to be replaced. Further, the Court already found that Anderson is not an adequate plaintiff. ECF No. 57 at 3-4 ("[T]he Williams Group has not satisfied its *prima facie*

[2] Both firms have undergone recent name changes.

burden of demonstrating under Rules 23(a)(4) and (g) that the proposed lead plaintiff group and its chosen counsel would be able adequately to represent the putative class."). Thus, he cannot now be deemed the *most* adequate plaintiff. *In re NYSE Specialists Sec. Litig.,* 240 F.R.D. at 143-44 (S.D.N.Y. 2007) ("[E]ven if [movant] were determined to be the real party in interest to the claims…he cannot satisfy the adequacy requirement of Rule 23(a) and therefore does not meet the statutory presumption of most adequate plaintiff."). Moreover, "the Second Circuit has held that there is no requirement that a court select as lead plaintiff only a movant with standing to assert every possible claim against every defendant." *In re Fuwei Films Sec. Litig.*, 247 F.R.D. 432, 438 (S.D.N.Y. 2008) (rejecting argument that lead plaintiff must have standing under Section 12 of the Securities Act to litigate those claims on behalf of class) (citing *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 82 (2d Cir. 2004); *see also Weinberg v. Atlas Worldwide Hldgs., Inc.*, 216 F.R.D. 248, 253 (S.D.N.Y. 2003) ("The idea that there should be multiple Lead Plaintiffs with standing to sue on all possible causes of action has been rejected by the Southern District."). Thus, that Anderson previously filed Securities Act claims is immaterial.

CONCLUSION

For the foregoing reasons, Jeffrey Derrick Anderson's Motion to Substitute Lead Plaintiff and to Approve Lead Counsel should be denied.

Dated: New York, New York
September 6, 2022

Respectfully submitted,

/s/Daniel L. Berger

Daniel L. Berger
Caitlin M. Moyna
GRANT & EISENHOFER P.A.
485 Lexington Avenue
New York, NY 10017
Tel.: (646) 722-8500
Fax: (646) 722-8501
Email: dberger@gelaw.com
Email: cmoyna@gelaw.com
Lead Counsel and Counsel for Crypto Assets Opportunity Fund LLC

J. Samuel Tenenbaum
Bluhm Legal Clinic of the Northwestern Pritzker School of Law
Complex Civil Litigation and Investor Protection Center
375 East Chicago Ave.
Chicago, IL 60611
Tel: (312) 503-4808
Email: s-tenenbaum@law.northwestern.edu

Additional Counsel for Crypto Assets Opportunity Fund LLC