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14
15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN FRANCISCO DIVISION**
18

19 COMMODITY FUTURES TRADING
COMMISSION,

20 Plaintiff,

21 v.

22 OOKI DAO (formerly d/b/a bZx DAO), an
unincorporated association,

23 Defendant.
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CASE NO. 3:22-cv-05416

**AMICUS CURIAE BRIEF OF LEXPUNK
REGARDING PLAINTIFF’S MOTION
FOR ALTERNATIVE SERVICE**

Date: November 30, 2022

Time: 2:00 pm

Place: Courtroom 2

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STATEMENT OF INTEREST

This case concerns the U.S. Commodities Futures Trading Commission’s (“CFTC”) claims against users of a piece of software and other people associated with it.¹ The software is known as the “bZx protocol” or “Ooki protocol” (together, “Ooki Protocol”).² Ooki Protocol is an example of a blockchain-based, open-source software known as a “decentralized finance” (“DeFi”) system. Ooki DAO is an example of a novel type of loose-knit, technologically mediated social structure known as a “decentralized autonomous organization” or “DAO.”³ DAOs are often closely associated with DeFi systems.⁴ LeXpunK⁵ is a community of lawyers and software developers dedicated to providing open source legal resources and support for DeFi and DAOs, providing a voice for groups that wish to use DeFi systems or associate through DAOs, and advocating for these communities.

LeXpunK operates through various working groups that specialize in (i) developing contracts, templates, and best practices for DAOs, (ii) responding to regulatory guidance, draft laws, and proposals for self-regulatory initiatives, (iii) developing DAO alternative dispute resolution processes, and (iv) producing general educational materials. The purpose of this brief is

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¹ Pursuant to Fed. R. Evid. 201(b)(2), LeXpunK respectfully requests that the Court take judicial notice of the articles and hyperlinked web pages referenced herein, the existence and contents of which are not reasonably subject to dispute.

² The CFTC describes the Ooki Protocol as “a blockchain-based software protocol that accepted orders for and facilitated margined and leveraged retail commodity transactions (functioning *similarly to* a trading platform)”. (September 22, 2022 Order Instituting Proceedings Pursuant to Section 6(c) and (d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, CFTC Docket No. 22-31, at 2.) (Emphasis Added). The CFTC refers to certain users of and other persons associated with the Ooki Protocol in the aggregate as “bZx DAO” or “Ooki DAO” (together, “Ooki DAO”).

³ <https://decrypt.co/34131/bzx-about-to-jump-on-yield-farming-bandwagon> and <https://ethereum.org/en/dao>

⁴ <https://consensys.net/blog/codefi/daos/>

⁵ LeXpunK (“Amicus”) files this brief pursuant to the Court’s Order of October 12, 2022 (ECF # 27).

1 to provide the Court with legal and technical context, in the absence of parties before the Court
2 able to respond to the CFTC’s Motion for Alternative Service (the “Motion” ECF #11).⁶

3 **BACKGROUND**

4 DeFi systems like Ooki Protocol let people all over the world interact over the Internet in
5 “peer-to-peer” trading, borrowing, lending, and other financialization of digital assets, including
6 cryptocurrencies.⁷ Copies of the Ooki Protocol and other DeFi systems are stored on certain
7 general-purpose blockchain systems, such as Ethereum.⁸ Software code comprising DeFi systems
8 are called “smart contracts”.⁹ The blockchains on which these smart contracts reside are databases
9 that operate and are maintained by a globally distributed, unaffiliated set of network nodes who
10 receive, process, and store transactions and their results.¹⁰

11 As part of their activities, blockchain node operators do the following for Ooki Protocol:

- 12 1. receive transaction requests relating to the Ooki Protocol and other DeFi smart contracts
13 from anonymous Internet users;
- 14 2. run the code for such smart contracts in accordance with those requests;
- 15 3. record the results of such code-execution on the blockchain; and

16 ///

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18 _____
19 ⁶ The DeFi Education Fund (“DEF”) has filed a separate *Amicus Curiae* brief (ECF #22). Amicus
20 generally supports the arguments advanced by DEF and will not replicate the arguments set forth
21 therein.

22 ⁷ <https://ethereum.org/en/defi/> and <https://ethereum.org/en/what-is-ethereum/>.

23 ⁸ In addition to Ethereum, the Ooki Protocol is also deployed to the Binance Smart Chain, and
24 Polygon blockchain systems (<https://docs.ooki.com/ooki-ecosystem/multichain>).

25 ⁹ The term “smart contract” is metaphorical, and refers to blockchain stored and software code.
26 Smart contracts, standing alone, are not legal contracts. See <https://ethereum.org/en/defi/> and
27 <https://ethereum.org/en/smart-contracts/>.

28 ¹⁰ See Iansiti, Marco; Lakhani, Karim R. (January 2017). "The Truth About Blockchain". Harvard
Business Review. Harvard University. The technology at the heart of bitcoin and other virtual
currencies, blockchain, is an open, distributed ledger that can record transactions between two
parties efficiently and in a verifiable and permanent way.

1 4. receive a reward of cryptocurrency—whether from the users, the blockchain network
2 itself, or a mix of the two—for performing these tasks, in a process known as “mining,”
3 “validation” or “block production”.¹¹

4 Ooki DAO and other DAOs associated with DeFi systems “are not corporations,” but
5 rather are *ad hoc* social formations “organized around *providing infrastructure*” that help make
6 possible the activities described immediately above.¹² In Ooki DAO’s case, the relevant
7 infrastructure is the Ooki Protocol as it exists on Ethereum and other blockchain systems.¹³ Ooki
8 Protocol users have received a token formerly referred to as “BZX” and now referred to as
9 “OOKI” (hereinafter, “OOKI”), in a process variously referred to as “liquidity mining,” “yield
10 farming,” or “protocol disbursement”.¹⁴ The OOKI Token is known as a “governance token” for
11 the Ooki Protocol.¹⁵ Other DeFi systems similarly distribute governance tokens to their users.¹⁶

12 Governance tokens such as OOKI give users control over two things: (1) changeable
13 properties of the DeFi system (e.g., the ‘stability fee’ parameter determining how much users of
14 the system must pay into the system for usage¹⁷) or (2) allocation of discretionarily controllable

15 ¹¹ <https://ethereum.org/en/what-is-ethereum/> [https://ethereum.org/en/developers/docs/consensus-](https://ethereum.org/en/developers/docs/consensus-mechanisms/pow/mining/#top)
16 [mechanisms/pos/#validators](https://ethereum.org/en/developers/docs/consensus-mechanisms/pos/#validators); and see [https://ethereum.org/en/developers/docs/consensus-](https://ethereum.org/en/developers/docs/consensus-mechanisms/pos/#validators)

17 ¹² See <https://vitalik.ca/general/2022/09/20/daos.html>

18 ¹³ These blockchain systems include Ethereum, Binance Smart Chain, and Polygon. See
19 <https://docs.ooki.com/ooki-ecosystem/multichain>

20 ¹⁴ <https://decrypt.co/34131/bzx-about-to-jump-on-yield-farming-bandwagon>

21 ¹⁵ <https://docs.ooki.com/governance/dao-governance>

22 ¹⁶ [https://academy.shrimpy.io/lesson/what-is-liquidity-](https://academy.shrimpy.io/lesson/what-is-liquidity-mining#:~:text=Liquidity%20mining%20is%20a%20process,accrued%20from%20traders%20swapping%20tokens)
23 [mining#:~:text=Liquidity%20mining%20is%20a%20process,accrued%20from%20traders%20swa-](https://academy.shrimpy.io/lesson/what-is-liquidity-mining#:~:text=Liquidity%20mining%20is%20a%20process,accrued%20from%20traders%20swapping%20tokens)
24 [pping%20tokens](https://academy.shrimpy.io/lesson/what-is-liquidity-mining#:~:text=Liquidity%20mining%20is%20a%20process,accrued%20from%20traders%20swapping%20tokens). And <https://ethereum.org/en/dao> and <https://consensys.net/blog/codefi/daos/>
25 “Liquidity mining is a process in which crypto holders lend assets to a decentralized exchange in
return for rewards. These rewards commonly stem from trading fees that are accrued from traders
swapping tokens.”

26 ¹⁷ <https://makerdao.world/en/faqs/stability-fee/> and
27 <https://makerdao.world/en/learn/governance/mkr-token/> (“As a governance token, MKR is used
28 ...to execute changes to parameters inside of the Maker Protocol like Stability Fees, the DSR,
Debt Ceilings, and many others.”)

1 resources that are related to the DeFi system (such as governance tokens that have not yet been
2 distributed)¹⁸. The goal of providing users with this limited authority is to provide for the
3 continuing availability, functioning and quality of the financial infrastructure those users rely
4 upon.¹⁹ The holders or users of such governance tokens are often referred to as comprising all or
5 part of “a DAO” such as Ooki DAO.²⁰

6 Although OOKI holders, or the Ooki DAO, may be able to “govern” the Ooki Protocol
7 through their OOKI tokens, such governance is highly limited, technologically constrained and not
8 like “governance” as it exists in traditional corporate structures.²¹ As noted above, neither the
9 Ooki DAO nor OOKI holders run the Ooki Protocol on behalf of users—that activity is performed
10 by neutral, general-purpose, unaffiliated, globally distributed blockchain network nodes whose
11 owner/operators neither know nor care whether the transactions they are processing relate to the
12 Ooki Protocol or any other specific DeFi system or protocol.²² Node owner/operators have no
13 contract, arrangement, or understanding with, and are not in privity with, any OOKI holders or the
14 Ooki DAO as such—rather, they perform their functions in order to gain cryptocurrency rewards
15 for their general network services, and any given “block” of data that is produced by them will
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18 ¹⁸ <https://uniswap.org/blog/uni> ““Uniswap governance will control all UNI vested to the Uniswap
19 treasury. At this point, governance can vote to allocate UNI towards grants, strategic partnerships,
20 governance initiatives, additional liquidity mining pools, and other programs.”

21 ¹⁹ See <https://compound.finance/governance/comp> (“Compound (COMP) is an ERC-20 asset that
22 empowers community governance of the Compound protocol; COMP token-holders and their
23 delegates debate, propose, and vote on all changes to the protocol. By placing COMP directly into
24 the hands of users and applications, an increasingly large ecosystem will be able to upgrade the
25 protocol, and will be incentivized to collectively steward the protocol into the future with good
26 governance.”

27 ²⁰ <https://cointelegraph.com/daos-for-beginners/what-is-a-dao> (“In 2020, a DeFi lending protocol
28 launched its own governance token and distributed it through a liquidity mining process.
Essentially, anyone who interacted with the protocol would receive tokens as a reward. Other
projects have since replicated and adapted the model. Now, the list of DAOs is extensive...”

²¹ *Supra*, note 11.

²² See, e.g., *Supra* notes 15, 19.

1 contain transactions relating to diverse smart contract systems rather than relating solely to the
2 Ooki Protocol.²³ Instead of running the Ooki protocol on behalf of others as a business, the Ooki
3 DAO, or OOKI holders, vote their tokens on various issues relating to the Ooki protocol, and, in
4 doing so, express their personal preferences as users of that digital infrastructure as to how it
5 should operate. For example, recent votes were held on a proposal to change the interest rates
6 charged by the Ooki Protocol²⁴ and a proposal to allocate previously un-distributed OOKI to a
7 ‘cross-chain’ bridge intended to make the copies of the Ooki Protocol on different blockchain
8 systems interoperable²⁵.

9 The OOKI token also contains a “delegation” feature whereby an OOKI holder can
10 authorize other people—by “permissioning” their respective blockchain system addresses—to use
11 the voting power of any given OOKI token.²⁶ Because of this delegation feature, it cannot even be
12 clearly ascertained which persons own and vote their OOKI, versus owning their OOKI and
13 delegating the voting power to other persons. All such persons—whether owning OOKI tokens,
14 voting OOKI tokens directly, or voting OOKI tokens through “delegation”, may be completely
15 unknown to one another in their identities, locations, interests, and motivations. Each may be
16 running his or her own business or personal activities on the Ooki Protocol, in a disparate and
17 uncoordinated manner, and voting their OOKI tokens solely to further their own personal,
18 individual, unaffiliated interests in the Ooki Protocol rather than, as portrayed by the CFTC, to
19 conduct a collective business enterprise.

20 Ooki DAO governance does not require use of any particular website or centrally
21 controlled software. Rather, OOKI tokens can be voted through any number of open-source
22

23 ²³ *Id.*

24 ²⁴ <https://forum.ooki.com/t/ooki-snapshot-proposal-to-adjust-interest-rates-with-minimal-interest-rate-mechanism/449>

26 ²⁵<https://snapshot.org/#/ooki.eth/proposal/0xb68f02817b18529c5cf17bf1ef8e40b1a9782d47f633e08305ca817fb8a55a1d>

28 ²⁶ <https://docs.ooki.com/governance/delegating>

1 software tools designed for blockchain system interaction, including completely self-hosted tools
 2 such as the client software for blockchain system “nodes”.²⁷ Moreover, *multiple* independently
 3 owned and operated and unaffiliated websites facilitate OOKI token voting, for people who don’t
 4 use wallet applications or their own nodes.²⁸ Furthermore, discussion of matters relating to the
 5 Ooki Protocol and Ooki DAO takes place on multiple platforms, including Twitter, Telegram,
 6 Discord, YouTube, GitHub, Instagram and a messaging forum devoted to discussing the Ooki
 7 Protocol.²⁹ In short, there is no one single website which all OOKI token holders, Ooki DAO
 8 participants or Ooki Protocol users can be presumed to view or use.

9 ARGUMENT

10 It is true, as can be seen, that this case concerns novel technology and novel internet-based
 11 social structures. At this procedural juncture, however, not-so-novel constitutional principles are at
 12 issue. The CFTC claims that a group of OOKI token holders violated the Commodities Exchange
 13 Act (“CEA”) by being a Futures Commission Merchant (“FCM”) from August 23, 2021 to the
 14 present. CFTC Complaint, ECF #1, p. 4. In particular, the CFTC seeks to hold liable an unknown
 15 and unidentified subset of Ooki token holders “who have voted those tokens to govern... the Ooki
 16 Protocol”. *Id.*, p. 11. The CFTC, without justification or analysis, characterizes the activity of
 17 having voted OOKI tokens *at any time, on any subject*, regardless of whether directly (as owner)
 18 or indirectly (as delegate), as constituting ‘membership’ in the “unincorporated association” of the
 19 Ooki DAO.³⁰

20 _____
 21 ²⁷ <https://ethereum.org/en/developers/docs/nodes-and-clients/> (“Running a node allows you to
 22 directly, trustlessly and privately use Ethereum”).

23 ²⁸ See, e.g., <https://snapshot.org/#/ooki.eth>;
 24 [https://www.tally.xyz/governance/eip155:1:0x3133b4F4dcffc083724435784fEFAD510FA659c6](https://www.tally.xyz/governance/eip155:1:0x3133b4F4dcffc083724435784fEFAD510FA659c6;);
 25 <https://etherscan.io/address/0x3133b4f4dcffc083724435784fefad510fa659c6#writeProxyContract>

26 ²⁹ <https://docs.ooki.com/>, see “Additional Resources” section in side ribbon and
 27 <https://forum.ooki.com/>

28 ³⁰ It is also seems that the CFTC is factually incorrect in its assertion that only OOKI Token
 holders can vote in the DAO. According to the OOKI governance documents "Token Holders with
 (footnote continued)

1 The CFTC seeks to serve these anonymous people, who may be all over the world, have
 2 not entered into a partnership or similar contract with one another, and who seemingly hold in
 3 common only their shared use of specific software (the Ooki Protocol) over the Internet, by
 4 posting a lawsuit on a website maintained by unknown persons with an unknown relationship to
 5 such people and such software, rather than serving the targeted software users themselves. The
 6 CFTC’s only rationale for such a novel alternative method of group service is that such persons
 7 are “associated” by means of the software in question—which, in the CFTC’s mind, makes such
 8 persons an “unincorporated association” constituting a legal person under U.S. federal law.

9 The CFTC’s Motion seeking leave to serve process in this manner, if granted, would
 10 offend basic principles of due process and potentially violate international law. Granting the
 11 Motion would also prevent OOKI holders from exercising their rights under the Administrative
 12 Procedure Act (“APA”) by using the judicial process, and a likely default judgment, to prevent
 13 such persons from challenging rules created by the CFTC regarding liability of token holders
 14 without complying with required rulemaking procedures. Finally, granting the Motion could also
 15 have a needless and unnecessary chilling effect on technological innovation by raising the specter
 16 of unlimited personally liability for persons interacting with blockchain based software. The
 17 Motion should be denied.

18 **I. BECAUSE A “DAO” IS NOT A LEGAL PERSON UNDER THE CEA OR OTHER**
 19 **APPLICABLE U.S. FEDERAL LAW, THE CFTC MUST PURSUE ITS CLAIMS**
 20 **AGAINST INDIVIDUAL DAO PARTICIPANTS, AGAINST WHOM**
 21 **ALTERNATIVE SERVICE IS IMPROPER**

22 **A. A “DAO” is Not a Person Under the Statute’s Plain Language.**

23 While the CEA includes an “association” within in the definition of “person”, *see* 7 U.S.C.

24 ///

25
 26 _____
 27 DAO voting rights is not limited to OOKI token holders." *See* archived version of this document
 28 (as of September 26, 2022) at
<https://web.archive.org/web/20220926144508/https://docs.ooki.com/governance/voting>.

1 § 1(a)(38), nothing in the statutory text suggests that a DAO is an association.³¹ This is a
 2 threshold problem because “[b]efore a court may exercise the state’s coercive authority over a
 3 person or property, some statute must authorize the act.” *SEC v. Ross*, 504 F.3d 1130, 1138 (9th
 4 Cir. 2007). As CFTC Commissioner Summer Mersinger observed: “[T]he CEA does not provide
 5 the Commission with authority to regulate the Ooki DAO.”³²

6 Whether a “DAO” is an association under the CEA is a matter of federal statutory
 7 interpretation, not state law. “When called on to resolve a dispute over a statute’s meaning, [a]
 8 Court normally seeks to afford the law’s terms their ordinary meaning at the time Congress
 9 adopted them.” *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) (“[T]he court’s sole
 10 function is to apply the law as the court finds it, not defer to some conflicting reading the
 11 government might advance.”). The CEA was enacted in 1936, and it is difficult to conceive that, at
 12 that time, Congress intended to include a DAO in the term “association”. The DAO at issue here,
 13 as explained in the CFTC’s complaint, is more like autonomous software than a corporation or
 14 partnership, which is controlled by people. ECF #1, p. 25 – 31. Indeed, Congress could not have
 15 intended that software be treated as a person for purposes of CEA when it enacted the law in 1936,
 16 given the fact that computers as we know them did not exist at that time, much less software. No
 17 case from any court holds otherwise. In short, there is no independent statutory basis to support
 18 the CFTC’s assertion that Ooki DAO is a person or an association. Without this authority, service
 19 on Ooki DAO cannot be approved by this Court, whether under FCRP 4 or otherwise.

20 The Administrative Procedure Act (“APA”) further militates against granting the CFTC’s
 21 request. Under the APA, courts are required to “hold unlawful and set aside agency action,
 22 findings, and conclusions found to be” (5 U.S.C. § 706(2)), *inter alia*, “arbitrary, capricious, an

23
 24 ³¹ Amicus’ position only differs from DEF’s in relation to DEF’s assertion that this Court should
 25 defer to California state law to determine what constitutes an association for the purposes of the
 26 CEA. While this Court can consider California state law, its primary goal is to adopt a rule that
 27 best comports with the CEA’s regulatory scheme. *PM Grp. Life Ins. Co. v. W. Growers Assurance*
 28 *Tr.*, 953 F.2d 543, 546 (9th Cir. 1992).

³² <https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement092222>.

1 abuse of discretion, or otherwise not in accordance with law [or] without observance of procedure
2 required by law[.]” 5 U.S.C. § 706(2)(A), (D). The agency action at issue in this matter is the
3 determination that “Ooki DAO is an unincorporated association comprised of holders of Ooki
4 Tokens (or of BZRX Tokens, when the Ooki DAO was doing business as the bZx DAO) who
5 have voted those tokens to govern (e.g., to modify, operate, market, and take other actions with
6 respect to) the Ooki Protocol (formerly named the Ooki Protocol) during the DAO Relevant
7 Period [after August 23, 2021].” CFTC Complaint, ECF #1, p. 11.

8 No person will be able to challenge whether the CFTC’s actions in expanding the
9 definition of “person” comport with the requirements of the APA if a default judgment is entered
10 in this matter on the CFTC’s behalf. Thus, allowing this to happen will effectively permit the
11 CFTC to create regulations in abrogation of the APA without effectively allowing parties
12 aggrieved by such rules to challenge them. It is a “foundational principle of administrative law that
13 a court may uphold agency action only on the grounds that the agency invoked when it took the
14 action.” *Michigan v. EPA*, 576 U.S. 743, 758, 135 S. Ct. 2699, 2710 (2015). As explained in the
15 DEF brief, the CFTC made no attempt to justify its position that Ooki DAO is a person for the
16 purposes of the CEA and further, that only some of its token holders are liable for the actions of
17 Ooki DAO. While the CFTC explains in great detail its general interest in regulating digital assets
18 as commodities, it does not explain its conclusion that Ooki DAO is a person under the CEA. This
19 renders the decision impermissible under the APA, which presents further grounds for the Court to
20 deny the CFTC’s Motion.

21 Furthermore, the CFTC’s proposed course of action here, serving the Complaint in this
22 matter in a fashion designed to obtain a default judgment, precludes review of the CFTC’s
23 administrative action under the APA. As explained in 5 USC § 702, “[a] person suffering legal
24 wrong because of agency action, or adversely affected or aggrieved by agency action within the
25 meaning of a relevant statute, is entitled to judicial review thereof.” If this Court allows the CFTC
26 to serve the complaint at issue here in a manner calculated to obtain a default judgment, the
27 affected OOKI holders will be unable to challenge the rules promulgated by the CFTC regarding
28 personal liability for token holders expressed in that complaint and the preceding administrative

1 action. Therefore, this Court should require that the CFTC serve the Complaint on the persons it
 2 believes are ultimately liable for the damages it seeks, so that such persons are able to
 3 appropriately challenge the agency's actions under the APA.

4 **B. Alternative Service is Inappropriate for Individual Ooki DAO Token Users.**

5 As explained above, although this case is styled by the CFTC as an action against a
 6 "DAO", it is really against individual Ooki Token users. This intent is evident in the CFTC's
 7 moving papers, where it alleges among other things:

- 8 • "at least 38 messages discussing the Commission's complaint against the Ooki DAO
 9 in the Ooki DAO's Telegram Channel, including by a participant listed as an Ooki
 DAO 'Community admin'"³³.
- 10 • Furthermore, the website through which the CFTC wishes to serve Ooki DAO "links
 11 to an Online Forum for Ooki Token holders to discuss and vote on Ooki DAO
 governance issues".³⁴
- 12 • "this action has been well-publicized and has been extensively discussed on social
 13 media, including in over 1,000 tweets on Twitter."³⁵

14 The CFTC's intention is not to make Ooki DAO, as a purported organization, aware of the action,
 15 but to make *individuals* who possibly own and vote Ooki Tokens and also use internet forums,
 16 read twitter, and use telegram aware of this action.

17 The CFTC's complaint and motion for alternative service suggest that Ooki DAO is a
 18 completely anonymous organization, where ownership and control can't be ascertained. But the
 19 administrative record and the CFTC's own actions contradict this narrative. The CFTC has
 20 already instituted and resolved an enforcement action against two alleged owners and operators of
 21 the underlying protocol, Tom Bean and Kyle Kistner. According to the CFTC,³⁶ (1) Ooki DAO is
 22 a successor organization to bZeroX, LLC ("bZeroX"), a traditional limited liability company

24 ³³ ECF #11, p. 10.

25 ³⁴ *Id.* p. 7.

26 ³⁵ *Id.*, p. 10.

27 ³⁶ <https://www.cftc.gov/PressRoom/PressReleases/8590-22>

1 whose ultimate beneficial owners are Mr. Bean and Mr. Kistner and (2) Ooki DAO “operated the
 2 same software protocol as bZeroX”.³⁷ In short, far from being anonymous actors, the CFTC
 3 identified Bean and Kistner as operators of the protocol at issue in this matter. Indeed, the CFTC
 4 reached a settlement agreement for \$250,000.00 with Bean and Kistner.³⁸

5 The CFTC does not describe what happened at the conclusion of its enforcement action
 6 that suddenly caused the protocol at issue in this litigation to cease being beneficially owned and
 7 operated by Bean and Kistner and start being owned and operated by others. It appears that the
 8 CFTC is somehow trying to get two bites at the same apple – the first time against Bean and
 9 Kistner, and the second time at an unknown and potentially international group of people who
 10 interacted with a software protocol, the operation of which caused Bean and Kistner to be charged
 11 by the CFTC and then settle with that regulator. Rather than name the actual persons whom the
 12 CFTC believes are liable for the alleged violations of the CEA, the CFTC has set up Ooki DAO as
 13 a straw man to obtain a default against.

14 But the fact that the CFTC does not know, or does not admit to knowing, the identity of
 15 these individuals is not material for purposes of service of this complaint, and it cannot use the
 16 fiction of a DAO as an organization as an end run around the Constitution.³⁹ Here, Ooki DAO is a
 17

18 ³⁷ The CFTC concludes its press release with the following statement: “[O]n approximately
 19 August 23, 2021, bZeroX transferred control of the bZx Protocol to the bZx DAO, which
 20 subsequently renamed itself and is currently doing business as the Ooki DAO. The Ooki DAO
 21 operates the Ooki Protocol (formerly the bZx Protocol) in the exact same manner as bZeroX and
 22 thus is continuing to violate the law in the same manner as bZeroX. By transferring control to a
 23 DAO, bZeroX’s founders touted to bZeroX community members the operations would be
 24 enforcement-proof—allowing the Ooki DAO to violate the CEA and CFTC regulations with
 25 impunity, as alleged in the federal court action. The order finds the DAO was an unincorporated
 26 association of which Bean and Kistner were actively participating members and liable for the Ooki
 27 DAO’s violations of the CEA and CFTC regulations.

28 ³⁸ See <https://www.cftc.gov/PressRoom/PressReleases/8590-22>.

³⁹ See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950),
 internal citations and quotations omitted; and see *Commodity Futures Trading Comm'n v. Bryant*,
 No. CV 21-00386 HG-KJM, 2022 WL 1746760, at *2 (D. Haw. May 31, 2022) (“A federal court
 is without personal jurisdiction over a Defendant unless the Defendant has been served in
 accordance with Federal Rule of Civil Procedure.”) (Denying CFTC Motion for entry of Default
 (footnote continued))

1 fictitious defendant, more akin to a “Doe” defendant than an unincorporated association. But if
2 the CFTC alleges that individuals it cannot identify are responsible for CEA violations, the
3 solution is to name them as fictitious defendants until such persons can be identified, served with
4 this lawsuit in a manner consistent with FRCP 4, and given an appropriate opportunity to defend
5 themselves. This is the correct method of filing and serving a complaint against unknown
6 individuals.

7 [When the] identity of alleged defendants will not be known prior to the filing of a
8 complaint... [T]he plaintiff should be given an opportunity through discovery to
9 identify the unknown defendants, unless it is clear that discovery would not uncover
the identities, or that the complaint would be dismissed on other grounds.

10 *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980).

11 A three factor test applies in determining whether early discovery will be permitted to
12 determine the identity of fictitious defendants:

13 District Courts in the Ninth Circuit typically apply a three-factor test when
14 considering motions for early discovery to identify Doe defendants. First, the moving
15 party should be able to identify the missing party with sufficient specificity that the
16 Court can determine that the defendant is a real person or entity who could be sued
17 in federal court. Second, the movant should identify all previous steps taken to locate
18 the elusive defendant to ensure that the movant has made a good faith effort to
comply with the requirements of the service of process and specifically identifying
defendants. Third, the plaintiff should establish to the Court's satisfaction that
plaintiff's suit against defendant could withstand a motion to dismiss.

19 *Strike 3 Holdings, LLC v. Doe*, No. 22cv659-LL (MSB), 2022 U.S. Dist. LEXIS 96062, at *3-4
20 (S.D. Cal. May 27, 2022), internal citations and quotations omitted, cleaned up.

21 Here the CFTC tries to circumvent this long recognized process for naming defendants
22 who cannot be identified prior to the filing of a complaint. The CFTC does not know whether the
23 actual persons it seeks to hold liable in this proceeding are proper defendants in this Court.

24
25 _____
26 where it had “failed to demonstrate that it has undertaken reasonably diligent efforts to locate the
27 Defendant and to comply with Fed. R. Civ. P. 4”); and see *Mennonite Bd. of Missions v. Adams*,
28 462 U.S. 791, 799, 103 S. Ct. 2706, 2711, 77 L. Ed. 2d 180 (1983) (“Neither notice by publication
and posting, nor mailed notice to the property owner, are means “such as one desirous of actually
informing the [mortgagee] might reasonably adopt to accomplish it.”) (citing Mullane).

1 Therefore the CFTC has invented a theory that a DAO is a person, and invented a rule that it can
2 be served through a chatbox on a website. Service by publication on a website will not apprise the
3 individuals whom the CFTC alleges have violated the CEA of such allegations. As noted above in
4 the background section of this brief, there is no central website for Ooki DAO, and the CFTC's
5 purported service on a single website provides insufficient notice. Rather, it is the shortest path
6 for the CFTC to obtain a default judgment against an entity that doesn't actually exist, which it
7 alleges provides no protection from ultimate liability for its purported beneficial owners. See
8 Complaint, ECF #1 p. 11. In this fashion, the CFTC seeks to establish CEA violations through
9 default, and subsequently hold individuals who never had a chance to defend themselves
10 responsible for that violation. This is inconsistent with due process for the reasons outlined in
11 Amicus's original moving papers and DEF's brief.⁴⁰

12 Importantly, defects in service also deprive this Court of personal jurisdiction. Any person
13 brought before this court must be either subject to personal jurisdiction of the Court or have
14 waived that jurisdictional requirement. Personal jurisdiction "represents a restriction on judicial
15 power not as a matter of sovereignty, but as a matter of individual liberty." *Ins. Corp. of Ir. v.*
16 *Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702, 102 S. Ct. 2099, 2104 (1982). If a DAO
17 is, by itself and on its own, subject to the personal jurisdiction of this Court, it must be served with
18 the Complaint in this matter in such a manner as to allow it to defend itself. If, on the other hand,
19 the CFTC's ultimate purpose is to hold certain Ooki Token holders liable for the action of the
20 DAO, the CFTC must identify those persons and serve this Complaint in a manner which allows
21 those persons to appear and defend themselves. If this Court renders a default judgment which is
22 ultimately enforceable against individual token holders, this Court will be, in effect, issuing a
23 judgment against persons over whom it may not have jurisdiction.

24 In addition to those general due process concerns, the CFTC is not completely in the dark
25 as to the identities of those they allege are liable for violations of Ooki DAO, as they allege that
26

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28 ⁴⁰ See ECF #17 p.8-9 and ECF #22, p. 12.

1 multiple Ooki DAO members have resided in the United States. ECF #1, p. 49. This allegation
 2 raises additional concerns to those raised by DEF, namely, it implies that there are Ooki Token
 3 holders who the CFTC alleges are liable in this matter who do not reside in the United States. As
 4 articulated in FN 3 of the Amicus’s moving papers this implication raises issues pertaining to the
 5 United States’ obligations under Hague Convention on the Service Abroad of Judicial and
 6 Extrajudicial Documents (the “Hague Convention”) as incorporated into FRCP 4(f)(1).

7 This Court should, at a minimum, require the CFTC to articulate why it believes that some
 8 Ooki Token holders reside in the United States and state whether it believes that Ooki Token
 9 holders reside outside of the United States, and where those token holders do reside. As the Ninth
 10 Circuit has explained “[t]he citizenship of each member of an unincorporated association must be
 11 alleged, even though the entity might be recognized at state law as having the ability to sue and the
 12 liability to be sued.” *Fifty Assocs. v. Prudential Ins. Co.*, 446 F.2d 1187, 1190 (9th Cir. 1970).
 13 Alternative service with respect to those token holders should comport with the Hague Convention
 14 and international treaty obligations. The failure to do so makes any judgment potentially
 15 unenforceable internationally.⁴¹

16 **II. TREATING OOKI DAO AS A “PERSON” FOR PURPOSES OF SERVICE OF**
 17 **PROCESS EXCEEDS THE CFTC’S AUTHORITY UNDER THE CEA**

18 The APA exists to ensure the agency actions by executive agencies are not arbitrary and
 19 capricious and that agencies do not exceed their statutory authority. *See* 5 USC § 706.⁴² Neither
 20

21 ⁴¹ An order allowing alternative service could well be unenforceable and contrary to international
 22 treaties on service. *See Cox v. Coinmarket OPCO*, LLC 2021 WL 5908206 (Slip. Op., 2021)
 23 (Refusing to allow service via social media because “[w]ithout further proof of the country of
 24 residency for the individual Defendants... [t]he Court can only speculate as to whether service by
 25 Twitter is prohibited by international agreement as the country of residency cannot be
 26 identified.”); *See, also*, Fed. R. Civ. P. 4(f)(1); and *see Williams v. Doe*, No. 6:21-03074-CV-RK,
 2021 WL 4975742, at *3 (W.D. Mo. Oct. 26, 2021) (refusing to allow service via WhatsApp or
 27 email on resident of London, England where there was insufficient evident that this method was
 28 adequate to provide notice to defendant, even though Plaintiff had communicated with the
 defendant using those methods).

⁴² The existence of a final rule for purposes of APA review is a functional test, and the APA
 (footnote continued)

1 the APA nor the CEA contemplate *ad hoc* agency enforcement actions – rulemaking by
 2 enforcement – as a substitute for APA governed rulemaking. But that is precisely what the CFTC
 3 seeks to do here, by bringing a lawsuit against an entity that is not within the scope of the CEA’s
 4 definition of “person” and for which no formal rulemaking process has ever been undertaken.

5 If this suit named the persons the CFTC intends to hold liable for alleged CEA violations,
 6 and was served in a manner which advised such persons of the pendency of this action, such
 7 persons would be permitted to ask this Court to review the propriety of the CFTC’s rulemaking
 8 with respect to DAOs under the CEA. Conversely, if the CFTC is permitted to obtain a default
 9 judgment against the DAO defendant through a questionable method service, the CFTC will
 10 obtain a judgment that extends the meaning of “person” under the CEA without the persons
 11 aggrieved ever having been given the opportunity to challenge such agency actions under the
 12 APA.

13 **A. The CFTC’s Rules with Respect to DAO Personhood, Token Holder Liability**
 14 **and DAO Membership are Arbitrary and Capricious.**

15 Judicial review under the “‘arbitrary and capricious’ standard... is narrow: [courts]
 16 determine only whether the [Agency] examined the relevant data and articulated a satisfactory
 17 explanation for his decision, including a rational connection between the facts found and the
 18 choice made.” *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (cleaned up). “Under
 19 what [the Supreme Court has] called this ‘narrow’ standard of review, we insist that an agency
 20 ‘examine the relevant data and articulate a satisfactory explanation for its action.’” *F.C.C. v. Fox*
 21 *Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (quoting *Motor Vehicle Mfrs. Assn. of United*
 22 *States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)). Ultimately, to uphold
 23 an agency action, a court must find that, based on the record, the action falls “within the bounds of
 24 reasoned decision-making[.]” *Dep’t of Com.*, 139 S. Ct. at 2569 (cleaned up).

25 _____
 26 contains "generous [judicial] review provisions [that] must be given a hospitable interpretation."
 27 *Abbott Labs. v. Gardner*, 387 U.S. 136, 141, 87 S. Ct. 1507, 1511 (1967), internal quotations and
 28 citations omitted. The APA permits judicial review of agency actions “for which there is no other
 adequate remedy in a court”. 5 U.S.C. § 704.

1 The Supreme Court has explained that, when undertaking this judicial review, “[w]e start
2 with settled propositions.” *Id.* at 2573. This consists of a four-part analysis. First, the agency must
3 disclose the basis of its analysis. Second, the court must evaluate this explanation in light of the
4 administrative record. Third, the court should only consider the stated reasons of the agency, and
5 not potential ulterior motives. Finally, the court should consider only the relevant administrative
6 record except in extreme circumstances. *Id.*

7 The Supreme Court further explained the underlying rationale:

8 The reasoned explanation requirement of administrative law, after all, is meant to
9 ensure that agencies offer genuine justifications for important decisions, reasons that
10 can be scrutinized by courts and the interested public. Accepting contrived reasons
11 would defeat the purpose of the enterprise. If judicial review is to be more than an
empty ritual, it must demand something better than the explanation offered for the
action taken in this case.

12 *Id.* at 2575–76.

13 At a minimum, “agencies must pursue their goals reasonably. Reasoned decision-making
14 under the Administrative Procedure Act calls for an explanation for agency action.” *Id.* at 2576.
15 Here the CFTC has advanced a novel theory of liability for DAO token holders. The CFTC has
16 divided the world of Ooki DAO Token holders into two camps. First, is the camp of token holders
17 who “voted those tokens to govern” the Ooki Protocol and second is the camp of token holders
18 who did not so vote those tokens. Complaint, ECF #1, paragraph 11. This distinction is arbitrary
19 and capricious. The CFTC does not explain how it determined which Ooki Token holders voted
20 their tokens, which DAO votes constituted governance votes, or the extent to which a voting token
21 holder who subsequently disposed of his or her tokens may be found liable. This constitutes an
22 arbitrary and capricious agency action by the CFTC.

23 The actual persons harmed by this agency action are the individual token holders whom
24 the CFTC seeks to assert as liable for the purported violations of the CEA. This Court should
25 require that such persons are afforded their rights to challenge the agency action underpinning this
26 alleged liability by requiring that the CFTC serve the Complaint herein in a manner that advises
27 such persons that the CFTC is attempting to hold them liable under the CEA.

28 ///

1 **B. Any Determination that DAOs are Futures Commodities Merchants or**
2 **Otherwise have Liability for DeFi Systems is a Legislative Rule Required to go**
3 **through an APA Required Notice and Comment period Before it can Bind**
4 **Anyone.**

5 Under the APA, substantive (a/k/a/ legislative) rules are subject to the rule making
6 requirements, which require proposed agency actions to go through notice and comment *before*
7 *they can bind third parties*. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (discussing
8 “legislative rule[s], which (to be valid) must go through notice and comment.”); see also *Perez v.*
9 *Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015) (quoting *Chrysler Corp. v. Brown*, 441 U.S.
10 281, 302–303 (1979) (“Rules issued through the notice-and-comment process are often referred to
11 as ‘legislative rules’ because they have the ‘force and effect of law.’”)).

12 The APA establishes the procedures federal administrative agencies use for “rule
13 making,” defined as the process of “formulating, amending, or repealing a rule.” §
14 551(5). “Rule,” in turn, is defined broadly to include “statement [s] of general or
particular applicability and future effect” that are designed to “implement, interpret,
or prescribe law or policy.” § 551(4).

15 *Id.*

16 Under the APA, “[g]eneral notice of proposed rule making shall be published in the
17 Federal Register[.]” 5 U.S.C. § 553(b).

18 After notice required by this section, the agency shall give interested persons an
19 opportunity to participate in the rule making through submission of written data,
20 views, or arguments with or without opportunity for oral presentation. After
consideration of the relevant matter presented, the agency shall incorporate in the
21 rules adopted a concise general statement of their basis and purpose.

22 5 U.S.C. § 553(c).

23 This mandate applies to all agency rules except in the case of the following:

24 [I]nterpretative rules, general statements of policy, or rules of agency organization,
25 procedure, or practice; or when the agency for good cause finds (and incorporates
26 the finding and a brief statement of reasons therefor in the rules issued) that notice
and public procedure thereon are impracticable, unnecessary, or contrary to the
public interest.

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28 ///

1 5 U.S.C. § 553(b)(A) and (B). As opposed to legislative rules, these “interpretive” or
2 “[p]rocedural rules,” the general label for rules falling under this exemption, are primarily
3 directed toward improving the efficient and effective operations of an agency, not toward a
4 determination of the rights or interests of affected parties.” *Mendoza v. Perez*, 754 F.3d 1002,
5 1023 (D.C. Cir. 2014) (cleaned up).

6 Indeed, “[t]he absence of a notice-and-comment obligation makes the process of issuing
7 interpretive rules comparatively easier for agencies than issuing legislative rules. But that
8 convenience comes at a price: Interpretive rules do not have the force and effect of law and are not
9 accorded that weight in the adjudicatory process.” *Perez*, 575 U.S. at 97. Accordingly, without
10 going through notice and comment

11 [a]n agency may use interpretive rules to *advise* the public by explaining its
12 interpretation of the law. But an agency may not use interpretive rules to *bind* the
13 public by making law, because it remains the responsibility of the court to decide
14 whether the law means what the agency says it means.

14 *Id.* at 109 (Scalia, *J.*, concurring) (emphasis in original).

15 The CFTC’s conclusions that (1) a DAO is a person under the CEA, (2) that only voting
16 token holders are members of a DAO and (3) that voting token holders of a DAO are liable for
17 DAO actions which violate the CEA are legislative rules under the APA. These are statements by
18 the CFTC designed to implement law and policy. They were not published in the federal register.
19 There was no notice and comment period for these proposed rules. And, finally, by no stretch can
20 these rules be classified as interpretative rules.

21 The CFTC has adopted new rules regarding the classification of DAOs as persons under
22 the CEA and proposed rules for who is liable for the actions of such DAOs without notice or
23 comment. And, now, the CFTC seeks to have this Court fashion new rules regarding the service of
24 process of a complaint under these new rules on a DAO. This Court should decline to do so, and
25 instead require that the CFTC serve this Complaint in a fashion that allows the individuals whom
26 it seeks to hold liable to challenge these agency actions under the APA.

27 ///

28 ///

CONCLUSION

For the reasons set forth herein, Amicus believes that the Court should vacate its prior Order granting the CFTC’s Motion for Alternative Service and for such other relief that is just and proper under the circumstances.

DATED: October 17, 2022

Respectfully submitted,

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