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Counsel for Amicus Curiae Paradigm Operations LP (Additional Parties Listed Below)

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

Commodity Futures Trading Commission,

Plaintiff,

v.

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

Defendant.

Case No. 3:22-cv-5416-WHO

**MOTION FOR LEAVE TO FILE
BRIEF OF *AMICI CURIAE*
PARADIGM OPERATIONS LP,
LEXPUNK, DEFI EDUCATION FUND,
AND ANDREESSEN HOROWITZ
IN RESPONSE TO PLAINTIFF'S
MOTION FOR DEFAULT JUDGMENT**

Date: May 17, 2023

Time: 2:00 p.m.

Honorable William H. Orrick

1 TO THE COURT, ALL PARTIES, AND ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that Paradigm Operations LP, LeXpunk, the DeFi Education
3 Fund, and Andreessen Horowitz, through their undersigned counsel, move this Court for leave to
4 file as *amici curiae* the attached brief.¹ This motion is supported by a proposed order granting the
5 motion and the proposed *amici* brief, marked as Exhibit A.

6 **INTEREST OF *AMICI CURIAE***

7 *Amici* are stakeholders in the digital asset ecosystem and decentralized finance. The Court
8 previously granted *amici* leave to file briefs in opposition to a motion for alternative service by the
9 Commodity Futures Trading Commission (“CFTC” or “Commission”), and further permitted *amici*
10 to file reply briefs on the issue, as well as participate in a hearing. In the months since that hearing,
11 the Court has granted the Commission’s motion for alternative service, the Commission has
12 effectuated service on the “Ooki DAO” within the terms of the Court’s Order, nobody has appeared
13 to defend the Ooki DAO in response to that service, and the Commission accordingly now seeks a
14 default judgment. *Amici* respectfully request leave to provide their views to the Court on that
15 request.

16 **ARGUMENT**

17 Trial courts have the discretion to allow the filing of an *amicus curiae* brief. *State v. Bureau*
18 *of Land Mgmt.*, 612 F. Supp. 3d 925, 951 n.15 (N.D. Cal. 2020). Courts generally exercise “great
19 liberality in permitting amicus briefs.” *Cal. ex rel. Becerra v. U.S. Dep’t of the Interior*, 381 F.
20 Supp. 3d 1153, 1164 (N.D. Cal. 2019) (quotation marks omitted). All an individual seeking to
21 appear as an *amicus* must show is “that his participation is useful or otherwise desirable to the
22 court.” *Id.*

23 “[T]he ‘classic role’ of *amicus curiae* is ‘assisting in a case of general public interest,
24 supplementing the efforts of counsel, and drawing the court’s attention to law that escaped
25 consideration.’” *Stanley v. Ayers*, No. 07-cv-04727, 2021 WL 121191, at *2 (N.D. Cal. Jan. 13,
26 2021) (quoting *Miller-Wohl Co. v. Comm’r of Lab. & Indus., State of Mont.*, 694 F.2d 203, 204

27 ¹ No party or counsel for a party authored the proposed brief in whole or in part, and no party,
28 counsel for a party, or person other than the proposed *amici curiae* or its counsel has made any
monetary contribution intended to fund the preparation or submission of the proposed brief.

1 (9th Cir. 1982)). That is the role that *amici* seek to continue playing in this matter. As when the
2 Court previously permitted *amici* to participate in this matter, no counsel for the DAO or any
3 individual has yet appeared to oppose the Commission’s complaint. Without the participation of
4 *amici*, the Court might not hear, as the attached brief details, arguments concerning the
5 unnecessarily overbroad nature of the relief the Commission seeks. .

6 **CONCLUSION**

7 For the foregoing reasons, *amici* respectfully request leave from the Court to file the
8 attached brief.

9
10 Dated: April 21, 2023

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EXHIBIT A

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

18 Commodity Futures Trading Commission,

19 Plaintiff,

20 v.

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

23 Defendant.

Case No. 3:22-cv-5416-WHO

BRIEF OF *AMICI CURIAE*
PARADIGM OPERATIONS LP,
LEXPUNK, DEFI EDUCATION FUND,
AND ANDREESSEN HOROWITZ
IN RESPONSE TO PLAINTIFF'S
MOTION FOR DEFAULT JUDGMENT

Date: May 17, 2023

Time: 2:00 p.m.

Honorable William H. Orrick

INTEREST OF *AMICI CURIAE* AND INTRODUCTION

1
2 *Amici* are stakeholders in the digital asset ecosystem and decentralized finance. The Court
3 previously granted *amici* leave to file briefs in opposition to a motion for alternative service by the
4 Commodity Futures Trading Commission (“CFTC” or “Commission”), and further permitted *amici*
5 to file reply briefs on the issue, as well as participate in a hearing. In the months since that hearing,
6 the Court has granted the Commission’s motion for alternative service, the Commission has
7 effectuated service on the “Ooki DAO” within the terms of the Court’s Order, nobody has appeared
8 to defend the Ooki DAO in response to that service, and the Commission accordingly now seeks a
9 default judgment. *Amici* respectfully oppose the entry of any judgment in this unprecedented
10 proceeding, but they file this brief with the more limited and focused aim of urging that any default
11 judgment the Court enters be a narrow one.

12 The Chief Justice of the United States has observed that “[i]f it’s not necessary to decide
13 more to dispose of a case, in my view it is necessary *not* to decide more.”¹ It is difficult to imagine
14 a context to which that admonition applies more directly than a default judgment proceeding—one
15 in which no opposing parties appear and there is no true adversarial presentation. *Amici* recognize
16 that this Court has determined the “Ooki DAO” is an association for purposes of service of process,
17 such that the CFTC’s suit could proceed. But that decision was a limited one, made in the
18 preliminary posture of assessing “whether and how the DAO can be *served*”—*not* in a posture in
19 which the Court assessed “whether the DAO is subject to regulation under the CEA,” Order at 8,
20 or whether “the DAO is an association that can be held liable under the CEA,” *id.* at 13. *Amici*
21 respectfully urge this Court to decide nothing more about the legal status of a DAO in the course
22 of entering any default judgment here. In addition, they urge the Court to make clear that any
23 default judgment it enters in this proceeding will run against only the “Ooki DAO” and assets in
24 the Ooki DAO’s treasury, rather than against any individuals or their personal assets.

25
26 ¹ Chief Justice John Roberts, Georgetown University Law Center Commencement Address
27 (May 20, 2006), <https://www.c-span.org/video/?192685-1/georgetown-university-law-center-commencement-address>; *see also, e.g., PDK Lab’ys Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J. concurring in part and concurring in the judgment) (“[T]he cardinal principle of judicial restraint — if it is not necessary to decide more, it is necessary not to decide more — counsels us to go no further.”).

1 The CFTC has not sued any individual in this proceeding and it previously make clear it is
 2 not seeking to impose liability on any person. *See, e.g.*, CFTC Opp. re Amicus Brs. at 2, 14.
 3 Imposing such liability would, moreover, require resolving complex legal and factual questions
 4 that are not properly addressed outside the context of adversarial presentation of the law and the
 5 facts. Should the Court enter a default judgment, it ought to avoid these uncharted waters.

6 In addition to not deciding more than necessary to dispose of the CFTC’s motion, the Court
 7 should decline to enter the Commission’s twenty-seven-page proposed order. This Court’s typical
 8 practice in a default posture appears to be entering a simple order that recites the procedural history
 9 and briefly discusses the *Eitel* factors before entering judgment (and that often says even less than
 10 that).² There is no reason for the Court to depart from that typical practice to make extensive
 11 findings on the one-sided record before it—particularly where, as here, there is a strong “possibility
 12 of a dispute concerning material facts” about how the Ooki DAO operates, as well as a cascade of
 13 novel legal issues best left for future “decisions on the merits.” *Eitel v. McCool*, 782 F.2d 1470,
 14 1471-72 (9th Cir. 1986). If this Court enters a default judgment, it should issue a simple order in
 15 line with those cited here that makes clear the Court’s judgment is limited to the Ooki DAO and
 16 the Ooki DAO only.

17 **I. The CFTC Has Affirmatively Disclaimed Any Effort to Hold Individuals Liable**
 18 **and the Court Has Accordingly Not Found that Individuals Could Be Liable.**

19 The CFTC has made clear that its Complaint seeks to impose liability only on the “Ooki
 20 DAO” as an entity, and not on any individual who owns or has previously owned Ooki DAO tokens.
 21 *Amici* respectfully submit that the Ooki DAO is not an association or other sort of entity; but
 22 regardless, the Commission has affirmatively disclaimed any ability to obtain a judgment here that
 23 would personally bind any individuals. *See, e.g.*, CFTC Opp. re Amicus Brs. at 2 (“simply
 24

25 ² *See, e.g.*, Dkt. 22, *Johnson v. LK Tea & Grill, Inc.*, No. 21-cv-08516 (N.D. Cal. June 27, 2022)
 26 (four-page discussion of *Eitel* factors); Dkt. 32, *Bd. of Trs. of the Sheet Metal Workers Pension Tr.*
 27 *of N. Cal. v. CER Mech. Corp.*, No. 20-cv-03462 (N.D. Cal. Apr. 9, 2021) (three-page discussion
 28 of *Eitel* factors); Dkt. 66, *Park Miller, LLC v. Durham Grp., Ltd.*, No. 19-cv-04185 (N.D. Cal. Oct.
 13, 2020) (one-page discussion of *Eitel*); Dkt. 40, *Bd. of Trs. for the Cement Masons Health &*
Welfare Tr. Fund for N. Cal. v. C. Aparicio, Cement Contractor, Inc., No. 19-cv-02231 (N.D. Cal.
 Aug. 13, 2020) (two-page order); Dkt. 48, *Elec. Indus. Serv. Bureau, Inc. v. Being of Serv., Inc.*,
 No. 13-cv-05810 (N.D. Cal. Jan. 8, 2016) (two-page order).

1 incorrect” to “characterize the CFTC’s Complaint as suing and/or seeking recovery directly against
2 individual Ooki token holders”); *id.* at 14 (confirming that, should it obtain a “money judgment”
3 here, “the CFTC could enforce that judgment only against the Ooki DAO’s assets (including those
4 held in the Ooki DAO Treasury.)”); *id.* (“[A]ny judgment against the Ooki DAO in this litigation
5 will not constitute a judgment against an individual Ooki DAO member.”); *id.* at 14-15 (“In such a
6 hypothetical future action or hypothetical amended current action, any alleged individual member
7 would have the opportunity to present any applicable defenses to his or her alleged membership in
8 the Ooki DAO or other defenses as that member sees fit.”).

9 In addition to limiting itself to a judgment against the Ooki DAO, the Commission has
10 disclaimed any intent to enforce any judgment it obtains against absent third parties. *Id.* at 15 (“Nor
11 does the CFTC’s complaint request that the Court enter judgment against any individual Ooki DAO
12 member on the basis of that member’s joint and several liability for a judgment against the Ooki
13 DAO.”). As the Commission has explained, it is seeking only “to obtain an injunction against the
14 Ooki DAO as an entity” and “to recover from the Ooki DAO Treasury.” *Id.* at 16 n.14. The
15 Commission’s pleadings thus make clear that any judgment should run no further than the sole
16 named defendant—the Ooki DAO.

17 This Court’s Order on Service of Process reflects these representations by the Commission.
18 As the Court there explained, the CFTC “sued Ooki DAO as an entity and did not sue the individual
19 Token Holders,” such that, “[i]f the CFTC ultimately seeks damages or fees of any kind from the
20 Treasury funds, it is not clear that the agency could require Token Holders to provide those
21 individually.” Order at 20. And the Court was further clear that its decision was limited to the
22 specific context of serving process. *E.g., id.* at 13 (“I reiterate that my determination that Ooki
23 DAO has the *capacity* to be sued does not necessarily establish that the DAO is an association that
24 can be held liable under the CEA. As discussed above, that is a question going to the merits of the
25 case and can be addressed on a dispositive motion later in litigation.”). The record in this case thus
26 uniformly points toward narrow relief that does not bind absent individuals.

27 The Commission’s and the Court’s clarity on this point make sense, as it would potentially
28 violate due process to issue a judgment that is binding on (or preclusive against) absent individuals

1 who were neither named in this action nor served with process. The Supreme Court has repeatedly
2 explained that “the right to be heard ensured by the guarantee of due process ‘has little reality or
3 worth unless one is informed that the matter is pending and can choose for himself whether to
4 appear or default, acquiesce or contest.’” *Richards v. Jefferson Cnty.*, 517 U.S. 793, 799 (1996).
5 Here, the Commission made no effort to identify or serve any individuals and indeed publicly stated
6 that this action would *not* bind absent third parties. It would accordingly raise serious constitutional
7 questions for a judgment to somehow alter the legal rights and obligations of such people. By
8 simply holding the Commission to its earlier word, by contrast, these constitutional difficulties can
9 be avoided.

10 **II. There Are Difficult Questions About Potential Token-Holder Liability that the**
11 **Court Ought Not Address in This Non-Adversarial Posture.**

12 The above supplies a more than sufficient basis to limit any default judgment to the named
13 defendant, but further favoring that course is the legal and factual complexity that would attend
14 applying this Court’s judgment to anyone else. Earlier in this proceeding when *amici* argued that
15 this unprecedented enforcement action raises a host of novel questions, the CFTC dismissed their
16 concerns as concerning a “hypothetical lawsuit”—one that presents “facts about the Ooki DAO (or
17 about hypothetical DAOs who are not before the Court) that are unsupported, untested, unripe, and
18 inappropriate for consideration at this stage.” CFTC Opp. re Amicus Brs. at 19-20. If this suit did
19 not require resolving novel issues then, it does not require doing so now. Once again, all that is
20 before the Court is the CFTC’s untested allegations and the legal views of *amici*. There is no
21 answer, no contrary evidence, and no filing from a party with a direct stake in the outcome. While
22 such a one-sided record might be sufficient to enter a default judgment against a named defendant
23 that was served with process and that nonetheless declined to appear on the narrow question of
24 liability for that named defendant (and only that named defendant), any such judgment should be
25 limited to what is essential to dispose of the suit.

26 As *amici* previously explained, the legal status of individuals who own governance tokens
27 in a DAO vis-à-vis that DAO involves novel legal, factual, and technological questions. While
28 *amici* recognize that this Court has found the Ooki DAO constitutes an unincorporated association

1 for purposes of process, the Court has not addressed (and should not address) the deeper questions
2 implicated by the CFTC’s suit. For example, it is unlikely that simply owning or voting a token
3 could suffice to incur secondary liability under the Commodity Exchange Act. *See* Paradigm
4 Amicus Br. at 9-11. Nor does the CFTC argue otherwise. There is thus no reason for the Court to
5 address such issues, none of which need be addressed to resolve the Commission’s current motion.

6 In addition to depriving the Court of adversarial presentation, the current default posture
7 provides no basis on which to consider—let alone resolve—untested legal and factual issues
8 concerning the relationship between the liability of the “Ooki DAO” and any potential liability of
9 current or former token holders. Individual token holders cannot compel the DAO to appear and
10 defend this action, and the DAO’s former token holders have no say whatsoever in whether the
11 DAO appears to defend this action. Nor, as noted above, do such current or former token holders
12 have any *reason* to come contest personal liability—to the extent they even know that this suit
13 exists. After all, the Commission has not attempted to serve any token holders and has further
14 assured whatever token holders are following this litigation via its public filings that the current
15 proceedings do *not* implicate them personally. In the Commission’s words, it will “enforce” any
16 “judgment only against the Ooki DAO’s assets (including those held in the Ooki DAO Treasury).”
17 CFTC Opp. re Amicus Brs. at 14. The current posture is thus a particularly ill-suited one for this
18 Court to address the legal relationship (if any) between the Ooki DAO and those who own or have
19 owned Ooki Tokens. The Court should accordingly make clear that any judgment it enters is
20 binding solely on the DAO and does not pretermitt the ability of a token holder to contest all aspects
21 of liability and damages in any future action the Commission might bring.

22 **III. The CFTC’s Proposed Order Presents Additional Novel Issues the Court Should**
23 **Decline to Address in the Current Default Posture.**

24 Finally, in addition to limiting any default judgment to the “Ooki DAO,” the Court should
25 neither make “findings” beyond the minimum necessary to support a judgment nor enter the more
26 extravagant relief the Commission seeks. The Court should instead follow what appears to be its
27 usual practice of explaining why a default judgment is appropriate under *Eitel* and explaining the
28 precise relief awarded as well as the basis for awarding it. No more is required.

1 That is especially so in this case because one of the critical considerations in entering (and
2 crafting) a default judgment is “the possibility of a dispute concerning material facts.” *Eitel*, 782
3 F.2d at 1471-72. Here, the Commission’s submissions contain apparent misstatements about the
4 Ooki DAO—for example, concerning the DAO’s ability to “operate” or “control” the Ooki
5 Protocol. *See, e.g.*, CFTC Mot. for Default J. Prop. Order at 4 (“The Ooki DAO exists . . . to operate
6 and monetize the Ooki Protocol.”). As *amici* previously explained, token holders “in a particular
7 DAO do not . . . ‘operate’ or ‘control’ the underlying protocols”; rather, their “voting rights are
8 typically limited according to the specific parameters of each protocol, and do not involve the type
9 of activities that the Commission would deem objectionable in its Complaint, such as allowing
10 users to open orders or enter positions.” Paradigm Amicus Br. at 3. DAOs generally cannot—and
11 *amici*’s belief is that the Ooki DAO here cannot—“operate” an associated protocol in any
12 conventional sense, as (for example) Google operates its popular search engine.

13 As to the Commission’s requested relief, the Commission asks the Court to enter extremely
14 broad relief, including remedies against third-party web hosting services that have not been named
15 (or involved) in this litigation. *See id.* at 23-24. This request raises due process concerns similar
16 to those noted above—as none of these companies are parties to this litigation—and presents its
17 own set of difficult remedial questions. *Amici* respectfully submit that the prudent course would
18 be to avoid the sweeping relief the Commission requests and enter a simpler order in line with
19 previous orders this Court has issued, at least until the Commission makes further showings and
20 provides more proof than it has thus far.

21 CONCLUSION

22 The CFTC’s suit is predicated on a complex constellation of factual and legal issues. Few
23 courts have grappled with the factual nuances of blockchain-based protocols or the legal
24 significance of such technology—and no court has done so against the backdrop of CEA liability
25 for a DAO. *Amici* respectfully submit that the Court should confine any default judgment it enters
26 to the named defendant, find no more than is minimally necessary to support the Court’s judgment,
27 and make clear that nothing in this default proceeding will alter the legal rights and obligations of
28 any non-party individuals. Should the Commission desire to establish general legal rules to govern

1 this large-and-growing industry, it should do so using well-worn procedures like notice-and-
2 comment rulemaking that provide stakeholders an opportunity to share their views in a reasoned
3 way, that provide the Commission a platform to give clear guidance to regulated parties on how it
4 understands the law's demands, and that provide a clean legislative rule that the judiciary can
5 review in an orderly, adversarial challenge should a regulated party decide to bring one.

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1 Dated: April 21, 2023

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ATTESTATION PURSUANT TO LOCAL RULE 5-1(h)(3)

Pursuant to Local Rule 5-1(h)(3), I attest that concurrence in the filing of this document has been obtained from each of the other signatories.

Dated: April 21, 2023

JONES DAY

By: /s/ Eric Tung
Eric Tung