REPORT

Futures & Derivatives Law

The Journal on the Law of Investment & Risk Management Products

April 2023 ▪ Volume 43 ▪ Issue 4

CFTC BRINGS FIRST-OF-ITS-KIND LAWSUIT AGAINST A DECENTRALIZED AUTONOMOUS ORGANIZATION

*By J. Christopher Giancarlo, Kari Larsen, Neal Kumar, Justin Browder, Michael Selig, and Annie Magovern**

I. EXECUTIVE SUMMARY

On September 22, 2022, in an action that was a first of its kind, the U.S. Commodity Futures Trading Commission ("CFTC") filed a complaint in federal court asserting that certain tokenholders of the decentralized autonomous organization ("DAO") called OOKI DAO were operating an "unincorporated association" subject to liability.[1] On the same day, the CFTC issued an order ("bZeroX Order") sanctioning affiliated crypto protocol operator bZeroX, LLC ("bZeroX") and its founders for failure to abide by various registration requirements.[2] Notably, in its action against OOKI DAO, the U.S. District Court for the Northern District of California authorized the CFTC to serve the summons and complaint via an online forum and help chat on the bZeroX website. In response, four interested parties filed amicus briefs, primarily arguing that serving the summons and complaint via an online forum and help chat was not sufficient to provide due process to the tokenholders of OOKI DAO. On November 14, 2022, the CFTC filed a consolidated opposition to the amicus briefs, arguing that the court should not reconsider its order upholding service since the CFTC's service method resulted in actual notice. The U.S. District Court for the Northern District of California held a hearing on the reconsideration of the alternative service question on December 7, 2022 and subsequently issued an order on December 13, 2022 holding that although OOKI DAO had actual notice of the litigation, the CFTC should serve at least one holder of OOKI DAO tokens to provide the best practicable notice.[3] Accordingly, the judge ordered that the CFTC serve bZeroX founders Tom Bean and Kyle Kistner in their roles as OOKI DAO tokenholders. On December 20, 2022, the court then issued another order concluding that service had been achieved, that OOKI DAO could be sued because OOKI DAO was an unincorporated association and that the CFTC's service made through the DAO's forum was sufficient.[4]

*Christopher Giancarlo, Kari Larsen, Neal Kumar, and Justin Browder are partners, Michael Selig is counsel, and Annie Magovern is an associate at Willkie Farr & Gallagher LLP.

THOMSON REUTERS®

42985038

II. OVERVIEW OF THE OOKI DAO LAWSUIT

A. SUFFICIENCY OF SERVICE

On September 22, 2022, the CFTC filed a complaint in the U.S. District Court for the Northern District of California against OOKI DAO for violations related to its alleged control over the DAO's software protocol.[5] OOKI DAO is an organization comprised of holders of the OOKI DAO governance token, OOKI ("OOKI"), who have the ability to vote on the adoption of certain upgrades and changes to the software protocol. The CFTC's complaint alleged that bZeroX developed and deployed a software protocol and subsequently transferred control over the protocol to OOKI DAO in an attempt to make it "enforcement-proof."[6]

That same day, the CFTC issued the bZeroX Order simultaneously filing and settling charges against bZeroX and its founders, Bean and Kistner, for developing and releasing a blockchain-based software protocol that enabled users to engage in off-exchange leveraged and margined retail commodity transactions in violation of the Commodity Exchange Act ("CEA") and CFTC regulations.[7] The respondents agreed to pay a civil monetary penalty of $250,000 for these violations.

The OOKI DAO lawsuit represents the first civil enforcement action by a federal regulator against a DAO and its members for violations of regulatory requirements.[8] One of the key issues in the case is who should be held liable for violations of the CEA and CFTC regulations when the activity is performed through a DAO. According to the CFTC complaint, OOKI DAO is an unincorporated association, and thus its members are jointly and severally liable for the actions of the association. The CFTC defined the DAO members as each OOKI holder who voted on governance measures, and thus, according to the CFTC, "chose to participate in running [the OOKI DAO] business" of governing the software protocol called bZx Protocol ("bZx Protocol").[9]

As discussed further below, CFTC Commissioner Summer Mersinger dissented from the enforcement action because she thought the CFTC should engage in notice-and-comment rulemaking regarding when a DAO member should be held liable for the actions of the DAO. According to Commissioner Mersinger, the CFTC's decision to pursue liability of DAO members as jointly and severally liable amounted to regulation by enforcement without appropriate notice to the market.

In response to the CFTC actions, four interested parties filed amicus briefs to object to the unconventional method by which the CFTC served the summons and complaint on OOKI DAO.[10] With approval from the U.S. District Court for the Northern District of California, the CFTC had served the summons and complaint through OOKI DAO website's Help Chat Box and posted notice of the summons and complaint on the OOKI DAO Online Forum, a web-based forum dedicated to discussion of OOKI DAO governance issues.[11] The amicus briefs contended that the CFTC had not alleged facts sufficient to establish that OOKI DAO was an unincorporated association and that providing notice to the central organization was not sufficient for due process in a DAO because OOKI DAO is not analogous to an ordinary business entity. In addition, the amicus briefs argued that the CFTC had not adequately pled that its proposed method of

service on OOKI DAO was likely to notify the parties potentially liable for the claims in the lawsuit. Accordingly, the amicus briefs reasoned that if the CFTC were permitted to proceed based on the proposed alternative method of service, the OOKI DAO tokenholders that the action purportedly implicates would not be given actual notice, and such holders would not be given a fair opportunity to litigate the issues that affect them since DAO tokenholders are not required to participate in the OOKI DAO Online Forum. The amici argued that if the CFTC wishes to hold such individuals responsible for violations of the CFTC's regulations, the CFTC should be required to identify those individuals who violated the regulations and provide proper service of process.

In its consolidated reply, the CFTC argued that the court should not reconsider its order granting the alternative service method since its service method followed applicable law and resulted in actual notice under federal and California law.[12] The CFTC asserted that it served the summons and complaint on OOKI DAO via the only avenue OOKI DAO made itself available for the public to contact it, and that OOKI DAO's official Twitter account publicly confirmed its receipt of the complaint.[13] In addition, the CFTC contended that the law does not require it to serve all members of an unincorporated association, but rather the association itself.[14] Finally, the CFTC clarified that it did not seek to enter judgment against any individual OOKI DAO member on the basis of that member's joint and several liability for a judgment against OOKI DAO. If the CFTC were to obtain a money judgment against OOKI DAO, the CFTC would enforce that judgment only against OOKI DAO's assets.[15]

Following a hearing on December 7, 2022, the U.S. District Court for the Northern District of California issued an order finding that the CFTC should serve at least one holder of OOKI DAO tokens to provide the best practicable notice, even though OOKI DAO had actual notice of the litigation.[16] Accordingly, the judge ordered that the CFTC serve bZeroX founders Bean and Kistner in their roles as OOKI DAO tokenholders.

On December 20, 2022, the Court issued a further order concluding that service had been achieved. Specifically, the Court found that OOKI DAO could be sued because OOKI DAO is an unincorporated association and that the CFTC's service made through the DAO's forum was sufficient.[17] The Court stated that the CFTC sufficiently alleged that OOKI DAO is an unincorporated association under California law because it is a group of two or more persons joined by mutual consent, not merely a technological tool, as certain amici argued.[18] The Court rejected an argument that different persons casting different votes did not constitute mutual consent, reasoning that such persons joined with the underlying common goal of governing the DAO.[19] Accordingly, the Court found that the OOKI DAO has the capacity to be sued as an unincorporated association under state law. However, the Court declined to rule on whether OOKI DAO has the capacity to be sued as an association that can be held liable under the CEA and noted that such a question goes to the merits of the case, which are yet to be decided. In addition, the Court found that posting on the Help Chat Box and Online Forum was reasonably calculated to apprise OOKI DAO of the litigation because the online discussion forum was dedicated to conversation about its business. In addition, the Court noted that since OOKI DAO is comprised

of tokenholders, service that was reasonably calculated to notify the tokenholders would reasonably notify the DAO itself.[20]

B. OOKI DAO'S ALLEGED VIOLATIONS OF CEA SECTIONS 4(a) AND 4(d) AND REGULATION 42.2

Although the judge's December 20, 2022 order shed an important light on the legal status of DAOs, the case is still to be decided on the merits. The CFTC's complaint against OOKI DAO, including certain OOKI holders, alleges violations of CEA Sections 4(a) and 4(d) and Regulation 42.2, which are the same laws and regulations applied in the bZeroX Order. The CFTC seeks civil monetary penalties and restitution and to enjoin OOKI DAO from continuing to operate the bZx Protocol.[21]

Specifically, the CFTC alleges that, on approximately August 23, 2021, bZeroX transferred the smart contract administrative keys for the bZx Protocol, which make it possible to modify and upgrade the protocol, to OOKI DAO.[22] Blockchain-based software protocol development companies often transfer governance authority over a protocol to a DAO after developing the protocol for purposes of decentralizing control over the protocol among an unaffiliated, dispersed community of protocol users. The CFTC's complaint alleges that bZeroX did so in an attempt to make the protocol "enforcement-proof."[23] The CFTC emphasizes that "DAOs are not immune from enforcement and may not violate the law with impunity."[24]

The CFTC asserts that "multiple OOKI DAO members have resided in the United States and have conducted OOKI DAO business (for example voting [OOKI]) to govern OOKI DAO and operate the [protocol] from within the United States."[25] The CFTC argues that each member of the DAO should be liable for the alleged violations of the CEA and CFTC regulations because the members participated in operating and monetizing the bZx Protocol. The CFTC's theory is that state law imposes a default corporate form on persons who agree to form an enterprise while sharing in the profits and liabilities. Such an organization is generally considered to be an "unincorporated association" or "general partnership" under state law, and each member is jointly and severally liable for the actions and obligations of the association.

The CFTC's complaint defines "members" of OOKI DAO as OOKI holders who used their tokens to vote on governance matters with respect to the bZx Protocol. This definition of an OOKI DAO "member" notably differs from the definition asserted by class action plaintiffs in *Sarcuni et al. v. bZx DAO et al.*, an unrelated pending lawsuit.[26] In that case, the plaintiffs argue that each OOKI holder should be jointly and severally liable for the unincorporated association's actions regardless of whether the holder voted on any governance matters or engaged in any other activity.[27] Although the CFTC does not assert that *all* OOKI holders should be deemed partners in an unincorporated association, as the plaintiffs argue in *Sarcuni*, the CFTC's approach invites questions regarding whether voting is the appropriate metric for determining DAO membership status. DAO governance tokenholders may engage in a broad swath of other activities in connection with a DAO, such as making proposals for upgrades and changes to the protocol, engaging in discussions related to governance on Discord and other communication channels, and participating in DAO

committees or "subDAOs." Under the definition of "member" asserted by the CFTC in the complaint (*i.e.*, a holder who used his or her tokens to vote on governance matters), none of these activities would be sufficient to cause a DAO governance tokenholder to qualify as a member of the DAO subject to joint and several liability for its actions.[28]

III. THE CFTC'S JURISDICTIONAL AUTHORITY

Although the CFTC's jurisdiction over commodity spot markets is limited to anti-fraud and anti-manipulation authority, when retail participants trade commodities on margin or leverage, the CFTC regulates the margined or leveraged trading activity as futures contracts, unless an exception applies. If no exception applies to such transactions, then the retail commodity transactions must, among other requirements, trade on a futures exchange known as a designated contract market ("DCM").[29] Furthermore, entities that facilitate trading in the fully regulated margined or leveraged contracts must register with the CFTC. For example, participants that execute orders and accept margin funds on behalf of market participants may need to register with the CFTC as a futures commission merchant ("FCM"). These transaction-level requirements apply to all retail commodity transactions that involve a U.S. person, regardless of the type of legal entity that offers or enters into such transactions.

There are two primary exceptions to the CFTC's jurisdictional authority to fully regulate commodity contracts traded on margin or leverage as futures contracts. First, trading on margin or leverage is not regulated as a futures contract if the parties to the trading activity are "eligible contract participants" or "eligible commercial entities," which are definitions designed to identify sophisticated market participants, but exclude retail participants.[30] Entities or persons that are not eligible contract participants or eligible commercial entities are often referred to as retail customers. Second, the CFTC does not regulate commodity trading on margin or leverage, even if the parties to the trading are retail customers, so long as the trading in the contracts "results in actual delivery within 28 days or such longer period as the [CFTC] may determine."[31]

IV. OVERVIEW OF THE bZeroX SETTLEMENT

According to the bZeroX Order, from June 2019 to August 2021, Bean and Kistner designed, marketed, and operated the bZx Protocol through their company, bZeroX. The bZeroX Order stated that during the relevant period, Bean and Kistner controlled bZeroX, were the only members of bZeroX, and were solely responsible for developing the bZx Protocol.

The bZx Protocol comprises a collection of smart contracts on the Ethereum blockchain that facilitate margined and leveraged retail commodity transactions.[32] The protocol allows any customer with an Ethereum wallet, including retail customers, to post margin to open leveraged positions whose value was determined by the price difference between two virtual currencies from the time the position was opened to the time it was closed. To execute a transaction on the bZx Protocol, a trader posts collateral in the form of ether ("ETH") to a smart contract to open a leveraged position based on the trader's expectation regarding the value of ETH to another virtual currency.[33] The smart contract would then bor-

row the other virtual currency from a bZx Protocol liquidity pool, whose assets were supplied by liquidity providers and received interest-bearing tokens in exchange. The smart contract would exchange the borrowed currency for ETH on a separate decentralized exchange and issue the trader a new token representing the position.[34] Positions on the bZx Protocol automatically rolled over every 28 days and could be liquidated at any time.[35] The primary benefit that bZeroX touted was that the decentralized nature of the bZx Protocol allowed customers to engage in these transactions without a third-party intermediary taking custody of their assets. The bZeroX website allowed users to transfer assets and open positions on the bZx Protocol, and bZeroX collected transaction fees from users, including origination fees and trading fees.[36]

The bZeroX Order charged Bean, Kistner, and bZeroX with violations of the CEA because the virtual currency transactions facilitated by the bZx Protocol are considered commodities under the CEA and were retail commodity transactions that were not executed on or through CFTC registrants. The bZeroX Order referenced ETH and DAI, another token that can be transacted with on the Ethereum blockchain, as examples of commodities transacted using the bZx Protocol.

By enabling retail commodity transactions involving U.S. retail customers, bZeroX was required to comply with Section 4(a) of the CEA, which provides that any relevant transaction must be "made on or subject to the rules of a board of trade that has been designated or registered by the CFTC as a contract market for the specific commodity."[37] Because bZeroX was not registered as a DCM with the CFTC, the retail commodity transactions it facilitated through its platform constituted illegal, off-exchange transactions in violation of Section 4(a) of the CEA.

Furthermore, because the transactions traded through bZeroX were also subject to regulation as futures contracts, the bZeroX Order also found that bZeroX violated the CEA for failing to register as an FCM. Specifically, bZeroX solicited and accepted orders for leveraged or margined retail commodity transactions with customers, and also accepted money or property to margin those transactions. As a result, bZeroX met the definition of an FCM, and violated the CEA for failure to register as an FCM during the relevant period.

The bZeroX Order further alleged that bZeroX failed to implement a customer identification program in violation of Regulation 42.2, which requires FCMs to conduct know-your-customer ("KYC") diligence on their customers pursuant to the Bank Secrecy Act.[38] Although bZeroX was not a registered FCM, Regulation 42.2 also applies to individuals and entities acting as unregistered FCMs.[39] The CFTC alleges that during the period in which bZeroX operated as an unregistered FCM, it did not conduct the required KYC diligence "and in fact explicitly marketed its lack of KYC diligence as a positive feature of the bZx Protocol."[40]

Based on these events, the CFTC alleged that bZeroX, Bean, and Kistner illegally facilitated off-exchange retail commodity transactions, illegally operated an unregistered FCM, and failed to comply with customer identification requirements applicable to FCMs under Regulation 42.2. Bean and Kistner agreed to pay a civil monetary penalty of $250,000 for their violations of the CEA and associated regulations.[41]

V. STATEMENTS FROM CFTC COMMISSIONERS

In June 2021, former CFTC Commissioner Dan Berkovitz previewed the issue of CFTC registration requirements for decentralized finance ("DeFi") projects in remarks to the Futures Industry Association. Commissioner Berkovitz noted, "Not only do I think that unlicensed DeFi markets for derivative instruments are a bad idea, I also do not see how they are legal under the CEA. The CEA requires futures contracts to be traded on a designated contract market licensed and regulated by the CFTC. The CEA also provides that it is unlawful for any person other than an eligible contract participant to enter into a swap unless the swap is entered into on, or subject to, the rules of a DCM. The CEA requires any facility that provides for the trading or processing of swaps to be registered as a DCM or a swap execution facility. DeFi markets, platforms, or websites are not registered as DCMs or SEFs. The CEA does not contain any exception from registration for digital currencies, blockchains, or 'smart contracts.' "[42]

Commissioner Mersinger dissented from the CFTC enforcement actions against bZeroX, Bean, Kistner, and OOKI DAO. Commissioner Mersinger disagreed with the CFTC's decision to define "members" of the OOKI DAO unincorporated association as "those holders of OOKI tokens that have voted on governance proposals with respect to running the business."[43] Commissioner Mersinger listed several reasons why she disagreed with this approach. First, she noted that it fails to rely on any legal authority in the CEA and instead relies on a theory of liability more commonly seen in state law contract and tort disputes. Second, she believed that it "arbitrarily defines" the OOKI DAO unincorporated association as those who vote OOKI tokens and "undermines the public interest by disincentivizing good governance in this new crypto environment." Finally, she noted that the CFTC had a viable alternative: it could have achieved a similar enforcement result by imposing aiding-and-abetting liability against certain individuals, such as Bean and Kistner, for OOKI DAO's violations of the CEA and CFTC rules.

Commissioner Mersinger also expressed concern that the CFTC's theory of liability for voting members of unincorporated associations constitutes regulation by enforcement (*i.e.*, setting policy based on new definitions and standards never before articulated by the CFTC or its staff). She suggested that rather than adopting its theory of voting member liability in an enforcement proceeding, the CFTC should instead have undertaken a public notice-and-comment rulemaking to address the significant policy issues raised by this action. Specifically, Commissioner Mersinger recommended seeking public input on two key questions of ongoing importance in the enforcement context: (1) how to define a member of a DAO that is an unincorporated association; and (2) within the bounds of the statutory authority granted by Congress in the CEA, who the CFTC will hold personally liable for a DAO's violations of the CEA and CFTC rules, and under what circumstances.[44] According to Commissioner Mersinger, a rulemaking proceeding on these issues would have more closely adhered to the CFTC's enforcement principles to follow the authority established in the CEA, soliciting public input on important policy issues, and transparency in holding market participants accountable.

VI. PROPOSED LEGISLATION

Despite the increasing use of DeFi, particularly for permissionless and composable projects, the regulatory landscape for such initiatives remains uncertain in the wake of the OOKI DAO lawsuit. For example, on August 3, 2022 the Digital Commodities Consumer Protection Act ("DCCPA"), a bipartisan bill co-sponsored by the leaders of the U.S. Senate Committee on Agriculture, Nutrition, and Forestry, was introduced in the U.S. Senate. The proposed bill may threaten DeFi's unique features and pose challenges for regulators.

If passed as currently drafted, the bill would provide the CFTC with the authority to regulate the spot and forward trading of digital commodities and would hold digital commodity platforms, likely including certain decentralized exchanges, to the same standards as traditional financial institutions. Specifically, the bill would:

- Require all digital commodity platforms-including trading facilities, brokers, dealers and custodians-to register with the CFTC;
- Require digital commodity platforms to adhere to advertising standards and disclose information about digital commodities and their risks, with the goal of bringing greater transparency and accountability to the marketplace;
- Authorize the CFTC to impose user fees on digital commodity platforms to fully fund its oversight of the digital commodity market;
- Direct the CFTC to examine racial, ethnic and gender demographics of customers participating in digital commodity markets and use that information to inform its rule-making and provide outreach to customers; and
- Recognize that other financial agencies have a role in regulating digital assets that are not commodities, but function more like securities or forms of payment.[45]

The proposed bill likely is paused for a time due to the collapse of FTX as legislators review the facts of the downfall and the potential for the various current legislative proposals to prevent such types of events in the future. However, given the political pressure due to such events, and the bipartisan nature of the DCCPA and various other legislative proposals regarding digital assets, we expect to see some legislative action regarding digital asset activities in 2023 or 2024.

VII. CONCLUSION

The OOKI DAO case remains ongoing and continues to present significant and novel issues specific to DAOs. Although the case is still to be decided on the merits, the U.S. District Court for the Northern District of California's rulings that OOKI DAO is an unincorporated association in California and that service made through OOKI DAO's online community forum was sufficient shed important light on the legal status of many DAOs. As DeFi projects continue to evolve, the potential for anonymity of founders and users may create novel issues for financial regulators. Industry participants will be closely watching the evolution of regulators' analyses of issues concerning DAOs.

ENDNOTES:

[1]*Commodity Futures Trading Commission v.*

OOKI DAO, Civil Action No: 3:22-cv-5416 (N.D. Cal.) (Sept. 22, 2022) ("OOKI DAO Complaint").

[2]*In the Matter of bZeroX, LLC; Tom Bean; and Kyle Kistner*, Order Instituting Proceedings Pursuant to Sections 6(c) and (d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, CFTC Docket No. 22 31 (Sept. 22, 2022).

[3]*Commodity Futures Trading Commission v. OOKI DAO*, Civil Action No: 3:22-cv-5416 (N.D. Cal.) (Dec. 13, 2022).

[4]*Commodity Futures Trading Commission v. OOKI DAO*, Civil Action No. 3:22-cv-05416, 2022 BL 454541.

[5]*See* OOKI DAO Complaint.

[6]*Id.* at 2.

[7]*See In the Matter of bZeroX, LLC; Tom Bean; and Kyle Kistner*, Order Instituting Proceedings Pursuant to Sections 6(c) and (d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions, CFTC Docket No. 22-31 (Sept. 22, 2022).

[8]We note that the U.S. Securities and Exchange Commission ("SEC") has similarly characterized another DAO, called "The DAO," as an unincorporated association in a Section 21(a) report of an investigation released in 2017. *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Exchange Act Release No. 81207 (July 25, 2017).

[9]*Id.*

[10]Motion for Leave to File Amicus Curiae Brief of DeFi Education Fund Regarding Plaintiff's Motion for Service, Exhibit A, Civil Action No. 3-22-cv-5416 (N.D. Cal.) (Oct. 4, 2022); Amicus Curiae Brief of LeXpunk Regarding Plaintiff's Motion For Alternative Service, Civil Action No: 3-22-cv-5416 (N.D. Cal.) (Oct. 17, 2022); Amicus Curiae Brief of Paradigm Operations LP Regarding Plaintiff's Motion For Alternative Service, Civil Action No: 3-22-cv-5416 (N.D. Cal.) (Oct. 17, 2022); and Amicus Curiae Brief of Andreessen Horowitz regarding Plaintiff's Motion for Alternative Service, Civil Action No. 3-22-cv-5416 (N.D. Cal.) (Oct. 31, 2022).

[11]*Commodity Futures Trading Commission v. OOKI DAO*, Civil Action No: 3:22-cv-5416 (N.D. Cal.) (Oct. 3, 2022).

[12]*Plaintiff's Consolidated Opposition to Amicus Curiae Motions for Reconsideration of Order Granting Plaintiff's Motion for Alternative Service*, 1, Civil Action No.: 3-22-cv-5416 (N.D. Cal.) (Nov. 14, 2022).

[13]*Id.* at 2.

[14]*Id.* at 13.

[15]*Id.* at 14.

[16]*Commodity Futures Trading Commission v. OOKI DAO*, Civil Action No: 3:22-cv-5416 (N.D. Cal.) (Dec. 13, 2022).

[17]*Commodity Futures Trading Commission v. OOKI DAO*, Civil Action No. 3:22-cv-05416, 2022 BL 454541.

[18]California state law defines an unincorporated association as "an unincorporated group of two or more persons joined by mutual consent for common lawful purpose, whether organized for profit or not." Cal. Corp. Code § 18035(a).

[19]*Commodity Futures Trading Commission v. OOKI DAO*, Civil Action No. 3:22-cv-05416, 2022 BL 454541.

[20]Under Federal Rule of Civil Procedure 4(h)(1)(A), service on an unincorporated association that is subject to suit under a common name may be provided in the same manner prescribed by Rule 4(e)(1) for service on individuals. Fed. R. Civ. P. 4(h)(1)(A). Federal Rule of Civil Procedure 4(e)(1) allows for service by following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made. Fed. R. Civ. P. 4(e). California law provides that unincorporated associations be served by delivering a copy of the summons and complaint to a designated agent. *See* California Civil Procedure Code § 416.40 and California Corporations Code § 18220. If no such agent exists, a judge or court may order a party to serve

one or more of the association's members by mailing a copy of the process to the association at its last known address. *Id.* Since OOKI DAO did not have an address, the Court found that California's alternative service provision governed, which provides that where no provision is made under California law for the service of summons, the court may direct that the summons be served in a manner which is reasonably calculated to give actual notice to the party to be served and that proof of such service be made as prescribed by the court. California Civil Procedure Code § 413.30.

[21]*Id*. at 4.

[22]OOKI DAO Complaint at 2.

[23]*Id.* at 2.

[24]*Id*.

[25]*Id.* at 17.

[26]*See Sarcuni et al. v. bZx DAO et al.*, Case No. SE 3:22-cv-00618-BEN-DEB, at 15 (S.D. Cal.) (May 2, 2022).

[27]*Id*.

[28]On September 27, 2022, the *Sarcuni* plaintiffs requested that the court take judicial notice of both the CFTC's complaint against OOKI DAO and the bZeroX Order, arguing that the CFTC's theory of liability supports its argument that OOKI DAO is a general partnership. *See Sarcuni et al. v. bZx DAO et al.*, Case No. SE 3:22-cv-00618-LAB-DEB (S.D. Cal.). On March 27, 2023, the judge held that the *Sarcuni* plaintiffs sufficiently alleged that a general partnership existed among tokenholders of the DAO. The judge rejected the defendants' arguments that the tokenholders' governance rights with respect to the DAO were limited as to preclude the possibility of their constituting a partnership. As members of a general partnership, the individual tokenholders could face vicarious joint and several liability exposure for the alleged torts of the DAO. That the mere ownership of governance tokens is sufficient to constitute a general partnership is significant and will likely have an impact on other DAO governance tokenholders in the future. Id.

[29]*See* Section 2(c)(2)(D) of the CEA.

[30]*See* CEA Sections 1a(17) & (18).

[31]*See* CEA Section 2(c)(2)(D)(ii)(III)(aa).

[32]bZeroX Order at 2.

[33]ETH refers to Ether, the native virtual currency of the Ethereum blockchain on which the bZx Protocol operates.

[34]*Id*.

[35]*Id*.

[36]*Id*.

[37]*Id*. at 7.

[38]Regulation 42.2, 17 C.Fed. Reg. § 42.2 (2021).

[39]*CFTC v. HDR Global Trading Limited*, No. 1:20-cv-08132, 2021 WL 3722183, at ¶ 39 (S.D.N.Y. Aug. 10, 2021) (consent order) (finding defendant who acted as an unregistered FCM liable for failing to adopt a customer identification program as required by Regulation 42.2).

[40]bZeroX Order at 5.

[41]*Id*. at 13.

[42]Keynote Address of Commissioner Dan M. Berkovitz Before FIA and SIFMA-AMG, Asset Management Derivatives Forum 2021 (June 8, 2021).

[43]Dissenting Statement of Commissioner Summer K. Mersinger Regarding Enforcement Actions Against: 1) bZeroX, LLC, Tom Bean, and Kyle Kistner; and 2) OOKI DAO (Sept. 22, 2022).

[44]*Id*.

[45]Digital Commodities Consumer Protection Act of 2022, R.Y.A. 22410, S. 4760 117th Cong. (2022).