IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

NORTHUMBERLAND COUNTY RETIREMENT SYSTEM and OKLAHOMA LAW ENFORCEMENT RETIREMENT SYSTEM, Individually and On Behalf of All Others Similarly Situated,	)	
Plaintiffs,	)	Case No. CIV-11-520-D
v.	)	
GMX RESOURCES INC., et al.,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF CLASS REPRESENTATIVES' UNOPPOSED MOTION FOR FINAL APPROVAL OF SETTLEMENT

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I. INTRODUCTION

Plaintiffs Northumberland County Retirement System and Oklahoma Law Enforcement Retirement System (collectively "Class Representatives"), individually and on behalf of the Settlement Class[1] preliminarily certified by the Court on April 21, 2014, respectfully submit this memorandum of law in support of their Unopposed Motion for Final Approval of Settlement (the "Final Approval Motion"). The Final Approval Motion requests: (1) final certification of the Settlement Class for settlement purposes only; (2) final approval of the $2.7 million Settlement as fair, reasonable, and adequate and in the best interests of the Settlement Class; (3) a finding that notice to the Settlement Class satisfied the requirements of Rule 23 and due process; and (4) approval of the proposed plan for allocating the net settlement proceeds to the Settlement Class (the "Plan of Allocation"). Based on their investigation, research, and expert analysis, Class Representatives and Class Counsel believe the Settlement is fair, reasonable, and adequate and in the best interests of the Settlement Class and, as such, respectfully request the Court grant final approval of the Settlement and all other relief requested.

[1] All capitalized terms not otherwise defined herein shall have the meanings given to them in the Stipulation and Agreement of Settlement dated March 25, 2014 (the "Stipulation"), a copy of which was attached as Exhibit 1 to Lead Plaintiffs' Memorandum of Law in Support of their Unopposed Motion to Certify the Settlement Class for Settlement Purposes, Preliminarily Approve Class Action Settlement, Approve Form and Manner of Notice and Set Date for Final Approval Hearing (Dkt. No. 137), and which is incorporated by reference as if set forth fully herein.

II. THE SETTLEMENT CONFERS AN IMMEDIATE $2.7 MILLION BENEFIT ON THE SETTLEMENT CLASS

Class Counsel and Class Representatives have achieved a $2.7 million Settlement with Defendants Ken Kenworthy, Jr., James Merrill, BBVA Securities Inc., Capital One Southcoast, Inc., Credit Suisse Securities (USA) LLC, Fortis Securities LLC, Howard Weil Incorporated (n/k/a Scotia Capital USA Inc.), Jefferies & Company, Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Pritchard Capital Partners, LLC, Wedbush Morgan Securities Inc., and Smith Carney & Co. (collectively, the "Settling Defendants"). The Settlement is an outstanding result and confers an immediate benefit on the Settlement Class.

In accordance with the Stipulation, the Settling Defendants deposited $2.7 million into the Escrow Account on or about May 19, 2014, which is earning interest for the benefit of the Settlement Class. *See* Declaration of Bradley E. Beckworth and Michael K. Yarnoff on Behalf of Class Counsel (the "Class Counsel Declaration") at ¶15. Upon the Effective Date, Class Representatives and the Settlement Class will dismiss the Complaint and all related claims in the Litigation. *See generally* Stipulation at Section IV. The Stipulation further allows Class Counsel to seek payment of attorneys' fees and reimbursement of Litigation Expenses from the Gross Settlement Fund, subject to the Court's approval. *Id.* at ¶¶8.1-8.2.[2]

[2] Class Representatives and Class Counsel are submitting, contemporaneously herewith, a separate Unopposed Motion for Approval of Attorneys' Fees and Litigation Expenses, and a Memorandum of Law in Support thereof.

On March 25, 2014, Class Representatives filed their Unopposed Motion to Certify the Class for Settlement Purposes, Preliminarily Approve Class Action Settlement, Approve Form and Manner of Notice and Set Date for Final Approval Hearing (the "Preliminary Approval Motion") (Dkt. No. 136), and their Memorandum in support thereof (the "Preliminary Approval Brief") (Dkt. No. 137). On April 21, 2014, the Court granted the Preliminary Approval Motion and, among other things, preliminarily certified the Settlement Class for settlement purposes, preliminarily approved the Settlement and approved the form and manner of notice to the Settlement Class. *See* Dkt. No. 138 ("Preliminary Approval Order"). Since then, the approved forms of Notice and Proof of Claim have been mailed to potential members of the Settlement Class and nominees in the manner approved by the Court, and to date, no Settlement Class Members have objected to the Settlement, or any aspect thereof, or requested to be excluded from the Settlement Class.[3]

III. SUMMARY OF THE ARGUMENT

The Court should grant final certification of the Settlement Class for settlement purposes. The Settling Parties have stipulated to class certification under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. *See* Stipulation at ¶3. Also, Class

[3] The deadline for filing objections to the Settlement, or opting out of the Settlement Class is July 10, 2014. *See* Preliminary Approval Order at ¶¶12, 14; *see* also Declaration of Josephine Bravata Concerning (A) Mailing of CAFA Notice; (B) Mailing of the Notice and Claim Form; (C) Publication of the Summary Notice; and (D) Requests for Exclusion Received to Date (the "SCS Declaration") at ¶12. To the extent any objections or requests for exclusion are received after the filing of this Memorandum, Class Representatives and Class Counsel will address those issues in their reply submission on or before July 24, 2014.

Representatives set forth extensive arguments satisfying each element of Rule 23 in their Preliminary Approval Brief. *See* Dkt. No. 137. And, as noted above, the Court preliminarily certified the Settlement Class on April 21, 2014. *See* Dkt. No. 138 at ¶2. Nothing has changed to alter the propriety of the Court's certification. Therefore, for all of the reasons set forth in the Preliminary Approval Brief and the Preliminary Approval Order, the Court should now grant final certification of the Settlement Class for the purpose of effectuating this Settlement.

The Court also should grant final approval of the Settlement. Courts in the Tenth Circuit consider four reasonableness factors when determining whether to finally approve a class action settlement. *Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324 (10th Cir. 1984). Those factors are whether: (1) the proposed settlement was fairly and honestly negotiated; (2) serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) in the judgment of the parties, the settlement is fair and reasonable. *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002); *Jones*, 741 F.2d at 324. Here, as detailed in section V.B. *infra*, all four of these factors support final approval of the Settlement.

The Court also should find that notice to the Settlement Class satisfied the requirements of Rule 23 and due process. As noted above, the Court approved the form and manner of notice in its Preliminary Approval Order. Dkt. No. 138 at ¶7. In accordance with that Order, the proposed long-form Notice was sent to potential

members of the Settlement Class and nominees and the Summary Notice was published in the national edition of *Investor's Business Daily* and over the *Business Wire*. *Id.* Specifically, these Notice Documents fully informed Settlement Class Members about the Litigation, the Settlement, and the facts needed to make informed decisions about their rights in connection with the Settlement. Moreover, the Notice Documents provided Settlement Class Members with a toll-free number and a URL address for the Claims Administrator's website (www.strategicclaims.net) where Settlement Class Members can go to obtain further information regarding the Settlement. *See* SCS Declaration at ¶8. Further, at the request of Defendants' Counsel, SCS mailed notice of the proposed Settlement, pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1715 ("CAFA"), to the appropriate federal and state officials, by certified return receipt through the United States Postal Service. *Id.* at ¶3.

For these reasons, and as demonstrated below, the Court should find the notice program implemented in this case was the best notice practicable under the circumstances, constitutes due and sufficient notice to all persons and entities entitled to receive such notice, and fully satisfies the requirements of Rule 23 and due process.

Finally, the Court should approve the Plan of Allocation. Class Representatives and Class Counsel respectfully submit the Plan of Allocation is a fair and reasonable method to allocate the net settlement proceeds to the Settlement Class, as it was formulated by competent counsel with the assistance of a damages expert, and is based on each Settlement Class Member's particular loss. *See* Class Counsel Declaration at ¶¶25-27. Therefore, the Court also should approve the Plan of Allocation.

IV. SUMMARY OF THE LITIGATION

For the sake of brevity and to avoid repetition, Class Representatives respectfully refer the Court to the accompanying Class Counsel Declaration for a detailed discussion of the procedural history of the Litigation. *See* Class Counsel Declaration at ¶¶6-14.

Based upon their investigation, research, expert analysis, and information obtained during the mediation process, Class Counsel and Class Representatives concluded the terms and conditions of the Settlement are fair, reasonable and adequate to the Settlement Class, and in their best interests. Having carried out the directives contained in the Court's Preliminary Approval Order, Class Representatives now seek final certification of the Settlement Class for settlement purposes, final approval of the terms of the Settlement itself, a finding that notice to the Settlement Class satisfied the requirements of Rule 23 and due process, and approval of the Plan of Allocation so that the Settlement may be completely executed. As demonstrated below, the Court should grant the Final Approval Motion.

V. ARGUMENT

A. Final Certification of the Settlement Class is Appropriate

The Court preliminarily certified the following Settlement Class for settlement purposes: all Persons who purchased or otherwise acquired GMX Resources Inc. common stock pursuant or traceable to the Company's May 2009 Offering or October 2009 Offering. *See* Dkt. No. 138 at ¶2.[4] Class Representatives now respectfully request the Court grant final certification of this Settlement Class.

The Settlement Class should be finally certified under Federal Rules of Civil Procedure 23(a) and (b)(3) for settlement purposes because: (1) the Settling Parties have stipulated to certification of the Settlement Class for purposes of settlement; (2) Class Representatives set forth extensive evidence establishing each element of Rule 23 in their Preliminary Approval Brief (Dkt. No. 137), which is respectfully incorporated by reference as if set forth fully herein; and (3) this Court preliminarily certified the Settlement Class (Dkt. No. 138 at ¶2) and nothing has changed to alter the propriety of the Court's certification.

[4] Expressly excluded from the Settlement Class are: (a) any putative members of the Settlement Class who submit valid and timely requests for exclusion from the Settlement Class in accordance with the requirements set forth in the Notice and Rule 23 of the Federal Rules of Civil Procedure; and (b) the Settling Defendants; GMX; members of the immediate family of any such Settling Defendant; any parent or subsidiary of any such Settling Defendant; any person, firm, trust, corporation, officer, director, or other individual or entity in which any Settling Defendant or GMX has or had a controlling interest; the partners, officers and directors of any Settling Defendant or GMX; and the legal representatives, agents, executors, heirs, successors, or assigns of any such excluded Person.

Additionally, for purposes of effectuating the Settlement, Class Representatives request the Court grant final appointment of Lead Plaintiffs as Class Representatives for the Settlement Class, and Nix Patterson & Roach, LLP ("NPR") and Kessler Topaz Meltzer & Check, LLP ("KTMC") as Class Counsel.

B. The Court Should Grant Final Approval of the Settlement

The Court should grant final approval of the Settlement. The procedure for review of a proposed class action settlement is a well-established two-step process. *In re Motor Fuel Temperature Sales Practices Litig*., 258 F.R.D. 671, 675 (D. Kan. 2009); *see also* MANUAL FOR COMPLEX LITIGATION § 13.14 (4th ed. 2004). First, at the preliminary approval stage, the Court determines if the settlement should be preliminarily approved such that the class should be notified of the pendency of a proposed settlement. *In re Motor Fuel*, 258 F.R.D. at 675; *accord*, MANUAL FOR COMPLEX LITIGATION § 1.46 (4th ed. 2004). The Court already completed this first step by issuing its Preliminary Approval Order, which preliminarily certified the Settlement Class for settlement purposes and preliminarily approved the Settlement as fair and reasonable. *See* Dkt. No. 138 at ¶5. Second—after the district court preliminarily approves the settlement—the class is notified and provided an opportunity to be heard at a fairness hearing before the settlement is finally approved. *In re Motor Fuel*, 258 F.R.D. at 675; *accord*, Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 11.25, at 38 (4th ed. 2002). Here, notice has been given to potential members of the Settlement Class pursuant to the terms of the Stipulation and in the form and manner approved by the Court. *See* SCS Declaration at ¶¶4-11. With the Final Approval Motion, Class Representatives now

request the Court take the second step—granting final approval of the Settlement.

Federal Rule of Civil Procedure 23(e) requires judicial approval of class action settlements. The Court has broad discretion in deciding whether to grant approval of a class action settlement. *Jones*, 741 F.2d at 324. "As a general policy matter, federal courts favor settlement, especially in complex and large-scale disputes, so as to encourage compromise and conserve judicial and private resources." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 455; *see also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("there is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); *Childs v. Unified Life Ins. Co.*, No. 10-CV-23-PJC, 2011 U.S. Dist. LEXIS 138818, at *29 (N.D. Okla. Dec. 2, 2011).

To that end, the Tenth Circuit has identified four factors for Courts to consider when deciding whether to finally approve a class action settlement. *See Rutter & Wilbanks*, 314 F.3d at 1188; *Jones*, 741 F.2d at 324. Each of these factors supports final approval of the Settlement.

1. The Settlement is the product of extensive arm's-length negotiations between experienced counsel

The fact that the Settlement was fairly and honestly negotiated by qualified, experienced counsel supports final approval. The fairness of the negotiations is to be examined with reference to the experience of counsel, the vigor with which the case was prosecuted, and any coercion or collusion that may have affected the negotiations. *Childs*, 2011 U.S. Dist. LEXIS 138818, at *32.

Here, the Settlement is the product of extensive arm's-length negotiations between the Settling Parties' experienced counsel. *See* Declaration of Layn R. Phillips ("Phillips Declaration"), Dkt. No. 140 at ¶11. Investigation of the facts and expert analysis provided the Settling Parties with more than sufficient knowledge and evidence to allow them to make informed decisions about the strengths and weaknesses of their respective cases. *Id.* at ¶8; *Childs*, 2011 U.S. Dist. LEXIS 138818, at *34.

Additionally, Class Counsel have unique experience prosecuting securities class actions. Indeed, Class Counsel regularly represent plaintiffs in class actions, and other complex commercial and consumer litigation. *See* Class Counsel Declaration at ¶¶33-34. For example, addressing NPR's efforts in a recently settled class action, Judge West of the Eastern District of Oklahoma stated:

> [T]he legal work on this case has just been absolutely spectacular, and I want to brag on all of you for the work that you put into it. I know that, for every little bit of iceberg that I saw above the water, there was a whole big ice cube down below it that I didn't see. I know you all put all the work in on behalf of your respective clients that they deserved, and that you both did outstanding work on this case.

CompSource Okla., et al. v. BNY Mellon, N.A., et al., No. CIV-08-469-KEW (E.D. Okla. Oct. 25, 2012) (Transcript of Final Fairness Hearing, Page 9, line 21 through Page 10, line 7), attached hereto as Exhibit 1.

Class Counsel are experienced and qualified counsel and represented the Settlement Class honestly and fairly during the settlement negotiations. Further, Class Representatives were involved in the mediation process, which resulted in a favorable recovery for the Settlement Class. *See, e.g.,* Declaration of Ginger Poplin on Behalf of

Oklahoma Law Enforcement Retirement System (the "OLERS Declaration"), at ¶¶6, 8-9. As such, the Settling Parties and their lawyers were well prepared for the serious and intelligent negotiations that led to the Settlement. *See* Phillips Declaration at ¶8; *In re Motor Fuel*, 258 F.R.D. at 675-76.

Additionally, the use of a formal mediation process supports the conclusion that the Settlement was fairly and honestly negotiated. *See Ashley v. Reg'l Transp. Dist*., No. 05-CV-01567-WYD-BNB, 2008 U.S. Dist. LEXIS 13069, at *17 (D. Colo. Feb. 11, 2008). The assistance of an experienced mediator "in the settlement negotiations strongly supports a finding that they were conducted at arm's-length and without collusion." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (noting that a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure").

Here, the Settlement resulted from formal and informal mediation sessions with a highly qualified and respected mediator, Judge Layn R. Phillips. *See* Phillips Declaration at ¶¶9-10. For over 20 years, Judge Phillips has successfully mediated high-stakes civil disputes for Fortune 500 companies nationwide and is considered one of the leading mediators in the resolution of multi-party matters, some involving as many as 150 parties. *Id.* at ¶5. Judge Phillips has mediated hundreds of disputes referred by private parties and courts, and has been appointed a Special Master by various federal courts in complex civil proceedings. *Id.* Judge Phillips also serves as a Fellow in the American College of Trial Lawyers, as a Diplomat Member of the California Academy of Distinguished

Neutrals, and has been nationally recognized as a mediator by the Center for Public Resources Institute for Dispute Resolution (CPR), serving on CPR's National Panel of Distinguished Neutrals. *Id.* Accordingly, Judge Phillips' opinions regarding the settlement negotiations in this Litigation and the qualifications of counsel should be accorded great weight.

After one face-to-face mediation session and multiple telephonic sessions overseen by Judge Phillips—in addition to the Settling Parties' independent communications with Judge Phillips—the Settling Parties were able to reach an agreement-in-principle to settle the Litigation on November 25, 2013. *Id.* at ¶10; Class Counsel Declaration at ¶13. Having read the Court's orders and the Settling Parties' litigation and mediation briefs, Judge Phillips is familiar with this Litigation, including the relative strengths and weaknesses of each side's position. *See* Phillips Declaration at ¶¶7, 13. In his declaration, Judge Phillips states, "I believe that the terms of the $2.7 million settlement represent a well-reasoned and sound resolution of highly uncertain litigation and that the result is fair, adequate, reasonable and in the best interests of the Class." *Id.* at ¶13. Additionally, Judge Phillips endorses the efforts of counsel for both sides, stating:

> It was apparent to me from the submissions and presentations made by Class Counsel and Defendants' Counsel before and during the mediation that Class Counsel and Defendants' Counsel had each performed a thorough examination of the facts underlying the action and, with the aid of experts, analyzed it to determine appropriate case valuations. Class Counsel and Defendants' Counsel were well informed on the current law and provided legal research and analysis of the relevant law. It was also apparent to me that considerable work was done by Class Counsel and Defendants' Counsel to prepare the case for mediation.

Id. at ¶8.

These facts demonstrate that the Settlement resulted from serious, informed, and non-collusive negotiations between skilled and dedicated attorneys. Therefore, the first factor—that the settlement be fairly and honestly negotiated—supports final approval of the Settlement.

2. Serious questions of law and fact exist, placing the ultimate outcome in doubt

The existence of serious questions of law and fact place the ultimate outcome of this Litigation in doubt. Such doubt "tips the balance in favor of settlement because settlement creates a certainty of some recovery, and eliminates doubt, meaning the possibility of no recovery after long and expensive litigation." *McNeely v. Nat'l Mobile Health Care, LLC*, No. 07-CV-933-M, 2008 U.S. Dist. LEXIS 86741, at *31-41 (W.D. Okla. Oct. 27, 2008) (citing *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, No. 01-CV-01451-REB-CBS, 2006 U.S. Dist. LEXIS 71039, at *16-18 (D. Colo. Sept. 28, 2006)).

To this day, the Settling Defendants deny they committed any act or omission giving rise to liability or a violation of law. *See* Stipulation at Section III. Indeed, the Settling Defendants have presented and would present numerous defenses that Class Representatives would have to overcome if this Litigation were to proceed to trial. As such, the Settling Defendants entered into this Settlement solely to eliminate the burden, expense, and distraction of further litigation. *Id*.

In addition, despite Class Representatives' optimism regarding their chances of succeeding at trial, they would have had to overcome a number of obstacles. First, the

Court and the Settling Parties would be required to resolve a variety of complex legal questions concerning Class Representatives' claims for violations of Sections 11, 12, and 15 of the Securities Act of 1933 (15 U.S.C. §§ 77k, 77l, and 77o). For example, this Court recently granted summary judgment in favor of defendants in an action involving claims very similar to those asserted here. *See United Food and Comm. Workers Union v. Chesapeake Energy Corp.*, No. CIV-09-1114-D, 2013 U.S. Dist. LEXIS 87427 (W.D. Okla. June 21, 2013). That decision is now on appeal to the Tenth Circuit and it could be years before a final resolution is reached. To the contrary, here, the Settlement Class is receiving an immediate benefit, avoiding the possibility of future adverse summary judgment rulings and likely appeals. As Judge Phillips points out, "[t]hroughout the mediation process, I developed a complete understanding of the full range of the dispute, the respective positions of the parties, and the relative strengths and weaknesses of those positions, as well as the risks, rewards, and costs of continued litigation and inevitable appeal." Phillips Declaration at ¶12. These issues, along with Settling Defendants' defenses, place the ultimate outcome of the Litigation in doubt.

Because this Litigation presents serious issues of law and fact that place the ultimate outcome in doubt, the second factor supports final approval of the Settlement.

3. The value of immediate recovery outweighs the mere possibility of future relief after long and expensive litigation

The immediate value of the $2.7 million recovery outweighs the uncertainty, additional expense, and likely lengthy duration of further litigation. The class "is better off receiving compensation now as opposed to being compensated, if at all, several years

down the line, after the matter is certified, tried, and all appeals are exhausted." *See McNeely*, 2008 U.S. Dist. LEXIS 86741, at *37. Here, the Settlement represents a significant and meaningful recovery for the Settlement Class without the risk or additional expense of further litigation. *See* Phillips Declaration at ¶12. These immediate benefits must be compared to the risk that the Settlement Class may recover nothing after a contested class certification process, summary judgment, trial and likely appeals, possibly years into the future. *See In re Sprint Corp. ERISA Litig.*, 443 F. Supp. 2d 1249, 1261 (D. Kan. 2006); *see also Chesapeake Energy Corp.*, 2013 U.S. Dist. LEXIS 87427.

While Class Counsel are confident in their ability to prove the claims asserted, they also recognize that liability is far from certain and that many potential obstacles to obtaining a final, favorable verdict exist. Even if Class Representatives were able to establish liability at trial, the Settling Defendants would have vigorously argued that the Settlement Class' damages are far less than the $2.7 million cash amount received in the Settlement.

Class Counsel are intimately familiar with the risks of proceeding with this Litigation because Class Counsel have extensive experience prosecuting these types of complex class actions. *See* Class Counsel Declaration at ¶34. Class Counsel submit that the value of the $2.7 million recovery outweighs the risks of proceeding further with the Litigation. Judge Phillips agrees with this position, as he states in his Declaration, "I believe that the terms of the $2.7 million settlement represent a well-reasoned and sound resolution of highly uncertain litigation and that the result is fair, adequate, reasonable

and in the best interests of the Class." Phillips Declaration at ¶13. Also, Class Representatives are aware of the risks and uncertainties involved in proceeding with further litigation and, as such, approve the Settlement. *See, e.g.,* OLERS Declaration at ¶11.

When the risks and uncertainties of continuing this Litigation are compared to the immediate and substantial benefits of the Settlement, it is clear that the Settlement is fair and reasonable and in the best interests of the Settlement Class. Therefore, this third factor supports final approval of the Settlement.

4. The Parties agree that the Settlement is fair and reasonable

The fact that the Settling Parties believe the Settlement is fair and reasonable supports final approval. Class Counsel and Class Representatives only agreed to settle this Litigation after considering the substantial benefits the Settlement Class will receive, the risks and uncertainties of continued litigation, and the desirability of proceeding under the terms of the Stipulation. *See* OLERS Declaration at ¶11; Class Counsel Declaration at ¶24.

Class Counsel's judgment as to the fairness of the Settlement also supports final approval. *Id*. "Counsels' judgment as to the fairness of the [settlement] agreement is entitled to considerable weight." *Childs*, 2011 U.S. Dist. LEXIS 138818, at *37 (citation omitted); *see also McNeely*, 2008 U.S. Dist. LEXIS 86741, at *37; *Trief v. Dun & Bradstreet Corp.,* 840 F. Supp. 277 (S.D.N.Y. 1993) ("Absent evidence of fraud or overreaching, courts consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel."). Here, Class Counsel believe the terms and

conditions of the Settlement are fair, reasonable, and adequate to Class Representatives and the other members of the Settlement Class, and in their best interests. *See* Class Counsel Declaration at ¶5.

As explained above, Class Counsel have extensive experience in complex class action litigation. *See* Class Counsel Declaration at ¶34. Both Class Counsel and Class Representatives submit that the Settlement is fair, reasonable, and adequate and should be approved. The Settling Defendants agree and do not oppose the Final Approval Motion. Therefore, this last factor supports the Court's final approval of the Settlement.

In sum, all four factors considered by courts in the Tenth Circuit when assessing a proposed class action settlement support final approval of this Settlement. For these reasons, Class Representatives and Class Counsel respectfully request the Court grant final approval of the Settlement as fair, reasonable, and adequate and in the best interests of the Settlement Class.

C. The Notice Method Used was Adequate and Should be Approved

The Court should find notice to the Settlement Class in this Litigation was the best possible notice and satisfied the requirements of Rule 23 and due process.

Rule 23(c)(2)(B) requires that notice of a settlement be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(c)(2)(B). Also, Rule 23(e)(1) instructs courts to "direct notice in a reasonable manner to all class members who would be bound by the proposal." FED. R. CIV. P. 23(e)(1). In terms of due process, a settlement notice "need only be reasonably calculated, under all of the circumstances, to

apprise the interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In its Preliminary Approval Order, this Court approved the form and manner of the Notice Documents to be disseminated to the Settlement Class, stating that the Notice Documents "constitute the best notice practicable under the circumstances." *See* Dkt. No. 138 at ¶7. The Court then directed the Claims Administrator to disseminate the Notice Documents to the Settlement Class in accordance with the Stipulation and the Preliminary Approval Order. *Id.* at ¶8.

Class Counsel, in conjunction with Counsel for the Settling Defendants and the Claims Administrator, conducted an extensive campaign to distribute the Notice to the Settlement Class. *See generally* SCS Declaration. In accordance with the Preliminary Approval Order, and in order to provide notice to those persons and entities who purchased or otherwise acquired GMX common stock pursuant or traceable to the Company's common stock offerings on or about May 13, 2009 or October 22, 2009, the Claims Administrator mailed, by first class mail, a total of 15,182 copies (as of June 25, 2014) of the Notice and Proof of Claim (together, the "Notice Claim Forms") to potential Settlement Class Members, including all of the individuals and organizations identified on the shareholder list provided by GMX's transfer agent, Compushare, and nominees.

See SCS Declaration at ¶¶5, 11.[5] Specifically, of the 15,182 Notice Claim Forms mailed: (i) 129 Notice Claim Forms were mailed to the individuals and organizations contained on the shareholder list provided by GMX's transfer agent; and (ii) an additional 15,053 Notice Claim Forms were mailed in response to requests by nominees, for forwarding, and by other individuals. *Id.* at ¶11.

In addition, on or before May 11, 2014, SCS mailed or e-mailed 1,713 Notices, along with a letter, to all brokerage companies, banks, trust companies and other nominees contained on SCS' master mailing list (the "Broker Letter"). *Id.* at ¶¶6, 11. Pursuant to the Broker Letter, these nominees were instructed, within ten (10) days of receiving the Broker Letter, either to mail a copy of the Notice Claim Form to their beneficial purchasers/owners directly, or provide SCS with a list of the names and addresses of such beneficial purchasers/owners so that SCS could mail Notice Claim Forms directly to them. *Id.*

Moreover, the Notice Claim Form, Summary Notice, Stipulation, Preliminary Approval Order, and Scheduling Order/Final Approval Hearing were posted and are available for review on SCS' website, www.strategicclaims.net. *Id.* at ¶8. A toll-free number, as set forth in the Notice, is also available to potential Settlement Class Members so they can contact SCS for more information regarding the Settlement. *Id.*

[5] In accordance with the Stipulation, the shareholder list provided by Compushare contained names and addresses for shareholders of GMX common stock during the period May 13, 2009 through March 10, 2011. *Id.*

Further, pursuant to the Court's Preliminary Approval Order, SCS caused the Summary Notice to be published in the national edition of *Investor's Business Daily* and over the *Business Newswire* on May 16, 2014. *Id.* at ¶9.

The Notice Documents fully inform Settlement Class Members about the Litigation, the Settlement, and the facts needed to make informed decisions about their rights. Indeed, in its Preliminary Approval Order, the Court found that:

> [T]he procedures established for publication, mailing and distribution of such Notices substantially in the manner and form set forth in ¶6 of this Order meet the requirements of Rule 23, Section 27(a)(7) of the Securities Act of 1933, 15 U.S.C. § 77z-1(a)(7), as amended by the Private Securities Litigation Reform Act of 1995, the Constitution of the United States, and any other applicable law, and constitute the best notice practicable under the circumstances.

Dkt. No. 138 at ¶7.

Following this notice campaign, there has been overwhelming support of the Settlement from the Settlement Class. Specifically, to date, no Settlement Class Members have objected to the Settlement or requested to be excluded from the Settlement Class. *See* SCS Declaration at ¶12. This fact strongly supports final approval of the Settlement as fair and reasonable.

In sum, the form, manner and content of the Notice and Summary Notice were the best practicable notice, and their contents were reasonably calculated to, and did, apprise potential Settlement Class Members of the pendency and nature of the Settlement and afford them an opportunity to opt out or object. Such notice surpasses the requirements of both Rule 23 and due process. Therefore, the Court should find notice to the Settlement Class satisfied the requirements of Rule 23 and due process.

D. The Plan of Allocation Should be Approved

The Court also should approve the proposed Plan of Allocation. Like the settlement itself, a plan of allocation must also be approved as fair and reasonable. *See In re Sprint Corp. ERISA Litig*., 443 F. Supp. 2d at 1262 (citing *In re Global Crossing Sec. & ERISA Litig*., 225 F.R.D. at 462). When a plan of allocation is formulated by competent and experienced class counsel, as is the case here, the plan need only have a reasonable, rational basis. *Id*. As a general rule, a plan of allocation that reimburses class members based on the type and extent of their injuries is reasonable. *Id*.

Here, Class Counsel formulated the proposed Plan of Allocation under which the Claims Administrator shall determine each Authorized Claimant's *pro rata* share of the Net Settlement Fund based upon each Authorized Claimant's Recognized Claim. *See* Notice at Appendix A; Class Counsel Declaration at ¶¶25-27. The Plan of Allocation, which Class Counsel deem to be fair and reasonable to all Settlement Class Members, also is based on a detailed evaluation of the strengths and weaknesses of the Settlement Class' claims. Thus, the proposed Plan of Allocation is based on each Settlement Class Member's particular loss. *Id*.

Because the Plan of Allocation was formulated by competent and experienced counsel and is based on the type and extent of each Settlement Class Member's particular loss, the Court should approve the Plan of Allocation as fair, reasonable, and adequate.

VI. CONCLUSION

The $2.7 million Settlement is a substantial recovery for the Settlement Class. Considering the risks and uncertainties associated with this Litigation, the value of the Settlement clearly outweighs the mere possibility of recovery after long and expensive litigation and trial, not to mention appeals−and avoids the potential risk of recovering less or nothing at all. Moreover, Class Representatives, Class Counsel and Judge Phillips all agree that the Settlement is fair, reasonable, and adequate and should be approved. In short, all four of the *Jones* factors to be considered by courts in approving class action settlements support final approval in this Litigation.

For all of these reasons, Class Representatives and Class Counsel respectfully request the Court enter an order: (1) granting final certification of the Settlement Class for settlement purposes; (2) granting final approval of the $2,700,000 Settlement as fair, reasonable, and adequate, and in the best interests of the Settlement Class; (3) finding notice to the Settlement Class satisfied the requirements of Rule 23 and due process; and (4) granting approval of the Plan of Allocation.

Dated: June 26, 2014

Respectfully submitted,

/s/ *Derrick L. Morton*

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Lead Counsel for Lead Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2014, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

Dated: June 26, 2014 /s/ *Derrick L. Morton*

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

COMPSOURCE OKLAHOMA, BOARD OF TRUSTEES OF THE ELECTRICAL WORKERS LOCAL NO. 26 PENSION TRUST FUND, in its capacity as a fiduciary of the Electrical Workers Local No. 26 Pension Trust Fund, CHILDREN'S HOSPITAL OF PHILADELPHIA FOUNDATION, and CHILDREN'S HOSPITAL OF PHILADELPHIA, individually and in its capacity as fiduciary of the Children's Hospital of Philadelphia Defined Benefit Master Trust, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	No: CIV 08-469-KEW
vs.	)	
BNY MELLON, N.A. and THE BANK OF NEW YORK MELLON,	)	
Defendants.	)	

* * * * *

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE KIMBERLY E. WEST
UNITED STATES MAGISTRATE JUDGE

OCTOBER 25, 2012

* * * * *

REPORTED BY: KEN SIDWELL, CSR-RPR
United States Court Reporter
P.O. Box 3411
Muskogee, Oklahoma 74402

A P P E A R A N C E S

FOR THE PLAINTIFFS:

MR. BRAD SEIDEL, MR. BRADLEY E. BECKWORTH, MR. JEFFREY J. ANGELOVICH, Nix Patterson & Roach, 205 Linda Drive, Daingerfield, Texas, 75638;

MR. PETER H. LeVAN, Jr., MR. SEAN M. HANDLER, Kessler Topaz, Meltzer & Check, LLP, 280 King of Prussia Road,Radnor, Pennsylvania, 19087;

MR. LAWRENCE R. MURPHY, Jr., MS. PANSY MOORE-SHRIER, Robinett & Murphy, 624 South Boston, Suite 900, Tulsa, Oklahoma, 74119;

MR. MICHAEL BURRAGE, Whitten Burrage, 1215 Classen Drive, Oklahoma City, Oklahoma, 73103.

FOR THE DEFENDANTS:

MR. DAMIEN MARSHALL, Boies, Schiller & Flexner, 575 Lexington Avenue, New York, New York, 10022;

MR. PHILLIP G. WHALEY, Ryan, Whaley, Coldiron & Shandy, 119 North Robinson Avenue, Suite 900, Oklahoma City, Oklahoma, 73102;

MR. WELDON STOUT, Wright, Stout & Wilburn, P.O. Box 707, Muskogee, Oklahoma, 74402.

Appearing by telephone, MS. MARLA ALHADEFF, defendant representative.

OCTOBER 25, 2012 PROCEEDINGS

(On the record at 1:30 p.m.)

THE COURT: Good afternoon. This is in case number CIV-08-469-KEW. I'm going to shorten the style. It's CompSource Oklahoma versus Bank of New York Mellon.

We have a number of attorneys here today. Brad Seidel, Bradly Beckworth, Joseph Angelovich, Michael Burrage, Larry Murphy. Is Pansy -- Pansy Moore, Peter LeVan, Sean Handler for the plaintiffs.

Damien Marshall appears for the defendants, as well as Phil Whaley, Weldon Stout. Appearing by phone is -- and I apologize for this in advance, I'm probably going to butcher this -- Martha Alhadeff -- is that correct -- by phone.

MS. ALHADEFF: That's close enough. Thank you.

THE COURT: I think we have the spelling so we'll just put it down phonetically as if I said it correctly, how about that?

We are set today on the basis of two motions that have been filed. The first motion is the motion for final approval of settlement, and then the motion for approval of attorneys' fees, expenses, and case contribution awards to the class representatives.

Who wishes to make the record on this, gentlemen?

MR. BECKWORTH: Your Honor, Brad Beckworth for the plaintiffs. If you'd like me to begin.

THE COURT: Okay. Go ahead.

MR. BECKWORTH: Here or back there?

THE COURT: Either way.

MR. BECKWORTH: Thank you, Your Honor. Brad Beckworth on behalf of the class representatives and the class. I'll do my best to keep this very short because I think we don't have too much new information for you.

As Your Honor knows, we submitted our preliminary approval papers back at the end of June when the Court granted preliminary approval on July 6th and gave pretty express instructions about how you wish for us to proceed with notice and the filing of all of our motions.

Pursuant to your order, we started the notice program to the class in August before the deadline that you had set for that. We mailed notice to all 353 domestic class member accounts, as well as the 24 foreign accounts. We had very few returned for improper addresses or any other reason, and we continued to re-mail and re-issue those to get everybody noticed.

Also, as you know, we maintained a case website throughout the period of the case. It encouraged all the clients that we knew of throughout the case to pay regular attention to that website. Once the case was

settled, we put all the settlement documents and notices on that website as well. We had quite a few clients or class members that would ask us questions about the settlement, we'd refer them to that website so they could download any of the documents.

Also, during the notice period, the Bank of New York gave notice to its regulators required under CAFA, so that has been done.

On September 27th -- or September 20th, we were required to file our motions, the two that you referenced. We filed those on time. September 27th was the deadline for any class member to request an exclusion or to object to the settlement. And also, if you'll recall, there were a limited number of foreign claimants that actually had to take the affirmative step of electing to participate in the case. We had an overwhelming, I would say unanimous, approval of the settlement by the class in the sense that there were zero objections. Zero objections to the settlement, zero objections to certification for final purposes, zero objections to the request for fees, expenses, and case contribution awards.

In addition to that, we had, I believe at the time, 19 of the 24 foreign accounts that affirmatively asked to be included in the settlement. I believe the number in a percent of damages analysis is somewhere in the high 80

percent of the foreign claimants that had damages have already elected to participate.

In addition to that, there were only two entities that requested exclusion. One was the Commonwealth of Pennsylvania for two small funds that they had that were participatory in the class, and also the University of Michigan. Other than that, everybody was on board. And just in our conversations with various class members, we felt like we had very affirmative support by the class for the settlement.

We have proposed an order that we submitted to the Court a week or so ago. Mr. Marshall can speak to this, but my understanding is that order is not opposed. They only take a position on certain issues. You know, they were only taking a position on the fees, expenses, and case contribution awards. But there's no opposition to any of the motions. Class has uniformly supported them.

Your Honor, if I can take just a minute, the one thing I would like to address, because our clients are here today, at least the CompSource contingency is here, and if I could just introduce them and say a few things. We have Mr. John McCormick who's just joined CompSourse recently this year as general counsel; Donna Romberg, who is one of the investment officers; and Steve Hardin, who's the chief financial officer. What I'd like to say about them,

Your Honor, as you know, we have requested a $50,000 case contribution award for each of the three class representatives. Personally I think that's a very modest sum for what they did. This case was really originated due to the relationship that we've had for quite some time with CompSource. We've worked for them in different capacities over the years. But Mr. Hardin and Ms. Romberg were involved in working with the Bank of New York here. And without getting into the substance of the case or, you know, responsibility of either side, I will just say that they paid very careful attention to what happened. They felt very strongly about taking action on behalf of CompSource, and those two spent a tremendous amount of time working with us before the case was filed, and throughout the case. Their former general counsel was also very, very involved. And since Mr. McCormick has been there, he's been involved. Everyone at CompSource, from the staff at the executive level to their support staff to the board was integral to our prosecution of this case. They were heavily involved. And just like the Court to know they put a ton of time in this case. Just, by way of example, Mr. Hardin was very often a 30(b)(6) designee in the case. I know, for one deposition, he spent somewhere between 70 and 100 hours himself preparing for that deposition. We've represented a lot of clients across the country, and these folks were just

a real treat to work with. And so we appreciate them, and I wanted them to hear that from us, and I just wanted Your Honor to know that, because, although we've burdened this Court with a lot of filings, you haven't had the ability to see what was going on sometimes behind, you know, the different sides of the works.

THE COURT: I'm not going to complain about that.

MR. BECKWORTH: Yes. I wouldn't either. So we appreciate them. And finally, Your Honor, just would like to say again how much we appreciate your time and your staff's time in this case. I know that we had 400 something docket entries. I know that it was a very hard-fought case, and we put a lot of burden -- or I don't know if that's the right word. But we put a lot of tough decisions and very good briefing I think by both sides to Your Honor, and we appreciate the way you handled this case in putting up with all of us. And I'd say the same thing for our opponents here. I know you know this has been, in some instances, very bitterly fought, but I feel like we've all worked very well together, especially in the end part of the case and working through the settlement issues together. We're ready to put it all behind us.

So with that, I'd sit down and ask Your Honor to approve everything and, if you're willing to, to sign the order that we submit.

THE COURT: Do you have any response from the defendants? Anybody else want to brag on me? That's always welcome. I'm kidding. I'm kidding.

MR. MARSHALL: Your Honor, just briefly. This is Damien Marshall for the Bank of New York Mellon defendants. And as Mr. Beckworth said, we don't have any -- we either don't take a position or don't object to the positions asserted in the proposed order.

I just want to put on the record that our position with regards to class certification is that it would only be appropriate for settlement purposes, not for litigation purposes. And with regard to the CAFA notice provided to our regulators, that was provided in accordance with the statutes. And we are taking no position with regard to the fees or fee awards or the awards for the plaintiffs.

You know, we thank Your Honor for your time and the Court's time. It was a burdensome case on the Eastern District of Oklahoma. And that's where the Bank of New York stands.

THE COURT: Okay. Well, let me just say, I appreciate everybody's kind words. This is, you know, why we all draw checks over here and they give us robes to wear and big courtrooms to do our job. It was a hard-fought case, and I think that the legal work on this case has just

been absolutely spectacular, and I want to brag on all of you for the work that you put into it. I know that, for every little bit of iceberg that I saw above the water, there was a whole big ice cube down below it that I didn't see. I know you all put all the work in on behalf of your respective clients that they deserved, and that you both did outstanding work on this case.

And I also want to congratulate the parties, even though it was a hard-fought case, to come together in what I think was in the best interest of the parties to resolve this case rather than -- and not worried about my time, but just worried about the economics of going forward with it. I think that this settlement was a good settlement.

I do want to find that the settlement was fair and reasonable, and that the requested 25 percent of settlement funds is fair and reasonable in light of the benefit that was conferred to the class in this case.

Do you have anything in particular that you wish to -- I asked specifically for the final approvement -- final approval of the settlement. I assume your comments also are inclusive of the motion for approval of attorneys' fees and costs, and there's not anything else you wish to add. Is that correct?

MR. BECKWORTH: Right.

THE COURT: Other than please approve them; right?

MR. BECKWORTH: Please approve them.

THE COURT: Okay.

MR. BECKWORTH: I will say one thing for the record that I think is important. We did notice that any class members could have an opportunity to appear today, and I've looked in the courtroom and see none, and I think that's something we should put on the record.

THE COURT: Well, we have some special guests here, but I don't think we have any class members. This is your time now to speak up if you are a class member that wishes to object. I don't see anybody, so this is kind of -- I guess it's kind of like a marriage ceremony where nobody stands up and objects.

So I do find that the reimbursement for amounts, expenses that is outlined in the paperwork is reasonable. The motions are approved. And I have signed a copy of the final order and judgment to be filed in this case. Good luck to you all. Thank you.

(Off the record at 1:41 p.m.)

C E R T I F I C A T E

I, Ken Sidwell, Certified Shorthand Reporter for the Eastern/Northern Districts of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in the above-captioned case.

I further certify that I am not employed by nor related to any party to this action, and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 26th day of October, 2012.

s/Ken Sidwell
Ken Sidwell, CSR-RPR
United States Court Reporter