UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

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| STRATHCLYDE PENSION FUND, Individually and on Behalf of All Others Similarly Situated,<br><br>Plaintiff,<br><br>vs.<br><br>BANK OZK, et al.,<br><br>Defendants. | No. 4:18-cv-00793-DPM<br><br>CLASS ACTION<br><br>MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION |

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## I. INTRODUCTION

Pursuant to Rule ("Rule") 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiff Strathclyde Pension Fund ("Strathclyde" or "Lead Plaintiff"), respectfully submits this memorandum of law in support of its motion for final approval of the $45 million Settlement reached in the above-caption securities class action (the "Action" or "Litigation"), and approval of the Plan of Allocation (the "Plan" or "Plan of Allocation"). The terms of the proposed Settlement are set forth in the Stipulation of Settlement dated May 23, 2022, which was previously filed with the Court ("Stipulation" or "Settlement"). ECF 195.[1] The Court granted preliminary approval of the Settlement on June 27, 2022 ("Preliminary Approval Order"). ECF 202.

The proposed Settlement provides for the payment of $45 million to investors who purchased or acquired Bank OZK (f/k/a Bank of the Ozarks, Inc.) ("Bank OZK" or the "Company") common stock between February 19, 2016 and October 18, 2018, inclusive (the "Class Period"). This an excellent result for the Class, as it far exceeds both the average ($20.5 million) and median ($8.3 million) settlement amounts in securities class actions resolved during 2021. *See* Laarni T. Bulan and Laura E. Simmons, *Securities Class Action Settlements: 2021 Review and Analysis*, at 1

[1] Unless otherwise noted, all terms capitalized herein are defined in the Stipulation or the Declaration of Jonah H. Goldstein in Support of (1) Lead Plaintiff's Motion for Final Approval of Settlement and Approval of Plan of Allocation, and (2) Class Counsel's Motion for an Award of Attorneys' Fees and Expenses and Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) ("Goldstein Decl." or "Goldstein Declaration"), submitted herewith.

(Cornerstone Research 2022) ("Cornerstone Report"), available at https://www.cornerstone.com/wp-content/uploads/2022/03/Securities-Class-Action-Settlements-2021-Review-and-Analysis.pdf. The Settlement Amount far exceeds the $14.7 million median settlement amount for cases settled in the Eighth Circuit between 2012 and 2021. *Id.* at 19, Appendix 3.

Further confirming the fairness of the proposed Settlement is the fact that, to date, there have been no objections to the Settlement filed by Class Members. Over 146,400 copies of the Notice have been sent to potential Class Members and nominees and notice was published in *The Wall Street Journal* and transmitted over the *Business Wire*. *See* accompanying Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Gilardi Decl."), ¶¶5-12, submitted herewith.

Finally, Class Counsel, with substantial experience successfully prosecuting securities class actions, and the Court-appointed Lead Plaintiff, which actively and faithfully oversaw this Litigation for years in accordance with its duties to the Class, have concluded that the proposed Settlement and proposed Plan are fair, reasonable, and adequate and in the best interests of the Class. Accordingly, for the reasons set forth herein and in the accompanying Goldstein Declaration, the proposed Settlement and proposed Plan warrant the Court's approval.

## II. FACTUAL AND PROCEDURAL BACKGROUND

To avoid repetition, Lead Plaintiff respectfully refers the Court to the accompanying Goldstein Declaration for a detailed discussion of the factual background and procedural history of the Litigation, the extensive efforts undertaken by Lead Plaintiff and its counsel during the course of the Litigation, and the factors bearing on the approval of the Settlement and Plan of Allocation.

## III. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

### A. The Standards for Final Approval of Class Action Settlements

Voluntary resolution through settlement is favored. *Beaver Cnty. Emps.' Ret. Fund v. Tile Shop Holdings, Inc.*, 2017 U.S. Dist. LEXIS 91651, at *5 (D. Minn. June 14, 2017); *George v. Uponor Corp.*, 2015 WL 5255280, at *6 (D. Minn. Sept. 9, 2015) ("'The policy in federal court favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context.'").[2] In the Eighth Circuit, "'strong public policy favors [settlement] agreements, and courts should approach them with a presumption in its favor.'" *In re Centurylink Sales Pracs. & Sec. Litig.*, 2020 WL 7133805, at *6 (D. Minn. Dec. 4, 2020) ("*Centurylink I*"); *see also In re Resideo Techs., Inc., Sec. Litig.*, 2022 WL 872909, at *1 (D. Minn. Mar. 24, 2022) ("A class-action settlement agreement is 'presumptively valid.'") (citing *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1063 (8th

[2] All citations are omitted and emphasis is added throughout unless otherwise noted.

Cir. 2013)). Indeed, "the presumption . . . of such settlements reflects courts' understandings that vigorous negotiations between experienced counsel protect against collusion and advance the fairness concerns underlying Rule 23(e)." *Yarrington v. Solvay Pharm., Inc.*, 2010 WL 11453553, at *7 (D. Minn. Mar. 16, 2010).

Pursuant to Rule 23, a court may approve a class action settlement "only after a hearing and only on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Rule 23(e)(2) directs the court to consider whether:[3]

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

The Eighth Circuit has also established four factors which overlap with those in Rule 23(e)(2) for determining whether a proposed settlement is fair, reasonable, and adequate: "the merits of the plaintiff's case, weighed against the terms of the settlement; the defendant's financial condition; the complexity and expense of further

[3] The amended Rule 23(e) identified specific factors for district courts to assess in evaluating fairness, reasonableness, and adequacy. The "goal of this amendment is not to displace any [of the circuit's unique] factor[s]." Fed. R. Civ. P. 23(e)(2) Advisory Committee Notes to 2018 Amendments.

litigation; and the amount of opposition to the settlement." *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988). An analysis of the relevant factors weighs unequivocally in favor of granting final approval of the Settlement.

In exercising its discretion, the court's examination is limited to determining that the settlement agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned. *See Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) (judges should not substitute its judgment for that of the litigants); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) ("'neither the trial court in approving the settlement nor this Court in reviewing [the] approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute'") (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974), *abrogated sub nom. by Goldberger v. Integrated Res., Inc.*, 209 F.3d. 43 (2d Cir. 2000)). "'The district court need not make a detailed investigation consonant with trying the case; it must, however, provide the appellate court with a basis for determining that its decision rests on well-reasoned conclusions and is not mere boilerplate.'" *In re Centurylink Sales Pracs. & Sec. Litig.*, 2021 WL 3080960, at *5 (D. Minn. July 21, 2021) (citing *In re Wireless Tele. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932-33 (8th Cir. 2005)) ("*Centurylink II*").

### B. The Proposed Settlement Satisfies Both the Rule 23(e)(2) and the Eighth Circuit Requirements

As acknowledged by the Preliminary Approval Order, Lead Plaintiff has met all of the requirements imposed by Rule 23(e)(2). ECF 202. Courts analyzing the Rule 23(e)(2) factors have noted that satisfaction of these factors is virtually assured where, as here, little has changed between preliminary approval and final approval. *See In re Chrysler-Dodge-Jeep Ecodiesel® Mktg., Sales Pracs. & Prod. Liab. Litig.*, 2019 WL 2554232, at *2 (N.D. Cal. May 3, 2019) (finding that the "conclusions [made in granting preliminary approval] stand and counsel equally in favor of final approval now"). Applying these criteria and the requirements under Eighth Circuit jurisprudence warrants this Court's final approval.

#### 1. Lead Plaintiff and Class Counsel Have Adequately Represented the Class

To determine whether the "class representatives and class counsel have adequately represented the class" pursuant to Fed. R. Civ. P. 23(e)(2)(A), the Court must ascertain whether "(1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 562-63 (8th Cir. 1982).

At every stage of the Litigation, Lead Plaintiff and Class Counsel have adequately represented the Class. Here, there is no conflict between Lead Plaintiff

and the Class, and as this Court previously found, Lead Plaintiff's interests in this case are directly aligned with those of the other Class Members. ECF 120.

Lead Plaintiff also retained "capable and experienced lawyers." *Id.* at 2. The record reflects that Lead Plaintiff and Class Counsel have diligently prosecuted this Litigation by, among other things: conducting a thorough pre-trial investigation into the Class's claims; drafting detailed amended complaints; opposing and partially defeating Defendants' motions to dismiss; defeating Defendants' §1292(b) petition; obtaining class certification; conducting extensive fact discovery, including obtaining and reviewing nearly 700,000 pages of documents produced by Defendants and third parties, reviewing and producing nearly 185,000 pages of documents to Defendants, conducting 12 fact depositions and three expert depositions, defending five fact and expert depositions; responding to discovery propounded by Defendants; opposing Defendants' motions for summary judgment and exclude Lead Plaintiff's loss causation and damages expert; preparing expert reports from three experts; and negotiating this proposed Settlement with the assistance of Michelle Yoshida, Esq., a well-known and experienced mediator. *See generally* Goldstein Decl. Lead Plaintiff and Class Counsel stood ready to, and at all times did, advocate for the best interests of the Class, and were actively preparing for trial at the time the proposed Settlement was reached.

**2. The Settlement Was Reached After Arm's-Length Negotiations with the Assistance of An Experienced Mediator**

When a "settlement was negotiated at arms' length between experienced and sophisticated counsel, . . . [there is a] presumption that it is fair and reasonable." *Phillips v. Caliber Home Loans, Inc.*, 2021 WL 3030648, at *6 (D. Minn. July 19, 2021) ("*Phillips I*"). Here, the parties engaged in a full-day mediation session with Ms. Yoshida in April 2022. In preparation for the mediation, both parties submitted and exchanged substantial materials in support of their respective positions. Throughout the day, both parties engaged in detailed, substantive discussions with Ms. Yoshida, each advancing its perceived strengths and weaknesses of the Litigation. Although the mediation concluded without a resolution of the case, the parties continued their discussion through Ms. Yoshida, and ultimately agreed to resolve the Litigation for $45 million. At all times, the negotiations were hard fought and at arm's length. *See Centurylink I*, 2020 WL 7133805, at *6 (the utilization of "an experienced mediator" during settlement negotiations supports a finding that the settlement is reasonable and should be approved); *Phillips v. Caliber Home Loans, Inc.*, 2022 WL 832085, at *2 (D. Minn. Mar. 21, 2022) (settlement approved where the parties "participated in a full-day mediation session") ("*Phillips II*").

At this advanced stage of the litigation, after the completion of fact and expert discovery, nearly fully briefing summary judgment and engaging in substantive, arm's-length mediation, the parties had a thorough understanding of their respective

strengths and weaknesses. *See, e.g.*, *Yarrington*, 2010 WL 11453553, at *8 (settlement negotiated at arms' length as "settlement discussions in this case were protracted, with attempts to reach resolution spanning several years," and "[a]ttorneys on both sides are very experienced . . . well-versed in the legal and factual issues implicated in this action"); *CenturyLink I*, 2020 WL 7133805, at *6 (approving settlement reached "at a stage in the litigation in which the parties understood the strengths and weakness of [its] case").

### 3. The Settlement Is Fair, Reasonable, and Adequate

Under Rule 23(e)(2)(C), in determining whether "the relief provided for the class is adequate, taking into account . . . the costs, risks, and delay of trial and appeal," courts take into consideration "'the merits of the plaintiff's case, weighed against the terms of the settlement'" and "'the complexity and expense of further litigation.'" *Uponor*, 716 F.3d at 1063; *Centurylink I*, 2020 WL 7133805, at *6. As set forth below, the record demonstrates that these factors weigh in favor of approval.

#### a. The Merits of the Class's Claims, Weighed Against the Terms of the Settlement, Support Final Approval of the Settlement

"The most important consideration in deciding whether a settlement is fair, reasonable, and adequate is 'the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.'" *Wireless*, 396 F.3d at 933. Courts have long recognized that securities fraud class actions such as this one present a myriad of risks that a plaintiff must overcome to ultimately secure a recovery. *See,*

*e.g.*, *In re Genworth Fin. Sec. Litig.*, 210 F. Supp. 3d 837, 844 (E.D. Va. 2016) ("[S]ecurities fraud cases require significant showings of fact in order to prevail before a jury, and 'elements such as scienter, reliance, and materiality of misrepresentation are notoriously difficult to establish.'").

This Action alleged that Defendants violated federal securities laws by making material misstatements and omissions regarding the credit quality of Bank OZK's portfolio, including the reported metrics concerning its non-performing loans and assets. The reported metrics failed to account for two allegedly non-performing loans, identified in the Amended Complaint as the "South Carolina Loan" and the "North Carolina Loan," Goldstein Decl., ¶20, which caused the price of OZK stock to trade at artificially inflated levels. The truth began to be revealed on July 27, 2017, when it was announced that the head of the department that oversaw the two failing loans had abruptly resigned from the Company. Bank OZK stock fell 12%. *Id.* Lead Plaintiff alleged that the fraud was fully revealed on October 18, 2018, when Defendants announced a charge-off of the North Carolina loan and the South Carolina Loan, which totaled just over $45 million. *Id.* On this news, Bank OZK stock fell 29.9%. *Id.*

Despite Lead Plaintiff's belief that its claims were meritorious, there were significant risks to proceeding. Indeed, the Court twice granted Defendants' motion to dismiss with respect to the North Carolina Loan allegations. *Id.*, ¶7. Further, the Court dismissed the July 27, 2017 disclosure for lack of loss causation, significantly

reducing potential damages. *Id.* This Court also dismissed one of the individual defendants from the case, leaving only Bank OZK and Gleason as Defendants. *Id.* As noted below, Defendants challenged each element of Lead Plaintiff's §10(b) and §20(a) claims, and after extensive discovery, the Defendants were still contesting all of these issues at summary judgment.

**Materiality and Falsity**: For example, Defendants argued that Lead Plaintiff failed to establish that Defendants made any materially misleading statements or omissions. *See* ECF 125 at 11-17. Defendants already had success in making such arguments, achieving dismissal of a number of Lead Plaintiff's alleged false statements. Moreover, Lead Plaintiff faced a risk that some of the surviving alleged false statements regarding the performance metrics disclosed by Bank OZK would be dismissed at summary judgment. Defendants argued that subjective judgments about the likelihood of loss on the South Carolina Loan are "quintessential statements of opinion. Predicting the likelihood of default on a loan 'is typically one of the most subjective and difficult judgments to make.'" ECF 125 at 11. Defendants argued that disagreements with accounting judgments do not establish securities fraud. Goldstein Decl., ¶59. In support, Defendants cited to a myriad of documentary evidence and deposition testimony gathered through discovery.

**Scienter**: Defendants also continued to contest scienter, arguing that Defendant Gleason, and in turn Bank OZK, lacked scienter because Lead Plaintiff could not establish that a difference in opinion about how to classify a failing loan could amount

to wrongful intent, especially when independent third-party reviews by Bank OZK's auditors and regulators did not disagree with Defendants' conclusions. *Id.*

**Loss Causation and Damages**: Even if Lead Plaintiff ultimately prevailed in proving falsity and scienter, this Action would have involved significant risks to establishing loss causation and damages. *See, e.g.*, *Genworth*, 210 F. Supp. 3d at 841-42 ("[P]laintiffs at trial would bear the burden of conveying complex information to a jury using financial records, complicated accounting principles, and expert testimony . . . . The high risk faced by taking the case to a jury verdict demonstrates the adequacy of this . . . settlement."). Defendants vigorously asserted that the price declines in Bank OZK's common stock on the relevant dates were not corrective of any material misstatement and that Lead Plaintiff could not establish its "reputational loss" theory of damages.

While Lead Plaintiff believes it had strong counterarguments on all of these points, at bottom, the fact remains that the Court at summary judgment or the jury at trial could have found such arguments persuasive, thereby significantly reducing or even completely eliminating recoverable damages. *See, e.g.*, *DeBruycker v. PM Beef Holdings, LLC*, 2005 WL 681298, at *1 (D. Minn. Mar. 2, 2005) (defendants' advancement of arguments that "if successful, would have reduced [Lead Plaintiff's] ultimate recovery" justified the settlement). Furthermore, "without settlement, the case would """likely drag on for years, [and] require the expenditure of millions of dollars, all the while class members would receive nothing."""" *Yarrington*, 2010 WL

11453553, at *9; *see also Phillips I*, 2021 WL 3030648, at *6 ("continued litigation likely would take several years to resolve").

**b. The Complexity and Expense of Further Litigation Supports Final Approval of the Settlement**

Courts have consistently recognized that the complexity, expense, and likely duration of the litigation are critical factors in evaluating the reasonableness of a settlement, especially when the settlement being evaluated is a securities class action. *See, e.g.*, *Phillips II*, 2022 WL 832085, at *3 ("'many of the immediate and tangible benefits' of settlement would be lost through continued litigation, making the proposed settlement 'an attractive resolution' of the case"); *Centurylink I*, 2020 WL 7133805, at *7 ("even if [Lead Plaintiff] were successful, the . . . costs and risks of continued litigation in such a large, complex case would be significant"). This case, with numerous complex legal and factual issues – including those related to falsity, scienter, loss causation, and damages – was no exception.

Without a settlement, this case would require the expenditure of substantial additional time and money, "'all the while class members would receive nothing.'" *Wireless*, 396 F.3d at 933. Assuming Lead Plaintiff successfully defeated Defendants' motion for summary judgment and motion to exclude Lead Plaintiff's damages expert, a trial in this case could take weeks and would be a complicated undertaking for the Court and jurors. *See In re AOL Time Warner, Inc.*, 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006) (due to its "notorious complexity," securities class actions

often settle to "circumvent[] the difficulty and uncertainty inherent in long, costly trials"). And even if Lead Plaintiff was successful at trial, post-trial motions and appeals certainly would follow, during which time the Class would receive no distribution of any damages award. In addition, a post-trial motion or an appeal of any favorable verdict would carry the risk of reversal, in which case the Class would receive no recovery at all – ever. *See, e.g.*, *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (affirming a lower court ruling that granted defendants' motion for judgment as a matter of law based on plaintiff's failure to prove loss causation, thereby overturning a jury verdict in plaintiff's favor). Accordingly, analysis of this factor supports final approval of the Settlement.

**4. Defendants' Financial Condition Supports Final Approval of the Settlement**

Defendants have mounted a vigorous defense for years, and the funds available to satisfy a settlement or judgment were being depleted by defense costs. Accordingly, this factor weighs in support of final approval of the Settlement.

**5. The Reaction of the Class to Date Supports Final Approval of the Settlement**

Pursuant to this Court's Preliminary Approval Order, the Court-approved Notice and Proof of Claim and Release Form ("Claim Form") were mailed to potential Class Members who could be identified with reasonable effort and the Summary Notice was published three times in *The Wall Street Journal*, and once over the *Business Wire*. Gilardi Decl., ¶¶5-12. The Notice advises the Class of the terms of

the Settlement and the Plan of Allocation as well as the procedure and deadline for filing objections. As of August 15, 2022, over 146,400 Notices and Claim Forms have been mailed to potential Class Members and nominees. *Id.*, ¶11.

The objection deadline is August 29, 2022, and to date, no objections have been received to the Settlement, the Plan of Allocation, or Lead Counsel's request for an award of attorneys' fees and expenses. Nor have there been any requests for exclusion from the Class. *See id.*, ¶16.[4]

**6. All Other Rule 23(e)(2)(C) Factors Are Met**

Rule 23(e)(2)(C) also instructs courts to consider whether the relief provided for the class is adequate in light of "the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," "the terms of any proposed award of attorney's fees, including timing of payment," and "any agreement required to be identified under Rule 23(e)(3)." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv). These factors support approval of the Settlement or are neutral and do not suggest any basis for inadequacy of the Settlement.

First, the procedures for processing Class Members' claims and distributing the proceeds of the Settlement to eligible claimants in this case are well-established,

[4] Even if there are objection(s), "[t]he fact that some class members object to the Settlement does not by itself prevent the court from approving the agreement." *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 906 (S.D. Ohio 2001). "'A certain number of . . . objections are to be expected in a class action . . . .'" *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 533 (E.D. Ky. 2010), *aff'd sub nom.*, *Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235 (6th Cir. 2011).

effective methods that have been widely used in securities class-action litigation. The proceeds of the Settlement will be distributed on a *pro rata* basis to Class Members who submit eligible Claim Forms with required documentation to the Court-appointed Claims Administrator, Gilardi & Co. LLC ("Gilardi"). Gilardi will provide claimants with an opportunity to cure any deficiencies in their claims or request review by the Court of a claim denial and will mail or wire eligible claimants their *pro rata* share upon completion of the claims process.

After the Effective Date of the Settlement, in accordance with the terms of the Stipulation, the Plan of Allocation, or such further approval and further order(s) of the Court as may be necessary or as circumstances may require, the Net Settlement Fund will be distributed to Authorized Claimants. If there is any balance remaining in the Net Settlement Fund after the initial distribution, and it would be feasible and economical to conduct a further distribution, Gilardi will conduct a further distribution of remaining funds among Authorized Claimants who have cashed its initial checks. Any *de minimis* balance that still remains after re-distributions and after payment of outstanding expenses and Taxes, if any, shall be contributed to a non-sectarian, not-for-profit charitable organization(s) unaffiliated with any party or its counsel serving the public interest. *See* Stipulation (ECF 195), ¶5.10.

The relief provided for the Class is also adequate when the terms of the proposed award of attorneys' fees are taken into account. As discussed in the accompanying Memorandum of Law in Support of Class Counsel's Motion for an

Award of Attorneys' Fees and Expenses and Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4), the proposed attorneys' fees of 25% of the Settlement Fund, to be paid upon approval by the Court, are reasonable in light of the efforts of Lead Plaintiff's Counsel and the risks in the Litigation. Moreover, approval of attorneys' fees is entirely separate from approval of the Settlement in this case, and neither Lead Plaintiff nor Class Counsel may terminate the Settlement based on any ruling with respect to attorneys' fees. *See* Stipulation, ¶6.4.

The court must also consider the fairness of the proposed settlement in light of any agreements required to be identified under Rule 23(e)(3). *See* Fed. R. Civ. P. 23(e)(2)(C)(iv). Here, the only agreements between the parties concerning the Settlement are the Term Sheet memorializing the agreement in principle, the Stipulation, and the parties' confidential Supplemental Agreement, which sets forth the conditions under which Defendants have the option to terminate the Settlement in the event that requests for exclusion from the Class exceed a certain specified threshold. *See* Stipulation, ¶7.4. This does not weigh against approval. *Centurylink II*, 2021 WL 3080960, at *7 ("The Court routinely approves class action settlements when there is a confidential agreement allowing the defendant to terminate the settlement if a particular threshold of class members opt out. The existence of such an agreement does not weigh against approval."); *see also In re Signet Jewelers Ltd. Sec. Litig.*, 2020 WL 4196468, at *13 (S.D.N.Y. July 21, 2020) ("This type of agreement is a standard provision in securities class actions and has no negative impact on the

fairness of the Settlement."). As is standard in securities class actions, the Supplemental Agreement is kept confidential in order to avoid incentivizing the formation of a group of opt-outs for the sole purpose of leveraging a larger individual settlement, to the detriment of the Class.[5]

### 7. The Settlement Treats Class Members Equitably Relative to Each Other

The proposed Settlement treats Members of the Class equitably relative to one another. *See* Fed. R. Civ. P. 23(e)(2)(D). As discussed below, pursuant to the Plan of Allocation, eligible claimants approved for payment by the Court will receive their *pro rata* share of the recovery based on their purchases or acquisitions of Bank OZK common stock during the Class Period. Lead Plaintiff will receive the same level of *pro rata* recovery as all other Class Members.[6]

Each of the above factors fully supports a finding that the Settlement is fair, reasonable, and adequate, and therefore deserves this Court's final approval.

## IV. THE PLAN OF ALLOCATION IS FAIR, REASONABLE, AND ADEQUATE

Class Counsel also seeks approval of the Plan of Allocation. The Plan of Allocation is set forth in the Notice mailed to Class Members and provides an

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[5] The Court permitted the Supplemental Agreement to remain sealed. ECF 201.

[6] Lead Plaintiff has separately moved for an award to compensate it for its time expended and expenses incurred on this Action, pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"). The Settlement is in no way contingent upon whether any such awards are granted.

equitable basis to allocate the Net Settlement Fund among all Class Members who submit an acceptable Claim Form.

Assessment of a plan of allocation in a class action under Rule 23 is governed by the same standards of review applicable to the settlement as a whole – the plan must be fair and reasonable. *See Lechner v. Mut. of Omaha Ins. Co.*, 2021 WL 424421, at *4 (D. Neb. Feb. 8, 2021) ("The Plan of Allocation for the Settlement Fund is approved as fair, reasonable, and adequate.").

The objective of a plan of allocation is to provide an equitable basis upon which to distribute the settlement fund among eligible class members. An allocation formula need only have a reasonable, rational basis, particularly if recommended by "experienced and competent" class counsel. *White v. Nat'l Football League*, 822 F. Supp. 1389, 1420 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994).

Here, the Plan of Allocation, which was developed by Class Counsel in consultation with its in-house damages expert, provides a fair and reasonable method to allocate the Net Settlement Fund among Class Members who submit valid Claim Forms. In developing the Plan, Lead Plaintiff's damages expert calculated the amount of estimated artificial inflation in the prices of Bank OZK's common stock during the Class Period that allegedly was caused by Defendants' alleged false and misleading statements. Lead Plaintiff's expert did so by considering the price changes in Bank OZK common stock in reaction to certain public announcements regarding Bank OZK in which such misrepresentations were alleged to have been revealed to the market,

adjusting for any price changes that were attributable to market forces, the allegations in the Second Amended Complaint, and the evidence developed in support thereof. Goldstein Decl., ¶84.

Class Counsel believes that the Plan of Allocation will result in a fair and equitable distribution of the proceeds among Class Members who submit valid Claim Forms and, thus, it should be approved. Significantly, no one has objected to the Plan of Allocation. Courts routinely approve substantially similar methods of distributing recoveries in securities class actions such as this one, and Lead Plaintiff respectfully submits that this Court should approve the Plan of Allocation submitted here. *See, e.g.*, *Peace Officers Annuity & Benefit Fund of Ga. v. DaVita Inc.*, 2021 WL 1387110, at *5 (D. Colo. Apr. 13, 2021) (approving as fair and reasonable a similar plan); *Campbell v. Transgenomic, Inc.*, 2020 WL 2946989, at *5 (D. Neb. June 3, 2020) (finding "formula for the calculation of the claims of the authorized claimants" was "a fair and reasonable basis upon which to allocate the proceeds of the settlement fund").

## V. THE NOTICE OF PROPOSED SETTLEMENT SATISFIES RULE 23 AND DUE PROCESS REQUIREMENTS AND IS REASONABLE

Rule 23(c)(2) requires the "'best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.'" *Eisen v. Carlisle & Jaquelin*, 417 U.S. 156, 173 (1974) (class notice designed to fulfill due process requirements). "The court must direct notice in a reasonable manner to all class members who would be bound by the [settlement]."

Fed. R. Civ. P. 23(e)(1)(B). The standard for measuring the adequacy of a class action settlement notice is reasonableness. *Bredthauer v. Lundstrom*, 2012 WL 4904422, at *3 (D. Neb. Oct. 12, 2012); *Reynolds v. Credit Bureau Servs., Inc.*, 2016 WL 389977, at *5 (D. Neb. Feb. 1, 2016) (stating notice is adequate if "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present its objections'").

Here, in accordance with the Preliminary Approval Order, beginning on July 8, 2022, the Claims Administrator caused the Notice and Claim Form to be mailed to potential Class Members and its nominees. Gilardi Decl., ¶¶5-11. In addition, the Summary Notice was published three times in *The Wall Street Journal* and once over the *Business Wire*. *Id.*, ¶12. As of August 15, 2022, over 146,400 copies of the Notice have been mailed to potential Class Members and nominees. *Id.*, ¶11. The Notice contains a description of the claims asserted, the Settlement, the Plan of Allocation, and Class Members' rights to participate in and object to the Settlement or the fees and expenses that Class Counsel intends to request, or to exclude themselves from the Class. Information regarding the Settlement, including downloadable copies of the Notice and Claim Form, was also posted on a website devoted solely to the administration of the Settlement: www.OZKSecuritiesClassAction.com. *Id.*, ¶14.

The notice program, approved by the Court, which combined an individual, mailed Notice and Claim Form to all potential Class Members and nominees who could be identified with reasonable effort, and a Summary Notice published three

times in a preeminent business publication and once over the internet, contained all of the information required by §21D(a)(7) of the PSLRA, and is adequate to meet the due process and Rules 23(c)(2) and (e) requirements for providing notice to the Class. *In re E.W. Blanch Holdings, Inc. Sec. Litig.*, 2003 WL 23335319, at *1 (D. Minn. June 16, 2003) (approving similar notice program); *Klug v. Watts Regul. Co.*, 2016 WL 7156478, at *24 (D. Neb. Dec. 7, 2016) (finding that "the combination of the summary postcard notice delivered by mail and the reference to a website that contains the complete notice, the claim form, the proposed settlement agreement, and other case information, is the best notice practicable under the circumstances").

## VI. CONCLUSION

Lead Plaintiff was prepared to bring this case to trial and believes that it would have won, but trial was certainly fraught with risk. As detailed herein, this $45,000,000 Settlement is an excellent result for the Class, and the product of extensive litigation efforts and settlement negotiations, and it avoids the considerable risk, expense, and delay if the Litigation were to continue. In addition, the Plan of Allocation will result in a fair and reasonable distribution of the proceeds. Therefore, Lead Plaintiff respectfully requests that this Court approve the Settlement of this Litigation and the Plan of Allocation as fair, reasonable, and adequate.

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Respectfully submitted,

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