

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

In re:

GMX RESOURCES, INC., et al.,

Debtor.

Chapter 11  
Case No. 13-11456 (SAH)  
(Jointly Administered)  
Hearing December 3, 2013 at 1:30 pm

**GX TECHNOLOGY CORPORATION'S LIMITED OBJECTION TO  
DEBTORS' MOTION TO APPROVE DISCLOSURE STATEMENT**  
**(Related to Dkt. Nos. 828, 829, 830, 831, 839 and 844)**

TO THE HONORABLE SARAH A. HALL,  
UNITED STATES BANKRUPTCY JUDGE,

GX Technology Corporation (“**GXT**”), through counsel, files this Limited Objection to Debtors’ Motion to Approve Disclosure Statement [Dkt. Nos. 828, 829, 831, and 839] (the “**Disclosure Statement**”) and in support, respectfully states:

**I. JURISDICTION AND VENUE**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (L) and (O). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief sought are Sections 365, 1123(b)(2) and 1125 of Title 11, United States Code, 11 U.S.C. §§ 101, *et seq.* (the “**Bankruptcy Code**”), and Rules 3016 and 3017 of the Federal Rules of Bankruptcy Procedure.

**II. PROCEDURAL BACKGROUND**

3. On April 1, 2013 (the “**Petition Date**”), GMX Resources, Inc. (“**GMXR**”) and subsidiary entities Diamond Blue Drilling Co. and Endeavor Pipeline Inc. (collectively, the “**Debtors**”) filed their respective voluntary petitions for relief pursuant to chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Oklahoma

(the “**Bankruptcy Court**”). These cases are jointly administered pursuant to this Court’s Order entered April 1, 2013 [Dkt. No. 13].

4. The Debtors continue to operate their businesses as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. The U.S. Trustee appointed an Official Committee of Unsecured Creditors [Dkt. Nos. 40 and 127]. No request has been made for the appointment of a trustee or examiner.

5. On October 23, 2013, Debtor’s filed their *Disclosure Statement to Accompany Joint Plan of Reorganization of GMX Resources, Inc. and Its Debtor Subsidiaries under Chapter 11 of the Bankruptcy Code* [Dkt. No. 828] and related items [Dkt. Nos. 829, 830, 831]. By these filings, Debtors seek an order of this Court approving the adequacy of their Disclosure Statement.

6. GXT timely filed this Limited Objection.

### **III. RELIEF REQUESTED**

7. By this Limited Objection, GX Technology Corporation (“**GXT**”) submits that Debtors’ Disclosure Statement, as filed, fails to provide adequate information regarding Debtors’ proposed assumption and assignment, or rejection, of executory contracts and should not be approved. GXT also seeks to ensure that Debtors are not attempting to retain the benefits of GXT’s geophysical seismic license and data without satisfying the obligations arising under the license agreement and Bankruptcy Code provisions governing executory contract assumption and assignment. Debtors’ Disclosure Statement is silent on this critical issue.

### **IV. APPLICABLE AUTHORITY**

8. The relief requested is mandated under Bankruptcy Code §§ 365(b), 1123(b)(2) and 1125, and pertinent authorities cited below.

## V. SUMMARY OF THE OBJECTION

9. By failing to identify *any* contracts that Debtors propose to assume and assign, or the cure obligations associated with the assumption of such contracts—or in the alternative, the contracts that Debtors propose to reject and the rejection damages relating to rejected contracts—Debtors have failed to provide adequate information to enable GXT to make informed decisions regarding the merits of Debtors’ proposed Joint Plan of Reorganization (Dkt. No. 830)(the “**Plan**”), and how confirmation of the Plan will affect the interests of GXT. GXT respectfully requests that Debtors be required to provide such information in advance of the hearing to obtain approval of their proposed Disclosure Statement, with sufficient time for GXT and other creditors and parties in interest to evaluate and respond to such information. Absent timely service of such information in advance of the hearing on Debtors’ Disclosure Statement, GXT respectfully requests that the Court deny approval of the Disclosure Statement for its failure to provide adequate information.

10. Additionally, this Limited Objection focuses on confidential and proprietary geophysical seismic data GXT supplied to GMXR pursuant to the GXT License Agreement (described below). GXT must be vigilant in preserving the value of its geophysical seismic data and license. To that end, GXT wants to ensure that GMXR does not mistakenly believe it has the legal right or ability (or is somehow obtaining, by way of approval of the Disclosure Statement and Plan of Reorganization, the legal right or ability) to retain and transfer the seismic data or other rights under the GXT License Agreement to New GMXR or Reorganized GMXR, without providing GXT with the protections to which it is entitled under the GXT License Agreement and applicable law, including cure and payment of the required Transfer Fee (as defined therein).

## **VI. BACKGROUND**

11. GXT has supplied GMXR with certain proprietary and confidential geophysical seismic data under a certain Master Geophysical Data-Use License (the “**License**”) dated effective March 17, 2011, between GXT, as Licensor, and GMXR, as Licensee, and that certain Supplemental Agreement No. 01 (“**Supplement**”) dated effective June 2, 2011, between GXT, as Licensor, and GMXR, as Licensee (collectively, the Supplement and License, as supplemented or amended, being the “**GXT License Agreement**”).<sup>1</sup> While GMXR has listed the GXT License Agreement as an executory contract on its Schedule G [Dkt. No. 311], and has acknowledged that GXT holds an undisputed, pre-petition \$1,387,200 claim thereunder, GMXR’s Disclosure Statement fails to indicate whether the GXT License Agreement is to be assumed and assigned, or rejected, under Debtors’ proposed Plan. Some background information is helpful in analyzing the value of the License.

### **A. GXT’s seismic data are costly to produce, commercially sensitive, very valuable, and highly confidential.**

12. GXT is a company that uses innovative, advanced technologies to perform geophysical seismic data acquisition services, supplying such data and analyses for customers involved in exploring for new sources of energy. GXT’s technologies produce very high fidelity land and marine subsurface images, and reduce the risk and cost of finding and producing hydrocarbons. GXT-developed data are trade secrets supplied under license agreements. Simply stated, GXT helps customers determine optimal spots to drill for oil and gas, on land and at sea.

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<sup>1</sup> Terms such as “Data”, “Derivatives”, “Show (-ing)”, and “Transfer” that are defined in the GXT License Agreement are used here with the definitions assigned therein. In accordance with this Court’s prior *Order Granting GXT’s Motion to Submit Certain Confidential Documents Under Seal* [Docket No. 305], the Court has received under seal for *in camera* review a redacted copy of the GXT License Agreement that redacts certain of its provisions as requested by GXT with GMXR’s consent.

**B. GMXR receives restricted access to and use of the confidential seismic data pursuant to a non-exclusive license that prohibits disclosure and transfer.**

13. As pertains to GMXR's bankruptcy case, GXT as licensor, and GMXR, as licensee, are parties to an active agreement governing GXT's acquisition of seismic data, and the licensed use of such seismic data by GMXR, on a non-exclusive basis, subject to the provisions of the license. GMXR is authorized to have access to the seismic data and derivatives (collectively the "Data") developed under the GXT License Agreement, as supplemented or amended, subject to and in accordance with that agreement.

14. By the terms of the GXT License Agreement, the Data owned by GXT that it licensed to GMXR, and at least portions of the GXT License Agreement itself, are confidential trade secrets and commercial research and development information within the meaning of section 107 of the Bankruptcy Code.<sup>2</sup> Under the Prior Court Orders, the GXT License Agreement is protected from disclosure unless third parties execute and deliver a Confidentiality and Non-Disclosure Agreement in a prescribed form.<sup>3</sup> No redacted content of the GXT License Agreement should be viewed by or shown to any party without: (a) GXT's and GMXR's prior written consent, or (b) further order of this Court after notice and opportunity for hearing. The Prior Court Orders further provide that, unless GXT gives its prior written consent or in such other manner as the Court shall direct after notice and an opportunity for hearing, no non-GMXR party may view the Data or Derivatives; provided, however, GMXR shall be permitted to Show

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<sup>2</sup> To protect its interests, GXT sought and obtained an order of this Court limiting and conditioning GMXR's use, display and/or assignment of the License and the Data. See Dkt. 384, *Agreed Order on GX Technology's Motion for Trade Secret and Adequate Protection*. GXT also sought [Dkt. 298] and obtained [Dkt. 305] an order of this Court authorizing GXT to submit the GXT License Agreement under seal, and it has been so submitted. See Dkt. 305 *Order Granting GX Technology's Motion to Submit Confidential Documents Under Seal* (collectively the "**Prior Court Orders**").

<sup>3</sup> At last inquiry, the Senior Secured Noteholders and their professional advisors had not executed a Confidentiality and Non-Disclosure Agreement.

Data or Derivatives to Prospective Acquirers as set forth in Section 3 of the GXT License Agreement.

15. These features of the GXT License Agreement and Data are not incidental, but are integral and essential to preserve the confidential, trade secret character of the Data. GXT's business would be irreparably harmed if the Data were disclosed other than in accordance with the GXT License Agreement. Ensuring conformity with these requirements is essential to adequately protect GXT, as licensor.

16. GMXR has stated that the GXT License is critical to GMXR's operations in the Niobrara Basin in Wyoming. Indeed, the first critical vendor for which GMXR sought payment authority was "(1) an installment payment for a seismic data study for the Niobrara Basin ... [supplied by GXT]. The Debtors have already spent millions of dollars for the seismic data study for the Niobrara Basin and would lose the right to use the data if they fail to make the remaining payments." [Dkt. No. 20 at ¶¶ 6, 15, 16 and 31-34].

**C. GXT performed a seismic study over a period of two years covering a vast geographic area owned by GMXR using expensive data acquisition and analytical know how, and licensed extensive seismic data to GMXR in reliance on the confidentiality requirements of the License.**

17. By way of further background, GXT would show the Court that the work undertaken pursuant to GXT's License Agreement involved more than two years of acquiring and processing seismic data covering approximately 204.87 square miles of land surface area in the Niobrara Basin in the State of Wyoming. To conceptualize the two-dimensional geographic footprint covered by 200 square miles, the greater Tulsa, Oklahoma metropolitan area covers 196.7 square miles, and Oklahoma City, Oklahoma's metropolitan area covers 606.4 square miles; so by comparison, the surface area mapped by GXT is larger than Tulsa and roughly one-

third the area of Oklahoma City.<sup>4</sup> However, the three-dimensional seismic map of the area also covers a depth of as much as three miles below the surface.

18. The seismic data were acquired and developed by GXT through the use of approximately 8,000 sound-wave gathering geophone sensors that accumulated geophysical data over a course of approximately two years for this project.<sup>5</sup> With the benefit of such seismic data, a company such as GMXR can make far better informed judgments for petroleum and shale gas exploration, the probable location of hydrocarbons, and drilling methodologies and locations more likely to yield desired production in a cost-effective manner.

19. When Debtors proposed to sell their assets, they did not identify the GXT License Agreement as one they proposed to assume. Presumably, when they filed their Disclosure Statement, Debtors had made up their minds about whether or not to assume that agreement. However, Debtors' Disclosure Statement remains silent on that point. Instead, it generally provides that any counterparty to a contract that Debtor proposes to assume and assign is bound by the following:

#### 1. ASSUMED CONTRACTS AND LEASES

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<sup>4</sup> <http://quickfacts.census.gov/qfd/states/40/4075000.html>;  
<http://quickfacts.census.gov/qfd/states/40/4055000.html>

<sup>5</sup> The purpose of seismic analysis is to study the earth's interior through examination of shock waves that have traveled through the subsurface. The shock waves are, in this instance, generated by percussion equipment and/or explosives that are designed to propagate the shock waves deep below the land surface. The shock waves travel below the surface through layers of rock, and when reflected back to the surface, are captured by geophones, which record the data digitally. These data are then processed to produce three-dimensional seismic profiles of the subsurface rocks and other substances. The seismic data, especially when combined with exploration drilling, can reveal much about subsurface. Such seismic information is an important tool in oil and gas exploration because, through skilled analysis, it permits formulation of high fidelity contour maps of subsurface layers, and reveals rock types and formations, the environments in which deposits may be found, and the geologic history of the subsurface, e.g., where fault lines or other penetrable strata may be situated.

Except as otherwise provided in the Plan, or in any contract, instrument, release, indenture, or other agreement or document entered into in connection with the Plan, as of the Effective Date each Reorganized Debtor shall be deemed to have assumed each Executory Contract and Unexpired Lease listed on a schedule to be filed as part of the Plan Supplement. All Executory Contracts and Unexpired Leases assumed by Reorganized GMXR shall be assigned to New GMXR on the Effective Date. All other Executory Contracts and Unexpired Leases not included in such schedule filed with the Plan Supplement will be rejected. The Confirmation Order shall constitute an order of the Bankruptcy Court under section 365 of the Bankruptcy Code approving the contract and lease assumptions or rejections described above, as of the Effective Date. Any motions to assume Executory Contracts or Unexpired Leases pending on the Effective Date shall be subject to approval by the Bankruptcy Court on or after the Effective Date by a Final Order. Each Executory Contract and Unexpired Lease assumed pursuant to Article VIII of the Plan or by any order of the Bankruptcy Court, which has not been assigned to a third party prior to the Confirmation Date, shall revert in and be fully enforceable by the Reorganized Debtors in accordance with its terms, except as such terms are modified by the provisions of the Plan or any order of the Bankruptcy Court authorizing and providing for its assumption under applicable federal law.

Unless otherwise provided in the Plan, each assumed Executory Contract or Unexpired Lease shall include all modifications, amendments, supplements, restatements or other agreements that in any manner affect such Executory Contract or Unexpired Lease, and all Executory Contracts and Unexpired Leases, related thereto, if any, including all easements, licenses, permits, rights, privileges, immunities, options, rights of first refusal and any other interests, unless any of the foregoing agreements has been previously rejected or repudiated or is rejected or repudiated under the Plan.

The List of Executory Contracts and Unexpired Leases to be assumed shall include a Cure amount for each such Unexpired Lease and Executory Contract. Parties objecting to the Cure amount or to the assumption of such Executory Contract or Unexpired Lease must file objections no later than two (2) days before the Confirmation Hearing. The failure of any party or Entity to timely file its objection to the Cure amount or assumption of such Executory Contract or Unexpired Lease shall be a bar to the assertion, at the Confirmation Hearing or thereafter, of any objection to such Cure amount or assumption, or the Debtors Consummation of the Plan, if authorized by the Court.

20. While, on one level, it would be simple for GXT to await Debtors' filing of their Plan Supplement, there are two problems with that approach. First, Debtors have sought expedited consideration, and a shortened deadline, for filing objections to their Disclosure



Statement, and second, if the Plan Supplement does not list the GXT License Agreement, that omission will not moot this objection, because it will still leave unanswered whether Debtors believe – mistakenly – they can transfer to New GMXR the Data received under the License without satisfying the critical conditions on such transfers set forth in the GXT License Agreement.

**D. The cure due GXT includes payment of \$2,312,000 for data acquisition, development and delivery.**

21. GXT is owed \$1,387,200 for seismic data acquisition and development, and entitled to an additional \$924,800 incident to delivery of additional seismic data. When GXT completed the seismic data acquisition phase of its obligations under the GXT License Agreement, in addition to amounts previously paid, GMXR became obligated to pay GXT the invoiced but as-yet-unpaid amount of \$1,387,200. This amount became past due and payable on March 17, 2013. It remains unpaid.

22. Additionally, GXT has delivered substantially all the Data “deliverables” under its agreement with GMXR, and such delivery gives rise to a right to collect an additional \$924,800 incident to delivery of the so-called “final deliverables” (the “**Final Deliverables**”). For GMXR to now fail to make payment as required under the GXT License Agreement would give GXT the right (subject to relief from the automatic stay if pre-confirmation) to terminate the License, and deprive GMXR and any successors of GMXR any permitted present or future access to or use of the Data, the Derivatives, and the trade secrets embodied in them.

23. By entry of the *Agreed Order Granting GXT’s Motion for Trade Secret and Adequate Protection* [Dkt. No. 384], GMXR has acknowledged that it does not dispute GXT’s entitlement to be paid Invoice No. CS0435 dated February 15, 2013 in the amount of \$1,387,200 for Geophysical 3D Seismic Survey Acquisition Services (Program: Bear Creek), and has

stipulated with GXT that GMXR is willing to allow GXT to defer delivery of any further Deliverables unless and until GXT is paid all amounts owed under the GXT License Agreement, with payment of these amounts being a pre-condition of GXT's delivery of Final Deliverables.

## **VII. DISCUSSION AND AUTHORITIES**

24. Unless and until Debtors serve their List of Executory Contracts and Unexpired Leases to be assumed, and include a proposed Cure Amount, no counterparty to an executory contract knows what to expect in terms of the proposed treatment of that counterparty's executory contract. Until GXT is served with such information, the Disclosure Statement fails to contain adequate information regarding the potential impact of the Plan of Reorganization on GXT and other parties in interest.

25. Furthermore, GXT is concerned its rights may be adversely impacted by the Debtors' *sub silentio* treatment of the GXT License Agreement, Data and Derivatives in the proposed Disclosure Statement and Plan [Dkt. Nos. 828, 829 and 830], and therefore GXT believes it must file this Limited Objection, so that if Debtors attempt to assume and assign the GXT License Agreement, or to transfer or convey the Data or Derivatives as part of their proposed Plan into the possession of the Senior Secured Noteholders, Debtors and others are on notice of GXT's position that Debtors may do so only upon compliance with the requirements of the GXT License Agreement and applicable law.

26. By this Limited Objection, GXT particularly wants to ensure that there is no assumption or assumption and assignment of the GXT License Agreement, or unauthorized disclosure of the Data supplied thereunder, without compliance with the GXT License Agreement and the protections afforded GXT under applicable law, including, without limitation, those provided pursuant to Bankruptcy Code §§ 365(b)(1)(A), (B) and (C) and 1123(b)(2) and 1125 (governing adequate protection, prompt cure, compensation, and adequate

assurance of future performance, and disclosure of adequate information) and the Prior Court Orders. Additionally, pursuant to the GXT License Agreement and applicable law, assignment or transfer of the GXT License Agreement, such as that potentially entailed in Debtors' Plan, requires GXT's consent and payment of a prescribed transfer fee.

27. GMXR, on its Schedule G [Dkt 311-6], has previously identified the GXT License Agreement as an executory contract subject to assumption or rejection. Yet it is not clear whether, in accordance with the Disclosure Statement and Plan, GMXR proposes to somehow use, display and/or assign the GXT License Agreement and/or the Data to a third party, for example, the Senior Secured Noteholders, without formally assuming and assigning the GXT License Agreement. GXT objects to GMXR doing so because of the impairment of value of these assets to GXT, and the violation of the parties' contract that would result.

28. After the passage of more than eight (8) months since the filing of these cases, GMXR should certainly know by now whether or not it wishes to assume and assign the GXT License Agreement pursuant to its proposed Plan.<sup>6</sup> However, as of this filing, GMXR has not listed that agreement in the Disclosure Statement as an executory contract that GMXR proposes to assume or assume and assign. So in part, GXT files this Limited Objection in order to protect against the possibility that GMXR might believe itself entitled, in view of the provisions of the Disclosure Statement, to nonetheless *sub silentio* convey an interest in the GXT License Agreement (for example, a sublicense) or the Data developed thereunder, to or for the benefit of the Senior Secured Noteholders (as such term is defined in the Disclosure Statement), without compliance with the terms of the GXT License Agreement and the provisions of 11 U.S.C. §§ 365(b) and 1123(b)(2). In that connection, GXT below supplies its view of applicable law

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<sup>6</sup> When Debtors previously filed a list of contracts they wished to assume in connection with their proposed § 363 asset sale, they did not list the GXT License Agreement. Dkt. No. 670-1.

regarding the requirements of any proposed assumption and assignment, and the proposed “cure” associated with assumption and assignment, that GMXR may hereafter propose.

29. Finally, in addition to maintaining that the Data, Derivatives and License are non-transferable and non-assignable except according to the terms of the License and applicable law, which will be detailed below, GXT expects, by filing a separate request for affirmative relief, to ensure that GMXR does not retain or attempt to convey the Data, Derivatives and License if GMXR has made a final determination not to assume the GXT License Agreement.

**A. Any assignment or transfer of the GXT License Agreement requires GXT’s written consent and payment of the transfer fee prescribed in the GXT License Agreement.**

30. The Prior Court Orders provide, among other things, that GMXR shall not Transfer the License, and is prohibited from Transferring Data or Derivatives, except as authorized by the GXT License Agreement. As a condition of proposed Transfer (as defined therein) or assignment of the GXT License Agreement, GXT’s prior consent is required and GXT is authorized to charge and collect a Transfer Fee (as defined therein).

31. Section 365(b) of the Bankruptcy Code provides, in relevant part that:

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption . . . ;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b). Pursuant to Bankruptcy Code § 1123(b)(2), the assumption, rejection, or assumption and assignment of an executory contract in a plan of reorganization is made subject to the provisions of Bankruptcy Code § 365(b). 11 U.S.C. § 1123(b)(2).

32. The GXT License Agreement constitutes a license of intellectual property. With respect to whether a debtor-in-possession licensee may assume and assign an executory intellectual property license without consent of the licensor, the leading case decided by a bankruptcy court in the Tenth Circuit indicates that courts continue to follow the “Actual Test,” that is, the prohibition contained in section 365(c) that “the trustee may not assume or assign any executory contract . . .” without the consent of the licensor applies when, as here, the Debtor intends to assign the license contract and thereby force the non-debtor, GXT, to accept performance from someone other than the debtor with whom it contracted. The leading case from a bankruptcy court sitting within the Tenth Circuit on this issue remains *In re Aerobox Composite Structures, LLC*, 373 B.R. 135, 138, 140-42 (Bankr. M.D. NM 2007).

33. In *Aerobox*, the court denied a motion by a licensor to compel rejection of a patent technology license where the debtor simply continued to operate under the license agreement post-petition and had not sought to assume or assign the agreement. The Court noted that the limitation contained in section 365(c) is to protect the non-debtor party from accepting performance from a party other than with whom it originally contracted. *Id.* at 141. Because the debtor-in-possession is not materially distinct from the pre-petition entity that entered into the contract, the non-debtor party would not be forced to accept performance from a materially different entity. Therefore, section 365(c) would not preclude a debtor who does not intend to assign a contract from assuming the contract. *Id.* at 142. Conversely, section 365(c) would

preclude the debtor from assigning the intellectual property license against the wishes of the counter-party licensor. It appears to be the conclusion of the Tenth Circuit, in an unpublished opinion in *In re LGX, LLC*, 2006 Bankr. LEXIS 635 (10th Cir. 2006), that the “Actual Test” applies, however, that case was remanded to determine whether the party objecting to the non-assignability had standing to object; therefore the opinion is not conclusive.

34. Here, the parties’ bargain unquestionably entails the highly restricted use of the Data, and solely by licensed users. GXT expressly reserved and retained the right to consent to any assignment or transfer of the License, *no matter how accomplished*. In the event a party not currently having the status of GXT’s licensee desires to even view the Data, that party must do so in conformity with the GXT License Agreement and the Court Order entered at Dkt. No. 384. If GMXR permits an unlicensed party to view or use the Data in violation of the GXT License Agreement, it subjects GMXR to claims for breach, and the remedies for breach, including damages and enforcement of specific performance, including termination of the License. It also subjects GMXR and such third parties to the risk that they be held in contempt of Court for violation of the Prior Court Orders entered at Dkt. Nos. 305 and 384.

**B. The Data are trade secrets entitled to protection from disclosure under governing Texas law.**

35. The GXT License Agreement provides, in pertinent part:

Licensee shall acquire, in accordance with the terms and conditions provided in this License, only the non-exclusive right to utilize such Data. Licensee shall in no event Show or Transfer the Data or Derivatives except as specifically provided in this License. Licensor shall have the right at any time to license the Data to Third Parties at such prices and on such terms and conditions as are determined by Licensor.

Except as expressly permitted by this License, Licensee agrees (a) to keep strictly confidential, and shall ensure that its employees and agents keep strictly confidential, the Data and Derivatives and

(b) not to Show, allow the use of, or display the Data or Derivatives to any Third Party.

36. GXT therefore maintains that no party may be allowed to view or use the Data or Derivatives except in accordance with the GXT License Agreement, and to have access to the Data and Derivatives in connection with transferring ownership of Debtor or Debtors' assets, the assignee expecting to receive access to the Data or Derivatives must itself become a duly authorized licensee, subject to and in accordance with the provisions of a license agreement.<sup>7</sup> While any third party is free to acquire a license directly from GXT on mutually agreed terms, no third party is permitted to receive an assignment of GMXR's license, even in an acquisition of, or merger with, GMXR, except in accordance with the terms and conditions of the GXT License Agreement.

37. GXT avers, on information sufficient to form a belief as to the truth of the matter asserted, that the Senior Secured Noteholders and their professional legal and financial advisors have not executed a Confidentiality and Non-Disclosure Agreement in substantially the form required by the Prior Court Orders. Therefore, GXT believes there is an utter lack of adequate assurance as to the future performance with respect to third party review of the Data or Derivatives, or any contemplated acquisition or assignment of the GXT License Agreement. Absent such adequate assurance, including, without limitation, execution of a suitable Confidentiality and Non-Disclosure Agreement, and evidence of the capacity and commitment to pay appropriate cure payments and the transfer fee incident to contract assumption and assignment (which the Senior Secured Noteholders and their Steering Committee or professional advisors have failed to provide), such parties should have no access to the Data, Derivatives or even the redacted GXT License Agreement.

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<sup>7</sup> See Prior Court Orders identified in footnote 2, supra.

**C. The GXT License Agreement, Data and Derivatives May Not Merely “Remain” with New GMXR or Reorganized GMXR without a Court-approved assumption and assignment taking place.**

38. The GXT License Agreement, Data and Derivatives may not merely “remain” with New GMXR or Reorganized GMXR without a Court-approved assumption and assignment of the GXT License Agreement. The GXT License Agreement and applicable law make this clear.

39. First, in construing a contract, the Court must ascertain and give effect to the parties’ intentions as expressed in the written agreement. *El Paso Field Services, L.P. v. Mastec North America, Inc.*, 389 S.W.3d 802, 805 (Tex. 2012). The explicit purpose of GXT License Agreement is to allow GMXR to utilize the Data or Derivatives under strict conditions of confidentiality for its internal purposes only. GXT License Agreement at ¶¶ 2 and 3. The GXT License Agreement affirms that “the Data and Derivatives constitute valuable and highly confidential trade secrets” and that GMXR agrees “(a) to keep strictly confidential, and shall ensure that its employees and agents keep strictly confidential, the Data and Derivatives and (b) not to Show, allow the use of, or display the Data or Derivatives to any Third Party.” GXT License Agreement at ¶ 2.1. In fact, the GXT License Agreement requires GMXR to place the following notice on any copy of the Data and Derivatives:



“NOTICE”

THIS DATA IS PROPRIETARY TO AND A TRADE SECRET TO GX TECHNOLOGY CORPORATION. THE USE OF THIS DATA AND DERIVATIVES IS RESTRICTED TO COMPANIES HOLDING A VALID USE LICENSE FROM GX TECHNOLOGY CORPORATION AND IS SUBJECT TO THE CONFIDENTIALITY TERMS OF THAT LICENSE. ANY UNAUTHORIZED, SHOWING, DISCLOSURE, USE, REPRODUCTION, REPROCESSING OR TRANSFER OF THIS DATA IS STRICTLY PROHIBITED.

GXT License Agreement at ¶ 2.3.

40. Thus, preserving the Data and Derivatives from disclosure to Third Parties in compliance with the terms in the GXT License Agreement is expressly made of paramount concern to the parties in the GXT License Agreement. The Prior Court Orders reinforce this.

41. The GXT License Agreement provides further protection in the event of a change in ownership of GMXR. Should a Third Party acquire control of GMXR, a Transfer Fee must be paid to GXT for continued use of the Data and Derivatives. GXT License Agreement at ¶ 5 and 5.3. A Third Party Acquisition is defined by the Agreement as:

**any transaction entered into by Licensee after the date hereof whereby any Third Party acquires the majority interest of assets of Licensee, either directly or indirectly, or otherwise gains Control of Ownership of Licensee or Licensee's oil and gas assets and business operations, whether accomplished by statutory merger, consolidation or share exchange, stock or asset purchase, bankruptcy reorganization or any other transaction.**

GXT License Agreement at ¶ 1.19 (emphasis added). A Third Party is further defined as any company or other legal entity that is not a Related Entity. GXT License Agreement at ¶ 1.18. A Related Entity is

any company or other legal entity which (i) is Controlled or Owned by a Party (the Party's subsidiary), or (ii) wholly Owns a Party (the Party's parent), (iii) is wholly Owned or Controlled by the Party's parent or, (iv) is a result of an internal reorganization provided such reorganization shall not include entities formed after the date hereof to accomplish a statutory

merger, asset sale or purchase, stock sale or purchase or any other transaction with an entity that is not defined as a Related Entity as of the date of this License.

GXT License Agreement at ¶ 1.15.

42. The Plan proposes to allow the holders of Senior Secured Notes to acquire the controlling equity ownership in a reorganized GMXR. In fact, the Plan creates new equity interests (in the form of new common stock and limited partnership or limited liability company ownership interests) in a newly formed entity, New GMXR, and conveys to the new entity all assets formerly owned by pre-confirmation GMXR. Then, the Senior Secured Noteholders receive issuance of the majority or controlling interests of New GMXR, which from the perspective of the GXT License Agreement, is a Third Party. The holders of the Senior Secured Notes are not subsidiaries, parents or sibling entities of any of the Debtors and thus are not Related Entities. Therefore, they are by definition a Third Party with respect to GMXR as Licensee under the GXT License Agreement. The proposed Plan is a transaction in which these Third Parties acquire control of ownership of New GMXR as Licensee. Thus, the proposed Plan is a Third Party Acquisition expressly requiring GXT's consent, and payment of the Transfer Fee to GXT. Among other things, the Plan provides, at section 5.11(c):

c) The Restructuring Transactions shall include, without limitation, the following actions:

i) On or prior to the Effective Date, New GMXR shall be formed as either (A) a single member limited liability company, with GMXR or Reorganized GMXR, as applicable, as its sole member or (B) a limited general partnership (sic), with its general partner to be identified in the New GMXR Agreement.

ii) (intentionally omitted here)

iii) No later than the Effective Date, GMXR shall contribute all of its Assets (except the Creditor Trust Assets) to New GMXR free and clear of all Liens, Claims, charges, or other encumbrances (except for any Liens

granted to secure the Exit Facility) in exchange for [36.2414]%<sup>2</sup> of the New GMXR Interests. All Assets of GMXR (except the Creditor Trust Assets) shall be deemed automatically transferred to New GMXR without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order or rule or any requirement of further action, vote or other approval or authorization by any Person.

iv) On the Effective Date, in accordance with Section 4.06 of the Plan, the GMXR Equity Interests shall be cancelled and the Reorganized GMXR Common Stock and [63.7586]%<sup>3</sup> of the New GMXR Interests shall be issued to the Senior Secured Notes Indenture Trustee on behalf of Holders of Allowed Senior Secured Noteholder Secured Claims in accordance with Section 4.01 of the Plan.

v) The Senior Secured Notes Indenture Trustee shall then distribute 100% of the Reorganized GMXR Common Stock and [63.7586]%<sup>4</sup> of the New GMXR Interests to the Holders of Allowed Senior Secured Noteholder Secured Claims in accordance with Section 4.01 of the Plan. Reorganized GMXR will retain [36.2414]%<sup>5</sup> of the New GMXR Interests.

Plan Section 5.11 (some subsections intentionally omitted here).

43. Unless the Court rules otherwise, the proposed Plan results in a Transfer as contemplated by the GXT License Agreement. A Transfer is defined as “the sale, assignment, lease, license, sublicense, transfer, exchange, trade, publication, encumbrance, or other disposition of the Data and Derivatives.” GXT License Agreement at ¶ 1.21. Because the Plan will enable holders of the Senior Secured Notes to acquire the right to use the Data and Derivatives as a Related Party to the Licensee following confirmation of the Plan, the Plan is, within the specific contemplation of the GXT License Agreement, a reorganization resulting in a transfer of the GXT License Agreement and Data thereunder to a Third Party—a transaction that is subject to payment of a Transfer Fee and GXT’s consent. So if GMXR somehow expects to retain the GXT License Agreement and Data under its Plan, the Plan effectuates a transfer that must comply with the GXT License Agreement in the same manner as if GMXR wished to grant a sublicense, transfer, exchange, publication or other disposition of the Data and Derivatives.

44. As demonstrated above, the holders of Senior Secured Notes are not Related Parties prior to the adoption and approval of the Plan. After the adoption and approval of the Plan, the holders of Senior Secured Notes will be Related Parties, as they will own a controlling interest in GMXR. If GMXR somehow expects to retain the GXT License Agreement and Data under its Plan, then as Related Parties post-Plan, the holders of Senior Secured Notes will then have the same right of usage of the Data and Derivatives as GMXR, subject to the terms of the GXT License Agreement (one such term being payment of the Transfer Fee). GXT License Agreement at ¶ 3.1. Acquisition of this right of access is a transfer of the Data and Derivatives. *See, e.g., PPG Industries, Inc. v. Guardian Industries Corporation*, 597 F.2d 1090, 1096-1097 (6th Cir. 1979), cert. denied 444 U.S. 930 (1979) (holding that termination clause in patent license was triggered where third party acquisition resulted in change in ownership of licensee even if patent license never changed hands).

45. In order for the GXT License Agreement, Data and Derivatives to remain with GMXR through its Plan, there must be a formal, Court-approved assumption and assignment of the GXT License Agreement, compliance with GMXR's cure obligations, payment of the Transfer Fee, and GXT's consent to such assignment.

**D. In the event GMXR does not obtain Court approval to assume and assign the GXT License Agreement, Data and Derivatives, then it should be deemed Rejected and the Data and Derivatives must be Promptly Returned to GXT, without any copy being retained.**

46. It should also be pointed out that, under the terms of the GXT License Agreement, in the event GMXR breaches or elects to reject the GXT License Agreement, then all Data and Derivatives obtained thereunder must be returned to GXT, and no copies may be retained. Aware that GMXR may yet serve a "Cure Notice" identifying the GXT License Agreement as one Debtors proposed to assume, GXT intends to continue conferring with Debtors, and if it

remains Debtors' intention not to assume or assume and assign the GXT License Agreement, GXT intends to file separately a request for affirmative relief (with the expectation that it should be uncontested) to ensure the continued preservation of GXT's valuable property rights, and the appropriate and complete return by Debtors of all Data and Derivatives currently in Debtors' possession.

47. If Debtors serve a "Cure Notice" with regard to the GXT License Agreement, it will be objectionable to GXT unless, in accordance with the GXT License Agreement, and in accordance with Bankruptcy Code § 363(e) and 365(b), Debtors agree that the following conditions govern GMXR's assumption or assumption and assignment of the GXT License Agreement; namely, GMXR must: (a) pay GXT, as a partial cure, \$1,387,200 accrued pre-petition that is due and unpaid, (b) pay GXT \$924,800 against delivery of final Deliverables, or as otherwise agreed; (c) obtain GXT's prior consent to such transfer, which can be based, in part, on adequate assurance of future performance, including, without limitation, execution of a suitable Confidentiality and Non-Disclosure Agreement, and evidence the capacity and commitment to pay all required cure payments, (d) pay, or arrange for GXT to be paid, the Transfer Fee prescribed in the GXT License Agreement. GXT also reserves the right to require compensation for its actual pecuniary losses, comprising out-of pocket costs and expenses of preserving its rights with respect to the GXT License Agreement and Data.

48. Of course, Debtors can address the issues raised by this Limited Objection by making a modest amendment to their Disclosure Statement, to include a statement that, in substance, makes clear (a) Debtors do not intend to assume, and instead request Court approval to immediately reject, the GXT License Agreement, and (b) when the rejection of the GXT

License is approved, Debtors will comply with their obligation to return, including, without limitation, compliance with the provisions of section 9.1, which includes the obligation to:

Upon expiration or termination of this License or any Supplement, regardless of the cause, Licensee shall within thirty (30) days return and/or destroy all respective Data and Derivatives and shall within the same thirty (30) day period provide written certification that all copies of the Data and Derivatives, and any physical manifestations thereof, subject to this License and/or the affected Supplement, have been returned to Licensor or destroyed, including removal of such Data from Licensee's storage and archival systems, workstations, prospect files, and that Licensee has retained no copies of such Data and Derivatives.

### **VIII. REQUEST FOR RELIEF**

49. For the foregoing reasons, GXT respectfully requests that this Court enter an order prohibiting and conditioned GMXR's assumption or assumption and assignment of the GXT License Agreement, or any attempted transfer of the GXT License Agreement, the Data or Derivatives (as defined therein) upon GMXR: (a) paying GXT, as a partial cure, \$1,387,200 accrued pre-petition that is due and unpaid, (b) paying GXT \$924,800 against delivery of Final Deliverables, or as otherwise agreed; (c) obtaining GXT's prior consent to such transfer, which can be based, in part, on adequate assurance of future performance, including, without limitation, execution of a suitable Confidentiality and Non-Disclosure Agreement, and evidence of the capacity and commitment to pay appropriate cure payments incident to contract assumption and assignment,; (d) paying, or arranging for GXT to be paid, the Transfer Fee prescribed in the GXT License Agreement. In the alternative, GXT requests that Debtors immediately reject the GXT License Agreement and comply with their obligations upon termination thereof.

Dated: November 18, 2013

Respectfully submitted,

/s/Kiran A. Phansalkar

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**CERTIFICATE OF SERVICE**

I certify that on the 18th day of November 2013, I electronically transmitted the attached document to the Court Clerk using the ECF filing system.

A true and correct copy of the foregoing was served by United States Mail, first class, postage prepaid to the following addresses:

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