Lee Albert (State Bar No. 26231986; LA-8307)
lalbert@glancylaw.com
GLANCY PRONGAY & MURRAY LLP
230 Park Ave, Suite 358
New York, New York 10169
(212) 682-5340

Garth Spencer (*pro hac vice*)
gspencer@glancylaw.com
Joseph D. Cohen (*pro hac vice*)
jcohen@glancylaw.com
GLANCY PRONGAY & MURRAY LLP
1925 Century Park East, Suite 2100
Los Angeles, California 90067
(310) 201-9150

Attorneys for Plaintiff Richard Goodman and the Proposed Settlement Class

[Additional Counsel on the Signature Block]

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RICHARD GOODMAN, *Individually And As Trustee of the Richard M. Goodman Revocable Living Trust, And On Behalf Of All Others Similarly Situated*,

Plaintiff,

vs.

UBS FINANCIAL SERVICES INC.,

Defendant.

Case No.: 2:21-cv-18123-KM-MAH

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION

Hon. Michael A. Hammer

Class Action

Motion Day: December 7, 2023

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Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Plaintiff Richard Goodman ("Plaintiff"), on behalf of himself and all other members of the proposed Settlement Class, respectfully submits this memorandum in support of his unopposed motion seeking: (i) final approval of the proposed Settlement of the above-captioned class action (the "Action"); (ii) final certification of the Settlement Class; and (iii) approval of the proposed plan of allocation for the proceeds of the Settlement (the "Plan of Allocation").[1]

I. INTRODUCTION

The proposed Settlement will resolve all claims against defendant UBS Financial Services Inc. ("UBS" or "Defendant") in exchange for a non-reversionary, all cash payment of $2,500,000 (the "Settlement Amount") for the benefit of the Settlement Class. This is an excellent result for the Settlement Class and it is both substantively and procedurally fair.

Substantively, Lead Plaintiff's Counsel's damages expert estimates that if Plaintiff overcame all obstacles to establishing liability, the $2.5 million Settlement

[1] Unless otherwise defined, all capitalized terms herein have the same meanings as set forth in the Stipulation and Agreement of Settlement dated June 8, 2023 ("Stipulation"; ECF No. 55-1), or in the concurrently filed Declaration of Garth Spencer in Support of: (I) Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Spencer Declaration" or "Spencer Decl."). Citations to "¶__" or "Ex. __" in this memorandum refer to paragraphs in, or exhibits to, the Spencer Declaration.

would *exceed* the *maximum* damages attributable to Settlement Class Members' tax overpayments that are *potentially* recoverable in this case. If, however, this Action continued to be litigated, an adverse decision at class certification, summary judgment, trial, or appeal, could have substantially reduced or altogether eliminated any recovery for the Settlement Class. Thus, the Settlement is substantively fair, reasonable and adequate.

Procedurally, this Settlement follows an arm's-length mediation before a highly experienced mediator, is the result of the mediator's recommendation, and was negotiated by counsel who possessed a thorough understanding of the strengths and weaknesses of the case based on hard-fought litigation. Indeed, prior to reaching the Settlement, Plaintiff's Counsel, among other things:

- conducted an extensive investigation of the claims asserted in the Action, which included, *inter alia*: (i) reviewing and analyzing publicly available information concerning UBS, including SEC filings and information from FINRA; (ii) researching relevant tax laws relating to the reporting of amortizable bond premium; (iii) reviewing and analyzing documents UBS had previously provided to Plaintiff, including account opening documentation and annual tax forms; (iv) interviewing a former employee of UBS with first-hand knowledge of UBS's conduct at issue in this case; and (v) researching causes of action under which UBS may be held liable for the conduct at issue;

- utilized their comprehensive investigation and additional research to draft and file the Class Action Complaint ("Complaint");

- researched, drafted, and filed an opposition to Defendant's motion to dismiss the Complaint, which led to the Court partially sustaining the Complaint;

- drafted, negotiated, and filed a joint discovery plan, confidentiality order, and discovery protocol, and prepared for and participated in telephonic scheduling conferences with the Court;

- drafted and served comprehensive requests for the production of documents and proposed search terms for electronically stored information on UBS, and responded and objected to UBS's requests for the production of documents to Plaintiff;

- Drafted and issued a subpoena for documents to FINRA relating to UBS's tax information reporting practices, and reviewed and analyzed FINRA's document production;

- engaged in numerous communications and meet and confer discussions with Defendant's Counsel concerning, *inter alia*, discovery, scheduling, UBS's motion to dismiss, and the potential resolution of this Action;

- negotiated for Defendant to produce, prior to the Parties' mediation, substantial data reflecting UBS clients' transactions in taxable municipal securities during the relevant period, reviewed and analyzed the data produced by Defendant, and used that data to estimate recoverable damages;

- obtained copies of Plaintiff's tax returns from his accountants, and redacted and produced relevant tax returns and other relevant documents to UBS as part of the pre-mediation exchange of information;

- engaged in a mediation process overseen by a highly experienced third-party mediator, Robert A. Meyer, Esq., of JAMS, which involved an exchange of written submissions concerning the facts of the case, liability and damages, a full-day in-person mediation session, and weeks of further negotiations that culminated in a mediator's recommendation to resolve the Action for $2.5 million in cash;

- negotiated with Defendant's Counsel to obtain additional data from UBS concerning UBS clients' transactions in taxable municipal securities during the relevant period, and worked with a damages expert to analyze that data and craft a plan of allocation that treats Plaintiff and all other members of the proposed Settlement Class fairly;

- conducted an interview, arranged with Defendant's Counsel, of a UBS employee with relevant knowledge, to confirm the fairness and reasonableness of the Settlement; and

- drafted and negotiated the terms of the Stipulation (including the exhibits thereto) and Supplemental Agreement with Defendant's Counsel.

The Settlement is, therefore, the result of arm's-length negotiations, conducted by informed and experienced counsel, and does not favor Plaintiff over other Settlement Class Members. In short, it is procedurally fair.

As discussed in greater detail below and in the Spencer Declaration, Lead Plaintiff and his counsel believe that the proposed Settlement meets the standards for final approval and is in the best interests of the Settlement Class. Accordingly, Plaintiff respectfully requests the Court grant the Settlement final approval.

Plaintiff also moves for approval of the proposed Plan of Allocation of the Net Settlement Fund. The Plan of Allocation was developed in conjunction with Lead Plaintiff's Counsel's damages expert and is designed to distribute the proceeds of the Net Settlement Fund fairly and equitably to Settlement Class Members. No Settlement Class Member is favored over another under the proposed Plan; rather, all Settlement Class Members—including Plaintiff—are treated in the same manner. *See* ¶¶57-65. The Plan of Allocation is, therefore, fair and reasonable and, as such, it too should be approved.

II. FACTUAL AND PROCEDURAL BACKGROUND OF THE LITIGATION

The Spencer Declaration is an integral part of this submission and, for the sake of brevity, the Court is respectfully referred to it for a detailed description of, *inter alia*: the factual background and procedural history of the Action, and the nature of the claims asserted (¶¶9-33); the negotiations leading to the Settlement (¶¶23-31); the risks and uncertainties of continued litigation (¶¶34-50); and the terms of the Plan of Allocation of the Net Settlement Fund. ¶¶57-65.

III. THE SETTLEMENT WARRANTS FINAL APPROVAL

Rule 23(e) requires court approval for any settlement of a class action, and courts within this circuit have a "strong judicial policy in favor of class action settlement." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 593-95 (3d Cir. 2010); *see also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004).[2] "Settlement agreements are to be encouraged because they promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts." *Ehrheart*, 609 F.3d at 594. This is particularly true for class actions involving complex litigation. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) ("The law favors

[2] Unless otherwise noted, all emphasis is added and internal citations and quotation marks are omitted.

settlements, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.").

Rule 23(e) provides that the Court should grant final approval to a class action settlement if it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Rule 23(e)(2)—which governs final approval— requires courts to consider the following questions in determining whether a proposed settlement is fair, reasonable, and adequate:

> (A) have the class representatives and class counsel adequately represented the class;
>
> (B) was the proposal negotiated at arm's-length;
>
> (C) is the relief provided for the class 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 attorneys' fees, including timing of payment; and
> >
> > (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) does the proposal treat class members equitably relative to each other.

Factors (A) and (B) "identify matters . . . described as 'procedural' concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement," while factors (C) and (D) "focus on . . . a 'substantive' review of the terms of the proposed settlement" (*i.e.*, "[t]he relief that the

settlement is expected to provide to class members"). Advisory Committee Notes to 2018 Amendments (324 F.R.D. 904, at 919).

These factors are not, however, exclusive. The four factors set forth in Rule 23(e)(2) are not intended to "displace" any factor previously adopted by the courts, but "rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *Id.* at 918; *see also Swinton v. SquareTrade, Inc.*, 2019 WL 617791, at *5 (S.D. Iowa Feb. 14, 2019) ("The specific considerations in Rule 23(e)(2)(A)–(D) were part of the 2018 Amendments. However, they were not intended to displace the various factors that courts have developed in assessing the fairness of a settlement."). For this reason, the traditional factors that are utilized by courts in the Third Circuit—known as the "*Girsh* factors"—to evaluate the propriety of a class action settlement (certain of which overlap with Rule 23(e)(2)) are still relevant:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) stage of the proceedings and the amount of discovery completed; (4) risks of establishing liability; (5) risks of establishing damages; (6) risks of maintaining the class action through the trial; (7) ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Singleton v. First Student Mgmt. LLC, 2014 WL 3865853, at *5 (D.N.J. Aug. 6, 2014) (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)); *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164-65 (3d Cir. 2006) (same).[3]

In sum, although under the 2018 Amendment to Rule 23 the specific factors by which a settlement is evaluated may have changed in some respects, what has not changed is that "[t]he central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate." Advisory Committee Notes to 2018 Amendments (324 F.R.D. at 918).

A. Plaintiff And His Counsel Adequately Represented The Settlement Class

Rule 23(e)(2)(A) requires the Court to consider whether the "class representatives and class counsel have adequately represented the class." "The adequacy requirement entails two inquiries: (1) whether the attorneys retained by the named Plaintiffs are qualified, experienced, and generally able to conduct the litigation; and (2) whether the named Plaintiffs themselves have interests that are antagonistic to or in conflict with those they seek to represent." *Inmates of Northumberland Co. Prison v. Reish*, 2009 WL 8670860, at *20 (M.D. Pa. March 17, 2009) (citing *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 141 (3d Cir. 1998)).

[3] The *Girsh* factors "are a guide and the absence of one or more does not automatically render the settlement unfair." *In re Schering-Plough/Merck Merger Litig.*, 2010 WL 1257722, at *5 (D.N.J. Mar. 26, 2010).

Here, as described above, Plaintiff—the proposed class representative—has claims that are typical of and coextensive with those of the Settlement Class. Plaintiff, like all Settlement Class Members, bought At-Issue Taxable Municipal Securities at a premium in a taxable UBS account during the Settlement Class Period, received a Form 1099 from UBS, and was allegedly damaged thereby. His interest in obtaining the largest possible recovery is, therefore, aligned with the other Settlement Class Members. *See In re Schering-Plough Corp.*, 2012 WL 4482032, at *6 (D.N.J. Sept. 25, 2012) ("[W]hen Lead Plaintiffs have a strong interest in establishing liability . . . and seek similar damages for similar injuries, the adequacy requirement can be met."). The close alignment of his interests with those of the Settlement Class is further demonstrated by his substantial involvement in the case. Plaintiff diligently oversaw the litigation, reviewed court filings and orders, regularly communicated with Lead Plaintiff's Counsel, produced documents in response to discovery requests, and remotely attended the Parties' full-day mediation session. *See* Ex. 2 (Plaintiff's Declaration) at ¶7. This close alignment of interests is also shown by Plaintiff's success in achieving an excellent result for all Settlement Class Members—according to Lead Plaintiff's Counsel's damages expert, the $2.5 million Settlement would exceed the maximum damages attributable to Settlement Class Members' tax overpayments

that are potentially recoverable in this case. Plaintiff is, therefore, an adequate class representative.

In the interests of full transparency, Plaintiff wishes to disclose that he has a familial relationship with one of the attorneys representing him in the case. Plaintiff's Counsel includes William H. Goodman, Esq. of Goodman, Hurwitz & James, P.C. William Goodman and Plaintiff Richard Goodman are brothers. William Goodman is a highly accomplished and respected lawyer with substantial experience representing plaintiffs in class action litigation. *See* Ex. 4 (GHJ Declaration) at ¶9 & Ex. 4-A (GHJ firm biography). The Settlement in no way favors the interests of William Goodman over the Settlement Class. Under these circumstances, in which a personal relationship exists between a class representative plaintiff and his counsel, and that relationship is fully disclosed and does not negatively impact the class in any way, courts routinely find adequacy to be satisfied. *See, e.g., Malchman v. Davis*, 761 F.2d 893, 899 (2d Cir. 1985) (affirming certification of class representatives who included the brother, mother-in-law, and personal friend of class counsel) *abrograted on other grounds by Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Weikel v. Tower Semiconductor Ltd.*, 183 F.R.D. 377, 398 (D.N.J. 1998) ("A personal relationship with a member of the law firm representing named plaintiffs does not, standing alone, warrant a finding undue reliance upon counsel"); *In re Greenwich Pharms.*

Sec. Litig., 1993 WL 436031, at *2 (E.D. Pa. Oct. 25, 1993) ("this court is not willing to find that the [father/son] relationship alone is sufficient to disqualify a representative plaintiff"); *Lewis v. Goldsmith*, 95 F.R.D. 15, 20 (D.N.J. 1982) ("I do not believe that because plaintiff is the nephew of his counsel he must be disqualified as a representative plaintiff.").

Plaintiff respectfully requests that the Court appoint his counsel Glancy Prongay & Murray LLP ("GPM", "Lead Counsel", or "Lead Plaintiff's Counsel") to serve as Class Counsel for the Settlement Class. GPM has extensive experience and expertise litigating complex class actions throughout the United States, and is qualified and able to conduct this litigation. *See* ECF No. 55-2 (GPM firm resumé). Moreover, GPM—which has handled the majority of the litigation in this matter (*see* ¶69 (chart of hours of Plaintiff's Counsel))—has demonstrated its ability and commitment to this litigation by, among other things, defeating in substantial part Defendant's motion dismiss, and negotiating a Settlement that is an excellent result for the Settlement Class. Based on these efforts, as well as a preliminary review of the results achieved, for purposes of preliminary approval of the proposed Settlement, the Court has already found that "Plaintiff and Lead Counsel have and will fairly and adequately represent and protect the interests of the Settlement Class" (ECF No. 60 at ¶2), and has appointed them as Class Representative and Class Counsel, respectively (*id.* at ¶3).

Thus, Plaintiff is an adequate representative of the Settlement Class, and his primary counsel, GPM, is qualified, experienced and capable of prosecuting this Action. *See Wilson v. LSB Indus., Inc.*, 2018 WL 3913115, at *18 (S.D.N.Y. Aug. 13, 2018) (appointing GPM as class counsel and noting that "GPM has had extensive experience serving as lead or co-lead counsel in class action securities litigation.").

B. The Settlement Resulted From Arm's-Length Negotiations

Rule 23(e)(2)(B) evaluates whether the proposed settlement "was negotiated at arm's-length." Here, the Settlement was negotiated by counsel with extensive experience in class action litigation, who were well versed in the strengths and weaknesses of their respective positions, under the auspices of a highly respected mediator who ultimately made a mediator's recommendation that the Parties accepted. *See* ECF No. 55-2 (GPM firm resumé). Accordingly, this factor weighs in favor of final approval. *See Alves v. Main*, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012) ("The participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's-length and without collusion between the parties."); *Bernhard v. TD Bank, N.A.*, 2009 WL 3233541, at *2 (D.N.J. Oct. 5, 2009) (preliminarily approving settlement and noting that the proposed settlement, which was achieved with the assistance of a mediator, appears to be the result of serious negotiation between the parties).

C. The Relief Provided To The Settlement Class Is Adequate

Rule 23(e)(2)(C)(i) overlaps significantly with *Girsh* (*e.g.*, factors 1, 4-9), and both sets of factors advise the Court to consider the adequacy of the settlement relief given the costs, risks, and delay that trial and appeal would inevitably impose. *Compare* Fed. R. Civ. P. 23(e)(2)(C)(i) *with Girsh,* 521 F.2d at 157. Thus, the *Girsh* factors, analyzed below, inform the Rule 23(e)(2)(C)(i) inquiry.

1. The Complexity, Expense, And Likely Duration Of The Litigation Support Final Approval Of The Settlement

The first *Girsh* factor, the complexity, expense, and likely duration of the litigation, supports final approval of the Settlement. Indeed, large class actions often involve complicated issues of fact and law, and this case is no different. If this litigation were to continue, Plaintiff would have to retain experts to opine on several topics such as damages and brokerage industry tax information reporting practices. *See Goodman v. UBS Fin. Servs., Inc.*, 2022 WL 2358403 at *7 (D.N.J. June 30, 2022) ("there are a number of factors that are relevant to determining what duty, if any, UBS owed to Goodman. Federal statutes and Treasury regulations, FINRA investigations, and standard industry practices may all come into play."). This would have substantially increased the cost of litigation. As a result, the complexity, expense, and likely duration of these proceedings favor final approval of the Settlement. *See Dartell v. Tibet Pharms., Inc.*, 2017 WL 2815073, at *6 (D.N.J. June 29, 2017).

2. Plaintiff Faced Risks On The Merits

The fourth, fifth, and sixth *Girsh* factors—the risks of establishing liability, establishing damages, and maintaining the class action through the trial—also support approval. While Plaintiff believes his claims to be meritorious, he also recognizes that UBS has potentially viable defenses, including arguments cutting against liability as to both of the remaining claims for breach of contract and negligence, as well as arguments against class certification and damages. Indeed, UBS achieved dismissal of most of Plaintiff's claims before Judge McNulty. *See Goodman*, 2022 WL 2358403 at *8.

Plaintiff might not have been able to establish UBS's liability at summary judgment and trial. *See In re Lucent Techs., Inc., Sec. Litig.*, 307 F. Supp. 2d 633, 645 (D.N.J. 2004) (proving liability "would have been very difficult" and based on risks and contingencies, settlement is reasonable given risks involved in establishing liability); *In re Ocean Power Techs., Inc.*, 2016 WL 6778218, at *19-20 (D.N.J. Nov. 15, 2016) (recognizing the difficulty of establishing liability class action and the added risk of establishing damages). UBS has consistently argued that its contracts with clients made no promise to report amortizable bond premium to them, and that its relationship with clients did not give rise to a duty of care so as to permit a negligence claim. *See* ECF Nos. 13-1, 21. Indeed, even in allowing Plaintiff's negligence and breach of contract claims to proceed, Judge McNulty

warned, "[i]t is entirely possible that information revealed in discovery will make either Count 1 [breach of contract] or 5 [negligence] untenable." *See Goodman*, 2022 WL 2358403 at *2.

Plaintiff also faced hurdles in obtaining class certification, as UBS would most likely argue that individual questions predominate over common questions, due to the differing circumstances of class members' securities transactions and tax positions. As such, while Plaintiff firmly believes that class certification is appropriate and that he would overcome UBS's arguments, class certification was not a forgone conclusion. *See In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2009 WL 5178546, at *6 (S.D.N.Y. Dec. 23, 2009) ("the uncertainty surrounding class certification supports approval of the Settlement").

UBS would also contest that the Plaintiff and the class suffered damages. For example, UBS has previously alluded to "questions concerning Plaintiff's standing and claims of injury," in light of the fact that UBS belatedly issued "corrected" Form 1099s to him. *See* ECF No. 22 at 6. Indeed, in class actions the issue of damages often turns into a "battle of the experts," with no guarantee as to who will prevail. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 539 (D.N.J. 1997) (a "jury's acceptance of expert testimony is far from certain, regardless of the expert's credentials. And, divergent expert testimony leads inevitably to a battle of the experts."), *aff'd,* 148 F.3d 283 (3d Cir. 1998).

Such a battle would not only increase the cost of litigation, but also the risk that a jury might credit UBS's experts and reject Plaintiff's claims. In contrast, the Settlement provides a favorable and immediate result for the Settlement Class while avoiding the significant risks of establishing liability and damages. *See In re Facebook, Inc. IPO Sec. and Derivative Litig.*, 2015 WL 6971424, at *5 (S.D.N.Y. Nov. 9, 2015) ("[D]amages would be subject to a battle of the experts, with the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount Plaintiffs' losses. Under such circumstances, a settlement is generally favored over continued litigation.").

3. The Settlement Amount Is Within The Range Of Reasonableness In Light Of The Best Possible Recovery And Attendant Risks Of Litigation

The seventh, eighth, and ninth *Girsh* factors—the ability of the defendant to withstand a greater judgment, and the range of reasonableness of the settlement fund given the best possible recovery and considering all the attendant risks of litigation—strongly support approval. The proposed Settlement recovers $2.5 million in cash for the Settlement Class. This is an excellent result. Lead Plaintiff's damages expert estimates that ***if*** Lead Plaintiff had fully prevailed on his claims at both summary judgment and after a jury trial, ***if*** the Court certified the same class period as the Settlement Class Period, ***and if*** the Court and jury accepted Plaintiff's damages theory—*i.e.*, Plaintiff's best-case scenario—the $2.5

million Settlement would ***exceed*** the ***maximum*** damages attributable to Settlement Class Members' tax overpayments that are ***potentially*** recoverable in this case.[4] This is an excellent result compared to the range of recoveries routinely approved by courts in class action settlements. *See, e.g.*, *AT&T*, 455 F.3d at 170 (affirming District Court determination that recovery of 4% of maximum damages was an "excellent" result); *Lincoln Adventures LLC v. Those Certain Underwriters at Lloyd's, London Members*, 2019 WL 4877563, at *5 (D.N.J. Oct. 3, 2019) (approving settlement providing 22% of reasonably recoverable damages, and citing cases approving settlements ranging from 2.4% to 15.3% of damages).

This case was not, however, risk free and there were meaningful barriers to recovery, including, but certainly not limited to, the above described risks concerning liability, class certification, and damages. Given the range of possible results in this litigation, including a substantial risk of ***no*** recovery to the

[4] Damages attributable to tax overpayments are the primary source of damages alleged by Plaintiff. Plaintiff also alleged other sources of damages, which Lead Plaintiff's Counsel believes to be substantially smaller in amount than the damages attributable to tax overpayments: (i) that UBS clients were harmed by the lost time-value of their money; and (ii) that some UBS clients likely incurred unnecessary expenses such as professional fees for tax return preparation and advice. *See* Complaint ¶¶105-13. Plaintiff also pled a claim for punitive damages, which was dismissed by Judge McNulty on the grounds that "punitive damages are a remedy, not a cause of action." *Goodman*, 2022 WL 2358403, at *2. Lead Plaintiff's Counsel believes there was substantial risk to obtaining punitive damages.

Settlement Class, there can be no question that the Settlement constitutes a considerable achievement and weighs heavily in favor of final approval.

D. The Other Rule 23(e)(2)(C) Factors Are Met

Rule 23(e)(2)(C) provides three more factors to consider in approving a settlement: (i) the effectiveness of the proposed method for distributing relief; (ii) the terms of the proposed attorneys' fees; and (iii) the existence of any other "agreements." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iv). Each of these factors supports approval of the Settlement or is neutral and thus does not suggest any basis to conclude the Settlement is inadequate.

1. The Proposed Method For Distributing Relief Is Effective

The method for distributing relief to eligible Settlement Class Members includes well-established, effective procedures. Here, as required by the Order Preliminarily Approving Settlement and Providing for Notice ("Preliminary Approval Order"; ECF No. 60), the Court-approved Settlement Administrator, Strategic Claims Services: (i) caused the Postcard Notice to be mailed, and/or caused the Notice to be emailed to 2,481 potential Settlement Class Members at the addresses set forth in the records provided by UBS;[5] and (ii) caused the Notice

[5] Plaintiff's Counsel is working with the Settlement Administrator and UBS to obtain and analyze additional data concerning potential Settlement Class Members, and will update the Court on the number of Settlement Class Members in the reply brief, which will be filed with the Court by November 30, 2023. ¶54 n.3.

and other important documents to be posted to the settlement website, www.ubstaxsettlement.com. Ex. 1 (Mailing Declaration), ¶¶5-9.

After Court-approval, the Settlement Administrator will determine each Settlement Class Member's *pro rata* share of the Net Settlement Fund under Lead Plaintiff's Counsel's guidance and according to the Plan of Allocation developed with Lead Plaintiff's Counsel's damages expert, and will mail Authorized Claimants their *pro rata* share of the Net Settlement Fund. ¶¶57-65. Given that UBS has provided contact information and the relevant transaction data for Settlement Class Members, a claims-free process is an efficient and effective way to distribute the Net Settlement Fund, and to ensure that a high proportion of eligible Settlement Class Members receive compensation.[6]

2. The Proposed Attorneys' Fees

Rule 23(e)(2)(C)(iii) addresses "the terms of any proposed award of attorney's fees, including timing of payment." The Notice provides that Lead Plaintiff's Counsel will apply to this Court for an award of attorneys' fees not to exceed 33⅓% of the Settlement Fund, which is consistent with attorneys' fees regularly approved in class action settlements. *See, e.g.*, *Dartell*, 2017 WL

[6] This is not a claims-made settlement. If the Settlement is approved, Defendant will not have any right to the return of a portion of the Settlement Amount based on the number of Settlement Class Members determined to be eligible to receive a distribution from the Net Settlement Fund, or the amounts to be paid to Authorized Claimants from the Net Settlement Fund. *See* Stipulation ¶13.

2815073, at *10 ("The one-third fee is within the range of fees typically awarded within the Third Circuit through the percentage-of-recovery method; the Circuit has observed that fee awards generally range from 19% to 45% of the settlement fund."); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 735 (E.D. Pa. 2001) (review of 289 settlements demonstrates "average attorney's fee percentage [of] 31.71%" with a median value that "turns out to be one-third").

In terms of timing, courts routinely order that "[t]he awarded attorneys' fees and expenses shall be paid immediately to Lead Counsel subject to the terms, conditions, and obligations of the Stipulation." *In re BHP Billiton Limited Sec. Litig.*, 2019 WL 1577313, at *1 (S.D.N.Y. Apr. 10, 2019); *In re Limelight Networks, Inc. Sec. Litig.*, 2011 WL 13185749, at *2 (D. Ariz. Mar. 23, 2011). This prevents objectors from attempting to "hold up" plaintiffs' counsel by delaying payment through frivolous appeals.

Finally, it is important to note that approval of the requested attorneys' fees is separate from approval of the Settlement, and the Settlement may not be terminated based on any ruling with respect to attorneys' fees. *See* Stipulation, ¶16.

3. The Parties Have One Other Agreement

Rule 23(e)(2)(C)(iv) calls for disclosure of any other agreements entered into in connection with the settlement of a class action. The Parties have entered

into one confidential agreement that establishes certain conditions under which Defendant may terminate the Settlement if a certain threshold of Settlement Class Members eligible to participate in the Settlement request exclusion (or "opt out") from the Settlement. Such supplemental agreements are common in class action settlements, and have "no negative impact on the fairness of the Settlement." *Christine Asia Co., Ltd. v. Yun Ma*, 2019 WL 5257534, at *15 (S.D.N.Y. Oct. 16, 2019); *see also O'Hern v. Vida Longevity Fund, LP*, 2023 WL 3204044, at *7 (D. Del. May 2, 2023) (characterizing "agreement allowing Defendants to terminate the settlement if the exclusion requests exceed a specific threshold" as "standard").

4. All Settlement Class Members Are Treated Equitably

Rule 23(e)(2)(D) requires courts to evaluate whether the settlement treats class members equitably relative to one another. The Settlement does not provide preferential treatment to the Plaintiff or any other segment of the Settlement Class. The proposed Plan of Allocation, which was developed by Plaintiff's damages expert in consultation with Lead Plaintiff's Counsel, is set forth in the Notice and provides a fair and reasonable method to allocate the Net Settlement Fund among Settlement Class Members. *See* ECF No. 55-1 at A-1 (Notice) at ¶¶34-36 (describing Plan of Allocation); ECF No. 55-3 (Declaration of Zachary Nye, Ph.D. in Support of the Proposed Settlement and Plan of Allocation) ("Nye Decl."). That the Plan of Allocation was formulated by Lead Counsel and its consulting damages

expert based on Plaintiff's theory of liability ensures its fairness and reliability. *See New York State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 233-34, 245 (E.D. Mich. 2016) (denying objection where the "Plan of Allocation was developed based on its expert's careful damages analysis").

Under the Plan of Allocation, the Settlement Administrator will calculate a Recognized Claim amount for each Settlement Class Member, which shall be the sum of the Settlement Class Member's estimated amortizable bond premium amounts relating to their relevant transactions in taxable municipal securities during the Settlement Class Period, based on data provided by UBS. *See* ECF No. 55-1 at A-1 (Notice) at ¶¶34-36; ECF No. 55-3 (Nye Decl.). The calculation of each Settlement Class Member's Recognized Claim under the Plan of Allocation is explained in the Notice and will be based on several factors, including the particular taxable municipal securities purchased by each Settlement Class Member, the maturity or call dates of those securities, and their purchase prices. *See* ECF No. 55-1 at A-1 (Notice) at ¶¶34-36 (describing Plan of Allocation); ECF No. 55-3 (Nye Decl.). The Net Settlement Fund will be allocated to Authorized Claimants on a *pro rata* basis based on the relative size of their Recognized Claim, which weighs in favor of final approval. *See, e.g.*, *In re Aetna Inc. Sec. Litig.*, 2001 WL 20928, at *12 (E.D. Pa. Jan. 4, 2001) ("Courts [] generally consider plans of allocation that reimburse class members based on the type and extent of

their injuries to be reasonable.") (*citing In re Ikon Office Sols. Inc. Sec. Litig.*, 194 F.R.D. 166, 184 (E.D. Pa. 2000). Because the proposed Plan of Allocation does not provide preferential treatment to any Settlement Class Member, segment of the Settlement Class, or to Plaintiff, this factor further supports final approval of the proposed Settlement. *O'Hern*, 2023 WL 3204044, at *7 (finding plan of allocation where each class member would receive their *pro rata* share of the funds based on calculation of recognized losses "treats all class members equitably").[7]

E. The Other *Girsh* Factors Support Final Approval

The final two *Girsh* factors—the reaction of the settlement class and stage of the proceedings/amount of discovery completed—also militate in favor of final approval.

1. The Reaction Of The Settlement Class Favors Approval

"This factor requires the Court to evaluate whether the number of objectors, in proportion to the total class, indicates that the reaction of the class to the settlement is favorable." *In re Schering-Plough Corp. Enhance Sec. Litig.*, 2013 WL 5505744, at *2 (D.N.J. Oct. 1, 2013), appeal dismissed (Apr. 17, 2014). It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members. *See In re Orthopedic Bone*

[7] Plaintiff is separately applying to the Court for a service award for his time and efforts in representing the Settlement Class.

Screw Prods. Liab. Litig., 176 F.R.D. 158, 185 (E.D. Pa. 1997) (stating that a "relatively low objection rate militates strongly in favor of approval of the settlement").

Here, the Preliminary Approval Order established a detailed plan to provide notice to the Settlement Class, which Lead Plaintiff's Counsel and the Settlement Administrator followed. *See* Ex. 1 (Mailing Declaration). While the time to object to the Settlement has not passed, not a single Settlement Class Member has objected to, or requested exclusion from, the Settlement.[8] *Id*. at ¶¶10-11. The lack of objections and opt outs further supports the conclusion that the Settlement merits final approval. *See O'Hern*, 2023 WL 3204044, at *7 ("When there are many class members and few objectors, there is a strong presumption in favor of approving the class action settlement under the second *Girsh* factor.").

2. The Stage Of The Proceedings And The Amount Of Discovery Completed

"Courts in this Circuit frequently approve class action settlement despite the absence of formal discovery." *Ocean Power*, 2016 WL 6778218, at *17 (citing cases); *Yedlowski v. Roka Bioscience, Inc.*, 2016 WL 6661336, at *13 (D.N.J. Nov. 10, 2016) (same). This is because the relevant inquiry under the third *Girsh* factor

[8] The deadline to request exclusion from, or to object to any aspect of, the Settlement is November 16, 2023. If objections or requests for exclusions are received after the date of this filing, they will be addressed on reply.

is "whether Plaintiffs had an adequate appreciation of the merits of the case before negotiating settlement." *In re Wilmington Tr. Sec. Litig.*, 2018 WL 6046452, at *5 (D. Del. Nov. 19, 2018). As such, "[e]ven settlements reached at a very early stage and prior to formal discovery are appropriate when there is no evidence of collusion and the settlement represents substantial concessions by both parties." *Little-King v. Hayt Hayt & Landau*, 2013 WL 4874349, at *10 (D.N.J. Sept. 10, 2013) (Hammer, J.).

Here, discovery was initially stayed in substantial part in accord with the Court's rulings on February 22, 2022, and subsequent scheduling order. *See* ECF Nos. 23, 25. Following Judge McNulty's decision on UBS's motion to dismiss, Plaintiff pressed discovery, meeting and conferring with UBS concerning his requests for production, providing UBS with proposed ESI search terms, and issuing a document subpoena to FINRA. In advance of the Parties' November 17, 2022, mediation, Plaintiff obtained from UBS data reflecting its clients' relevant securities transactions, sufficient to allow Plaintiff to calculate class-wide damages.

In addition to the documents obtained in discovery, Plaintiff possessed substantial information with which to assess the merits of the case owing to his thorough pre-filing research that included, among other things: reviewing and analyzing publicly available information concerning UBS, including SEC filings and information from FINRA; researching relevant tax laws relating to the

reporting of amortizable bond premium; reviewing and analyzing documents UBS had previously provided to Plaintiff, including account opening documentation and annual tax forms; and interviewing a former UBS employee with first-hand knowledge of UBS's conduct at issue in this case.

Moreover, Plaintiff responded to UBS's motion to dismiss, had the benefit of this Court's decision on the motion to dismiss, consulted with a damages expert, and participated in a full-day mediation during which the Parties debated the merits of the Action, including damages. These steps, among others, gave Plaintiff a clear and realistic understanding of the value of the case. *See* ¶¶9-33; *see also Vaccaro v. New Source Energy Partners L.P.*, 2017 WL 6398636, at *5 (S.D.N.Y. Dec. 14, 2017) ("Although the action did not proceed to formal discovery . . . [t]he Court finds that Lead Plaintiffs were well-informed to gauge the strengths and weaknesses of their claims and the adequacy of the settlement.").

In sum, the Rule 23(e)(2) and *Girsh* factors support final approval of the Settlement.

IV. THE SETTLEMENT CLASS SHOULD BE FINALLY CERTIFIED

The Court's July 12, 2023, Preliminary Approval Order certified the Settlement Class for settlement purposes only under Fed. R. Civ. P. 23(a) and (b)(3). *See* ECF No. 60 at ¶1. There have been no changes to alter the propriety of class certification for settlement purposes. Thus, for the reasons stated in

Plaintiff's Preliminary Approval Brief (*see* ECF No. 54 at pp. 29-36), Plaintiff respectfully requests that the Court affirm its determinations in the Preliminary Approval Order certifying the Settlement Class under Rules 23(a) and (b)(3).

V. THE PLAN OF ALLOCATION SHOULD BE APPROVED

Approval of a "plan of allocation of a settlement fund in a class action is governed by the same standards of review applicable to approval of the settlement as a whole: the distribution plan must be fair, reasonable and adequate." *In re Par Pharm. Sec. Litig.*, 2013 WL 3930091, at *3 (D.N.J. July 29, 2013); *see also Walsh v. Great Atlantic & Pacific Tea Co. Inc.*, 726 F.2d 956, 964 (3d Cir. 1983) ("The Court's principal obligation is simply to ensure that the fund distribution is fair and reasonable as to all participants in the Fund"). To meet this standard, a plan of allocation recommended by experienced and competent class counsel "need only have a reasonable and rational basis." *Par Pharm.*, 2013 WL 3930091, at *8; *see In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005). Further, "a plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable." *In re Lucent Techs.*, 307 F. Supp. 2d at 649.

The proposed Plan of Allocation here is contained in the Notice that was emailed to potential Settlement Class Members and published on the case website. *See* Mailing Declaration, Ex. 1-C & ¶¶6, 8. Plaintiff's damages expert, in

consultation with Lead Counsel, developed the Plan of Allocation. The objective of the Plan of Allocation is to equitably distribute the Settlement proceeds to those Settlement Class Members who suffered economic losses as a proximate result of UBS's alleged wrongdoing. ¶¶57-65. The Plan of Allocation generally weighs the claims of Settlement Class Members against one another for the purposes of making *pro rata* allocations of the Net Settlement Fund. *See* ECF No. 55-1 at A-1 (Notice) at ¶¶34-36 (describing Plan of Allocation); ECF No. 55-3 (Nye Decl.).

The formula for determining each Authorized Claimant's Recognized Claim is based on Plaintiff's allegations, and reflects applicable IRS guidelines and Treasury Regulations, and the relevant Settlement Class Member transaction data produced by UBS. *See id.* Generally, the Plan of Allocation calculates a Recognized Claim for each Authorized Claimant based on the estimated amount of amortizable bond premium that Plaintiff alleges should have been reported to the Authorized Claimant with respect to their purchases of At-Issue Taxable Municipal Securities[9] during the Settlement Class Period (*i.e.*, between January 1, 2014 and December 31, 2019, inclusive). *See id*. Under the Plan of Allocation, the Net

[9] "At-Issue Taxable Municipal Securities" means Build America Bonds and certain other bonds created under the American Recovery and Reinvestment Act of 2009 (ARRA), consisting of TED (Tribal Economic Development Bonds); QZA (Qualified Zone Academy Bonds); QEC (Qualified Energy Conservation Bonds); QSC (Qualified School Construction Bonds); RZF (Recovery Zone Facility Bonds); RZE (Recovery Zone Economic Development Bonds); RZP (Recovery Zone Private Activity Bonds); and CRE (Clean Renewable Energy Bonds).

Settlement Fund is to be distributed to Authorized Claimants in proportion to their Recognized Claims. *See id.*

Lead Counsel believes that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Settlement Class Members who suffered losses as result of the conduct alleged in the Action, and should be approved by the Court. S*ee In re Schering-Plough Corp. Sec. Litig.*, 2009 WL 5218066, at *5 (D.N.J. Dec. 31, 2009) (approving plan of allocation in part because "it was fashioned by experienced class counsel"); *Harris v. U.S. Physical Therapy, Inc.*, 2012 WL 3277278, at *7 (D. Nev. July 18, 2012) ("Based on counsels' knowledge of the specific facts of this action, experience in settlements such as this, and opinion that the settlement is fair, reasonable, and adequate," this factor weighs in favor of granting approval of the settlement.). Furthermore, to date, no Settlement Class Members have objected to the Plan of Allocation, further supporting approval of the Plan of Allocation. The Court should, therefore, approve the Plan of Allocation. *See In re Innocoll Holdings Public Ltd. Co. Sec. Litig.*, 2022 WL 16533571, at *8 (E.D. Pa. Oct. 28, 2022) (finding the plan of allocation fair, reasonable, and adequate where the claim for each "class member's recognized loss is based on when the securities were purchased and sold" and where the "Settlement fund is then allocated *pro rata* based on the adjusted recognized loss.").

VI. CONCLUSION

For the reasons stated herein and in the Spencer Declaration, Plaintiff respectfully requests that the Court approve of the proposed Settlement and proposed Plan of Allocation as fair, reasonable, and adequate, and grant final certification of the Settlement Class.[10]

DATED: November 2, 2023

GLANCY PRONGAY & MURRAY LLP

By: */s/ Lee Albert*

Lee Albert (State Bar No. 26231986; LA-8307)
lalbert@glancylaw.com
230 Park Ave, Suite 358
New York, New York 10169
(212) 682-5340

Garth Spencer (*pro hac vice*)
gspencer@glancylaw.com
Joseph D. Cohen (*pro hac vice*)
jcohen@glancylaw.com
1925 Century Park East, Suite 2100
Los Angeles, California 90067
(310) 201-9150

Goodman Hurwitz & James, P.C.
William H. Goodman (*pro hac vice*)
bgoodman@goodmanhurwitz.com
1394 E Jefferson Avenue
Detroit, MI 48207
(313) 567-6170

[10] Proposed orders will be submitted with Plaintiff's reply papers, after the deadlines for objections and seeking exclusion have passed.

Attorneys for Plaintiff Richard Goodman and the Proposed Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2023, I caused the foregoing to be filed electronically with the Clerk of the Court using the ECF system, which will send notification of such filing to all parties.

Respectfully submitted,

November 2, 2023
Lafayette Hill, Pennsylvania

/s/ Lee Albert
Lee Albert