UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE MOODY'S CORPORATION SHAREHOLDER DERIVATIVE LITIGATION	Lead Case No. 1:08-cv-9323 (GBD) ECF ACTION (Derivative Action)
This Document Relates To: All Actions	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL APPROVAL OF DERIVATIVE ACTION SETTLEMENT, AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

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I. INTRODUCTION

Pursuant to Rule 23.1 of the Federal Rules of Civil Procedure, Plaintiffs, by and through their undersigned counsel, respectfully move the Court for final approval of the Settlement[1] as fair, adequate, reasonable, and in the best interests of Moody's Corporation ("Moody's" or the "Company") and its shareholders, and for approval of the requested award of attorneys' fees and the reimbursement of expenses.

In settlement of and as a result of the Derivative Claims and Derivative Actions, the Settling Defendants agree that Moody's has implemented or will adopt, enhance and/or maintain certain governance, internal control, risk management and compliance provisions reflected in Exhibit A to the Stipulation (the "Governance Provisions"). The Governance Provisions are designed to identify, monitor, and address legal, regulatory and internal compliance issues throughout the business and operations of Moody's Investors Service, Inc. ("MIS"), the credit rating agency operating subsidiary of the Company. Plaintiffs' Counsel believe that the Governance Provisions provide substantial benefits to Moody's and its shareholders that directly remedy the core claims asserted in the Derivative Actions.

In accordance with the Stipulation, the Company agrees to maintain its commitment to the implementation of the provisions set forth in Exhibit A for a period of not less than two years from the entry of the Judgment (the "Settlement Commitment Term"). The Settlement further provides that Moody's agrees that for the Settlement Commitment Term, it will commit from its treasury all funds as are necessary to implement and maintain the Governance Provisions.

[1] All capitalized terms used in this Memorandum, unless otherwise defined, shall have the same meaning as set forth in the Stipulation of Settlement filed in this action (Docket No. 24, the "Stipulation").

In their expert reports filed simultaneously with this Memorandum,[2] Plaintiffs' experts fully support and opine that the relief achieved under the Settlement provides substantial benefits to Moody's and its shareholders. Moreover, the proposed Settlement eliminates the risk of delay or non-recovery, as well as the uncertainty and expense of continued litigation.

For the reasons set forth herein, Plaintiffs respectfully request that the Court grant final approval of the proposed Settlement as fair, reasonable and adequate to Moody's and its shareholders, and approve the requested award of attorneys' fees and the reimbursement of expenses.

II. PROCEDURAL HISTORY

The procedural background of the Derivative Actions is set forth in detail in the Joint Declaration of Plaintiffs' Counsel in Support of Final Approval of the Proposed Settlement, Award of Attorneys' Fees and Reimbursement of Expenses (the "Joint Attorney Declaration" or "JAD"), filed herewith. In the interest of brevity, Plaintiffs respectfully direct the Court to that document for a more detailed discussion, and here provide a short summary for the Court's convenience.

The Derivative Actions are shareholder derivative actions brought for the benefit of nominal defendant Moody's against the Individual Defendants, who are current and former executive officers and directors of the Company. Plaintiffs' claims include breach of fiduciary duty, gross mismanagement, abuse of control, unjust enrichment, violations of the federal

[2] Plaintiffs file herewith expert reports by Professor Donald Langevoort, Mr. M. Douglas Watson, Jr., Mr. James Lam and Professor Joshua D. Coval. As detailed in the Joint Declaration of Plaintiffs' Counsel in Support of Final Approval of the Proposed Settlement, Award of Attorneys' Fees and Reimbursement of Expenses (the "Joint Attorney Declaration") filed herewith, plaintiffs retained these and other industry, governance and compliance and risk management experts based on their substantial experience and expertise in areas which were the focus of the Derivative Actions.

securities laws, waste of corporate assets and constructive fraud. *See* Stipulation, ¶ A.

On October 30, 2008, plaintiff LMPERS filed a shareholder derivative action in the Court, captioned *Louisiana Municipal Police Employees Retirement System v. Raymond W. McDaniel, Jr*., *et al.*, No 08-CV-9323, alleging that demand on the Board of Directors of Moody's (the "Board") was futile and, therefore, excused (the "Federal Demand Excused Action"). On November 3, 2008, plaintiff Sokolowski sent a shareholder demand to the Board (the "Sokolowski Demand Letter"), and in July 2009, filed a shareholder derivative action in the Court, captioned *W.A. Sokolowski v. McGillicuddy, et al*., No. 1:09-CV-6063, alleging wrongful refusal of the demand (the "Federal Demand Refused Action"). In June 2010, by Order of the Court (Document No. 17), the Federal Demand Excused Action and the Federal Demand Refused Action (collectively, the "Federal Court Actions") were consolidated under the caption *In Re Moody's Corporation Shareholder Derivative Litigation,* No. 1:08-CV-9323. *See* Stipulation, ¶ B.

Separately, two shareholder derivative complaints were filed in the Supreme Court of the State of New York, County of New York, Commercial Division (the "State Court").[3] On November 24, 2008, these plaintiffs filed a Consolidated Amended Shareholder Derivative Complaint (the "Demand Futile State Court Action"). In addition, by letter dated August 12, 2008, plaintiff Nadoff sent a demand letter under New York law to the Board (together with the Sokolowski Demand Letter, the "Demand Letters"). On December 8, 2008, plaintiff Nadoff filed a demand refused derivative complaint in the State Court, captioned *Nadoff v. McDaniel, et*

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[3] These actions were captioned *Brockton Contributory Retirement System v. McDaniel, Jr., et al.*, Index No. 601910/08 (N.Y. Sup. Ct. June 27, 2008) and *Flynn v. McDaniel, Jr., et al.*, Index No. 109175/08 (N.Y. Sup. Ct. July 2, 2008).

al., Index No. 116438/08 (N.Y. Sup. Ct. Dec. 8, 2008), alleging wrongful refusal of the demand (the "Demand Refused State Court Action," and collectively with the Demand Futile State Court Action, the "State Court Actions"). The Federal Court Actions and the State Court Actions, including the Demand Letters, are collectively referred to herein as the "Derivative Actions." *See* Stipulation, ¶ C.

Following intensive discussions among the parties, in June 2010, Plaintiffs and Moody's informed the Court of their agreement to a production, subject to Federal Rule of Evidence 408, of certain Moody's records, and, on a parallel track, the exploration of potential settlement of the claims. Pursuant to this process, Plaintiffs and Moody's undertook a series of meetings, including with certain Moody's personnel. In addition, commencing on July 15, 2010, Moody's provided Plaintiffs with certain Moody's documents, including internal custodial files of Moody's personnel relevant to the Company's credit rating production process during the relevant period and specifically to the area of structured finance. In total, Moody's produced a total of approximately six million pages of internal documents.

In consultation with their experts and based on their review and analysis of relevant information, including Moody's internal document production, Plaintiffs' Counsel developed governance, internal control, risk management and compliance proposals directed to both the board and management levels at Moody's, which Plaintiffs' Counsel provided to counsel for defendants in April 2011. Plaintiffs and Moody's, through counsel, thereafter entered into a period of intensive face-to-face and telephonic settlement discussions and meetings commencing in early July 2011, which included the exchange of detailed written settlement proposals. As a result of the litigation, arm's-length discussions and settlement negotiations, the Settling Parties

entered into the proposed Settlement, resulting in the execution of the Stipulation. *See* Stipulation, ¶ E.

III. THE GOVERNANCE PROVISIONS

The Governance Provisions provide for Moody's adoption of an integrated system of internal control and oversight focused on defined, quality-based Core Objectives. *See, e.g.*, Declaration of M. Douglas Watson, Jr. ("Watson Decl.") ¶¶ 12, 66; Declaration of Professor Donald Langevoort ("Langevoort Decl.") ¶¶ 26, 62, 70. Negotiated with input from Plaintiffs' corporate governance, risk management, corporate finance, and credit rating industry experts, these provisions are consistent with principles expressed in recognized frameworks for the evaluation of systems of governance, internal control, compliance, and risk management, including the "Internal Control – Integrated Framework," published in 1992 by the Committee of Sponsoring Organizations of the Treadway Commission on Fraudulent Financial Reporting ("COSO"), the COSO "Enterprise Risk Management – Integrated Framework" (2004), and the Federal Organizational Sentencing Guidelines ("OSG") Section 8B2.1(b), "Effective Compliance and Ethics Programs" standards. *See, e.g.*, Langevoort Decl. ¶¶ 19, 20, 23, 29-30, 35, 37-38, 41, 49, 56, 64 n. 26, 68-70. The Governance Provisions were designed and negotiated by Plaintiffs' Counsel with a view toward complementing and enhancing management and governance initiatives undertaken by Moody's in response to evolving regulatory mandates, and, in some cases, independently of those mandates.[4] The Governance Provisions are targeted to

[4] Plaintiffs discuss at Section III.A. of their Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Derivative Settlement (Document 23) the regulatory and internal Moody's initiatives undertaken in response to, *inter alia*, the financial crisis. Plaintiffs' counsel carefully reviewed and analyzed these regulatory and internal Company initiatives to assure the provisions of any proposed Settlement complemented, enhanced and added to these initiatives in ways that provided substantial benefit to Moody's and its shareholders.

address the core claims alleged in the Derivative Actions – breach of fiduciary duty for failure properly to manage and oversee the quality, integrity and independence of Moody's credit ratings – by requiring the implementation and maintenance of enhanced management and board level processes.

In the opinion of Professor Langevoort, Plaintiffs' corporate governance expert:

> [T]aken as a whole, the Settlement Terms represent an integrated set of board and management level improvements to Moody's pre-existing policies that can be expected, if implemented faithfully and with the commitment of Moody's board and management, to contribute materially to the fostering, enhancement and maintenance of (a) a credit ratings quality-focused culture at Moody's and (b) a system of governance, internal control, risk management, and compliance reasonably designed to promote the best realizable achievement of the quality-based Core Objectives that form the foundation of the Proposed Settlement."

Langevoort Decl. ¶ 70. Professor Langevoort concludes that "the Settlement Terms, taken as a whole, if faithfully implemented by Moody's, offer substantial benefits to Moody's and its shareholders," *id.*, and "because the proposed Settlement terms can be expected to foster the best possible achievement of the key credit rating quality goals set forth in the Core Objectives , . . . a benefit to the public." *Id.* ¶ 71. *See also* Watson Decl. ¶ 66 ("Assuming that this system is implemented with fidelity, it will create substantial benefits not only for Moody's and its shareholders, but also for the users of Moody's credit ratings"); Declaration of James Lam ("Lam Decl.") ¶ 60 ("the proposed Settlement will provide substantial organizational and financial benefits to Moody's and its shareholders, as well as additional benefits, in the form of improvements in the quality of Moody's credit ratings, to the financial market professionals who utilize them").

See also Langevoort Decl. ¶¶ 13-16, 21 n.12, 24 n.14, 27, 29 n.17, 34 n.18 and 37 n.19.

A. The Core Objectives

The Governance Provisions begin with the Core Objectives, set forth in Section 1(a), which serve as a foundation for the proposed Settlement. *See, e.g.,* Langevoort Decl. ¶¶ 17-18, 20-21, 68; Watson Decl. ¶ 13. The Core Objectives inform every aspect of the agreements Moody's has made concerning the key functional units of its credit rating business, including the Ratings Group (responsible for the production, monitoring and maintenance of ratings), the Credit Policy Group (a quality-focused group independent of the Ratings Group business lines), Compliance, and Internal Audit functions, as well as board-level reporting by the senior officers of these functions. They focus the Settlement on the key elements of credit rating and analytical quality. *See, e.g.*, Langevoort Decl. ¶ 17; Watson Decl. ¶ 30. Commercial objectives are excluded from the Core Objectives, thus establishing the primacy of the quality goals advanced by the Settlement. *See, e.g.*, Watson Decl. ¶15; Lam Decl. ¶ 19.

Core Objectives pertaining to credit rating quality include predictive quality, timeliness of evaluation, insightfulness, and transparency. These ratings-quality objectives are essential to the utility of Moody's credit ratings to their users. *See, e.g.*, Declaration of Professor Joshua D. Coval ("Coval Decl.") ¶¶ 6, 8, 13; Watson Decl. ¶¶ 17, 20, 23. Core Objectives pertaining to the analytical process used by Moody's to produce and maintain its credit ratings include independence, rigor, professional skepticism, credit judgment and integrity. These quality objectives form the foundation of a professional culture that holds credit ratings quality as an ethical imperative. *See, e.g.*, Watson Decl. ¶¶ 26-30; Langevoort Decl. ¶¶ 19, 68. Moreover, including independence, rigor, professional skepticism, and credit judgment in the Core Objectives should also foster an atmosphere promoting open discussion and debate among

analytical personnel, thereby maximizing Moody's intellectual capital resources in the pursuit of the credit rating quality objectives embodied in the Core Objectives. *See, e.g.*, Watson Decl. ¶ 28.

Establishing a set of core objectives to serve as the foundation of a quality-focused Settlement is consistent with recognized best practices standards for corporate internal controls and risk management. As Professor Langevoort observes:

> Anchoring the settlement on a set of ratings quality focused Core Objectives is consistent with the standards found in the COSO Internal Control Framework and the COSO Risk Management Framework. At the foundation of any system of internal control must be an identification of objectives and an assessment of risks to their accomplishment. *See generally*, COSO "Internal Control – Integrated Framework," ("COSO Framework") (1992) at pp. 15-18, 33-48; COSO "Enterprise Risk Management Framework," ("ERM Framework") (2004) at pp. 35-54. The new COSO Exposure Draft emphasizes the fundamental importance of objective setting to internal control, describing appropriate objective setting, requiring well-articulated, "specific, measurable, attainable, relevant, and time-bound objectives," as a prerequisite of internal control: "As part of internal control, management specifies objectives that have been set so that risks to the achievement of those objectives can be identified and assessed." COSO Exposure Draft at p. 6.

Langevoort Decl. ¶ 20. The result of intensive negotiation, each word of the Core Objectives was carefully vetted by both counsel and Plaintiffs' corporate governance, finance, and credit rating industry experts to ensure that every essential element of credit rating and analytical quality was present in this initial, foundational provision of the settlement relief. The Core Objectives reflect Plaintiffs' principle goal in the proposed Settlement of obtaining settlement terms that address the core claims in the Derivative Actions, and provide a substantial benefit to Moody's and its shareholders through governance, internal control, risk management, compliance and board oversight provisions designed to foster the best possible achievement of credit rating quality.

Although components of the Core Objectives could be found in various Moody's public documents, including documents published prior to the financial crisis, here, as reflected in the hard-fought negotiation of these terms, Moody's agreement to adopt the Core Objectives as part of a court ordered settlement is a critical initiative.[5] The formal adoption by the Company of the Core Objectives, coupled with the commitment to their communication, as discussed below, from the highest reaches of the Company, their embedding in the roles and responsibilities of the key management personnel driving ratings quality and their use as a basis for an additional key set of reporting obligations to the Board, provide mechanisms necessary to ensure implementation of the Core Objectives even when confronted by powerful market pressures. *See, e.g.*, Langevoort Decl. ¶ 62.

B. Leadership Communication to Foster Corporate Culture

Section 1(b) provides for a program of leadership communications to help foster a corporate culture focused on the Core Objectives. Moody's Chief Executive Officer, the MIS Chief Operating Officer ("MIS-COO"), and MIS's Chief Credit Officer will each annually communicate to all MIS employees the importance of one or more of the Core Objectives. These communications will refer to "the Core Objectives," may be tailored to emphasize one or more key elements deemed relevant to current events and circumstances, and shall include a hyperlink to the Core Objectives on Moody's internal website. This provision will help to assure the leadership "tone at the top" crucial to reinforcing the primacy of Moody's quality-focused Core Objectives. *See, e.g.*, Lam Decl. ¶ 20; Watson Decl. ¶ 31. The importance of fostering a

[5] The negotiation was intensive on both sides, Plaintiffs believe, because not only would the Core Objectives provide an integrated statement of ratings quality standards, but the Core Objectives would also be reflected in a proposed stipulation of settlement submitted to the Court and which Moody's would commit to implement during the Settlement Commitment Term.

quality-focused corporate culture through such a program of leadership communications is underscored by Plaintiffs' corporate governance expert, Professor Langevoort, who observes that while "[o]fficial policies specify what the board and management want to happen," "[c]orporate culture determines what actually happens, and which rules are obeyed, bent, or ignored." Langevoort Decl. ¶ 23 (quoting COSO ERM Framework at p. 30).

C. Management Roles and Responsibilities Provisions

1. MIS Ratings Group. Section 2 explicitly embeds the Core Objectives into the management roles and responsibilities of MIS's Ratings Group, the functional group directly responsible for producing Moody's ratings. Under Section 2(a), the MIS-COO "plays a leadership role in facilitating the Ratings Group's achievement of the Core Objectives," Section 2(a)(i), and, in furtherance of the Core Objectives, undertakes to promote: (1) the issuance of insightful, independent, rigorous, transparent and timely evaluations of the creditworthiness of debt and debt-like securities; (2) the publication of insightful research on the credit risk of debt and debt-like securities; (3) appropriate levels of investment in human capital and other resources; and (4) appropriate training and professionalism of all Moody's credit ratings production personnel. *See* Section 2(a)(ii). Plaintiffs concluded from their investigation that each of these four components was and is an area of critical importance for Moody's, and they are where Plaintiffs focused their efforts in crafting and negotiating the Settlement. In practice, this means that, with the Core Objectives as the central guidepost, the MIS-COO must promote:

- the issuance and maintenance of timely and accurate credit ratings through independent, rigorous and timely processes and methodologies;
- the publication of rating research and other targeted publications supplementary to Moody's credit ratings, that will provide to the market a clear, well-articulated

basis for its rating opinions, and add a perspective otherwise not generally understood, or fully appreciated by investors and other market professionals;

- sufficient investment in appropriately trained and experienced analytical manpower and supporting IT systems, and appropriate allocation of these resources, to consistently produce and maintain accurate credit ratings on a timely basis; and

- professional ethical commitment to, and realization of, the quality, independence and integrity goals reflected in the Core Objectives, supported by sufficient technical and ethical training, by all levels of the Ratings Group hierarchy, including senior managers, middle management, and credit rating analysts.

Under Sections 2(b) and (c), each subordinate Ratings Group manager will, within his or her area of authority, have the same responsibilities as the MIS-COO. In addition to requiring promotion, in furtherance of the Core Objectives, of these matters, Section 4(a) makes the MIS-COO accountable to report, as discussed below, to the MIS Committee of Moody's Board specifically regarding pursuit of the Core Objectives in each of these areas, ensuring the information flow with respect to ratings quality is delivered directly to the Board.

These provisions, which establish and clearly delineate roles, responsibilities, authority and accountability with respect to the ratings quality based goals of the Core Objectives, are:

> consistent with both the COSO Frameworks and the OSG. For example, the COSO Internal Control Framework states that a key component of the internal control element "Control Environment" is the definition of key areas of authority and responsibility as they relate to corporate objectives: "This includes assignment of authority and responsibility . . . . Another challenge is ensuring that all personnel understand the entity's objectives. It is essential that each individual knows how his or her actions interrelate and contribute to achievement of the objectives." COSO Internal Control Framework at pp. 28-29. *See also* COSO ERM Framework at 32.

Langevoort Decl. ¶ 46. Moreover, as explained by Professor Langevoort:

> Extending the requirement of leadership with respect to pursuit of the Core Objectives to Ratings Group managers subordinate to the MIS-COO – those in charge of the business lines and important business line subgroups – is especially

> important. Just as the MIS-COO is responsible for leadership and "tone at the top" concerning pursuit of the Core Objectives within the Ratings Group, these subordinate managers must through their leadership set a "tone in the middle" that is consistent with the "tone at the top." By requiring that each manager subordinate to the MIS-COO "plays a leadership role in facilitating achievement of the Core Objectives," within his or her respective sphere of authority, the Proposed Settlement will help to foster a credit ratings quality-based corporate and professional culture that extends effectively from the top of the organization through and across the Ratings Group management hierarchy and into the ranks of the professional credit rating analysts who perform the credit analysis supporting Moody's credit ratings.

Langevoort Decl. ¶ 45.

Sections 2(d) and (e) extend these management roles and responsibilities to Moody's U.S. Structured Finance Monitoring division, the only Ratings Group subunit specifically treated in the Governance Provisions. Plaintiffs sought and obtained specific treatment of this subunit based on their view of its importance and the input of their credit rating industry experts.[6] The structured finance surveillance function is crucial to Moody's timely maintenance of accurate structured finance ratings. This function is charged with monitoring and maintaining the predictive quality of tens of thousands of outstanding Moody's structured finance credit ratings, each of which is dependent upon the performance of a collateral pool typically containing hundreds of amortizing assets. This is no small challenge. *See, e.g.*, Watson Decl. ¶ 37. In view of these considerations, the Settlement's specific focus on embedding the Core Objectives within management responsibilities of this subunit itself represents an important benefit to Moody's, its shareholders, and users of Moody's structured finance credit ratings. *See, e.g.*, Langevoort Decl.

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[6] *See, e.g.*, Watson Decl. ¶ 21 ("For structured finance, timely updates may be even more important than accuracy of the initial rating, because after the initial rating, when credit analysis is necessarily more speculative because the collateral pool has no performance history, the actual performance history of the collateral pool emerges over time. Actual collateral pool performance history provides a far less speculative basis upon which to base the credit rating of the securities that depend on the cash flows from the collateral pool.").

¶¶ 50-51.

2. MIS Credit Policy Group. Section 3 addresses the roles and responsibilities of MIS's Credit Policy Group. The Credit Policy function, with "centralized oversight responsibility" for overseeing rating quality and "reviewing and approving new or revised methodologies and rating policies,"[7] has existed at Moody's since at least 1997.[8] The Governance Provisions build on Moody's efforts to enhance the independence, function, and board-level reporting of the MIS Credit Policy Group by embedding focus on the Core Objectives within its roles and responsibilities, and by establishing the Chief Credit Officer's accountability to report to the MIS Committee of the Moody's Board regarding the Credit Policy Group's efforts directed toward achievement of the Core Objectives, including efforts to achieve the Core Objectives through each of the specific activities of the Credit Policy Group listed in the Governance Provisions, as well as reporting on *ex post* performance of Moody's credit ratings (*see* discussion, *infra*). Section 3 of the Governance Provisions functions to embed the Core Objectives in the Credit Policy Group's roles and responsibilities, thus providing the benefit, within the Credit Policy Group and particularly in the case of the Chief Credit Officer, of clearer delineation of roles and responsibilities, authority and accountability with respect to the Core Objectives. *See, e.g.*, Langevoort Decl. ¶ 56. By doing so, Section 3 also establishes the foundation for the Chief Credit Officer reporting requirements that follow in Section 4.

Pursuant to Section 3(a), the Credit Policy Group's purpose will include promoting the "achievement by MIS of the Core Objectives." Section 3(b) provides that "in furtherance of the

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[7] Moody's Report on the Code of Professional Conduct (April 2006) at pp. 3-4, 6.

[8] *Id.* at p. 4.

Core Objectives," the Credit Policy Group is responsible for: (1) conducting research on the performance of MIS Credit Ratings; (2) reviewing and approving MIS methodologies and models, and significant changes thereto; (3) overseeing various internal credit committees that formulate high-level rating policies and practices for each of the rating groups within MIS; and (4) promoting rating quality and consistency by its involvement in portfolio reviews of credits by sector or region and in broad discussions to reassess views on sectors and asset classes, and by participation of credit policy officers in rating committees." Section 3(c) states that Moody's Credit Policy Committee ("CPC"), a senior-level committee consisting of MIS's Chief Credit Officer and other Credit Policy Group officers, with input from nonvoting members from the Ratings Group, annually reviews the major methodologies and rating models MIS uses, and significant changes thereto. Finally, Section 3(d) provides that the Credit Policy Group will review new financial products that are materially different from the products MIS has rated in the past to determine the feasibility of providing a credit rating.[9]

By specifically providing for focus on the Core Objectives in the performance of these functions, Section 3 "aligns the Credit Policy Group with the overall ratings quality goals established in the Settlement Terms." Langevoort Decl. ¶ 56. This focus enhances the value of the Credit Policy Group's functions as critical components in Moody's pursuit of ratings quality. For example, with respect to the Credit Policy Group's responsibility for reviewing the feasibility of providing a credit rating for new financial products, Plaintiffs' credit rating industry

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[9] With the exception of Section 3(c)'s requirement that the CPC annually review major methodologies and changes thereto, which was obtained by Plaintiffs through the settlement negotiations, the listed responsibilities are not a product of the Settlement, but instead, in some cases (*e.g.*, methodology approval, credit research) have existed for many years, as discussed *supra*. Section 3 embeds a focus on the Core Objectives within all of these functions, both to align the Credit Policy Group with the central objectives of the Settlement, and to establish a basis for focus on the Core Objectives in the Chief Credit Officer's reporting, under Section 4, to the MIS Committee.

expert, Mr. Douglas Watson, observes that "new financial products may present analytical challenges and/or issues relating to the availability of sufficient information to produce and maintain high quality ratings," and states that adoption of the Core Objectives and embedding them in Credit Policy Group roles and responsibilities will have a beneficial effect on such feasibility reviews, because the Credit Policy Group will be called upon to "balance the overarching Core Objective of promoting global capital market efficiency with the Core Objectives of producing timely rating opinions having high predictive quality" and that "the feasibility of providing credit ratings for new financial products will necessarily be viewed in terms of the Core Objectives separate and apart from consideration of commercial objectives." Watson Decl. ¶ 42. Mr. Watson concludes that "[t]he practical effect of adoption of the Core Objectives on such feasibility reviews is an important benefit of the Settlement terms not only to Moody's, but also to users of MIS's credit ratings for new types of financial instruments." *Id.* *See also* Langevoort Decl. ¶ 57.

D. Board Level Reporting Provisions

Building on the foundation established by the previous sections, Section 4 provides for additional board-level reporting designed to form an integrated information and reporting system focusing on the Core Objectives. *See* Langevoort Decl. ¶ 26; *see also* Watson Decl. ¶ 66. Section 4 establishes a system providing for specific reporting to the MIS Committee of the Moody's Board from senior officers in four separate, independent functions, all centered on the Core Objectives set forth in Section 1, and embedded in key management roles and responsibilities in Sections 2 and 3. *See* Lam Decl. ¶ 31.

Section 4(a)(i) provides that the MIS-COO will report at least annually to the MIS

Committee of the Moody's Board regarding ongoing efforts of the Ratings Group directed towards achievement of the Core Objectives, including the matters listed under the Settlement as the MIS-COO's responsibilities, as described above. Under Sections 4(a)(i) and 2(a)(ii)(3), for example, the MIS-COO will be accountable to report to the MIS Committee regarding whether the Ratings Group has made "appropriate levels of investment in human capital and other resources," such as IT resources, to effectively pursue the Core Objectives of "predictive, high quality ratings" and "timely evaluation" in its critical role of monitoring outstanding credit ratings to maintain their current accuracy. Plaintiffs' credit rating industry expert, Douglas Watson, views the MIS-COO's responsibility "for furthering the Core Objectives by promoting appropriate resource allocation to achieve the Core Objectives, both in terms of IT and human capital resources, and for development of human capital resources through appropriate training and professionalism" as "particularly important." Watson Decl. ¶ 35.

Section 4(a)(ii) requires the MIS-COO to also report at least annually regarding "ongoing efforts of the Ratings Group to develop policies, procedures and methodologies that are reasonably designed to achieve the production and maintenance of high quality, predictive credit ratings on a timely basis." This provision is crucial, as Plaintiffs' credit rating industry expert, Mr. Watson, observes:

> Th[e] language [of Section 4(a)(ii)] emphasizes two crucial quality issues – the predictive quality, or accuracy, of Moody's credit ratings, and the timeliness with which they are produced and maintained. Thus, the MIS-COO is responsible for reporting to the MIS Committee the Rating's Group's ongoing efforts to develop policies, procedures, and methodologies reasonably designed to produce accurate ratings that will be maintained, through the Ratings Group's monitoring (sometimes called surveillance) function, on a timely basis.

Watson Decl. ¶ 45. Plaintiffs' risk management expert, James Lam, finds Section 4(a)(ii) to be

crucial from a risk management standpoint because:

> [I]t requires forward-looking reporting that will focus on the risks and challenges faced by Moody's in achieving the central credit rating quality attributes embodied in the Core Objectives – credit rating accuracy and timeliness – and how the Ratings Group is addressing those challenges and risks through the ongoing development of appropriate, reasonably designed policies, procedures and credit rating methodologies.

Lam Decl. ¶ 33. Professor Langevoort opines that, "consistent with COSO principles, [the reporting required by Section 4(a)(ii) will provide] the Moody's Board . . . with forward-looking information to support its oversight of the Ratings Group's risk assessment and risk response relating to Moody's key credit ratings quality objectives," and concludes that "[s]uch input will form an important basis for Moody's efforts to achieve the Core Objectives." Langevoort Decl. ¶ 29. Importantly, by bringing to the Moody's Corporation Board information concerning the reasonable design of Moody's credit rating methodologies, Section 4(a)(ii) requires Moody's to take a significant step beyond the requirements of current laws and regulations. *See, e.g.*, Langevoort Decl. ¶ 29 n. 17.

Section 4(b)(i) provides that the Chief Credit Officer will report to the MIS Committee at least annually regarding ongoing efforts of the Credit Policy Group directed toward achievement of the Core Objectives, including the matters listed under the Settlement as the specific responsibilities of the Credit Policy Group. For example, under this provision, the Chief Credit Officer would be accountable to demonstrate to the MIS Committee the Credit Policy Group's pursuit of the Core Objectives through: (1) its credit rating methodology review and approval function, (*cf.* Section 3(b)(ii)); and (2) its new financial product rating feasibility review function. Such reporting complements the reporting required from the MIS-COO under Section 4(a), *see, e.g.*, Lam Decl. ¶ 35, and "provides to the MIS Committee an additional, important

source of information relevant to credit rating quality, independent of that provided by the Ratings Group through the MIS-COO's required reporting." Watson Decl. ¶ 46.

Section 4(b)(ii) provides that the Chief Credit Officer will report at least annually to the MIS Committee regarding credit rating performance, broken down by business line, or, to the extent appropriate, sub-groups within each line of business, measured by reasonable and appropriate metrics, examples of which are listed. This reporting is consistent with the Credit Policy Group's responsibility, in furtherance of the Core Objectives, to "conduct[] research on the performance of MIS credit ratings." Section 3(b)(i). According to the expert reports of Mr. Watson, and Plaintiffs' corporate finance expert, Professor Coval, such ratings performance information provides important, outcomes-based indications of the extent to which Moody's is meeting its key substantive ratings quality goals, as reflected in the Core Objectives, within relevant sub-groupings of its credit ratings business. *See, e.g.*, Watson Decl. ¶¶ 48-49; Coval Decl. ¶¶ 15-25.[10] Professor Langevoort observes that such information is "crucial for the oversight of Moody's efforts to achieve the Core Objectives," Langevoort Decl. ¶ 35, and adds that such reporting is "consistent with COSO and OSG recognition of the importance of robust and well-informed board oversight of the effectiveness of internal controls directed toward the achievement of important corporate objectives." *Id.* James Lam, Plaintiffs' risk management expert, notes that:

The combined requirements of ex-post (backward-looking) measurement of credit

[10] Professor Coval discusses the metrics listed in Section 4(b)(ii) in detail, explaining how they provide key information regarding ordinal accuracy (how well the ratings rank ordered securities by relative risk of default or loss), cardinal accuracy (how well the ratings predicted actual default and loss levels), and timeliness (how well the monitoring function performed in producing updates to maintain the current accuracy of the ratings). *See* Coval Decl. ¶¶ 15-25. Professor Coval concludes that "[t]he examples of credit rating performance metrics listed in the Settlement terms at Section 4(b)(ii) . . . constitute a reasonable set of metrics for reporting credit rating performance to the Moody's Board of Directors." Coval Decl. ¶ 25.

> rating accuracy and ex-ante (forward-looking) reporting concerning efforts to develop reasonably designed credit rating policies, procedures and methodologies, required from the MIS-COO under Section 4(a)(ii) . . . provide a powerful feedback loop on credit rating quality and performance" that "will provide substantial benefits to Moody's by facilitating continuous improvement in ratings accuracy."

Lam Decl. ¶ 36.

Under Section 4(c), the MIS Designated Compliance Officer for the United States ("US DCO") must report at least annually to the MIS Committee regarding ongoing efforts of the Compliance Department directed toward achievement of the Core Objectives, and the US DCO's annual report concerning MIS's compliance during the prior calendar year with MIS's policies and procedures that relate to ratings-related activities and relevant securities laws and regulations. As required under the Dodd-Frank Act, the MIS compliance function will perform, *inter alia*, a monitoring function designed to track and evaluate compliance with ratings-related internal policies, procedures and methodologies, many of which have important quality implications. *See, e.g.*, Langevoort Decl. ¶¶ 36-38. Section 4(c) goes beyond the requirements of existing law, the MIS Code of Professional Conduct, the MIS Committee Charter, and the Moody's Audit Committee Charter by: (1) requiring the US DCO to report directly to the MIS Committee of the Moody's Board at least annually; (2) establishing the accountability of the US DCO to report directly to the MIS Committee of the Moody's Board regarding efforts of the Compliance Department directed toward achievement of the Core Objectives, *see, e.g.*, Langevoort Decl. ¶ 38; and, (3) requiring the US DCO to report directly to the MIS Committee of the Moody's Board regarding the US DCO's annual report concerning MIS's compliance during the prior calendar year with MIS's policies and procedures that relate to ratings-related activities and relevant securities laws and regulations (which annual report is required under the

Dodd-Frank Act, but is not required under the law to be reported to the Board). *Id.* ¶ 37.

Professor Langevoort notes that:

> The proposed Settlement's addition of a requirement that the US-DCO report directly to the MIS Committee is consistent with the OSG, which specifically addresses the need to assure that managers with compliance responsibilities report periodically to the board on compliance and ethics issues, and be granted "direct access" to the board or relevant committee. §8B2.1.(b)(2)(C).

Langevoort Decl. ¶37.[11] Further, Professor Langevoort elaborates the important effects of Section 4(c)'s requirement that the USDCO report to the MIS Committee specifically concerning the Compliance Department's efforts to achieve the Core Objectives:

> [I]n keeping with the Settlement's focus on credit rating quality, Section 4(c) adds to the US-DCO's responsibilities the accountability to report to the MIS Committee concerning the Compliance Department's ongoing efforts toward achievement of the Core Objectives. This reporting requirement will require the US-DCO to ensure that the credit rating quality-based Core Objectives are internalized within the Compliance Department's function in a manner that will support the US-DCO's demonstration to the MIS Committee that the Compliance Department is, in fact, engaged in ongoing efforts to support Moody's achievement of these objectives. . . . The US-DCO's reporting to the MIS Committee will thus not only add an additional, independent channel of information to the Committee, but will drive a focus on credit rating quality throughout the MIS Compliance Department. Both of these effects will contribute significantly to the substantial benefit to Moody's and its shareholders from the Settlement Terms.

Langevoort Decl. ¶ 38.

Section 4(d)(ii) requires the Head of Internal Audit to report at least annually to the MIS Committee concerning, *inter alia*, ongoing efforts of the Internal Audit Department directed toward achievement of the Core Objectives, ongoing efforts to test key internal controls surrounding MIS's ratings process, and the audit process. Section 4(d)(i) addresses reporting to

[11] *See also* COSO, "Guidance on Monitoring Internal Control Systems" Vol. 1 ¶ 19 (2009), and Vol. 2 ¶¶ 34-36.

the Audit Committee, also requiring the Head of Internal Audit to report at least quarterly to the Audit Committee concerning, *inter alia*, ongoing efforts directed toward achievement of the Core Objectives. This new Audit Committee reporting requirement goes beyond previously existing internal audit function reporting requirements set forth in Moody's Audit Committee Charter and Internal Audit Charter by establishing the accountability of the Head of Internal Audit to report to the Audit Committee on a quarterly basis regarding efforts of the internal audit function relating to the Core Objectives. Because the Audit Committee consists of all of Moody's independent directors, and, as of 2012, the MIS Committee consists of all of the directors (with the CEO being the only non-independent member),[12] "in effect this new quarterly reporting requirement creates a quarterly executive session of the independent members of the MIS Committee, with quarterly focus on the Internal Audit Department's independent assurance role with respect to the Company's pursuit of the Core Objectives." Langevoort Decl. ¶ 40. In practical terms, this requirement means that *every quarterly meeting* of the Audit Committee with the Head of Internal Audit must include reporting regarding the Internal Audit Department's activities relating to the Core Objectives, for example a status update regarding testing or evaluation of ratings-related internal controls, the progress and results of such audits, and follow up on implementation progress with respect to internal audit recommendations.

These new Internal Audit reporting provisions "represent an important enhancement to Moody's board-level responsibilities with respect to the Company's pursuit of the quality goals embodied in the Core Objectives," and comport "with recognition by the COSO Frameworks of the important role that an effective Internal Audit function can play in monitoring and evaluating

[12] *See* Moody's Proxy Statement filed March 6, 2012, at page 5.

internal controls and the value of the resulting independent assurance to the oversight role of the board of directors." Langevoort Decl. ¶ 41; *see also* Lam Decl. ¶ 40 ("Section 4(d) provides a fourth channel of information, independent of the other three, to the Moody's Board concerning the Company's efforts to achieve the quality-focused Core Objectives.").

While the Core Objectives serve as the foundation for the proposed Settlement, the enhanced board-level reporting provisions, tied to the Core Objectives, will serve to focus the Board on the credit rating quality goals stated therein. These board-level reporting requirements provide for separate information channels, setting the stage for multiple information flows to the Moody's Board concerning the multiple "lines of defense" directed towards the effective identification, assessment, and management of risks to achievement of the credit ratings quality goals embodied in the Core Objectives. *See, e.g.*, Lam Decl. ¶ 41; Langevoort Decl. ¶ 62. Such reporting not only provides the substantial benefit of keeping the Board well-informed, but the accountability of each of the MIS-COO, the Chief Credit Officer, the US-DCO, and the Head of Internal Audit to report to the Moody's Board regarding each of their efforts directed at achievement of the quality goals embodied in the Core Objectives will motivate sustained attention and focus on credit rating quality at the management and employee levels. *See, e.g.*, Watson Decl. ¶ 43 ("Board-level reporting focusing on the Core Objectives emphasizes accountability for their pursuit and achievement in a real and tangible way for the senior officers who are required to report to the MIS Committee"); Lam Decl. ¶ 38 ("Attention and scrutiny at the board-level generally leads to higher levels of attention and focus at the management and employee levels").

E. Section 5 of the Governance Terms

Section 5 describes conflict of interest and compensation provisions adopted by Moody's. Section 5(a) describes the separation of Moody's credit rating business and non-credit rating business into separate subsidiaries. Section 5(b) describes the operational segregation of analytical functions within Moody's credit rating business from commercial functions. Section 5(c) describes the role of Moody's independent Credit Policy Group in mitigating potential commercial influences on the rating process. Section 5(d) describes several compensation provisions: (1) MIS Rating Personnel are not compensated or evaluated on the basis of the amount of revenue that MIS derives from the issuers they rate or with which they regularly interact;[13] (2) compensation of MIS Rating Personnel in the Credit Policy Group and Compliance personnel with responsibility solely for MIS compliance is not linked either to MIS's or Moody's financial performance, with limited exceptions; (3) Moody's 2010 change to a system of equity-based incentive compensation for senior management that "uses accuracy ratios as part of performance share awards ["PSAs"] for certain members of management;"[14] and (4)

[13] This policy is not new. It has existed at Moody's at least since the adoption of the original version of the MIS Code of Professional Conduct in June 2005. *See* MIS Code of Professional Conduct (June 2005), Section 2.11 ("Analysts will not be compensated or evaluated on the basis of the amount of revenue that Moody's derives from Issuers that the Analyst rates or with which the Analyst regularly interacts"). It was adopted by Moody's from the original International Organization of Securities Commissions' ("IOSCO") Code of Conduct Fundamentals for Credit Rating Agencies (the "IOSCO Code"), and has since been adopted as a mandatory regulatory requirement for Credit Rating Agencies operating in the EU. *See* REGULATION (EC) No 1060/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 September 2009 on credit rating agencies, Article 7.3. ("Compensation and performance evaluation of rating analysts and persons approving the credit ratings shall not be contingent on the amount of revenue that the credit rating agency derives from the rated entities or related third parties"). The existence of this policy is recited in Section 5 because it is one of the compensation-related policies applicable at Moody's designed to mitigate the risk of commercial influences on the rating process, and therefore is a part of the integrated set of policies designed to protect rating quality that will exist at Moody's in the event that the proposed Settlement is approved.

[14] In 2010, Moody's redesigned its equity-based incentive compensation to include a mix of 60% Performance Share Awards ("PSAs") and 40% options; formerly Moody's equity-based incentive compensation was

Moody's agreement, pursuant to the Settlement, to "evaluate the use and efficacy of accuracy ratios as part of performance share awards periodically in order to assess whether they should be extended to other employees or other groups."

With the exception of Moody's agreement to periodically evaluate extension of the accuracy-based PSAs, the provisions of Section 5 were adopted by Moody's outside the context of the proposed Settlement. They are recited in Section 5 because they are a part of the integrated set of policies designed to protect rating quality that will exist at Moody's in the event that the proposed Settlement is approved, and which must be maintained for the Settlement's two year commitment period (see discussion below). These provisions "will complement the integrated system of quality-focused internal control, risk management, compliance and board-level reporting to be established under Sections 1 through 4 of the proposed Settlement Terms." Langevoort Decl. ¶ 69. Moody's agreement, pursuant to the Settlement, to periodically evaluate extension of the accuracy-based PSAs provides a benefit to Moody's and its shareholders "by requiring focused evaluation of the efficacy of the incentive for accuracy and the desirability of its extension to additional employees and functions, thereby increasing the likelihood that the explicit linkage of credit rating accuracy to compensation will extend to other employees and groups over time." Lam Decl. ¶ 47. Moreover, "this process of evaluation will naturally enhance the focus and depth of the annual accuracy goal setting and evaluation processes necessitated by the accuracy-based PSAs, so as to include evaluation of efficacy and the desirability of extension." *Id.*; *see also* Langevoort Decl. ¶ 67; Watson Decl. ¶ 64.

100% options. The PSA's are structured so that their ultimate pay-out value is determined by the achievement of pre-defined performance factors over the three-year period following their grant. For PSA participants with MIS-related duties, Moody's included a ratings quality-based performance factor for the PSAs (along with a financial performance-based metric).

F. Two Year Commitment Period and Funding Commitment

The Company has agreed to maintain its commitment to the effective implementation of the provisions set forth in Exhibit A for a two year period from the Effective Date of the Settlement, the Settlement Commitment Term. In addition, the Settlement provides that during the Settlement Commitment Term, Moody's will commit from its treasury the funds necessary to implement the Governance Provisions. These provisions ensure that the Governance Provisions will be mandated for a sufficient period to produce a lasting effect on Moody's internal control, risk management, compliance, and Board reporting practices, and will be supported by the funding necessary to their effective implementation. *See, e.g.*, Langevoort Decl. ¶ 70.

IV. ARGUMENT

A. The Applicable Legal Standard

Pursuant to Rule 23.1 of the Federal Rules of Civil Procedure, a settlement of a shareholder derivative action requires court approval, a decision left to the sound discretion of the Court. *See Strougo v. Bassinni*, 258 F. Supp.2d 254, 257 (S.D.N.Y. 2003). In making this decision, "the district court must 'carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not a product of collusion.'" *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 336 (S.D.N.Y. 2005) (quoting *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001)). *See also Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000) (same). This evaluation necessarily includes consideration of whether "the compromise fairly and adequately serves the interests of the corporation on whose behalf the derivative action was instituted." *In re AOL Time Warner S'holder Derivative Litig.*, No. 02 Civ. 6302 (SWK), 2006 WL 2572114, at *2 (S.D.N.Y. Sept. 6, 2006) (citation omitted). "There is a strong initial

presumption that a proposed settlement negotiated during the course of litigation is fair and reasonable." *Strougo*, 258 F. Supp. 2d at 257 (citation omitted).

To determine a settlement's fairness, a court should consider "both the settlement's terms and the negotiating process leading to settlement." *D'Amato*, 236 F.3d at 85. Further stressing the importance of the negotiating process, the Second Circuit found:

> A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." Manual for Complex Litigation, Third, § 30.42 (1995)

Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005). *See also In re Elan Sec. Litig.*, 385 F. Supp. 2d 363, 369 (S.D.N.Y. 2005) (presumption of fairness where "the Court finds that the Settlement is the product of arm's length negotiations conducted by experienced counsel knowledgeable in complex class litigation ") (quoting *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173-174 (S.D.N.Y. 2000)).

Particularly in complex litigations such as those comprising the Derivative Actions here, "[a]s a general policy matter, federal courts favor settlement, especially in complex and large-scale disputes, so as to encourage compromise and conserve judicial and private resources." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (citations omitted). This strong policy in support of settlement is particularly true in derivative actions because "such litigation 'is notoriously difficult and unpredictable.'" *Maher v Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983) (quoting *Schiimmel v. Goldman*, 57 F.R.D. 481, 487 (S.D.N.Y. 1973)).

B. The Proposed Settlement Is the Product of an Adversarial Arm's-Length Negotiation by Experienced Counsel and Supported by Extensive Discovery

Courts in this Circuit examining a proposed settlement's procedural fairness "pay close attention to the negotiating process, to ensure that the settlement resulted from arm's-length negotiations and that plaintiffs' counsel possessed the [necessary] experience and ability, and have engaged in the discovery, necessary to effective representation of the [absent plaintiffs'] interests." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009); *see also AOL Time Warner*, 2006 WL 2572114, at *3 (same). Settlements that are reached in "arm's-length negotiations between experienced, capable counsel after meaningful discovery" are presumed to be fair, adequate and reasonable. *See Wal-Mart Stores*, 396 F.3d at 116. "Absent fraud or collusion, [courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *Clark v. Ecolab Inc.*, Nos. 07 Civ. 8623 (PAC), 04 Civ. 4488 (PAC), 06 Civ. 5672 (PAC), 2010 WL 1948198, at *4 (S.D.N.Y. May 11, 2010) (citation omitted).

The Derivative Actions were intensely litigated by leading practitioners from the corporate defense and shareholder plaintiff bars. The Settlement was reached through adversarial negotiations between counsel actively representing their clients' interests. Plaintiffs had inspected, reviewed and analyzed millions of pages of internal Company documents and other relevant materials, including academic articles and Congressional and regulatory testimony, investigations and evidence, and worked closely with industry, governance and compliance and risk management experts. *See, e.g.*, JAD ¶¶ 11, 30-31, 35-36, 41, 54. In addition, the negotiations between Plaintiffs' and Defendants' counsel occurred over an extended period, and included numerous in-person meetings and telephone discussions, as well as the active exchange and negotiation of written proposals and counter-proposals (*id.* ¶¶ 58-59). *See,*

e.g., *AOL Time Warner,* 2006 WL 2572114, at *3 (negotiations "spanned an extended period of time and benefited from multiple proposals passed between the parties throughout this period"). Counsel were, therefore, intimately familiar with the strengths and weaknesses of each side's position, and used this knowledge to the advantage of their respective clients. *See In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ 8144 (CM), 2009 WL 5178546, at *6 (S.D.N.Y. Dec. 23, 2009) (finding that the "extensive amount of discovery completed weigh[ed] heavily in favor of approval" because the parties could "realistically evaluate the strengths and weaknesses of the claims" and "evaluate the fairness of the proposed Settlement").

C. The Settlement Should Be Approved as Fair, Reasonable and Adequate

In *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), the Second Circuit discussed factors that courts in this Circuit consider in evaluating whether class action settlements are fair, reasonable and adequate. *See also WorldCom*, 388 F. Supp. 2d at 337 (citing to same). The *Grinnell* factors include:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the 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.

Grinnell, 495 F.2d at 463 (citation omitted). In evaluating substantive fairness, "not every factor must weigh in favor of settlement, 'rather the court should consider the totality of these factors in light of the particular circumstances.'" *Global Crossing*, 225 F.R.D. at 456 (quoting *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003)). In the present case, consideration of the relevant *Grinnell* factors strongly supports final approval of the proposed Settlement.

1. The Risks of Continuing Litigation Favor Final Settlement

This consideration weighs heavily in favor of the Court approving the proposed Settlement, as this litigation qualifies as complex, as to both establishing liability and proving damages. One important purpose of settlement is to avoid the inherent uncertainty in proceeding with the litigation. *See Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194(CM), 2010 WL 4877852, at *14 (S.D.N.Y. Nov. 30, 2010); *see also State of W. Va. v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970) ("It is known from past experience that no matter how confident one may be of the outcome of the litigation, such confidence is often misplaced."), *aff'd*, 440 F.2d 1079 (2d Cir. 1971). Indeed, as noted above, courts in this District generally favor settlements of derivative actions because they are "notoriously difficult and unpredictable." *AOL Time Warner*, 2006 WL 2572114, at *3.

The claims alleged in the Derivative Actions are asserted against certain of the Company's past and present senior executives and directors. Each defendant strongly denies liability and disputes many of the factual and legal predicates underlying the derivative claims. In addition to these individual defenses, derivative litigation raises procedural hurdles and risks for shareholders not found in either class or securities litigation, including, *inter alia*: (i) the requirement to make a demand on the board before proceeding to file a complaint or face heightened pleading requirements to demonstrate such demand should be excused; and (ii) the likely deference the Court will grant to the findings and recommendations of a special litigation committee within the context of a motion to dismiss.

Any trial of the Derivative Claims would be complex, expensive and time consuming, requiring extensive expert analysis and the requirement to establish liability in the face of

conflicting testimony and evidence. Even assuming that Plaintiffs prevailed at trial, it should be expected that defendants would file post-trial motions and appeals, thereby increasing the costs and duration of this litigation and further delaying financial recovery and other relief to the Company. In negotiating the proposed Settlement, Plaintiffs' Counsel, while strongly believing they had powerful arguments to overcome these hurdles, were nonetheless fully aware of the material risks of continuing to litigate the Derivative Actions, particularly when weighed against the fact that the proposed Settlement provides substantial benefits to the Company immediately without "the risks, complexity, duration, and expense of continuing litigation." *Global Crossing*, 225 F.R.D. at 456-57.

2. The Stage of the Proceedings and the Amount of Discovery Completed

As discussed above and detailed in the Joint Attorney Declaration, this litigation commenced four years ago with the filing of derivative complaints in both this Court and New York State Court, as well as the sending of shareholder demand letters to the Moody's Board. *See, e.g.*, JAD ¶¶ 4-23. As such, plaintiffs have had ample opportunity to fully investigate their claims – including through review and analysis of millions of pages of documentary production and other relevant materials and the close consultation with experts, *id.* ¶¶ 11, 30-31, 35-36, 41, 54 – to arrive at a well-reasoned determination of their strengths and weaknesses, and to assess the reasonableness of the proposed Settlement.

All parties have been able to develop a clear view of their case, and, over almost four years since the commencement of this litigation, have come to agree that the proposed Settlement serves the best interests of the Company.

3. The Reaction of Other Shareholders

The time for shareholders to object to the proposed Settlement has not yet been reached. To date, Plaintiffs' Counsel have not received any objections from Moody's shareholders to any aspect of the proposed Settlement. To the extent any objections are received, this factor will be further addressed in Plaintiffs' reply papers in support of the proposed Settlement.

4. The Settlement Benefits Achieved Favor Final Approval

For the purposes of assessing the proposed Settlement for final approval, the remaining *Grinnell* factors all look to the reasonableness of the benefits achieved under the circumstances. Courts have recognized that there is "a range of reasonableness with respect to a settlement" which considers the potential for recovery in practical rather than hypothetical terms. *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). *See also Global Crossing*, 225 F.R.D. at 461 ("settlement amount has to be judged in th[e] context of the legal and practical obstacles to obtaining a large recovery"); *Republic Nat'l Life Ins. Co. v. Beasley*, 73 F.R.D. 658, 668 (S.D.N.Y. 1977) ("In evaluating the proposed settlement, the Court is not to compare its terms with a hypothetical or speculative measure of a recovery that might be achieved by prosecution of the litigation to a successful conclusion.").

As set forth in the Stipulation and discussed above, and reflected in the expert reports submitted by Plaintiffs' industry, governance and compliance and risk management experts, the proposed Settlement provides substantial benefits to the Company. *See, e.g.*, Lam Decl. ¶ 60; Langevoort Decl. ¶¶ 70-71; Watson Decl. ¶ 66. Plaintiffs' Counsel negotiated aggressively throughout the settlement process. *See, e.g.*, JAD ¶¶ 58-59. Moreover, as the result of the proposed Settlement, these governance and compliance provisions must be maintained by the

Company for a period of not less than two years from the entry of the Judgment, and must be fully funded by the Company for that entire period. *See* Stipulation ¶¶ 2.2, 2.3. Such a comprehensive proposed Settlement clearly falls within the "range of reasonableness." *See, e.g.*, *Newman*, 464 F.2d at 693 (the range of reasonableness of a settlement "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion").

Courts have long recognized that in derivative actions, non-monetary benefits, such as material changes in corporate management or policies, provide real and substantial benefits and warrant approval. *See, e.g.*, *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 395 (1970) (recognizing that non-pecuniary relief as the result of a derivative action can provide a substantial benefit to a corporation); *In re Schering-Plough Corp. S'holder Derivative Litig.*, No. 01-1412, 2008 WL 185809, at *5 (D.N.J. Jan. 14, 2008) ("The results of counsels' efforts achieved the socially laudable goal of promoting regulatory compliance, which is particularly important in light of Schering's role as one of the world's leading pharmaceutical companies."); *see also AOL Time Warner,* 2006 WL 2572114, at *4 (same); *Unite Nat'l Ret. Fund v Watts, et al.*, No. 04-CV-3603 (DMC), 2005 WL 2877899 (D.N.J. Oct. 28, 2005) (same).

As described above, the proposed Settlement should be approved because the Governance Provisions provide substantial benefits to Moody's and its shareholders that directly remedy the core claims asserted by Plaintiffs in the Derivative Actions.

* * *

As detailed above, all relevant factors strongly favor approval of this Settlement.

V. THE PROPOSED NOTICE TO MOODY'S SHAREHOLDERS IS ADEQUATE

A. Notice Was Disseminated in Accordance with the Preliminary Approval Order

As directed by the Court, the Settlement Notice was published by Moody's in accordance with the Preliminary Approval Order. The Settlement Notice provided for a three-pronged notice: (1) publication of the Summary Notice in a national publication directed to investors, *The Wall Street Journal*, (2) posting relevant settlement-related documents on the Company's website, and (3) Form 8-K disclosure (with copies of the Stipulation, Exhibit A and the Summary Notice as exhibits) via the SEC, which resulted in broad public access to the settlement documents through the SEC's Electronic Data-Gathering, Analysis, and Retrieval ("EDGAR") system

B. The Notice Procedures Fully Satisfied Due Process

Rule 23.1 of the Federal Rules of Civil Procedures requires notice be given to shareholders in derivative actions "in such manner as the court directs." The notice process detailed herein satisfies the requirements set forth by Rule 23.1, as well as the terms of the Court's Order, and otherwise fulfills the due process rights of Moody's shareholders in that adequate notice was received, since it informed shareholders of the Settlement's terms, "the availability of further information from the court,. and the right . . . to object and be heard." *Bell Atl. v. Bolger*, 2 F.3d 1304, 1317 (3d Cir. 1993). Moreover, the notice was "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [settlement] and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950).

VI. THE REQUESTED FEE AWARD IS FAIR AND SHOULD BE APPROVED

It is well established that where a derivative action provides substantial non-monetary benefits to the nominal defendant corporation, plaintiff's counsel are entitled to an award of reasonable attorneys' fees. *See, e.g.*, *Mills*, 396 U.S. at 395 ("a corporation may receive a 'substantial benefit' from a derivative suit, justifying an award of counsel fees, regardless of whether the benefit is pecuniary in nature"); *Kaplan v. Rand*, 192 F.3d 60, 69 (2d Cir. 1999) (non-monetary benefits have been held to form the basis of fee awards); *Koppel v. Wien*, 743 F.2d 129, 134 (2d Cir. 1984) (reversing denial of attorneys' fees, Second Circuit notes that under *Mills*, "[i]t is well established that non-monetary benefits may support a fee award); *In re AOL Time Warner S'holder Derivative Litig.*, No. 02 Civ. 6302 (CM), 2010 WL 363113, at *15 (S.D.N.Y. Feb. 1, 2010) ("*AOL Time Warner II*") ("Though the value of these [governance and compliance] reforms cannot be reduced scientifically to dollars and cents, counsel are entitled to sizable compensation ... .").

As detailed above, the Settlement achieved by Plaintiffs' Counsel in this action is significant, and, as supported by the opinions of Plaintiffs' experts, provides substantial benefits to Moody's and its shareholders. *See, e.g.*, Langevoort Decl. ¶¶ 70-71; Watson Decl. ¶ 66; Lam Decl. ¶ 60. The Governance Provisions set forth at Exhibit A to the Stipulation provide for Moody's adoption of an integrated system of internal control and board-level reporting focused on defined, quality-based Core Objectives. These provisions were negotiated with input from Plaintiffs' corporate governance, risk management, corporate finance, and credit rating industry experts, and are consistent with recognized best practice frameworks for internal control, compliance, and risk management. Plaintiffs' Counsel vigorously prosecuted the Derivative

Actions, facing daunting challenges and legal standards, as well as determined and skilled adversaries. To marshal the record, develop the settlement proposals, and prosecute the claims over a four-year period, Plaintiffs' Counsel invested substantial time on a fully contingent basis and incurred nearly $1 million in unreimbursed expenses. Plaintiffs' Counsel respectfully request a fee and expense award in the combined amount of $4.95 million, an amount arrived at by the parties as the result of hard-fought mediation under the auspices of former federal judge Layn R. Phillips. *See* Declaration of Layn R. Phillips in Support of Application for Attorneys' Fees, Inclusive of Expenses ("Phillips Decl."), filed herewith.

A. The Legal Standards Governing Fee Applications

Courts in the Second Circuit apply the "Goldberger factors" to determine whether a requested fee award is reasonable given the specifics of the action. These factors include: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000); *see also In re Pfizer Inc. S'holder Derivative Litig.*, 780 F. Supp. 2d 336, 343 (S.D.N.Y. 2011) (same); *AOL Time Warner II*, 2010 WL 363113, at *7 (same). As demonstrated below, consideration of the benefits of the proposed Settlement and other relevant *Goldberger* factors fully support an award of fees and reimbursement of expenses in the requested amount.

1. The Benefits Achieved Support Counsel's Fee Request

As discussed above, as a result of this litigation, Plaintiffs' Counsel achieved significant governance and compliance benefits for Moody's, including the adoption of quality-based Core

Objectives and an integrated system of governance, internal control, and reporting to assure that these objectives are effectively pursued. The Governance Provisions are targeted to address the core claims alleged in the Derivative Actions – breach of fiduciary duty for failure to manage properly and oversee the quality, integrity and independence of Moody's credit ratings – by requiring the implementation and maintenance of enhanced management and board processes, and to address issues at the heart of the rating process designed to achieve high quality ratings in the face of the types of commercial pressures which confronted Moody's.

These governance and compliance enhancements are substantial, and fully support counsel's fee request. Over the past decade, the nature of derivative litigation and its resolution have evolved, as settlements in derivative cases have reached ever more deeply into management and board-level governance reporting processes. Courts have recognized the substantial value of such benefits to a corporate enterprise – including based on non-monetary benefits alone. These courts have not hesitated to approve substantial attorneys' fees for achieving such benefits – especially where, as here, the settlement is tailored to the specific alleged wrongdoing which underlay the derivative claims. For example:

- In the Home Depot derivative action, the court awarded $14.5 million in attorneys' fees and approved a settlement resolving challenged executive compensation. In the settlement, Home Depot adopted corporate governance provisions, including: new charters and independence requirements for the Audit Committee, the Nominating and Corporate Governance Committee, the Leadership Development Committee and the Compensation Committee and new altered compensation practices, and enhanced shareholder access to the CEO. *See City of Pontiac Gen. Emp.'s Ret. Sys. v. Langone*, Civil Action No. 2006-cv-122302 (Ga. Super. Ct., Order June 10, 2008), attached hereto as Exhibit 1.

- In the Shell Oil derivative litigation, the court awarded $9.2 million in attorneys' fees and approved a settlement resolving breach of fiduciary duty allegations in connection with improper oil reserve classifications. The settlement terms were directed to the prevention of the type of financial and reporting misconduct at issue, and provided for changes in

management responsibilities and board structure and functions. *See Unite Nat'l Ret. Fund*, 2005 WL 2877899, at *5.

- In the Eli Lilly derivative litigation, the court awarded a fee of $8.75 million and approved a settlement resolving allegations that the board breached its duties in connection with certain safety related issues, including off-label marketing of a number of drugs. The settlement (reached before a decision on the motion to dismiss) provided for substantial corporate governance and compliance reforms, including adoption by the board of both a Compliance Core Objective and a Product Safety and Medical Risk Management Core Objective, enhanced oversight responsibilities by designated board committees, and reporting obligations by senior officers to those committees. *See Lambrecht v. Taurel,* No. 1:08-cv-68-WTL-TAB, (S.D. Ind. July 27, 2010) ("Eli Lilly") attached hereto as Exhibit 2.

- In the Schering-Plough derivative action, the court awarded a fee of $9.5 million and approved a settlement resolving claims alleging failures in the company's manufacturing processes, anti-kickback, and Medicaid rebate abuses. The settlement included detailed provisions in specific areas of compliance and governance reform, enhancing and expanding the oversight role of the Audit and Business Practices committees, requiring the Board to receive detailed reporting of compliance and risk-related information, and establishing a well-resourced and staffed centralized global compliance function. *See Schering-Plough*, 2008 WL 185809.

Courts in this District have also awarded substantial fees where derivative settlements have included both therapeutic and monetary relief, recognizing the singular importance to the corporation of the governance and compliance reforms. *See, e.g.*, *In re Pfizer*, 780 F. Supp. 2d at 342 (Judge Rakoff awarded a fee of $22 million paid from a $75 million fund, recognizing that "[o]n balance, the Court concludes that the settlement is likely to provide considerable corporate benefits to Pfizer and its shareholders, in the form of a significantly improved institutional structure for detecting and rectifying the types of wrongdoing that have, in recent years, caused extensive harm to the company."); *AOL Time Warner*, 2006 WL 2572114, at *4 (After noting derivative counsel's role assisting company in obtaining $200 million payment from insurance carriers, court found "Even more importantly, the governance and compliance provisions memorialized in the Settlement directly address the failure of internal controls that precipitated

the instant lawsuits. The preventive aspect of these provisions is itself a significant benefit of the Settlement."). Reflecting this same view, the Court-appointed Special Master in *AOL Time Warner* found in recommending an award of $8.77 million in attorneys' fees that "the accession of one of America's largest corporations to an intrusive series of novel governance and monitoring initiatives was a commendable achievement for which credit clearly goes to counsel." *AOL Time Warner II*, 2010 WL 363113, at *15.

The corporate governance improvements in these cases are illustrative of the premium placed on governance and compliance changes as valuable consideration for derivative settlements. These cases provide strong precedential support both for the approval of the proposed Settlement and for the $4.95 million in attorneys' fees and expenses requested.

2. Time and Labor Expended by Counsel

Plaintiffs' Counsel committed substantial resources to the Derivative Actions, including attorney time amounting to a total lodestar of approximately $15,801,085.75.[15] This figure represents 28,142.35 attorney hours billed at Plaintiffs' Counsel's current hourly rates.[16] The

[15] This aggregate lodestar amount for Plaintiffs' Counsel is reflected in the chart provided as Exhibit A of the Declaration of Karen L. Morris in Support of Final Approval of Proposed Settlement and the Award of Attorneys' Fees, Inclusive of Expenses (the "Morris Supporting Declaration"), filed herewith. Individual firm lodestar charts are also provided as Exhibit B to the Morris Supporting Declaration. As noted on these charts, the lodestar provided reflects each firm's lodestar from that firm's inception in the case through differing end dates between March and June 2012. The aggregate lodestar amount does not include additional work performed since the end dates listed on the individual firm lodestar charts, including, *inter alia*, work on drafting and negotiating documentation in support of preliminary and final approval of the proposed Settlement. JAD ¶¶ 60-61.

[16] Second Circuit authority holds that in determining a reasonable attorneys' fee award, "current rates, rather than historical rates, should be applied in order to compensate for the delay in payment." *Konits v. Valley Stream Cent. High Sch. Dist*., 350 Fed. Appx. 501, 504 n.2 (2d Cir. 2009), (quoting *LeBlanc–Sternberg v. Fletcher*, 143 F.3d 748, 764 (2d Cir.1998)). Plaintiffs' Counsels' current rates are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson*, 465 U.S. 885, 896 n.11 (1984). *See e.g., In re Comverse Tech. Inc. Sec. Litig*., No. 06-CV-1825 (NGG) (RER), 2010 WL 2653354, at *4 (E.D.N.Y. June 24, 2010) (noting that hourly rates of $125 to $880 were "not extraordinary for top New York law firms"); *In re Marsh ERISA Litig*., 265 F.R.D. 128, 146 (S.D.N.Y. 2010) (court was "satisfied

hours expended were necessary and reasonable given the importance and complexities of the case, the substantial discovery record reviewed and analyzed, and the long and vigorously conducted settlement negotiation process. Plaintiffs' Counsel painstakingly planned and coordinated their work to avoid duplication and unnecessary expenditure of time. *See, e.g.*, JAD ¶¶ 13, 19, 23, 28-29.

The requested fee, net of expenses to be paid from the fee, is approximately $4 million. Because the requested fee constitutes a modest fraction of actual lodestar, it is presumptively reasonable. *See, e.g.*, *Jermyn v. Best Buy Stores, L.P.*, No. 08 Civ. 214 CM, 2012 WL 2505644, at *10 (S.D.N.Y. June 27, 2012) ("negative" lodestar multiple indicates reasonableness of negotiated fee); *Marsh & McLennan,* 2009 WL 5178546, at *20 (fee request constituting "deep discount from . . . lodestar . . . unquestionably supports requested . . . fee"); *In re Veeco Instruments Inc. Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007) (same); *In re Blech Sec. Litig.*, No. 94 Civ. 7696 (RWS), 2000 WL 661680, at *5 (S.D.N.Y. May 19, 2000).

3. The Complexity of this Case Supports the Requested Fee

Under any set of circumstances, the nature and scope of the Derivative Actions were expansive and complex. The extremely technical nature of the credit rating function performed by Moody's and the alleged operational failures that occurred at the Company underlying the Derivative Actions, as well as the highly charged regulatory and legislative environment in

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that the lodestar [was] reasonable" where hourly rates ranged from $125 for administrative personnel to $775 for senior lawyers); *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 589-90 (S.D.N.Y. 2008) (noting that hourly rates of $750 for partners and $300 - $550 for associates were consistent with the rates charged by the defense bar for similar work, and that comparable rates have been found reasonable by other courts for class action work); *In re Gilat Satellite Networks,Ltd.*, No. CV-02-1510 (CPS) (SMG), 2007 WL 2743675, at *17 (E.D.N.Y. Sept. 18, 2007) (attorney rates from $325 to $725 were "not out of line with the rates of major law firms engaged in [securities class action] litigation").

which these claims were brought and prosecuted, added significantly to the complexity of this litigation.

Plaintiffs' Counsel met these complexities with diligent work, skill and expertise. From the inception, in the wake of the subprime-related credit crisis, the regulatory environment within which Moody's operated was undergoing rapid changes.[17] To maximize efficiency given the level of complexity and the state of ongoing legislative and regulatory developments on multiple fronts, Plaintiffs' Counsel developed "work plans" identifying key areas for research and investigation, *see* JAD ¶ 39) – one tailored to address issues relevant to Moody's regulatory environment and relevant governance, internal control, compliance, and risk management external standards and internal processes, *id.* ¶¶ 52-54 , and one tailored to evaluation of the factual and legal merits of the claims asserted in the Derivative Actions and the evidence relevant to those claims. *Id.* ¶ 41. The process of developing these work plans was thorough, involving substantial preliminary research to identify and gather key source materials and determine the most effective avenues of analysis and investigation. *Id.* ¶ 40.

Pursuant to the work plans, two separate teams of plaintiffs' counsel were formed, with one team initially focusing on the governance, risk and compliance issues (the "GRC Team") and the other initially focusing on the merits issues (the "Merits Team"). *Id.* ¶ 40. Work performed on the governance, risk and compliance work plan focused on obtaining a broad and deep working understanding of Moody's, its credit rating business, its governance, internal

[17] Indeed, during the pendency of this case, Congressional investigations, SEC examinations, new proposed SEC rulemaking relating to credit rating agencies and asset backed securities, the federal legislative process that would culminate in the Dodd-Frank Act's credit rating agency and asset backed securities provisions, additional rulemaking by the SEC and federal banking regulators, the federal Financial Crisis Inquiry Commission's investigation, and EU credit rating agency regulatory developments, among other processes, were all ongoing.

controls and processes, applicable existing regulations, and the impact of current investigation and new rulemaking on the Company. *Id.* ¶ 54.

Plaintiffs' Counsel also undertook substantial research, including review of relevant academic and professional literature regarding such complex issues as the structured finance credit rating process and governance and risk management in the credit rating environment, to identify the appropriate areas of expertise that would be required to prosecute the Derivative Actions. *Id.* ¶ 30. As a result of this effort, between February and December 2010, Plaintiffs' Counsel interviewed and retained well-respected and knowledgeable credit rating industry, finance, corporate governance, and risk management experts to assist Plaintiffs' Counsel in their investigation and the development of settlement proposals. *Id.* ¶ 31.

The Merits Team, for its part, engaged in an extensive review of publicly available factual source material, including Congressional testimony and documents submitted in connection with various hearings and investigations into the financial crisis (including the final report of the Financial Crisis Inquiry Commission), third-party complaints and litigation materials, press materials and academic literature. *Id.* ¶ 41. Commencing in July 2010, Moody's produced a total of approximately six millions pages of documents, including internal custodial files of Moody's personnel relevant to the Company's credit rating production process during the relevant period and specifically to the area of structured finance. *Id.* ¶ 36. Plaintiffs' Counsel retained and worked closely with Crivella West, a sophisticated document management firm, enabling Plaintiffs' Counsel to review and analyze the production in an efficient and effective manner. *Id.* ¶¶ 37, 43-49; *see also* Declaration of Heidi A. Armstrong ("Armstrong Decl."), filed herewith. The document review, in coordination with Plaintiffs' experts, provided the

foundation for Plaintiffs' Counsel's extensive factual and legal analysis. JAD ¶¶ 50-51.

Over the course of many months, and working closely with their experts, and in coordination with the Merits Team, the GRC Team developed an initial set of governance, compliance and risk management proposals directed to both the management and the board level at Moody's (the "Governance Proposals"). *Id.* ¶ 55, 57. The development of the Governance Proposals was an intensive and iterative process, entailing numerous drafts, meetings with experts, revisions, additions, and supporting substantive research. *Id.* ¶ 55. Throughout this time, collaboration between the Merits Team and the GRC Team intensified, with Merits Team members providing key input from their ongoing document review and analysis to inform the development of settlement proposals and counter-proposals. *Id.* ¶ 57.

Defendants' counsel responded to Plaintiffs' Governance Proposals in mid-July 2011. *Id.* ¶ 58. Over a series of face-to-face meetings and telephone sessions beginning in July 2011 and continuing into April 2012, the parties negotiated the terms of the Stipulation, and, specifically, the terms of Exhibit A to the Stipulation (the "Governance Provisions"). *Id.* The negotiation process was hard fought, with the parties actively exchanging proposals and counter-proposals, and engaging in frequent in-person and telephonic conference sessions attended by key members of the parties' legal teams. *Id.* Ultimately, the parties were able to reach agreement on proposed settlement terms. *Id.* ¶ 59. The Stipulation of Settlement was presented to the Moody's Board and approved in May 2012. *Id.*

The Second Circuit has reaffirmed its view that "the quality of representation is best measured by results." *Wal-Mart Stores*, 396 F.3d at 117 (quoting *Goldberger*, 209 F.3d at 55). Plaintiffs respectfully submit that the result achieved here reflects lawyering of the highest

quality under difficult and complex circumstances on behalf of Moody's and its shareholders.

4. The Contingent Nature of Counsel's Work and Counsel's Experience Both Support the Requested Fee

Second Circuit authority recognizes the risk of litigation to be "'perhaps the foremost' factor to be considered in determining" the award of appropriate attorneys' fees. *In re Elan,* 385 F. Supp. 2d at 374 (quoting *Goldberger*, 209 F.3d at 54); *see also In re Pfizer*, 780 F. Supp. 2d at 343 (awarding substantial fee in derivative action, court recognized that settlement "was achieved despite plaintiffs' considerable legal and practical hurdles in prosecuting this action, risks that were accentuated by the fact that plaintiffs' counsel pursued the action on a fully contingent basis"); *Hicks v. Stanley*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005) (because plaintiffs' "attorneys take upon themselves the risk that litigation will not be successful, including the risks of non-reimbursed expenditures and the opportunity cost of attorney time dedicated to the case. . .[a]ttorneys in contingency cases reasonably should expect higher fees than would be had if they were guaranteed such fees up-front whether or not the party receives any relief"); *Steiner v. Williams*, No. 99 Civ. 10186 (JSM), 2001 WL 604035, at *7 (S.D.N.Y. May 31, 2001) (taking into account, in approving fees of 30% of a $20 million recovery that "[i]n undertaking this litigation, counsel took a tremendous risk that, in the end, nothing would be recovered").

The risk undertaken by Plaintiffs' Counsel was especially high in this case. Courts have recognized that derivative actions are "notoriously difficult and unpredictable." *Mathes v. Roberts*, 85 F.R.D. 710, 713 (S.D.N.Y. 1980); *see also AOL Time Warner*, 2006 WL 2572114, at *3 (same); *Cohn v. Nelson*, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005) (same). Indeed, as a result of the interplay between the business judgment rule and the pre-suit demand requirement,

a large portion of filed derivative actions are dismissed. That is particularly true where, as here, the derivative claim is premised on a claim that a corporate Board of Directors failed to properly monitor the company's operations and employee conduct. *See, e.g., In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996) (failure-to-monitor claim "is possibly the most difficult theory in corporat[e] law upon which a plaintiff might hope to win a judgment"). Thus, substantial risks confronted Plaintiffs' Counsel when they decided to invest their time and resources in this fully contingent litigation. *See, e.g., In re The Walt Disney Co. Derivative Litig*., 907 A.2d 693 (Del. Ch. 2005), (court granted judgment for defendants in derivative action after over seven years of litigation), *aff'd*, 906 A.2d 27 (Del. 2006). Plaintiffs' Counsel, on behalf of their clients, undertook to correct problems at Moody's involving the heart of its business: the accuracy and integrity of its credit ratings. They did so in the face of a very demanding legal standard for pleading and proving breach of fiduciary duty claims under Delaware law and determined opposition by Defendants. It was through the perseverance and skill of Plaintiffs' Counsel that the substantial benefits of the Settlement were achieved. Counsel should be rewarded accordingly. *See, e.g., In re WorldCom, Inc., Sec. Litig.,* No. 02 Civ. 3288 (DLC), 2004 U.S. Dist. LEXIS 22992, at *73 (S.D.N.Y. Nov. 12, 2004) ("[Plaintiffs' counsel] undertook this service on a fully contingent basis. Its risks and effort deserve to be awarded appropriately.").

The result achieved in the face of daunting odds required the participation of highly skilled and experienced attorneys with expertise in the specialized areas of derivative litigation and substantive corporate governance, compliance and risk management reforms. See individual firm resumes provided as exhibits to the individual firm declarations filed by Plaintiffs'

Counsel.[18] Plaintiffs' Counsel brought a high degree of expertise and sophistication to bear in the litigation of the Derivative Actions.

5. Public Policy Supports the Requested Fee Award

This action would not have been possible if prior cases had not recognized the societal interest in providing incentives to specialized and experienced counsel to bring high-risk, high-stakes derivative actions. *See Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1194-96 (6th Cir. 1974) (court must make sure that counsel is fairly compensated for the amount of work done as well as for the results achieved, so as to ensure such compensation recognizes "society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others"). Public policy considerations are particularly relevant to the proposed resolution of the Derivative Actions here. In addition to the recognized need to motivate counsel to pursue representative litigation generally, Plaintiffs' experts also opine that the Settlement offers substantial benefits to the users of Moody's credit ratings and the general investing public. *See, e.g.*, Langevoort Decl. ¶ 71; Watson Decl. ¶ 66; Lam Decl. ¶ 60.

B. The Requested Fee Amount Was Arrived at through Arm's-Length Negotiations with an Independent Mediator

The agreed fees in this case (inclusive of expenses) were only reached in the context of lengthy and contentious negotiations, pursuant to a formal mediation under a nationally-recognized mediator, Hon. Layn R. Phillips (Ret.). Phillips Decl. ¶¶ 4-8. This fact is deserving of significant weight in the Court's analysis of a reasonable fee. *See, e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (holding that it was proper to give weight to the role of a mediator in considering negotiated fee amount for the purpose of determining whether

[18] Individual firm declarations are provided as Exhibits D through J of the Morris Supporting Declaration.

negotiations were at arm's length); *In re PayPal Litig.*, No. C-02-1227-JF PVT, 2004 WL 2445244, at *1 (N.D. Cal. Oct. 13, 2004) (recommendation of mediator who had worked with the parties to achieve settlement over the course of several months entitled to significant weight in Court's assessment of a reasonable fee); *In re Schering-Plough/Merck Merger Litig.*, No. 09-CV-1099 (DMC), 2010 WL 1257722, at *18 (D.N.J. Mar. 26, 2010) (court gave weight to negotiation of requested fee award before a respected neutral mediator); *Lambrecht v. Taurel*, No. 1:08-cv-68-WTL-TAB, 2010 WL 2985946, at *2 (S.D. Ind. June 8, 2010) (Magistrate Judge's Report and Recommendation, adopted by the Judge, found persuasive fact that fee and expense amount requested was "the result of mediation before retired Chief Magistrate Judge Edward A. Infante").

Moreover, the parties' mediation of the fees occurred in the presence and with the active involvement of the Company and its counsel. *See, e.g.*, JAD ¶¶ 67-69. Such participation by the Company is of particular importance in the context of derivative litigation. *See, e.g.*, *Shlensky v. Dorsey*, 574 F.2d 131, 150 (3d Cir. 1978) ("the presence and active involvement of the corporation against which an award of the plaintiffs' attorneys' fees and other litigation costs may be assessed distinguishes a shareholders' derivative suit from a class action for purposes of the fee award").

The contentious mediation process undertaken before Judge Phillips by experienced counsel actively representing their clients' positions represents a textbook case of a true, arm's-length negotiation (Phillips Decl. ¶¶ 4 - 8). *See, e.g.*, *In re Schering-Plough*, 2008 WL 185809, at *6 (district court noted with favor the role played by retired Magistrate Judge in mediation of the agreed upon $9.5 million fee awarded in case). Judge Phillips received substantive

submissions from Plaintiffs' counsel in advance of the fee mediation regarding applicable legal standards and their application under the facts of the case, as well as daily time records. Phillips Decl. ¶ 5. Thereafter, the parties participated in a full-day face-to-face mediation session before Judge Phillips followed by multiple telephonic conferences and communications through Judge Phillips. JAD ¶ 66; Phillips Decl. ¶¶ 6, 7. Based on his knowledge of the settlement process and the role Plaintiffs' counsel played in achieving the benefits provided for in the Settlement, Judge Phillips took an active role in guiding the parties to the amount, inclusive of expenses, that the parties ultimately agreed upon. Phillips Decl. ¶¶ 4-9; *see also Lambrecht*, 2010 WL 2985946, at *2.

C. The Requested Expenses Are Reasonable

With respect to Plaintiffs' Counsel's application for reimbursement of litigation expenses, "it is well-established that plaintiffs who confer a corporate benefit may be awarded . . . expenses . . . ." *In re Pfizer,* 780 F. Supp. 2d at 343. Here, Plaintiffs' expenses totaled $1,001,093.73. The complex nature of the underlying claims drove the expenses incurred. As set forth at Exhibit C of the Morris Supporting Declaration, these expenses included: (1) $445,189.50 incurred in connection with the retention of experts in the areas of structured finance, the credit rating industry, governance and compliance, and risk management, critical to assisting counsel in gaining the depth of understanding necessary to assess the merits of the claims, to craft detailed Settlement proposals, and to engage in the intensive negotiations leading to the proposed settlement ultimately agreed upon, *see* JAD ¶¶ 30-31 and Exhibit A thereto; and (2) $275,000 for the retention of Crivella West which provided cutting-edge, computerized analytic services to assist Plaintiffs' Counsel in the identification and retrieval of information

contained in the electronic production. *See id.* ¶¶ 37, 43, 45; *see also* Armstrong Decl. Plaintiffs' Counsel seek reimbursement as well for travel costs to the multiple sessions with of Moody's employees, expert meetings, witness interviews, settlement negotiations, and Court hearings throughout the four-year pendency of the Derivative Actions. *See, e.g.*, JAD ¶¶ 27 and n.2, 32-33, 58. Exhibit C to the Morris Supporting Declaration also details routine costs incurred, including legal and factual research costs and telephone and copying charges. These are the types of expenses reasonably incurred in this type of complex litigation. *See, e.g.*, *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 364 (E.D.N.Y. 2010) (awarding counsel's expenses, including "expert fees, electronic research charges, long distance telephone and facsimile charges, postage and delivery expenses, discovery costs, filing fees, photocopying, expenses associated with locating and interviewing dozens of witnesses, and out-of-town travel expenses," finding that such expenses "are of the type that are necessarily incurred in litigation and routinely charged to clients billed by the hour").

VII. CONCLUSION

For the reasons set forth herein, the detailed provisions of the proposed Settlement provide substantial benefits to Moody's. Plaintiffs and Plaintiffs' Counsel respectfully request that the Court find the proposed Settlement to be fair, reasonable and adequate to Moody's and its shareholders, and approve the Settlement in its entirety.

Plaintiffs and Plaintiffs' Counsel further respectfully request that the Court approve the requested award of attorneys' fees in the amount of $4.95 million, inclusive of expenses in the amount of $1,001,093.73.

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Respectfully submitted,

s/ Albert M. Myers

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