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20 Capital Research and Management Company
21 and American Funds Distributors, Inc.

22 **UNITED STATES DISTRICT COURT**
23 **CENTRAL DISTRICT OF CALIFORNIA**
24 **WESTERN DIVISION**

25 **RACHELLE KORLAND, ON**
26 **BEHALF OF THE EUROPACIFIC**
27 **GROWTH FUND,**

28 Plaintiff,

v.

CAPITAL RESEARCH AND
MANAGEMENT COMPANY, et al.

Defendants.

MASTER FILE NO.
CV 08-4020 GAF (RNBx)

NOTICE OF MOTION AND
MOTION TO DISMISS;
MEMORANDUM OF POINTS &
AUTHORITIES; DECLARATION
OF ANDREW Z. EDELSTEIN

Judge: Hon. Gary A. Feess
Date: October 6, 2008
Time: 9:30 a.m.
Place: Courtroom 740
255 E. Temple Street
Los Angeles, CA 90012

1 TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on October 6, 2008, at 9:30 a.m. or as soon
3 thereafter as this matter may be heard, in Courtroom 740 of the United States
4 District Court, located at 255 E. Temple Street, Los Angeles, California 90012,
5 Defendants Capital Research and Management Company and American Funds
6 Distributors, Inc. (collectively, “Defendants”) will and hereby does move the Court
7 to dismiss Plaintiff’s Complaint pursuant to Rules 8 and 12(b)(6) of the Federal
8 Rules of Civil Procedure (the “Motion”).

9 As more fully set forth in the accompanying Memorandum of Points and
10 Authorities, Defendants’ Motion to Dismiss is made on the following grounds:

11 Plaintiff’s allegations in the Complaint consist of generalized commentary on
12 the mutual fund industry as a whole, and thereby fail to proffer the requisite fund-
13 specific allegations necessary to plead valid causes of action. The remaining
14 allegations that purport to address specifically the Fund’s 12b-1 fees fail for the
15 following reasons:

16 (1) The entire premise of Plaintiff’s Complaint is based on the argument that
17 Defendant’s use of 12b-1 fees to pay for post-sale shareholder services was
18 improper. But relevant caselaw holds that 12b-1 fees can be used to pay for post-
19 sale shareholder services because such payments result in retained fund assets and
20 additional fund sales, and therefore are made in connection with distribution. And in
21 any event, the SEC has clearly affirmed on multiple occasions that Rule 12b-1
22 payments can be used to pay for shareholder services.

23 (2) Moreover, Plaintiff’s claim is premised on the false assumption that the
24 standard articulated in *Gartenberg v. Merrill Lynch Asset Mgmt.* is not applicable to
25 Section 36(b) claims regarding excessive 12b-1 fees. But numerous cases have
26 established that the applicable standard for determining whether 12b-1 fees are
27 “excessive” is that Plaintiff must demonstrate that the fees are “disproportionate to
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1 the services rendered.” Plaintiff has not made any allegations regarding the services
2 provided, nor how those services are disproportionate to the fees. Moreover, the
3 *Gartenberg* standard requires analysis of six factors to examine the reasonableness
4 of the challenged fees, and the Complaint here barely mentions these factors.

5 (3) Finally, Plaintiff alleges a claim against CRMC for “control person
6 liability” under Section 48(a) of the ICA. But no implied right of action exists under
7 Section 48(a).

8 This Motion is based on this Notice of Motion and Motion, the accompanying
9 Memorandum of Points and Authorities, the accompanying Request For Judicial
10 Notice In Support of Defendants’ Motion to Dismiss the Complaint, the
11 accompanying Declaration of Andrew Z. Edelstein In Support of Defendants’
12 Motion to Dismiss the Complaint, and the exhibits attached thereto and such
13 argument and additional papers as may be submitted to the Court before and at the
14 hearing on this Motion.

15 Dated: September 12, 2008

16 GIBSON, DUNN & CRUTCHER LLP
17 GARETH T. EVANS
18 ANDREW Z. EDELSTEIN

19 By: _____/s/
20 Gareth T. Evans

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1 excessive 12b-1 fees. (Compl. ¶ 91 n.5.) But numerous cases directly on point hold
2 that Plaintiff’s conclusion is wrong. It has long been established that the applicable
3 standard for determining whether fees are “excessive” – including a claim for
4 excessive 12b-1 fees – is that Plaintiff must demonstrate that the fees are
5 “disproportionate to the services rendered.” *See id.* at 928. But Plaintiff’s Complaint
6 contains no allegations regarding the services CRMC provides, let alone how those
7 services might be disproportionate in comparison to the challenged fees. Moreover,
8 the *Gartenberg* standard requires analysis of six factors to examine the reasonableness
9 of the challenged fees, and the Complaint here barely mentions any of these
10 *Gartenberg* factors.

11 Lastly, Plaintiff purports to allege a claim against CRMC for “control person
12 liability” under Section 48(a) of the ICA. But, as both this Court and numerous others
13 have recently held, there is no implied right of action under Section 48(a). Therefore,
14 this claim must be dismissed.

15 In sum, the Complaint is simply devoid of the required factual and legal
16 allegations necessary to survive a motion to dismiss, and is based on several false
17 assumptions about the law as it relates to Section 36(b) and Rule 12b-1. For these
18 reasons and those discussed further below, the Complaint should be dismissed with
19 prejudice.

20 **II. STATEMENT OF FACTS**

21 **A. Background**

22 Plaintiff Rachelle Korland, an Ohio resident, alleges that she is the owner and
23 holder of shares in the Fund. (Compl. ¶ 16.) The Fund is an open-end, diversified
24 management investment company – *i.e.*, a mutual fund – that is part of the American
25 Funds family of mutual funds. *See EuroPacific Growth Fund, Statement of*
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27
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1 Additional Information, at 17 (July 30, 2008) (Declaration of Andrew Z. Edelstein
2 (“Edelstein Decl.”) Ex. A).¹

3 The Board of Trustees for the Fund includes eleven independent trustees who
4 establish the Fund’s policies and supervise and review the operation and management
5 of the Fund. *See id.* at 11-12. The independent trustees are not employed by or
6 otherwise affiliated with CRMC. The Fund also has two interested trustees who are
7 associated with CRMC or affiliated entities. *See id.* at 12-14.

8 **B. Investment Adviser Services and Fees**

9 Subject to the authority of the Board of Trustees, CRMC serves as investment
10 adviser to the Fund, and has overall responsibility for Fund management. (Compl. ¶
11 32-34.) CRMC oversees all investment advisory and portfolio management services
12 for the Fund, and directly, or through agreements with other CRMC affiliates and
13 service providers, manages or supervises all aspects of the Fund’s general day-to-day
14 business activities and operations. (Compl. ¶ 34.)

15 CRMC receives compensation for its services to the Fund pursuant to the
16 Investment Advisory and Service Agreement.² *See* EuroPacific Growth Fund,
17 Statement of Additional Information, at 22-24 (July 30, 2008) (Edelstein Decl. Ex. A).
18 Each year, the Fund’s Governance and Contracts Committee (the “Contracts
19 Committee”) considers the Investment Advisory and Service Agreement and then
20 gives its recommendation as to whether or not they should recommend that the full
21 Board of Trustees approve the agreement. Only independent trustees for the Fund
22 serve on the Contracts Committee. After the Contracts Committee recommends the

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24
25 ¹ On a motion to dismiss, the Court may take judicial notice of publicly available
26 documentation including the Fund’s Statement of Additional Information. (*See*
27 Defendants’ Request For Judicial Notice in Support of Defendants’ Motion to Dismiss
28 and accompanying Edelstein Decl.). Plaintiff also incorporated these documents by
reference into her Complaint. (Compl. ¶ 184.)

² The compensation paid by the Fund to CRMC pursuant to the Investment Advisory
and Service Agreement –known as the “advisory fee”–is not alleged to be excessive.

1 agreement, the Fund's Board of Trustees then votes on whether or not to approve the
2 Investment Advisory and Service Agreement. *See id.* at 18.

3 **C. Distribution Services and Fees**

4 AFD is the principal underwriter and distributor for the Fund and has the
5 responsibility for the sale of Fund shares. It is a wholly-owned subsidiary of CRMC.
6 (Compl. ¶¶ 35-37.) Rule 12b-1, which was promulgated by the SEC in 1980,
7 authorizes a mutual fund board to use the fund's own assets to promote the sale of
8 fund shares, provided certain conditions are met. In this respect, the Rule provides in
9 pertinent part as follows:

10 **§ 270.12b-1 Distribution of shares by registered open-end management**
11 **investment company.**

12 (a)(1) *Except as provided in this section*, it shall be unlawful for any
13 registered open-end management investment company . . . to act as a
14 distributor of securities of which it is the issuer, except through an
15 underwriter...

16 (2) For purposes of this section, such a company will be deemed to be
17 acting as a distributor of securities of which it is the issuer, other than
18 through an underwriter, if it engages directly or indirectly in financing any
19 activity which is primarily intended to result in the sale of shares issued by
20 such company, including, but not necessarily limited to, advertising,
21 compensation of underwriters, dealers, and sales personnel, the printing
22 and mailing of prospectuses to other than current shareholders, and the
23 printing and mailing of sales literature;

24 (b) A registered, open-end management investment company...may act as
25 a distributor of securities of which it is the issuer: Provided, That any
26 payments made by such company in connection with such distribution are
27 made pursuant to a written plan describing all material aspects of the
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1 proposed financing of distribution and that all agreements with any person
2 relating to implementation of the plan are in writing...

3 *See* 17 CFR 270.12b-1 (2008) (emphasis added); (Compl. ¶ 71 n.2.)

4 The Fund has adopted Plans of Distribution in accordance with Rule 12b-1.
5 The Fund initially makes the 12b-1 payment to AFD, but AFD then passes on all but a
6 small percentage of those 12b-1 fees to broker-dealers who provide services to the
7 Fund and its shareholders. The Fund's public filings disclose that "[p]ayments under
8 the Plans may be made for service-related and/or distribution-related expenses." *See*
9 *EuroPacific Growth Fund*, Statement of Additional Information, at 27 (July 30, 2008)
10 (Edelstein Decl. Ex. A). The Prospectus is clear that for all of the Fund's share
11 classes, "up to .25% of these expenses may be used to pay service fees to qualified
12 dealers for providing certain shareholder services." *EuroPacific Growth Fund, Inc.*,
13 Prospectus, at 28 (July 30, 2008) (Edelstein Decl. Ex. B).

14 III. ARGUMENT

15 Plaintiff's Complaint fails to plead factual allegations in support of a claim
16 under Sections 36(b) and 48(a) of the ICA, and should be dismissed pursuant to Rule
17 12(b)(6) of the Federal Rules of Civil Procedure. "A district court should grant a
18 motion to dismiss if plaintiffs have not pled 'enough facts to state a claim to relief that
19 is plausible on its face.'" *Williams v. Gerber Prods. Co.*, 523 F.3d 934, 938 (9th Cir.
20 2008) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007)). The ICA
21 "imposes a large number of threshold determinations before litigation on the merits of
22 a case may commence," and makes claims brought under the ICA "particularly
23 appropriate for dismissal for failure to state a claim under Rule 12(b)(6)." *Krantz v.*
24 *Prudential Inv. Fund Mgmt. LLC*, 77 F. Supp. 2d 559, 562 (D.N.J. 1999) (quoting
25 *Olesh v. Dreyfus Corp.*, No. CV-94-1664, 1995 WL 500491, at *11 (E.D.N.Y. Aug. 8,
26 1995)), *aff'd*, 305 F.3d 140 (3d Cir. 2002), *cert. denied*, 537 U.S. 1113 (2003).

1 **A. The Complaint Fails To State A Claim Under Section 36(b)**
2 **Of The ICA.**

3 **1. The Standard for Evaluating a Section 36(b) Claim.**

4 Section 36(b) of the ICA is the exclusive federal remedy for plaintiffs seeking
5 redress for allegedly excessive fees. Section 36(b) provides, in pertinent part:

6 The investment adviser of a registered investment company shall be
7 deemed to have a fiduciary duty with respect to the receipt of
8 compensation for services, or of payments of a material nature, paid
9 by such registered investment company, or by the security holders
10 thereof, to such investment adviser or any affiliated person of such
11 investment adviser.

12 15 U.S.C. § 80a-35(b). Courts have routinely held that this fiduciary duty under
13 Section 36(b) applies not only to the fees paid for advisory services, but also to other
14 payments, such as those made in connection with Rule 12b-1. *See Krinsk v. Fund*
15 *Asset Mgmt., Inc.*, 654 F. Supp. 1227, 1234 (S.D.N.Y. 1987) (dismissing challenge to
16 Rule 12b-1 fee because claim was required to be brought under Section 36(b), and
17 was not), *aff'd*, 875 F.2d 404 (2d Cir.), *cert. denied*, 493 U.S. 919 (1989); *Meyer v.*
18 *Oppenheimer Mgmt. Corp.*, 764 F.2d 76, 82 (2d Cir. 1985) (stating Section 36(b)
19 governs fees charged under Rule 12b-1); *Mintz v. Baron*, Civ. No. 05-4904 (LTS)
20 (HBP), 2006 U.S. Dist. LEXIS 66867, *9 (S.D.N.Y. Sept. 19, 2006) (holding that
21 Section 36(b) “applies to any fees charged in connection with Rule 12b-1”).

22 Courts have long recognized that Section 36(b) is a “narrow federal remedy”
23 which imposes a “fiduciary duty upon advisers regarding their compensation.” *Green*
24 *v. Nuveen Advisory Corp.*, 295 F.3d 738, 742-43 (7th Cir.), *cert. denied*, 537 U.S.
25 1088 (2002). Furthermore, to establish an excessive fee claim under Section 36(b), a
26 plaintiff must plead facts demonstrating that the challenged fee “is so
27 disproportionately large that it bears no reasonable relationship to the services
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1 rendered and could not have been the product of arm's-length bargaining.”
2 *Gartenberg*, 694 F.2d at 928; *see also Gallus v. Ameriprise Fin., Inc.*, 497 F. Supp. 2d
3 974, 984-85 (D. Minn. 2007) (holding that to state a claim for excessive 12b-1
4 distribution fees, plaintiff must allege that the fee is disproportionate to the services
5 rendered); *ING Principal Prot. Funds Derivative Litig.*, 369 F. Supp. 2d 163, 167-69
6 (D. Mass. 2005) (same). Courts have further held that in order to state a claim under
7 Section 36(b), a plaintiff must allege that the fees are excessive and not simply
8 “improper.” *See Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 117 (2d Cir. 2007)
9 (*quoting Gartenberg*, 694 F.2d at 928.).

10 Courts – including this Court – have identified six factors to be considered in
11 determining whether the challenged fee is excessive: (1) the nature and quality of the
12 services provided to fund shareholders; (2) the profitability of the fund to the
13 investment adviser; (3) economies of scale of operating the fund as it grows larger; (4)
14 comparative fee structures; (5) fall-out benefits (*i.e.*, indirect profits to the adviser
15 attributable in some way to the existence of the fund); and (6) the independence and
16 conscientiousness of the directors. *See, e.g., Gartenberg*, 694 F.2d at 929-30; *Migdal*
17 *v. Rowe Price-Fleming Int’l, Inc.*, 248 F.3d 321, 329 (4th Cir. 2001); *Krinsk v. Fund*
18 *Asset Mgmt., Inc.*, 875 F.2d 404, 409 (2d Cir. 1989); *In re Am. Funds Fees Litigs.*, No.
19 CV 04-5593 GAF, 2005 U.S. Dist. LEXIS 41884, at *16 (C.D. Cal. Dec. 16, 2005)
20 (Feess, J.). These factors are typically referred to as the “*Gartenberg* Factors.”

21 **2. Plaintiff’s Contention that the Pleading Standard Under 36(b)**
22 **is Inapplicable is Unavailing and Ultimately Fatal to Her**
23 **Claim.**

24 Plaintiff contends – erroneously – that the *Gartenberg* standard under Section
25 36(b) is inapplicable to determining whether the Distributor Defendant breached its
26 fiduciary duty by charging an excessive fee. (Compl. ¶ 91 n.5.) Plaintiff claims that
27 because a portion of the 12b-1 fee is used for “service,” the fee is not “primarily
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1 intended to result in the sale of shares issued by” the Fund, and is therefore “per se
2 excessive and disproportionate” without regard to the *Gartenberg* factors. *Id.*
3 (emphasis added). Accordingly, Plaintiff seeks to abandon the well-established
4 *Gartenberg* pleading standard under Section 36(b) and replace it with a heretofore
5 non-existent “per se” violation standard.³

6 Plaintiff’s legal interpretation of Section 36(b) completely misses the mark.
7 First, courts have consistently held that the standard for determining whether a Rule
8 12b-1 fee is excessive under Section 36(b) is the same as the standard for determining
9 whether a challenged advisory fee is excessive – *i.e.*, the *Gartenberg* standard. No
10 court has ever found such a “per se” violation of Section 36(b) to exist. Second, even
11 if a “per se violation” of Section 36(b) did exist, the use of 12b-1 fees to pay for
12 shareholder services would not support such a claim. In fact, both the SEC and the
13 courts have expressly found that using 12b-1 fees to fund post-sale shareholder
14 services is not improper.

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17 ³ In the alternative, the Plaintiff also argues that even if the 12b-1 fees charged by the
18 Defendants are “primarily intended” to result in the sale of fund shares, they are
19 excessive and disproportionate under the factors set forth by the SEC in the release in
20 which it adopted Rule 12b-1, Investment Company Act Release No. 11414 (Oct. 28,
21 1980) (“Final Rule Release”) (*See App. Tab A*). But Plaintiff’s heavy reliance on the
22 Final Rule Release is a red herring. (Compl. ¶ 92.) Contrary to Plaintiff’s postulation,
23 the Final Rule Release factors never have been, nor are they currently, mandatory
24 factors that fund directors must review. Rule 12b-1(d) on its face states that “in
25 fulfilling their duties under this paragraph the directors should consider and give
26 appropriate weight to all pertinent factors.” The Rule also notes that “[f]or a discussion
27 of factors which may be relevant to a decision to use company assets for distribution,
28 see Investment Company Act Release Nos. 10862 (Sept. 7, 1979) (*See App. Tab B*) and
[Final Rule Release].” 17 CFR 270.12b-1. Significantly, the SEC decided not to include
those factors in the rule itself “[i]n order to avoid the appearance of either unduly
constricting the directors’ decision making process or of creating a mechanical
checklist.” The SEC Release specifically stated that “the Commission has decided not
to require the directors to consider any particular factors” Final Rule Release at 12
(*See App. Tab A*). The SEC has asserted (and Plaintiff’s Complaint concurs) that these
factors only “provide helpful guidance to directors.” *Id.*; *cf.* Compl. ¶ 93 n.6. It is
therefore clear that the SEC has never required directors to consider these factors when
approving a 12b-1 plan. Thus, Plaintiff’s fallback argument is baseless.

1 **a. Plaintiff Misunderstands the Law in Arguing For a**
2 **“Per Se” Violation of Section 36(b).**

3 Plaintiff repeatedly argues that Defendants committed a “per se violation” of
4 Section 36(b) by using 12b-1 payments for improper purposes (*i.e.*, post-sale
5 shareholder services). (*See* Compl. ¶¶ 9-10, 25-26, 31, 75, 78, 90, 101, 191.)
6 Plaintiff’s argument is unfounded because no such “per se” standard exists.

7 As discussed above, it is well established that to state a claim under Section
8 36(b), a plaintiff must allege that the fees are disproportionate to the services
9 rendered. Courts have routinely *rejected* attempts by plaintiffs to circumvent this
10 required showing by arguing the fees at issue were “improper” or “per se” unlawful.
11 For example, in cases involving funds closed to new investors, where 12b-1 fees are
12 used almost exclusively for shareholder services, courts have rejected such categorical
13 allegations brought under Section 36(b). *See In re Goldman Sachs Mut. Funds Fee*
14 *Litig.*, No. 04 Civ. 2567 (NRB), 2006 U.S. Dist. LEXIS 1542, at *36 (S.D.N.Y. Jan. 3,
15 2006) (ruling that “merely asserting that Rule 12b-1 fees were charged while the funds
16 at issue were closed to new investors” was insufficient to allege “that the fees charged
17 were disproportionate to the services rendered”); *Yameen v. Eaton Vance Distribs.,*
18 *Inc.*, 394 F. Supp. 2d 350, 358 (D. Mass. 2005) (emphasis added) (finding that the
19 plaintiff relied “upon the categorical contention, rejected by the regulatory bodies
20 charged with supervising this activity, that such fees are per se disproportionately
21 large and hence unreasonable when paid out while the fund is closed” and
22 categorizing the plaintiff’s argument as “an erroneous construction of an SEC rule”
23 insufficient “to state a claim under Section 36(b)”). The Second Circuit has also held
24 that an allegation that fees were “improper” – even if true – would not state a claim
25 under Section 36(b). *See Bellikoff*, 481 F.3d at 117 (*quoting Gartenberg*, 694 F.2d at
26 928).⁴

27 ⁴ *See also ING*, 369 F. Supp. 2d at 169 (confirming that “SEC Rule 12b-1 permits
28 fund-advisory firms to recover certain sales-related expenses previously paid out when

1 Courts have repeatedly rejected “per se” violations of Section 36(b) in favor of
 2 an application of the *Gartenberg* analysis. *See In re Salomon Smith Barney Mut.*
 3 *Fund Fee Litig.*, 528 F. Supp. 2d 332, 338 (S.D.N.Y. 2007) (concluding that “[t]he §
 4 36(b) test is basically an economic one where the improper use of fees is not
 5 ‘excessive per se’”) (citations omitted); *In re Oppenheimer Funds Fees Litig.*, 426 F.
 6 Supp. 2d 157, 158 (S.D.N.Y. 2006) (dismissing plaintiffs’ theory that increasing
 7 advisory fees “to create a slush fund to bribe brokers for the benefit of the Adviser
 8 Defendants and their affiliates” was excessive per se because “§ 36(b) creates no such
 9 per se rule”). In fact, no court has ever adopted a “per se” violation of Section 36(b),
 10 and Plaintiff’s attempt to create such a rule here should be rejected.

11 **b. The Use of 12b-1 Fees to Pay for Shareholder Services**
 12 **Does Not Violate Section 36(b).**

13 Regardless of whether a “per se” violation of Section 36(b) could exist, Plaintiff
 14 clearly has not alleged facts that would constitute such a violation. Indeed, Plaintiff’s
 15 entire basis for the purported per se violation is premised on a fundamentally incorrect
 16 interpretation of Rule 12b-1. Plaintiff incorrectly assumes that payments made for
 17 shareholder services cannot be primarily intended to result in the sale of shares of the
 18 Fund, and are therefore improper. (*See, e.g.*, Compl. ¶ 10.) This is a blatant
 19 misreading of Rule 12b-1.

20 Funds have the option to decide whether or not to include payments for
 21 shareholder service in their Rule 12b-1 Plan. Although payments for distribution must
 22 be made in accordance with a distribution plan approved in conformance with Rule
 23 12(b)-1, payments for service only need to be included in a Rule 12b-1 plan if they are
 24 made in connection with distribution. *See* 17 CFR 270.12b-1.⁵ EUPAC’s 12b-1 Plan

25
 26 distributing the fund’s shares,” and therefore plaintiffs “must also allege that the
 27 distribution fees are disproportionate and unrelated to the sales-related services actually
 28 provided when shares of the funds were marketed and sold to the general public”).

⁵ Indeed, the SEC has even explained that “paying for non-distribution services under
 12b-1 plans . . . is not prohibited by the present rule[.] . . . Some funds have paid for

1 “permit[s] the fund to expend amounts to finance any activity primarily intended to
2 result in the sale of fund shares, provided the fund’s board of trustees has approved the
3 category of expenses for which payment is being made.” EuroPacific Growth Fund,
4 Statement of Additional Information, at 27 (July 30, 2008) (emphasis added)
5 (Edelstein Decl. Ex. A). The service fees approved under the Fund’s 12b-1 Plan are
6 made in connection with distribution because the activities the fees are used to finance
7 will help the fund retain assets, encourage existing shareholders to purchase
8 additional shares in the Fund, and indirectly, help attract new investors. “Potential
9 benefits of the [12b-1] Plans to the fund include quality shareholder services, savings
10 to the fund in transfer agency costs, and benefits to the investment process from
11 growth or stability of assets.” *Id.* at 29. Therefore, Plaintiff’s claim that payments for
12 service cannot be “primarily intended” to result in the sale of Fund shares (Compl. ¶
13 10) is simply wrong.

14 Courts agree that it is permissible to use 12b-1 fees to pay for service-related
15 activities because those payments fund activities made in connection with distribution.
16 The trial court in *Krinsk* held that “even if payments for shareholder service and
17 maintenance of Fund size are not ‘distribution payments,’ per se, they are made ‘in
18 connection with’ a distribution and are therefore to be regulated by the 12b-1 plan.”
19 *Krinsk*, 715 F. Supp. at 501; *see also Meyer v. Oppenheimer Mgmt. Corp.*, 609 F.
20 Supp. 380, 389 (S.D.N.Y. 1984) (rejecting plaintiff’s argument that using 12b-1 fees
21 to service pre-existing accounts violated Rule 12b-1 because “[e]ven an already
22
23

24 such services through a 12b-1 plan, apparently to address the possibility that the
25 payments may later be characterized as distribution expenditures.” Payment of Asset-
26 Based Sales Loads by Registered Open-End Management Investment Companies,
27 Release No. IC-16431, at *68 n.126 (June 21, 1988) (*See App. Tab C*). As the SEC has
28 stated, funds may choose to pay for services through a 12b-1 Plan or can pay the same
service fees directly from fund assets. “To the extent non-distribution expenses are a
legitimate fund expense, a fund could pay for such expenses outside the 12b-1 plan,
subject to other applicable legal requirements.” *Id.* at *103, n.173.

1 existing account may purchase new shares of the Fund”).⁶ Further, the Second Circuit
2 in *Meyer* concluded that Rule 12b-1 “refers not to ‘distribution expenses’ but to any
3 payments ‘in connection with’ a distribution,” and remanded the issue with directions
4 “for the district court to invite the SEC to submit its views on the Rule 12b-1 issues,
5 once those issues have been clarified by refinement of appellant’s claims.” *Meyer*,
6 764 F.2d at 85. The district court subsequently upheld its previous ruling that the
7 payments were proper because no additional facts helpful to resolving the 12b-1 issue
8 were discovered on remand. *See Meyer v. Oppenheimer Mgmt. Corp.*, 707 F. Supp.
9 1394, 1406 (S.D.N.Y. 1988). Therefore, AFD’s decision to include payments for
10 shareholder services within its Plan of Distribution is proper under both SEC rules and
11 the caselaw.

12 Even if the Court were to assume (without Defendants conceding the point) that
13 payments for shareholder services were not made in connection with distribution,
14 dismissal is still warranted. The SEC has often provided guidance that a Rule 12b-1
15 plan may provide for payments covering both distribution and non-distribution
16 services.⁷ Since at least as early as 1988, the SEC has acknowledged that mutual
17 funds use 12b-1 fees to pay for non-distribution activities, such as “payments to
18 [financial] institution[s] for providing ‘administrative services’ or ‘shareholder

19 ⁶ In *Gallus v. Ameriprise Financial, Inc.*, plaintiff alleged that the defendants “charged
20 excessive section 12(b) distribution fees in violation of their obligations under section
21 36(b).” *Gallus*, 497 F. Supp. at 984. The court held that evidence showing that “85%
22 of Defendants’ 12b-1 distribution fees were paid for services to existing shareholders
23 and not to marketing the Funds to new shareholders” was persuasive support for the
24 conclusion that 12b-1 payments benefit existing shareholders. *Id.* at 985 (emphasis
25 added).

26 ⁷ The SEC’s interpretation of its own regulation must be given controlling weight
27 unless it is plainly erroneous or inconsistent with the regulation. *See Thomas*
28 *Jefferson Univ. v. Shalala*, 512 U.S. 504, 506 (1994) (ruling that the Secretary of
Health and Human Services’ interpretation of a Medicare regulation that the Secretary
issued was a “reasonable construction of the regulatory language” and thus
controlling); *see also Morrison v. Madison Dearborn Capital Partners III L.P.*, 463
F.3d 312, 315 (3d Cir. 2006) (affirming dismissal where the court found that the
plaintiff’s argument was “contrary to the SEC’s interpretation of [Securities Exchange
Act of 1934 regulations it issued]”).

1 services.” *See* Payment of Asset-Based Sales Loads by Registered Open-end
2 Management Investment Companies, Investment Company Act Release No. 16431, at
3 39-40 (June 21, 1988) (“1988 Release”) (*See* App. Tab C); *see also* *Investment*
4 *Company Institute*, SEC No-Action Letter, 1998 SEC No-Act. LEXIS 976, at *14
5 (Oct. 30, 1998) (the SEC “has stated that funds may pay for non-distribution expenses
6 pursuant to rule 12b-1 plans”) (*See* App. Tab D).⁸

7 In 1992, the SEC approved the adoption of amended NASD Rule 2830, which
8 subjected funds to a maximum asset-based sales charge. *See* Order Approving
9 Proposed Rule Change Relating to the Limitation of Asset-based Sales Charges as
10 Imposed by Investment Companies, Securities and Exchange Act of 1934 Release No.
11 30897 (July 13, 1992) (*See* App. Tab F). Rule 2830 permits funds to pay a maximum
12 .25% asset-based service fee, which is defined as “payments by an investment
13 company for personal service and/or the maintenance of shareholder accounts.”
14 Release No. 34-30897 at 3 (*See* App. Tab F). Following the amendment of the NASD
15 Rule 2830, the SEC explicitly acknowledged that the maximum .25% asset-based
16 service fee was often paid with 12b-1 fees. *See* Investment Company Act Release No.
17 26341, at *7 n.25, *6 n.15 (*See* App. Tab G).⁹ Therefore, the SEC has explicitly

18
19 ⁸ *See also* Charles Schwab & Co., Inc., SEC No-Action Letter, 1992 SEC No-Act.
20 LEXIS 861, at *3 n.2 (Aug. 6, 1992) (confirming that “[a] Participating Fund may pay
21 the service fees under a distribution plan adopted under Rule 12b-1 of the 1940 Act”) (*See* App. Tab E).

22 ⁹ *See also* Registration Form Used By Open-End Management Investment Companies,
23 Investment Company Act Release No. 23064, at 13925 (Mar. 23, 1998) (agreeing
24 with the recommendation of commenters on the proposed rule that the description of
25 12b-1 fees in the fee table should read “Distribution [and/or Service] (12b-1) Fees”,
26 not “Marketing (12b-1) Fees” and adding to the instructions to Item 8 of Form N1-A:
27 “If the Fund pays services fees [as defined by NASD Rule 2830] under its rule 12b-1
28 plan, modify [the 12b-1] disclosure to reflect the payment of these fees (e.g., by
indicating that the Fund pays distribution and other fees for the sale of its shares and
for services provided to the shareholders).”) (*See* App. Tab H); Registration Form
Used By Open-End Management Investment Companies, Investment Company
Release No. 22528, at *27 (Mar. 10, 1997) (proposing amendments to the disclosure
requirements of Form N1-A and stating that “[a] fund may pay ‘service fees’ alone or
combined with fees for the sale and distribution of its shares”) (*See* App. Tab I).

1 acknowledged that the very same 0.25% fee that the Plaintiff alleges the Fund is
 2 paying for improper purposes can lawfully be used to pay for post-sale service
 3 activities. (*Cf.* Compl. ¶¶ 73, 75, 78.)¹⁰

4 Plaintiff defines “servicing efforts” as “providing monthly or quarterly account
 5 statements, confirmations of transactions, and suitability analyses of the client’s
 6 account” (Compl. ¶ 85), as well as “funding to support the broker dealer [to] maintain
 7 [] a mutual fund ‘supermarket’.” (Compl. ¶ 10). These are the same services the
 8 SEC’s report on “Mutual Fund Fees and Expenses” indicates that 12b-1 fees may
 9 cover.¹¹ That report states that 12b-1 fees not only cover distribution and marketing,
 10 but also pay for financial advice/planning, consolidated statements, and other services
 11 provided by a “mutual fund supermarket.” Division of Investment Management,
 12 Securities and Exchange Commission, Report on Mutual Fund Fees and Expenses, at
 13 16 (Dec. 2000) (“2000 Report”) (*See* App. Tab J). Plaintiff cannot properly claim that
 14 using 12b-1 fees to pay for post-sale services makes such payments “excessive and
 15 disproportionate” as a matter of law when the SEC itself has provided notice to the
 16 entire industry that these fees may properly be used for such purposes.¹²

17 ¹⁰ Courts addressing the issue have also concluded that 12b-1 fees may properly be
 18 used to pay for service activities. *See e.g., ING*, 369 F. Supp. 2d at 167 (finding that
 19 “Rule 12b-1 also permits a mutual fund to compensate broker-dealers with asset-based
 20 service fees for providing shareholder services and maintaining shareholder
 21 accounts”).

22 ¹¹ Division of Investment Management, Securities and Exchange Commission, Report
 23 on Mutual Fund Fees and Expenses, at 17 (Dec. 2000) (“2000 Report”) (*See* App. Tab
 24 J).

25 ¹² As recently as this week, Andrew Donohue, the head of the SEC’s Division of
 26 Investment Management, was quoted as follows regarding the SEC’s position on Rule
 27 12b-1:

28 One way to look at it, is that when it was first adopted,
 12b-1 essentially permitted existing fund shareholders
 to pay for attracting future shareholders. If you look at
 the current uses of 12b-1, it really is for current
 shareholders to pay for current shareholders; they’re
 paying for themselves. Alternatives have developed to
 the front-end sales charge. And that has provided some
 benefits to investors – an alternative means to purchase

1 **3. Plaintiff’s Complaint Should be Dismissed Because it Fails to**
2 **Allege Facts Sufficient to Demonstrate that the 12b-1 Fees are**
3 **Excessive.**

4 Having misplaced her entire reliance on the argument that the use of 12b-1 fees
5 for service is a “per se” violation of Section 36(b), Plaintiff offers little else that could
6 salvage her claim. Critically, the Complaint completely fails to meet the long
7 established *Gartenberg* standard for pleading a claim under Section 36(b). *See Part*
8 *III.A.*, above. That is, the Plaintiff has utterly failed to allege that the challenged fee is
9 “is so disproportionately large that it bears no reasonable relationship to the services
10 rendered.” *Gartenberg*, 694 F.2d at 928.

11 Courts have repeatedly granted motions to dismiss Section 36(b) claims where,
12 as here, the plaintiff failed to plead facts alleging a disproportionate relationship
13 between the services rendered and the fees charged. *See In re Am. Mut. Funds Fee*
14 *Litigs.*, 2005 LEXIS 41884, at *16 (Feess, J.) (plaintiff must allege “specific facts
15 regarding the disproportionately high nature of the fees in question”); *Yampolsky v.*
16 *Morgan Stanley Inv. Advisors Inc.*, Nos. 03 Civ. 5710 (RO), 03 Civ. 5896 (RO), 2004
17 WL 1065533, *2 (S.D.N.Y. May 12, 2004) (dismissing the complaint because it
18 “rel[ie]d heavily on generalities about deficiencies in the securities industry, and
19 statements made by industry critics and insiders,” but contained no factual allegations
20 “as to the actual fee negotiations or management and distribution services rendered”),
21 *aff’d sub nom. Amron v. Morgan Stanley Inv. Advisors, Inc.*, 464 F.3d 338 (2d Cir.
22 2006); *Yameen*, 394 F. Supp. 2d at 356 (holding that plaintiffs must “allege some

24 shares. That wasn’t envisioned when 12b-1 was first
25 adopted and one could say the wisdom of 12b-1 was
26 that it permitted that to evolve without additional action
27 by the commission to let that happen.

27 *Soft Dollars, 12b-1 and Valuation: Q&A With SEC’s Donohue*, BoardIQ, Sept. 9,
28 2008 (Edelstein Decl. Ex. D). Therefore, the SEC continues to publicly approve of
 using 12b-1 fees to pay for expenses for servicing existing fund shareholders.

1 relationship between fees charged and the services rendered that, if true, would
2 support a claim that the fees are excessive”); *Levy v. Alliance Capital Mgmt. L.P.*, No.
3 97 Civ. 4672 (DC), 1998 WL 744005, at *4 (S.D.N.Y. Oct. 26, 1998) (granting
4 motion to dismiss where plaintiff “fail[ed] to explain how the fees and expenses are
5 excessive in light of the ‘Gartenberg’ factors that courts consider”); *Olesh v. Dreyfus*
6 *Corp.*, No. 94 Civ 1664, 1995 WL 500491, at *19, 21 (E.D.N.Y. Aug. 8, 1995)
7 (granting motion to dismiss Section 36(b) claim for failing to allege that the fee is so
8 disproportionately large that it bears no reasonable relationship to the services
9 rendered).

10 Here, Plaintiff has not alleged any facts pertinent to the relationship between the
11 12b-1 fees charged and the services rendered in return for those fees. Plaintiff alleges
12 only, in barest conclusory fashion, that the 12b-1 fees are excessive and
13 disproportionate because they pay for servicing efforts that are not “‘primarily
14 intended to result in the sale of shares issued by’ the Fund.” (Compl. ¶¶ 87, 90.)
15 However, the Complaint is devoid of allegations concerning the amount of fees paid
16 to and retained by AFD,¹³ or the specific services that AFD as the Fund’s distributor
17 provides, in return for the fees charged. Additionally, there are no allegations
18 concerning the costs that AFD incurred in providing those services, much less whether

19
20 ¹³ Plaintiff acknowledges in her Complaint that the majority of the Rule 12b-1 fees are
21 paid to broker-dealers. (Compl. ¶¶ 10, 78, 177.) But under Section 36(b), AFD can
22 only be liable for the portion of fees that it retains. Courts have held that where, as
23 here, a distributor serves as a pass-through entity for Rule 12b-1 payments, this does
24 not constitute the “receipt of compensation” under Section 36(b). *See Pfeiffer v.*
25 *Bjurman, Barry & Assocs.*, Civ. No. 03-9741, 2006 U.S. Dist. LEXIS 7862, *9
26 (S.D.N.Y. Mar. 3, 2006). *Pfeiffer* held that (1) “serving as a pass-through entity for
27 Rule 12b-1 payments does not constitute ‘receipt’ under the ICA” and (2) constructive
28 receipt of payments did not establish that the adviser was the recipient of payments as
required by § 36(b). *See id.* at *14-15. *See also Zucker v. AIM Advisors, Inc.*, 371 F.
Supp. 2d 845, 849 (S.D. Tex. 2005) (dismissing a complaint alleging that an advisor
was liable for allegedly excessive 12b-1 fees because it was an indirect recipient of
those fees); *Zucker v. Federated S’holder Servs. Co.*, No. 2:06 cv 214, 2007 U.S. Dist.
LEXIS 15186, at *6-7 (W.D. Pa. Mar. 5, 2007) (dismissing a Section 36(b) claim
where allegations failed to show that the defendants actually received the fees and
ruling that indirect receipt of compensation is insufficient).

1 or not those costs were exceeded by the amount of the 12b-1 fees received.¹⁴ Without
2 these fundamental allegations, Plaintiff cannot possibly show that the fee is
3 “disproportionately large” when compared to the “services rendered.” Therefore,
4 Plaintiff has failed to state a claim for breach of fiduciary duty under Section 36(b).

5 Moreover, the Complaint fails to allege facts sufficient to support a claim under
6 any of the *Gartenberg* Factors. Indeed, of the six *Gartenberg* Factors, Plaintiff’s
7 Complaint makes no allegations with respect to three of these factors: (i) the nature
8 and quality of the services provided by the Distributor to the Fund; (ii) the
9 profitability of the Fund to the adviser; and (iii) any fall-out benefits or indirect profits
10 to the adviser attributable in some way to the existence of the Fund. With respect to
11 the other three *Gartenberg* factors ((i) economies of scale, (ii) comparative fees and
12 (iii) the independence and conscientiousness of the trustees), the Complaint barely
13 makes passing reference to these factors. These scant allegations hardly support a
14 finding that the 12b-1 fees paid by the Fund are excessive in violation of Section
15 36(b).

16 **a. Economies of Scale.**

17 One of the *Gartenberg* Factors to consider in assessing the reasonableness of
18 the challenged fees is whether the adviser has realized economies of scale with respect
19 to the operation of the Fund and, if so, the extent to which those scale economies have
20 been shared with the Fund shareholders. While the Complaint does address
21 economies of scale, those allegations actually support dismissal of Plaintiff’s claim.

22 The term “economies of scale” is an economic concept which describes a
23 particular relationship between the size of a mutual fund and the cost of providing
24 services to the fund. *See Kalish v. Franklin Advisers, Inc.*, 742 F. Supp. 1222, 1237

25 _____
26 ¹⁴ *See ING*, 369 F. Supp. 2d at 169 (ruling that plaintiffs failed to state a claim with
27 respect to the .25% service fees because they did not “allege that the service fees
28 exceed the ongoing expenses associated with maintaining shareholder accounts.
Plaintiffs allege no facts that, if true, would indicate that the service fees are unrelated
to the shareholder services provided by broker-dealers”).

1 (S.D.N.Y. 1990) (“The concept of ‘economies of scale’ assumes that as a mutual fund
2 increases in size, its operational costs decrease proportionally.”). Accordingly, to
3 adequately allege the existence of economies of scale, a plaintiff must make some
4 allegations regarding the costs to the investment adviser of managing and operating a
5 fund, and show how those costs changed as the fund’s assets increased over time. *See*
6 *Amron v. Morgan Stanley Inv. Advisors, Inc.*, 464 F.3d 338, 345 (2d Cir. 2006)
7 (finding allegations with respect to Rule 12b-1 fees insufficient because the complaint
8 made “no allegations regarding the costs of performing fund transactions or the
9 relationship between such costs and the number of transactions performed”). To
10 establish a Section 36(b) claim, plaintiffs typically allege that the adviser realized
11 large economies of scale in managing the fund and that it failed to pass those savings
12 on to fund shareholders in the form of lower fees. *See Jones v. Harris Assocs. L.P.*,
13 No. 04 C 8305, 2007 U.S. Dist. LEXIS 13352, at *25 (N.D. Ill. Feb. 27, 2007)
14 (plaintiffs argued that “breakpoints were not set in relation to any analysis of the
15 savings achieved from economies of scale”), *aff’d*, 527 F.3d 627 (7th Cir. 2008),
16 *reh’g denied*, No. 07-1624, 2008 U.S. App. LEXIS 16857 (7th Cir. Aug. 8, 2008);
17 *Gallus*, 497 F. Supp. 2d at 982 (alleging that defendants “realized enormous
18 economies of scale” that were not appropriately shared with the Funds’ shareholders).

19 Here, however, Plaintiff alleges that Defendants have not realized any
20 economies of scale in managing the Fund. (Compl. ¶¶ 124-25.) In this respect, the
21 Complaint cites to a number of broad statements by various industry critics
22 questioning the existence of economies of scale in the mutual fund industry generally
23 (Compl. ¶¶ 108-116, 118, 120-23), and concludes that there are “no economies of
24 scale concerning the performance of the fund because it already is the 11th largest
25 fund in the United States, by assets, as of mid-2007.” (Compl. ¶ 117.) Plaintiff’s
26 claim that there are no economies of scale with respect to the Fund severely
27 undermines her excessive fee claim.

28

1 would not support a violation of Section 36(b). Indeed, the only way these allegations
2 could possibly support a Section 36(b) claim regarding the Fund's 12b-1 fees is if this
3 Court deemed the entire mutual fund industry to be in breach of its fiduciary duties.

4 **c. Independence and Conscientiousness of the Independent**
5 **Trustees.**

6 The only other *Gartenberg* Factor that the Complaint addresses is the
7 independence and conscientiousness of the Trustees. As with the other factors,
8 Plaintiff's allegations with respect to the independence and conscientiousness of the
9 Independent Trustees consist largely of quotations from industry commentators about
10 the mutual fund industry in general (*see, e.g.*, Compl. ¶¶ 158-64). The Fund-specific
11 allegations that exist in the Complaint are limited to conclusory allegations regarding
12 the number of American Fund Boards that each Trustee is a member of and the
13 amount of time the Fund's Contract Committee spends in formal meetings each year.
14 (Compl. ¶¶ 165-68.) The Complaint alleges that the Fund's Contracts Committee held
15 only one meeting in 2007 and that this meeting was held on the same day as the
16 meetings of the Contracts Committees of certain other funds within the American
17 Funds family of which these same Trustees are members. (Compl. ¶ 170.) The
18 Complaint further asserts that because these meetings were held on the same day, the
19 Fund's Contracts Committee spent an immaterial amount of time considering the
20 Fund's Plan of Distribution. (Compl. ¶¶ 166-75.)¹⁷

21 These types of allegations concerning the independence of the Fund's Trustees
22 are patently insufficient. For example, alleging that the Fund's Contract Committee
23 met once in 2007 does not mean that the members of the Committee did not receive
24 and review materials relating to the Fund's Plan of Distribution prior to that meeting,

25 _____
26 ¹⁷ The Trustees for EUPAC also held six audit committee meetings and two
27 nominating committee meetings during the 2008 fiscal year in addition to the one
28 governance and contracts committee meeting Plaintiff cites in her Complaint. *See*
EuroPacific Growth Fund, Statement of Additional Information, at 17-18 (July 30,
2008) (Edelstein Decl. Ex. A).

1 or at other meetings. Nor does it mean that members of the Committee did not
2 properly discharge their duties at that meeting. These types of allegations are clearly
3 insufficient to establish that the Independent Trustees were negligent in protecting the
4 interests of Fund shareholders. Indeed, courts have repeatedly rejected these type of
5 conclusory allegations as insufficient as a matter of law. *See, e.g., Migdal*, 248 F.3d at
6 330 (noting that the fact that a director serves “on multiple boards within a fund
7 complex is insufficient to demonstrate control”); *Amron*, 464 F.3d at 345 (noting that
8 allegations regarding directors’ compensation and membership on multiple boards,
9 combined with industry-wide “criticism,” fails as a matter of law to demonstrate lack
10 of independence); *Strougo v. Bea Assocs.*, 188 F. Supp. 2d 373, 382 (S.D.N.Y. 2002)
11 (stating that an allegation that board meetings were only two hours was insufficient to
12 state a claim of inattention to duty).

13 Plaintiff also alleges that the Independent Trustees are not truly independent
14 because only one of five independent trustees on the nominating committee was
15 elected by shareholders. (Compl. ¶¶ 46-48.) However, such claims are insufficient as
16 a matter of law without further allegations as to how or why this alleged fact
17 undermines the independence of the Fund’s directors. *See In re Morgan Stanley &*
18 *Van Kampen Mut. Fund Sec. Litig.*, No. 03 Civ. 8208 (RO), 2006 U.S. Dist. LEXIS
19 20758, at *51 n.26 (S.D.N.Y. Apr. 14, 2006) (citing numerous cases which find that
20 allegations regarding the selection and nomination process for directors or
21 compensation arrangements for directors are not sufficient to establish directors’ lack
22 of independence or disinterestedness); *see also Strougo*, 188 F. Supp. 2d at 382
23 (placing no importance on how independent directors were selected, absent additional
24 information).

25 Accordingly, the Complaint clearly fails to state a claim under Section 36(b).
26
27
28

B. There Is No Implied Right Of Action Under Section 48(a).

Plaintiff’s claim under Section 48(a) of the ICA also must be dismissed.¹⁸ As this Court has previously held, “there is no private right under Section 48(a). District courts, taking direction from *Alexander v. Sandoval*, 532 U.S. 275 (2001), have uniformly held Section 48(a) establishes no private right of action.” *In re Am. Mut. Funds Fee Litig.*, No. CV 04-5593 GAF, 2007 U.S. Dist. LEXIS 8276, *23-24 (C.D. Cal. Jan. 18, 2007) (Feess, J.) (citations omitted). Indeed, over the last five years, each and every one of the more than twenty courts to have considered the issue have refused to find an implied private right of action under any section of the ICA. *See, e.g., id.*; *see also In re Am. Funds Fee Litigs.*, 2005 U.S. Dist. LEXIS 41884, at *14 (Feess, J.).¹⁹ Defendants need not belabor this point further. Plaintiff’s claim under Section 48(a) should be dismissed with prejudice.

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¹⁸ CRMC is only named as a defendant in Plaintiff’s Section 48(a) claim. (Compl. ¶ 197.) Therefore, to the extent the Section 48(a) claim is dismissed, CRMC should be dismissed from the lawsuit, even if the Section 36(b) claim somehow survives.

¹⁹ *See also, e.g., In re Salomon Smith Barney Mut. Fund Fees Litig.*, 441 F. Supp. 2d 579, 603 (S.D.N.Y. 2006) (finding no private right under 48(a)); *In re Merrill Lynch Inv. Mgmt. Funds Sec. Litig.*, 434 F. Supp. 2d 233, 239 (S.D.N.Y. 2006) (ruling no private right under 34(b), 36(a) or 48(a)); *In re Morgan Stanley & Van Kampen Mut. Fund Sec. Litig.*, 2006 U.S. Dist. LEXIS 20758, at *44 (concluding no private right under 34(b) and 48(a)); *In re Eaton Vance Mut. Funds Fee Litig.*, 380 F. Supp. 2d 222, 232 (S.D.N.Y. 2005) (affirming no private right under 34(b), 36(a) or 48(a)); *In re Davis Selected Mut. Funds Litig.*, No. 04 Civ. 4186, 2005 U.S. Dist. LEXIS 23203, at *9 (S.D.N.Y. Oct. 11, 2005) (same).

IV. CONCLUSION

For the foregoing reasons, the Complaint should be dismissed in its entirety, and with prejudice.

DATED: September 12, 2008

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP
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