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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)

DEFENDANTS' REPLY
MEMORANDUM OF POINTS AND
AUTHORITIES IN FURTHER
SUPPORT OF THEIR MOTION
TO DISMISS

[Response To Plaintiff's Opposition To
Defendants' Request For Judicial
Notice Filed Concurrently Herewith]

Judge: Hon. Gary A. Feess
Date: February 2, 2009
Time: 9:30 a.m.
Place: Courtroom 740
255 E. Temple Street
Los Angeles, CA 90012

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendants respectfully submit this reply memorandum in support of their
3 motion to dismiss Plaintiff’s Complaint.

4 **I. PRELIMINARY STATEMENT**

5 The arguments in Plaintiff’s Memorandum of Points and Authorities
6 Opposing Defendants’ Motion to Dismiss (“Opposition” or “Opp”) illustrate that
7 this Motion turns on a straightforward legal issue: whether expenses related to
8 activities that are arguably “non-distribution” in nature—such as on-going
9 shareholder service provided by broker-dealers and their registered
10 representatives—are prohibited from being included in a Plan of Distribution
11 adopted pursuant to Rule 12b-1.

12 Plaintiff maintains that the inclusion of these expenses in a Plan of
13 Distribution is a *per se* violation of Rule 12b-1. Plaintiff’s Opposition is based
14 on a fundamental misunderstanding of the purpose of Rule 12b-1, the SEC’s own
15 interpretation of the Rule, and the manner in which mutual funds are distributed
16 and serviced. Therefore, some background on the history and evolution of Rule
17 12b-1 may be helpful in understanding why Plaintiff’s interpretation of the Rule
18 makes no sense and runs contrary to every known legal authority on the issue.

19 Rule 12b-1 was adopted to limit the circumstances under which a fund’s
20 assets could be used to pay expenses related to distributing shares of the fund.
21 Accordingly, the Rule states that it is intended to address the “direct” and
22 “indirect” use of fund assets to pay expenses for activities “primarily intended to
23 result in the sale of [fund] shares.” 17 CFR 270.12b-1(a)(2). In the extreme,
24 many activities that are paid for by a fund could be characterized as an “indirect”
25 distribution expense. For example, many broker-dealer firms have divisions or
26 affiliates that provide fund shareholder recordkeeping services (often called “sub-
27 transfer agent” or “omnibus” services). These entities provide statements and
28

1 process fund share transactions. These entities would not be providing this
2 service unless their affiliates were engaged in distributing fund shares.
3 Therefore, at a minimum, it could be argued that since such expenses appear to
4 be indirectly related to distribution, they must be included in fund Plans of
5 Distribution. In fact, twenty years ago, the SEC staff took just this position—it
6 required all expenses for the services provided by sub-transfer agents or omnibus
7 service providers affiliated with broker-dealers engaged in fund distribution to be
8 included in Plans of Distribution.

9 However, in 1992, the staff reversed this position in a no-action letter
10 issued to The Shareholder Services Group, a third party that provided sub-
11 transfer agency services. *The Shareholder Services Group, Inc.*, SEC No Action
12 Letter, 1992 SEC No-Act. LEXIS 891 (Aug. 12, 1992). Shareholder Services
13 sought assurance from the SEC staff that it would not take enforcement action if
14 the expenses for the sub-transfer agent services it rendered to 300 different funds
15 were paid outside of Plans of Distribution. They argued that sub-transfer agent
16 service was far removed from the distribution process and truly was “pure”
17 service rendered by individuals not engaged in selling fund shares; therefore,
18 such expenses were not required to be included in Plans of Distribution. The
19 SEC stated that funds may pay for expenses unrelated to distribution outside a
20 Plan of Distribution, but stressed that the determination of the nature of an
21 expense is to be decided on a case-by-case basis.

22 Investment advisers—*i.e.*, the companies that manage mutual funds—
23 continued to struggle over which activities would be considered distribution and
24 which would be considered non-distribution service. Indeed, that debate
25 continued at the recent SEC Roundtable on Rule 12b-1 in Washington D.C. *See*
26 *Transcript of Division of Investment Management Rule 12b-1 Roundtable (“SEC*
27 *Roundtable”)* (June 19, 2007), *available at*

1 <http://www.sec.gov/news/openmeetings/2007/12b1transcript-061907.pdf>.¹ As a
 2 result, where sufficient ambiguity exists over whether a service might be
 3 considered an “indirect” form of distribution, investment advisers have continued
 4 to err on the side of caution by including those service-related expenses under a
 5 Rule 12b-1 distribution plan.²

6 The SEC has acknowledged that there is no bright line test for when a
 7 particular activity is distribution or non-distribution, and that such activity needs
 8 to be examined on a case-by-case basis “in light of the surrounding
 9 circumstances.” *Shareholder Services Group*, 1992 SEC No-Act. LEXIS 891 at
 10 2. Consequently, the SEC has taken the position that “*paying for non-*
 11 *distribution services under 12b-1 plans . . . is not prohibited by the present rule[.]*
 12 . . . Some funds have paid for such services through a 12b-1 plan, apparently to
 13 address the possibility that the payments may later be characterized as
 14 distribution expenditures.” (*See Payment of Asset-Based Sales Loads by*
 15 *Registered Open-End Management Investment Companies*, Exchange Act
 16 Release No. IC-16431, 53 Fed. Reg. 23258, at *68 n.126 (June 21, 1988)) (the
 17 “1988 Release”) (*See Motion App. Tab C*) (emphasis added).

18 Plaintiff’s claim that Defendants’ inclusion of non-distribution services in
 19 a Rule 12b-1 plan is a *per se* violation is impossible to reconcile with the SEC’s
 20

21 ¹ *Id.* at 92 (describing the challenges faced by advisers and regulators in not
 22 exceeding the cap of .25% on service fees because “[i]t is very difficult, as a
 23 practical matter, to decide whether somebody is incurring a fee for services,
 24 versus distribution.”); *see also id.* at 90 (SEC official stating that “52 percent of
 25 12b-1 payments are used to pay ongoing shareholder services. Yet they are paid
 26 pursuant to 12b-1 plans. Shareholder servicing expenses *are not necessarily* a
 27 distribution expense.”) (emphasis added).

28 ² Moreover, because legitimate service expenses may be paid directly by a
 mutual fund, there is no incremental benefit to an adviser including those service
 costs in a Rule 12b-1 plan. To the contrary, including service expenses in a
 distribution plan subjects those payments to greater scrutiny and more onerous
 reporting requirements, such as reporting those expenses quarterly to the fund’s
 board. *See* 17 CFR 270.12b-1(b).

1 interpretation of the Rule. In this case, Defendants included the challenged fees
2 under Rule 12b-1 for good reason: They are primarily paid to dealer firms for
3 “services” (including on-going advice) rendered by individual financial
4 consultants who are largely compensated by their broker dealer firms for
5 distribution-related activities. Because it is difficult to cleanly separate service
6 and distribution in this context, Defendants chose to subject the fees to the
7 additional scrutiny of a Rule 12b-1 plan as a prophylactic measure.³ This was the
8 only way to avoid an unintended violation of Rule 12b-1 should the SEC (or a
9 private plaintiff) subsequently disagree with Defendants’ characterization of the
10 payment as non-distribution.

11 Plaintiff’s theory that the inclusion of service fees in a Rule 12b-1 fee is
12 *per se* unlawful is flatly contradicted by the plain language of Rule 12b-1,
13 repeated SEC and regulatory guidance, and applicable case law. Therefore, for
14 the reasons stated herein and in Defendants’ opening brief, the Complaint should
15 be dismissed with prejudice.

16 II. ARGUMENT

17 Plaintiff’s arguments fail for at least three reasons: (1) it is not a violation of
18 Rule 12b-1 to include service expenses within a Rule 12b-1 distribution plan; (2)
19 Plaintiff cannot allege a *per se* violation of Section 36(b) unrelated to the *Gartenberg*
20 standard; and (3) Plaintiff’s *Gartenberg* analysis is woefully inadequate.

21 A. Rule 12b-1 Fees May Be Used to Pay for Shareholder Services

22 Nothing in the plain language of Rule 12b-1 remotely suggests that including
23 payments for shareholder services within a Rule 12b-1 distribution plan is prohibited.
24

25 ³ As noted in the Fund’s Statement of Additional Information, funds have the
26 option to decide whether to include payments for shareholder service in their
27 Rule 12b-1 Plan. Although payments for distribution must be made in
28 accordance with a distribution plan approved in conformance with Rule 12b-1,
payments for service only need to be included in a Rule 12b-1 plan if they are
made in connection with distribution. *See* Motion at 10-11.

1 Rule 12b-1 states that a mutual fund may act as a distributor of its own securities only
2 when payments made “in connection with such distribution are made pursuant to a
3 written plan [*i.e.*, a “12b-1 plan”]...” 17 C.F.R. § 270.12b-1. The rule makes clear that
4 a mutual fund may not make *distribution* payments without a 12b-1 plan. But it does
5 not “logically follow” from this (as Plaintiff claims (Opp. at 7)) that a mutual fund may
6 not also pay for shareholder services pursuant to a Rule 12b-1 plan, or that doing so is
7 *per se* illegal. Pursuant to the plain language of the Rule, there is no prohibition on a
8 mutual fund using Rule 12b-1 fees to pay for shareholder services.⁴

9 The plain language of Rule 12b-1 should end the analysis. However, even if the
10 Rule were ambiguous, Plaintiff has cited *absolutely no legal authority* which can be
11 read to support the theory that Rule 12b-1 was somehow intended to make service fees
12 unlawful. To the contrary, the authorities universally agree with Defendants’
13 interpretation of Rule 12b-1 that the inclusion of non-distribution services within a Rule
14 12b-1 plan is permissible. Both the SEC, which promulgated Rule 12b-1, and FINRA
15 (formerly the NASD),⁵ which has been granted the authority to regulate Rule 12b-1 fees
16

17 ⁴ For this same reason, Plaintiff’s interpretation of Rule 12b-1 would be
18 inconsistent with the authority Congress delegated to the SEC. The SEC’s
19 authority to promulgate Rule 12b-1 derives from Section 12(b) of the ICA.
20 Section 12(b) authorizes the SEC to govern the circumstances under which a fund
21 may act as a distributor of fund shares, but it does not authorize the Commission
22 to make non-distribution services illegal. If Rule 12b-1 is read to prohibit
23 shareholder servicing fees, the rule would be invalidated as having exceeded the
24 SEC’s rule making authority. *See Chamber of Commerce of the United States v.*
25 *SEC*, 366 U.S. App. D.C. 351, 358 (D.C. Cir. June 26, 2005) (holding that “the
26 [SEC] did not exercise its regulatory authority to effect a purpose beyond that of
27 the statute from which its authority derives” when promulgating a rule regarding
28 mutual fund director independence requirements); *see also Federal Maritime*
Com. v. Anglo-Canadian Shipping Co., 335 F.2d 255, 258 (9th Cir. 1964) (stating
that “the regulations of an agency of the United States must be issued within the
powers conferred by Congress. If agency regulations go beyond what Congress
has authorized, they are void”) (citations omitted).

⁵ The Financial Industry Regulatory Authority (“FINRA”), was created in July 2007
through the consolidation of NASD and the member regulation, enforcement and
arbitration functions of the NYSE, and is the largest non-governmental regulator for all
securities firms doing business in the United States.

1 paid to brokers under Section 22(b) of the ICA, expressly endorse the payment of post-
2 sale shareholder service fees under Rule 12b-1.⁶ *See* Motion at 12-14.

3 For example, as set forth in Defendant's Memorandum of Points and Authorities
4 in Support of Motion to Dismiss ("Motion") (*see* Motion at 13-14), the SEC approved
5 amendments to the NASD Rules of Fair Practice that impose a cap on service fees paid
6 to brokers within a Rule 12b-1 plan. Specifically, Rule 2830 has the effect of imposing
7 an overall cap of 1% on 12b-1 fees on an annual basis by limiting the amount of asset-
8 based sales charges (*i.e.*, distribution) paid by the fund to .75% and the amount of
9 service fees paid under the plan to .25%.⁷ *Id.* at 5. The SEC has endorsed the .25%
10 cap, claiming it was "fully consistent with the statutory mandate of section 22(b) of the
11 1940 Act" which gives the NASD authority to limit such expenses. *See* Release No.
12 34-30897 at 9 (July 13, 1992) (*See* Motion App. Tab F).

13 Plaintiff tries to marginalize this NASD rule (*see* Opp. at 11, n. 5) by arguing that
14 the NASD rule "does not specifically address Rule 12b-1." However, one of the
15 purposes of the amendments to NASD Rule 2830 was specifically to include Rule 12b-
16 1 payments within the scope of the Rule. *See* Release No. 34-30897, at 2 (July 13,
17 1992) (*See* Motion App. Tab F) (stating that "[the NASD] believed additional
18 amendments were necessary to prevent circumvention of the existing maximum sales
19 charge rule because it had become possible for funds to use 12b-1 plans . . . to charge
20 investors more for distribution than could have been charged as an initial sales load
21 under the existing maximum sales charge rule.")

22
23
24 ⁶ The SEC's interpretation of the laws it administers is entitled to substantial
25 deference. *See, e.g., Env'tl. Action, Inc. v. SEC*, 895 F.2d 1255, 1259 (9th Cir. 1990);
see also Motion at 12 n.7.

26 ⁷ *See* Order Approving Proposed Rule Change Relating to the Limitation of Asset-
27 Based Sales Charges as Imposed by Investment Companies, Exchange Act Release No.
28 30897, at 1, 5 (July 13, 1992) (Motion App. Tab F); *see also* NASD Conduct Rule
2830(d)(5).

1 In addition, Plaintiff's Opposition almost completely ignores the numerous SEC
2 releases cited by Defendants in which the SEC specifically endorses the inclusion of
3 service expenses in a Rule 12b-1 distribution plan. Plaintiff addresses only one of these
4 releases, a 1988 Release in which the SEC could not have been more clear in stating
5 that it was permissible for a fund to pay non-distribution expenses with Rule 12b-1 fees.
6 (*See* the 1988 Release at 39-40). Plaintiff's challenge to that release is unintelligible,
7 and if anything, supports dismissal of the Complaint.

8 Apparently retreating from her initial position that *any* use of Rule 12b-1 fees for
9 service was *per se* unlawful,⁸ Plaintiff concedes that the 1988 Release permits the use of
10 12b-1 fees to pay for "legitimate" service. (*See* Opp. at 10.) The 1988 Release actually
11 states that "to the extent a fund is paying for legitimate non-distribution services, such
12 payments *need not be* made under a 12b-1 plan." (*See* Release No. IC-16431, at 39-40)
13 (emphasis added). Thus, in light of the ambiguity about whether a service may be
14 considered an indirect form of distribution, it is clear that the SEC was clarifying that
15 that service payments *may* be made under a 12b-1 plan, but to the extent they are
16 "legitimate" (*i.e.*, pure service and not distribution), they can be paid directly by the
17 Fund outside of the distribution plan without having to comply with the additional
18 scrutiny and disclosure requirements of 12b-1. (*See* Motion App. Tab C). Nothing in
19 the Release supports a *per se* violation of Rule 12b-1 based on the use of 12b-1 fees to
20 pay for non-distribution service.⁹

21 _____
22 ⁸ At the outset, Plaintiff argues that "the use of 12b-1 fees to pay for post-sale services
23 would by the plain reading of the statute violate the regulatory scheme." Opp. at 3.
24 However, she appears now to concede that the 1988 Release permits the payment of
service fees under a Rule 12b-1 plan as long as those fees are for "legitimate" service.

25 ⁹ Plaintiff also grossly mischaracterizes the Rule itself. Plaintiff states that because
26 the "mailing of prospectuses to other than current shareholders" is included as one of
27 the "permitted activities" under Rule 12b-1, such a mailing to existing shareholders is
28 prohibited. Opp. at 8. However, that is not what the Rule says at all. Rather, Rule
12b-1 defines when a fund "will be deemed to be acting as a distributor," and lists "the
mailing of prospectuses to other than current shareholders" as one example of when a
fund will be deemed to be engaged in an activity "primarily intended to result in the

1 Moreover, the SEC has repeatedly clarified that service payments are not only an
2 acceptable part of a 12b-1 Plan, but advised that those expenses should be included in
3 certain circumstances.¹⁰ In those instances where it is not clear whether an activity is
4 properly characterized as service or distribution, the SEC has stated that advisers may
5 want to include those activities in a 12b-1 plan in order to avoid inadvertently violating
6 Rule 12b-1.¹¹ See Motion at 10-11, n.5; 12-13. The SEC even provided guidance on
7 how investment advisers should disclose service fees paid through a 12b-1 plan in their
8 filings.¹²

9
10 sale of shares.” 17 C.F.R. § 270.12b-1(a)(2). The fact that the Rule states that
11 payments for activities such as mailing prospectuses to non-shareholders *must* be
12 included in a 12b-1 plan in no way prohibits investment companies from making *other*
13 payments under a 12b-1 plan.

14 ¹⁰ See *supra* pp. 2-4; see also SEC Division of Investment Management, Report on
15 Mutual Fund Fees and Expenses, at 16-17 (Motion App. Tab J) (listing “financial
16 advice/planning” and “consolidated statements and other services provided by a mutual
17 fund supermarket” as services often paid for under a 12b-1 Plan); Registration Form
18 Used By Open-End Management Companies, ICA Release No. 22528, at *27 (Mar. 10,
19 1997) (Motion App. Tab I) (noting “[a] fund [could] pay ‘service fees’ alone or
20 combined with fees for the sale and distribution of its shares”); SEC No-Action Letter,
21 1998 SEC No-Act. LEXIS 976, at *14 (Oct. 30, 1998) (See Motion App. Tab D) (“The
22 [SEC] has stated that funds may pay for non-distribution expenses pursuant to rule 12b-
23 1 plans”).

24 ¹¹ The SEC’s position in this regard is in direct contrast to Plaintiff’s interpretation of
25 12b-1. If Plaintiff’s theory were correct, every payment would fall into one of two
26 discrete buckets: (i) distribution payments under 12b-1 and (ii) non-distribution (*i.e.*,
27 service) payments. According to Plaintiff, distribution payments would be required to
28 be in the 12b-1 plan, and service payments would be *per se* prohibited from being in the
12b-1 plan. This would force an adviser to choose whether every action it takes was
properly characterized as service or distribution, and if one of these actions was labeled
incorrectly, Rule 12b-1 would be violated. This cannot possibly be the correct
interpretation of Rule 12b-1, given that the question of what is service and what is
distribution is not always clear. It is for exactly this reason that the SEC specifically
allows advisors to include service payments under Rule 12b-1.

¹² Investment Company Filing Guidance, SEC No-Action Letter, 1994 WL 808442, at
*4 (Feb. 25, 1994) (instructing registrants to place a parenthetical after the line caption
“Rule 12b-1 fees” to “indicate inclusion of service fees [deducted from assets pursuant
to a Rule 12b-1 Plan]” and noting that investment companies could also pay service
fees outside of a 12b-1 Plan, and that such fee amounts should be included in an “Other
Expenses” line item).

1 The courts, too, have long recognized the use of 12b-1 plans to pay for post-sale
2 services. (See Motion at 11-12.) For example, the court in *ING Principal Prot. Funds*
3 *Derivative Litig.*, 369 F. Supp. 2d 163, 167 (D. Mass. 2005), stated that “Rule 12b-1
4 also permits a mutual fund to compensate broker-dealers with asset-based service fees
5 for providing shareholder services and maintaining shareholder accounts.” Plaintiff
6 fails to address this language in her Opposition, attempting instead to divert this Court
7 to other issues in that case, or pointing to the meaningless distinction that the case
8 involved “closed end funds.” (Opp. at 9.) Plaintiff does not offer any insight as to why
9 this might be relevant, but in any event, it is clear the case law cited by Defendants is
10 directly on point.

11 In fact, every court to have considered the issue has concluded that payments for
12 service are properly within the scope of Rule 12b-1. See *Krinsk v. Fund Asset Mgmt.,*
13 *Inc.*, 715 F. Supp. 472, 501 (S.D.N.Y. 1988) (holding that “even if payments for
14 shareholder service and maintenance of Fund size are not ‘distribution payments,’ per
15 se, they are made ‘in connection with’ a distribution and are therefore to be regulated by
16 the 12b-1 plan”) (emphasis added); *Gallus v. Ameriprise Fin., Inc.*, 497 F. Supp. 2d
17 974, 985 (D. Minn. July 10, 2007) (holding that Rule 12b-1 fees at issue were not
18 excessive because they were used to pay for services to existing shareholders). Perhaps
19 most telling, half of Plaintiff’s Opposition is devoted to confusing and misguided
20 attempts to distinguish the voluminous authority cited by Defendants, ***but she does not***
21 ***cite a single case or regulatory authority suggesting that Rule 12b-1 fees may not be***
22 ***used to pay for shareholder service.***

23 Finally, the use of Rule 12b-1 fees to pay for non-distribution service is a
24 widespread practice in the mutual fund industry, and Plaintiff’s challenge would thus
25 have far-ranging implications on the SEC’s enforcement efforts in this area. For
26 example, in 2005 the Investment Company Institute (“ICI”) reported that funds use 52%
27 of all Rule 12b-1 fees “for the ongoing assistance and service that financial advisers and
28

1 others provide to shareholders after the purchase.” (See ICI, “How Mutual Funds Use
2 12b-1 Fees,” *Fundamentals*, Vol. 14, No. 2, (Feb. 2005), available at
3 <http://members.ici.org/getPublicPDF.do?file=fun1402>). Moreover, mutual fund
4 directors who have responsibility for approving Rule 12b-1 plans on an annual basis
5 have done so based on guidance that Rule 12b-1 plans may be used to “compensate
6 brokers and sellers of fund shares for shareholder accounting and other services
7 provided to fund shareholders.” *Mutual Fund Directors Forum, Best Practices and*
8 *Practical Guidance for Directors Under Rule 12b-1*, at 1 (May 2007) (“Best Practices
9 Guide”), available at <http://www.mfdf.com/site/documents/12b-1Report.pdf>. These
10 industry reports further underscore that 12b-1 fees for post-sale shareholder services are
11 not only acceptable, but are a widespread practice in the market today.

12 It is therefore beyond question that industry regulators such as the SEC and
13 FINRA, the federal courts, and the mutual fund industry itself have all recognized and
14 approved the use of 12b-1 fees to pay for post-sale shareholder services.¹³

15 **B. Plaintiff Cannot Allege a Per Se Violation Under Section 36(b)**

16 Plaintiff’s Complaint repeatedly makes clear her claim rests on a *per se* violation
17 of Section 36(b). In response to the overwhelming legal precedent rejecting such a *per*
18 *se* approach, Plaintiff goes to great pains in her Opposition to continue to press that
19

20 ¹³ Plaintiff stresses the importance of the factors set forth by the SEC in the Release in
21 which it adopted Rule 12b-1, Investment Company Act Release No. 11414 (Oct. 28,
22 1980) (See Motion App. Tab A). See Opp. at 3-4, 20. But, as Defendants have stated
23 previously (and as Plaintiff has not refuted), Plaintiff’s reliance on these factors is
24 misplaced, as the factors have never been mandatory, and the SEC specifically declined
25 to include them in the Rule itself to avoid restricting the directors in their decision-
26 making process. See Motion at 9-10 n.3. Likewise, the Best Practices Guide firmly
27 states that those original factors are irrelevant to today’s uses of Rule 12b-1. See Best
28 Practices Guide at p. 2 (stating that “the factors that the Commission suggested in 1980
... are today, in the context of current systems of distribution, largely irrelevant”); and
p. 11 (stating that “directors should seek to identify a set of factors (whether or not
those factors were on the SEC’s original list) that is relevant to the plan they are
evaluating, and use those factors to determine what action they should take with respect
to the plan.”) Plaintiff’s reliance on the SEC’s original suggested factors is thus wholly
without merit.

1 theory without using the phrase “*per se* violation.” See Opp. at 1 (the use of 12b-1 fees
2 for services makes the payment “*ab initio* impermissible and, thus, inherently
3 ‘excessive’ under Section 36(b)”; *id.* at 7 (payment of service fees under 12b-1 would
4 be “‘excessive’ as a matter of law”); *id.* at 9 (use of 12b-1 fees for shareholder services
5 “are by definition ‘excessive’”). No matter what label Plaintiff attaches, however, no
6 Court has ever found that such a *per se* violation of Section 36(b) exists without regard
7 to an analysis of whether the challenged fees are excessive.

8 To the contrary, courts have routinely rejected claims that fees are improper or
9 unlawful and therefore constitute a *per se* breach of a fiduciary duty under Section
10 36(b). See Motion at 9-10. Plaintiff’s attempt to dismiss the case law cited in
11 Defendants’ Motion is unavailing. That some of these cases involved closed-ended
12 funds is irrelevant, because each involved allegations nearly identical to the ones
13 Plaintiff makes here. See, e.g., *Yameen v. Eaton Vance Distribs., Inc.*, 394 F. Supp. 2d
14 350, 357 (D. Mass. 2005) (“Plaintiff provides a wooden reading of Rule 12b-1. She
15 reads it to bar deferred payment for *services* rendered. . . . Rule 12b-1 and NASD Rule
16 2830 are specifically designed to allow mutual funds to continue paying sales charges
17 after a fund has closed to new investors”). For example, in *ING Principal Prot. Funds*,
18 the court held that plaintiffs failed to state a claim for violation of Section 36(b) with
19 respect to a fund’s payment of Rule 12b-1 service fees because they did “not allege that
20 the service fees exceed the ongoing expenses associated with maintaining shareholder
21 accounts” and did not allege any “facts, that, if true, would indicate that the services
22 fees are unrelated to the shareholder services provided by broker-dealers.” *ING*
23 *Principal Prot. Funds*, 369 F. Supp. 2d at 169

24 Just as in *ING Principal Prot. Funds*, Plaintiff here does not make any allegations
25 that the service fees are unrelated to the services provided. Plaintiffs have not cited a
26 single case finding a violation of Section 36(b) can be sustained without these
27 allegations. By contrast, numerous authorities hold that it is insufficient to simply
28

1 allege, as Plaintiff does here, that the fees themselves are improper in support of a 36(b)
2 claim.¹⁴

3 Plaintiff's reliance on *Rohrbaugh v. Investment Company Institute*, No. 00-1237,
4 2002 U.S. Dist. LEXIS 13401, at *34-35 (D.D.C. July 2, 2002), is unavailing. In
5 *Rohrbaugh*, the court *dismissed* a complaint because it "failed to assert any facts
6 alleging a breach of fiduciary duty related to advisory fees" and had "absolutely no
7 connection to excessive advisory fees." Similarly, in *Green v. Fund Asset Mgmt., L.P.*,
8 19 F. Supp. 2d 227 (D.N.J. 1998), the court denied dismissal only because it decided
9 there was a question of fact whether a conflict of interest existed regarding how the
10 advisory fees were calculated that could not be decided on the pleadings. *See id.* at 234
11 n.10. In contrast, Plaintiff here alleges only that Defendants purportedly violated Rule
12 12b-1 and in so doing purportedly violated Section 36(b).

13 Finally, Plaintiff's entire theory of *per se* liability rests on the premise that the
14 payment of Rule 12b-1 fees for non-distribution service is a violation of Rule 12b-1.
15 As this premise is incorrect, there clearly can be no *per se* liability under Section 36(b).
16 Thus, the only way the challenged fees can violate Section 36(b) is if they are excessive
17 under a *Gartenberg* analysis.

18 **C. Plaintiff Fails to Allege Facts Sufficient to Demonstrate that the 12b-1**
19 **Fees Are Excessive Under the Gartenberg Standard**

20 The *Gartenberg* standard applies to Plaintiff's allegations regarding excessive
21 Rule 12b-1 fees. (*See* Motion at 7-8.) Courts have repeatedly ruled that the *Gartenberg*
22 factors must be considered when determining whether or not a challenged fee is
23 excessive. *See, e.g., Gartenberg v. Merrill Lynch Asset Mgmt.*, 694 F.2d 923 (2d Cir.
24

25 ¹⁴ *See Bellikoff v. Eaton Vance*, 481 F.3d 110, 117 (2d Cir. 2007); *In re Salomon Smith*
26 *Barney Mut. Fund Fees Litig.*, 528 F. Supp. 2d 332, 338 (S.D.N.Y. 2007); *In re*
27 *Oppenheimer Funds Fees Litig.*, 426 F. Supp. 2d 157, 158 (S.D.N.Y. 2006). The
28 Plaintiff ignores the basic proposition for which Defendants cites these cases – that
Section 36(b) requires more than an allegation that fees are improper *per se* in order to
survive a motion to dismiss.

1 1982), *cert. denied*, 461 U.S. 906 (1983); *In re Am. Funds Fee Litig.*, No. CV 04-5593
2 GAF, 2005 U.S. Dist. LEXIS 41884, at *16 (C.D. Cal. Dec. 16, 2005) (Feess, J.).
3 Plaintiff does not—and cannot—cite any case that involves Rule 12b-1 fees which
4 supports her contention that an excessive 12b-1 fee claim may be successfully alleged
5 without meeting the *Gartenberg* factors. *See Gallus v. Ameriprise Fin., Inc.*, 497 F.
6 Supp. 2d 974, 984-85 (D. Minn. 2007); *ING Principal Prot. Funds Derivative Litig.*,
7 369 F. Supp. 2d 163, 167-69 (D. Mass. 2005).

8 The Complaint cannot possibly survive under the *Gartenberg* standard. Plaintiff
9 has failed to allege any facts to support the conclusion that the 12b-1 fees charged by
10 the Fund are “so disproportionately large that they bear no reasonable relationship to the
11 services rendered and could not have been the product of arm’s-length bargaining.” *See*
12 *Gartenberg*, 694 F.2d at 928; Motion at 15-17. Courts have consistently granted
13 motions to dismiss Section 36(b) claims where, as here, a plaintiff has failed to meet
14 this standard. *E.g., Amron v. Morgan Stanley Inv. Advisors, Inc.*, 464 F.3d 338 (2d Cir.
15 2006) (affirming dismissal of a § 36(b) claim where the two complaints in that case
16 failed to allege facts sufficient to satisfy each *Gartenberg* factor); *In re Salomon Smith*
17 *Barney Mut. Fund Fees Litig.*, 528 F. Supp. 2d 332, 338 (S.D.N.Y. 2007) (dismissing
18 complaint after analysis as to whether each *Gartenberg* factor was adequately pled);
19 *Hoffman v. UBS-AG*, No. 05 Civ. 6817 (LBS), No. 05 Civ. 7027 (LBS), No. 05 Civ.
20 8448 (LBS), 2008 U.S. Dist. LEXIS 85065, at *48-50 (S.D.N.Y. Oct. 22, 2008)
21 (agreeing with cases “that require more substantial pleadings in order to bring a claim
22 under the ICA”); *see also* Motion at 15-16 (collecting cases).

23 Despite this authority, Plaintiff argues that she is being held to a heightened
24 pleading standard. (*See Opp.* at 13.) But all of the cases dismissing complaints for
25 failure to allege facts sufficient to support the *Gartenberg* factors were decided based
26 on the Fed. R. Civ. P. Rule 8 pleading standard. Under Rule 8, a plaintiff still must
27 plead “more than labels and conclusions, and a formulaic recitation of the elements of a
28

1 cause of action will not do.” *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955,
2 1964-65 (2007). Indeed, even the case cited by Plaintiffs, *Forsythe v. Sun Life*
3 *Financial, Inc.*, 417 F. Supp. 2d 100, 114-15 (D. Mass. 2006), states that “the liberality
4 of Rule 8 should not be read to mean that there are not some minimal standards that
5 must be met. . . . [A] § 36(b) complaint is not sufficient if it rests solely on general and
6 conclusory legal assertions that the fees charged were excessive.”

7 Plaintiff has not satisfied Rule 8’s basic pleading requirements. She has pleaded
8 significantly fewer facts than each case she cites as satisfying the pleading standard
9 under *Gartenberg*,¹⁵ including the Second Amended Complaint filed in *In re American*
10 *Funds Fee Litigation* (also known as “*Corbi*”). Plaintiff’s argument with respect to
11 *Corbi* apparently rests on her belief that the present Complaint is at least as good as the
12 *Corbi* Second Amended Complaint. (*See Opp.* at 21-22.) That is simply not true.¹⁶ In
13 any event, as Plaintiff herself acknowledges in a footnote, this Court never analyzed the
14 *Corbi* Second Amended Complaint to assess whether it adequately pled the *Gartenberg*
15 factors. *Id.* at 21, n.11; *see also In re Am. Funds Fee Litig.*, No. CV 04-5593 GAF,
16 2007 U.S. Dist. LEXIS 8276, *12-23 (C.D. Cal. Jan. 17, 2007) (discussing only the
17 issue concerning when the Section 36(b) “action” arose).

18
19 ¹⁵ *See Siemers v. Wells Fargo & Co.*, No. 05-4518, 2006 U.S. Dist. LEXIS 60858, at
20 *61 (N.D. Cal. Aug. 14, 2006) (plaintiff alleged “a variety of detailed facts” to support
21 excessive fee claim); *Wicks v. Putnam Invest. Mgmt. LLP*, No. 04-10988, 2005 U.S. Dist.
22 LEXIS 4892, at *3 (D. Mass. Mar. 28, 2005) (alleging that the services provided by
23 defendants have not been in proportion to the fees earned and alleging facts regarding
kickbacks to brokers); *Pfeiffer v. Bjurman, Barry & Assocs.*, No. 03 Civ. 9741, 2004 U.S.
Dist LEXIS 16924, at *8 (S.D.N.Y. 2004) (alleging detailed facts relating to the receipt
of fees in the six months after the fund closed and when services remained the same).

24 ¹⁶ Moreover, there are significant differences between the *Corbi* and the *Korland*
25 complaints. For example, the *Corbi* case was focused on challenging the *advisory fees*
26 paid by 16 (later eight) different American Funds. But Plaintiff here admits that “[t]he
27 appropriateness of the investment advisory fees is *not at issue in this action.*” (*Opp.* at 1)
28 (emphasis added). Therefore, it is not surprising that Plaintiff found only vague
conclusory allegations regarding 12b-1 fees in the *Corbi* Second Amended Complaint, as
its focus was on advisory fees.

1 Having failed to find a single case where a plaintiff survived a motion to dismiss
2 in circumstances similar to those presented here, Plaintiff nonetheless asserts that she
3 has adequately pleaded facts regarding each of the six *Gartenberg* factors. She claims
4 that “although the headings do not necessarily use *Gartenberg*’s literal words,” (Opp. at
5 22), the allegations are buried in Plaintiff’s Complaint somewhere.¹⁷ However, the
6 paragraphs of the Complaint she cites as addressing “nature and quality of services” and
7 “fund profitability” actually have nothing to do with those *Gartenberg* factors, Opp. at
8 22. Similarly, Plaintiff cannot point to any allegations regarding “fall-out benefits.”
9 Instead, she claims that fall out benefits are only pled “in broad substance” (*i.e.*, not at
10 all). Opp. at 12.

11 Moreover, the Complaint barely scratches the surface with respect to the
12 remaining three *Gartenberg* factors – (1) economies of scale; (2) comparative fees; and
13 (3) the independence and conscientiousness of the Fund’s directors. Certainly, Plaintiff
14 has not plead “enough facts to state a claim to relief that is plausible on its face.”
15 *Twombly*, 127 S. Ct. at 1974. Plaintiff’s casual references to a few *Gartenberg* factors,
16 supported only by broad conclusory allegations and recycled critiques of the mutual
17 fund industry as a whole, are insufficient to survive a motion to dismiss.

18 **1. Nature and Quality of the Services Provided**

19 To allege facts regarding the nature and quality of services provided, Plaintiff
20 must, at an absolute minimum, describe the types of services provided by Defendants
21 and state why those services are not commensurate with the fees paid for them. *See*
22 *Forsythe*, 417 F. Supp. 2d at 114 (“The complaint should at least set forth basic facts as
23

24 ¹⁷ *See Watkins v. Sanders*, No. 08-CV-1615, 2008 U.S. Dist. LEXIS 101026, at *11
25 (S.D. Cal. Dec. 12, 2008) (when plaintiff’s arguments are “scattered throughout the
26 complaint and are not organized into a ‘short and plain statement of the claim,’ dismissal
27 for failure to satisfy Rule 8[] is proper.”); *Brewer v. Indymac Bank*, No. 08-Cv-01211,
28 2008 U.S. Dist. LEXIS 73202, at *2 (E.D. Cal. Aug. 13, 2008) (“Rule 8(a) requires
parties to make their pleadings straightforward, so that judges and adverse parties need
not try to fish a gold coin from a bucket of mud.” (quoting *U.S. ex. rel. Garst v.*
Lockheed-Martin Corp., 328 F.3d 374, 378 (7th Cir. 2003))).

1 to who did what to whom, when, where and—if relevant to the case—why.”). But there
2 is no reference in Plaintiff’s Complaint to the multitude of services the Defendants
3 provide. Plaintiff’s only reference to the actual services provided concerns services
4 provided by *broker-dealers* – not the defendants here.¹⁸ (See, e.g., Compl. ¶ 88 “...the
5 broker is legally obligated to provide Fund shareholders many of these services...such
6 as trade confirmations, account statements and suitability analyses.”) Plaintiff cannot
7 point to one paragraph in the Complaint that contains allegations relating to the types of
8 services *Defendants* provided, the quality of those services, or why the 12b-1 fees are
9 allegedly excessive in relation to those services.

10 Plaintiff further argues that the 12b-1 fees are excessive because broker-dealers
11 are “legally obligated” to provide post-sale shareholder services, and therefore the
12 broker-dealers do “not have to be induced to provide that service in return for
13 payment.”¹⁹ (See Opp. at 14.) This argument fails for several reasons. First, this case
14 concerns the fees paid to and retained by Defendants—not broker-dealers. See *Pfeiffer*,
15 2006 U.S. Dist. LEXIS 7862 at *9, *14-15 (holding that (1) “serving as a pass-through
16 entity for Rule 12b-1 payments does not constitute ‘receipt’ under the ICA” and that (2)
17 constructive receipt of payments did not establish that the adviser was the recipient of
18 payments as required by § 36(b)). Moreover, to adopt Plaintiff’s logic would mean that
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22 ¹⁸ Plaintiff’s Complaint acknowledges that the majority of the Rule 12b-1 fees at issue
23 in this case are paid to broker-dealers. (Compl. ¶¶ 10, 78, 177.) But Plaintiff’s
24 Opposition fails to even address (and therefore implicitly concedes) Defendants’
25 argument that because the majority of fees at issue were not paid to the Defendants, they
are outside the scope of this Section 36(b) action. See Motion at 16, n.13. This fact alone
supports dismissal. *Id.*

26 ¹⁹ The Complaint alleges that this legal obligation derives from brokers’ “operations
27 and compliance obligations.” Compl. ¶ 88. But Plaintiff does not cite any source or
28 authority for these obligations, nor does Plaintiff even reference such “operations and
compliance obligations” in her Opposition.

1 broker-dealers are not entitled to be paid for services they are legally obligated to
2 perform.²⁰

3 The remaining allegations to which Plaintiff directs the Court have nothing to do
4 with the nature or quality of the services that Defendant AFD provided to Plaintiff in
5 exchange for the payment of 12b-1 fees. (*See* Compl. ¶¶ 73, 76-77 (statements
6 regarding only the amount of the 12b-1 fee); ¶¶ 78, 89-91 (broad conclusory statements
7 that the .25% service portion of the 12b-1 fee is not primarily intended to result in the
8 sale of fund shares); ¶ 178 (conclusory statement that Independent Directors did not
9 seek lower fees or a limit on the use of 12b-1 fees despite the size of the fund and
10 “[i]ncreases in computerization and productivity”); ¶¶ 179, 181 (regurgitation of
11 industry criticism about mutual fund fees generally)).

12 Plaintiff also argues—even though the Complaint does not so allege—that
13 because many shareholder accounts are small, “[c]ommon sense suggests that such
14 small accounts do not need substantial expenditures on shareholder services.” (Opp. at
15 14.) But all accounts, no matter what size, are entitled to the same quality services, and
16 obviously the cost of some services are the same for all accounts no matter the size
17 (*e.g.*, the costs of printing and mailing account statements is the same no matter if the
18 account is \$1,000 or \$100,000 in value). More importantly, because Rule 12b-1 fees
19 are based on the percentage of assets held, investors with small amounts actually pay
20 less for those services. (*See* SEC Roundtable at 172) (Mr. Sharp noted that if 12b-1
21 fees were to be eliminated, “small investors will be paying more than they are now”).

22
23 ²⁰ This clearly cannot be the case. Indeed, even Plaintiff admits that Defendants are
24 permitted to charge 12b-1 fees of up to .25% to pay for such shareholder services,
25 including post-sale services. (Opp. at 13.) As the general counsel of a large broker-
26 dealer makes clear, without such 12b-1 fees brokers would still charge investors for post-
27 sale shareholder services, and those fees would likely be higher than the 12b-1 fees
28 charged by advisers like Defendants. (*See* SEC Roundtable at 135-36, 172). Moreover,
Plaintiff blatantly mischaracterizes the testimony of Michael J. Sharp, General Counsel of
Citigroup Wealth Management, claiming that he “stated that the purpose of the post-sale
12b-1 service fee is not primarily intended to result in the sale of fund shares. . . .”
(Compl. ¶ 91.) Plaintiff does not include a pinpoint cite for Mr. Sharp’s alleged
statement, because Mr. Sharp did not make any such statement).

1 In conclusion, the Complaint contains no allegations relating to the nature and
2 quality of the services provided by Defendants or how the services are excessive
3 relative to the fees paid.

4 **2. Profitability**

5 The Complaint is also devoid of any allegations concerning the costs incurred by
6 Defendants in providing services to the Fund or its shareholders. Plaintiff tries to
7 compensate for this deficiency by continually repeating allegations regarding the size of
8 the Fund. (*See e.g.*, Opp. at 1, 12, 14-15.) Plaintiff's implicit message seems to be that
9 if the Fund is alleged to be "incredibly large," then *ipso facto* the Court should be
10 convinced that the Funds' fees are excessive. (*See* Opp. at 15.)

11 However, profitability can only be alleged by reference to Defendants' costs and
12 revenues. *See Amron v. Morgan Stanley Inv. Advisors, Inc.*, 464 F.3d 338, 344 (2d Cir.
13 2006) (holding that "assertions regarding the size of 12b-1 and advisory fees . . . are
14 irrelevant to a showing of profitability without some allegation of the corresponding
15 costs incurred in operating the funds"); *Kalish v. Franklin Advisers, Inc.*, 742 F. Supp.
16 1222, 1231 (S.D.N.Y. 1990) (explaining that profit is defined as "net income as a
17 percentage of revenues" which is derived at "by deducting appropriate costs from gross
18 revenues").

19 Plaintiff's sole allegations purporting to relate to profitability state only the total
20 dollar amount of fees paid by the Fund, or refer more generally to the total amount of
21 12b-1 fees paid by all American Funds. (*See* Opp. at 14-15.) Such allegations are
22 insufficient to plead a breach of a fiduciary duty under Section 36(b), *see Amron*, 464
23 F.3d at 344, and to accept such a bootstrap argument would render the fund profitability
24 factor a nullity. Moreover, Plaintiff's allegations are particularly deficient here because
25 the Complaint fails to allege what fees Defendant AFD retains of the gross amounts that
26 are paid to broker-dealers, much less what AFD's costs were. Thus, Plaintiff has not
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1 alleged how AFD has profited from these fees. (*See* Motion at 16 & n. 13.) In short,
2 Plaintiff has failed to make any allegations relating to profitability.

3 **3. Economies of Scale**

4 Plaintiff does not deny that historically other plaintiffs in Section 36(b) have
5 always alleged the opposite of what Plaintiff asserts here—that the adviser realized
6 substantial economies of scale. *See* Motion Br. at 18. Despite lacking any legal
7 authority,²¹ Plaintiff asserts that an allegation concerning the total absence of economies
8 of scale is sufficient to make out an excessive fees claim under Section 36(b). (*See*
9 *Opp.* at 15.) However, the absence of any economies of scale indicates that Defendants
10 did not receive excessive fees. (*See* Motion at 17-18.)

11 Plaintiff tries to hedge her bets by arguing that, even if there were some
12 economies of scale realized, the amount shared by Defendants with fund investors is
13 insufficient as a matter of law. (*Opp.* at 16.) Here again, Plaintiff cites no legal
14 precedent for her bald assertions.

15 Significantly, in calculating the amount of savings, Plaintiff purposefully avoids
16 referencing the following publicly available facts:

- 17 • First, Plaintiff references the Fund’s breakpoints, but ignores the fee waivers,
18 and in so doing suggests that only \$24 million in savings was passed on by
19 Defendants to Fund investors over a three year period. In reality, Defendants’
20 fee waivers alone saved the Fund a total of \$48 million in just the year ended
21 March 31, 2008.²² (*See* Motion at 19 n.15.)

22
23 ²¹ Instead, Plaintiff relies on commentary by industry critics who do not purport to
24 conduct any analyses of the Fund at issue here. *See Opp.* at 15-16 (citing paragraphs ¶¶
108-116, 118, 120-23 of the Complaint).

25 ²² Plaintiff’s claim that Defendants conceded that it is irrelevant whether economies of
26 scale benefit investors is a gross misstatement of comments made by Paul Haaga (a
27 CRMC officer) at an SEC Roundtable discussion. Mr. Haaga stated only that the size of
28 the fund (*i.e.*, “to have assets come into the fund”) is irrelevant. He did not comment on
whether breakpoints and fee waivers—ways of sharing the savings from economies of
scale—benefit investors. He added that regardless of whether a fund is increasing in size,

- Second, Plaintiff computes a misleading year-over-year comparison of the Fund's total 12b-1 fees. (*See Opp.* at 16 & n.7.) This type of financial analysis demonstrates only that the size of the Fund grew from 2006 to 2007, and thus the 12b-1 fee, which is a percentage of the Fund's assets, also grew. This analysis also fails to account for the millions of dollars saved by the Fund due to Defendants' combined use of fee waivers and breakpoints in the advisory fee schedule.²³

4. Comparative Fees

In addressing the *Gartenberg* comparative fees factor, Plaintiff's allegations again fail to satisfy basic pleading requirements. The allegations that purport to relate to this factor consist of: (1) one general conclusory statement that "most mutual funds of the same generic type, including the Fund, charge essentially the same 12b-1 fee percentages" (Compl. ¶ 181); and (2) statements made by industry critics regarding competition relating to mutual fund fees generally. (Compl. ¶¶ 179-180; *see also* Motion at 19-20.) These are plainly insufficient.

Plaintiff apparently attempts to argue that comparative fees (despite being a *Gartenberg* factor) are irrelevant or that charging fees similar to others in the industry somehow supports a breach of fiduciary duty. (*Opp.* at 17.) Plaintiff suggests that similar pricing suggests a lack of competition between advisers' fees. Aside from being economically insensible,²⁴ no court analyzing the *Gartenberg* factors has ever held (or even suggested) that the charging of fees in line with other funds in the industry

it "is a good thing to have" shareholders pay an ongoing service fee. *See SEC Roundtable* at 60.

²³ An additional ground for dismissal is that, as with profitability, allegations relating to economies of case require pleading "the costs of performing fund transactions or the relationship between such costs and the number of transactions performed." *Amron*, 464 F.3d at 345. And, as with the discussion of profitability noted *supra*, the Complaint contains no allegations relating to costs and thus cannot properly allege that Defendants achieved any economies of scale.

²⁴ As a matter of economics, perfect competition (*e.g.*, for commodities such as wheat) should result in little or no price disparity.

1 supports an allegation that those fees are excessive. To the contrary, *Gartenberg*
 2 specifically stated that comparative fees were relevant because ““best industry practice
 3 . . . will provide a guide.”” *Gartenberg*, 694 F.2d at 929 (citing S. Rep. No. 91-194).

4 Plaintiff acknowledges that industry practice is to pay brokers an NASD-
 5 sanctioned .25% service fee and a .75% commission fee under a 12b-1 plan.
 6 Defendants charged these fees, which Plaintiff admits was the same percentage charged
 7 by a “majority of funds” in the industry. (*See Opp.* at 17.) These allegations cannot
 8 support a Section 36(b) excessive fee claim.

9 **5. Independence and Conscientiousness of the Independent**
 10 **Directors**

11 The ICA expressly provides a presumption that the Fund’s Independent Directors
 12 are independent. *See* 15 U.S.C. § 80a-2(a)(9) (a “natural person shall be presumed not
 13 to be a controlled person.”); *In re AllianceBernstein Mut. Fund Excessive Fee Litig.*,
 14 No. 04 Civ. 4885 (SWK), 2006 U.S. Dist. LEXIS 939, at *9-11 (S.D.N.Y. Jan. 11,
 15 2006) (noting the ICA has a “statutory presumption of director independence.”).
 16 Plaintiff does not, and cannot, rebut that presumption here.

17 The Complaint—in spite of its many repetitive statements—contains just three
 18 conclusory allegations that purport to show the lack of independence and
 19 conscientiousness of the Independent Directors: (1) the Directors receive compensation;
 20 (2) all Directors were not elected by shareholders; and (3) the Directors spent an
 21 “immaterial” amount of time considering the 12b-1 plans for the Fund because (a) they
 22 (allegedly) considered the 12b-1 plan only at the yearly Contracts Committee meeting
 23 held simultaneously to other funds’ Contracts Committee meetings and (b) they serve
 24 on multiple funds’ boards.²⁵ (Compl. ¶¶ 165-68, 171-174.) These types of conclusory

25 _____
 26 ²⁵ And, as with the other *Gartenberg* factors, Plaintiff ignores key facts which would
 27 undermine her allegations relating to the Directors’ independence and conscientiousness.
 28 For example, Plaintiff never addresses the fact that the Fund meets quarterly and also
 formally held six audit committee meetings and two nominating committee meetings, in
 addition to the Contracts Committee meeting. *See Motion* at 20 n. 17.

1 allegations are insufficient to state a claim under Section 36(b).²⁶ (See Motion at 21)
 2 (citing *Migdal*, 248 F.3d at 330 (dismissing a claim where plaintiff made nearly
 3 identical allegations to plaintiff here)); *Amron*, 464 F.3d at 345 (same); *Strougo v. BEA*
 4 *Assocs.*, 188 F. Supp. 2d 373, 382 (S.D.N.Y. 2002) (same); *In re Morgan Stanley &*
 5 *Van Kampen Mut. Fund Secs. Litig.*, No. 03 Civ. 8208 (RO), 2006 U.S. Dist. LEXIS
 6 20758, at *51 n.26 (S.D.N.Y. Apr. 14, 2006) (collecting cases that held that allegations
 7 regarding selection and compensation of directors is insufficient to show a conflict of
 8 interest)).²⁷ Plaintiff cites no authority to the contrary.

9 **B. Plaintiff's Section 48(a) Claim Should Be Dismissed**

10 Plaintiff's response with respect to the Section 48(a) claim highlights the fact that
 11 this claim is *prima facie* defective. (See Opp. at 22-24; cf. Motion at 22.) Indeed,
 12 Plaintiff acknowledges the weakness of her argument by admitting that the line of cases
 13 derived from *Alexander v. Sandoval* explicitly hold that there is no private right of
 14 action with respect to Section 48(a). (Opp. at 23.) But Plaintiff disagrees with these
 15 reported authorities, proposing instead an illogical hybrid construction of the ICA
 16

17 ²⁶ The Complaint also seems to suggest, and the Opposition argues, that the size of the
 18 fees alone is evidence that the directors did not act independently or with
 19 conscientiousness. (Compl. ¶ 175; Opp Br. at 19.) Yet Plaintiffs cannot cite one case in
 20 which a court accepted this bootstrap argument that the gross *amount* of fees itself was an
 21 indication that the directors did not act independently or conscientiously.

22 ²⁷ Plaintiff's attempt to distinguish these cases falls flat on its face. Indeed, they are
 23 directly on point. Both *Migdal* and *Morgan Stanley* directly addressed whether a director
 24 or trustee acted independently or conscientiously and is directly applicable to the
 25 allegations set forth above. See *Migdal*, 248 F.3d at 328 (plaintiffs "alleged that the
 26 directors of the funds were not independent" under § 36(b)); *In re Morgan Stanley & Van*
 27 *Kampen Mut. Fund Secs. Litig.*, No. 03 Civ. 8208 (RO), 2006 U.S. Dist. LEXIS 20758, at
 28 *51 (S.D.N.Y. Apr. 14, 2006) (addressing issue of whether the directors were conflicted).
 Nor is the procedural posture of *Strougo* significant, as it clearly addressed the issue of
 whether "outside directors on the Fund's board are not independent." 188 F. Supp. 2d
 at 380. Additionally, *Amron* did not, as Plaintiffs suggest, contain less detailed factual
 allegations than Plaintiffs allege here, but virtually identical allegations. See *Amron*, 464
 F.3d at 345 (Complaint cited industry criticism, that the directors were conflicted because
 they received compensation and benefits for service on the fund's board, and that the
 directors did not spend sufficient time reviewing the fees due to their service on other
 company's boards).

1 wherein Sections 34(b) and Section 36(a) do not contain private rights of action, but
2 Section 48(a) does.²⁸ *Id.*

3 Plaintiff's argument is merely a distinction without a difference, created for the
4 expediency of trying to survive the motion to dismiss in this case. Indeed, since
5 *Alexander* was decided in 2001, more than 20 courts have refused to find a private right
6 of action under any section of the ICA.²⁹ This Court has joined this chorus of authority,
7 in *In re Am. Mut. Funds Fee Litig.*, 2007 U.S. Dist. LEXIS 8276 at *23-24.

8 Plaintiff further argues that if the Section 36(b) claim survives, the Section 48(a)
9 claim is predicated on a violation of Section 36(b), and therefore must also survive. But
10 this Court has rejected that premise when it dismissed the Section 48(a) claim in *Corbi*.
11 *See id.* Indeed, two of the cases that the Plaintiff cites to support her argument that the
12 Section 48(a) claim should be sustained are inopposite as well, as they also *dismiss* the
13 48(a) claims for failure to plead primary violations of the ICA.³⁰ In fact, the *Evergreen*
14 court specifically noted that the lack of a private right of action under Section 48(a) was
15 an alternative basis on which to dismiss the plaintiffs' Section 48(a) claim. *See*
16 *Evergreen*, 423 F. Supp. at 260, fn. 5. Finally, the one case Plaintiff cites as sustaining
17 a Section 48(a) claim only did so because the motion to dismiss apparently did not
18 specifically address the issue whether or not a private right of action exists under
19 Section 48(a) of the ICA, which, in contrast, is the explicit ground for dismissal asserted
20

21 ²⁸ In the absence of clear evidence of Congressional intent, the court may not usurp the
22 legislative power by unilaterally creating a new cause of action. *In re Digimarc Corp.*,
23 2008 U.S. App. LEXIS 24967, at * 15 (9th Cir. 2008) (holding there is no private right of
24 action under Section 304 of the Sarbanes-Oxley Act).

25 ²⁹ *See* Motion at 22 & n.19.

26 ³⁰ *See In re Evergreen Mut. Funds Fee Litig.*, 423 F. Supp. 2d 249, 260 (S.D.N.Y. 2006)
27 (finding that because plaintiffs "failed to state a cause of action for a primary violation
28 under Sections 34(b), 36(a), or 36(b) of the ICA, their claim . . . for control person liability
is insufficient"); *In re Franklin Mut. Funds Fee Litig.*, 388 F. Supp. 2d 451, 468 (D.N.J.
2005) (holding that Section 48(a) is a "secondary liability section" and "dismissing
plaintiffs' claim because they did not adequately plead any bases for primary liability
under the ICA").

1 by the present Motion. *See In re Dreyfus Mut. Funds Fee Litig.*, 428 F. Supp. 2d 342,
2 356 (W.D. Pa. 2005).

3 In short, the ICA does not explicitly provide a private right of action for
4 violations of Section 48(a) of the ICA. Therefore, courts have presumed that Congress
5 did not intend to create one. *See Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 116 (2d
6 Cir. 2007). Accordingly, this claim must be dismissed.³¹

7 **III. CONCLUSION**

8 For the foregoing reasons, as well as the reasons stated in Defendants' Motion to
9 Dismiss, the Complaint should be dismissed in its entirety, with prejudice.

10 DATED: January 12, 2009

11
12 Respectfully submitted,

13
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28 ³¹ For the reasons stated in the Motion, if the Section 48(a) claim is dismissed, CRMC must be dismissed from the lawsuit. *See* Motion at 22, n. 18.