DEVELOPMENTS IN LITIGATION UNDER SECTION 36(b) OF THE 1940 ACT

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I. INTRODUCTION

Courts have issued more decisions concerning the Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq. (the "Act") in the last several years than in the previous two decades. These decisions have focused on the nature and scope of claims under Sections 36(b) of the Act and the factors courts must consider when evaluating claims for excessive fees under Section 36(b).[1]

Investment advisers have been largely successful in defending many of the recent civil lawsuits. The issue of whether there are implied rights of action under various sections of the Act has been decided resoundingly in the negative. As such, essentially the only avenue for private plaintiffs to sue under the Act has been Section 36(b), which provides an express private right of action. Courts have been reluctant to expand that section to allow challenges based on anything other than pure excessive fees, and plaintiffs bringing an excessive fee claim are required to meet a very high standard of proof to recover under the statute.

On March 30, 2010, the Supreme Court of the United States decided Jones v. Harris Associates L.P., 130 S. Ct. 1418 (2010), and expressly adopted the standard established by the United States Court of Appeals for the Second Circuit more than 25 years ago in Gartenberg v. Merrill Lynch Asset Management, Inc., 694 F.2d 923 (2d Cir. 1982). Under Jones, "to face liability under § 36(b), an investment adviser must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining." Jones, 130 S. Ct. at 1426. The decision affirms a standard that makes it difficult to prove a violation of Section 36(b), and potentially closes the door on further attempts by plaintiffs to expand Section 36(b) beyond a narrow type of wrong (i.e., excessive fees).

More recently, plaintiffs have filed actions challenging the fees for funds that rely on sub-advisers for the provision of investment advisory services, a practice that is particularly prevalent in the insurance industry. These so-called "manager of managers" cases assert that the sub-advisers are performing, with minor exceptions, all of the investment management services but only receive a "fraction" of the fee paid to the manager. These cases are the new frontier of Section 36(b) litigation, and generally require the investment manager to demonstrate the services provided by the manager versus the sub-advisers, as well as to explain why sub-advisers are willing to provide day-to-day advisory services for a fraction of the total management fee.

This Outline discusses recent developments and decisions involving these and other topics.

II. SECTION 36(b)—THE EXPRESS RIGHT OF ACTION FOR BREACH OF FIDUCIARY DUTY WITH RESPECT TO RECEIPT OF COMPENSATION

A. Background of Section 36(b)

Congress passed the Act as a comprehensive federal regulatory scheme to protect investment company shareholders from self-dealing and other abuses that were perceived

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[1] See James N. Benedict et al., "The Aftermath of the Mutual Fund Crisis," 38 Rev. of Sec. & Commodities Reg. 261 (Dec. 7, 2005).

to be rampant throughout the mutual fund industry. 15 U.S.C. § 80a-1 (1997) (Findings and Declarations of Policy). Unlike the Securities Act of 1933 and the Securities Exchange Act of 1934, which emphasize disclosure, the Act is more regulatory and remedial in nature. The Act contains various prohibitions and requires the board of directors of an investment company to include "disinterested" persons. 15 U.S.C. § 80a-10(a). The Supreme Court has instructed that these persons serve as "independent watchdogs" who supply "an independent check upon the management." Burks v. Lasker, 441 U.S. 471, 484 (1979).

1. Legislative History

a. As originally enacted, the Act did not effectively monitor fee structures "negotiated" between funds and their investment advisers. Investment Company Amendments Act of 1969, S. Rep. No. 91-184 (1969), reprinted in 1970 U.S.C.C.A.N. 4897, 4901. Instead, the original Section 36 authorized the Securities and Exchange Commission (the "Commission") to bring an action against certain persons affiliated with investment companies for gross misconduct or gross abuse of trust within five years prior to when suit is filed. Pub. L. No. 768, ch. 686 § 36, 76th Cong., 3d Sess. (Aug. 22, 1940), 54 Stat. 841 (emphasis added).

b. As mutual funds experienced rapid growth in the 1950s and 1960s, investment advisers earned fees which did not necessarily reflect perceived economies of scale realized in managing larger funds. Securities & Exchange Commission, Public Policy Implications of Investment Company Growth, reprinted in H.R. Rep. No. 2237, 89th Cong., 2d Sess., 10-12 (1966). Congress determined that the unique structure of the mutual fund industry resulted in closer relationships between mutual funds and their investment advisers than those usually existing between other buyers and sellers of investment advisory services. Because of this closeness, "the forces of arm's-length bargaining [did] not work in the same manner in the mutual fund industry as they [did] in other sectors of the American economy." S. Rep. No. 91-184, at 5, reprinted in 1970 U.S.C.C.A.N. 4897, 4901.

c. In 1970, Congress sought to address the problem by adding Section 36(b) to the Act, 15 U.S.C. § 80a-35(b), thereby imposing a fiduciary duty upon investment advisers in connection with their receipt of compensation.

- Section 36(b) is the only provision under the entire Act which expressly provides private citizens with a right of action. By responding to a specific problem in the mutual fund industry, Congress expressly sought to provide private citizens a right of action to remedy violations in limited circumstances. This is unlike any other provision of the Act.

- By its terms, Section 36(b) is limited to breaches of fiduciary duty involving an investment adviser's receipt of compensation. 15 U.S.C. § 80a-35(b). This provision does not on its face give plaintiffs the right to sue for alleged breaches of general fiduciary duties (compare with Section 36(a), discussed infra Section IV.B).

- Section 36(b) gives private litigants a short, one-year limitations period in which to bring suit. 15 U.S.C. § 80a-35(b). This is in direct contrast with the longer, five-year limitations period given the SEC for enforcement proceedings. E.g., Liaros v. Vaillant, No. 93 Civ. 2170, 1996 WL 88559, at *14 (S.D.N.Y. Mar. 1, 1996); In re ML-Lee Acquisition Fund II, L.P. & ML-Lee Acquisition Fund (Retirement Accounts) II, L.P. Sec. Litig., 848 F. Supp. 527, 542 (D. Del. 1994).

- Damages under Section 36(b) are limited to fees received by investment advisers within the prior year. 15 U.S.C. § 80a-35(b)(3). Only recipients of advisory compensation or other payments shall be liable for damages under Section 36(b). Id.

- Because Section 36(b) is "equitable" in nature, plaintiffs are not entitled to a jury trial. See Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 487 F. Supp. 999, 1001 (S.D.N.Y.), aff'd sub nom. In re Gartenberg, 636 F.2d 16 (2d Cir. 1980), cert. denied sub nom. Gartenberg v. Pollack, 451 U.S. 910 (1981); Kalish v. Franklin Advisers, Inc., 928 F.2d 590, 591 (2d Cir.), cert. denied, 502 U.S. 818 (1991); Schuyt v. Rowe Price Prime Reserve Fund, Inc., 663 F. Supp. 962 (S.D.N.Y.), aff'd, 835 F.2d 45, 46 (2d Cir. 1987), cert. denied, 485 U.S. 1034 (1988); Sivolella v. AXA Equitable Funds Mgmt. LLC, Nos. 11-4194, 13-312, 2013 WL 4096239 (D.N.J. July 3, 2013), adopted by, 2013 WL 4402331 (D.N.J. Aug. 15, 2013).

- For a comprehensive analysis of the legislative history and development of Section 36(b), see generally William P. Rogers & James N. Benedict, "Money Market Management Fees: How Much Is Too Much?," 57 N.Y.U. L. REV. 1059 (1982).

2. Initial Litigation—The Excessive Fee Cases

In connection with the increased popularity of money market funds in the 1980s, plaintiffs brought numerous claims under Section 36(b) alleging that investment advisers were charging these funds excessive management fees.[2]

a. Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923 (2d Cir. 1982), cert. denied sub nom. Andre v. Merrill Lynch Ready

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[2] Early cases under § 36(b) concerning advisory fees turned on whether plaintiffs, as shareholders in the funds, were required to make a demand on the fund directors before bringing suit. For years, courts uniformly held that such a demand was required under the traditional standards for derivative lawsuits under Rule 23.1. Weiss v. Temporary Inv. Fund, Inc., 692 F.2d 928 (3d Cir. 1982), vacated, 465 U.S. 1001, on remand, 730 F.2d 939 (3d Cir. 1984); Grossman v. Johnson, 674 F.2d 115 (1st Cir.), cert. denied sub nom. Grossman v. Fidelity Mun. Bond Fund, Inc., 459 U.S. 838 (1982).

In Fox v. Reich & Tang, Inc., 692 F.2d 250, 252 (2d Cir. 1982), aff'd sub nom. Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (1984), the Court held that the demand requirement governing derivative actions brought by shareholders of a corporation does not apply to an action brought by an investment company shareholder under § 36(b) of the Act.

Assets Trust, 461 U.S. 906 (1983), was the first case to undertake a comprehensive analysis of the standards courts should apply when evaluating "excessive fee" claims under Section 36(b). In Gartenberg, two shareholders of the Merrill Lynch Ready Assets Trust money market fund brought a derivative action attacking the size of fees paid to the adviser as excessive, in breach of the adviser's fiduciary duty under Section 36(b). Plaintiffs did not claim that individual investors were not getting their money's worth, but rather, that the adviser, due to the size of the fund, was making too much money.

The District Court concluded that Congress was imprecise in delineating the fiduciary duty imposed by Section 36(b), but maintained that the standard is one of fairness. The court dismissed the complaint after applying a three-prong test that examined:

(1) whether the fee was in the range prevailing in the marketplace;

(2) whether the fee was sufficiently disclosed and the services satisfactorily performed; and

(3) whether the scope of the enterprise was adequately disclosed to directors and investors.

Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 528 F. Supp. 1038 (S.D.N.Y. 1981), aff'd, 694 F.2d 923 (2d Cir. 1982), cert. denied sub nom. Andre v. Merrill Lynch Ready Assets Trust, 461 U.S. 906 (1983).

The Second Circuit affirmed, holding that plaintiffs had failed to meet their burden of proving that the fees charged by the adviser were so excessive or unfair so as to amount to a breach of fiduciary duty within the meaning of Section 36(b). Gartenberg, 694 F.2d at 932. The court reviewed the "tortuous" legislative history of Section 36(b) and concluded that, to be guilty of a violation, the fee must be "so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining." Id. at 928.

The court identified six factors to be considered in determining whether fees charged by the investment adviser were disproportionate to the services rendered: (1) the nature and quality of the services provided to fund shareholders; (2) the profitability of the fund to the adviser-manager; (3) economies of scale of operating the fund as it grows larger; (4) comparative fee structures; (5) fallout benefits—i.e., indirect profits to the adviser

attributable in some way to the existence of the fund; and (6) the independence and conscientiousness of the directors. Id.

b. Subsequent to Gartenberg, plaintiffs in the 1980s were generally unsuccessful in pursuing "excessive fee" claims under Section 36(b). See, e.g., Krinsk v. Fund Asset Mgmt., Inc., 875 F.2d 404, 409 (2d Cir.), cert. denied, 493 U.S. 919 (1989); Schuyt v. Rowe Price Prime Reserve Fund, Inc., 663 F. Supp. 962 (S.D.N.Y.), aff'd, 835 F.2d 45 (2d Cir. 1987), cert. denied, 485 U.S. 1034 (1988). See generally James N. Benedict, Mark Holland & Barry W. Rashkover, "Developments in Management Fee Litigation," Rev. of Sec. & Commodities Reg., Vol. 22, No. 15 (Sept. 13, 1989).

B. More Recent Litigation Involving Section 36(b)

Courts have issued numerous decisions involving Section 36(b) since the mutual fund industry scandal broke in 2003. These cases fall into roughly three categories: (1) "pure" excessive management fee actions under Section 36(b); (2) "manager of managers" actions where plaintiffs attack the fee structure of mutual funds that utilize sub-advisers; and (3) former revenue sharing cases repleaded as pure excessive management fee cases.

1. "Pure" Excessive Management Fee Cases

There are several of the so-called "pure" excessive management fee cases currently pending in United States District Courts throughout the nation. Most of these actions were brought by the same plaintiffs' counsel and contained, at the outset, nearly identical allegations. There have been numerous recent decisions in this category of cases, most notably the Supreme Court's landmark decision in Jones, et al. v. Harris Associates, L.P.

a. Summary Judgment

(4) Following extensive fact and expert discovery, the parties in Jones v. Harris Assoc. L.P., No. 04 C 8305, 2007 WL 627640 (N.D. Ill. Feb. 27, 2007) cross-moved for summary judgment. Plaintiffs' argument in support of their motion focused "on conduct of parties other than Harris or actions of Harris other than receipt of compensation." Instead, plaintiffs claimed that the management agreements were invalid, rendering the associated fees charged thereunder "excessive." According to plaintiffs, the management agreements were invalid because: (1) one trustee "received deferred compensation from Harris, rendering him an interested party in Harris and making him ineligible to vote on approval of any fee agreements"; (2) the trustees' social and professional relationships with fund management precluded them from exercising "independent judgment in

assessing the fees"; and (3) Harris failed to disclose one trustee's compensation and his relationships with other members of the board in relevant public filings. Id. at *5. The court disagreed. In rejecting plaintiffs' arguments, the count held that even if one of the purportedly "independent" trustees was deemed to be, in fact, "affiliated" with the adviser, the overwhelming majority of the remaining members of the Board that approved the subject fees were "independent." Second, the court found that plaintiffs' argument relating to the trustees' business and social relationships with fund management were insufficient to render them "affiliated" with the defendant, holding that plaintiffs failed to demonstrate requisite control of the trustees and a corresponding effect on shareholder interests. Finally, the court held that defendant's purported failure to disclose deferred compensation allegedly remitted to one of the funds' trustee was outside the scope of Section 36(b), finding that "[t]o sweep this conduct into the ambit of § 36(b) would directly contradict the universal view that the fiduciary duty it sets out is both narrow and limited." Id. at *6. Accordingly, the court denied plaintiffs' motion for summary judgment.

The court then turned to defendant's motion for summary judgment. Defendant argued that summary judgment was warranted because: (1) the fees at issue were in line with those charged to substantially similar funds in other fund complexes; (2) the trustees were provided with information relating to each of the subject funds and the trustees approved the fee schedules; (3) the fee schedules included breakpoints that resulted, at least in part, through negotiation efforts by the trustees; and (4) the funds at issue performed relatively well during the relevant time period. See Jones, 2007 WL 627640, at *8. The court began its analysis by discussing the appropriate standard by which claims brought pursuant to Section 36(b) should be viewed. After briefly reviewing the Seventh Circuit's discussion of the issue in Green v. Nuveen Advisory Corp., 295 F.3d 738 (7th Cir. 2002), the court adopted the applicable framework set forth in Gartenberg. Turning its attention to defendant's first argument, the court noted that any comparison of fees required that it consider not only those fees charged to other funds within other complexes, but also those fees charged to defendant's institutional clients. The court nevertheless concluded that an examination of the fees charged to other mutual funds and institutional clients

evidenced that the fees at issue fell within this range, "thus preventing a conclusion that the amount of fees indicates that self-dealing was afoot." Jones, 2007 WL 627640, at *8. Citing its previous discussion rejecting plaintiffs' motion for summary judgment, the court agreed with the defendant's second argument in support of summary judgment, concluding that "[t]he evidence the parties have provided indicate that the board as a whole was operating without any conflict that would prevent it from engaging in arm's-length negotiations with [the defendant]." Id. With respect to defendant's third point, the court found that, although breakpoints could have been set at a lower level, they nevertheless were comparable to the fee structures adopted by other mutual funds, providing a reasonable inference that such breakpoints were the result of arm's-length negotiations. Finally, the court noted that the funds performed well during the relevant time period, rejecting plaintiffs' request that it consider performance outside of the one year look-back period. As a result, the court concluded that summary judgment in favor of the defendant was warranted, holding that "[w]hat matters is whether there is a fundamental disconnect between what the Funds paid and what the services were worth; on this score Plaintiffs have not set forth an issue of fact that, if resolved in their favor, could lead to a finding that [Defendant] had breached its § 36(b) duty." Id. at * 9.

Plaintiffs appealed the district court's decision granting summary judgment to the Seventh Circuit, which affirmed. See Jones v. Harris Assoc. L.P., 527 F.3d 627 (7th Cir. 2008). In doing so, the Seventh Circuit rejected the notion that Section 36(b) empowers courts to engage in price setting and, in affirming summary judgment, relied heavily on the effect of competition in the mutual fund industry and the ability of investors to "vote with their feet." In the court's view, Section 36(b)'s fiduciary duty requires full disclosure and honesty in the fee-negotiation process, but the level of fees is to be established by competitive forces in the market. In so holding, the court explicitly rejected the Second Circuit's approach to the issue, as set forth in Gartenberg. Instead, the court noted, in pertinent part:

> "[J]ust as plaintiffs are skeptical of Gartenberg because it relies too heavily on markets, we are skeptical about Gartenberg because it relies too little on markets . . . . Having had another chance to study this question, we now disapprove of the

> Gartenberg approach. A fiduciary duty differs from rate regulation. A fiduciary must make full disclosure and play no tricks but is not subject to a cap on compensation. The trustees (and in the end investors, who vote with their feet and dollars), rather than a judge or jury, determine how much advisory services are worth."

Id. at 632. The court also rejected plaintiffs' arguments based on comparisons to fees for institutional products, holding that such comparisons are invalid in light of differences in the management and servicing of those products. Specifically, the court found that:

> "Different clients call for different commitments of time. Pension funds have low (and predictable) turnover of assets. Mutual funds may grow or shrink quickly and must hold some assets in high-liquidity instruments to facilitate redemptions. This complicates an adviser's task. Joint costs likewise make it hard to draw inferences from fee levels. Some tasks in research, valuation, and portfolio design will have benefits for several clients. In competition those joint costs are apportioned among paying customers according to their elasticity of demand, not according to any rule of equal treatment."

Id. at 634-35. Accordingly, the Seventh Circuit affirmed dismissal of plaintiffs' complaint.

Following the Seventh Circuit's affirmance, plaintiffs moved for rehearing en banc. Although the court summarily rejected plaintiffs' motion, a group of five judges filed a dissenting opinion that argued that competition cannot be counted on to solve the problem of excessive mutual fund fees and suggested that fees for institutional products may be a valid benchmark. See Jones v. Harris Assocs. L.P., 537 F.3d 728, 730 (7th Cir. 2008). Specifically, the dissenters cited favorably to a study published by a professor at Northwestern University, which stated that an increasing amount of cronyism between agents in the mutual fund industry lead to increased fees that were borne by shareholders. See id. at 730-31 (citing Camelia M. Kuhnen, "Social Networks, Corporate Governance and Contracting in the Mutual Fund Industry"

(Mar. 1, 2007), available at http:// ssrn. com/ abstract= 849705).

Additionally, the dissenters questioned the panel's reasoning in dismissing comparisons between the fees Harris Associates charged to its retail mutual funds and those charged to its institutional clients. The dissenters found that "[t]he panel opinion throws out some suggestions on why this difference may be justified, but the suggestions are offered purely as speculation, rather than anything having an evidentiary or empirical basis." Jones, 537 F.3d at 731. Instead, the dissenters cited favorably to a study by economists John Freeman and Stewart Brown, who found that:

> "[T]he chief reason for substantial advisory fee level differences between equity pension fund portfolio managers and equity mutual fund portfolio managers is that advisory fees in the pension field are subject to a marketplace where arm's-length bargaining occurs. As a rule, [mutual] fund shareholders neither benefit from arm's-length bargaining nor from prices that approximate those that arm's-length bargaining would yield were it the norm."

Id. at 731-32 (citing John P. Freeman & Stewart L. Brown, "Mutual Fund Advisory Fees: The Cost of Conflicts of Interest," 26 J. Corp. L. 609, 634 (2001)).

The dissenters also expressed dissatisfaction with the panel's formulation of the standard of liability for 36(b) actions; i.e., that the fees must be "so unusual that a court will infer that deceit must have occurred." Id. at 732 (citing Jones, 527 F.3d at 632). In particular, the dissenters found that the "so unusual" standard wrongly emphasized comparing the adviser's fees to those charged by other mutual fund advisers; but that the "governance structure that enables mutual fund advisers to charge exorbitant fees is industry-wide, so the panel's comparability approach would if widely followed allow those fees to become the industry's floor." Id.

Arguably, the dissenters' main contention with the panel's opinion may have been more procedural than substantive. The dissenters admitted that "[t]he outcome of this case may be correct", however, they took issue with the panel's

failure to circulate its opinion to the full court prior to its publication, as is the practice with decisions that create circuit splits. Id. The dissenters found that "the creation of a circuit split, the importance of the issue to the mutual fund industry, and the one-sided character of the panel's analysis warrant our hearing the case en banc." Id. at 732-33.

Seizing upon the language of the five dissenting judges, counsel for the plaintiffs subsequently petitioned the Supreme Court for review of the case. On March 9, 2009, the Supreme Court granted plaintiffs' petition for certiorari. See Jones v. Harris Assoc. L.P., 129 S. Ct. 1579 (2009). On March 30, 2010, in a landmark decision, the Court reversed the Seventh Circuit's decision and, in doing so, unanimously determined that the Second Circuit's decision in Gartenberg appropriately harmonized both the plain language of the statute and Congressional intent, and represented the appropriate standard under Section 36(b). See Jones v. Harris Assocs. L.P., 130 S. Ct. 1418 (2010).

Justice Samuel Alito, writing for a unanimous Court, began the decision by reviewing the historical underpinnings of the statute and its corresponding amendments, noting that Section 36(b) was born out of "problems relating to the independence of investment company boards and the compensation received by investment advisers." See id. at 1422 (internal citations omitted). According to the Court, the "fiduciary duty" standard contained in Section 36(b) represented a "delicate compromise" between protecting shareholder interest and eschewing any formal rate-making authority to be vested with the SEC. See id. at 1423.

The Court then addressed its attention to the meaning of Section 36(b)'s use of the term "fiduciary duty," noting first that in the intervening years since Congress passed the statute, both the judiciary and the SEC repeatedly and consistently have interpreted that language in a manner substantially similar to that adopted by the Second Circuit in Gartenberg. The Court relied on its decision in Pepper v. Litton, 308 U.S. 295 (1939), an "analogous" bankruptcy case wherein the Court looked to trust law, to inform Section 36(b)'s "fiduciary duty" phraseology. In Pepper, the Court found that:

> [t]he essence of the test is whether or not under all the circumstances the transaction carries the

> earmarks of an arm's length bargain. If it does not, equity will set it aside.

See Jones, 130 S. Ct. at 1427 (quoting Pepper, 308 U.S. at 306-07).

According to the Court in Jones, "this formulation expresses the meaning of the phrase 'fiduciary duty' in [Section] 36(b)," and the Gartenberg approach as set forth by the Second Circuit "fully incorporates this understanding of the fiduciary duty set out in Pepper and reflects [Section] 36(b)(1)'s imposition of the burden on the plaintiff." Id. Moreover, the formulation under Gartenberg correctly insists that "all relevant circumstances be taken into account" and properly "uses the range of fees that might result from arm's-length bargaining as the benchmark for reviewing challenged fees." Id.

The Court also noted that the approach set forth in Gartenberg properly reflects Section 36(b)'s place in the overall statutory scheme of the Act, particularly in connection with "its relationship to the other protections that the Act affords investors." Id. According to the Court, scrutiny of investment adviser compensation by both a fully informed and independent board and shareholder suits constitute separate and mutually reinforcing mechanisms for controlling adviser conflicts of interests. See id. at 1427-28. With respect to the independent fund directors, the Act instructs that a measure of deference to a board's judgment may be appropriate in some instances, but that the measure of deference is dependent on the particular circumstances of the case. See id. at 1428. According to the Court, Gartenberg "heeds these precepts." Id.

Although both of the parties in the case endorsed the basic Gartenberg approach, the Court found several fundamental and material disagreements that warranted further discussion. The first of these disagreements centered on whether (and when) a comparison of the fees charged to an adviser's institutional clients is appropriate when assessing the fees charged to retail mutual funds. Finding that the Act requires consideration of all "relevant factors," the Court refused to embrace a bright-line rule and instead instructed courts to "give such comparisons the weight that they merit in light of the similarities and differences between the services that the clients in question require" and cautioned courts to "be wary of inapt comparisons."

Id. In doing so, the Court specifically dismissed concerns that such comparisons would "doom any fund to trial," noting that "plaintiffs bear the burden in showing that fees are beyond the range of arm's-length bargaining," and "[o]nly where plaintiffs have shown a large disparity in fees that cannot be explained by the different services in addition to other evidence that the fee is outside the arm's-length range will trial be appropriate." Id. at 1429 n.8. In addition, the Court cautioned courts from relying too heavily on comparisons with fees charged to mutual funds by other fund advisers, as such comparisons may not necessarily be appropriate given that other fund adviser fees may themselves suffer from a lack of arm's-length negotiation. See Jones, 130 S. Ct. at 1429.

Finally, the Court found that Section 36(b) requires a court's evaluation of an investment adviser's fiduciary duty to take into account "both procedure and substance." See id. (internal citations omitted). The Court noted that "[w]here a board's process for negotiating and reviewing investment-adviser compensation is robust, a reviewing court should afford commensurate deference to the outcome of the bargaining process." Id. (citations omitted). As a result, "if the disinterested directors considered the *relevant factors*, their decision to approve a particular fee agreement is entitled to considerable weight, even if a court might weigh the factors differently." Id. (emphasis added).[3] The Court noted that instances may arise when a board's process was somehow deficient or when the adviser withholds important information. In such circumstances, a reviewing court "must take a more rigorous look at the outcome." Id. at 1430. In so holding, the Court cautioned that the fiduciary duty standard under Section 36(b) "does not call for judicial second-guessing of informed board decisions," nor does it suggest that "a court may supplant the judgment of disinterested directors apprised of all of the relevant information, without additional evidence that the fee exceeds the arm's-length range. See id.

As a result, the Court concluded that the Seventh Circuit, by focusing almost exclusively on the element of

[3] In so holding, the Court embraced the applicability of the Gartenberg factors and further solidified the almost 30 years of jurisprudence that has developed since the Second Circuit's decision was first rendered. See Jones, 130 S. Ct. at 1429-30; see also id. at 1425-26 & n.5 (listing relevant Gartenberg factors).

disclosure, erred, and vacated and remanded the decision for further proceedings. See id. at 1430-31.

(5) In Gallus v. Ameriprise Fin., Inc., 497 F. Supp. 2d 974 (D. Minn. 2007), plaintiffs asserted claims under Sections 12(b) and 36(b) of the Act, claiming that the fees charged to several funds within the American Express-branded family of funds were "excessive." At the conclusion of fact discovery, defendants moved for summary judgment, arguing that there was no genuine issue of material fact based on the evidence relating to the Gartenberg factors regarding whether the fees could not have been the product of arm's-length bargaining under Section 36(b). After setting forth the applicable standard set forth in Gartenberg, the court concluded that there are was no genuine issue of material fact regarding whether the fee was so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining. See Gallus, 497 F. Supp. 2d at 984.

With respect to the nature and quality of services provided by the adviser to the funds, the court found that plaintiffs failed to establish a link between alleged misconduct that resulted in several regulatory settlements and the value of services paid for by the challenged fees, and that plaintiffs' characterization of the "undisputed performance figures as 'poor'," standing alone, did not create a genuine issue of material fact. Id. at 980. Next, the court analyzed the profitability of the funds to the adviser, and concluded that plaintiffs' mere assertions that the detailed reports provided by the adviser to the funds were improper because of the cost allocation methodology was insufficient to create a genuine issue of material fact. Id. at 980-81. Furthermore, the court found that the board was provided with detailed reports that expressly addressed certain so-called "fall-out" benefits when negotiating the fees with the adviser, and that plaintiffs' assertions that the profitability or cost data with respect to institutional business constituted a fall-out benefit did not create an issue of material fact. Id. at 980. The court also held that the breakpoints in the subject funds' fee schedules, as well as the fee adjustments based on fund performance, served to share the benefit of economies of scale, and rejected plaintiffs' claim that defendants' should have shared more with the funds based merely on expert testimony that failed to identify what amount of cost savings would have been appropriate. Id. at

981-82. The court then analyzed plaintiffs' contention that the fees charged to non-mutual funds was somehow relevant for determining the excessiveness of the fees charged to mutual funds, concluding that such a comparison was expressly rejected by the Second Circuit in Gartenberg. The court further concluded that, even if such a comparison was somehow relevant, the plaintiffs failed to demonstrate how the services provided to the different types of funds were comparable and that, in any event, the Board had, in fact, been provided with such data. See Gallus, 497 F. Supp. 2d at 982-83. Finally, the court found that the plaintiffs had failed to adduce any evidence that the Board members were not independent and qualified; nor did plaintiffs dispute that the Board met regularly, played an active role in the contract negotiation process, and sought the advice and counsel of third-party consultants. Id. at 983. As a result, the court concluded that summary judgment on plaintiffs' Section 36(b) claim was warranted. Id. at 983-84.

Turning to the remaining claim under Section 12(b), the court held that: (1) plaintiffs' assertion that existing shareholders received "absolutely 'no material benefit'" from the distribution fees was "without merit," noting that "approximately 85% of Defendants' 12b-1 distribution fees were paid for services to existing shareholders and not to marketing the Funds to new shareholders"; and (2) that the evidence established that the Board had, in fact, considered the benefits of the services provided pursuant to the distribution fees. The court dismissed plaintiffs' claim brought pursuant to Section 12(b). Id. at 985.

Plaintiffs appealed the district court's decision to the Eighth Circuit. See Gallus v. Ameriprise Fin., Inc., 561 F.3d 816 (8th Cir. 2009). The Eight Circuit began its substantive analysis by, inter alia, detailing the Second Circuit's decision in Gartenberg and comparing it to the Seventh Circuit's decision in Jones. See id. at 822. Rejecting the Seventh Circuit's reasoning in Jones, the Gallus court concluded that Gartenberg "provide[s] a useful framework for resolving claims of excessive fees," but also found that Section 36(b) provides for a basis of liability independent of, and wholly apart from, any excessiveness of the fee. The Eighth Circuit concluded that "[w]e believe that the proper approach to § 36(b) is one that looks to *both* the adviser's conduct during negotiation and the end result" and that "[u]nscrupulous behavior *with respect to either* can

constitute a breach of fiduciary duty." Id. at 823 (emphasis added). Thus, the court noted that an adviser's conduct in connection with the board's review and approval process may serve as a violation of Section 36(b) even though the fee is in line with those charged by comparable funds and "passed muster under the Gartenberg standard." Id.

In addition to this determination that Section 36(b) provides for an "independent" basis of liability, the Eighth Circuit held that the lower court "erred in rejecting a comparison between the fees charged to Ameriprise's institutional clients and its mutual fund clients." Id. at 823. In so holding, the Eighth Circuit refused to embrace a bright-line rule, but noted that "the argument for comparing mutual fund advisory fees with the fees charged to institutional accounts is particularly strong in this case because the investment advice may have been essentially the same for both accounts." Id. at 824. As a result, the Eighth Circuit determined that a dispute between the experts retained by the parties here about whether the adviser "purposefully omitted, disguised, or obfuscated information that it presented to the Board about the fee discrepancy between different types of clients" raised a question of material fact precluding the grant of summary judgment in favor of defendants. Id.

Counsel for defendants subsequently petitioned the Supreme Court for review of the case. See No. 09-163, Petition for Cert. Filed, 78 USLW 3083 (U.S. Aug. 6, 2009). On April 5, 2010, the Supreme Court granted the defendants' petition, vacated the lower court judgment, and remanded the case for further consideration in light of the Court's decision in Jones v. Harris Associates L.P., 130 S. Ct. 1418 (2010). The Eighth Circuit's decision was very difficult to reconcile with the Supreme Court's holdings in Jones that Section 36(b) is "sharply focused on whether the fees themselves were excessive," and that instances of non-disclosure (i.e., when the adviser withholds important information from the board) go only to the weight given to the board's approval of the fees. Jones, 130 S. Ct. at 1430.

On remand, the district court reinstated its Order granting summary judgment and re-entered judgment in favor of the defendants. See Gallus v. American Exp. Fin. Corp., Civ. No. 04-4498, 2010 WL 5137419, at *1 (D. Minn. Dec. 10, 2010). The court held that "[i]n Jones, the Supreme Court adopted the Gartenberg framework and reasoning that this

Court used in reaching its summary judgment opinion. And, in its order reversing this Court, the Eighth Circuit specifically noted that this Court properly applied the Gartenberg factors." Gallus, 2010 WL 5137419, at *2.

Plaintiffs appealed the district court's decision, but the Eighth Circuit affirmed. See Gallus v. Ameriprise Fin., Inc., 675 F.3d 1173 (8th Cir. 2012). The Eighth Circuit began its analysis by noting that "Jones has altered the way in which we determine whether an adviser has breached its fiduciary duty under § 36(b). In our previous decision, we held that the proper approach to § 36(b) is one that looks to both the adviser's conduct during negotiation and the end result . . . but after Jones, process-based failure alone does not constitute an independent violation of § 36(b). Instead, we have been instructed that § 36(b) is sharply focused on the question of whether the fees themselves were excessive." Id. at 1179 (internal citations omitted).

The Eighth Circuit stated that the "fee-negotiation process remains crucially important, as it allows the court to determine the amount of deference to give the board's decision to approve the fee." Id. The court then noted that the directors received information on the services provided to the funds, the adviser's profit from the funds, and on institutional fees (at the board's request). The Eighth Circuit decreased the amount of deference accorded to the board's judgment, however, because the directors placed too much significance on the fees charged by the funds' competitors, which "like those challenged, may not be the product of negotiations conducted at arm's length." Id. (quoting Jones, 130 S. Ct. at 1429).

The Eighth Circuit then rejected plaintiffs' claims with regard to the fees charged to Ameriprise's institutional clients. Specifically, the Eighth Circuit noted that "[a]lthough the disparity in fees charged to Ameriprise's different clients is likely relevant to whether the fees fall within the arm's length range, the plaintiffs have failed to set forth the additional evidence required to survive summary judgment." Gallus, 675 F.3d at 1180-81 (internal citations omitted).

The Eighth Circuit next considered plaintiffs' argument that the alleged flaws in the fee-negotiation process constituted additional evidence that the fees violated Section 36(b). The Eighth Circuit rejected this argument,

and noted that "[w]e do not read Jones to allow a deficient process to be the additional evidence required to survive summary judgment . . . because the opinion's language again focuses on evidence that the fee is outside the arm's length range." Id. at 1181.

Finally, the Eighth Circuit rejected plaintiffs' contentions that the district court's "rigorous" review was not "rigorous" enough, and that an adviser runs afoul of Rule 12b-1 if it benefits from a Rule 12b-1 fee. Instead, the Eighth Circuit held that an adviser only violates Rule 12b-1 if such a fee is "outside the range of what would have been negotiated at arm's-length in the light of all of the surrounding circumstances." Id. at 1182 (internal citations omitted).

(6) In Bennett v. Fidelity Management & Research Co., C.A. Nos. 04-11651, 04-11756, 2011 WL 98837 (D. Mass. Jan. 10, 2011), the court issued a decision after briefing and hearing on the defendants' motion for summary judgment in which it held that "[a]fter Jones, the ultimate standard of liability under § 36(b) is whether an investment adviser charged a fee that was so disproportionately large that it bore no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining." Id. at *1 (citing Jones, 130 S. Ct. at 1426; Gartenberg, 694 F.2d at 928). The court thereafter ordered plaintiffs to submit supplemental briefing identifying "the evidence they rely upon to place in genuine dispute each applicable Gartenberg factor" and "why those disputed factors would, if decided in plaintiffs' favor, be sufficient to persuade a reasonable finder of fact that the challenged fees were so disproportionately large that they bore no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining." Bennett, 2010 WL 98837, at *2. Defendants were ordered to explain in response why the plaintiffs are not entitled to prevail. Id. Plaintiffs subsequently stipulated to dismiss this case with prejudice. See Bennett v. Fidelity Mgmt. & Research Co., No. 04-11651, Stipulation of Dismissal (D. Mass. Jan. 27, 2012).

b. Motions To Dismiss

(1) In Sins v. Janus Capital Mgmt., LLC, No. 04-cv-1647, 2006 WL 3746130 (D. Colo. Dec. 15, 2006), plaintiffs, shareholders of funds within the Janus-branded family of

funds, asserted derivative claims under Section 36(b) of the Act and alleged that the defendant breached its fiduciary duties by providing similar services to institutional clients for substantially lower fees and that defendants failed to pass on the benefits of economies of scale. Defendants moved to dismiss, arguing that plaintiffs' allegations were insufficient to state a claim under Section 36(b) because they were based on observations and criticisms of the mutual fund industry generally and conclusory statements purportedly based upon "information and belief, and did not relate to the disproportionality of the fees at issue. See id. at *2.

The court agreed that plaintiffs' generalized allegations, standing alone, were insufficient to state a cause of action under Section 36(b), and noted that it was both "concerned" and "troubled" by plaintiffs' allegations made on purported "information and belief," finding that such allegations were identical to those in other complaints in unrelated cases. Nevertheless, the court found that the complaint contained facts sufficient to state a claim upon which relief may be granted, and denied defendants' motion. After reviewing the Gartenberg factors and noting that the Tenth Circuit has not expressly adopted those factors, the court analyzed several of the Gartenberg factors in turn, and concluded that plaintiffs' allegations were sufficient to withstand dismissal at the initial pleading stage. See Sins, 2006 WL 3746130, at *3-4.

(2) In Hunt v. Invesco Funds Group, Inc., No. H-04-2555, 2006 WL 1581846 (S.D. Tex. June 5, 2006), plaintiffs asserted derivative claims under Section 36(b) of the Act on behalf of eight different mutual funds in the AIM-branded family of funds. Plaintiffs alleged that the benefits resulting from the marked increase in fund assets were improperly retained by defendants, rendering their advisory and distribution fees "excessive" in violation of the fiduciary duties imposed upon them by Section 36(b). Defendants moved to dismiss, arguing: (1) that plaintiffs failed to allege sufficient facts specific to each of the eight funds at issue, as required by Gartenberg; and (2) even if some allegations were sufficiently specific, they were based on factual and other deficiencies.

The court disagreed and sustained plaintiffs' amended complaint, finding that the allegations as pled were "sufficient to allege a disproportionality between the fees

that Defendants charged each of the funds at issue and the services that Defendants provided to the funds." Id. at *2. Analyzing several Gartenberg factors in turn, the court found that the amended complaint sufficiently set forth allegations pertaining to: (1) the amounts and types of fees charged by defendants for each of the eight funds; (2) the nature and quality of services provided to the funds, both in general and specific terms; (3) the existence of scale economies and the failure of defendants to pass on the resulting benefits to fund shareholders; and (4) the independence and conscientiousness of the funds' trustees. Furthermore, the court pointed out that plaintiffs advisory fee comparisons were sufficient to survive a motion to dismiss, noting that the amended complaint included facts comparing the advisory fees for each of the funds at issue with those "fees charged for equivalent advisory services," including institutional pension accounts managed by defendants as well as "average advisory fees charged for [sic] peer mutual funds." Id. at *2-5.

Finally, the court rejected defendants argument that plaintiffs allegations were "based upon demonstrably false and contradictory premises, which cannot sustain plaintiffs' claims," noting that defendants had "failed to demonstrate that the allegations are contradictory or not well-pled" and were sufficient to state a claim under Section 36(b). Id. at *5.

Following the court's decision, plaintiffs' agreed to dismiss their complaint with prejudice and without costs. See Hunt v. Invesco Funds Group, Inc., No. H-04-2555, slip op. (S.D. Tex. Jan. 29, 2007).

(3) In Dumond v. Massachusetts Fin. Servs. Co., No. Civ. A. 04-11458, 2006 WL 149038 (D. Mass. Jan. 19, 2006), plaintiffs, shareholders of funds within the Massachusetts Financial Services (MFS) fund complex, brought suit under Section 36(b) of the Act. Plaintiffs alleged that defendants failed to pass on the benefits of economies of scale, had charged excessive distribution fees, had provided similar services to institutional clients for substantially lower fees, and paid excessive commissions to broker-dealers in exchange for soft dollars.

On motion to dismiss, defendants argued that plaintiffs did not plead factual allegations sufficient to state a claim under Section 36(b). After reviewing the Gartenberg

factors and noting that the First Circuit has not expressly adopted those factors, Judge O'Toole opined that Gartenberg does not establish a heightened pleading standard for Section 36(b) claims and that the plaintiffs' failure to plead facts that specifically address the Gartenberg factors was not in itself a ground for dismissal. The court held that plaintiffs' allegations were factual, not merely conclusory. The court held that although certain cases could be read as requiring a higher level of factual pleading under Section 36(b) (see Krantz v. Prudential Invs. Fund Mgmt., 305 F.3d 140 (3d Cir. 2002), cert. denied, 537 U.S. 1113 (2003); Migdal v. Rowe Price-Fleming Int'l, 248 F.3d 321 (4th Cir. 2001); Yampolsky v. Morgan Stanley Inv. Advisers Inc., No. 03 Civ. 5710, 2004 WL 1065533 (S.D.N.Y. May 12, 2004)), they were not binding precedent in the District of Massachusetts and were inconsistent with the applicable standard under Fed. R. Civ. P. 8. Furthermore, said the court, the instant action presented a different set of alleged deficiencies than those that led the courts to dismissal in the other cases. Dumond, 2006 WL 149038, at *2-3.

Following Judge O'Toole's decision denying defendants' motion to dismiss, defendants filed a motion for a protective order in an effort to secure a decision: (1) declaring that the damages period applicable to a Section 36(b) claim is limited to only the one year period prior to the filing of the complaint; and (2) prohibiting plaintiffs from seeking discovery after the relevant damages period except to the extent that such documents created after the applicable period contain or reflect responsive information relating to the at-issue period. See Dumond v. Massachusetts Fin. Servs. Co., No. Civ. A. 04-11458, 2007 WL 602589, at *1 (D. Mass. Feb. 22, 2007). Plaintiffs opposed defendants' motion, arguing that the period for which damages may be awarded under Section 36(b) begins one year before the filing of the complaint and continues until the complaint is fully adjudicated and that, even if the court were to limit damages to those accruing within the one year period prior to the commencement of the lawsuit, discovery should not necessarily be limited to events occurring within that limited period. See id. at *1. In support of their position, defendants cited numerous cases, including the Supreme Court's decision in Daily Income Fund v. Fox, 464 U.S. 523, 526 n.2 (1984). After briefly addressing each case in turn, the court noted that, with the sole exception of a lone order by a magistrate

judge, "[i]n all of these cases, the courts were considering the effect of § 36(b)(3)'s backward-looking limitation, and not whether that section imposed a forward-looking one." Dumond, 2007 WL 602589, at *4. With respect to Daily Income, the court found that "the Court's brief reference to the damages period was casual dictum, not a controlling holding," and concluded that Section 36(b)(3) permits ongoing damages on a forward-looking basis. Dumond, 2007 WL 602589, at *5. Accordingly, the court denied defendants' motion for a protective order.[4]

(4) In Turner v. Davis Select Advisers LP, No. 08-CV-421, slip op. (D. Ariz. June 1, 2011), plaintiff asserted causes of action under Sections 36(b), 47, and 48(a) of the Act. Plaintiff alleged that the adviser to and distributor of the Davis New York Venture Fund received disproportionately large Rule 12b-1 fees, and the adviser received excessively disproportionate advisory fees, in violation of Section 36(b). Plaintiff also asserted control person liability against the adviser, and contended that the advisory and distribution contracts should be voided under Section 36(b).

After concluding that plaintiff did have standing to assert the claims (slip op. at 6-9); that the amended complaint related back to the date of filing of the original complaint (slip op. at 9-10); and that the damages period under Section 36(b) is not confined solely to the one year period prior to filing of the complaint (slip op. at 11-12), the court performed a Gartenberg factor-by-factor analysis of the complaint. The court concluded that "[w]hile Plaintiff is correct that '[t]he Amended Complaint Sufficiently Articulates the Gartenberg Factors,' Plaintiff's allegations largely consist of general conclusions, not facts, and Plaintiff does not explain how any of the facts alleged show that a particular fee was 'so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining.'" Slip op. at 13 (quoting Gartenberg, 694 F.2d at 928).

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[4] In a virtually identical "pure" excessive case brought against Putnam, also pending before Judge O'Toole, the court denied defendants' motion to stay a second action brought against Putnam and held that Section 36(b)(3)'s one year limitations period does not impose a forward-looking limitation on damages. See Vaughn v. Putnam Inv. Mgmt. LLC, No. 04-10988, 2007 WL 602596, at *5 (D. Mass. Feb. 22, 2007).

Having concluded that plaintiff failed to state a claim under Section 36(b) against either the adviser or the distributor, the court also dismissed the claim for control person liability under Section 48(a). Slip op. at 19. The court also concluded that Plaintiff was not standing in the shoes of the fund and was not a party to the contracts which he sought to void. As such, the court dismissed plaintiff's Section 47(b) claim. Slip op. at 17-19.

(5) In Reso v. Artisan Partners L.P., No. 11-CV-873, 2011 WL 5826034 (E.D. Wis. Nov. 18, 2011), an investor in several funds managed by Artisan brought suit claiming that Artisan's advisory fees violated Section 36(b) of the Act. The court rejected Artisan's motion to dismiss.

The court first considered Artisan's arguments that many of plaintiff's allegations should be disregarded because they were alleged on "information and belief" and because many were copied from complaints filed by plaintiff's lawyers in other lawsuits. The court rejected these arguments noting that the "mere fact that allegations are somewhat generic and have been pled elsewhere does not give the Court sufficient indicia that [plaintiff's] lawyers failed to reasonably inquire into the circumstances in this case." Id. at *4-5.

The court then evaluated plaintiff's claims using the Gartenberg factors as a framework, and noted that "the Court will deny Artisan's motion to dismiss even if [plaintiff] has failed to allege certain of the Gartenberg factors, so long as [plaintiff's] complaint, taken as a whole, alleges facts that demonstrate a plausible claim for relief under Section 36(b)." Id. at *6.

First, the court found that plaintiff satisfied the factor concerning the independence and conscientiousness of the board by alleging that the directors did not receive sufficient information, and that the directors permitted the funds to pay higher fees than Artisan's institutional clients. While the court noted that "[l]ike many of [plaintiff's] allegations, this one slips in by the skin of its teeth, [the allegations] are sufficient to satisfy the Court at this stage of the case." Id. at *6-7.

The court then found that plaintiff satisfied the nature and quality of services factor by alleging that "other than standard investment advising services, Artisan provides

only de minimis services to the funds at issue in this case," and that the funds pay for their own transfer agency, legal and accounting services." Id. at *7. The court also found that despite high Morningstar rankings in other fields, the funds' "F" fee ratings "nonetheless raise an inference that the nature and quality of Artisan's services may be viewed as deficient by outside analysts of mutual funds." Id.

Likewise, the court found that plaintiff satisfied the comparative fees factor by alleging that Artisan charged lower fees and provided higher breakpoints to its institutional clients. Id. at *8-9.

The court found that plaintiff's "strongest" allegations related to the economies of scale factor because plaintiff "sufficiently establish[ed] that Artisan's fee is reduced only slightly over the course of amassing a large amount of assets, but that Artisan does not suffer significant additional expenditures over the course of that expansion. Therefore, the Court finds that Artisan is not appropriately passing on those economies of scale to the mutual funds." Id. at *9.

Finally, the court found that plaintiff satisfied the profitability factor by alleging facts "sufficient to show that Artisan reaps too great a benefit from the funds in this case." Id.

Defendants subsequently filed a motion for summary judgment, but the case settled shortly thereafter. See Reso v. Artisan Partners L.P., No. 11-CV-873, Order (E.D. Wis. Aug. 23, 2012).

(6) In Laborers' Local 265 Pension Fund v. iShares Trust, No. 3:13-cv-00046, 2013 WL 4604183 (M.D. Tenn. Aug. 28, 2013), plaintiffs, investors in certain iShares exchange traded funds, filed a derivative action on behalf of the funds, asserting claims under Sections 36(a), 36(b) and 47(b) of the Act and seeking the return of allegedly "excessive" fees, contractual rescission and injunctive relief. Plaintiffs asserted the claims against the funds as nominal defendants, as well as BlackRock Fund Advisors ("BFA"), BlackRock Institutional Trust Company, N.A. ("BTC") and individual directors of the funds. BFA acted as investment adviser to the funds, while BTC was hired by BFA to act as securities lending agent to the funds. Plaintiffs sought to recover revenue derived from BTC's lending of the funds' securities, alleging that the 35 percent

fee-split of this revenue, approved by the funds' directors, was excessive. Id. at *1-2.

Plaintiffs also alleged that an additional 5 percent of securities lending revenue was paid to BlackRock affiliates as administrative fees, resulting in a "40/60 division of revenue between the BlackRock affiliates and the iShares funds" that was likewise excessive, when compared to fees paid by "peer mutual funds, and, in particular, compared to funds which employ unaffiliated lending agents." Id. at *2.

In dismissing plaintiffs' Section 36(b) claim, the court relied primarily on an SEC Exemption Order issued pursuant to Sections 6(c) and 17(b) of the Act, which applied to the securities lending agreement at issue. The court explained that because Section 36(b)(4) of the Act provides that Section 36(b) is inapplicable to payments or compensation made in connection with orders under Section 17 of the Act, plaintiffs' Section 36(b) claim must be dismissed. Id. at *3, *5-6.

The court also dismissed plaintiffs' claims under Sections 36(a) and 47(b), finding that plaintiffs failed to overcome the presumption that no private right of action exists under those sections of the Act. Id. at *6-10.

Although the court's dismissal was without prejudice and provided plaintiffs with an opportunity to file a motion for leave to amend by September 17, 2013, the court specifically noted that if such a motion was not filed, "the court will enter final judgment in the case." Id. at *10. Plaintiffs subsequently sought an extension of time to file their motion by October 17, 2013, which was granted. After the extended deadline passed, on October 22, 2013, defendants moved to dismiss the case, which the court granted shortly thereafter. See Laborers' Local 265 Pension Fund v. iShares Trust, No. 3:13-cv-00046 (M.D. Tenn. Oct. 24, 2013).

2. The New Frontier: Manager of Managers Cases

In the so-called "manager of managers" cases, plaintiffs take aim at fund managers that rely on sub-advisers for the provision of investment advisory services, a practice that is particularly prevalent in the insurance industry. Plaintiffs in these actions generally assert that the sub-advisers are performing, with minor exceptions, all of the investment management services, but only

receive a "fraction" of the fee paid to the manager. These cases are the new frontier of Section 36(b) litigation.

a. In Curran v. Principal Management Corp., No. 4:09-cv-433, 2010 WL 2889752 (S.D. Iowa June 8, 2010), vacated in part by 2011 WL 223872 (S.D. Iowa Jan. 24, 2011), investors in two "funds of funds" (i.e., mutual funds that invest in other mutual funds), alleged that defendants violated Section 36(b) by charging excessive advisory fees, receiving excessive profits due to economies of scale, and with regard to excessive Rule 12b-1 fees (counts I, II and III, respectively). Notably, plaintiffs brought these claims on behalf of the funds in which they owned shares (i.e., the funds of funds), as well as the underlying funds in which those funds invested. The "funds of funds" and the underlying funds were all part of the Principal fund complex.

Plaintiffs also alleged that the defendant investment adviser relied on sub-advisers to provide investment advisory services to the funds, but still charged the funds a higher fee than what was paid to the sub-advisers. Notably, plaintiffs did not challenge the sub-advisers' fees, but instead contended those fees proved the excessiveness of the defendant investment adviser's fees. Id. at *8.

At the outset, defendants moved to dismiss plaintiffs' claims on the basis that they lacked statutory standing to assert the claims on behalf of the underlying funds. Id. at *2. While defendants pointed out that plaintiffs failed to allege ownership in the underlying funds, the court noted that plaintiffs were "affected by the fees paid to the investment advisor in the same way as people who directly own shares in the Underlying Funds." Id. at *4 & n.5. Thus, after analyzing the text of Section 36(b), the structure of the ICA, its legislative history, as well as relevant case law, the court concluded that Section 36(b) "creates a private right of action for all 'security holders' in the registered investment company, including persons who possess an interest in a mutual fund that is acquired through a fund of funds . . . ." Id. at *6; but see infra (vacating this portion of the decision).

The court next denied in part and granted in part defendants' motion to dismiss relating to excessive advisory fees. The court concluded that plaintiffs' allegations that the investment adviser "charges more than the subadvisors, who allegedly provide the bulk of investment advice, that the charges do not reflect the benefits derived from economies of scale, and that other institutional clients pay less for the same services, all support a reasonable inference that [the investment adviser] collected excessive fees for its investment advising services of the Subject

Funds," and denied defendants' motion to dismiss with regard to the investment adviser that actually received the challenged advisory fees. Curran, 2010 WL 2889752, at *9.

The court granted the motion to dismiss, however, with regard to the funds' distributor, as well as an affiliated investment adviser that was not adequately alleged to have been a recipient of the challenged compensation. Id. at *9-10.

Next, the court dismissed plaintiffs' second claim regarding defendants' alleged receipt of excessive profits from economies of scale. "Because the existence of 'excess profits from economies of scale' does not provide an alternative, independent basis for a § 36(b) claim, Count II will be dismissed." Id. at *10.

Finally, with regard to plaintiffs' Rule 12b-1 claim, the court stated that plaintiffs "have met their burden by alleging that fees collected by [the distributor] for its distribution services surpassed the value of those services, and that the manner in which those fees were assessed did not correspond to the type of services performed but, rather, resemble fees collected for advisory services." Id. at *11. Noting that defendants' arguments were largely factual in nature, the court concluded that "the allegations set forth in Count III are sufficient to raise an inference that the distribution fees collected by [the distributor] were additional and excessive compensation for advisory services subject to a § 36(b) claim." Id.

Defendants subsequently filed a motion for reconsideration with respect to the issue of statutory standing under Section 36(b) for the underlying funds. The court concluded that its prior interpretation of the relevant statutory language was clearly erroneous, and held that plaintiffs do not have a private right of action pursuant to Section 36(b) to assert claims on behalf of the eighteen underlying funds in which they did not hold any "securities." See Curran v. Principal Mgmt. Corp., LLC, No. 4:09-cv-433, 2011 WL 223872 (S.D. Iowa Jan. 24, 2011).

On May 17, 2013, the parties alerted the court that the surviving portion of the action had settled. The court approved the parties' settlement on June 12, 2013, and dismissed the action with prejudice.

b. In Santomenno v. John Hancock Life Insurance Co., 677 F.3d 178 (3d Cir. 2012), plaintiffs brought suit against defendants for allegedly charging excessive fees on annuity insurance contracts offered to plan participants through which participants could invest in certain mutual funds. Plaintiffs' Section 36(b) claims

challenged the structure of those mutual funds, as defendants utilized sub-advisers to provide investment advisory services to the funds. Plaintiffs alleged that defendants' management fees for the funds were excessive because they significantly exceeded the fees paid to the sub-advisers. The district court granted defendants' motion to dismiss on plaintiffs' Section 36(b) claim because plaintiffs "no longer owned any interest in the John Hancock funds." Id. at 181. The Third Circuit affirmed. Id.

The Third Circuit rejected plaintiffs' argument that there is no "continuing ownership requirement" under Section 36(b). The court noted that plaintiffs' "mistakenly assume that the root of the continuous ownership requirement is Rule 23.1. Instead, the prerequisite arises from the fact that Congress directed that only the Securities and Exchange Commission and securities holders, *acting on behalf of the investment company*, could bring an action to enforce the rights created by Section 36(b). As the Court recognized in Daily Income Fund, any recovery in an action brought under Section 36(b) belongs to the investment company. When a plaintiff disposes of his or her holdings in the company, that plaintiff no longer has a stake in the outcome of the litigation because any recovery would inure to the benefit of existing securities holders, not former ones. A continuous ownership requirement gives effect to this 'undeniably derivative' nature of a Section 36(b) claim." Id. at 184 (citations omitted) (emphasis in original).

c. In Sivolella v. AXA Equitable Life Insurance Co., No. 11-4194, 2012 WL 4464040 (D.N.J. Sept. 25, 2012), plaintiff was an investor in a variable annuity administered by defendants, which enabled plaintiff to invest in a variety of mutual funds managed by defendants. Plaintiff brought claims under, inter alia, Section 36(b) alleging that defendants' management fees were excessive because defendants utilized sub-advisers to provide investment advisory services to the funds, but still charged higher fees than the sub-advisers.

Under the variable annuity, plaintiff made payments to defendants, which were then segregated into a separate account controlled by defendants. The separate account then invested in AXA funds for the benefit of plaintiff. Notably, the AXA funds at issue were sold only to insurance companies and not to the general public. Accordingly, when plaintiff brought claims for a violation of Section 36(b) and unjust enrichment, defendants filed a motion to dismiss on the grounds that plaintiff lacked standing. Id. at *2, 4.

The court noted that defendants' position was that "the term 'security holder,' as used in Section 36(b), refers to the legal or record owner of a security" while plaintiff's position was that "the term refers to the equitable or beneficial owner of a security." Id. at *4.

The court began its analysis by noting that the Act was intended to protect the rights of mutual fund shareholders, and that the term "security holder" was not defined "in order to control situations regardless of the legal form or structure of the investment." Id. (citing Prudential Ins. Co. of Am. v. S.E.C., 326 F.3d 383, 386-88 (3d Cir. 1964)).

The court concluded "it seems to make little sense to broadly construe the word 'security,' and limit the reach of 'holders' to entities that lack any economic interest or stake in the transaction. Here, it would make no sense to limit standing to enforce ICA § 36(b) to AXA or any other entity that did not pay the allegedly excessive compensation [when] Plaintiff and similarly situated investors are responsible for and paid all of the challenged fees. Plaintiff and other investors bear the full risk of poor investment performance. Plaintiff and other investors have the right to instruct AXA how to vote their shares. Assets held in a separate account are immune from claims of AXA's creditors, while being vulnerable to claims of the investors' creditors. And when Plaintiff decides to withdraw her investment in the AXA Funds, she, not AXA, pays the taxes on that investment. Given that, Plaintiff has all of the economic stake in these transactions." Id. at *5 (citation omitted).

The court also rejected defendants' reliance on Curran v. Principal Management Corp., No. 433, 2011 WL 223872 (S.D. Iowa Jan. 24, 2011), which held that an investor in a "fund of funds" is not a "security holder" in the mutual funds invested in by the fund of funds. The court noted "that in Curran, plaintiffs did not have standing with respect to the underlying funds because they 'd[id] not enjoy any of the incidents of ownership or possession of any security in the Underlying Funds because they d[id] not have the privilege of voting, they d[id] not receive dividends and they d[id] not receive liquidations with regard to the Underlying Funds.' As previously stated, here, Plaintiff has the right to instruct AXA how to vote, dividends enhance the value of her investments, and when she withdraws her investment in the AXA Funds, she will receive

those proceeds, as well as any dividends." Sivolella, 2012 WL 4464040, at *5 (quoting Curran, 2011 WL 223872, at *4).[5]

Finally, the court dismissed plaintiff's federal common law unjust enrichment claim because "it is not needed to fill in the interstices of the ICA." Sivolella, 2012 WL 4464040, at *5. Subsequent to the motion to dismiss, the court also struck plaintiff's jury demand. Sivolella v. AXA Equitable Funds Mgmt. LLC, Nos. 11-4194, 13-312, 2013 WL 4096239 (D.N.J. July 3, 2013), adopted by, 2013 WL 4402331 (D.N.J. Aug. 15, 2013).

d. In Kasilag v. Hartford Investment Financial Services, LLC, No. 11-1083, 2012 WL 6568409 (D.N.J. Dec. 17, 2012) investors in six mutual funds alleged that defendant charged excessive investment management fees, as well as excessive Rule 12b-1 fees. With respect to plaintiffs' investment management fee claims, plaintiffs alleged that defendant's management fees were excessive because defendant hired sub-advisers to provide investment advisory services to the funds, but still charged higher management fees than the sub-advisers. Following a motion to dismiss plaintiffs' amended complaint, which was granted in part and denied in part with leave to amend, plaintiffs amended their complaint again. Defendant brought a motion to dismiss both counts of the second amended complaint. Id. at *2.

The court first credited plaintiffs' allegations relating to sub-advisory fees, noting that the complaint alleged that defendant paid sub-advisers to perform substantially all of the services provided to the funds, "at a fraction of the fee [defendant] charges for such services." Id. at *3. The court noted that while this count had been previously dismissed for lack of specificity, the revised complaint added allegations regarding the overlap of services

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[5] But see SSR II, LLC v. John Hancock Life Ins. Co. (U.S.A.), No. 652793/2011, 2012 WL 4513354 (N.Y. Sup. Ct. Sept. 28, 2012). In this case, an investor in numerous variable life insurance policies chose to invest in a fund ("the underlying fund") that *then* invested in funds that fed into Bernard Madoff's ponzi-scheme. When the investor brought various state claims against the insurance carriers and investment advisers of the underlying fund, the court dismissed several of plaintiff's claims for lack of standing. The court began by noting that it was undisputed that the insurance carriers invested in the underlying fund on behalf of plaintiff "to ensure that the cash value of [plaintiff's] variable life insurance policies could earn investment returns without incurring income taxes." Id. at *2. The court then reasoned that plaintiff could not assert derivative claims on behalf of the underlying fund because plaintiff "is not a partner or investor and has no other type of relation to the [underlying fund] that would permit it to act on behalf of the Fund. In fact, although [plaintiff] seeks to be considered an 'investor,' in the past, it has held itself out *not* to be an 'investor' for [tax] purposes. . . . [Plaintiff] cannot now maintain that it is an investor to avail itself of derivative claims that properly vest in the legal investors (the Carriers)." Id. at *3 (emphasis in original).

provided by defendant and sub-advisers under the respective agreements, as well as the differences in the fees charged. Id.

The court also rejected defendant's arguments concerning the complaint's comparisons to fees charged by: (1) Vanguard; and (2) by defendant's affiliate to institutional accounts. Id. at *4-5. With respect to the first argument, the court noted that while comparisons to Vanguard are typically of little use in a Section 36(b) case, that such a comparison "is more apt" here because Vanguard and defendant employ the same sub-adviser. The court thus took note that the complaint alleged that investors "in the Funds receive comparable investment management services to the Vanguard funds but pay substantially greater fees." Id. at *5. The court also found defendant's second argument unavailing because plaintiffs alleged that an "apples-to-apples" comparison was possible between retail and institutional clients. This was due to the fact that plaintiffs had also alleged that any services that were only provided to retail funds were provided pursuant to "separate agreements . . . that set them apart from the institutional clients." Id. Significantly, however, the court limited the reach of plaintiffs' institutional fee allegations to the only retail fund that plaintiffs compared to other specific institutional funds. Id.

The court granted without prejudice, however, defendant's motion to dismiss regarding Rule 12b-1 fees. The court based its dismissal on the complaint's "sparse and conclusory" allegations, as well as plaintiffs' failure to establish standing with respect to Class B shares of the funds. Id. at *8-9.

3. Former Revenue Sharing Class Actions Repleaded As Excessive Management Fee Claims

a. In In re American Mutual Funds Fee Litigation, following more than two years of extensive fact and expert discovery, a Section 36(b) case was tried on the merits for the first time in 20 years. The case was tried from July 28, 2009 through August 7, 2009, before Judge Feess in the Central District of California. The plaintiffs' excessive fee claim was directed at eight of the 30 funds in the American Fund complex. Sixteen witness testified at trial: 11 fact witnesses and five experts. One of the principle theories advanced by plaintiffs at trial was that the eight funds had experienced significant growth in assets under management during the period 2003-2008, and that such growth negatively impacted the investment results of those funds. Plaintiffs claimed, among other things, that, as a result of this negative impact, Rule 12b-1 fees, which contributed to the growth of the funds, were excessive. Plaintiffs also attacked investment advisory, transfer agent, and

administrative service fees as excessive. After receiving post-trial briefing, Judge Feess entertained "closing" arguments on September 2, 2009.

Thereafter, the court announced its "intended decision," finding that plaintiffs failed to meet their burden of establishing that the fees in question were so disproportionate to the services rendered that they could not have been the result of arm's-length bargaining. With respect to plaintiffs' claim regarding 12b-1 fees, the court indicated that plaintiffs' theory spoke only to the use of such fees, and that plaintiffs failed to adduce evidence establishing that the nature and quality of the services provided in exchange for those fees was disproportionate. In addition, the court found that plaintiffs failed to establish that the growth in assets under management had any negative impact on investment results. Judge Fees also refused to apply the standards articulated by the Seventh Circuit in Jones and the Eight Circuit in Gallus, finding that both were inconsistent with Section 36(b) itself. Judge Feess found that the proper standard was that articulated in Gartenberg and its progeny. At the directive of Judge Fees, the Defendants submitted post-trial proposed findings of fact and conclusions of law on October 2, 2009.

On December 28, 2009, Judge Feess issued a 105-page opinion, containing extensive Findings of Fact and Conclusions of Law that echoed, in large part, the holdings included in his prior "intended decision." In doing so, Judge Feess rejected each of the plaintiffs' principal theories of liability and ruled for defendants on all of the major substantive issues presented, including the standard for liability under Section 36(b) and each of the Gartenberg factors. See In re Am. Mutual Funds Fee Litig., No. CV 04-5593, 2009 WL 5215755 (C.D. Cal. Dec. 28, 2009).

As an initial matter, the court found that "the proper legal standard to be applied to Plaintiffs' excessive fee claims under Section 36(b) is the standard set forth in Gartenberg," and squarely rejected the alternative standards set forth in both Jones v. Harris, 527 F.3d 627 (7th Cir. 2008), and Gallus v. Ameriprise, 561 F.3d 816 (8th Cir. 2009). See In re Am. Mutual Funds Fee Litig., 2009 WL 5215755, at *43. However, the Court found that "Section 36(b) does not require Plaintiffs' to establish that the fees charged by Defendants were excessive in the aggregate. Plaintiffs may challenge a particular fee and may prevail on their Section 36(b) claim if they can show that such a fee was disproportionate to the services rendered in exchange for that fee." See In re Am. Mutual Funds Fee Litig., 2009 WL 5215755, at *44.

Next, the court addressed the nature and quality of services provided to the funds and their corresponding shareholders, noting that the "long-term performance of the majority of the funds at issue ranged from good to excellent in five-year, ten-year, and lifetime intervals," and the "Funds' very high shareholder retention rates and low level of complaints are consistent with shareholder satisfaction with the level of services provided." Id. at *18, 48. As a result, the court found that the plaintiffs failed to offer any evidence undermining the conclusion that defendants' investment advisory services were anything other than of the highest quality. See id. at *49.

With respect to profitability, the court found that defendants overall "profit levels" ranged from pre-tax operating margins of 30% to 35%, which "fall within the range of profit margins that other courts have deemed acceptable under Section 36(b)" Id. at *50. As to economies of scale, the court began its analysis by noting that the existence of scale is "properly analyzed at the fund complex level and not at the fund level." Id. at *28. After finding that economies of scale can be shared with fund shareholders in a number of ways, including breakpoints, fee reductions, fee waivers, offering low fees from inception, or making additional investments to enhance shareholder services, the court held that plaintiffs had "failed to sustain their burden of proving the existence of economies of scale" and "any economies of scale that may have been realized during the relevant period were sufficiently shared with investors." Id. at *51, 52 (internal citations omitted).

According to the court, the independent directors of the American Funds were "successful, well-educated business people with knowledge regarding financial markets and financial services," were "well-qualified with significant experience relevant to the performance of their duties," and were given "extensive" and "comprehensive" materials which "provided sufficient factual detail and explanatory background to allow [them] to fulfill their responsibilities to Fund Shareholders." Id. at *31, 53, 54. Although the independent directors "did not diligently inquire into some issues of importance and failed to recognize the consequence of some of the information presented to them," the court nevertheless held that overall the conduct of the directors met the Gartenberg standard. Thus, the court concluded, based on the entirety of the record before it, that the independent directors diligently exercised their responsibility in approving the fees at issue. See In re Am. Mutual Funds Fee Litig., 2009 WL 5215755, at *55-56.

As indicated in its "intended decision," the court found that plaintiffs failed to establish the growth in assets under management had any negative impact on investment results. Indeed, to the contrary, the court held that the growth of the American Funds during the 2003 through 2008 time-period actually "benefited the Funds in a number of ways." Id. at *14. For example, "the fees paid by the Funds declined (in percentage terms) as a result of growth via breakpoints, waivers, and reductions in the other fees charged to the Funds." Id. Moreover, the court concluded that "the size of the Funds has [also] led to lower brokerage commissions, enhanced [Capital Research]'s competitive advantage in trading, and led to better service from trading partners," (id.) and "[t]here was no persuasive evidence demonstrating that the size and growth of the funds negatively impacted the Funds' performance" Id. at *16. Indeed, the court found that "[s]ome of the Funds best investment results came during the period when the Funds were at their largest, and some of the largest and fastest growing funds were among the best performing." Id.

Finally, the court concluded that defendants' fees were lower than industry averages for comparable funds, and that plaintiffs adduced no evidence that defendants had realized any so-called fallout benefits. See id. at *53. As a result, plaintiffs "failed to sustain their burden of proving that [Capital Research] charged fees that were 'so disproportionally large that [they bore] no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining'" and entered judgment for defendants. Id.

When plaintiffs appealed Judge Feess's decision, the Ninth Circuit affirmed the ruling "in large part for the reasons stated in the district court's comprehensive order." Jelinek v. Capital Research & Mgmt. Co., 448 F. App'x 716 (9th Cir. 2011).

b. In In re Salomon Smith Barney Mutual Fund Fees Litigation, 441 F. Supp. 2d 579 (S.D.N.Y. 2006), another revenue sharing action, plaintiffs alleged that Salomon Smith Barney ("SSB") and certain affiliated entities engaged in a scheme consisting of three components: (1) SSB offered undisclosed incentives to brokers and financial advisers to steer investors into SSB's proprietary funds and other funds with which SSB had undisclosed "kickback" arrangements; (2) SSB extracted improper fees from investors in its proprietary funds; and (3) SSB caused its proprietary funds to invest in poorly performing companies because of their status as SSB investment banking clients. See id. at 583-85. Plaintiffs asserted claims under Sections 11, 12(a)(2), and 15 of the

Securities Act of 1933; Sections 10(b) and 20(a) and Rules 10b-5 and 10b-10 of the Securities Exchange Act of 1934; Sections 34(b), 36(b), and 48(a) of the Act; and various claims under state law. Defendants moved to dismiss the complaint in its entirety including plaintiffs' Section 36(b) claim, arguing, inter alia, that the claim was improperly asserted directly as a putative class action rather than derivatively on behalf of the subject funds and that plaintiffs' Section 36(b) allegations were insufficient to state a claim.

Judge Crotty agreed, and dismissed plaintiffs' Section 36(b) cause of action. The court first addressed defendants' argument that a Section 36(b) claim may only be properly asserted derivatively on behalf of the funds rather than directly by fund shareholders. Distinguishing the Supreme Court's decisions in Fox and Kamen as dealing with the applicability of the demand requirement of Rule 23.1 of the Federal Rules of Civil Procedure, the court held that Section 36(b) confers a derivative, and not a direct, right of action and dismissed plaintiffs' claim accordingly. See id. at 593-97. Moreover, the court also found that the allegations in the complaint were insufficient to state a claim under Section 36(b). First, plaintiffs' allegations regarding improper Rule 12b-1 fees, soft dollars, and commissions fell outside the scope of Section 36(b), which covers only the receipt of compensation by investment advisers and their affiliates, not compensation paid to brokers and other third parties. Id. at 600-01. Second, absent any allegation that the total fees charged were disproportionate to the services provided, plaintiffs' allegations regarding the improper use of fees charged to the funds were insufficient to state a claim under Section 36(b). Id. at 601-03 (citing In re Eaton Vance Mutual Funds Fee Litig., 403 F. Supp. 2d 310 (S.D.N.Y. 2005)). The court granted plaintiffs leave to replead the Section 36(b) claims as a derivative claim and advised plaintiffs to be mindful of the pleading standards of Section 36(b) and Gartenberg in doing so. See Salomon Smith Barney, 441 F. Supp. 2d at 603.

In response to Judge Crotty's July 26, 2006 decision, plaintiffs filed a Second Consolidated Amended Complaint on behalf of nine individual SSB mutual funds, alleging violations of Section 36(b) of the Act. Defendants again moved to dismiss, arguing that plaintiffs' allegations in support of their Section 36(b) claim failed to state a cause of action. The court agreed. Citing the Second Circuit's opinion in Amron v. Morgan Stanley Investment Advisors, Inc., 464 F.3d 338 (2d Cir. 2006), Judge Crotty noted that, in order to survive dismissal at the initial pleading stage, a plaintiff must set forth those facts necessary to a finding that the fees were excessive, on a factor-by-factor basis. See Salomon

Smith Barney, 528 F. Supp. 2d 332, 337 (S.D.N.Y. 2007). Prior to conducting its own analysis of the allegations set forth by plaintiffs, the court noted that Judge Sweet, in a substantially similar case, applied the analysis employed by the Second Circuit in Amron and found the allegations insufficient to withstand dismissal. See id. at 337 n.7. The court next conducted a factor-by-factor analysis of the allegations contained in the Second Consolidated Amended Complaint and, relying on the Second Circuit's decision in Amron, held that plaintiffs "failed to allege sufficient facts to support any of the Gartenberg factors." Id. at 339. Moreover, the court noted that during the course of oral argument on defendants' motion to dismiss, "[p]laintiffs' counsel conceded that he could not identify any case in the Second Circuit or Southern District of New York where allegations [of improper revenue sharing resulting in excessive fees] have satisfied" the standard adopted by Gartenberg and reaffirmed by Amron. The court dismissed the complaint in its entirety, with prejudice. Id. Plaintiffs appealed the court's dismissal to the Second Circuit, which heard oral argument in the matter in March 2009.

The Second Circuit noted that dismissal was warranted with regard to most of plaintiffs' Section 36(b) claims, but reversed the district court with regard to plaintiffs' transfer agent fees claim. Plaintiffs alleged that SSB caused the funds to replace its transfer agent with an SSB affiliate. "Once it replaced the existing agent, the SSB affiliate then sub-contracted with that agent to continue to perform virtually the same services that it had previously performed, but at a steep discount. Rather than pass the resulting savings on to investors in the form of lower fees, SSB's affiliate kept the windfall, permitting Defendants to profit at the expense of the SSB Funds and their investors." R.W. Grand Lodge of F. & A. M. of Pa. v. Salomon Bros. All Cap Value Fund, 425 F. App'x 25, 30 (2d Cir. 2011).

The court noted that plaintiffs' claim "constitutes a garden variety breach of fiduciary duty. We recently considered similar allegations in a case argued in tandem with this one, and involving some of the same defendants [and] determined that, as a result of the alleged transfer agent arrangement, the 'shareholders were being grossly overcharged for transfer agent services and [the investment adviser] was reaping the benefits.' In effect, 'the Fund investors . . . were at the mercy of a faithless fiduciary.' We have little trouble concluding that, as alleged, transfer agent services fees resulting from this particular arrangement bear no reasonable relationship to the services rendered, could not have been the product of arm's length bargaining, and as a result, adequately support an alleged violation of section 36(b)." Id. at 30-31

(quoting Operating Local 649 Annuity Trust Fund. Smith Barney Fund Mgmt. LLC, 595 F.3d 86, 93 (2d Cir. 2010)).

C. Attempts to Expand the Scope of Section 36(b)

In the last decade, the "themes" pursued by plaintiffs changed. In addition to alleging that an adviser's fees are "excessive," plaintiffs now invoke Section 36(b) to challenge fund distribution and trading practices, failure to participate in class action settlements in connection with portfolio securities, and the adviser's portfolio selections for the fund. Plaintiffs also are attacking the structure of the fees themselves as *per se* violations of Section 36(b), without necessarily alleging that they are excessive or disproportionate to the services rendered.

There were approximately 25 of the "revenue sharing" cases pending in federal courts around the nation. Those cases, along with the Settlement Participation Class Actions, are attempts by the plaintiffs' bar to expand the scope of Section 36(b). In contrast to the "pure" excessive management fee actions, courts have issued many more decisions in the revenue sharing line of cases—all since August 1, 2005. There have also been numerous decisions involving the Settlement Participation Class Actions.

More recently, the Supreme Court's decision in Jones, et al. v. Harris Associates, L.P. potentially closes the door on plaintiffs' attempts to expand Section 36(b) beyond pure excessive fee claims.

1. Distribution Practices—Directed Brokerage, Revenue Sharing, and Rule 12b-1 Plans

Directed Brokerage & Revenue Sharing

a. In In re Lord Abbett Mutual Funds Fee Litigation, 385 F. Supp. 2d 471 (D.N.J.), amended and superseded by 407 F. Supp. 2d 616 (D.N.J. 2005), plaintiffs asserted class and derivative claims alleging that brokers were compensated excessively as an incentive for them to steer new investors into Lord Abbett mutual funds. Plaintiffs alleged broker compensation was excessive because it included, above the standard compensation for executing portfolio transactions and selling shares, either revenue sharing payments or soft dollar payments. The adviser also allegedly treated brokers to lavish vacations and directed brokerage business to brokers who steered clients into Lord Abbett Funds. See In re Lord Abbett, 385 F. Supp. 2d at 475-76. Plaintiff purported to bring, inter alia, a direct claim for breach of fiduciary duty under Section 36(b).

The court sua sponte concluded that a Section 36(b) claim can be maintained only as a derivative, rather than a direct claim, and accordingly dismissed plaintiffs' direct Section 36(b) class action claim. In re Lord Abbett, 385 F. Supp. 2d at 488. In so holding, Judge Martini cited the Supreme Court's decision in Daily Income

Fund, Inc. v. Fox, 464 U.S. 523, 535 n.11 (1984), which stated "unequivocally" that Section 36(b) confers only a derivative right of action. The court noted that the Supreme Court's decision in Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 108 (1991), does not alter this conclusion, finding that when examined in context, Kamen merely states that a shareholder may bring a derivative claim under Section 36(b) without making a pre-complaint demand; that suit, however, remains a derivative action brought on behalf of the company. In re Lord Abbett, 385 F. Supp. 2d at 488 n.6. The court dismissed the Section 36(b) claim without prejudice.

Plaintiffs moved for reconsideration, arguing that the court's holding is contrary to Supreme Court precedent, and ignored Section 36(b)'s supposed distinction between claims by shareholders and claims by the fund. Explaining that he previously considered and rejected precisely these arguments in his decision on defendants' motion to dismiss, Judge Martini denied plaintiffs' motion. In re Lord Abbett Mutual Funds Fee Litig., 417 F. Supp. 2d 624 (D.N.J. 2005).

Although Judge Martini had previously provided plaintiffs with leave to amend the complaint to assert a Section 36(b) claim derivatively, the Lord Abbett Defendants moved for reconsideration, arguing that the court's previous decision dismissing state law claims as preempted under SLUSA required dismissal with prejudice of the action in toto. See In re Lord Abbett Mutual Funds Fee Litig., 463 F. Supp. 2d 505, 509 (D.N.J. 2006). Judge Martini agreed, finding that the plain language of SLUSA required dismissal of the entire "covered class action" rather than mere "counts," "claims," or "allegations." The court noted that such an interpretation was consistent with the Supreme Court's recent decision in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 126 S. Ct. 1503 (2006), which recognized that Congress intended SLUSA's preemptive powers to be broadly construed. See In re Lord Abbett, 463 F. Supp. 2d at 513-14. Because the use of the phrase "covered class action" required dismissal of the entire class action, including plaintiffs' Section 36(b) claim, the court held that the previous dismissal of the Section 36(b) claim had to be with prejudice. Id. at 515.

Plaintiffs appealed Judge Martini's decision. In a case of first impression, the Third Circuit reversed and remanded for further proceedings. See In re Lord Abbett Mutual Funds Fee Litigation, 553 F.3d 248 (3d Cir. 2009). The court held that the word "action" in the language of SLUSA is modified by the phrase "based upon the statutory or common law of any State." Id. at 255. As such,

and in light of the legislative history of SLUSA, the court held that SLUSA does not mandate dismissal of an action in its entirety where the action includes only some "pre-empted" claims. Id. at 255-56.

b. In In re Goldman Sachs Mutual Funds Fee Litigation, No. 04 Civ. 2567, 2006 WL 126772 (S.D.N.Y. Jan. 17, 2006), plaintiffs brought claims under Section 34(b), 36(a), 36(b), and 48(a) of the Act and Sections 206 and 216 of the Investment Advisers Act of 1940, as well as state law claims for breach of fiduciary duty and unjust enrichment. Plaintiffs alleged that defendants charged the Goldman Sachs Funds' shareholders excessive fees, which were then used to pay kickbacks to brokerage firms to steer new investors into the Funds. Plaintiffs further alleged that the existing shareholders received no benefit from the economies of scale that theoretically should have resulted from the increased assets in the funds. Id. at *1-4.

Judge Buchwald dismissed the Section 36(b) claim in its entirety. At the outset, Judge Buchwald held that plaintiffs failed to allege that the "Trustee/Officer Defendants" actually received investment advisory or Rule 12b-1 fees. The court rejected plaintiffs' argument that the Trustee/Officer Defendants violated Section 36(b) by receiving their compensation despite the fact that they violated their fiduciary duties. Judge Buchwald found that this allegation did not meet the requirements of Section 36(b) because this compensation does not constitute receipt of payments for advisory services or Rule 12b-1 fees. Id. at *7-8.

With respect to the other defendants, the court held that plaintiffs failed to allege facts demonstrating the lack of any reasonable relationship between fees received and services provided by the distributor and adviser defendants. Judge Buchwald concluded that plaintiffs failed to allege that either the advisory fees or Rule 12b-1 fees were disproportionate to the services rendered, as required by Section 36(b). The court noted that plaintiffs' allegations regarding Rule 12b-1 fees could not establish that the advisory fees were excessive, and that mere assertions that fees increased with the size of the funds could not establish that benefits from economies of scale were not passed on to investors. In addition, merely asserting that Rule 12b-1 fees were charged while the funds at issue were closed to new investors did not adequately allege that the fees charged were disproportionate to the services rendered. Finally, the court held that the kickback allegations did not constitute support for the excessive Rule 12b-1 allegations. Id. 8-10. Judge Buchwald dismissed the Section 36(b) claim in its entirety.

c. In Forsythe v. Sun Life Financial, Inc., 417 F. Supp. 2d 100 (D. Mass. 2006), plaintiffs alleged that defendants made substantial payments to brokers in exchange for the brokers' steering unwitting clients to invest in funds in the Massachusetts Financial Services ("MFS") family of funds. Defendants moved to dismiss the complaint in its entirety.

Judge O'Toole held that plaintiffs stated a claim under Section 36(b). After reviewing the Gartenberg factors and noting that the First Circuit has not expressly adopted these factors, Judge O'Toole opined that Gartenberg does not establish a heightened pleading standard for Section 36(b) claims and that plaintiffs' failure to plead facts that specifically address the Gartenberg factors was not in itself a ground for dismissal. See Forsythe, 417 F. Supp. 2d at 114.

Judge O'Toole found that defendants were correct that plaintiffs must allege some connection between the wrongs alleged and excessive compensation of an investment adviser or affiliated persons. However, the court was unwilling to conclude at the motion to dismiss stage that a Section 36(b) claim may not attack the lawfulness of excessive Rule 12b-1 fees, soft dollar payments, and excessive broker commissions despite the fact that such payments may not be "advisory fees" in the most literal sense. The court concluded that plaintiffs satisfied the notice pleading requirements of Fed. R. Civ. P. 8 by alleging in some factual detail wrongful conduct specific to defendants. See id. at 115-16.

Judge O'Toole also rejected defendants' argument that the claim should be dismissed because plaintiffs failed to allege sufficient facts that, if proven, would demonstrate that the services rendered by defendants were disproportionate to the fees charged. While plaintiffs did not make any allegations regarding the quality of services rendered, the court found that such allegations may be irrelevant to their theory of excessiveness. Plaintiffs' theory was that the fees were excessive because they were unauthorized and taken from fund assets solely for the defendants' benefit; in other words, fees amounting to "something for nothing" are inherently excessive. Judge O'Toole noted that at least one court in a different Section 36(b) context concluded that the wrongful retention of monies by an adviser that were in essence "something for nothing" could represent a disproportionate relationship between fees and services. See Forsythe, 417 F. Supp. 2d at 116 (citing Jones v. Harris Assocs. L.P., Civ. No. 04 C 8305, 2005 WL 831301, at *3 (N.D. Ill. Apr. 7, 2005)).

The court did, however, find that plaintiffs' Section 36(b) claim improperly claimed damages for a greater period than is allowed by the statute, and appeared to claim damages against the trustee defendants, who were not proper defendants under the statute. The surviving Section 36(b) claim was limited accordingly. See Forsythe, 417 F. Supp. 2d at 116-17.

Judge O'Toole also held that plaintiffs lacked standing to assert any Section 36(b) claim except on behalf of the two funds in which they owned shares at the time the lawsuit was filed, and dismissed the claim against the rest of the funds. Judge O'Toole stated that this conclusion followed not only from the plain statutory language, but also from the unique nature of the Section 36(b) cause of action. The court rejected plaintiffs' argument that they had standing to sue because the MFS Funds allegedly engaged in a common course of wrongful conduct. Judge O'Toole stated that each fund should be treated as a separate and distinct entity in the Section 36(b) context and a plaintiff may not use the corporate structure of the broader investment company to confer standing. The court concluded that plaintiffs may not use a class action to bootstrap themselves into standing that they lack. See Forsythe, 417 F. Supp. 2d at 117-18.

Following Judge O'Toole's decision denying defendants' motion to dismiss plaintiffs' Section 36(b) claim, defendants' filed a motion for a protective order in an effort to secure a decision declaring that the damages period applicable to Section 36(b) claims was limited to only the one year period before the filing of the complaint. See Forsythe v. Sun Life Fin., Inc., 475 F. Supp. 2d 122 (D. Mass. 2007). Plaintiffs opposed defendants' motion, arguing that the period for which damages may be awarded under Section 36(b) begins one year before the filing of the complaint and continues until the complaint is fully adjudicated and that, even if the court were to limit damages to those accruing within the one year period prior to the commencement of the lawsuit, discovery should not necessarily be limited to events occurring within that limited period. See id. at 123-24. In support of their position, defendants' cited numerous cases, including the Supreme Court's decision in Daily Income Fund v. Fox, 464 U.S. 523, 526 n.2 (1984). After briefly addressing each of the cases cited by defendants in turn, the court noted that, with the sole exception of a lone order by a magistrate judge, "[i]n all of these cases, the courts were considering the effect of § 36(b)(3)'s backward-looking limitation, and not whether that section imposed a forward-looking one." Forsythe, 475 F. Supp. 2d at 127. With respect to Daily Income, the court found that "the Court's brief reference to the damages period was casual dictum, not a controlling holding," and

concluded that Section 36(b)(3) permits ongoing damages on a forward-looking basis. Id. at 128. Accordingly, the court denied defendants' motion for a protective order.

d. In In re Oppenheimer Funds Fees Litigation, 419 F. Supp. 2d 593 (S.D.N.Y. 2006), another revenue sharing action, plaintiffs were shareholders in 23 Oppenheimer-branded mutual funds managed by OppenheimerFunds, Inc. and its affiliate, OppenheimerFunds Services. Plaintiffs alleged a variety of class and derivative claims against the parent corporation, investment advisers, distributors, and a select group of trustees, directors and officers of the Oppenheimer Funds. The crux of plaintiffs' complaint was a fraudulent scheme whereby the defendants made "improper secret payments" from fund assets to unaffiliated broker-dealers in an effort to induce those broker-dealers to push Oppenheimer Funds "more aggressively" to consumers, the result of which benefited the defendants at the expense of the Oppenheimer Funds. Plaintiffs also alleged that investment advisers improperly inflated their own fees in an effort to finance these payments and failed to pass onto Oppenheimer Fund shareholders the benefits of scale economies resulting from the increases in Fund assets. Plaintiffs asserted claims under Sections 34(b), 36(a), 36(b) and 48(a) of the Act; Sections 206 and 208 of the Investment Advisers Act of 1940; and state common law claims for breach of fiduciary duty and unjust enrichment. Defendants moved to dismiss the complaint in its entirety arguing, inter alia, that: (1) there is no private right of action under Sections 34(b), 36(a), and 48(a) of the Act; (2) plaintiffs' state common law claims were improperly brought directly as a putative class action and should have been asserted derivatively on behalf of the subject funds; (3) plaintiffs failed to make pre-suit demand or, alternatively, failed to plead futility with the requisite particularly for those claims brought derivatively pursuant to the Investment Advisers Act of 1940; and (4) plaintiffs failed to state a claim under Section 36(b) of the Act.

Although the court granted defendants' motion to dismiss with respect to the overwhelming majority of claims, it did sustain plaintiffs' Section 36(b) cause of action, finding that plaintiffs' allegations that defendants inflated their fees "so as to provide a slush fund for making some of the illicit payments" to unaffiliated broker-dealers "barely" survived the minimal pleading requirements of Fed. R. Civ. P. 8(a), despite the fact that the allegations were "poorly pled." Id. at 596-97 (citing Paragraph 220 of Amended Complaint). The court did, however, dismiss the Section 36(b) claim with respect to all defendants except the investment advisers, noting that only the investment advisers were

recipients of advisory compensation, as required by the Act. See id. at 597.

The investment adviser defendants moved for reconsideration of the court's opinion with respect to Section 36(b), arguing that the court's conclusion that paragraph 220 of the amended complaint supported a claim overlooked the fact that the theory as to why the subject fees were "excessive" was not one permitted by law. Specifically, defendants argued that the only allegation in the amended complaint pertaining to the "excessiveness" of the fees at issue involved plaintiffs' contention that increases in advisory fees were used to create a "slush fund to bribe brokers for the benefit of the investment advisers and their affiliates," and were not for the benefit of Oppenheimer Fund shareholders. Defendants claimed that plaintiffs were, in essence, advocating for a determination that such fees were *per se* "excessive," in violation of Section 36(b). The court agreed, noting that plaintiffs had failed to make any specific factual allegation, as required by Gartenberg v. Merrill Lynch Asset Management, Inc., 694 F.2d 923 (2d Cir. 1982), as to why the added amounts rendered the advisory fees disproportionate to the services rendered. See In re Oppenheimer Funds Fee Litig., 426 F. Supp. 2d 157, 158-59 (S.D.N.Y. 2006). The court vacated its previous ruling sustaining plaintiffs' Section 36(b) claim against the investment adviser defendants and dismissed, with prejudice, the remaining claim. See id. at 159.

e. In In re BlackRock Mutual Funds Fee Litigation, No. 04 Civ. 164, 2006 WL 4683167 (W.D. Pa. Mar. 29, 2006), plaintiffs similarly alleged that defendant BlackRock, Inc., and certain of its subsidiaries and affiliates, made improper "shelf-space" payments to unaffiliated broker-dealers in exchange for "aggressively" marketing BlackRock-branded mutual funds to "unwitting investors." According to plaintiffs, these improper payments were in several different forms, and included: (1) directed brokerage; (2) revenue sharing; and (3) so-called "soft-dollar" payments. Plaintiffs alleged that these payments violated: (1) Sections 34(b), 36(a), 36(b) and 48(a) of the ICA; (2) Section 215 of the Investment Advisers Act of 1940; and (3) state common law, including breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, and claims for anticompetitive conduct.

Defendants moved to dismiss the complaint in its entirety, including plaintiffs' Section 36(b) claim. According to defendants, the Section 36(b) claim was improperly brought directly as a putative class action, rather than derivatively on behalf of the subject funds. The court agreed with defendants, and dismissed

plaintiffs' Section 36(b) claim. See id. at *9-10. Citing the plain language of the statute and the Supreme Court's decisions in Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (1984) and Kamen v. Kemper Financial Services, Inc., 500 U.S. 90 (1991), the court held that Section 36(b) confers a derivative, and not a direct, right of action even though such an action is not subject to the demand requirement of Rule 23.1. See BlackRock, 2006 WL 4683167, at *9-10.

f. In In re Evergreen Mutual Funds Fee Litigation, 423 F. Supp. 2d 249 (S.D.N.Y. 2006), plaintiffs alleged that defendants engaged in a purported "kickback scheme" whereby they made undisclosed and improper payments to unaffiliated broker-dealers in an effort to induce these brokers to steer unwitting investors into Evergreen-branded mutual funds. Plaintiffs further alleged that the addition of new investors resulted in a marked increase in fund assets, the benefits of which were improperly retained by the investment adviser and its affiliates, and not passed on to fund shareholders. Based upon these allegations, plaintiffs brought the following claims against the investment adviser, distributor, trustees, officers, and other affiliates of the Evergreen family of mutual funds: (1) Sections 34(b), 36(a), 36(b) and 48(a) of the Act; (2) Section 215 of the Investment Advisers Act of 1940; and (3) a myriad of state common law claims, including breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, and claims for anticompetitive conduct. Defendants moved to dismiss plaintiffs' complaint in its entirely, including plaintiffs' Section 36(b) claim, arguing that: (1) the conduct at issue was not actionable under Section 36(b); and (2) plaintiffs failed to plead facts evidencing that the fees at issue were "excessive." See id. at 257.

Judge Sweet agreed and dismissed plaintiffs' Section 36(b) claim in its entirety. Citing the Second Circuit's decision in Gartenberg, the court concluded that a plaintiff asserting a claim under Section 36(b) must allege some facts demonstrating that the fees at issue are so disproportionately large that they bear no reasonable relationship to the services rendered. Noting that the allegations contained in the complaint were substantially similar to those at issue in both In re Eaton Vance Mutual Funds Fee Litigation and In re Goldman Sachs Mutual Funds Fee Litigation, Judge Sweet held that plaintiffs' allegations of revenue sharing were insufficient to sustain a claim under Section 36(b) because the complained of conduct related to the improper use of the subject fees, not that the fees themselves were excessive. See Evergreen, 423 F. Supp. 2d at 257-59. Moreover, the court dismissed the Section 36(b) claim with respect to the distributor defendant and trustees/officers for

the additional reason that the complaint failed to allege that those defendants were recipients of compensation, as required by Section 36(b)(3). See id. at 259.

In response to Judge Sweet's March 27, 2006 dismissal of plaintiffs' Section 36(b) claim, plaintiffs moved to set aside the court's previous order or, alternatively, for leave to file a second amended complaint in an effort to cure the deficiencies in their previous complaint. See In re Evergreen Mutual Funds Fee Litig., 240 F.R.D. 115 (S.D.N.Y. 2007). After briefly reviewing the standards applicable to a motion for reconsideration, the court found that it had not overlooked plaintiffs' prior allegations relating to economies of scale and the purported increase in management fees allegedly used to subsidize the adviser's improper payments to unaffiliated broker-dealers. The court, therefore, denied plaintiffs motion for reconsideration, noting that plaintiffs had failed to demonstrate, as a threshold requirement, the existence of allegations that were not previously considered by the court. See id. at 117-20.

The court then rejected plaintiffs' motion for leave to file yet another amended complaint, finding that further attempts to replead their Section 36(b) claim would be futile. See id. at 119-22. Citing Gartenberg v. Merrill Lynch Asset Management, Inc., 694 F.2d 923 (2d Cir. 1982), the court analyzed each of the six relevant factors in turn, and concluded that plaintiffs' proposed second amended complaint continued to suffer from material pleading deficiencies, and affirmed its earlier ruling dismissing the complaint in its entirety.

g. In In re Morgan Stanley & Van Kampen Mutual Fund Securities Litigation, No. 03 Civ. 8208, 2006 WL 1008138 (S.D.N.Y. Apr. 18, 2006), plaintiffs brought a myriad of claims relating to Morgan Stanley's revenue sharing program. According to plaintiffs, Morgan Stanley provided incentives to its sales force of individual registered representatives to promote the sales of its proprietary funds. Plaintiffs claimed that these sales incentives and Morgan Stanley's failure to disclose them constituted violations of Sections 11, 12 and 15 of the Securities Act of 1933; Sections 10(b) and 20(a) and Rule 10b-5 of the Securities Exchange Act of 1934; Sections 34(b), 36(b), and 48(a) of the Act; Sections 206 and 215 of the Investment Advisers Act of 1940, as well as state law claims for breach of fiduciary duty. With respect to plaintiffs' Section 36(b) claim, plaintiffs alleged that defendants purported use of improper Rule 12b-1 distribution fees, soft dollars, and the payment of "excessive commissions" by the investment advisers rendered defendants advisory fees "excessive" in violation of

Section 36(b). The court disagreed, noting that the Second Circuit's decision in Gartenberg provided six factors courts should consider when determining whether the advisory fees at issue are "so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's-length bargaining" and found that plaintiff's allegations pertaining to expense ratios and use of soft-dollars were "too vague and conclusory to meet the requirements of Gartenberg." Id. at *12. Citing Judge Koeltl's decision in Eaton Vance, the court found that plaintiffs' allegations fell outside the applicable scope of Section 36(b), "which addresses only the negotiation and enforcement of payment arrangements between investment advisers and funds, not whether investment advisers acted improperly in the use of the funds" and dismissed plaintiffs' Section 36(b) claim in its entirety. Id. at *13.

h. In In re Merrill Lynch Investment Management Funds Securities Litigation, 434 F. Supp. 2d 233 (S.D.N.Y. 2006), plaintiffs alleged that Merrill Lynch and related defendants entered into agreements with certain mutual funds pursuant to which Merrill Lynch received payments from the funds in exchange for providing financial and other incentives to its sales force to sell the funds. Plaintiffs claimed that these distribution arrangements and Merrill Lynch's failure to disclose them constituted violations of Sections 12 and 15 of the Securities Act of 1933; Sections 10(b) and 20(a) and Rule 10b-5 of the Securities Exchange Act of 1934; Sections 34(b), 36(a), 36(b), and 48(a) of the Investment Company Act of 1940; Sections 206 and 215 of the Investment Advisers Act of 1940; and state law. With respect to the claim brought pursuant to Section 36(b), plaintiffs alleged that the investment adviser and distributor defendants charged "inflated" and "excessive" distribution and advisory fees. Defendants moved to dismiss the complaint in its entirely. Citing Gartenberg, the court agreed and dismissed plaintiffs' Section 36(b) claim, holding that plaintiffs' allegations were "conclusory" and devoid of any "factual support" and determined that plaintiffs failure to allege any facts about the negotiations of the fees at issue or the services provided in exchange for those fees required dismissal even under the liberal pleading standards of Rule 8. Id. at 240-41.

i. In Siemers v. Wells Fargo & Co., No. C 05-4518, 2006 WL 2355411 (N.D. Cal. Aug. 14, 2006), plaintiff asserted numerous claims relating to Wells Fargo's revenue sharing program. According to plaintiff, Wells Fargo and certain related defendants engaged in a purportedly undisclosed "scheme" to pay unaffiliated third party broker-dealers in an effort to induce their customers into purchasing Wells Fargo-branded mutual funds. Plaintiff

alleged that he was harmed by: (1) receiving biased advice from broker-dealers; and (2) the dissipation of fund assets by paying purportedly "excessive" fees to the investment advisers and distributor defendants. Plaintiff claimed that these "kickback" arrangements and Wells Fargo's failure to disclose them constituted violations of Sections 12 and 15 of the Securities Act of 1933; Sections 10(b) and 20(a) and Rule 10b-5 of the Securities Exchange Act of 1934; and Sections 36(b) and 48(a) of the Act. With respect to plaintiff's Section 36(b) claim, plaintiff alleged that: (1) as the funds' assets grew as a result of this purported "scheme," the benefits of such growth were improperly retained by defendants and were not shared with fund shareholders; (2) the expense ratios for the funds were higher than those for similarly situated funds in other complexes; (3) the funds' performance was poor and, therefore, the fees were not justified; (4) the investment adviser defendants improperly caused the funds to pay "higher-than-usual commissions" to financial consultants for services already being performed by the adviser and sub-adviser; (5) the funds' directors either failed to receive or declined to consider relevant information necessary for determining that any benefits resulting from increased fund assets were shared with the funds; and (6) defendants' "shelf-space" program conferred no benefit to the funds and its investors because defendants increased their fees in order to recoup the costs of direct payments to the broker-dealers. Id. at *16.

Defendants moved to dismiss plaintiff's Section 36(b) claim in its entirety, arguing that the plain language of Section 36(b) bars only the receipt of "excessive" fees but not the purportedly inappropriate use of fees. Moreover, defendants asserted that the plaintiff's allegations were too general in nature and not of the type mandated under Gartenberg and its progeny. The court disagreed. First, the court noted that neither the Supreme Court nor the Ninth Circuit have set forth standards for pleading a claim brought pursuant to Section 36(b), and that Gartenberg has limited precedential value outside of the Second Circuit. Moreover, the court noted that even if the standard enunciated by the Second Circuit was applicable, Gartenberg "did not purport to determine how to state a claim (i.e., set pleading standards), much less assert a heightened pleading standard." Id. at *18 (internal quotations omitted). After noting that the relevant factors courts should consider when determining the sufficiency of a claim brought pursuant to Section 36(b) are not limited to those detailed in Gartenberg, the court reviewed each factor in turn and determined that plaintiff's claim was, in fact, adequately plead. Despite this, the court found that the plaintiff failed to allege that he owned any of the relevant funds on the date the suit was commenced and

dismissed plaintiff's claim under Section 36(b) with leave to replead. Id. at *21.

In an attempt to cure the deficiencies identified in the court's August 14, 2006 ruling, the plaintiff filed an amended complaint based upon the same complained-of conduct relating to defendants' improper and undisclosed revenue sharing agreements with unaffiliated broker-dealers. See Siemers v. Wells Fargo & Co., No. C 05-4518, 2006 WL 3041090 (N.D. Cal. Oct. 24, 2006). Defendants again moved to dismiss plaintiff's Section 36(b) claim, arguing that the plaintiff lacked standing to sue on behalf of eighty-seven Wells Fargo-branded funds which he did not own, and the plaintiff's allegations concerning one of the distributor defendants, Stephens Inc., were insufficient to state a claim. According to defendants, the second amended complaint failed to allege that Stephens was: (1) an affiliate of any of the Wells Fargo-related defendants; (2) an "investment adviser" to the funds; or (3) an officer, director, advisory board member, or underwriter of any of the subject funds. After noting that the defendants were correct insofar as the complaint itself does not contain anything other than a reference to Stephens as a "distributor," the court noted that the funds' prospectuses specifically referred to Stephens as a "principal underwriter." According to the court, because the relevant prospectuses were incorporated into the complaint by reference, the plaintiff had, in fact, alleged and demonstrated that Stephens was a proper defendant under Section 36(b). See id. at *7-8.

Following several additional rounds of motion practice pertaining to various other alleged deficiencies in the operative complaint, the plaintiff filed a motion for class certification with respect to those claims alleging violations of Sections 10(b) and 20(a) and Rule 10b-5 of the Securities Exchange Act of 1934. See Siemers v. Wells Fargo & Co., 243 F.R.D. 369 (N.D. Cal. 2007). After an extensive analysis of the applicable standard for class certification pursuant to Rule 23, the court appointed lead plaintiff Siemers as the class representative and certified a class of "[a]ll purchasers of shares (of any class) bought between November 4, 2000, and June 8, 2005" for four mutual funds within the Wells Fargo family of funds. Id. at 371. With respect to plaintiff's claim asserting a violation of Section 36(b), the court bifurcated the proceeding and stayed plaintiff's Section 36(b) claim. Id. at 375. Importantly, the court found that, with respect to the remaining claims under the Exchange Act, the plaintiff would be required to demonstrate—to a jury—that the Adviser Defendant had a practice of extracting excessive advisory and other fees from the four funds, and that the excessiveness of such fees would be judged under the factors set

forth in Gartenberg v. Merrill Lynch Asset Management, Inc., 694 F.2d 923 (2d Cir. 1982). See Siemers, 243 F.R.D. at 374. This unusual decision, therefore, appears to be the first time that a jury would be required to apply the Gartenberg factors to assess the excessiveness of fees received by an advisor and evidences a marked departure from the usual practice that a judge, and not a jury, is to determine whether the subject fees are, in fact, excessive under the standard set forth in Gartenberg. See Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 487 F. Supp. 999, 1001 (S.D.N.Y.) (holding that, because a determination of the excessiveness of the fees and the corresponding remedy is equitable in nature, plaintiffs are not entitled to a jury trial), aff'd sub nom. In re Gartenberg, 636 F.2d 16 (2d Cir. 1980), cert. denied sub nom. Gartenberg v. Pollack, 451 U.S. 910 (1981). On July 5, 2007, the parties entered into a stipulation of settlement.

j. On August 29, 2006, Edward D. Jones ("Edward Jones"), various Edward Jones affiliates, and a number of individual defendants agreed to settle several class actions alleging that Defendants shoehorned as many investors as possible into a limited number of "preferred" mutual fund families in exchange for hundreds of millions of dollars in cash payments from those preferred funds but concealed the arrangement and the conflicts of interest it created from its clients. (The preferred funds included mutual funds in seven fund complexes: Lord Abbett Funds; American Funds; Federated Funds; Goldman Sachs Funds; Hartford Funds; Putnam Funds; and Van Kampen Funds.) The settlement also covered two actions originally filed in state courts that alleged the Defendants' receipt and retention of the cash payments while holding its clients' assets in trust constituted a breach of fiduciary duty. See Spahn v. Edward D. Jones & Co., No. 04 CV 00086 (E. D. Mo.) (Memorandum of Law in Support of Lead Plaintiffs' Amended Motion for An Order Preliminarily Approving Class Action Settlement, Conditionally Certifying the Settlement Class, Approving the Form and Manner of Notice, and Setting Fairness Hearing (D.I. 187)). Defendants agreed to pay $127.5 million consisting of a $55 million cash component and a $72.5 million non-cash component. See id.

k. In Gilliam v. Fidelity Management & Research Co., No 04-11600, slip op. (D. Mass. Sept. 18, 2006), plaintiffs alleged that defendants made undisclosed, improper, and excessive payments to unaffiliated broker-dealers to promote the sale of Fidelity-branded mutual funds over other funds. Plaintiffs alleged that this purported "scheme" resulted in a marked increase in fund assets, the benefits of which were wrongfully retained by the defendants and were not shared with fund investors. Based on these

allegations, plaintiffs brought claims under Sections 34(b), 36(a), 36(b), and 48(a) of the Act; Sections 206 and 215 of the Investment Advisers Act of 1940; and common law claims for breach of fiduciary duty and unjust enrichment. Defendants moved to dismiss the complaint in its entirety, including plaintiffs' claim under Section 36(b) arguing, inter alia, that the claim was improperly brought directly as a putative class action rather than derivatively on behalf of the subject funds. After an extensive analysis of the plain language, legislative history, and various decisions interpreting the scope of a cause of action brought pursuant to Section 36(b), the court concluded that Congress intended only to create a derivative, and not direct, cause of action and recommended dismissal of plaintiffs' claim. In so doing, the court acknowledged that previous decisions in the District of Massachusetts had characterized Section 36(b) claims as direct, but declined to follow such precedent based on a determination that such decisions were the result of "imprecise" findings. Moreover, the court analyzed the substantive law of the funds' states of incorporation—in this case, Massachusetts and Delaware—and found additional support for its determination that the Section 36(b) claim asserted by plaintiffs is, in fact, derivative. See id. at 23-47. The action was subsequently voluntarily dismissed with prejudice.

l. In Boyce v. AIM Management Group, Inc., No. H-04-2587, 2006 WL 4671324 (S.D. Tex. Sept. 29, 2006), plaintiffs alleged that the advisers, distributors, and directors of the AIM-branded family of funds violated Sections 34(b), 36(a), 36(b), and 48(a) of the Act; Section 215 of the Investment Advisers Act of 1940, and state law by making excessive revenue sharing payments to unaffiliated broker-dealers, which ultimately resulted in an increase in asset-based fees paid to defendants. Id. at *1. Judge Ellison dismissed the Section 36(b) claim, with leave to replead, for failure to assert that cause of action derivatively, rather than directly. Id. at *3. The court found that the source of the confusion over whether Section 36(b) provides for a direct rather than derivative right of action stems from "a statement that Supreme Court made in Kamen v. Kemper Financial Services, Inc., 500 U.S. 90 (1991)." Boyce, 2006 WL 4671324, at *3. The court noted, however, that the "more sensible interpretation is that the Court's reference to Section 36(b) as 'direct' was not intended to reverse the [Supreme Court's earlier] holding of Daily Income, but merely to emphasize that a shareholder can bring a derivative claim under Section 36(b) 'directly,' i.e., without first making a demand on the corporation. Id. (citing In re Am. Mutual Funds Fee Litig., 2005 WL 3989803, at *3 (C.D. Cal. Dec. 16, 2005)). The court thus dismissed the Section 36(b) claim with leave to replead.

Following the court's ruling on defendants' motion to dismiss, plaintiffs filed a third amended complaint, asserting their ICA Section 36(b) claim derivatively on behalf of the subject funds. See Boyce v. AIM Mgmt. Group, Inc., No. H-04-2587, 2007 WL 7117575 (S.D. Tex. Sept. 17, 2007). Defendants moved to dismiss the complaint or, alternatively, for reconsideration of the court's September 29, 2006 decision granting plaintiffs the opportunity to replead their Section 36(b) claim derivatively. Defendants argued, consistent with Judge Martini's decision in In re Lord Abbett Mutual Funds Fee Litigation, No. 04-CV-559, 2006 WL 3483946 (D.N.J. Dec. 4, 2006), that the court's previous decision dismissing state law claims as preempted under SLUSA required dismissal of the entire action, including plaintiffs' Section 36(b) claim. Defendants also argued that the previous complaint was insufficient to constitute an "action" for purposes of Section 36(b)'s one year look-back damages period because it was improperly asserted directly as a putative class action rather than derivatively on behalf of the subject funds. According to defendants, the "action," as defined by Section 36(b), was instituted once plaintiffs asserted their claim derivatively and that plaintiffs failed to allege any facts within the applicable one-year period. See Boyce, 2007 WL 7117575, at *3-6. Citing Judge Feess' decision in In re American Mutual Funds Fee Litigation, No CV 04-5593, slip op. (C.D. Cal. Jan. 17, 2007), plaintiffs argued that SLUSA did not mandate dismissal of the entire action, and that the "action" for purposes of Section 36(b)'s one-year look back provision was triggered upon the filing of the initial complaint. See Boyce, 2007 WL 7117575, at *3.

Judge Ellison rejected defendants' argument that the court's prior dismissal of plaintiffs' state law claims as preempted under SLUSA required the dismissal of the entire action, finding that "if Congress intended SLUSA to preclude both federal and state claims presented in a 'covered class action,' such indication would be apparent. It is not." Id. at *5. The court, however, agreed with defendants' interpretation of the word "action" as it relates to Section 36(b)'s one-year look back period, finding that "[n]o 'action' meeting the section 36(b) statutory provision was filed until December 7, 2006, when plaintiff filed an 'action' 'on behalf of such company.' Until that time, only a class action lawsuit—a claim not cognizable under section 36(b)—was on file." Id. at *6. Moreover, the court found that the "relation back" of amendments provision was inapplicable to cases brought pursuant to Section 36(b), holding that a rule of procedure may not be used to modify a substantive damages limitation. Id. Finally, the court held that because plaintiffs failed to plead facts alleging damages within the relevant "look-back" period, the cause of action brought pursuant

to Section 36(b) failed to state a claim, and dismissed plaintiffs' complaint with prejudice. Id. at *6-7.

m. In In re Scudder Mutual Funds Fee Litigation, No. 04 Civ. 1921, 2007 WL 2325862 (S.D.N.Y. Aug. 14, 2007), another revenue sharing action, plaintiffs alleged that Deutsche Bank and certain affiliated entities engaged in a scheme to improperly induce unaffiliated broker-dealers to steer investors towards Scudder-branded mutual funds, the result of which increased fund assets and corresponding fees. Plaintiffs further allege that several of the Trustees were current or former employees of the Investment Advisor Defendants, creating a conflict of interest between "the interest in siphoning fees from shareholders to induce brokers to sell the Funds' shares" and the interests of the fund shareholders. Id. at *2-3. According to plaintiffs, this purported "conflict" was manifested in several improper practices, including, inter alia, inappropriate revenue-sharing arrangements, so-called "soft-dollar kickbacks," and the failure to pass on the benefits of scale economies to fund shareholders. Id. at *3. Plaintiffs allege that these activities constituted violations of Sections 36(b) and 48(a) of the Act. Defendants moved to dismiss the complaint in its entirety, including plaintiffs' Section 36(b) claim, arguing that: (1) plaintiffs improperly asserted their claim directly as a putative class action rather than derivatively on behalf of the subject funds; and (2) plaintiffs' Section 36(b) allegations were insufficient to state a claim.

Judge Batts agreed and dismissed plaintiffs' Section 36(b) cause of action in its entirety with prejudice. The court first addressed defendants' argument that a Section 36(b) claim may only be brought derivatively on behalf of the funds rather than directly by fund shareholders. After analyzing the plain language of Section 36(b) and relevant case law directly on point, the court held that the text of the statute coupled with dicta from the Supreme Court's decision in Daily Income and the Second Circuit's language in Olmsted v. Pruco Life Ins. Co. of New Jersey, 283 F.3d 429 (2d Cir. 2002), "requires a ruling that Section 36(b) provides for derivative, not direct, suits." In re Scudder, 2007 WL 2325862, at *13. Moreover, the court also found that the allegations in the complaint were insufficient to state a claim under Section 36(b). Citing Gartenberg v. Merrill Lynch Asset Management, Inc., 694 F.2d 923 (2d Cir. 1982), the court analyzed each of the six relevant factors in turn, and concluded that plaintiffs' complaint failed to state a claim. Specifically, the court found that plaintiffs' bald allegations that: (1) the nature and quality of services deteriorated because several high-level employees departed from the Scudder complex; (2) the purported soft-dollar kickbacks were an improper

use of fund assets; (3) the benefits of economies of scale were improperly retained by defendants and not passed on to fund investors; and (4) the funds' Trustees lacked independence and conscientiousness merely because two of the Trustees were allegedly employees of the defendants, lacked the requisite specificity to state a claim under Section 36(b). In re Scudder, 2007 WL 2325862, at *13-18.

n. In Alexander v. Allianz Dresdner Asset Management of America Holding, Inc., 509 F. Supp. 2d 190 (D. Conn. 2007), plaintiffs alleged that defendants used assets from the PIMCO-branded family of mutual funds to make improper "shelf-space" payments to unaffiliated broker-dealers in exchange for promoting the funds to unwitting investors. Id. at 193. Plaintiffs alleged that these payments violated: (1) Sections 34(b), 36(a), 36(b) and 48(a) of the ICA; (2) Section 215 of the Investment Advisers Act of 1940; and (3) various claims under state common law, including breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and unjust enrichment. Id. at 193-94. Defendants moved to dismiss the complaint in its entirety, including plaintiffs' Section 36(b) claim. According to the defendants, plaintiffs' allegations that defendants breached their fiduciary duty by "improperly charging investors in the Funds purported Rule 12b-1 marketing fees" and by "improperly inflating management fees by shifting expenses from the Investment Advisers to the Funds' investors without a corresponding reduction in the management fees" was insufficient to state a viable claim under Section 36(b). The court agreed. Citing the Second Circuit's decisions in Gartenberg and Eaton Vance, the court found that plaintiffs' allegations that the defendants used fees for an improper purpose was insufficient to state a cause of action pursuant to Section 36(b). See Allianz Dresdner Asset Mgmt., 509 F. Supp. 2d at 195-96.

o. In Hoffman v. UBS-AG, 591 F. Supp. 2d 522 (S.D.N.Y. 2008), investors in various UBS mutual funds brought a putative class action involving revenue sharing against, inter alia, the investment adviser and distributor of the UBS proprietary funds. Plaintiffs alleged violations of various provisions of the Act, the Securities Act, and the Securities Exchange Act. With respect to the Act, plaintiffs asserted claims under Section 36(b) both directly and derivatively. Defendants moved to dismiss both. The court as an initial matter adopted Judge Batts' analysis in In re Scudder to conclude that Section 36(b) provides for derivative, not direct, suits, and granted defendants' motion as to the direct claim. See Hoffman, 591 F. Supp. 2d at 538. Turning to the derivative claims, Judge Sand held that plaintiffs had not pled facts relating to the Gartenberg factors as required under Second Circuit

jurisprudence. Judge Sand held that allegations of underperformance alone are not sufficient; the complaint did not allege sufficient information for the court to determine the profitability of defendants, "which is a prerequisite to establishing [the profitability] factor"; plaintiffs' allegations concerning fall-out benefits referred to the propriety of the fees, not the amount charged; plaintiffs' allegations did not satisfy the economies of scale factor; plaintiffs did not make appropriate comparisons to other mutual funds; and plaintiffs' reference to statements of SEC officials about mutual fund directors generally and to a Forbes magazine article about the UBS board of directors were insufficient to challenge the presumption of disinterestedness under the Act. Id. at 538-41.

Rule 12b-1 Plans / Funds Closed to New Investors

a. In Korland v. Capital Research and Management Company, No. CV-08-4020, 2006 WL 936612 (C.D. Cal. Feb. 10, 2009), plaintiff, a shareholder in the $100 billion EuroPacific Growth Fund (the "Fund" or "EUPAC") challenged the Fund's payment of post-sale Rule 12b-1 fees to broker-dealers for servicing Fund shareholders. Plaintiff claimed that the Rule 12b-1 fees paid by EUPAC were improper and therefore *per se* excessive in violation of Sections 36(b) and 48(a) of the Act. Rule 12b-1, enacted by the SEC in 1980, provides a mechanism by which a mutual fund may use its assets to pay for activities primarily intended to result in the sale of fund shares. In response to this Rule, EUPAC, like many mutual funds, enacted a "Rule 12b-1 plan" which allowed the fund to use fund fees to pay for distribution, as well as for activities relating to post-sale shareholder services. Plaintiff alleged that this latter use—payments to broker-dealers for ongoing service advice rendered by individual financial consultants—was an activity which did not "result in the sale of fund shares" and was therefore *per se* illegal.

Defendants moved to dismiss the complaint, arguing that there is no such thing as a *per se* violation of Section 36(b) and that the plaintiff failed to state a claim under the six-factor Gartenberg test which governs mutual fund excessive fee actions. Defendants highlighted for the court the 28-year history of Rule 12b-1, and the fact that the SEC had recognized that post-sale shareholder services encourages mutual fund shareholders to purchase new or additional fund shares.

The court (Feess, D.J.) held that under applicable case law, it was insufficient under Section 36(b) for plaintiff to plead that an expenditure under Rule 12b-1 was "*per se*" unlawful or

unauthorized; "more must be alleged." Judge Feess went on to state that the mere allegation "that fees are used for an improper purpose" is also not sufficient to state a Section 36(b) claim. Judge Feess explained that if plaintiff chooses to replead, plaintiff must plead detailed Gartenberg-style allegations. Lastly, Judge Feess held that there is no private right of action for controlling person liability under Section 48(a) of the ICA, and dismissed that claim with prejudice.

b. In Mintz v. Baron, No. 05 Civ. 4904, 2006 WL 2707338 (S.D.N.Y. Sept. 19, 2006), plaintiffs, shareholders in two Baron-branded mutual funds, brought claims under Section 36(b) of the Act, as well as a state law claim for breach of fiduciary duty, against the funds' investment adviser, distributor, and a select group of trustees of the Baron funds. Plaintiffs' claims related to certain distribution payments made pursuant to Rule 12b-1 that were charged to funds that were closed to new investors. According to plaintiffs, once the funds at issue closed to new investors, the distribution and service fees far exceeded the minimal costs actually incurred, and defendants' receipt of those fees constituted a breach of their fiduciary duties under Section 36(b). See id. at *2. Defendants moved to dismiss. With respect to the claim under Section 36(b), defendants argued that the allegations pertaining to the complained-of conduct (i.e., the receipt of Rule 12b-1 fees despite the fact that the funds at issue were closed) failed to state a claim "because the Funds' prospectus demonstrates that they are open to additional investments by certain categories of investors and that the relevant 12b-1 plan permits payment of administrative, as well as marketing expenses." Id. at *4. Citing Gartenberg, the court analyzed each of the relevant factors in turn and concluded that plaintiffs' allegations were "barely" sufficient to survive a motion to dismiss. Id. at *4.

The court, however, made two additional rulings with respect to Section 36(b). First, the court dismissed the Section 36(b) claim as to the investment adviser defendant because Section 36(b) only applies to recipients of the fees in question, which plaintiffs did not allege. See id. at *3. Second, the court noted that plaintiffs improperly asserted their Section 36(b) claim directly on behalf of a putative class of shareholders rather than derivatively on behalf of the subject funds. Accordingly, the court directed plaintiffs to either replead their Section 36(b) claim derivatively or, alternatively, to "show cause in writing as to why such amendment is not necessary." Id. at *4.

Following the court's ruling on defendants' motion to dismiss, plaintiffs filed a second amended complaint, asserting substantially

similar allegations. Again, defendants moved to dismiss, arguing that the complaint failed to adequately allege a violation of Section 36(b), as set forth by the Second Circuit in Gartenberg and reiterated in Amron. The court agreed, noting that the Supreme Court's decision in Twombly v. Bell Atlantic, 550 U.S. 544 (2007), required a detailed application and examination of each of the Gartenberg factors. After reviewing each factor in turn, the court found the amended complaint inadequate, holding that "[i]n the absence of facts sufficient to provide context for any Gartenberg factor that would support Plaintiffs' claim of excessive fees, the Amended Complaint fails to state plausibly a claim under Section 36(b)." See Mintz v. Baron, No. 05 Civ. 4904, 2009 WL 735140, at *4 (S.D.N.Y. Mar. 20, 2009).

c. See also Zucker v. Federated Shareholder Svcs. Co., No. 2:06cv241, 2007 WL 709305 (W.D. Pa. Mar. 5, 2007) (dismissing plaintiffs' Section 36(b) claim pertaining to the improper receipt of redemption, transfer agency, and other fees charged to shareholders in a closed fund within the Federated mutual fund complex for: (1) failure to assert the claim derivatively on behalf of the subject fund; and (2) failing to allege that several defendants were recipients of the subject fees).

d. In Curran v. Principal Management Corp., No. 4:09-cv-433, 2010 WL 2889752 (S.D. Iowa June 8, 2010), investors in two "funds of funds" (i.e., mutual funds that invest in other mutual funds), alleged that defendants violated Section 36(b) in charging excessive advisory fees, receiving excessive profits due to economies of scale, and with regard to excessive Rule 12b-1 fees (counts I, II and III, respectively). Notably, plaintiffs brought these claims on behalf of the funds in which they owned shares (i.e., the funds of funds), and the underlying funds which those funds invested in. The "funds of funds" and the underlying funds were all part of the Principal fund complex.

With regard to plaintiffs' Rule 12b-1 claim, the court stated that plaintiffs "have met their burden by alleging that fees collected by [the distributor] for its distribution services surpassed the value of those services, and that the manner in which those fees were assessed did not correspond to the type of services performed but, rather, resemble fees collected for advisory services." Id. at *11. Thus, noting that defendants' arguments were largely factual in nature, the court concluded that "the allegations set forth in Count III are sufficient to raise an inference that the distribution fees collected by [the distributor] were additional and excessive compensation for advisory services subject to a § 36(b) claim." Id.

On May 17, 2013, the parties alerted the court that the surviving portion of the action had settled. The court approved the parties' settlement on June 12, 2013, and dismissed the action with prejudice.

e. In a different approach to asserting liability in connection with the payment of Rule 12b-1 fees, the plaintiff in Smith v. Franklin/Templeton Distributors, Inc., No. C-09-4775, 2010 WL 3248644 (N.D. Cal. June 8, 2010), alleged that Franklin/Templeton Fund Distributors ("FTD"), the principal underwriter and distributor of Franklin Custodian Funds (the "Trust"), and certain members of the board of trustees of the Trust, violated Section 47(b) of the Act by paying Rule 12b-1 fees to broker-dealers. Section 47(b) makes unenforceable by either party a contract "that is made, or whose performance involves, a violation of [the Act], or of any rule, regulation, or order thereunder." 15 U.S.C. § 80a-46(b)(1). Plaintiff contended that the Rule 12b-1 fees paid were asset-based compensation prohibited by Section 202 of the IAA and, thus, the distribution plans pursuant to which the fees were paid were unenforceable under Section 47(b).

Defendants moved to dismiss the complaint, arguing that Section 47(b) is strictly a remedy section; a plaintiff must allege a viable predicate violation in connection with Section 47(b). The court agreed with defendants, holding that "a plaintiff can seek relief under § 47(b) only by asserting a violation of some other section of the ICA." Franklin/Templeton, 2010 WL 2348644, at *7 (citing cases). "The court finds no language in ICA § 47(b) sufficient to create a private right of action under that statute, absent a showing of some other violation of the ICA." Id. Nor, held the court, can a violation of the IAA be the predicate for the Section 47(b) claim, as "[Section] 47(b) applies only to a contract that is made, or whose performance involves, a violation of the ICA." Id. at *8 (quotations omitted). The court dismissed the action with leave to replead. Id.

Plaintiff subsequently filed an amended complaint in which he asserted a claim for "contract voiding" pursuant to Section 47(b). In his complaint, Plaintiff asserted that the Trust "seeks a declaration that the contractual obligation to make payments of Trust assets in the form of asset-based compensation to broker-dealers holding Trust shares in brokerage account [sic] violates the Trustees' duties under Section 36(a) of the ICA and Rule 38a-1 to avoid improper use of Trust assets," and alleged that "due to the violation of core provisions of the ICA, Section 36(a) and Rule 38a-1 . . . that require proper and lawful use of Trust assets, the Trust seeks to have its own contractual obligations deemed to be

void by reason of Section 47(b), in an action maintained under Section 47(b)." Smith v. Franklin/Templeton Distribs., Inc., No. C 09-4775, 2010 WL 4286326, at *1 (N.D. Cal. Oct. 22, 2010).

Defendants again moved to dismiss for failure to state a claim, which the court granted before a scheduled hearing on the motion. The court held that plaintiff's amended complaint failed to allege facts sufficient to show a predicate violation of either Section 36(a) or Rule 38a-1. Id. at *2. The court held that neither Section 36(a) nor Rule 38a-1 provide an express or implied private right of action. Nor does Section 36(a) create a federal fiduciary duty or regulate the improper use of Trust assets, or provide a right of action for a claim for breach thereof. Id. Similarly, the court held that "Rule 38a-1 does not impose on funds a duty to assure that broker-dealers comply with registration requirements, but rather simply requires funds to adopt and implement compliance programs that are reasonably designed to prevent violation of the federal securities laws." Id. at *3. As such, plaintiff did not plead facts sufficient to show any violation of Rule 38a-1.

The court dismissed the federal claim in the amended complaint without leave to amend. The court declined to exercise supplemental jurisdiction over the state law claims and dismissed those claims without prejudice to refiling in state court. Id.

2. Market Timing and Late Trading

On August 25, 2005, Judge Motz in the District of Maryland issued the first of the decisions on motions to dismiss in the numerous tracks and sub-tracks in the market timing and late trading multi-district litigation. See In re Mutual Funds Inv. Litig. (In re Janus Subtrack Investor Class Op.), 384 F. Supp. 2d 845 (D. Md. 2005) ("Market Timing Class Op."); In re Mutual Funds Inv. Litig. (In re Janus Subtrack Fund Derivative Op.), 384 F. Supp. 2d 873 (D. Md. 2005) ("Market Timing Derivative Op."). With respect to the investor class actions, the court held that plaintiffs' allegations that: (1) management fees, which were based on the amount of funds under management, were increased excessively by late trades and market timed transactions that increased the funds under management; (2) the influx of funds from late trades and market-timed transactions excessively increased fees paid by funds for distribution of shares; and (3) the management fees paid as a result of the deposit of so-called "sticky assets" that would "sit quietly, in low-risk money-market or government bond funds" were entirely unearned, stated a claim under Section 36(b). Market Timing Class Op., 384 F. Supp. 2d at 867-68.

On May 30, 2006, Judge Motz issued a series of letter opinions in the market timing and late trading multi-district litigation discussing the scope of liability under Section 36(b). See In re Mutual Funds Inv. Litig. (In re Van Kampen

Funds Sub-Track), No. MDL-15863, 2006 WL 1581176 (D. Md. May 30, 2006); In re Mutual Funds Inv. Litig. (In re AIM/Invesco Sub-Track), No. MDL-15864, 2006 WL 1581193 (D. Md. May 30, 2006). With respect to the Van Kampen sub-track, defendants' sought reconsideration of the court's March 1, 2006 order permitting plaintiff to pursue its claims under Sections 36(b) and 48(a), arguing that plaintiff had failed to allege facts sufficient to sustain a claim within the one year look-back period applicable to claims brought under Section 36(b). The court agreed, finding that the complaint did not include any allegations within the applicable time period and dismissed plaintiff's claims under the Act accordingly. See In re Van Kampen, 2006 WL 1581176, at *1-2.

On the same day as Van Kampen, Judge Motz dismissed plaintiffs' claims brought under Sections 36(b) and 48(a) in the AIM/Invesco sub-track, finding that plaintiffs failed to allege that defendants "actually received the purportedly excessive compensation" at issue and held that defendants could not, therefore, be subject to secondary liability under Section 48(a). AIM/Invesco Sub-Track, 2006 WL 1581193, at *1.

Recently, Judge Motz issued several additional letter opinions dismissing plaintiffs' Section 36(b) claims against the trustees of several funds. According to the court, plaintiffs failed to allege that that the trustees were recipients of the subject fees, as required by Section 36(b), rendering the allegations "insufficient to support a viable 36(b) claim." In re Mutual Funds Inv. Litig. (In re RS Investment Sub-Track), No. 04-md-15863, slip op. at *2 (D. Md. July 7, 2006); In re Mutual Funds Inv. Litig. (In re Alger Sub-Track), No. 04-md-15863, slip op. at *2 (D. Md. July 7, 2006).

On December 28, 2006, Judge Motz issued an Order entering final judgment dismissing claims in the Market Timing MDL against William Wolverton, former general counsel of Putnam. Plaintiffs had alleged that Wolverton violated Section 36(b) of the Act in that as general counsel of Putnam he failed to stop market timing activities and was a recipient of asset managements fees by virtue of receiving his salary. Plaintiffs also alleged that Wolverton violated Section 48 of the Act as a control person in that he caused to be done through others what would be unlawful under the Act for he himself to do. Judge Motz agreed with Wolverton that his salary did not constitute the receipt of fees contemplated by Congress in connection with Section 36(b) and, thus, there was no Section 36(b) violation. Further, without an underlying violation of Section 36(b), there could be no violation of Section 48. See Zuber v. Putnam Inv. Mgmt. LLC, et al., No. 04-cv-564, slip op. (D. Md. Dec. 28, 2006) (D.I. 2298-2).

On December 30, 2008, Judge Motz issued a decision in the Janus and Putnam sub-tracks denying defendants' motion for summary judgment on the Section 36(b) claims. See In re Mutual Funds Inv. Litig., 590 F. Supp. 2d 741 (D. Md. 2008). Judge Motz echoed his earlier ruling denying motions to dismiss the Section 36(b) claims asserted against the Janus defendants and held, without substantial analysis, that "[t]o the extent that a portion of the fees paid to the

investment adviser defendants was 'disproportionate, excessive, or unearned,' . . . because it was based upon the existence of market timing agreements or of insider market-timed trades not disclosed when the fees were negotiated, plaintiffs (derivatively, on behalf of the funds that paid the fees) may recover that portion of the fees." Id. at 759-60. It is worth noting that Judge Motz acknowledged the two different approaches to deciding the viability of Section 36(b) claims that have evolved—Gartenberg and Jones v. Harris—but found that the two approaches lead to the same place. Id.

On January 20, 2010, Judge Motz issued a decision in the Janus funds derivative litigation granting defendants' motion for summary judgment on plaintiffs' claim under Section 36(b)—the sole remaining claim in that action. See In re Mutual Funds Inv. Litig., 681 F. Supp. 2d 622 (D. Md. 2010). In doing so, Judge Motz held that the fiduciary duty under Section 36(b) has a scienter component. Id. at 628. According to the court:

> [A]llowing recovery in the absence of intentional or reckless adviser misconduct would be to concentrate on the compensation itself, not on the adviser's actions. This focusing on the compensation itself, and ignoring the advisers' conduct, would allow Section 36(b) to be used to *de facto* challenge the reasonableness of the fees, which is inconsistent with the text and intent of 36(b).

Id. As such, the court ruled, whether viewed under the "excessive/disproportionate" test of Gartenberg and its progeny, or the "honest negotiation" test of Jones v. Harris—the court held that it need not resolve which of the two standards is most appropriate because they both lead to the same place—Defendants could only be liable for the "'portion of the fees paid to the [Janus Defendants that] was disproportionate, excessive, or unearned . . . because it was based on the existence of market timing agreements or of insider market-timed trades not disclosed when the fees were negotiated . . . .'" Id. (quoting In re Mutual Funds Inv. Litig., 590 F. Supp. 2d 741, 760 (D. Md. 2008)).

Importantly, no other court has held that the fiduciary duty under Section 36(b) has a scienter requirement, a fact Judge Motz squarely acknowledges: "I suspect this is because proof of breach is usually powerful evidence of the adviser's state of mind." In re Mutual Funds Inv. Litig., 681 F. Supp. 2d at 629 n.12.

3. Outsourcing Payments to Affiliated Entities

a. In In re Smith Barney Transfer Agent Litig., No. 05 Civ. 7583, 2007 WL 2809600 (S.D.N.Y. Sept. 26, 2007), plaintiffs alleged that in 1999 defendants recommended that the funds retain the services of what is now known as Citicorp Trust Bank ("CTB"), an affiliate of the funds' investment adviser, to serve as the primary transfer agent for the funds. Although CTB was responsible for providing all of the Smith Barney-branded mutual funds' transfer

agent services, CTB allegedly subcontracted the vast majority of the transfer agent work to First Data Investor Services Group ("First Data"). Pursuant to this subcontract, it was alleged that First Data charged significantly lower fees, yet CTB did not pass on those discounts to the funds, nor did the funds' investment adviser disclose to the funds such discounts or that First Data performed most of the transfer agent services. Id. at *1. Based on these allegations, plaintiffs asserted claims under Sections 10(b) and 20(a) and Rule 10b-5 of the Securities Exchange Act of 1934 and Section 36(b) of the Act. Defendants moved to dismiss the complaint in its entirety, including plaintiffs' Section 36(b) claim, arguing, inter alia, that the claim was improperly asserted directly as a putative class action rather than derivatively on behalf of the subject funds. Id. at *4. The court agreed and dismissed plaintiffs' Section 36(b) claim. Id. Applying the law of the state of the funds' incorporation, the court held that the purported injury was suffered, if at all, directly by the funds, and that the claims were therefore derivative in nature. Id.

One of the plaintiffs appealed the decision. On appeal, the United States Court of Appeals agreed with the district court that an action under Section 36(b) is derivative, and rejected plaintiff's argument that it could assert claims under Section 36(b) in which the recovery would go to it directly. Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC, 595 F.3d 86, 97 (2d Cir. 2010). "To the extent Local 649 seeks damages that inure to its own benefit and not to the Funds', that result is not permitted by § 36(b)." Id. at 98. The Second Circuit reversed the district court's dismissal of plaintiffs' securities fraud claim and remanded.

On remand, the defendants filed another motion to dismiss, which the district court granted in part and denied in part. See In re Smith Barney Transfer Agent Litig., 765 F. Supp. 2d 391 (S.D.N.Y. 2010). The court first discussed defendants' argument that plaintiffs lacked standing. With regard to the argument that plaintiffs should have brought their Section 10(b) claim derivatively—because plaintiffs only alleged harm to the funds—the court rejected defendants' argument: because plaintiffs claimed they were "fraudulently induced to purchase shares . . . they can be said to have suffered a direct injury." See In re Smith Barney, 765 F. Supp. 2d at 399.

Next, the court held that plaintiffs lacked standing to pursue claims on behalf of funds in which no named plaintiff invested, and dismissed claims "on behalf of mere holders of Smith Barney

Funds securities," because "§ 10(b) limited private causes to action to purchasers and sellers." Id. at 399-400.

The court then rejected defendants' argument that plaintiffs' claims were time-barred. With regard to news articles cited by defendants, the court noted that the articles' reference to investigators "trying to determine Defendants' culpability demonstrates that any evidence of Defendants' mental state had not yet been uncovered. Thus, because a reasonably diligent investor would not necessarily have discovered facts establishing that Defendants acted intentionally or with reckless disregard, Plaintiffs' claims are not time-barred." Id. at 400-01 (citations omitted).

Next, the court dismissed one of the individual defendants on the grounds that he did not make any of the false statements alleged in the complaint. While the court acknowledged the efficacy of the group pleading doctrine, which presumes that corporate disclosures are the collective work of, and can be attributed to, those with "direct involvement in the everyday business of the company," the court declined to apply the doctrine to the chief executive officer of Citigroup Asset Management. Id. at 401. The court found that since the complaint alleged no direct involvement by the individual in the adviser's recommendations to the funds' board, and because the individual was not an officer of the Smith Barney funds, that it would be inappropriate to apply the doctrine against him. Id.; see also id. at 402 (dismissing Section 20(a) claim against this individual).

Shockingly, lead plaintiffs' counsel subsequently informed the court that the lead plaintiff did not actually own shares in the at-issue fund (rather lead plaintiff owned shares in a similarly named fund). After excoriating the lawyers for both sides for letting this error go unnoticed for six years of litigation, the court dismissed lead plaintiff and set a briefing schedule for an appointment of a new lead plaintiff and lead counsel. See In re Smith Barney Transfer Agent Litig., No. 05 Civ. 7583, 2011 WL 4430857 (S.D.N.Y. Sept. 22, 2011).

After plaintiffs resolved the standing issue, plaintiffs re-filed their action, and defendants again moved to dismiss. The court ultimately dismissed the claims against the investment adviser and one of the individual defendants for failure to plead reliance, but sustained a Rule 10b-5(b) claim against another individual defendant who had signed allegedly misleading fund documents. See infra In re Smith Barney Fund Transfer Agent Litig., No. 05 Civ. 7583, 2012 WL 3339098 (S.D.N.Y. Aug. 15, 2012).

4. Securities Lending

a. In Laborers' Local 265 Pension Fund v. iShares Trust, No. 3:13-cv-00046, 2013 WL 4604183 (M.D. Tenn. Aug. 28, 2013), plaintiffs, investors in certain iShares exchange traded funds, filed a derivative action on behalf of the funds, asserting claims under Sections 36(a), 36(b) and 47(b) of the Act and seeking the return of allegedly "excessive" fees, contractual rescission and injunctive relief. Plaintiffs asserted the claims against the funds as nominal defendants, as well as BlackRock Fund Advisors ("BFA"), BlackRock Institutional Trust Company, N.A. ("BTC") and individual directors of the funds. BFA acted as investment adviser to the funds, while BTC was hired by BFA to act as securities lending agent to the funds. Plaintiffs sought to recover revenue derived from BTC's lending of the funds' securities, alleging that the 35 percent fee-split of this revenue, approved by the funds' directors, was excessive. Id. at *1-2.

Plaintiffs also alleged that an additional 5 percent of securities lending revenue was paid to BlackRock affiliates as administrative fees, resulting in a "40/60 division of revenue between the BlackRock affiliates and the iShares funds" that was likewise excessive, when compared to fees paid by "peer mutual funds, and, in particular, compared to funds which employ unaffiliated lending agents." Id. at *2.

In dismissing plaintiffs' Section 36(b) claim, the court relied primarily on an SEC Exemption Order issued pursuant to Sections 6(c) and 17(b) of the Act, which applied to the securities lending agreement at issue. The court explained that because Section 36(b)(4) of the Act provides that Section 36(b) is inapplicable to payments or compensation made in connection with orders under Section 17 of the Act, plaintiffs' Section 36(b) claim must be dismissed. Id. at *3, *5-6.

The court also dismissed plaintiffs' claims under Sections 36(a) and 47(b), finding that plaintiffs failed to overcome the presumption that no private right of action exists under those sections of the Act. Id. at *6-10.

Although the court's dismissal was without prejudice and provided plaintiffs with an opportunity to file a motion for leave to amend by September 17, 2013, the court specifically noted that if such a motion was not filed, "the court will enter final judgment in the case." Id. at *10. Plaintiffs subsequently sought an extension of time to file their motion by October 17, 2013, which was granted. After the extended deadline passed, on October 22, 2013,

defendants moved to dismiss the case, which the court granted shortly thereafter. See Laborers' Local 265 Pension Fund v. iShares Trust, No. 3:13-cv-00046 (M.D. Tenn. Oct. 24, 2013).

5. Other Attempts to Expand the Scope of Section 36(b)

Over the years, plaintiffs have tried in earnest to expand the scope of Section 36(b), by challenging:

a. Failure to participate in class actions—see Hamilton v. Allen, 396 F. Supp. 2d 545 (E.D. Pa. 2005); Stegall v. Ladner, 394 F. Supp. 2d 358 (D. Mass. 2005); Hogan v. Baker, No. Civ. A. 305CV73P, 2005 WL 1949476 (N.D. Tex. Aug. 12, 2005); Dull v. Arch, No. 05 C 140, 2005 WL 1799270 (N.D. Ill. July 27, 2005); Jacobs v. Bremner, 378 F. Supp. 2d 861 (N.D. Ill. 2005); Mutchka v. Harris, 373 F. Supp. 2d 1021 (C.D. Cal. 2005); Davis v. Bailey, No. CIVA05CV42, 2005 WL 3527286 (D. Colo. Dec. 22, 2005); Everett v. Bozic, No. Civ. 00296, 2006 WL 2291083 (S.D.N.Y. Aug. 3, 2006).

b. Portfolio selections—see Benak v. Alliance Capital Mgmt. L.P., No. Civ. A. 01-5734, 2004 WL 1459249 (D.N.J. Feb. 9, 2004).

c. Fund mergers—see Olesh v. Dreyfus Corp., No. CV-94-1664, 1995 WL 500491 (E.D.N.Y. Aug. 8, 1995); Wexler v. Equitable Capital Mgmt. Corp., No. 93 Civ. 3834, 1994 WL 48807 (S.D.N.Y. Feb. 17, 1994).

d. Rights offerings—see In re Nuveen Fund Litig., No. 94 C 360, 1996 WL 328006 (N.D. Ill. June 11, 1996); Strougo v. Scudder, Stevens & Clark, Inc., 964 F. Supp. 783 (S.D.N.Y. 1997); King v. Douglass, 973 F. Supp. 707 (S.D. Tex. 1996).

e. The use of leverage—see Green v. Fund Asset Mgmt., L.P., 19 F. Supp. 2d 227 (D.N.J. 1998); Green v. Fund Asset Mgmt., L.P., 53 F. Supp. 2d 723, 731 (D.N.J. 1999), rev'd, 245 F.3d 214 (3rd Cir. 2001) (Section 36(b) does not preempt state law claims for breach of fiduciary duty and deceit); Green v. Fund Asset Mgmt., L.P., 147 F. Supp. 2d 318 (D.N.J. 2001), aff'd, 286 F.3d 682 (3d Cir.), cert. denied, 537 U.S. 884 (2002); Green v. Nuveen Advisory Corp., 186 F.R.D. 486, 490 (N.D. Ill. 1999); Green v. Nuveen Advisory Corp., No. 97 C 5255, 2001 WL 1035652 (N.D. Ill. Sept. 10, 2001), aff'd, 295 F.3d 738 (7th Cir.), cert. denied, 537 U.S. 1088 (2002).

f. Annuity contracts—see Levy v. Alliance Capital Mgmt. L.P., No. 97 Civ. 4672, 1998 WL 744005 (S.D.N.Y. Oct. 26, 1998), aff'd, 189 F.3d 461 (2d Cir. 1999).

g. The propriety of directors serving on the boards of multiple funds[6]—see Migdal v. Rowe Price-Fleming, No. 98-2162, 1999 WL 104795 (D. Md. Jan. 20, 1999); Migdal v. Rowe Price-Fleming Int'l, No. 98-2162, 2000 WL 350400 (D. Md. Mar. 20, 2000), aff'd, 248 F.3d 321 (4th Cir. 2001); see also Verkouteren v. Blackrock Fin. Mgmt., Inc., 37 F. Supp. 2d 256 (S.D.N.Y. 1999); Verkouteren v. Blackrock Fin. Mgmt., Inc., No. 98 Civ. 4673, 1999 WL 511411 (S.D.N.Y. July 20, 1999), aff'd, 208 F.3d 204 (2d Cir. 2000) (unpublished table opinion); Krantz v. Prudential Invs. Fund Mgmt. LLC, 77 F. Supp. 2d 559 (D.N.J. 1999), aff'd, 305 F.3d 140 (3d Cir. 2002), cert. denied, 537 U.S. 1113 (2003); Strougo v. BEA Assocs., No. 98 Civ. 3725, 1999 WL 147737 (S.D.N.Y. Mar. 18, 1999); Strougo v. BEA Assocs., No. 98 Civ. 3725, 2000 WL 45714 (S.D.N.Y. Jan. 19, 2000); Strougo v. BEA Assocs., 188 F. Supp. 2d 373 (S.D.N.Y. 2002); Krantz v. Fidelity Mgmt. & Research Co., 98 F. Supp. 2d 150 (D. Mass. 2000); Miller v. Mitchell Hutchins Asset Mgmt., Inc., No. 01-CIV-192 (S.D. Ill. Mar. 12, 2002); Nelson v. AIM Advisors, Inc., No. 01-CV-282, 2002 WL 442189 (S.D. Ill. Mar. 8, 2002).

h. Failure to reduce a fund's trading discount—see, e.g., Marquit v. Dobson, Nos. 98 Civ. 9089, 98 Civ. 9059, 98 Civ. 9088, 2000 WL 4155 (S.D.N.Y.), aff'd sub nom. Marquit v. Williams, 229 F.3d 1135 (2d Cir. 2000) (unpublished decision).

i. Payment of membership dues to the ICI—see Rohrbaugh v. Investment Co. Inst., No. Civ. A. 00-1237, 2002 WL 31100821 (D.D.C. July 2, 2002).

j. Fees of underlying funds in "fund of funds"—see Curran v. Principal Mgmt. Corp., No. 4:09-cv-433, 2010 WL 2889752, at *6 (S.D. Iowa June 8, 2010) (concluding Section 36(b) "creates a private right of action for all 'security holders' in the registered investment company, including persons who possess an interest in a mutual fund that is acquired through a fund of funds"), vacated by 2011 WL 223872 (S.D. Iowa Jan. 24, 2011); Sivolella v. AXA Equitable Life Ins. Co., No. 11-4194, 2012 WL 4464040 (D.N.J. Sept. 25, 2012).

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[6] For a discussion of the background which prompted these cases, see James N. Benedict & Mary K. Dulka, "Recent Developments in Litigation Under the Investment Company Act of 1940," Rev. of Sec. & Commodities Reg., Vol. 35, No. 14 (August 2002), at 156-57.

III. CONCLUSION

Although many courts continue to restrict the scope of cases brought under Section 36(b) of the Act, plaintiffs continue to attack conduct with claims under that Section. In light of the Supreme Court's March 30, 2010 decision in Jones v. Harris Associates L.P., which both the industry and the plaintiffs' bar claim as a victory, it is unclear whether plaintiffs will continue to view Section 36(b) as an attractive cause of action in view of the burden of proof imposed upon those seeking to recover. Although the recent filing of "manager of managers" cases suggests that plaintiffs have not yet given up on Section 36(b), Jones should deter plaintiffs from using Section 36(b) as a vehicle to attack conduct beyond excessive fees.

November 1, 2013