

1 incentives for sales of the mutual funds rather than for the stated purpose of “shareholder
2 servicing.” At the same time, however, he has found no evidence that the promised shareholder
3 services were not provided.

4 With respect to profit sharing, Lead Plaintiff would have had to overcome Defendants’
5 arguments that such payments merely reallocated revenues within Wells Fargo in order to track
6 performance of business units, causing no damage to any investor. Lead Plaintiff reviewed
7 documents stating that the profit sharing payments did in fact cause the Wells Fargo brokers to
8 recommend Wells Fargo funds, but Defendants argued that reasonable investors would have
9 expected Wells Fargo brokers to push their own funds.

10 In its order granting class certification, the Court made two rulings that drastically
11 reduced the size of possible recovery. First, it limited the class to investors in three mutual
12 funds.² For these three funds, the total payments to broker dealers (excluding dealer
13 reallowances and distribution fees) was \$10.8 million.³ Of this amount, approximately \$3.7
14 million was in shareholder servicing fees. Another \$1.7 million was in “revenue sharing”
15 payments. Another \$4.5 million was in “profit sharing” among the Defendants and their
16 affiliates. The remaining less than \$1 million were in smaller categories, some of which such as
17 “networking” fees were disclosed in the prospectuses; others of which were fees that could not
18 be differentiated into one of the above categories. Lead Plaintiff would have asserted that all of
19 these amounts were recoverable at trial, but for the same reasons stated above, he recognized that
20 his best case was with respect to the \$1.7 million in revenue sharing payments.

21 Second, the Court ruled that Lead Plaintiff would have to prove that the payments were
22 financed by “excessive fees” charged to the funds. The Court rejected Lead Plaintiff’s argument
23 that the fees used to finance revenue sharing were necessarily “excessive” for the simple fact that
24 they were of no benefit to investors. Instead, it held that Lead Plaintiff had to prove that those
25 fees were “excessive” under the six *Gartenberg* factors. *See Gartenberg v. Merrill Lynch Asset*

26 ² The Court made this ruling primarily on manageability grounds.

27 ³ The amount of \$10.9 million previously provided to the Court included \$123,000 in 12b-1 fees
28 that would not be challenged.

1 *Management, Inc.*, 528 F.Supp. 1038 (S.D.N.Y. 1981), aff'd, 694 F.2d 923 (2d Cir. 1982), *cert.*
2 *denied*, 461 U.S. 906 (1983).

3 After the Court's order granting class certification, Lead Plaintiff negotiated a settlement
4 to recover approximately \$1.1 million for the class, or 65% of the total amount paid as revenue
5 sharing. If a class had been certified as to all of the Wells Fargo mutual funds, the equivalent
6 settlement at the same percentage of revenue sharing payments would have been \$84.5 million.

7 The Court has indicated that it wants further information as to whether the class might
8 have been able to recover not just the \$1.7 million in revenue sharing, but the total of \$10.8
9 million in all fees paid to brokers. Aside from the arguments set forth above as to the difficulty
10 of proving their case as to the other categories of fees, the Court has requested that Lead Plaintiff
11 evaluate the *Gartenberg* factors to determine how much (if any) of the \$10.8 million could be
12 said to have come from "excessive fees."⁴

13 Lead Plaintiff has now evaluated the *Gartenberg* factors based upon the evidence
14 obtained in discovery and publicly available information. Lead Plaintiff's judgment is that, if the
15 case were to proceed to trial, and the jury were instructed to apply the *Gartenberg* factors, the
16 class would not recover substantially more than the amount obtained in settlement, and
17 potentially far less.

18 Under the *Gartnerberg* method, for a fee to be excessive, the mutual fund manager "must
19 charge a fee that is so disproportionately large that it bears no reasonable relationship to the
20 services rendered and could not have been the product of arm's-length bargaining." *Gartenberg*,
21 694 F.2d at 928. Courts typically consider six factors in applying this standard. These are:
22 (1) the nature and quality of services provided to fund shareholders; (2) the profitability of the
23 fund to the adviser-manager; (3) fall-out benefits; (4) economies of scale; (5) comparative fee
24 structures; and (6) the independence and conscientiousness of the trustees. *See Krinsk v. Fund*

25 _____
26 ⁴ The total advisory fees paid by the three funds during the class period were \$31.7 million, and
27 the total expenses paid by the funds for all purposes (other than 12b-1 fees) were \$51.2 million.
28 Plaintiff's 10(b) claim does not challenge the overall advisory fees or expenses, however, but
only the portion paid to broker dealers without disclosure to investors. But in any event, the
Gartenberg analysis has been performed with respect to all fees paid.

1 *Asset Mgmt., Inc.*, 875 F.2d 404, 409 (2d Cir. 1989) *citing Gartenberg*, 694 F.2d at 929-30. It
2 does not appear that any single factor is controlling; rather “all pertinent facts must be weighed”
3 and each of the factors considered. *See, e.g., Schuyt v. Rowe Price Prime Reserve Fund*, 663 F.
4 Supp. 962, 972 (S.D.N.Y. 1987), *citing Gartenberg*, 694 F. 2d at 929.

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8 **REDACTED (five pages)**
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13 **SETTLEMENT RECOVERY PER CLASS MEMBER**

14 The Court also has asked for additional information about the number of class members
15 and recovery per class member. As explained at the July 11 hearing, the number of class
16 members is not known. Defendants have disclosed the number of accounts that purchased one of
17 the three Wells Fargo Funds through either (1) direct-to-fund purchases or (2) purchases through
18 Wells Fargo Investments (collectively “Wells Fargo Accounts”). This number is 21,837.
19 Defendants also have disclosed that another 6,375 individual accounts purchased one of the three
20 mutual funds through an outside broker.

21 In addition to these two totals, there were 99 “omnibus” accounts that purchased one of
22 the three mutual funds. Defendants do not possess the individual purchaser information for these
23 accounts and so do not know how many persons are represented. On the whole, it is known that
24 the omnibus accounts represent 69.22% of the total purchases. Assuming that the individual
25 purchases through the omnibus accounts are roughly equivalent in size to the purchases through
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1 the Wells Fargo Accounts, the omnibus accounts would be expected to represent another 63,445
2 individual purchasers. This would mean that there were a total of 91,657 total class members.⁵

3 Recovery per class member depends on the number of persons who make claims, the
4 dollar amount of their investments, and the length of time they held their shares. If the claim rate
5 is 30% (which is higher than the average securities case), there would be approximately 30,000
6 claims. Assuming that \$600,000 is available for distribution to the class, there would be an
7 average (mean) recovery of \$20. If the claims rate is only 10%, the average (mean) recovery
8 would be \$60. As in all securities class actions, there will undoubtedly be some persons who
9 held large numbers of shares for a longer time, and thus are entitled to a greater-than-average
10 recovery that equates to several hundreds of dollars, if not more, while others held so little or for
11 such a short time, that their damages are *de minimis*. To reduce administrative expenses for *de*
12 *minimis* claims, the settlement includes a \$20 floor on distributions. Lead Plaintiff expects that
13 many if not most claimants will recover far more than \$20. Lead Plaintiff also believes that
14 every person who makes a claim will end up recovering more money than they could have
15 received at trial. ⁶

16 The Court also asked whether claims may be made by the broker dealers who hold the
17 funds in omnibus accounts, on behalf of all their customers. The answer is yes. Indeed, the
18 settlement notice explicitly informs omnibus account holders of their right to file such claims.
19 The claims administrator is experienced in working with the major brokerage houses to receive
20 their data for this sort of processing.⁷

21 The Court also expressed a concern that the claim form is too complex and would deter
22 claims. Lead Plaintiff believes that the complexity will be greatly reduced by the fact that class

23 _____
24 ⁵ Importantly, the settlement agreement shifts to Defendant all costs of direct notice (printing,
25 mailing, and emailing), so the settlement fund will not be diminished if there are a larger than
26 expected number of class members who need to be provided notice.

26 ⁶ [Redacted]

27 ⁷ As explained at the most recent hearing, it is not possible to avoid a proof of claim form,
28 because Defendants do not have information about the individual transactions made within the
omnibus accounts.

1 members can submit claims online. In the online process, class members will first be asked to
2 identify which of the three funds they purchased, and then asked for transactions only in the
3 identified funds. (Those who submit paper claims similarly can ignore the portions of the claim
4 form that do not apply to them.) Lead Plaintiff has learned from Defendants that fewer than ten
5 percent of the Wells Fargo Account holders purchased more than one of the three funds at issue.

6 The claim form already has been made simpler than those in many securities class actions
7 in several respects. For example, class members need not submit trade confirmations or account
8 statements. (The claims administrator will conduct random audits to deter false claims.) Nor
9 does it require class members to perform any computations, but only to set forth their purchases
10 and sales. Nor are persons required to dividend reinvestment information. Lead Plaintiff is
11 willing to further simplify the claim form as this Court sees fit.

12 **CONCLUSION**

13 Lead Plaintiff hopes that this information satisfies the Court as to the reasonableness of
14 his conclusion that the settlement is in the best interests of the class. Should the Court have any
15 further questions, however, Lead Plaintiff will be happy to answer them.

16 DATED: July 25, 2007

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