Nos. 18-3238/18-3239

In the

United States Court of Appeals
For the Sixth Circuit

NANCY GOODMAN; JACQUELINE PEIFFER,
Plaintiffs-Appellants,

v.

J.P. MORGAN INVESTMENT MANAGEMENT, INC.; JP MORGAN FUNDS MANAGEMENT, INC.,
Defendants-Appellees.

CAMPBELL FAMILY TRUST; JACK HORNSTEIN; ANNE H. BRADLEY; CASEY LEBLANC; VALDERRAMA FAMILY TRUST,
Plaintiffs-Appellants,

v.

J.P. MORGAN INVESTMENT MANAGEMENT, INC.; JP MORGAN FUNDS MANAGEMENT, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
For The Southern District of Ohio, Eastern Division

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA'S BRIEF OF *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES URGING AFFIRMANCE

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Pursuant to Sixth Cir. R. 26.1, *amicus* makes the following disclosure:

1. Is amicus a subsidiary or affiliate of a publicly owned corporation?

No. The Chamber is a non-profit organized under the laws of the District of Columbia.

2. Is there a publicly owned corporation, not a party to the appeal or an *amicus*, that has a financial interest in the outcome?

None known.

/s/ Matthew A. Fitzgerald
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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that, like this one, raise issues of concern to the nation's business community.[1]

Members of the Chamber and their subsidiaries include investment advisers, some of whom have been sued as defendants under Section 36(b) of the Investment Company Act of 1940 (the "Act"), 15 U.S.C. § 80a-35(b). Members of the Chamber also include investors in mutual funds governed by the Act. The Chamber thus is familiar with the mutual fund industry, both from the perspective of investment advisers entitled to charge management fees for their services, and from the perspective of investors, who know that paying management fees is part of the cost of investing in mutual funds. The Chamber has an interest in this case

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus,* its members or its counsel contributed money to the preparation or submission of this brief.

both because this is an important time for excessive fee litigation, and because this case bears similarities to numerous other excessive fee cases.

Counsel for appellees consented to the filing of this brief. Counsel for appellants refused to consent. The Chamber files this brief together with a motion for leave to file, in accord with Federal Rule of Appellate Procedure 29(a)(4)(D).

INTRODUCTION

Most Section 36(b) cases should be far simpler than the parties—particularly plaintiffs—often make them. The Supreme Court in *Jones* set a high bar for plaintiffs to meet: they must prove that an advisor's fee "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 v. Harris Assocs. L.P.*, 559 U.S. 335, 346 (2010). Up to six *Gartenberg* factors can be relevant to whether a plaintiff has cleared that high bar. Properly viewed, these factors offer the courts significant flexibility in determining whether a plaintiff has stated a plausible claim or presented sufficient evidence to merit a bench trial.

The problem is that § 36(b) excessive-fee cases are commonly brought against a particular type of mutual fund advisors. These advisors work with very large funds, charge competitive and well-publicized fee rates, and provide good value for their services. Independent analysts like Morningstar and Lipper

consider their funds high-performing, and specifically taking into account the fees they charge, rate them often at or above average for their classes.

Cases brought against such advisors should not survive long. The Seventh Circuit recently recognized exactly this on remand from the Supreme Court in *Jones v. Harris Assocs. L.P. (Jones II)*, 611 F. Appx. 359 (7th Cir. 2015). After many years of litigation, the court found it undisputed that the defendant advisor charged fees "in line with those charged by advisors for other comparable funds" and that "the funds' returns (net of fees) exceeded the norm for comparable investment vehicles." *Id.* at 360-61. In other words, advisors providing reasonable returns net of fees could not possibly be charging fees far disproportionate to the services rendered or beyond what arm's-length bargaining could produce.

Today, information about advisors' fees and funds' performance is well-publicized and easy to analyze. The *Jones* case lasted more than a decade, but ultimately was decided on facts apparent on the face of any Morningstar Snapshot (a blurb that awards funds stars on a scale of one to five, and compares returns and expenses to funds in the same class).

Courts sometimes misuse the six *Gartenberg* factors by wrongly treating them as elements of a claim or defense. That error entitles parties to seek reams of discovery and attempt to prove any fact they can argue might play some role in

determining how any one of the factors might cut. That process needlessly protracts § 36(b) litigation and multiplies its expense.

This Court has the opportunity to avoid this misuse of the *Gartenberg* factors, both in this case today and for the future § 36(b) cases in this Circuit. Much like in *Jones*, just a few undisputed facts make the proper outcome in this case clear.

ARGUMENT

I. Dismissal or pre-trial judgment should often occur in § 36(b) cases.

A. Section 36(b) is not the cornerstone of regulation of mutual fund fees.

In 1970, Congress amended the Investment Company Act of 1940. Members of Congress were aware that advisors often created and operated the mutual funds they advised, so that fee-setting may not naturally occur in an arm's-length manner. *Burks v. Lasker*, 441 U.S. 471, 481 (1979) (citing S. Rep. No. 91-184, p. 5 (1969)). This created a risk that the fast-growing mutual fund industry might take advantage of investors by charging exorbitant fees. SEC, Public Policy Implications of Investment Company Growth, *reprinted in* H.R. Rep. No. 2237, 89th Cong., 2d Sess., 10-12 (1966). Congress took several steps to prevent this.

Congress primarily acted to curb conflicts of interest by requiring that the boards of directors of mutual funds be composed of at least 40 percent independent directors. 15 U.S.C. § 80a-10(a); *id.* at § 80a-2(a)(19) (defining "interested

persons" who cannot be more than 60 percent of boards). Those independent directors, in turn, received "a host of responsibilities," including to "review and approve the contracts of the investment advisor" each year. *Burks*, 441 U.S. at 483; 15 U.S.C. § 80a-15(c) (requiring a majority of independent directors to approve advisor compensation). The Supreme Court has repeatedly described this aspect of the law as the "cornerstone of the effort to control conflicts of interest within mutual funds." *Burks*, 441 U.S. at 482; *Jones*, 559 U.S. at 348.

Next, Congress also created an actionable fiduciary duty of investment advisors. 15 U.S.C. § 80a-35(b) ("the investment adviser . . . shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services").

At the same time, however, Congress saw the risk that § 36(b) could be abused. Members of Congress knew that the cause of action it was creating could be used to file strike suits. *See* H.R. Rep. No. 91-1382, at 8 (1970) (Section 36(b) was not meant to allow "the harassment of investment advisers by ill-founded and nuisance law suits, the so-called strike suit"); 116 Cong. Rec. 33,279, 33,283 (1970) (Remarks of Rep. Stuckey) (explaining a risk of "strike suits by unscrupulous lawyers more interested in fees than the shareholders").

B. Congress took multiple steps to limit the cause of action it created in § 36(b).

Understanding that risk, Congress created a "narrowly circumscribed right of action for damages." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S.

11, 22 n.13 (1979). The statute itself contains numerous indicators of how narrow the § 36(b) cause of action should be.

First, Congress set a bar higher than simple "reasonableness" for fee challenges. Although the SEC proposed allowing itself to challenge any fee that was not "reasonable," those versions of the law ultimately failed to pass the Senate. *Daily Income Fund v. Fox*, 464 U.S. 523, 538 (1984) (detailing the legislative history). The problem with a "reasonable fee" standard was that "enabling the SEC to enforce the fairness of advisor fees might in essence provide the Commission with ratemaking authority." *Id.* at 538.

Rather than have the SEC or the courts assume the power to identify and enforce whatever rates they found "reasonable," Congress settled on a "fiduciary duty" standard instead. This standard does "not permit a compensation agreement to be reviewed in court for 'reasonableness.'" *Jones*, 559 U.S. at 341; *id.* at 352 ("Congress rejected a 'reasonableness' requirement that was criticized as charging the courts with rate-setting responsibilities."). Section 36(b) was not "intended to authorize a court to substitute its business judgment for that of the mutual fund's board of directors in the area of management fees." S. Rep. No. 91-184, 6 (1969).

Second, even after setting the breach-of-fiduciary-duty standard, Congress modified it "in a significant way." *Jones*, 559 U.S. at 347. Under the common law, fiduciaries alleged to have engaged in self-dealing would bear "the burden . . .

not only to prove the good faith of the transaction but also to show its inherent fairness." *Pepper v. Litton*, 308 U.S. 295, 306 (1939). Section 36(b), however, flips the burden of proof onto any plaintiff claiming a breach. 15 U.S.C. § 80a-35(b)(1) ("the plaintiff shall have the burden of proving a breach of fiduciary duty"); *Jones*, 559 U.S. at 347 (noting that Congress "modifie[d] this duty" by "shift[ing] the burden of proof").

Third, Congress applied the fiduciary duty solely "with respect to the receipt of compensation." 15 U.S.C. § 80a-35(b) (creating a "fiduciary duty with respect to the receipt of compensation"). Congress also made explicit that only the *recipients* of compensation or payments can be sued under Section 36(b). 15 U.S.C. § 80a-35(b)(3) ("No such action shall be brought or maintained against any person other than the recipient of such compensation or payments.").

In this case, the district court gave effect to this provision by dismissing claims made against a sub-administrator of the funds. *Goodman v. J.P. Morgan Inv. Mgmt, Inc.*, 2016 WL 759654, at *5–6 (S.D. Ohio Feb. 26, 2016). The court rejected plaintiffs' theory that they could sue entities that received payments only indirectly, after it was initially paid directly to the advisors. It correctly ruled that "the statute establishes the direct relationship: the payor can sue the payee." *Id.* at *6; *see also In re Dreyfus Mut. Funds Fee Litig.,* 428 F. Supp. 2d 342, 351 (W.D. Pa. 2005) ("The statute does not provide for the recovery of any and all monies

from anyone who may have been involved in a breach of fiduciary duty owed to mutual fund investors.”). Plaintiffs do not contest this correct ruling below.

Fourth, Congress limited the damages available in § 36(b) litigation in at least two ways. 15 U.S.C. § 80a-35(b)(3). The law allows only “actual damages” and caps the amount at “the amount of compensation or payment received . . . by such recipient.” *Id.* Separately, the law sets a short time limit. It provides that “No award of damages shall be recoverable for any period prior to one year before the action was instituted.” *Id.*

Fifth, Congress set up claims under § 36(b) as equitable, thus steering these cases toward bench, not jury, trials. “[C]areful examination of the legislative history . . . shows that Congress went to great pains to emphasize that it was creating an equitable action to be administered on equitable standards.” *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 487 F. Supp. 999, 1003 (S.D.N.Y. 1980), *aff'd*, 694 F.2d 923 (2d Cir. 1982). Both the Senate, House, and Conference reports leading to the passage of § 36(b) refer to allowing an “equitable action” or “the equitable standards” governing fiduciary relationships. *Id.* at 1004-05. *See also Lorillard v. Pons*, 434 U.S. 575, 583 (1978) (recognizing that, as to jury trial rights, the Court considers Congress aware of the significance of the terms “legal” versus “equitable”). Thus, “a claim under § 36(b), even when labeled as one for

damages, ordinarily should be treated as an equitable claim not for a jury." *Krinsk v. Fund Asset Mgmt., Inc.*, 875 F.2d 404, 414 (2d Cir. 1989).[2]

In sum, Congress packed the text and history of § 36(b) with markers that the cause of action being created should be narrow and circumscribed. Congress limited the fiduciary duty it created by setting the standard above 'reasonableness', reversing the typical burden of proof, setting a short damages period, setting the statute's focus solely on 'recipients' of fees, and steering the claims away from juries.

II. The world of § 36(b) litigation is excessively expensive and wasteful.

A. Section 36(b) aims at a problem that market forces have largely addressed.

Section 36(b) takes aim at excessive fees in the mutual fund industry. Yet the industry has changed dramatically since 1970. Over the past several decades, average fees have dropped significantly. Moreover, independent analysts like Morningstar and Thomson Reuters Lipper ("Lipper") have increased investor visibility into the fees they must pay and the gross and net performance of the funds they invest in.

[2] In this case, plaintiffs recognized these principles by withdrawing their demand for a jury trial. *Goodman v. J.P. Morgan Inv. Mgmt., Inc.*, 301 F. Supp. 3d 759, 763 & n.3 (S.D. Ohio 2018) (observing the withdrawal and noting that plaintiffs would "not [be] entitled to a jury trial" anyway).

As a threshold matter, the mutual fund industry today has grown "exponentially" since the passage of § 36(b). *Jones*, 559 U.S. at 343. In the 1960s, fewer than 200 funds existed, with less than $40 billion in assets under management. Wharton Sch. of Fin. & Commerce, *A Study of Mutual Funds*, H.R. Rep. No. 87-2274, at 4 (1962).[3] By 2008, the number of mutual fund investors had multiplied more than twenty-five times, from 3.5 million investors to 92 million. *Jones*, 559 U.S. at 343. And as of last year, assets under management reached $18.7 trillion, across 9,356 mutual funds in the United States. Investment Company Institute, *Investment Company Fact Book* at 58 (2018);[4] Statistica—The Statistics Portal, *Number of mutual funds in the United States from 1997 to 2017*.[5]

As the popularity and size of the industry has grown, fees have fallen. Over the twenty years from 1996 to 2016, the asset-weighted expense ratio for all mutual fund expenses fell from 1.04% to 0.63%. Investment Company Institute, *Trends in Expenses and Fees of Funds, 2016*, at 1–2 (2016).[6] Morningstar reports confirm these numbers. Morningstar, *2015 Fee Study: Investors are Driving Expense Ratios Down*, at 2 (including a chart of expenses since 1990 and asserting

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[3] Documents readily available to the public online are flagged with footnotes containing their urls.
[4] Available at: https://www.ici.org/pdf/2018_factbook.pdf.
[5] Available at: https://www.statista.com/statistics/255590/number-of-mutual-fund-companies-in-the-united-states/
[6] Available at: https://www.ici.org/pdf/per23-03.pdf.

that "the asset-weighted expense ratio, which best reflects investors' collective experience, was 0.64% in 2014.").[7]

Meanwhile, independent performance ratings for mutual funds have grown in popularity. Lipper measures fees and performance in the mutual fund industry, and provides data and analysis to the public. Lipper prepares reports assessing fees of top mutual funds and the fees paid to advisers. Similarly, Morningstar provides a rating of one to five stars for mutual funds, based on performance and costs to investors (including, of course, fees). These reports, along with the disclosures made in prospectuses, make it easy to see which funds perform well and what fees they charge.

In this environment, as the SEC's website notes, "[i]t takes only minutes to use a mutual fund cost calculator to compute how the costs of different mutual funds add up over time and eat into your returns."[8] The same webpage also provides a link to such a calculator. *Id.* Many investors have elected to move their money into very-low-cost, passively-managed index funds, essentially voting with their feet to pay lower fees by adopting different investment strategies.

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[7] Available at: http://news.morningstar.com/pdfs/2015_fee_study.pdf
[8] Available at: https://www.sec.gov/fast-answers/answersmffeeshtm.html (also providing a link to the calculator).

In short, the problem Congress sought to address with § 36(b) has simultaneously been ameliorated by market forces, independent analysts, widely-available information, and increased competition in an ever-more-public industry.

B. Typical § 36(b) litigation carries markers of a strike suit.

The demographics of § 36(b) litigation suggest that, despite Congress' efforts, strike suits are common. In this field, studies have shown: (1) lawyer-driven litigation, with the same firms filing the same generic allegations over and over; (2) deep pockets targeted as defendants, regardless of their comparative fee rates; (3) litigation costs falling heavily on the defense side; and (4) rare trials, never won by the plaintiffs' side.

First, "excessive-fee litigation is driven almost exclusively by plaintiffs' attorneys." Q. Curtis & J. Morley, *The Flawed Mechanics of Mutual Fund Fee Litigation*, 32 Yale J. on Reg. 1, 11 (2015). During the five years between the beginning of 2013 and the end of 2017, roughly 40 cases have been filed under § 36(b). Five law firms filed the great majority of these. J. Morley & Q. Curtis, *Taking Exit Rights Seriously: Why Governance and Fee Litigation Don't Work in Mutual Funds*, 120 Yale L.J. 84, 117 (2010) ("plaintiffs' lawyers play a dominant role in initiating and running the great majority of section 36(b) suits").[9]

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[9] Plaintiff's counsel in this case have filed § 36(b) litigation in Maryland, Delaware, Pennsylvania, Tennessee, Illinois, and California. *See, e.g., Lynn M. Kennis Tr. U/A DTD 10/02/2002 v. First Eagle Inv. Mgmt., LLC*, No. 14-585, 2015

Reflecting this trend, numerous § 36(b) cases across the country have been filed with remarkably similar allegations. *See, e.g.*, *Hunt v. Invesco Funds Group*, No. 04-cv-2555 (S.D. Tex); *Baker v. Am. Century Inv. Mgmt.*, No. 04-cv-4039 (W.D. Mo.); *Gallus v. Am. Express Fin. Corp.*, No. 04-cv-4498 (D. Minn.); *Strigliabotti v. Franklin Res., Inc.*, No. 04-cv-883 (N.D. Cal.); *Dumond v. Mass. Fin. Servs. Co.*, No. 04-cv-11458 (D. Mass.); *Krueger v. Neuberger Berman Mgmt., Inc.*, No. 05-cv-1316 (S.D.N.Y.); *Williams v. Waddell & Reed Inv. Mgmt. Co.*, No 04-cv-2561 (D. Kan.); *Cox v. ING Invs. LLC*, No. 1:13-cv-01521-MAK (D. Del. Aug. 30, 2013); *McClure v. Russell Invs. Mgmt.*, No. 1:13-cv-12631 (D. Mass. Oct. 17, 2013); *Curd v. SEI Invs. Mgmt.*, No. 2:13-cv-7219-TJS (E.D. Pa. Dec. 11, 2013); *Zehrer v. Harbor Capital Advisors*, No. 1:14-cv-00789 (N.D. Ill. Feb. 4, 2014).

At least one court has expressed concern about this phenomenon. In *Sins v. Janus Capital Mgmt., LLC*, No. 04-cv-1647, 2006 WL 3746130 (D. Colo. Dec. 15, 2006), the court stated that it was "concerned" and "troubled" by plaintiffs'

WL 8489956 (D. Del. Dec. 9, 2015); *Zoidis v. T. Rowe Price Assocs.*, Inc., No. 16-2786, 2017 WL 1196585 (D. Md. Mar. 31, 2017); *Kennis v. Metro. W. Asset Mgmt., LLC*, No. 15-8162, 2017 WL 8784795 (C.D. Cal. Sept. 11, 2017); *Laborers' Local 265 Pension Fund v. iShares*, 769 F.3d 399 2014 WL 4812238 (6th Cir. 2014); *Curd ex rel. SEI Int'l Equity Fund v. SEI Investments Mgmt. Corp.*, No. 13-7219, 2015 WL 4243495 (E.D. Pa. July 14, 2015); *Zehrer v. Harbor Capital Advisors, Inc.*, No. 14 C 00789, 2018 WL 1293230 (N.D. Ill. Mar. 13, 2018); *North Valley GI Med. Grp. v. Prudential Investments LLC*, No. CV JKB-15-3268, 2016 WL 4447037 (D. Md. Aug. 23, 2016).

allegations made on purported "information and belief," finding that such allegations were identical to those in unrelated cases. The court noted that "the number of apparently generic, boilerplate allegations in the Amended Complaint" and doubted explicitly that reasonable inquiry had been made to support those allegations. *Id.* at *4.

Second, the biggest funds and advisors are the most common targets of § 36(b) litigation, even though these advisors rarely charge the highest fees. "Excessive fee lawsuits are unlikely to target small funds and small fund families, even though those funds and families are likely to have the most egregious fees." Morley & Curtis, 120 Yale L.J. at 127. This targeting of large fund complexes has resulted in many excessive fee cases being brought against advisers who charge fees that are in-line or actually *lower* than the median fees charged by competitors across the mutual fund industry. Ajay Khorana and Henri Servaes, *Conflicts of Interest and Competition in the Mutual Fund Industry*, at 3, 20 (2004); Curtis & Morley, 32 Yale J. on Reg. at 12 (empirical study showed that "expense ratios of funds targeted for § 36(b) suits were not actually higher than those of untargeted funds" and made a "core finding that targeted funds were larger and, more importantly, were operated by much larger advisors than untargeted funds").

Surveys of case law reveal that many of the defendants are advisors of mutual funds ranking in the top 25 for assets under management. Actions have

been brought against BlackRock (#1), Fidelity Investments (#4), J.P. Morgan (#5), PIMCO (#9), TD Ameritrade (#10), Prudential Investments (#13), T. Rowe Price (#16), and AXA Equitable (#22). Mutual Fund Directory 2018.[10]

These funds do not carry egregious fees—but they do have many billions of dollars in assets. Therefore, the *gross sums* subject to litigation can be tremendous. Morley & Curtis, 120 Yale L.J. at 127 (suggesting that settlements with giant funds could pay plaintiff's counsel more than smaller funds, even if the fees charged by those advisors are much lower).

Third, once in litigation, the expense of discovery falls heavily on the defense. The burdens of discovery in § 36(b) cases fall disproportionately on defendants because they possess the bulk of the relevant information. Plaintiffs, by contrast, have few documents that could be subject to burdensome discovery requests and therefore have no incentive to propound reasonable discovery demands. Some defense counsel have informally estimated that litigation costs in § 36(b) lawsuits may range from three to four times higher for advisers than for plaintiffs. *Section 36(b) Litigation Since Jones v. Harris*, ICI Mutual Litigation Overview 1, 10.[11]

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[10] Available at: http://mutualfunddirectory.org/
[11] Available at: http://www.icimutual.com/content/section-36b-litigation-jones-v-harris

The heavy cost of defense, combined with the high dollar figures sought in § 36(b) complaints—in this case, for instance, Plaintiffs demand "hundreds of millions of dollars"—creates pressure to settle. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 732, 740 (1975) (a weak complaint "has a settlement value . . . out of any proportion to its prospect of success at trial so long as [plaintiff] may prevent the suit from being resolved against him by dismissal or summary judgment").

Finally, there are hardly any trials in § 36(b) litigation. It appears that there have been only four trials on § 36(b) claims since 1990. ICI Mutual at 11. Plaintiffs have not won any of these. *See, e.g. Sivolella v. AXA Equitable Life Ins. Co.*, No. 16-4241, __ F. Appx. __, 2018 WL 3359108 (3d Cir. July 10, 2018) (affirming judgment for defendants after a 25-day bench trial); *Kasilag v. Hartford Inv. Fin. Servs.* LLC, 2017 WL 773880 (D.N.J. Feb. 28, 2017) (ruling for the defendants after a bench trial) (appeal pending); *Jelinek v. Cap. Research & Mgmt. Co.*, 448 F. Appx. 716 (9th Cir. 2011) (affirming judgment for defendants after a bench trial); *Kalish v. Franklin Advisors*, 928 F.2d 590 (2d Cir. 1990) (affirming judgment for defendants after a bench trial); *see also* Morley & Curtis, 120 Yale L.J. at 117 (noting that it has been reported "with some degree of confidence that plaintiffs have won very few—if any—verdicts in mutual fund fee litigation").

III. The *Gartenberg* factors should not needlessly prolong § 36(b) cases.

This landscape of § 36(b) litigation is stark. This backdrop informed the Supreme Court in *Jones* as it adopted the high bar plaintiffs must meet to survive motions to dismiss and summary judgment. It should also inform this Court and others in applying *Jones* and the *Gartenberg* factors.

A. *Jones* set a high standard for plaintiffs.

The rule announced in *Jones* is straightforward: "[T]o face liability under § 36(b), an investment advisor 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*, 559 U.S. at 346. The parties do not dispute this rule, *see* Appellant Br. at 19, although it is easy to lose it in the blizzard of details that plaintiffs rely so heavily on to purportedly create genuine issues of material fact.

Recognizing the age of the *Gartenberg* factors and the SEC's embrace of them in its regulations, the Court blessed their continued viability. 559 U.S. at 343-46. At the same time, the Court specifically observed several of the ways that Congress limited the reach of § 36(b)—including its shift of the burden of proof onto plaintiffs and its creation of disinterested boards to primarily review and consider fee arrangements. *Jones*, 559 U.S. at 347-48; *see also id.* at 354 (Thomas, J., concurring) (urging courts to continue "follow[ing] an approach . . . that defers

to the informed conclusions of disinterested boards and holds plaintiffs to their heavy burden of proof in the manner the Act, and now the Court's opinion, requires").

The *Jones* Court ultimately ordered courts to undertake a common-sense analysis of § 36(b) claims. The Court refused to set any "categorical rule" about "the comparisons of the fees charged different types of clients" beyond asserting that § 36(b) does "not necessarily ensure fee parity." 559 U.S. at 350. Along the same line, the Court declined to set any categorical rule for comparisons of the fees charged to other funds by other advisors. *Id.* at 349-50. Courts, it warned, "must be wary of inapt comparisons," and should avoid "judicial price-setting." *Id.* at 350, 352.

The Court particularly recognized that this flexibility should not mean that these cases should more commonly reach trial. *Id.* at 350 n.8 (refusing to find that simple fee comparisons would "doom any fund to trial," and holding that "trial [will] be appropriate" only when "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") (emphasis added).

B. Often, far fewer than all six *Gartenberg* factors can be dispositive.

The *Jones* Court thus ordered the courts to take a practical, common-sense approach to § 36(b) cases. The consideration of "all relevant circumstances," 559

U.S. at 347, however, does not require treating the six *Gartenberg* factors as if they were elements of a § 36(b) claim or defense. Ultimately, when independent analyst reports show that an advisor's fees charged are similar to those charged other funds, and show that performance net of fees is similar to that of other funds, it is hard to envision the other *Gartenberg* factors possibly yielding a plausible case for excessive fees.

Jones does not require in-depth analysis of every factor in every case. Inherent in the idea of factors is that individual considerations may carry different weight in different cases. *E.g., Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 944–45 (1st Cir. 1995) (differentiating between elements and factors, observing that "factors' are to be weighed and evaluated in making a single 'evaluative' determination . . . [w]eakness of the showing of one factor, or even total failure to show it, is not fatal; a strong showing as to other factors may outweigh the deficiency."). Even the *Gartenberg* Court, in identifying the factors, made clear that its factors were not meant to be exclusive, and conceded that some might be more significant than others. *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923, 929–30 (2d Cir. 1982).

Indeed, plaintiffs commonly take advantage of the fact that the *Gartenberg* factors are not "elements" at the motion-to-dismiss stage. *See, e.g., Kasilag v. Hartford Inv. Fin. Servs., LLC*, 2012 WL 6568409, at *2 (D.N.J. Dec. 17, 2012)

("The plaintiff need not address all of the *Gartenberg* factors to survive a motion to dismiss if, when taken as a whole, the complaint demonstrated a plausible claim for relief under Section 36(b).").

The ultimate end of the *Jones* case itself demonstrates the flexibility the courts have in determining whether § 36(b) complaints state a plausible claim or whether evidence in those cases justifies a trial. Following remand from the Supreme Court, the Seventh Circuit in *Jones* dispatched the plaintiffs' case in a three-page opinion. *Jones v. Harris Assoc. L.P.*, 611 F. Appx. 359, 361 (7th Cir. 2015) ("*Jones II*"). The Seventh Circuit observed that the advisor sued in that case charged "fees in line with those charged by advisors for other comparable funds," and that "the fees could not be called disproportionate in relation to the value of [the] work, as the funds' returns (net of fees) exceeded the norm for comparable investment vehicles." *Id.* at 360-61. These facts were undisputed. *Id.* Under the Supreme Court's flexible standard, these considerations "jointly suffice" to grant summary judgment against the § 36(b) claim. 611 F. Appx. at 361 (adding that the advisor "delivered value for money; the funds it was advising did as well as, if not better than, comparable funds").

Jones II was faithful to the Supreme Court's holding. An advisor who charges a fee that is in line with the fees charged by advisers to similar mutual funds cannot be said to fall outside the range of what could have been negotiated

through arm's-length bargaining. An adviser who provides above-average performance net of its fees cannot be said to charge fees that are unreasonable in relation to its services.

Other cases teach the same lesson. *See, e.g.*, *Sivolella v. AXA Equitable Life Ins. Co.*, 2016 WL 4487857 (D.N.J. Aug. 25, 2016), *aff'd*, No. 16-4241, 2018 WL 3359108 (3d Cir. July 10, 2018). In *Sivolella*, the plaintiffs' case went to trial. The trial lasted 25 days and through 14 live witnesses, including seven experts; it yielded a 4,500 page transcript and 720 exhibits. Yet according to Lipper reports, the advisors' fees for the funds at issue were at the median for the industry. *Id.* at *65. The funds also satisfied or exceeded expectations in performance; the active funds beat their benchmarks, and the passive funds matched them, gross of fees, as intended. *Id.* at *66-*69. Despite these simple dispositive facts, the district court wrote 150 pages addressing the *Gartenberg* factors in exhausting detail before ruling for the advisors. The Third Circuit affirmed.

The *Gartenberg* factors, if treated with too much care, can needlessly multiply effort and expense. A searching, in-depth inquiry into every *Gartenberg* factor in every case strays from the Court's instruction that they are "factors" and unnecessarily prolongs these cases.

C. This case is an excellent example of attempted overcomplication—summary judgment was proper.

Plaintiffs in this case targeted the advisors and administrators of the fifth-largest mutual fund complex in the United States: J.P. Morgan. These are multi-billion dollar funds. Appellee Br. at 2; *Goodman,* 301 F.Supp.3d at 765 ("Collectively, the Funds had $105 billion in [assets under management]" at the end of 2015).

No one claims that these Funds performed poorly. *Goodman*, 301 F.Supp.3d at 777 ("Plaintiffs do not allege that the Funds performed poorly."). On the contrary, it should be undisputed that the advisors had good performance over 3-year, 5-year, and 10-year periods. Across all of these periods, Lipper rated the seven Funds 61 times. Of those 61 ratings, the Funds performed *in the top 20%* of their classes more than half of the time (37 ratings); and in the top half of their classes more than 90 percent of the time (55 out of 61 rankings). Lipper Performance Data, Dkt. 109-1, PID#6071.

At the same time, the total *expenses* for those Funds, which would include advisory fees and administration fees, hovered around average for their Fund classes. Lipper Expense Data, PID#6072 (showing total expenses among the best 60% of the Funds' classes in 19 out of 21 instances). On top of the publicly announced fees, "the Funds, through fee waivers, gave back millions of dollars of fees that they were entitled to receive pursuant to their contracts." *Goodman*, 301

F.Supp.3d at 769. Plaintiffs "do not contend that fees were not remitted; rather, they contend that . . . the amounts remitted were not enough." *Id.*

Overall the Funds "performed better than, and the fees were in line with, other mutual funds of similar scope. Plaintiffs do not and cannot deny this." *Goodman*, 301 F.Supp.3d at 769. These comparisons were made using Lipper reports—"one of the most commonly used sources to measure fees and performance in the mutual fund industry." *Id.* at 769.

The district court properly recognized that the funds' average fees and excellent net-of-fees performance were "telling regarding whether the fees are excessive." *Goodman*, 301 F.Supp.3d at 769.

Nonetheless, the district court felt duty-bound to "review all of the relevant factors before making a determination." *Id.* at 768. The evidence was voluminous. Discovery forced J.P. Morgan to share hundreds of thousands of pages of documents. Each side enlisted multiple expert witnesses, and Plaintiffs deposed at least 18 people affiliated with J.P. Morgan. At summary judgment, Plaintiffs alone submitted "more than 100 exhibits, 30 appendices, three expert reports, and deposition testimony from numerous [defense] witnesses." Appellant Br. at 14.

The court then filled 26 pages of the Federal Supplement analyzing every *Gartenberg* factor in the light most favorable to the plaintiffs. It addressed differences between degrees of risk and the amount of work involved in advising

versus sub-advising various Funds. It addressed alleged economies of scale. It studied the process by which the disinterested boards of directors had approved the fees at issue.

At the end of all of this, the court rightly concluded what was already plain from simple Lipper or Morningstar data: the defendants are high-performing advisors working with large, profitable Funds, charging well-publicized and often-compared fees that are roughly the average for similar funds. This left Plaintiffs far, far short of the *Jones* standard. *Goodman,* 301 F.Supp.3d at 767.

On appeal, Plaintiffs' argument boils down to contending that the district court gave their arguments short shrift. Appellant Br. at 14. But the face of the district court's order belies that contention. And given the simple Lipper data, it is hard to imagine how the fees in this case could possibly be excessive beyond any "reasonable relationship to the services rendered." *Jones*, 559 U.S. at 346.

CONCLUSION

For these reasons, *amicus* therefore respectfully submits that the Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,627 words, excluding the parts of the brief exempted by 6th Circuit Rule 32(b)(1).

2. This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally-spaced typeface using Microsoft Word, in 14-point size.

/s/ Matthew A. Fitzgerald
Matthew A. Fitzgerald

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2018, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the system.

/s/ Matthew A. Fitzgerald
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