18-0733-cv

In the

United States Court of Appeals
For the Second Circuit

JOAN PIRUNDINI,

Plaintiff-Appellant,

v.

J.P. MORGAN INVESTMENT MANAGEMENT, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York (New York City)

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA'S BRIEF OF *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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RULE 26.1 DISCLOSURE STATEMENT

Amicus Chamber of Commerce of the United States of America hereby certifies that it is a non-profit membership organization, with no parent company and no publicly-traded stock.

/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 or its counsel funded 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 declined to take a position. 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 (an independent public fund description 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 facts, all either addressed in the Complaint itself or widely available to the public online by independent analysts, 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). Subsequently, 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 "review[ing] and approv[ing] 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 many guardrails to limit the reach of § 36(b). Section 36(b) is 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."). Courts have recognized the effect of these provisions. *E.g.*, *Goodman v. J.P. Morgan Inv. Mgmt, Inc.*, 2016 WL 759654, at *5–6 (S.D. Ohio Feb. 26, 2016) (rejecting an indirect theory of liability: "the statute establishes the direct relationship: the payor can sue the payee"); *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.").

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 "[n]o 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). In this case, Plaintiff recognized these principles by making no jury demand.

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 needlessly 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, minimizing the need for § 36(b). Moreover, independent analysts like Morningstar and Thomson Reuters Lipper ("Lipper") have increased investor visibility into the fees they must pay, as well as providing insight into the gross and net performance of all funds.

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).[2] 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);[3] Statistica—The Statistics Portal, *Number of mutual funds in the United States from 1997 to 2017*.[4]

As the popularity and size of the industry has grown, fees have fallen. Over the twenty years from 1996 to 2016, the asset-weighted average 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).[5] 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 that "the asset-weighted expense ratio, which best reflects investors' collective experience, was 0.64% in 2014.").[6]

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[2] Documents readily available to the public online are flagged with footnotes containing their urls.

[3] Available at: https://www.ici.org/pdf/2018_factbook.pdf.

[4] Available at: https://www.statista.com/statistics/255590/number-of-mutual-fund-companies-in-the-united-states/

[5] Available at: https://www.ici.org/pdf/per23-03.pdf.

[6] Available at: http://news.morningstar.com/pdfs/2015_fee_study.pdf

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. 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."[7] 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. More entrants into the market and greater competition have made these choices and lower fees possible.

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.

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[7] Available at: https://www.sec.gov/fast-answers/answersmffeeshtm.html (also providing a link to the calculator).

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 revealed: (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").[8]

[8] Plaintiff's counsel in this case have filed § 36(b) litigation in New York, Wisconsin, and Illinois during the past few years. *See, e.g., Karp v. Harris Assocs., L.P.*, No. 1:16-cv-8216 (N.D. Ill. filed Aug. 19, 2016); *Wayne County Emp. Ret. Sys. v. Fiduciary Mgmt., Inc.*, No. 2:15-cv-1170 (E.D. Wis. filed Sept. 30, 2015); *Chill v. Calamos Advisors LLC*, No. 1:15-cv-1014 (S.D.N.Y. filed Feb. 11, 2015); *Paskowitz v. Prospect Capital Mgmt. L.P.*, No. 1:16-cv-2990 (S.D.N.Y. filed Apr. 21, 2016).

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' allegations made on purported "information and belief," finding that such allegations were identical to those in unrelated cases. The court noted "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.[9]

[9] Available at: http://mutualfunddirectory.org/

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.[10]

The heavy cost of defense, combined with the high dollar figures sought in § 36(b) complaints—the complaint in this case claims tens of millions of dollars in alleged damages—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

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

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. Notably, plaintiffs have not prevailed in 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 24, although it is easy to lose it in the blizzard of details that Plaintiff relies so heavily on to purportedly state a plausible claim.

Recognizing the age of the *Gartenberg* factors and the SEC's embrace of them in its regulations, the Court blessed their continued viability. *Jones*, 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, even at the pleading stage. 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. *See Gartenberg v. Merrill Lynch Asset Mgmt., Inc*., 694 F.2d 923, 929–30 (2d Cir. 1982).

Indeed, courts at the motion-to-dismiss stage often recognize that the *Gartenberg* factors are not "elements." *See, e.g.*, Op., JA477; *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)."). This principle, however, cuts both ways. While a plaintiff could imaginably state a plausible claim on fewer than six *Gartenberg* factors, just a handful of pieces of public information about the funds may also be dispositive in favor of the defense. In particular, where an advisor's fees fall compared to what independent analysts consider similar funds, and the performance of a fund *net of fees* are factors that alone should demolish many claims that a fee is beyond what an arm's length negotiation could produce.

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 dispose of 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—dismissal was proper.

Plaintiffs in this case targeted advisors of the fifth-largest mutual fund complex in the United States: J.P. Morgan. The Fund at issue is a multi-billion dollar fund. JA67 ¶ 119 (describing the Fund's assets as "$9.8 billion in 2016").

No one claims that the Fund performed poorly. Instead, the Complaint asserts only that "the Fund's performance, versus similar mutual funds, was essentially middling." JA78 ¶ 153. As the district court observed, "Plaintiff does not even allege that the Fund underperformed its peers; it alleges only that the Fund performed about the same." Opinion, JA485. On appeal, Plaintiff seems to take issue with this; she emphasizes that she alleged the Fund "*underperformed approximately half of its peers.*" Appellant's Br. at 48 (emphasis in original). Even taking this allegation entirely as true, the Fund also did *better than* "approximately half" of its peers, landing commonly in the third (middle) quintile. JA105 ¶ 217.

Moreover, the quintiles that Plaintiff refers to rate performance *net of fees*. In other words, even under Plaintiff's own allegations, the Fund performs overall about average, after taking into consideration the fees that it charges. How a mutual fund that gives its customers net returns average for its similar fund group could be charging fees beyond what arm's-length negotiations could yield is difficult to imagine. It is certainly not plausible. Opinion, JA485 (pointing out that allegations of middling performance "are insufficient to raise an inference that the fees were so excessive as to violate Section 36(b)").

At the same time, when the fee information is isolated, Lipper reports show that the Fund fell into the "first quintile of the Universe." JA65 ¶ 114. The Complaint considers this an "a-ha" moment: showing, it says, that the Fund carries the *highest* fees in its class. *Id.* However, that view is mistaken. The first quintile is the best, not the worst; it reflects the *lowest* 20% of fees in the Universe of comparable funds. Public information beyond reasonable question reflects this. *See, e.g.*, Lipper Report, Mutual Fund Directors Forum 2012, at 14 (explaining that "first quintile" when describing expenses means "lowest/best 20%").[11]

This top rating makes sense in light of the fee waivers that Plaintiff addresses in the Complaint. Opinion, JA474. By any account, the fee waivers sometimes "reduce[d] the fees owed . . . by considerable amounts." *Id.*; JA47 ¶ 78; Opinion, JA475 (noting that fee waivers cut the fees paid in late 2016 by $4.54 million, "or about 11.5% of the total amount it was owed"). Even acknowledging these fee waivers, Plaintiff argues that the fees nonetheless were excessive.

[11] Available at: http://www.mfdf.org/images/DirResPDFs/Lipper_Reports-2012_Directors_Institute.pdf.

Plaintiff's efforts to make her own data to re-focus away from Lipper are also telling. The Complaint undertakes its *own* comparative fund analysis, which produces an allegation that the Fund pays the highest advisory fees among 92 funds Plaintiff says are similar. JA63-64 ¶¶ 107-11. But even Plaintiff's best gerrymandering of similarity in funds yields an allegation that the Fund pays fees "just one basis point—or one one-hundredth of one percent—above the next highest one, and just five basis points above the next two." Opinion, JA480, n.10 (recognizing that even taking this as true, nothing about it supports an inference that the fees "are so outside the range of what could be negotiated at arm's length as to be actionable under Section 36(b)").

The district court correctly dismissed this case. Plaintiff's very best efforts to slice and dice the data *still* left her unable to plausibly allege that the fees charged to this Fund are out of line, and unable to plausibly allege poor performance net of fees. Discovery would be an expensive exercise in futility.

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 5,590 words, excluding the parts of the brief exempted by rule.

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
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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2018, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Second 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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