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No. 08-586

In the Supreme Court of the United States

JERRY N. JONES, ET AL.,

Petitioners,

v.

HARRIS ASSOCIATES L.P.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR FIDELITY MANAGEMENT & RESEARCH COMPANY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus Curiae Fidelity Management & Research Company will address the following questions:

1. Whether the plain language and structure of the Investment Company Act ("ICA"), as confirmed by legislative history, show that Congress intended courts considering Section 36(b) claims to give substantial deference to the business judgment of fund directors concerning the level of fees paid to a fund's investment adviser.

2. Whether the principles set forth in *Gartenberg* and updated in *Jones* to reflect significant changes in the mutual fund industry and its regulation during the past three decades—including increased competition and disclosure and more searching fee evaluation by fund directors—provide the appropriate standard by which to judge claims under Section 36(b) and require affirmance of the district court's and Seventh Circuit's decisions.

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INTEREST OF THE *AMICUS CURIAE*

Amicus Fidelity Management & Research Company (together with its affiliated entities, "Fidelity") has acted since its founding in 1943 as the investment adviser to the Fidelity family of mutual funds.[1] Fidelity—a privately held international provider of financial services for individuals and institutions managing over $1.3 trillion in assets—offers more than 300 mutual funds, including some of the world's largest. Fidelity also offers brokerage, financial planning, wealth management, and securities trading services. It reinvests billions of dollars each year into improving products and services for investors using state-of-the-art infrastructure and technology, and is consistently recognized for providing some of the highest levels of customer support in the industry.

Fidelity provides investment management services (portfolio management, research, and trading) and a range of shareholder and administrative services to Fidelity funds under Management Agreements reviewed and approved by fund boards of directors annually. Fidelity provides additional services to Fidelity funds under separate transfer agent, distribution, and pricing and bookkeeping agreements, which are also reviewed and approved annually by fund boards.

[1] No counsel for any party authored this brief in whole or in part and no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' consents to the filing of this brief are on file with the Clerk.

Fidelity and the directors of Fidelity funds take seriously their responsibilities concerning Management Agreements, including adviser fees. *All* members of the fund boards' Operation Committees that review these agreements are independent of Fidelity. Between 71% and 83% of the funds' full boards have been independent directors in recent years. Those boards comprise former executives of major corporations and senior figures from government, financial services, and accounting, who receive training specific to fund oversight and contract issues. Boards obtain information relevant to their consideration of Management Agreements not only from Fidelity, but also from third-party auditors and services, and they are advised by independent counsel. Contract review is a year-round process. It involves numerous conversations, presentations, and discussions between trustees and Fidelity, as ICA Section 15(c) contemplates.

Fidelity is keenly interested in the interpretation of Section 36(b). Despite offering fees among the lowest in the industry and state-of-the-art service, Fidelity has faced Section 36(b) suits, including, currently, *Bennett* v. *Fidelity Management & Research Company*, No. 04-CV-11651 (D. Mass.). Fidelity speaks with experience of the costs and disruption those suits cause, the adverse impact of expansive liability rules on fund governance, and the ease with which any fund can be targeted with speculative and legally irrelevant economic comparisons in such cases. Fidelity believes its views as a leader in the mutual fund industry will assist the Court in this case.

SUMMARY OF ARGUMENT

I. Statutory language and structure—confirmed in the legislative history and reflected in decades of judicial decisions and SEC pronouncements—show that Congress intended courts to give substantial deference to the judgment of fund boards and to create a private cause of action only for fees "so unusual" or "so disproportionate" that they could not have been the outcome of arm's-length bargaining. A fund board is entitled to exercise its business judgment as to the approval of appropriate fees, and judicial deference is warranted when it does so.

II. Deference to the business judgment of fund boards extends to a judgment that fees are appropriate even though the adviser's fees to institutional clients, such as pension funds, are lower. Services provided to mutual funds are inherently different from and significantly more costly than the limited services that institutional clients require.

Attempting to isolate fees for particular services for direct comparison would mire courts in intractable economic disputes that could be resolved only by arbitrary assignments of value and cost. Efforts to place a value on advisers' services would inevitably result in courts engaging in vague reasonableness or fairness inquiries, or in cost-plus ratemaking, both of which Congress prohibited. A plaintiff can always find an expert to take its side in disputes about an adviser's fees for components of services that the adviser offers only on a bundled basis, or about what costs should be allocated to specific fund services. Including those inquiries as part of the Section 36(b) cause of action would invite

suits against *every* fund after *every* annual contract review—something Congress did not intend.

III. Plaintiffs' contention that "captive" fund boards require close judicial supervision is refuted by vigorous competition among funds. With more than 8000 funds competing for retail investors—who can readily switch between funds or to other investment vehicles—there can be no doubt that a fund with high fees relative to performance and services would find it extremely difficult to attract or retain investors. Fee levels have responded to competition, which constrains fees regardless of whether funds replace their investment advisers.

In this highly competitive environment, in which the SEC actively oversees relations between funds and advisers, superimposing open-ended common law standards onto Section 36(b) is unnecessary to protect investors. To do so would contradict the intent of Congress that the provision establishes *federal* fiduciary duty standards attuned to the particular circumstances of mutual fund governance. Beyond this, relevant common law principles do not support the sort of remote comparisons or open-ended reasonableness inquiry plaintiffs advocate. Nor is there any support in the text or history of the ICA for the proposition that Section 36(b) creates a cause of action, separate from fee levels, for alleged deficiencies in an adviser's disclosure to a fund board—a theory unlike any securities liability Congress ever created.

IV. An open-ended Section 36(b) inquiry would encourage litigation against every fee, based on loose economic comparisons and speculation about other information that advisers might have provided. It

has the potential to turn every fee agreement into a lengthy dispute in federal court with no standards to resolve the matter early in the litigation or to guide appellate review, ratcheting up the pressure on advisers to settle regardless of the merits. It would leave advisers at constant risk of judge-ordered retroactive fee changes, interfere with efficient business operations, heap expense on shareholders, and deter service on fund boards. This Court has refused to impose standards that have such adverse effects. By contrast, a standard focused on the elements identified in Section 36(b)—exercise of business judgment, and the level of compensation for services—promotes early disposition of weak suits. Affirming the judgment would provide courts with important guidance in applying the governing law.

ARGUMENT

I. SECTION 36(b) CREATES A NARROW CAUSE OF ACTION FOR FEES THAT COULD NOT HAVE RESULTED FROM ARM'S-LENGTH BARGAINING.

For nearly 30 years courts have interpreted Section 36(b) to mean that a plaintiff must prove that an adviser's fee is "so disproportionately large" given "services rendered" that it "could not have been the product of arm's-length bargaining." *Gartenberg* v. *Merrill Lynch Asset Mgmt.*, 694 F.2d 923, 928 (2d Cir. 1982). The Seventh Circuit, stating a standard different only in subtleties, recognized that compensation must be "so unusual" as to suggest that fund trustees abdicated their responsibilities. Pet. App. 9a. This focus on whether a fee could have been the product of the contract review process contemplated by ICA Section 15(c) is the only

interpretation congruent with the statute's language and history.

A. Statutory Text, Structure, And History Show Congress Intended A Narrow Cause Of Action For Fees That A Board Acting At Arm's-Length Could Not Have Approved.

1. Section 36(b) provides a carefully circumscribed private remedy for excessive fees. In private suits, Congress declared that an investment adviser has a "fiduciary duty with respect to *the receipt of compensation for services*." By contrast, in Section 36(a) Congress laid down a more expansive fiduciary obligation enforceable only by the SEC.

Subsection (b)(3) further specifies that a private cause of action lies only against "the recipient" of the "compensation," and it limits recovery to "actual damages" during one year prior to filing of the suit, capped at "the amount of compensation" received. To minimize strike suits, Congress placed the burden of proof on plaintiffs. A court's inquiry into excessiveness is focused by Subsection (b)(2), which provides that approval of an adviser's compensation by a fund's board of directors "shall be given such consideration by the court as is deemed appropriate under all the circumstances."

Additional guidance as to when deference to the board's approval of a fee is appropriate comes from Section 15(c), which sets out key responsibilities with respect to Management Agreements, including compensation provisions. A majority of the *independent* directors of a fund must approve the adviser's fee. And it is the duty of fund directors "to request and evaluate, and the duty of an investment adviser

* * * to furnish, such information as may reasonably be necessary to evaluate" the fee. Provided that a board obtains information it deems necessary, and evaluates the fee in light of that information, its approval of the fee is entitled to substantial deference. As this Court has held, board approval must be given "serious consideration by the court in a § 36(b) action." *Daily Income Fund* v. *Fox*, 464 U.S. 523, 540 (1984); see Rogers & Benedict, *Money Market Fund Management Fees: How Much is Too Much?*, 57 N.Y.U. L. Rev. 1059, 1124 (1982) ("Responsibility for determining the fairness" of a fee rests primarily with the "good faith judgment" of the "board of directors").

2. Legislative history confirms that Congress intended courts to evaluate fee claims through the prism of the board's business judgment. This Court concluded in *Burks* v. *Lasker*, 441 U.S. 471, 484-485 (1979), that "Congress' purpose in structuring the [ICA] as it did" was "to place the unaffiliated directors in the role of 'independent watchdogs'" with "primary responsibility for looking after the interests of the funds' shareholders," including their interest in not paying excessive fees. See S. Rep. No. 91-184 (1969), 1970 USCCAN 4897, 4903 (describing fund directors' "important role in the management fee area"). Section 15(c) ensures that "the attention of the directors" is "fixed on their responsibilities." *Ibid.*

Congress made clear that it did "not inten[d] [Section 36(b)] to shift the responsibility for managing an investment company" from the board of directors "to the judiciary." *Id.*, 1970 USCCAN at 4903. To the contrary, the statute preserved "the authority and responsibility of directors," and specifically 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." *Id.*, 1970 USCCAN at 4902-4903 (emphasis added).

Elaborating on the statutory language, the Senate and House Committee Reports explain how a court should determine whether deference is due to the board's business judgment: by "evaluat[ing] whether the deliberations of the directors were a *matter of substance* or *a mere formality*." *Id.*, 1970 USCCAN at 4910 (emphasis added); H.R. Rep. No. 91-1382, at 37 (1970) (same). That inquiry might not ultimately be "controlling" in every case—for example, a fee itself might be "so disproportionate" or "so unusual" as to suggest the process had broken down. S. Rep. No. 91-184, 1970 USCCAN at 4910; see Pet. App. 9a. But Congress intended a court's focus to be on whether the board made a "*responsible determination* regarding the management fee," in contrast to just rubber-stamping the fee request. S. Rep. No. 91-184, 1970 USCCAN at 4903 (emphasis added). It is that inquiry—as well as the fact that Section 36(b) "established new enforcement mechanisms"—that makes Section 36(b) not "superfluous" to Section 15(c). U.S. Am. Br. 14-15.

3. Accordingly, courts have recognized since *Gartenberg* that approval by an independent board is the single most important factor in evaluating a claim under Section 36(b) and "militates strongly against the contention that the advisors have breached their fiduciary duty to the funds or their shareholders." *Green* v. *Fund Asset Mgmt., L.P.*, 147 F. Supp. 2d 318, 332 (D.N.J. 2001), aff'd, 286 F.3d 682 (3d Cir. 2002); accord *Schuyt* v. *Rowe Price Prime Reserve Fund, Inc.*, 663 F. Supp. 962, 988

(S.D.N.Y.) (board approval to be "weighted heavily"), aff'd, 835 F.2d 45 (2d Cir. 1987); *Krinsk* v. *Fund Asset Mgmt., Inc.*, 715 F. Supp. 472, 501 (S.D.N.Y. 1988) (courts "will not ignore a responsible decision by the Trustees"), aff'd, 875 F.2d 404 (2d Cir. 1989); Pet. App. 8a, 13a-14a; *Gartenberg*, 694 F.2d at 930 (board approval among the most "important factors").

B. SEC Regulations Confirm That A Board's Business Judgment Warrants Substantial Deference.

On the business judgment issue, the SEC has now changed its tune. Despite its support for plaintiffs here, the SEC previously advised this Court that "shareholder protection" is achieved by deferring to the "business judgment" of independent directors, stating that any other approach would evidence "a failure to give proper consideration to the structure and purposes of the Act." U.S. Am. Br. in *Burks*, 1978 WL 207114, at *2-*3, *7-*9; see *id.* at *2-*3 ("the congressional goal of active stewardship by disinterested directors" is "achieved by applying the traditional business judgment rule within a framework of safeguards" supplied by Section 15(c)); *id.* at *9 ("The business judgment rule" is one of "shareholder protection and should not lightly be discarded"). See also Paul Roye, Director, SEC Div. of Inv. Mgmt., *What Does It Take to Be an Effective Independent Director of a Mutual Fund* (Apr. 14, 2000) ("court will not substitute its judgment" for that of the board).

Indeed, since 1970 the SEC has strengthened the statutory protections for investors in Sections 15(c) and 36(b) through regulations effectively mandating that independent directors constitute at least 50% of the board and select other independent directors,

and requiring independent legal counsel. 66 Fed. Reg. 3734, 3758-3759 (2001). In fact, most boards, like those of the Fidelity funds, comprise about 75% independent directors. These rules "have led to stronger, more independent" fund boards, "better equipped to deal" with "oversight of fund expenses." Paul Roye, Director, SEC Div. of Inv. Mgmt., Memo. in Response to Correspondence from Rep. Baker, June 9, 2003, at 49, available at http://tinyurl.com/m3ohoj.

The SEC also has elaborated on the factors related to fees that should be considered by the board, and requires that the basis of the board's decision be disclosed to shareholders. 17 C.F.R. § 240.14a-101, Item 22(c)(11); *id.* Part 274. It also mandates that fees be prominently disclosed, in plain English, in the prospectus. SEC Form N-1A. This "[i]ncreased transparency," the SEC has said, encourages "boards to engage in vigorous and independent oversight of advisory contracts." *Disclosure Regarding Approval of Investment Advisory Contracts by Directors of Investment Companies*, ICA Release No. 26,486 (June 23, 2004).

And, of course, the SEC has the power to enforce duties regarding review of Management Agreements. It conducts regular 15(c) "audits" and files administrative proceedings when necessary. See *In re N.Y. Life Inv. Mgmt. LLC.*, ICA Release No. 28,747, at 7 (May 27, 2009) (Section 15(c) violation by adviser). A statement by the SEC that a board's or adviser's actions were inadequate would have impact across the industry and remedy any general failing the SEC perceived.

In this regulatory environment, judicial deference to the business judgment of a board is

especially appropriate. See SEC Div. of Inv. Mgmt., *Report on Mutual Fund Fees and Expenses* 6 (Dec. 2000) ("primary reliance on disclosure and procedural safeguards to determine mutual fund fees" is "sound and operates in the manner contemplated by Congress"); SEC Div. of Inv. Mgmt., *Protecting Investors: A Half Century of Investment Company Regulation* 253 (1992) (the "'watchdog' function" performed by independent directors has "served investors well").

II. A COURT SHOULD NOT SECOND GUESS A BOARD'S BUSINESS JUDGMENT CONCERNING THE RELEVANCE OF FEES CHARGED TO INSTITUTIONAL CLIENTS.

Plaintiffs barely mention fund boards, except to denigrate them as "captive"—a charge contradicted by statutory and regulatory provisions promoting independent business judgments, by elaborate and effective systems for review of fees established in response, and by the vigorously competitive nature of the modern fund industry. See Part III.A, *infra*. Instead, plaintiffs' proposed inquiry begins and ends with an apples-to-oranges comparison between fees paid by mutual funds and those paid by institutional clients, such as pension funds.

According to plaintiffs, a fund board's determination that such a comparison is uninformative, or that fee differences are justified, is besides the point; the court in a Section 36(b) suit must undertake its own inquiry, second-guessing the board's decision. Compare U.S. Am. Br. 30 (citing SEC and other sources stating that *fund boards* may wish to consider fees charged for institutional products). Plaintiffs' approach invites litigation against every

fund fee, because advisers' fees to institutional clients are usually lower. *E.g.*, Collins, *The Expenses of Defined Benefit Pension Plans and Mutual Funds*, ICI Perspective 9 (Dec. 2003). Indeed, it is precisely because this differential is almost universal that trial lawyers want to make it a litmus test under Section 36(b). The comparison plaintiffs advocate is false, and it would lead courts into a quagmire with no standards to judge plaintiffs' claims.

A. Mutual Fund And Institutional Fees Are Not Comparable.

The SEC acknowledges that "[t]he comparison to fees paid by unaffiliated institutional clients * * * raises the question whether the services provided to different kinds of entities [are] in fact comparable." U.S. Am. Br. 31 n.10. They are not. See Coates & Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy*, 33 J. Corp. L. 151, 185 (2007) ("retail and institutional customers consume different services or differ in the underlying cost of generating services"). For example:

- Retail mutual funds are subject to statutory and regulatory requirements that are inapplicable to institutional products, including detailed requirements of the Securities Act, Securities Exchange Act, Investment Advisers Act, and ICA. The resulting legal obligations—including complying with the Sarbanes-Oxley Act, retaining independent trustees and a chief compliance officer, making prospectus disclosures, and conducting shareholder meetings—provide investor protections, but come at a big price. Compliance costs are far lower for institutional products.

● Advisers provide a broad array of services to thousands (even millions) of mutual fund shareholders. These services commonly include preparing disclosure documents, providing investment guidance and education, developing retirement plans, operating investor centers, call centers, and websites, performing transfer agency services, and providing account statements and dividend and tax reporting. Advisers must make significant investments in the infrastructure necessary to provide these services. Most of these services are not given to institutional clients, which generally contract only for basic investment advisory services, principally stock selection. For example, institutional clients do not use an investment adviser's costly telephone representatives or investor centers.

● The vastly different size of retail and institutional accounts means that the adviser's transaction costs for mutual funds are dramatically higher. The average account size in Fidelity mutual funds is approximately $12,000, while institutional accounts average more than $50 million. Providing record keeping, transfer, and other services is substantially more costly for numerous small accounts than for a small number of large accounts.

● Advisers face far greater entrepreneurial risks with retail mutual funds. An institutional account begins life when a single client invests millions of dollars. By contrast, an adviser starting a retail mutual fund typically uses its own money as capital and works to build an investor base over time—often at a loss until the fund reaches a breakeven level of assets, which can take years and may never happen. The adviser must constantly market funds to offset redemptions.

● Investors can redeem their shares in retail mutual funds on a daily basis, resulting in unpredictable daily cash flows in and out of the fund. Institutional customers require cash flow only a handful of times per year and typically provide the adviser advance notice. The need to meet daily cash flow requirements makes portfolio management of mutual funds more difficult and costly than management of institutional products—a fact plaintiffs concede when they acknowledge that money market funds are not comparable to institutional accounts precisely because of such cash flow differences. Pet. Br. 30.

In light of differences like these in the services provided to the two types of clients, courts have rejected the argument that fees charged to institutional clients are relevant when considering mutual fund adviser compensation. The Second Circuit explained that the "nature and extent of the services required by each type of fund differ sharply." *Gartenberg*, 694 F.2d at 930 n.3. The Seventh Circuit recognized too that "[d]ifferent clients call for different commitments of time." Pet. App. 13a. Virtually every court to have considered the issue agrees.[2]

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[2] *E.g.*, *Strougo* v. *BEA Assocs.*, 188 F. Supp. 2d 373, 384 (S.D.N.Y. 2002) ("relevant comparison" is "to other mutual funds, not to non-mutual fund institutional clients"); *In re AllianceBernstein Mut. Fund Excessive Fee Litig.*, 2006 WL 1520222, at *2 (S.D.N.Y. May 31, 2006) ("fee differential reflects * * * different services provided" and "different liabilities assumed"); *Schuyt*, 663 F. Supp. at 974 n.38 (services provided "to the Fund and [institutional] clients differ substantially"); *In re Evergreen Mut. Funds Fee Litig.*, 240 F.R.D. 115, 122

B. Isolating Portfolio Management Fees Is Economically And Legally Improper.

Plaintiffs contend that these differences can be disregarded if a court limits its inquiry to the "portfolio management" component of an adviser's fee. Pet. Br. 50; Econ. Am. Br. 23. But that narrower focus makes the proposed comparison no more viable or appropriate.

In many cases, there is no stand-alone charge for mutual fund portfolio management to which institutional portfolio management prices can be compared. Fund advisory contracts often cover shareholder and administrative services not provided to institutional clients. See SEC Div. of Inv. Mgmt., *Report on Mutual Fund Fees and Expenses* Part III.B.1 & n.60 (Dec. 2000). For Fidelity's Magellan Fund, for example, Fidelity's management fee covers not only portfolio management, but also maintaining shareholder relations (through more than 100 investor centers, a 24/7 call center, and a state-of-the art web site, and by providing investor education), supervising relations with numerous third parties, providing ICA regulatory compliance, and furnishing reports and analyses to fund trustees, among others. Fidelity Magellan Fund 2009 Statement of Additional Information, "Management Contract" (May 30, 2009). Accordingly, the two charges cannot be compared because they are for different services.

When an investor buys a mutual fund, the investor buys the whole package of services: the account statements, website, phone center, and

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(S.D.N.Y. 2007) ("comparisons [to institutional account fees] are not necessarily informative").

compliance infrastructure, along with investment management. For that reason, courts have recognized the need to evaluate the totality of fees and services, not just isolated components. *E.g.*, *Gartenberg*, 694 F.2d at 930 ("all services rendered to the fund or its shareholders" must be considered) (quoting S. Rep. No. 91-184, 1970 USCCAN at 4910); Pet. App. 13a; *Krinsk*, 715 F. Supp. at 498 (issue is whether different fee components "in combination, amoun[t] to a breach of fiduciary duty"); *Benak* v. *Alliance Capital Mgmt.*, 2004 U.S. Dist. LEXIS 12231, at *25 (D.N.J. Feb. 9, 2004) ("it is the overall nature and quality of the services provided by the investment adviser that is at issue"). As Judge Pollack explained in *Gartenberg*, what counts is "the totality of the values placed at the disposal of the shareholders." 528 F. Supp. at 1052. For that reason, benefits provided to investors under *other* contracts are also "a 'surrounding circumstance'" that "would pervade all aspects of a hypothetical arms' length negotiation over the Fund's advisory fee." *Krinsk*, 715 F. Supp. at 486; see also *id.* at 481-482.

That approach is required by the statute. Section 36(b) provides that an action may be asserted against an "investment adviser or any affiliated person" with respect to compensation received "for services," expressing Congress's intent that courts consider *all* compensation received by the adviser and its affiliates and *all* services they render. Congress expected courts to "look at * * * *all services rendered* * * * and *all compensation and payments received*, in order to reach a decision as to whether the adviser has properly acted as a fiduciary." S. Rep. No. 91-184, 1970 USCCAN at 4910 (emphasis added).

Any effort to segregate fees for mutual fund portfolio management in order to compare them to institutional portfolio management charges is certain to produce arbitrary results. Different advisers and fund boards allocate costs and revenues differently among the various elements of integrated services, most of which are joint-and-common across many funds. Some services to a mutual fund may be provided at cost, or even at a loss, with profits taken on other services, and advisers vary in how they make these accounting allocations across services and across funds. These allocations are "an art rather than a science" (*Krinsk*, 715 F. Supp. at 489), with the range of reasonable allocations being large. In consequence, allocated cost and profit data—inevitably at the heart of plaintiffs' proposed comparison—has very little economic meaning and should have no role in Section 36(b) litigation. See Pet. App. 13a ("Joint costs * * * make it hard to draw inferences from fee levels"); *Schuyt*, 663 F. Supp. at 978 n.48 ("accounting systems are subject to significant variation in results depending on how" they "allocate common costs").[3]

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[3] Plaintiffs and *amici* admit that litigation over individual "fund profitability," a factor under *Gartenberg*, is pointless because it is based on "highly contestable facts" that are subject to "fierce dispute," making profitability "next to impossible for courts to analyze." Bogle Am. Br. 23; NASCAT Am. Br. 14; see Pet. Br. 32 n.23. The sort of arbitrary accounting allocations that make profitability analysis pointless also infect plaintiffs' proposed comparison of portfolio management fees.

C. Courts Lack The Institutional Capability To Ascertain Reasonable Mutual Fund Fees.

In light of the inherent differences between mutual funds and institutional accounts, how could a court determine what additional charge is warranted for the additional services? How, for example, would a court assign a value to investors to a fully staffed mutual fund compliance department charged with overseeing performance of myriad statutory and regulatory duties? Or to preparing, updating, and distributing a prospectus? A trial would do nothing to illuminate such metaphysical questions. Compare U.S. Am. Br. 12, 32.

With no basis to assess the "value" of services to investors, courts would necessarily resort to analysis of an adviser's costs for providing the services. That approach would run headlong into Congress's bar on "a 'cost-plus'" approach or "general concepts of rate regulation as applied to public utilities." S. Rep. No. 91-184, 1970 USCCAN at 4903; see U.S. Am. Br. 23 n.6 (conceding these methods are impermissible). Years of experience have demonstrated the deficiencies of price-setting in cost-plus regimes. And as we have explained, cost allocation is a judgment, not a science in the mutual fund industry, which would provide no objective standards for adjudication.

The comparison to fees charged to institutions advocated by plaintiffs therefore offers no solution for a court asked to second guess a board fee approval. The court would be left with the sort of amorphous "reasonableness" inquiry that Congress expressly rejected in favor of "a different method of

testing management compensation." S. Rep. No. 91-184, 1970 USCCAN at 4902.[4] Congress understood that substituting the judgment of a non-specialist court as to the appropriate level of adviser compensation for that of fund directors operating under the regulatory supervision of the SEC—based on remote comparisons and vague economic theories—would not lead to a better business judgment.

Determining what fee is proper is a role for which federal judges are institutionally unsuited. See *Pac. Bell Tel. Co.* v. *LinkLine Commc'ns*, 129 S. Ct. 1109, 1120-1121 (2009) ("Institutional concerns" require "clear rules" that courts may "adequately and reasonably supervise," not open-ended inquiries more suited to a "regulatory agency"); *Verizon Commc'ns* v. *FCC*, 535 U.S. 467, 539 (2002) (the correct rate "is the stuff of debate for economists and regulators," not judges); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 731, 741-43 & n.25 (1977) (refusing to take on "the uncertainties and difficulties" of applying "economic theorems" to determine whether "overcharges" occurred). As Justice Breyer has asked, "how is a judge" to "determine a 'fair price'?" and how can a "court determine this price * * * without acting

[4] Claims of the United States (at 19) and Bogle (at 17) that the industry successfully opposed a reasonableness standard but then agreed to the same thing under the fiduciary duty standard are incorrect. The industry told Congress that "reasonableness" was unacceptable because "courts might feel called upon to substitute their business judgment for that of the directors of the fund," and that the fiduciary duty instead focused inquiry "on the substance" of the Section 15(c) process. Bogle Am. Br., App. C. Congress rejected the SEC's plea to make the standard focus on whether the fee was "unfair" when it refused to enact a reasonableness standard and included subsection (b)(2). Cf. U.S. Am. Br. 18, 19.

like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years?" *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.)); see Rogers & Benedict, *supra*, 57 N.Y.U. L. Rev. at 1112-1114 (myriad intangible factors are considered in evaluating fees; the proper fee is "a question of business judgment not properly a subject for judicial determination").

Section 36(b) avoids these pitfalls by focusing in the first instance on the board's exercise of its business judgment in approving fees, as required by subsection (b)(2). If the court concludes that the board's decision does not warrant deference, because it was a "formality" rather than a review of "substance" (S. Rep. No. 91-184, 1970 USCCAN at 4910), it should then consider, as required by *Gartenberg* and *Jones*, whether the fee is so excessive as to amount to a breach of fiduciary duty. Only a fee so obviously excessive that a court may find a breach of fiduciary duty—without resort to the economic quibbling plaintiffs advocate—is actionable under that standard. See Pet. App. 9a; *Gartenberg*, 694 F.2d at 928.

III. PLAINTIFFS ERR IN ADVOCATING OPEN-ENDED COMMON LAW STANDARDS OR INQUIRIES APART FROM FEE LEVELS.

A. Intensive Competition, Stringent Regulation, And Extensive Disclosure Make Plaintiffs' Expansive Theory Of Liability Unnecessary To Protect Investors.

Plaintiffs contend that minute judicial dissection of fund fees and the process by which they were

approved is needed to protect investors. That argument "cannot override" the ICA's "text and structure" (*Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 188 (1994)) and is "more appropriately addressed to Congress than to this Court." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 156 n.12 (1976). In any event, it is erroneous because there are regulatory, judicial, and competitive constraints on fee levels that have served investors well.

Plaintiffs and their *amici* rely on statements in SEC reports and legislative history from the 1960s that competition was then lacking because fund boards were "captive" and would not switch advisers. But "a lot has happened in the last 38 years." Pet. App. 11a; see *LinkLine Commc'ns*, 129 S. Ct. at 1120 n.3 (pricing inquiry under antitrust laws controlled by *current* economic and legal conditions); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587-592 (1986) (determining whether pricing claim made "economic sense" by considering contemporaneous market conditions).

Regulatory action since 1972 has effectively required that at least 50% of directors be independent and has made the Section 15(c) contract review process far more robust. And the *Gartenberg* analysis has made Section 36(b) a powerful deterrent to advisers requesting excessive fees. Plaintiffs' assertion that it has been insufficiently protective of investors is contradicted by their own trial-lawyer *amici*, who concede that many Section 36(b) suits have settled with "substantial benefits" for mutual fund shareholders. NASCAT Am. Br. 9-10.

At the same time, competition in the mutual fund industry has exploded. In 2006, there were

more than 8,000 mutual funds with assets of $10,400 billion, up from 379 mutual funds with assets of $38.2 billion in 1966. Coates & Hubbard, *supra*, 33 J. Corp. L. at 157. The growth of no-load funds, fund supermarkets, and tax-advantaged investment vehicles like Section 401(k) and Section 529 plans means that switching between mutual funds today often involves no transaction costs at all.

Investors also are better informed than ever before. SEC regulations require advisers to disclose to investors information on fees, performance, risks and costs, portfolio holdings, and manager and director compensation and experience. *E.g.*, SEC, *Enhanced Disclosure and New Prospectus Delivery Option for Registered Open-End Management Investment Companies*, ICA Release No. 28,584 (Jan. 13, 2009); SEC, *Consolidated Disclosure of Mutual Fund Expenses*, ICA Release No. 16,244 (Feb. 1, 1988). Fund investors have access to a wealth of additional information that aids in the selection of mutual fund investments. They can readily compare the costs of investing in any mutual fund, including by using simple online tools (*e.g.*, http://www.sec.gov/investor/tools/mfcc/mfcc-int.htm) or third-party providers like Morningstar or Lipper.

A multitude of funds, transparent fee and performance data, and low transaction costs have fostered an environment in which (the SEC has admitted) "competition is fierce." SEC, *Protecting Investors, supra*, at 347. Advisory fees have declined dramatically in response. See 2009 Investment Company Institute Fact Book 61-63. Price wars are routine. *E.g.*, Lemann, *Schwab's Fee Cuts Challenge Vanguard, Fidelity*, Ignites, May 6, 2009 (reporting on a price war in index fund fees); *Big Fee Cuts in*

Store at Putnam, Ignites, July 28, 2009 (Putnam fee cuts "are aimed at ratcheting up competition with rivals such as Fidelity" and bring a "price war" to "active product sales"). In this environment, in which "barriers to entry" are low, it would "be impossible to maintain supracompetitive prices" for long. *Matsushita*, 475 U.S. at 591 n.15.

The "captive" label is a red herring. As explained in HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 205 (2005), Domino's franchisees may be "captive," and, in theory, could be forced to pay high prices to Domino's for pizza dough. But if Domino's "charge[s] its franchisees a high price for pizza dough, Domino's customers are free to purchase pizzas wherever they please. If the local Domino's franchisee overprices its pizzas," customers "will go somewhere else." Similarly, if an adviser imagined a fund was its "captive," from which supra-competitive fees could be extracted, it would quickly be reined in by an attentive board. And if the board were inattentive, it would find that its shareholders are not "captive" but, like Domino's customers, can "go somewhere else."

B. Section 36(b) Does Not Track Common Law Fiduciary Duty Standards, Which In Any Event Defer To The Business Judgment Of Boards Of Directors.

Plaintiffs' attempted reliance on common law fiduciary duties suffers from two defects: Congress did not borrow state common law duties, and common law in any event defers in analogous circumstances to the business judgment of boards of directors.

1. This Court explained in *Daily Income Fund* that Section 36(b) creates a "unique" and "entirely new right" that "differs significantly" from pre-existing state law rights. 464 U.S. at 534 n.10, 535, 541. That provision, as the SEC informed this Court in *Burks*, establishes "federal standards," and in interpreting those standards it is "the policies of federal law" that "are significant." 1978 WL 207114, at *11, *16 n.12; see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 744-745 (1975) (common law rules were developed in a world "light years away from the world of commercial transactions to which" federal securities laws apply).

The meaning of "fiduciary duty" in Section 36(b) must be interpreted in the context of the overall statutory scheme of the ICA. The federal policies of the ICA that we have described—a rigorous Section 15(c) contract review process, director independence, deference to directors who engage in substantive consideration of fees, rejection of "reasonableness" and rate-regulatory standards, and focus on whether compensation was blatantly excessive given all services provided—show that Section 36(b) "was intended to provide a very specific, narrow federal remedy that is more limited than * * * common law doctrines." *Green*, 286 F.3d at 685; accord *Green* v. *Nuveen Advisory Corp.*, 295 F.3d 738, 743 (7th Cir. 2002) (same); see also *Central Bank*, 511 U.S. at 184 (though securities laws are "deeply rooted" in common law, "it does not follow that Congress intended to apply that kind of liability to the private causes of action in the securities Acts").

Additional federal policies that have guided this Court's interpretation of the securities laws (discussed in Parts II and IV), include preferring clear

liability rules over hazy ones; avoiding interpretations that encourage vexatious litigation, make it difficult to dispose of baseless suits on pre-trial motions, or lead to blackmail settlements; and avoiding interpretations that would take courts beyond their institutional abilities. All those policies point toward a circumscribed cause of action under Section 36(b).

The label "fiduciary," this Court has explained, "only begins analysis." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 85-86 (1943). Because Congress intended "federal courts to interpret" Section 36(b)'s "'fiduciary duty' in the ['federal common law'] tradition" (*Gartenberg*, 528 F. Supp. at 1046), and because federal policies weigh heavily against an expansive interpretation, the open-ended state common law doctrines plaintiffs rely upon are irrelevant.

2. Insofar as state common law principles have any import, it is those principles that concern "the traditional function of the courts to enforce such fiduciary duties in *similar type relationships*." S. Rep. No. 91-184, 1970 USCCAN at 4902. One critical feature of the relationship here is that an adviser's compensation must be approved by a largely independent fund board and is reviewed annually in a process closely guided by Section 15(c), SEC regulation, and judicial precedent. Another is that investtors who believe fees are too high have an exit option —a dissatisfied shareholder can easily move her money to another fund or different investment entirely. The general principles of trust and agency law which plaintiffs cite are far removed from this special context.

Congress in the ICA recognized the special relevance of board approval, enacting Section

36(b)(2) and explaining that the statute embraced "concepts developed by the courts as to the authority and responsibility of directors." S. Rep. No. 91-184, 1970 USCCAN at 4903. Rejecting the most stringent common law "waste" standard for review of director action, Congress directed courts to inquire instead whether the board engaged in substantive review under Section 15(c). Plaintiffs supply no plausible reason why this Court should borrow common law fiduciary standards used in far less analogous circumstances—standards that in any event, as *amicus* SIFMA explains (at 16-24), would not override agreed-upon, market-level fees.

C. Adviser Conduct Does Not Provide A Basis For A Section 36(b) Suit Separate From The Fee Level.

Plaintiffs advocate an alternative theory of Section 36(b) liability adopted by the Eighth Circuit in *Gallus* v. *Ameriprise Financial, Inc.*, 561 F.3d 816 (8th Cir. 2009). There, the court concluded that Section 36(b) "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. It suggested that adviser conduct during the board's review process may violate Section 36(b) even though the fee "passed muster under the *Gartenberg* standard." *Ibid.* And it held that a dispute between experts 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 summary judgment. *Id.* at 824.

That ruling is inconsistent with the statute. Under Section 36(b)(2), mere disagreement with the amount or type of information the adviser supplied or the weight the board gave information does not create an issue of fact that invites a court to second guess the board's business judgment. See Part II, *supra*. Alleged deficiencies in the Section 15(c) process must be so fundamental that they preclude the board from making a "responsible determination." S. Rep. No. 91-184, 1970 USCCAN at 4903. And even when that showing can be made, it is not an independent basis for liability. It simply overcomes deference to the business judgment of the board and focuses the inquiry instead on whether the fee is so disproportionate to services provided as to be obviously improper.[5]

Gallus's open-ended deception theory is unlike any express securities liability Congress ever created. Actions for misrepresentation or omission are all carefully circumscribed by Congress and by the courts. See, *e.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976); *Blue Chip Stamps*, 421 U.S. at 754-755; *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 774 (2008). In the

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[5] In *Gallus* the board obtained a report from the adviser showing that the services provided "were different than those provided to the institutional clients." 497 F. Supp. 2d 974, 982 (D. Minn. 2007). The board's consideration of that data and the fact that the agreed-upon fee was within normal limits refuted plaintiffs' claim that substantive review had not occurred. *Id.* at 983. And plaintiffs failed to link "alleged deficiencies" to "the results of the Board's fee-negotiation process." *Ibid.* That is the classic situation in which a court should defer to the business judgment of the board. It is legally irrelevant that plaintiffs can find an expert to say that the data should have been presented differently.

securities registration context, there are schedules of information that must be disclosed, and omission of information not expressly required to be disclosed is actionable only if it makes an affirmative statement misleading. In the proxy context, there are again specific required disclosures. Periodic corporate reports are governed by disclosure schedules and rules. The ICA and SEC regulations prescribe specific disclosure requirements that the Commission enforces under Sections 15(c) or 36(a). By contrast, *Gallus* would open up a new disclosure-based cause of action under a provision that contains no rules of disclosure or misrepresentation at all. This Court should reject plaintiffs' invitation to invent a new theory of liability that bears no resemblance to any disclosure-based cause of action prescribed by Congress and that has no basis in the language of the statute.

IV. STANDARDS THAT PERMIT PRE-TRIAL DISPOSITION OF WEAK SECTION 36(b) SUITS AVOID WASTE OF JUDICIAL AND SHAREHOLDER RESOURCES.

Plaintiffs advocate a broad liability rule with no support in the statutory text, structure, or history, or relevant common law. The rule they advocate also is unnecessary given competition among funds and the SEC's comprehensive authority over the Section 15(c) process whereby fund trustees "request and evaluate," and investment advisers "furnish," information reasonably "necessary to evaluate" the fee. Plaintiffs' approach would burden courts with open-ended factual and economic inquiries that cannot efficiently be managed by courts. It threatens massive discovery and decade-long litigation (or forced settlements) for every adviser with respect to

every fund, because it lacks standards to identify weak claims and dispose of them early. Specific standards set forth in the statute, however, promote efficient pre-trial disposition.

A. Properly Analyzed, Section 36(b) Standards Promote Pre-Trial Disposition Of Weak Claims.

According to plaintiffs, allegations that an adviser charged fund investors higher fees than those paid by institutional investors would be enough to survive dismissal, and the comparability of those fees would be the subject of conflicting expert testimony that prevents summary judgment. Pet. Br. 50 n.50; see also U.S. Am. Br. 32. Plaintiffs envisage too that alleging that an adviser should have provided more or different information to fund trustees and hiring an expert to so opine would be enough to get to trial, regardless of the amount of the fee. Pet. Br. 33; see also Law Prof. Am. Br. 30-31; NASCAT Am. Br. 16-17. Experts for plaintiffs in Section 36(b) suits have testified that they believe most fund complexes charge excessive fees. See *Goetz* v. *Crosson*, 967 F.2d 29, 37 (2d Cir. 1992) (van Graafeiland, J., concurring in part) ("an 'expert' can be found to support almost any position if one searches long enough and pays well enough"). Under plaintiffs' approach, every claim will evade pre-trial disposition.

Such open-ended liability standards guarantee that private Section 36(b) suits will be "employed abusively to impose substantial costs on [those] whose conduct conforms to the law." *Tellabs, Inc.* v. *Makor Issues & Rights*, 551 U.S. 308, 313 (2007). As the Solicitor General recently reminded this Court when advocating a "standard [that] reflects the

critical importance of the pleading stage in private securities litigation," lax rules encourage "'nuisance filings'" and "'vexatious discovery requests,'" which in turn lead to "'extortionate settlements.'" U.S. Am. Br. in *Tellabs*, *supra*, No. 06-484, at 21 (quoting *Merrill Lynch* v. *Dabit*, 547 U.S. 71, 81 (2006)).

Those detrimental consequences are just as substantial in Section 36(b) litigation, in which discovery targets both advisers and fund boards of directors and, combined with the annual second-guessing of director conduct that plaintiffs propose, would "dete[r] qualified individuals from serving on boards." *Dabit*, 547 U.S. at 81; see *Blue Chip Stamps*, 421 U.S. at 741 (describing the asymmetrical burden of "extensive deposition of the defendant's officers and associates and the concomitant opportunity for extensive discovery of business documents"); Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 643-645 (1989). The large amounts at stake in fee suits mean that a case not disposed of before trial may never reach an adjudication on the merits. See *Blue Chip Stamps*, 421 U.S. at 740 (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").

If trial does occur, plaintiffs here insist that courts must adjudicate fees based on a judge's assignment of "value," an untethered inquiry that would turn mutual funds into a judicially rate-regulated industry, subvert competition, and "ultimately result in more harm than good." *Hochfelder*, 425 U.S. at 214 n.33. The threat of judicially imposed retroactive fee reductions

following each renewal of a management agreement would make conducting an adviser's business a matter of guesswork. See *Dabit*, 547 U.S. at 80 ("the very pendency of the lawsuit may frustrate or delay normal business activity"). As the Court has observed, "[t]he hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences." *Blue Chip Stamps*, 421 U.S. at 748 (quoting *Ultramares Corp.* v. *Touche, Niven & Co.*, 255 N.Y. 170, 179-180 (1931) (Cardozo, C.J.)); accord *Dirks* v. *SEC*, 463 U.S. 646, 658 n.17 (1983).

By advocating liability rules that rest on speculative and endlessly contestable economic theories, plaintiffs and the SEC contradict this Court's preference for standards that permit courts to dispose of unmeritorious actions early in the litigation. *E.g.*, *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558-559 (2007) (deficiencies should "'be exposed at the point of minimum expenditure of time and money by the parties and the court'" or "discovery expense will push cost-conscious defendants to settle even anemic cases"); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327 (1986) (summary judgment is not "a disfavored procedural shortcut," but "an integral part of the Federal Rules"). "[P]rocedural intractibility" would make Section 36(b) actions especially burdensome because the "issues would be hazy," the "litigation protracted," and the "resolution unreliable." *In re Merrill Lynch & Co.*, 273 F. Supp. 2d 351, 366 n.28 (S.D.N.Y. 2003) (Pollack, J.) (quoting *Grace* v. *Rosenstock*, 228 F.3d 40, 48 (2d Cir. 2000)).

As this Court has observed of related statutes, extending the Section 36(b) cause of action "makes

the civil remedy more far reaching, but it does not follow that the objectives of the statute are better served." *Central Bank*, 511 U.S. at 188. As we have explained in Part I, the objective of Section 36(b) is clear on the face of the statute—to provide a remedy for fees so excessive that they evidence a breakdown in the Section 15(c) process, while deferring to the business judgment of a fund board that has substantively reviewed and approved the adviser's fee. These standards are procedurally manageable, as litigation since *Gartenberg* demonstrates. *E.g.*, *Amron* v. *Morgan Stanley Inv. Advisors, Inc.*, 464 F.3d 338, 344-346 (2d Cir. 2006) (dismissal); *Green* v. *Nuveen Advisory Corp.*, 295 F.3d 738 (7th Cir. 2002) (summary judgment).

Proper application of these standards curtails the coercive potential of fee actions and makes meritless claims easier "'to dispose of before trial'" (*Blue Chip Stamps*, 421 U.S. at 742-743), fulfilling Congress's purpose "to eliminate nuisance suits." H.R. Rep. No. 91-1382, at 38 (1970). To state a claim a plaintiff would have to plead "sufficient factual matter"—not "'labels,'" "'conclusions,'" or "'naked assertions'"—to show that there are special "circumstances" that make it not "appropriate" to defer to the fund board's business judgment approving the fee. *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009); ICA § 36(b)(2).

Such allegations might include facts showing that trustees rubber-stamped the fee without undertaking substantive review, that the dialogue between the adviser and fund board contemplated by Section 15(c) did not occur, or that there were other deficiencies in the review process so fundamental that they precluded the board from making a business judgment. Allegations showing that the fee

is higher than that charged by advisers to comparable funds should not be sufficient to overcome deference to the board's judgment absent other allegations permitting the court to infer that the board did not give substantive consideration to the amount of the fee in the context of services provided. See *Iqbal*, 129 S. Ct. at 1949, 1951 (not enough to plead facts "that are 'merely consistent with' a defendant's liability"; to "plausibly establish" liability, complaint must eliminate "'obvious alternative explanation[s]'"). The higher a fee compared to others in the relevant market, the easier it may be for a plaintiff to plead other facts showing that deference is unwarranted. See Pet. App. 9a.

Allegations that directors, who gave substantive consideration to the level of management fees, might have requested or the adviser might have supplied different information are not sufficient to plead that deference is unwarranted. Nor is any other process-focused allegation sufficient when reasonable people could differ about the relevance or meaning of the supposed defect. It is not enough for plaintiffs simply to allege that institutional investors paid less, when the fund board considered that fact in its deliberations. If such allegations—which could be made against virtually every fund—stated the plausible claim for relief necessary to survive a motion to dismiss, this would make a mockery of Section 36(b)(2) and of Congress's intent not 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, 1970 USCCAN at 4902-4903.

When pleadings are sufficient to undermine the substantial deference due to the board, the focus of

the dismissal inquiry should move to the amount of the fee itself. To survive dismissal plaintiffs must adequately plead that the fee was "so disproportionate" to services provided or "so unusual" as to show that the agreement could not have been the product of arm's-length bargaining. That inquiry is "context-specific" and requires a court "to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950. But because "some inference" of misconduct is not enough, *id.* at 1952, a pleading would have to allege that the fee was significantly higher than that paid by comparable funds *and* plead facts showing the higher fee was not justified by services provided. A plaintiff could not meet that burden without also pleading facts showing that competition—which drives investors to funds with reasonable fees—failed in the particular market.

Unlike plaintiffs' proposal, this inquiry achieves what Congress intended by giving deference to the actions of fund directors in reviewing fee agreements, while protecting investors from excessive fees in extraordinary cases.

B. Applying The Correct Standards, The Judgments Below Should Be Affirmed.

Just as a plaintiff must allege such facts to survive dismissal, he must produce substantial evidence to support them to avoid summary judgment. Here, plaintiffs failed to do so. See *Matsushita*, 475 U.S. at 586-588 (summary judgment

appropriate in complex case involving economic debate over proper price levels).[6]

As Judge Kocoras held in granting summary judgment under the traditional *Gartenberg* standard, the Oakmark funds' independent trustees attended to their duty of considering Harris's management contract, and Harris complied with its Section 15(c) obligation to provide the trustees with the information necessary for review, including "fees charged to Harris's other clients." Pet. App. 16a. The court also found no evidence that the trustees were not disinterested, as plaintiffs alleged. *Id.* at 24a-26a, 30a-31a. The fee was comparable to those charged to similar funds, well within the acceptable range, and certainly not indicative "that self-dealing was afoot." *Id.* at 30a. And the "services Harris provided to institutional clients" were "more limited than those they provided to the Funds." *Id.* at 16a. Accordingly, plaintiffs produced no evidence showing that it was inappropriate to defer to the Oakmark funds' board's approval of Harris's fee. Given that record—and the outstanding performance of these funds—plaintiffs' "elaborate story of what they believe should have transpired between the Funds and Harris in order to produce a deal that would ultimately be more advantageous to the Plaintiffs" was "irrelevant." *Id.* at 32a. This record gives no reason to second guess the board's business judgment, and provides a sound

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[6] This Court can affirm on any ground that the law and record supports. *E.g.*, *Brooke Group* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 232-243 (1993); *Stoneridge*, 128 S. Ct. at 769. This Court's application of the correct legal standards to this record would serve important educational purposes for the industry and lower courts.

basis for the Seventh Circuit's ruling (see *id*. at 8a), which should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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