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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOAN OBESLO; ANNE HALL; TINA GORRELL-DEYERLE, on behalf of Great-West Funds, Inc.,

Plaintiffs - Appellants,

and

DUPLASS, ZWAIN, BOURGEOIS, PFISTER & WEINSTOCK APLC 401 (K) PLAN,

Plaintiff,

v.

GREAT-WEST LIFE & ANNUITY INSURANCE CO; GREAT-WEST CAPITAL MANAGEMENT, LLC,

Defendants - Appellees.

No. 20-1310

Appeal from the United States District Court
for the District of Colorado
(D.C. Nos. 1:16-CV-00230-CMA-SKA, 1:16-CV-01215-CMA-SKA,
and 1:16-CV-03162-CMA-SKC)

Michael A. Wolff (Jerome J. Schlichter with him on the briefs), Schlichter Bogard & Denton LLP, St. Louis, Missouri, for Plaintiffs – Appellants.

Sean M. Murphy, Milbank LLP, New York, New York (Robert J. Liubicic, Milbank LLP, Los Angeles, California, Edward C. Stewart, Wheeler Trigg O'Donnell LLP, Denver, Colorado, Robert Michael Little, Great-West Life & Annuity Insurance Co., Greenwood Village, Colorado, with him on the briefs), for Defendants – Appellees.

Before **TYMKOVICH**, Chief Judge, **HOLMES**, and **McHUGH**, Circuit Judges.

McHUGH, Circuit Judge.

This is an appeal from a consolidated shareholder derivative action arising under § 36(b) of the Investment Company Act of 1940 ("ICA"). Plaintiff-Appellants ("Plaintiffs") are shareholders in a major mutual fund complex through their employer-sponsored retirement plans. They allege the complex's investment adviser, Great-West Capital Management LLC ("GWCM"), and affiliate recordkeeper, Great-West Life & Annuity Insurance Co. ("GWL&A") (collectively "Defendants"), breached their fiduciary duties by collecting excessive compensation from fund assets.

Shareholders suing under § 36(b) must satisfy the arduous standard set out in *Jones v. Harris Assocs. L.P.*, 559 U.S. 335 (2010). No one has ever done so, including, according to the district court, Plaintiffs. After holding an eleven-day bench trial in January 2020, the district court adopted and incorporated by reference, with few changes, Defendants' Proposed Findings of Fact and Conclusions of Law. It also found for Defendants on every element of every issue, concluding "even though they did not have the burden to do so, Defendants presented persuasive and credible evidence that overwhelmingly proved that their fees were reasonable and that they did not breach their fiduciary duties." App. Vol. II at 528.

Plaintiffs now appeal. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

To provide context for the factual and procedural history of this dispute, we begin with an overview of the investment framework and the relevant regulatory statutes. With the benefit of that backdrop, we set forth the factual and procedural history of this dispute.

A. Statutory and Legal Background

An investment company is a corporation that manages a portfolio of financial securities for its shareholders. Separate legal entities called investment advisers create investment companies. The investment adviser incorporates the company, chooses the company's directors, oversees the company's investments, and compensates itself by deducting fees from the company's assets. One common type of investment company is a mutual fund. A single investment adviser can supervise numerous mutual funds. This corporate arrangement is known as a "mutual fund complex." App. Vol. II at 517.

Congress passed the ICA, 15 U.S.C. § 80a-1 *et seq*., to protect mutual fund shareholders because "the relationship between a fund and its investment adviser [is] 'fraught with potential conflicts of interest.'" *Jones*, 559 U.S. at 339 (quoting *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984)). Congress then amended the ICA in 1970 to strengthen shareholder protection in two key ways. *Id.*

First, Congress bolstered the independence of mutual fund directors. The amended ICA requires at least 40% of an investment company's board of directors to be independent, defined as having no interest in or affiliation with the investment adviser. 15 U.S.C. §§ 80a-10(a), 80a-2(a)(19). The "scrutiny of investment adviser compensation

by a fully informed mutual fund board is the 'cornerstone of the [ICA's] effort to control conflicts of interest within mutual funds.'" *Jones*, 559 U.S. at 348 (quoting *Burks v. Lasker*, 441 U.S. 471, 482 (1979)). Director independence is crucially important because the ICA "assigns a host of special responsibilities" to a mutual fund's board of directors, including the "duty to review and approve the contracts of the investment adviser." *Burks*, 441 U.S. at 482–83. Therefore, disinterested directors act as "independent watchdogs . . . [and a] check upon the management of investment companies." *Id.* at 484.

Second, Congress added § 36(b) to the ICA, which imposes a fiduciary duty on investment advisers and their affiliates. Section 36(b) states investment advisers owe shareholders a fiduciary duty with respect to setting and collecting their fees, and with respect to paying affiliates from mutual fund assets. 15 U.S.C. § 80a-35(b).[1] Section 36(b) also grants shareholders a private right of action for breach of that duty. *Id*.

To prove breach under § 36(b), a plaintiff must show the investment adviser's compensation 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 Supreme Court has instructed courts to consider all relevant factors when making this determination, including six factors articulated by the Second Circuit in the seminal case *Gartenberg vs. Merrill Lynch Asset Management, Inc*. *Id.* at 353. A plaintiff must also establish the amount of "actual damages resulting from the breach" to prevail on a claim under § 36(b). 15 U.S.C. § 80a-35(b)(3); *see also Sivolella*

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[1] Section 36(b) of the ICA is codified at 15 U.S.C. § 80a-35(b).

v. AXA Equitable Life Ins. Co., No. 11-cv-4194 (PGS) (DEA), 2016 WL 4487857, at *70 (D.N.J. Aug. 25, 2016) (noting a failure "to show 'actual damages' . . . prevents any recovery by Plaintiffs"), *aff'd sub nom. Sivolella ex rel. EQ/Common Stock Index Portfolio v. AXA Equitable Life Ins. Co.*, 742 F. App'x 604 (3d Cir. 2018).

B. Factual Background

1. Great-West Funds and the Defendants

The investment company in this case is Great-West Funds Inc. ("Great-West Funds"). It is a mutual fund complex that has issued approximately sixty series of shares, each of which is a separate mutual fund (the "Funds"). The Great-West Funds' Board of Directors (the "Board") oversees the Funds.

Defendant GWCM is the investment adviser for the Funds. GWCM provides investment advisory services for all the Funds under a single investment advisory agreement approved by the Board. GWCM does not direct investment strategy. Instead, it hires and monitors subadvisers that direct individual funds. GWCM's other advisory services include preparing weekly performance reports, conducting a fund performance review, and supervising certain aspects of Great-West Funds' Lifetime Funds.[2] GWCM is a wholly-owned subsidiary of Defendant GWL&A. With staff and professionals supplied by GWL&A, GWCM provides a 120-person in-house investment administration team that conducts fund accounting, valuation, bookkeeping, financial reporting, expense

[2] Lifetime Funds are specific mutual funds organized around a target retirement date—i.e., Lifetime 2025, 2035, 2045, and 2055 Funds.

accounting, tax, and compliance services. This type of corporate arrangement is common throughout the industry. *See Jones*, 559 U.S. at 338 (describing how mutual funds are typically structured).

Defendant GWL&A administers the Funds as part of its retirement recordkeeping business, pursuant to an administrative services agreement approved by the Board. "GWL&A is the second largest recordkeeper in the country, administering $650 billion in assets and 40,000 plans, and has grown faster than its competitors." App. Vol. II at 505. Customer organizations hire GWL&A—doing business as Empower Retirement[3]—to develop and maintain retirement plans for their employees. A customer designates a retirement plan sponsor to set up a customized retirement plan for its organization by selecting from among the 14,000 investment options Empower offers, which include the Funds. Of note, plan sponsors owe their customer organizations a fiduciary duty to select prudent investments. *See* 29 U.S.C. §1104(a)(1). GWL&A-administered retirement plans are the main vehicle through which the Funds are sold. The Funds are not available to the general public.

Employees of GWL&A's customers who select the Funds in their retirement portfolios become Great-West Funds shareholders. The recordkeeping services GWL&A provides its customers, therefore, also service shareholders. These services include

[3] In 2014 GWL&A's parent corporation (Great-West Financial Inc.) acquired the retirement plan recordkeeping business of JP Morgan and combined it with the recordkeeping business of its subsidiaries, Putnam Investments and GWL&A, under the brand "Empower Retirement." App. Vol. XI at 3037.

maintaining mutual fund records, performing sub-accounting of plan participant shareholdings, distributing investment materials such as quarterly statements and prospectuses, distributing dividends and other payments, responding to shareholder queries, and providing information to the Board. GWL&A serves shareholders through call centers, a mobile app, a website, and on-site meetings.

2. The Contested Funds and the Plaintiffs

Plaintiffs are three individuals who hold shares in the Funds.[4] They claim the advisory and administrative services fees charged to four mutual funds (the "Contested Funds") are excessive under § 36(b). The Contested Funds are: (1) the Great-West S&P 500 Index Fund; (2) the Great-West S&P 600 Index Fund; (3) the Great-West Real Estate Index Fund; and (4) the Great-West Templeton Global Bond Fund.

Defendants acknowledge many index funds are commodity-like products, as some index funds "are all essentially the same except for the fees that they charge." App. Vol. IV at 1087; *see also* App. Vol. XI at 2989 (deposition testimony during which the former GWL&A President and CEO agreed its S&P 500 Index Fund is a commodity fund). The

[4] Plaintiff Joan Obeslo is a retired former GWL&A employee. Ms. Obeslo invested in, among others, the Great-West S&P 500 and S&P 600 Index Funds through an IRA administered by GWL&A. Plaintiffs Anne Hall and Tina Gorrell-Deyerle participate in the Superior Court of California, Monterey County Deferred Compensation Plan. GWL&A administers this plan. Ms. Hall and Ms. Gorrell-Deyerle invested in, among others, the Great-West Real Estate Index Fund and the Great-West Templeton Global Bond Fund. Of note, Plaintiff Duplass, Zwain, Bourgeois, Pfister & Weinstock APLC 401(k) Plan is a defined contribution plan whose participants own shares in certain Great-West Funds. It has not joined this appeal. In district court, it alleged that only the advisory fee is excessive, even though its participants also pay the administrative fee.

S&P 500 and 600 Index Funds track the performance of those indexes. The Great-West Real Estate Index Fund tracks the performance of an index of real estate investment trusts. From 2010 through 2016, the S&P 500 Index Fund grew from $755.3 million to $2.453 billion. During that same time, the S&P 600 Index Fund grew from $258.1 million to $765.6 million. The Real Estate Index Fund grew from $7.5 million in 2012 to $325.7 million in 2016.

The Great-West Templeton Global Bond Fund is a "clone[] of an existing retail fund[]" that Franklin Advisers Inc., a third-party, sells to the general public. App. Vol. V at 1433. Of note, Franklin Advisors also serves as the subadviser to GWCM for the Great-West Templeton Global Bond Fund. *Id*. From 2010 through 2016, the Great-West Templeton Global Bond Fund grew from $182.4 million to $359.1 million.

3. Board Approval of the Contested Funds' Fees

The ICA limits recovery to actual damages from excessive compensation as of the year preceding commencement of the action. 15 U.S.C. §80a-35(b)(3). Here, the relevant time period begins on January 29, 2015. Plaintiffs claim damages through December 31, 2017. The fees Defendants charged the Funds during this timeframe, and the Board's process for approving them, are described below.

a. The Board's annual 15(c) process

An investment adviser's compensation must be annually reviewed and approved by the majority of a mutual fund's independent directors. 15 U.S.C. § 80a-15(c). This is known throughout the industry as the "'15(c)' process." App. Vol. II at 519. The Board's 15(c) process "followed best practices recommended by industry authorities[,] including

the Mutual Fund Directors Forum, the Investment Company Institute, and the Fund Director's Guidebook." *Id.* at 483. As part of this process, the Board met five times per year, with four quarterly meetings and an annual meeting each April to approve Defendants' compensation and any relevant agreements.

The Board had an Independent Directors' Committee ("IDC") that met separately at the end of each quarterly meeting. The IDC also met every March to review 15(c) process materials in advance of the April meeting. These materials could total approximately 10,000 pages and included information about the six *Gartenberg* factors. *See* App. Vol. X at 2742–50 (March 2015 memo to the IDC from outside counsel describing the factors and how they should be applied); App. Vol. XV at 3537 (March 2015 IDC meeting minutes showing outside counsel presented on the factors and "noted that the information requested of [GWCM] and the sub-advisers was meant to address these factors"). The materials also included analysis from outside consultants—Lipper Inc. provided comparisons of peer funds' fees and performance, and JDL Consultants reported on the competitiveness and reasonableness of the Funds.[5] The IDC was represented by outside counsel, "who advised the directors regarding the materials they

[5] Lipper is a financial services firm. The district court found that "Lipper is a respected and widely used expert on comparative fee data with a 'stellar' reputation." App. Vol. II at 488. JDL is also a financial services firm. An independent director on the Board testified that JDL is a "well respected" national firm that "looks at fees and profitability and reasonableness and performance" of mutual funds. App. Vol. IV at 980. Plaintiffs do not challenge the competency of either firm.

should consider and whether the 15(c) materials they received were sufficient for them to make an informed decision." App. Vol. II at 482.

"The directors had six weeks with the [15(c)] material[s] before the April meeting, during which time they reviewed the material and asked GWCM follow-up questions." *Id.* IDC members received these materials two weeks before their 15(c) meeting in March.

b. GWCM's advisory services fees

Great-West Funds compensates GWCM based on a percentage of the total value of the average daily net assets under management for each fund. That percentage is expressed in basis points ("bps")—e.g., 15 bps is 0.15% of covered assets. For clarity's sake, the investment advisory services fees GWCM charged the Contested Funds during the relevant time period are listed in the following chart.

	Jan. 2015	May 2017	Aug. 2017
S&P 500 Index Fund	25 bps	19 bps	17 bps
S&P 600 Index Fund	25 bps	25 bps	21 bps
Real Estate Index Fund	35 bps	35 bps	35 bps
Templeton Global Bond Fund	95 bps	58 bps	58 bps

The March 2014 Investment Advisory Agreement governed GWCM's advisory services fees at the beginning of the relevant time period. Per this agreement, GWCM collected a 25 bps fee from the Great-West S&P 500 and S&P 600 Index Funds.[6] GWCM

[6] The 2014 agreement actually states these funds carry a 60 bps advisory services fee. But this number includes a 35 bps administrative services fee GWCM collected on behalf of GWL&A. *See* Part I.B.3.c, *infra*. GWCM kept only 25 bps. Every advisory services fee in the 2014 agreement includes this flat surcharge, including those for the Great-West Real Estate Index Fund and the Great-West Templeton Global Bond Fund.

also collected a 35 bps fee from the Great-West Real Estate Index Fund, and a 95 bps fee from the Great-West Templeton Global Bond Fund. GWCM's compensation did not change when the Board approved an Amended and Restated Investment Advisory Agreement on May 1, 2015.[7]

The underlying lawsuit was initiated in January 2016. At that time, the 2015 Amended and Restated Investment Advisory Agreement was in effect, and the 2016 15(c) process was underway. The IDC held its 15(c) meeting in March 2016, during which the directors questioned GWCM about specific Funds' expenses and fees. They also asked outside counsel to "request additional information from [GWCM] regarding the fees and expenses of the Great-West Templeton Global Bond Fund, the Great-West S&P 500 index Fund," and others. App. Vol. XV at 3542. GWCM provided responses to the Directors in advance of the Board's April 2016 meeting. The responses did not discuss the Great-West Templeton Global Bond Fund due to GWCM's ongoing review of that fund's expense structure and its stated intention to present the Board with a new proposal.

The Board met in April 2016, and questioned GWCM about the Great-West S&P 500 Index Fund's and the Great-West Templeton Global Bond Fund's fees and expenses. The Board then renewed the May 2015 Amended and Restated Investment Advisory Agreement for another year. GWCM's fees remained the same.

[7] The advisory services fees in the 2015 investment advisory agreement do not include the 35 bps surcharge, so they appear to be lower than those from 2014, despite GWCM collecting the same amount of money.

In June 2016, GWCM provided the Board with a presentation following up on questions from the April 2016 meeting. GWCM concluded its fees were "reasonable" and "consistent with industry averages." *Id.* at 3162, 3164. GWCM also said it expected to provide the Board with results from its ongoing "holistic review of the fund complex, including a review of each Fund's fee structure," at the September meeting. App. Vol. XIV at 3514. As part of that holistic process, GWCM prepared an internal document comparing the Funds' fees to the top ten best-selling large market funds on the Empower platform.

In September 2016, GWCM first proposed revising its fee and expense structure. The proposal included breakpoints—automatic fee reductions triggered when a fund reaches a certain size. GWCM proposed reducing fees on funds that reached $1 billion and $2 billion.

At a November 15, 2016, board meeting, GWCM submitted its proposal for Board approval. GWCM's portfolio manager said "the proposal is intended to position the Funds for future growth," and GWCM's goal is "to be priced reasonably and competitively with peers." App. Vol. XV at 3518–19. Because the Great-West S&P 500 Index Fund had hit the relevant breakpoints, GWCM proposed reducing its effective fee on that fund to 19 bps. For reasons unrelated to breakpoints, GWCM also proposed reducing its fee to 58 bps on the Great-West Templeton Global Bond Fund. GWCM did not propose immediately reducing fees for the Great-West S&P 600 Index Fund or Real Estate Index Fund. The independent directors then requested "GWCM provide further analysis on the proposals for the Great-West S&P 500 Index" and a different fund, and

the Board scheduled another meeting for November 18 "to consider such analysis and to defer any further consideration of the proposals until such time." *Id.* at 3522.

On November 18, 2016, the Board approved GWCM's proposal. Because the new fee and expense structure contained changes besides fee reductions,[8] the Board chose to have the proposal take effect in May 2017 so shareholders could approve all the changes at once as part of the annual 15(c) process. The Board re-approved the proposal on November 30 to correct clerical errors. The Amended and Restated Investment Advisory Agreement dated May 1, 2017, included the proposed fee reductions.[9]

In June 2017, as part of its "constant[] reassess[ment of] fund expenses in an effort to keep the Great-West Funds competitively positioned," GWCM volunteered further fee reductions. App. Vol. XI at 2942–43. GWCM proposed reducing its fees on the Great-West S&P 500 Index Fund to 17 bps and on the S&P 600 Index Fund to 21 bps. Its stated goal was to "make [the] Funds more competitive with their passively-managed peers." *Id.* at 2943. The reductions took effect in August 2017.

[8] These other changes are not relevant to this appeal.

[9] The fee schedule in the 2017 investment advisory agreement lists an 18 bps fee for the Great-West S&P 500 Index Fund, but GWCM and the parties treat the fee as 19 bps. *See* App. Vol. XI at 2911 (noting the fee listed in the schedule "was actually 0.186% and has since been rounded up to 0.19%").

c. GWL&A's administrative services fees

Great-West Funds compensates GWL&A through a 35 bps administrative services fee charged to certain share classes of Great-West Funds stock. This fee has not changed during the relevant time period.

A 2006 administrative services agreement between GWCM and GWL&A set the price and terms of GWL&A's fees at the start of the relevant time period. GWL&A did not collect its compensation directly. GWCM added GWL&A's 35 bps fee to its own advisory fee, collected the total amount from the Funds, and then passed GWL&A its portion of those monies. For example, GWCM charged the Great-West S&P 500 a 60 bps fee, keeping 25 bps for itself and giving 35 bps to GWL&A.

The 2006 agreement terminated in May 2015, in conjunction with the creation of Empower. GWL&A then entered into an administrative services agreement with Great-West Funds directly. The Board approved this agreement at its September 2014 quarterly meeting, and it went into effect on May 1, 2015. GWL&A still charged a 35 bps fee under this agreement, but it was now paid directly by the Funds.

Around this same time, Great-West Funds began issuing Institutional Class shares of its mutual funds, alongside the Initial Class and Class L shares it had historically issued. Great-West Funds offered each Contested Fund in all three shares of classes. Under the 2015 agreement, Institutional Class shares are not charged administrative services fees. Customer plans "may choose the Institutional share class of the Funds . . . and pay for recordkeeping through fees charged at the plan or participant level." App. Vol. II at 492*; see also* App. Vol. IV at 1124 (independent director testimony, noting "it

is [a customer's] decision how they want to pay for [their plans]; whether it is by the sponsor, by the participant fee, by a 12b-1 fee, or by using a 35 basis points administrative fee"); App. Vol. V at 1361–62 (independent director testimony, saying "whether a plan sponsor . . . picks the institutional share class with zero basis points or the investor class with 35 basis points, GWL&A is going to basically make the same amount of money on that plan"). Plans created before 2015 did not have the ability to select Institutional Class shares, but could switch to Institutional Class shares later.

The Board renewed the 2015 Administrative Services Agreement at its April 2016 15(c) annual meeting. However, at the IDC's separate meeting in March 2017, the independent directors had questions about the administrative services fee. The "performance and expense analysis" JDL Consultants provided them "use[d] the Institutional Class shares," and because they do not pay the administrative services fee, the directors thought it was "difficult to assess the reasonableness of such fees relative to peer groups." App. Vol. XV at 3551. The independent directors then "requested peer group fee and expense data for the non-Institutional Share classes of the Funds." *Id.* at 3533. This information was provided, and, after further review and discussion, the Board renewed the 2015 Administrative Services Agreement in April 2017. The Board also changed the agreement's name to the Shareholder Services Agreement.

C. Procedural History

1. Pretrial Proceedings

In January 2016, Plaintiffs filed a shareholder derivative action under § 36(b) alleging GWCM breached its fiduciary duty by charging excessive investment advisory

services fees. In December 2016, Plaintiffs filed another derivative action under § 36(b) challenging the administrative advisory services fees charged by GWCM and GWL&A. These cases were consolidated with a third against GWCM, filed in May 2016 by the Duplass 401(k) Plan. Plaintiffs filed a Consolidated Amended Complaint in September 2017, which was amended in October 2018. Plaintiffs, derivatively on behalf of Great West Funds, "sought to recover for the [F]unds the Defendants' excess compensation and the [F]unds' lost investment opportunity." Aplt. Br. at 9. Seventeen mutual funds were at issue.

Defendants filed a motion to dismiss and a motion for summary judgment. The district court dismissed some plaintiffs who lacked standing, but it denied summary judgment after "rel[ying] on opinions offered by Plaintiffs' expert . . . J. Chris Meyer" to conclude genuine material facts were disputed. App. Vol. II at 520–21. Defendants filed a motion to strike Mr. Meyer as an expert shortly thereafter. The district court denied the motion, stating "weaknesses in Mr. Meyer's qualifications and conclusions were proper subjects for cross examination, but they did not preclude him from testifying."[10] *Id.* at 521.

[10] In a subsequent order sanctioning Plaintiffs' counsel, the district court stated, "[i]f Plaintiffs had accurately represented the limitations of Mr. Meyer's expert opinions, it is highly likely that this case would not have survived Defendants' Motion for Summary Judgment." Aple. Supp. App. at 79 n.1.

2. The Bench Trial

The district court held an eleven-day bench trial in January 2020. Plaintiffs presented four fact witnesses. Three were plaintiff shareholders and the other was a trustee of the Duplass Plan. The district court found the fact witnesses' "testimony had limited probative value with respect to whether Defendants' fees were excessive." *Id*. The district court emphasized this point by highlighting two examples—Ms. Obeslo testifying she was happy because her retirement account kept making money, and a former trustee of the Duplass 401(k) Plan saying he opposed initiating the litigation.

Plaintiffs' sole expert witness was Mr. Meyer, and he was the "only witness that Plaintiffs produced who attempted to calculate damages." *Id.* at 528. Mr. Meyer "was formerly employed at Nationwide Funds, Delaware Investments, Putnam, and Kemper Financial Services, in a variety of roles . . . [but he had] not worked in the mutual fund industry since 2009." *Id.* at 524. The district court stated Mr. Meyer was "**thoroughly discredited** on cross examination," noting just a few of the "abundant examples of . . . weaknesses and inconsistencies in Mr. Meyer's testimony." *Id.* 528–29 (emphasis in original). The district court found "Mr. Meyer's testimony to be non-credible . . . [and] his specific theories regarding Plaintiffs' alleged damages [to be] legally flawed." *Id.* at 529.

Defendants called nine fact witnesses. They included independent directors Gail Klapper, Steven McConahey, and R. Timothy Hudner. *Id.* at 522. The directors' testimony focused on the 15(c) process. The district court found the "evidence makes clear that the directors closely scrutinized fees, resulting in numerous fee reductions." *Id.*

at 486. The Board "asked about breakpoints or fee reductions at nearly every meeting dating back to at least 2013," *id.* at 483–84, and it engaged in a "robust push and pull process . . . with the Board continuing to press for reductions and breakpoints even when GWCM provided industry data showing the Funds were not typical candidates for breakpoints, and even when Lipper . . . agreed with that data," *id.* at 484–85. Six of Defendants' employees also testified. They discussed "the market in which Defendants compete, how Defendants function as business entities, the process of corresponding with the Board in order to set the fees at issue, and Defendants' profitability." *Id.* at 523.

Defendants also presented two expert witnesses. Arthur Laby, a professor at Rutgers Law School, "was qualified as an expert in mutual fund governance." *Id.* at 524. Dr. Glenn Hubbard is a Professor of Finance and Economics, a former Dean at the Graduate School of Business at Columbia University, and a Professor of Economics at Columbia. He was "qualified as an expert in financial analysis, mutual fund fee analysis, and economies of scale." *Id.*

3. District Court Decision

In August 2020, the district court entered judgment in favor of Defendants on two independent grounds. First, the district court found Defendants did not breach their fiduciary duties under § 36(b), concluding "that Plaintiffs failed to meet their burden of proof with respect to **all** of the *Gartenberg* factors." *Id.* at 527 (emphasis in original). The district court also found that "even though they did not have the burden to do so, Defendants presented persuasive and credible evidence that overwhelmingly proved that their fees were reasonable and that they did not breach their fiduciary duties." *Id.* at 528.

Thus, the district court adopted and incorporated by reference Defendants' proposed findings of fact and conclusions of law regarding "the *Gartenberg* factors and the surrounding circumstances." *Id.* at 527.

Second, the district court found Plaintiffs "did not establish that **any** actual damages resulted from Defendants' alleged breach of fiduciary duty." *Id.* (emphasis in original). The district court reached this conclusion after refuting each of Mr. Meyer's three theories regarding Plaintiffs' alleged damages. When the district court juxtaposed Mr. Meyer's "fundamentally flawed" damages theories "with the inadequacy of his testimony overall, [it] conclude[d] that his opinions [were] entitled to **no weight**." *Id.* at 533 (emphasis in original). Thus, the district court concluded, "the record is devoid of any evidence that suggests that Plaintiffs sustained actual damages as a result of the fees that Defendants charged." *Id.*

II. DISCUSSION

"In an appeal from a bench trial," this court "review[s] the district court's factual findings for clear error, and its legal conclusions de novo." *Holdeman v. Devine*, 572 F.3d 1190, 1192 (10th Cir. 2009) (quotation marks omitted). Factual findings "are clearly erroneous when they are unsupported in the record," or if "we have the definite and firm conviction that a mistake has been made" after reviewing all the evidence. *Id.* (quotation marks omitted). The same standard applies to factual findings adopted from Defendants' proposed findings. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985) ("[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous."). The district court "has the

exclusive function of appraising credibility, determining the weight to be given testimony, drawing inferences from facts established, and resolving conflicts in the evidence." *Holdeman*, 572 F.3d at 1192 (quotation marks omitted). Therefore, this court "view[s] the evidence in the light most favorable to the district court's ruling and must uphold any district court finding that is permissible in light of the evidence." *Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1305 (10th Cir. 2015) (quotations marks omitted).

Plaintiffs must show more than the viability of their own theory to warrant remand under the clear error standard. They must demonstrate the district court's findings were impermissible. *See Anderson*, 470 U.S. at 574 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). Plaintiffs must prove even more to justify reversal. They must show the district court's conclusions were impermissible *and* they carried their own burden under § 36(b). *Id.* As we now explain, Plaintiffs cannot do so.

A. Breach

Defendants breach their fiduciary duty under § 36(b) if their compensation "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. Courts evaluate breach by considering "all relevant circumstances," including the six factors specifically set forth in *Gartenberg*. *Id.* at 353. The *Gartenberg* factors are:

> (1) the nature, extent, and quality of the services provided by the adviser to the shareholders; (2) the profitability of the mutual fund to the adviser; (3) "fall-out" benefits, such as indirect profits [accruing to the adviser due

> to its relationship with the fund]; (4) economies of scale achieved by the adviser as a result of growth in assets under the fund's management and whether savings generated from the economies of scale are shared with shareholders; (5) comparative fee structures used by other similar funds; (6) the level of expertise, conscientiousness, independence, and information with which the board acts.

Goodman v. J.P. Morgan Inv. Mgmt., Inc., 954 F.3d 852, 857 (6th Cir. 2020) (citing *Jones*, 559 U.S. at 344–45, 344 n.5). The *Gartenberg* factors implicate a bevy of factual considerations. Yet, two basic patterns pervade Plaintiffs' arguments and tilt each factor in Defendants' favor.

First, Plaintiffs cannot overcome the standard of review they face on appeal. The district court found for Defendants on each of the six *Gartenberg* factors. Because no single factor is dispositive, Plaintiffs must convince this panel that the district court erred on enough issues to justify overturning a multifactor balancing test on clear error review. They cannot carry such a heavy burden. The record is so flush with support for the district court's factual findings that Plaintiffs are left with little recourse beyond relitigating facts decided in district court. The substantial deference this court affords the district court's factual conclusions dooms this effort.

Second, even putting aside this arduous standard of review, Plaintiffs fail to satisfy their burden under § 36(b). Section 36(b) modifies the common law standard for breach of fiduciary duty "in a significant way: it shifts the burden of proof from the fiduciary to the party claiming breach . . . to show that the fee is outside the range that arm's-length bargaining would produce." *Jones*, 559 U.S. at 347. Plaintiffs neither present evidence establishing the outer bounds of arm's-length bargaining, nor show why Defendants' fees

are outside that range. Plaintiffs' focus on discrediting Defendants' evidence misapprehends their burden under § 36(b).

These patterns reemerge throughout the forthcoming analysis. We now turn to the *Gartenberg* factors, in reverse order, holding the district court did nor err on any factor.

1. Deference to the Board

The sixth *Gartenberg* factor is "the level of expertise, conscientiousness, independence, and information with which the board acts." *Goodman*, 954 F.3d at 857. The emphasis this factor received in *Jones*, and its unique basis in the statutory text, suggest it is the most important. *See* 15 U.S.C. § 80a-35(b)(2) (instructing courts to give board approval of agreements "such consideration . . . as is deemed appropriate under all the circumstances").

The district court found the Board's directors to be independent and qualified. Plaintiffs do not challenge this finding on appeal, instead reframing the relevant question as "not whether the directors were 'independent' . . . [as defined] under 15 U.S.C. §§80a−10(a) and 80a–2(a)(19)," but "whether the directors acted for the benefit of the shareholders instead of Defendants." Aplt. Reply at 22. We are not so quick to dismiss the importance of complying with the ICA's text or the Supreme Court's direction. And where Plaintiffs have failed to challenge the district court's finding that the Board's directors were independent and well-qualified, this factor already tilts in favor of Defendants.

Moreover, Plaintiffs mischaracterize the key inquiry. The Supreme Court has stressed "the standard for fiduciary breach under § 36(b) does not call for judicial second-

guessing of informed board decisions." *Jones*, 559 U.S. at 352. Accordingly, the critical inquiry is whether the "board's process for negotiating and reviewing investment-adviser compensation is robust." *Id.* at 351. Courts are comparatively ill-suited to determine what fee structures most benefit shareholders. Thus, Congress designed the ICA to balance judicial scrutiny and board oversight. *See id.* at 348 (stating independent director scrutiny and shareholder suits "are mutually reinforcing but independent mechanisms for controlling conflicts" under the ICA). Courts respect this statutory design by "afford[ing] commensurate deference to the outcome of the bargaining process" when a board's 15(c) process is robust. *Id.* at 351. A disinterested board's decision that "considered the relevant factors . . . is entitled to considerable weight, even if a court might weigh the factors differently." *Id.* But if the "board's process was deficient or the adviser withheld important information, the court must take a more rigorous look at the outcome." *Id.* Additionally, a court "must take into account both [the] procedure and [the] substance" of a board's 15(c) process when deciding if its process was robust. *Id.*

The record supports the district court's finding that "the Board's decision to approve the fees is entitled to substantial deference" because it "engaged in a robust process in approving Defendants' fees." App. Vol. II at 527. The district court found the Board's 15(c) process "followed best practices recommended by industry authorities." *Id.* at 483. The district court also credited Professor Laby's testimony that the Board's "meeting schedule was 'at least as good or better than most boards I have seen.'" *Id.* at 481. The independent directors were provided "extensive information" that Professor

Laby testified was "adequate to evaluate each [*Gartenberg*] factor."[11] *Id.* at 482. The IDC was also represented by outside counsel and received analysis from independent consultants, which Professor Laby testified "very much enhances a board's independence." *Id.*

Plaintiffs concede "Defendants and the directors followed the *formalities* of a robust approval process," but Plaintiffs contend "they did nothing with that material that was *substantively* robust." Aplt. Br. at 37 (emphasis in original). However, the record contains numerous examples suggesting otherwise. Professor Laby testified "the Board was highly engaged in the 15(c) process," and the directors were "actively engaged with respect to fees." App. Vol. II at 83. And the district court found the "evidence makes clear that the directors closely scrutinized fees, resulting in numerous fee reductions." *Id.* at 486. This evidence includes "the Board ask[ing] about breakpoints or fee reductions at nearly every meeting dating back to at least 2013," and the IDC immediately inquiring about fee reductions after GWCM lowered its subadviser costs on the Great-West S&P

[11] Plaintiffs claim the "directors agreed to have the Funds pay [the administrative services] fee without addressing any of the *Gartenberg* factors." Aplt. Br. at 43 (emphasis omitted). However, Plaintiffs draw this conclusion solely from the failure of Board minutes to mention the factors were discussed. *Id.* (treating minutes from the April 2015 meeting Board approving the Administrative Services Agreement that do not mention a discussion about the factors as proof of the Board not considering them). Ms. Klapper testified that discussions of these factors occurred at that same meeting. *See* App. Vol. III at 818 ("I am telling you today, we look at the *Gartenberg* factors for all of these agreements . . . I don't think that these minutes reflect everything that was said over the course of the entire day."). The district court is responsible for "resolving conflicts in the evidence." *Holdeman*, 572 F.3d at 1192. We defer to the district court's resolution of this factual dispute in Defendants' favor.

500 and 600 Index Funds in 2015.[12] *Id* at 483–84. It also includes Board minutes that "reflect the robust push and pull process" with GWCM about their fees, despite GWCM and Lipper providing "industry data showing the Funds were not typical candidates for breakpoints." *Id.* 484–85. Furthermore, the Board's "continued push for a comprehensive fee restructuring" ultimately led to fee reductions saving "shareholders of the Great-West S&P 500 Index Fund . . . $1.6 million." *Id.* at 485.

The record does not indicate the district court's findings of fact were unsupported, mistaken, or impermissible. Plaintiffs' recycled arguments are unpersuasive. Specifically, they argued that the Board was too small, some directors appeared unknowledgeable at trial, the Board did not properly evaluate 15(c) materials, the Board took too long to enact fee reductions, and Professor Laby was not credible. These critiques all seek to relitigate the import of evidence in the record, but "[i]t is not the role of an appellate court to retry the facts." *Holdeman*, 572 F.3d at 1192. And even if these contentions have merit, they do not render the district court's findings impermissible. Not even Plaintiffs' most potent critique—that GWCM understated the profitability on its advisory fee by including GWLA's fee in the calculation—proves the 15(c) process was insufficiently robust. *See*

[12] In December 2015, the Board approved the selection of a new subadviser for the Great-West S&P 500 and S&P 600 Index Funds, effective April 2016. This subadviser charged a lower subadvisory fee, thereby increasing GWCM's profits, since GWCM paid subadvisers to manage fund investments out of its own fee. At the December meeting, the independent directors asked "why GWCM was not lowering its fees with respect to [these] index Funds" given its increased revenues. App. Vol. XIII at 3451. GWCM's portfolio manager "explained that GWCM intends to review its fee structure" for all the Funds "in connection with" the 2016 15(c) process. *Id*.

Goodman, 954 F.3d at 865–66 (stating a board's "thoughtful review process that considered substantial information from [an adviser], . . . as well as information from independent third parties" is still robust even if an adviser "may not have presented to the Board all the information [the plaintiffs] wanted"). Plaintiffs propose an alternative interpretation of the facts; they do not highlight clearly erroneous information or fatally discredit any of the district court's findings.

Finally, Plaintiffs' argument that the Board failed to engage in substantive oversight is unavailing. Plaintiffs contend the Board's cooperative posture during the 15(c) process means they "never negotiated on behalf of shareholders over Defendants' compensation." Aplt. Br. at 39. This theory relies on a circumscribed understanding of negotiation—suggesting arm's-length bargaining requires a level of adversarial conflict not present here. *See id.* at 39 ("The directors never rejected a fee that GWCM or GWLA requested."); *id.* at 40–41 (criticizing the Board for "never demand[ing] a similar fee reduction from GWCM" after it hired a new subadviser in 2015); *id.* at 41 (noting "no director objected" to GWCM's conclusion that its fee was reasonable in June 2016); *see also* Aplt. Reply at 20 (panning the Board for accepting GWCM's first proposal).[13]

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[13] Plaintiffs also defend their argument in two other ways. First, Plaintiffs cite testimony from Ms. Klapper purportedly admitting the Board did not negotiate. *See* Aplt. Br. at 39 (noting Ms. Klapper "objected that 'negotiate' was 'kind of a strong term'"). But when her full testimony is examined, Plaintiffs' mischaracterization of her testimony is apparent. *See* App. Vol. III at 834 ("We spent a lot of time talking to the adviser about fees. 'Negotiate' is kind of a strong term, in terms of our process with regard to the adviser. We asked for a lot of facts. We had an opportunity to express our opinion about whether or not—what the adviser might want to do. *I suppose you could call that negotiation*.") (emphasis added). Second, citing an email exchange between Defendants' employees, Plaintiffs claim the fee reductions were "an effort by GWCM to 'get ahead of

The district court expressly rejected this restricted interpretation of negotiation. *See* App. Vol. II at 486 ("Plaintiffs' suggestion that the Board and adviser must engage in adversarial negotiations is unsupported."). Indeed, Plaintiffs' assertion comes perilously close to arguing a more robust process or conscientious board would have necessarily pursued lower fees or employed more aggressive tactics—an argument repeatedly rejected by courts. *See, e.g.*, *In re BlackRock Mut. Funds Advisory Fee Litig.*, 327 F. Supp. 3d 690, 716 (D.N.J. 2018) (noting the "ICA does not impose a duty on the board of directors of a mutual fund to negotiate the lowest possible advisory fee"), *aff'd*, 816 F. App'x 637 (3d Cir. 2020); *Zehrer v. Harbor Cap. Advisors, Inc.*, Nos. 14 C 00789, 14 C 07210, 2018 WL 1293230, at *7 (N.D. Ill. Mar. 13, 2018) ("Even if the Board might have driven a harder bargain, the legal standard does not require that.").

Even if this theory had merit, Plaintiffs' burden is to show the district court's conclusion that the "board's process for negotiating and reviewing [Defendants'] compensation [was] robust" is impermissible on the record. *Jones*, 559 U.S. at 351; *see also Anderson*, 470 U.S. at 573–74 (articulating plaintiff's burden on clear error review). The district court found "shareholders of the Great-West S&P 500 Index Fund saved $1.6 million as a result of *negotiated* breakpoints and fee reductions." App. Vol. II at 485 (emphasis added). For reasons already discussed, the record does not suggest this is a

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the litigation environment'" and not a product of negotiation. Aplt. Reply at 21; *see also* App. Vol. XI at 2911. Yet, an email between two of Defendants' employees cannot negate evidence of the Board's participation in negotiations.

clearly erroneous interpretation of events. Accordingly, this factor weighs heavily in Defendants' favor and puts reversal or remand far out of reach.

2. Fee Comparisons

The fifth *Gartenberg* factor examines "comparative fee structures used by other similar funds." *Goodman*, 954 F.3d at 857. Market competition does not sufficiently regulate adviser fees, but this "do[es] not suggest that rates charged by other adviser-managers to other similar funds are not a factor to be taken into account" under § 36(b). *Gartenberg*, 694 F.2d at 929.

Still, Plaintiffs make the Board's use of the Lipper fee comparisons—and the district court's adoption of the Board's reasoning—the centerpiece of their appeal. They allege: (1) the district court and the Board relied too heavily on the fee comparisons when deciding GWCM's fees were reasonable; (2) the fee comparisons were inappropriate because they compared total expense ratios of mutual funds, instead of the discrete advisory and administrative services fees at issue; (3) the fee comparisons did not show GWCM's advisory services fees were within the range of comparable funds; (4) the court should have considered different fee comparisons that GWCM itself prepared; and (5) the directors did not use fee comparisons when assessing GWL&A's advisory fees. Aplt. Br. at 13–23. None of these arguments prove persuasive.

a. Reliance on fee comparisons

Unlike Plaintiffs' other fee comparison arguments, their claim that the district court relied too heavily on fee comparisons—and thus ran afoul of *Jones*—raises a question of law and is reviewed de novo. The Supreme Court has stated "courts should

not rely too heavily on comparisons with fees charged to mutual funds by other advisers" because those other fees "may not be the product of negotiations conducted at arm's length." *Jones*, 559 U.S. at 350–51. Plaintiffs claim the district court ignored this directive, but their claim is unavailing for several reasons.

First, Plaintiffs do not explain how or why the district court crossed a threshold from proper consideration of fee comparisons—which is required under *Gartenberg*—to relying on them too heavily—which the *Jones* Court admonished. They merely note "[t]he district court adopted in whole [the comparative fees] section of Defendants' proposed findings and conclusions, which was longer than any other *Gartenberg* factor section" in Defendants' Proposed Findings of Fact and Conclusions of Law. Aplt. Reply at 7. But adopting a thorough argument does not demonstrate undue reliance on it, particularly when the district court's judgment did not turn on fee comparisons alone. The district court held that "Plaintiffs failed to meet their burden of proof with respect to **all** of the *Gartenberg* factors." App. Vol. II at 527 (emphasis in original). Thus, Plaintiffs provide no reason to believe the district court's consideration of Defendants' fee comparisons conflicted with *Jones*.

Second, Plaintiffs' critique that the directors heavily relied on the fee comparisons, and the district court merely rubberstamped the directors' decision, misses the mark. *Jones* warns courts against heavily relying on fee comparisons during judicial review. 559 U.S. at 350–51. But nothing in *Jones* dictates what information directors, as opposed to the court, should rely on during their 15(c) process. *See id.* Indeed, courts have permitted boards to consider similar fee comparisons as part of their 15(c) process. *See*

Goodman, 954 F.3d at 862 (observing that fee comparisons specifically compiled by Lipper can be appropriate under *Jones* because the reports are "widely accepted in the field as a tool to compare fees and performance in the mutual fund industry"). And even if the Board relied on fee comparisons during its own multi-faceted deliberation, the district court did not violate *Jones* by approving the Board's ultimate decision. On the contrary, *Jones* instructs courts to defer to outcomes of robust 15(c) processes, *see* 559 U.S. at 351, like the process at issue here.

Third, Plaintiffs' argument that the district court's consideration of the Lipper fee comparison violated *Jones* because "[t]here was no evidence at trial that Defendants' Lipper comparison funds fees resulted from arm's length bargaining" misunderstands the burden of proof under § 36(b). Aplt. Br. at 14. Plaintiffs criticize the district court for "not explain[ing]" how the comparison "demonstrated GWCM's fee was proportionate to the services it provided [for the Great-West S&P 500 Index Fund], when its services were little different from other S&P 500 index funds." *Id*. at 16. They also chide Defendants for "provid[ing] no standard for a court to determine [when a fee] is 'within range'" of its peers. Aplt. Reply at 10. But *Jones* places no such burden on either the district court or the Defendants. As the district court recognized, Defendants "did not have the burden" to present the "persuasive and credible evidence that overwhelmingly proved that their fees were reasonable." App. Vol. II at 528. The burden was on Plaintiffs to prove Defendants' compensation 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. Plaintiffs made no effort to do so, and the district court's consideration of fees, absent such affirmative evidence, is not at odds with *Jones*.[14]

Fourth, this case is easily distinguishable from the cases *Jones* warned against. Defendants correctly note the district court's decision is more nuanced than the opinion *Jones* overturned. *See* Aple. Br. at 29 (recognizing *Jones* reversed a decision "that placed almost exclusive reliance" on fee comparisons). Indeed, in the overturned decision, the Seventh Circuit expressly held "we now disapprove the *Gartenberg* approach." *Jones v. Harris Assocs. L.P.*, 527 F.3d 627, 632 (7th Cir. 2008). Here, the district court considered each *Gartenberg* factor, finding that none weighed in favor of Plaintiffs.

For the above reasons, the district court's consideration of the Lipper fee comparison was not legal error. We now turn to the many reasons the district court

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[14] Plaintiffs' attempt to discredit the Lipper fee comparisons illustrates their unusual approach to the comparative fees factor. As Defendants note, much of Plaintiffs' claim ignores that they "bear the burden on the comparative fees factor." Aple. Br. at 29. Typically, plaintiffs use this factor to identify a reasonable range of fees that, by comparison, a defendant's compensation exceeds. *See, e.g.*, *Chill v. Calamos Advisors LLC*, 417 F. Supp. 3d 208, 258 (S.D.N.Y. 2019) (noting the plaintiffs there sought "to use two sets of comparisons to prove excessive advisory fees").

Plaintiffs continue to argue GWCM's internal fee comparisons showed GWL&A's administrative services fee "was grossly disproportionate to the service GWL[&]A provided to [the Contested] Funds." Aplt. Reply at 9. However, the district court found these comparisons to be largely irrelevant. App. Vol. II at 493. Instead, the district court credited competing evidence showing the GWL&A fees were reasonably proportionate, including deposition testimony from Plaintiffs' own expert witness who admitted "a 35 bps fee for administration in the context of a 401(k) plan was *not* excessive, because 'this is between the plan sponsor and the administrator as to what a fair fee is, and the fund board shouldn't be in the middle of that.'" *Id*. at 491 (emphasis in original) (quoting the trial transcript).

permissibly concluded this fee comparison demonstrated Defendants' fees "were reasonable and that they did not breach their fiduciary duties." App. Vol. II at 528.

b. Appropriateness of fee comparisons

Plaintiffs argue "[t]he fee comparisons on which the district court relied were inappropriate . . . because they compared funds' total expense ratios instead of advisory fees or administrative fees." Aplt. Br. at 15. The district court disagreed, based largely on Dr. Hubbard's testimony. Dr. Hubbard "credibly testified" that Lipper's decision to compare the total expense ratio of the Funds to their peers was "the most relevant metric for evaluating the fees paid by shareholders" given the unitary advisory fee the Funds paid for most of the relevant time period.[15] App. Vol. II at 488. He also testified that "Lipper used a reasonable framework for selecting peers." *Id.* at 489. Plaintiffs respond by arguing the decision to compare total expense ratios, and to not isolate discrete fees for comparison, prevented the Board from being able to "separately determine how GWCM's advisory fee and GWLA's administrative services fee each and separately compared to other funds." Aplt. Br. at 17.

But the operative question on appeal is not which approach proves superior. Both methodologies discount and highlight different costs and benefits. Rather, the proper question is whether the district court clearly erred by concluding fee comparisons using

[15] A fund's total expense ratio is the total of all fees charged to shareholders in exchange for the services provided to the fund. *Id.* at 519. A unitary advisory fee is a fee structure under which the fees cover more services and expenses than other funds in the industry. For example, a unitary fee structure may combine pure advisory work with other costs like registration or other support services.

total expense ratios of funds were appropriate. The answer to that question is "no"; the record supports the district court's determination. The only expert witness to discuss this issue was Dr. Hubbard, and the court deemed him credible. App. Vol. II at 488. Additionally, the court concluded Defendants' fees "cover[] more services and expenses than most other funds," which weighs in favor of using comparative metrics that better capture the total price of broader services. *Id.*; *see also id.* at 490 (noting Dr. Hubbard testified that "looking only at advisory fees . . . is not 'the comparison one would do from an economic perspective'"). Thus, the district court's position is a permissible interpretation of the facts and was not clearly erroneous.[16]

c. Within range of comparable funds

The district court's finding that Defendants' "Advisory Fees and Administrative Fee were within the range of comparable funds" is also not clearly erroneous. *Id.* at 527. Plaintiffs criticize this finding, arguing that "what is 'within range' is nothing more than the *ipse dixit* of Defendants or their expert." Aplt. Reply at 10. However, this response underscores Plaintiffs' misunderstanding of the clear error standard of review and their

[16] Plaintiffs also argue the district court's approval of Lipper fee comparisons is tantamount to endorsing market competition theory. *See* Aplt. Reply at 3 (arguing "the district court's undue reliance on Lipper fee comparisons" is equivalent to saying "fees that are 'within range' of other mutual funds must be proportionate" because market competition between funds constrains pricing). This argument flows from the Supreme Court's instruction that "courts should not rely too heavily on comparisons with fees charged to mutual funds by other advisers . . . because these fees . . . may not be the product of negotiations conducted at arm's length." *Jones*, 559 U.S. at 350–51. As previously discussed, the district court did not rely too heavily on these comparisons. *See* Part.II.B.2.a, *supra*. Accordingly, Plaintiffs dramatically overstate how much market theory "pervade[s] the district court's analysis." Aplt. Reply at 3.

burden under § 36(b). The district court agreed with Defendants' analysis that their fees were within range of their peers, in part because Plaintiffs did not provide credible contradictory evidence during the bench trial. This finding is far from clearly erroneous.

Plaintiffs also dispute this finding by: (1) selectively citing outlying fees as proof of unreasonableness; (2) blaming the district court for not defining what constitutes being within the range of other fees; (3) criticizing the use of generic fee comparisons over fund-specific fee comparisons; and (4) redeploying factual arguments rejected by the district court.[17] But none of these arguments establish the district court clearly erred.

The first argument wrongly assumes high fees are inherently disproportionate. *See Pirundini v. J.P. Morgan Inv. Mgmt. Inc.*, 309 F. Supp. 3d 156, 164 n.10 (S.D.N.Y. 2018) ("It is well-settled that 'charging a fee that is above the industry average does not violate Section 36(b).'") (quoting *Paskowitz v. Prospect Cap. Mgmt. L.P.*, 232 F. Supp. 3d 498, 504 (S.D.N.Y. 2017)). It also ignores the district court's findings that Defendants' fees were below average when looking at other data sets. The second argument improperly shifts the burden of proof onto the district court. The third argument's claim that fund-specific analysis should be the preferred methodology is not grounded in the law. *See Kasilag v. Hartford Inv. Fin. Servs., LLC*, 745 F. App'x 452, 456 (3d Cir. 2018) (unpublished) ("[T]he text of § 36(b) [does not] require[] a separate analysis for each Fund at issue. . . ."). And the fourth argument attempts to relitigate the facts in this court, which is an approach that cannot succeed or establish clear error.

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[17] For example, Plaintiffs reargue that index funds do not warrant higher fees than actively managed funds because they are commodity-like products. Aplt. Br. at 19.

d. GWCM's internal fee comparisons

Plaintiffs also claim the "district court entirely ignored" the draft fee comparison of peer funds GWCM prepared in June 2016, which it argues is a more apt comparison. Aplt. Reply at 9. This is mistaken. The court specifically called this draft fee comparison "aspirational" and found it to be largely irrelevant "due to [the] different structures and significantly higher assets" in the funds analyzed by GWCM. App. Vol. II at 493. The court's decision not to give this draft fee comparison more weight than the Lipper fee comparison is not clearly erroneous. *See Goodman*, 954 F.3d at 863 ("Lipper reports are widely used in the industry."); *Holdeman*, 572 F.3d at 1192 (noting the district court "has the exclusive function of appraising credibility, determining the weight to be given [to evidence], . . . and resolving conflicts in the evidence").

e. Fee comparisons for GWL&A

Plaintiffs further argue that "Defendants did not even provide [the district court] Lipper fee comparisons for GWLA's 35 bp fee." Aplt. Br. at 22. Defendants dispute this, but even if true, the argument does not advance Plaintiffs' case. As Defendants note, "Plaintiffs had the burden of proof on the comparative fees factor. Thus, even if Plaintiffs were correct that that [sic] there was no third party data on administrative fees, that would only further support the conclusion that they failed to satisfy their burden."[18] Aple. Br. at 38.

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[18] Plaintiffs do not respond to this argument in their Reply Brief.

3. Economies of Scale

The fourth *Gartenberg* factor is "economies of scale achieved by the adviser as a result of growth in assets under the fund's management and whether savings generated from the economies of scale are shared." *Goodman*, 954 F.3d at 857. The district court found "Plaintiffs failed to quantify any alleged economies of scale or show that those economies were not adequately shared with shareholders." App. Vol. II at 527. It further concluded that Plaintiffs needed to "quantify economies of scale" for each Contested Fund to prevail on this factor. *Id.* at 529. Quantifying economies of scale requires demonstrating "the per unit cost of performing Fund transactions decreased as the number of transactions increased." *Id.* at 499 (quoting *Krinsk v. Fund Asset Mgmt., Inc.*, 875 F.2d 404, 411 (2d Cir. 1989)).

We need not resolve whether this factor requires § 36(b) plaintiffs to provide quantified economies of scales. Even ignoring the quantification issue, Plaintiffs did not present any evidence proving GWCM achieved economies of scale. Although Plaintiffs argue certain graphs displayed these economies of scale, the district court rejected these graphs as irrelevant. Specifically, the court found the graphs did not "analy[ze] . . . actual total costs . . . [and the graphs] assumed certain costs were fixed when in fact they were not." App. Vol. II at 497. Further, Plaintiffs' expert witness admitted to not accounting "for methods of sharing economies of scale that Defendants had in place, such as fee waivers and reinvestment programs." *Id.* at 529. The expert witness also admitted that "some of his assumptions about relevant facts" he used to find economies of scale "were

inaccurate." *Id*. Under these circumstances, the district court's conclusion on this factor does not constitute clear error.

4. Fall-Out Benefits

The third *Gartenberg* factor is ascertaining the "fall-out benefits" that accrue to the adviser due to its relationship with the fund. *Goodman*, 954 F.3d at 857. The district court found "Plaintiffs failed to identify any significant fall-out benefits that Defendants acquired." App. Vol. II at 528. Plaintiffs do not contest the district court's finding on appeal, and this factor weighs in Defendants' favor.

5. Profitability

The second *Gartenberg* factor is considering "the profitability of the mutual fund to the adviser." *Goodman*, 954 F.3d at 857. This also weighs in Defendants' favor.

First, Plaintiffs do not offer persuasive evidence demonstrating Defendants' profits exceeded the outer bounds of arm's-length bargaining. This is their statutory burden. *See Jones*, 559 U.S. at 347 (noting plaintiffs must "show that the fee is outside the range that arm's-length bargaining would produce"). Instead, Plaintiffs almost exclusively focus on discrediting the methodology Defendants use to calculate profitability. *See* Aplt. Reply at 16 (rebuking Defendants for analogizing to other cases finding similar profit margins reasonable, because those cases featured dissimilar funds); *id.* at 17–18 (criticizing GWCM for combining different share classes in profitability calculations).

Undermining Defendants' profitability data, however, does not satisfy Plaintiffs' burden to show Defendants' compensation is disproportionately large. Neither does highlighting "that GWCM had kept its same asset-based fees in place for years as fund

assets and GWCM profit margins grew." Aplt. Br. at 48. This point is tantamount to claiming that any increase in profit enjoyed by growing funds is inherently excessive. The Supreme Court has instructed courts to avoid engaging in this kind of blunt rate regulation. *Jones*, 559 U.S. at 352 (noting "Congress rejected a 'reasonableness' requirement that was criticized as charging the courts with rate-setting responsibilities"); *see also Goodman*, 954 F.3d at 857 (stating "courts should 'identify the outer bounds of arm's-length bargaining and not engage in rate regulation'" (quoting *Jones v. Harris Assocs. L.P.*, 611 F. App'x 359, 360 (7th Cir. 2015) (unpublished)).

Second, the district court did not clearly err in finding "Defendants' profits were within the range of their competitors." App. Vol. II at 527. This result is well supported in the record. Plaintiffs' own expert witness noted Defendants' profits on the Great-West S&P 500 Index Fund were "in line with profit margins he himself believed were reasonable at his former employer." *Id.* at 501. Additionally, "JDL independently analyzed complex-wide profitability for the Board and found Great-West's profit margins to be reasonable relative to other advisers." *Id.* at 500. The district court's decision to adopt Defendants' preferred complex-wide profitability calculation methodology, as opposed to Plaintiffs' preferred method of calculating profitability at the share class level, does not render its analysis clearly erroneous. The record shows independent consultants like JDL used this same approach. *Id.*; *see also Holdeman*, 572 F.3d at 1192 (noting it is the district court's function to resolve "conflicts in the evidence").

6. Adviser Services

The first *Gartenberg* factor is "the nature, extent, and quality of the services provided by the adviser to the shareholders." *Goodman*, 954 F.3d at 857. The district court found "Defendants provided extensive, high-quality services in exchange for their fees." App. Vol. II at 527. Plaintiffs disagreed, arguing Defendants' "long list of services they performed for the Funds was no different from the services other advisers perform for their funds." Aplt. Br. at 36. They maintain Defendants' services did not justify their fees, which "were consistently higher than [their] competitors." *Id.*

Again, Plaintiffs must do more than demonstrate Defendants' fees were higher than other advisers. They must establish Defendants' compensation "bears no reasonable relationship to the services rendered." *Jones*, 559 U.S. at 346. The record includes facts suggesting some relationship existed, including descriptions of unique services GWCM provides. Additionally, as Defendants note, "even if Defendants' services were of the same *type* provided by other advisers, that does not mean Defendants provide the same *quality* of services." Aple. Br. at 46. The court found the quality of Defendants' services evidenced by the funds' comparatively good performance. App. Vol. II at 503.

Plaintiffs state the Contested Funds' performance does not justify Defendants' fees, highlighting the Great-West Templeton Global Bond Fund to underscore their point. Plaintiffs observe: (1) GWCM is paid more for a cloned fund than the fund's primary investor; (2) shareholders of GWCM's version of the fund pay nearly double what investors pay for the fund on the retail market; and (3) other Empower funds pay GWL&A less for the same services.

We are unpersuaded for several reasons: (1) GWCM's decision to charge a higher fee than Franklin does not render its fee excessive, *see Pirundini*, 309 F. Supp. 3d at 164 n.10, and the district court found the Templeton Fund's total expense ratio to be cheaper than peer global macro hedge funds in certain years, *see* App. Vol. II at 489; (2) comparisons to Franklin's retail equivalent fund are "inapt because they were as much as one hundred times larger, did not have unitary fees, and were not subadvised like the Great-West Funds," *id.* at 494 n.18; and (3) GWL&A negotiates fees with plan sponsors individually and is compensated in idiosyncratic ways.

Further evidence of the reasonable relationship between Defendants' fees and services was provided by Plaintiffs' own expert. Mr. Meyers admitted "a 35 bps fee for administration in the context of a 401(k) plan was *not* excessive, because 'this is between the plan sponsor and the administrator as to what a fair fee is, and the fund board shouldn't be in the middle of that.'" *Id*. at 491 (emphasis in original) (quoting trial transcript). Plaintiffs have failed to prove the district court's findings are clearly erroneous as to the quality of Defendants' services.

7. Surrounding Circumstances

The Supreme Court instructed courts to specifically consider the six *Gartenberg* factors, but it also stressed "that all relevant circumstances be taken into account." *Jones,* 559 U.S. at 347. Accordingly, the district court noted two "surrounding circumstances" that also weigh in Defendants' favor. App. Vol. II at 510. First, plan sponsors provide an "additional layer of fiduciary scrutiny . . . [which] weighs against a finding that the Funds' fees are outside the range of what would result from arm's-length bargaining." *Id*.

at 511. Customer plans are "managed by plan fiduciaries who, before a single individual participant ever invests in a Great-West Fund, (i) select Empower as the plan recordkeeper, and (ii) choose the Great-West Funds from among Empower's broad menu of options, with full visibility into the Funds' fees and performance." *Id*. at 510. Second, the administrative services fee "is not the actual price of GWL&A's administrative and recordkeeping services, which is individually negotiated by retirement plans with Empower." *Id*. at 511. Thus, analyzing this fee demands considering other negotiated terms, like "a 10 bps credit provided to any plan that includes Great-West Funds" or the fact that "[n]on-Great-West funds often use total intermediary fees (including 12b-1 fees) to pay for GWL&A's services." *Id*.

Plaintiffs criticize the district court's consideration of circumstances other than the *Gartenberg* factors. Yet, they dramatically overstate the weight the district court gives these surrounding circumstances. *See* Aplt. Br. at 28 ("An adviser cannot be relieved of its §36(b) [obligation] merely because *some* shareholders may be in plans subject to other duties." (emphasis in original)). The district court never suggested these circumstances could prove dispositive independent of its *Gartenberg* analysis. The court merely noted they also "weigh against Plaintiffs."[19] App. Vol. II at 510.

III. CONCLUSION

For these reasons, we **AFFIRM** the district court's order.

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[19] Because we conclude the district court did not err in holding Plaintiffs failed to prove Defendants breached their fiduciary duty under § 36(b) to the ICA, we need not review the district court's additional finding that "Plaintiffs failed to meet their burden with respect to damages" at trial. App. Vol. II at 528.