Nos. 18-3238/18-3239

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NANCY GOODMAN; JACQUELINE PEIFFER,

Plaintiffs-Appellants,

v.

J.P. MORGAN INVESTMENT MANAGEMENT, INC.; JP MORGAN FUNDS MANAGEMENT, INC.,

Defendants-Appellees

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

Plaintiffs-Appellants,

v.

J.P. MORGAN INVESTMENT MANAGEMENT, INC.; JP MORGAN FUNDS MANAGEMENT, INC.,

Defendants-Appellees

On Appeal from the United States District Court for the
Southern District of Ohio, Eastern Division

REPLY BRIEF OF PLAINTIFFS-APPELLANTS (REDACTED)

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INTRODUCTION

"On a motion for summary judgment, the District Court cannot deny the existence of disputes over material facts by making findings of fact and then labelling them 'undisputed.'" *Sherwood v. Washington Post*, 871 F.2d 1144, 1147 (D.C. Cir. 1989). But that is precisely what the district court did, and what JPMIM asks this Court to affirm.[1] JPMIM's self-serving "undisputed" labels aside, the record is rife with disputes of material facts as to whether:

- JPMIM provides substantially the same investment advisory services to the Funds and Subadvised Funds;
- Purported differences in the services provided by JPMIM justify the enormous fee disparity between the Funds and Subadvised Funds;
- Purported differences in risk justify the difference in fees charged to the Funds and Subadvised Funds;
- Fees charged to so-called "peer" funds provide an appropriate comparison point where JPMIM has made no showing that such fees are negotiated at arm's length or cover the same services that JPMIM provides to the Funds;
- Performance can justify the higher fees charged to the Funds when the Subadvised Funds delivered virtually the same investment returns;
- JPMIM's profits far exceed what they would have earned pursuant to an arm's-length negotiated fee rate; and
- The Funds realized economies of scale and whether certain fee waivers were a sufficient sharing of economies of scale.

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[1] Capitalized terms not defined herein have the same meaning as in the Opening Brief of Plaintiffs-Appellants ("Pls.' Br.").

Such factual disputes preclude summary judgment. *See, e.g.*, *In re BlackRock Mutual Funds Advisory Fee Litig.*, No. 14-cv-1165, 2018 WL 3075916 (D.N.J. June 13, 2018) ("*BlackRock*"); *Kennis v. Metropolitan West Asset Mgmt., LLC*, No. 15-cv-8162 (C.D. Cal. Sept. 11, 2017) ("*MetWest* 9/11/17 Order"); *Kasilag v. Hartford Inv. Fin. Servs., LLC*, No. 11-cv-1083, 2016 WL 1394347 (D.N.J. Apr. 7, 2016).

Seeking to avoid the consequence of such factual disputes, JPMIM argues that the Seventh Circuit's decision in *Jones v. Harris Assocs. L.P.*, 611 F. App'x 359 (7th Cir. 2015) ("*Jones II*") altered the framework for evaluating Section 36(b) claims. Defendant contends that under *Jones II*, summary judgment is proper whenever (i) a mutual fund's fees are "in line with those charged to similar mutual funds" and (ii) a fund's "performance exceeded the norm of similar funds." Brief of Defendant-Appellee J.P. Morgan Investment Mgmt., Inc. ("Def.'s Br.") 1, 23-24. But even the district court here rejected this overly simplistic interpretation. *See* Opinion, RE 135, Page ID # 6250. Rather, consistent with the Supreme Court, *Jones II* acknowledges that "the [ICA] requires consideration of all relevant factors." *Jones II*, 611 F. App'x at 361 (quoting *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 349-50 (2010)).

Consideration of "all relevant factors" here—viewed in their totality and with all reasonable inferences drawn in Plaintiffs' favor—required denial of Defendant's motion. The district court exceeded the proper bounds of summary judgment by not

only weighing competing fee comparisons, but also requiring Plaintiffs to prove their claims. Opinion, RE 135, Page ID # 6258 ("Giving the above comparisons ***the weight*** they merit as *Jones* requires, the Court concludes that ***Plaintiffs have not 'show[n]*** that the fees [charged by JPMIM] are beyond the range of arm's-length bargaining.'") (citation omitted).[2] The district court's decision is contrary to well-established law in this Circuit and should not stand. *See, e.g., Hanson v. Madison Cty. Det. Ctr.*, No. 17-5209, 2018 WL 2324252, at *1 (6th Cir. May 22, 2018) (reversing summary judgment where "the district court improperly made credibility determinations, weighed the evidence, and discredited [Plaintiffs'] *entire* version of events") (emphasis in original).

ARGUMENT

JPMIM contends, and the district court concluded, that "Plaintiffs have not set forth issues of fact that, ***if resolved in their favor***, could lead to a finding that Defendants had breached their § 36(b) duty." Def.'s Br. 21; Opinion, RE 135, Page ID # 6273. But if the following facts are resolved in Plaintiffs' favor, a reasonable factfinder could conclude that JPMIM violated its fiduciary duty:

(i) JPMIM charges the Funds more than $132 million annually above what it charges the Subadvised Funds to perform substantially the same investment advisory services (Pls.' Br. 21-37);

(ii) JPMIM incurs comparable costs in providing those services to the Funds and Subadvised Funds (Pls.' Br. 23, 51);

[2] All emphasis is added unless otherwise noted.

(iii) JPMIM delivers substantially the same investment performance to the Funds and to the Subadvised Funds (Pls.' Br. 23, 45);

(iv) JPMIM realizes enormous profits from providing services to the Funds (Pls.' Br. 26, 46); and

(v) JPMIM failed to adequately share the benefits of economies of scale with the Funds (Pls.' Br. 26, 46-48, 52).

Unable to contest the above facts, JPMIM resorts to calling them "immaterial." Def.'s Br. 13. But, in addition to the case law cited in Plaintiffs' Opening Brief, similar facts have been found sufficient to withstand summary judgment in a recent decision issued after Plaintiffs filed their Opening Brief. *See BlackRock*, 2018 WL 3075916.

In *BlackRock*, like here, plaintiffs presented evidence that the adviser charged its captive funds excessively higher fees than the adviser charged for providing substantially the same advisory services to certain subadvised funds. *Id*. at *21. Based on a similar record, the *BlackRock* court was unable to find plaintiffs' comparison "inapt as a matter of law." *Id*. at *23. The plaintiffs in *BlackRock*, like here, also presented evidence that (a) the adviser realized economies of scale that were not adequately shared with the funds (*id*. at *27-35); and (b) the adviser's profits from its captive funds were disproportionate to the services provided and far in excess of profits it would have realized at arm's-length negotiated fee rates (*id*. at *35-37).

JPMIM's efforts to distinguish *BlackRock* fail. JPMIM argues that the defendant in *BlackRock* did not point to evidence that it provided the funds with "above average performance while charging fees in line with those charged to similar funds." Def.'s Br. 49. But BlackRock made precisely the same arguments. *See* Def.'s Br. in Supp. of Mot. for Summ. J., *In re BlackRock Mut. Funds Advisory Fee Litig.*, No. 14-cv-1165 (D.N.J.), ECF No. 133 ("*BlackRock* Defs.' Summ. J. Br.") at 29-30 (arguing that the "Funds outperformed their peers each year over the rolling 10-year performance measurements"); *id*. at 19 (arguing "that the Funds' advisory fees and other expenses were in line with, and in many cases lower than, those of comparable funds").

JPMIM argues that the defendant in *BlackRock* did not show that it provided additional services, such as investor relations, cash flow management, and tax liability management services. Def.'s Br. 49. But BlackRock pointed to an even more extensive list of purportedly additional services. *See BlackRock* Defs.' Summ. J. Br. at 10 (citing eleven ancillary services that purportedly distinguished BlackRock's role as adviser versus subadviser).

And JPMIM argues that the defendant in *BlackRock* had no evidence comparable to JPMIM's evidence of purportedly greater risks. Def.'s Br. 49. But the court in *BlackRock* considered purported differences in risk. *See BlackRock*, 2018 WL 3075916, at *19 (citing evidence that BlackRock is purportedly faced with

"[d]iffering levels of liability exposure and risks (*e.g.*, liability from errors, reputational risk)"). Thus, faced with a similar evidentiary record, the court in *BlackRock* considered and rejected many of the same arguments advanced by JPMIM, finding them incapable of resolution on summary judgment. *See also MetWest* 9/11/07 Order at A-36 (denying motion for summary judgment and rejecting argument that Subadvised Fund fee comparisons are inapt as a matter of law). The same outcome is warranted here.

I. *JONES II* DOES NOT ALTER THE STANDARD OF LIABILITY

Recognizing the numerous infirmities with the district court's resolution of disputed questions of fact, Defendant argues that the Court need not consider those portions of the Opinion. Instead, citing *Jones II*, Defendant revives its argument below that summary judgment is appropriate in every Section 36(b) case where a mutual fund (i) delivers above average performance, and (ii) its fees are in line with fees charged by "comparable" funds. Def.'s Br. 15, 23-31.

But even the district court rejected Defendant's myopic interpretation of *Jones II*. *See* Opinion, RE 135, Page ID # 6250 ("[T]his Court disagrees with Defendants' interpretation of *Jones II*, *i.e.*, that undisputed evidence on these two factors alone requires summary judgment in favor of a defendant."). The district court recognized that the ***Supreme Court's*** opinion in *Jones* governs, and that decision "requires a trial court to review all of the relevant factors before making the determination as to

whether a defendant violated Section 36(b)." *Id*. at Page ID #6251; *see also N. Valley GI Med. Grp. v. Prudential Investments LLC*, No. 15-cv-3268, 2016 WL 4447037, at *8 (D. Md. Aug. 23, 2016) ("*Prudential*") (finding that Defendant's position misinterprets *Jones II* and "misstates governing precedent").

Jones II does not help Defendant. The Seventh Circuit found fee comparisons lacking because the "Plaintiffs have not proffered evidence that would tend to show that Harris provided pension funds (and other non-public clients) with the same sort of services that it provided to the Oakmark funds, or that it incurred the same costs when serving different types of clients." *Jones II*, 611 F. App'x at 361. Here, Plaintiffs have proffered evidence showing that JPMIM's fees for investment advisory services are excessive by comparing those fees with the arm's-length bargained-for fees charged to the Subadvised Funds and that the services provided by JPMIM to the Fund and the Subadvised Funds are substantially the same. *See* Pls.' Br. 21-25. Plaintiffs have also proffered evidence that JPMIM incurs comparable costs when servicing both sets of funds (Pls.' Br. 23)—which JPMIM does not dispute (*see* Def.'s Br. 35).

In addition, the plaintiffs in *Jones II* conceded factual issues. Foremost among those was that the defendant's comparison to other funds was apt. *Jones II*, 611 Fed. App'x at 361. As a result, the Seventh Circuit found that plaintiffs "lack[ed] the sort

of evidence that might justify a further inquiry under the Supreme Court's approach." *Id*.

II. QUESTIONS OF FACT EXIST REGARDING THE FEE COMPARISONS

Defendant plays fast and loose with an "institutional client" label in an effort to persuade the Court that Plaintiffs' comparisons are inapt. Whether JPMIM refers to the *Sponsoring Adviser* of the Subadvised Funds as an "institutional client" is irrelevant. The Funds and the Subadvised Funds are indisputably all retail mutual funds that must comply with the same laws and regulations and require substantially the same advisory services. *See* JPMIM's Responses to Interrogatories, RE 112-40, Page ID # 2088-89; *see also* Kwok Tr., RE 119-19, Page ID # 3660-61. The flow of payments—whether from the Subadvised Funds to the Sponsoring Advisers to JPMIM or from the Subadvised Funds to JPMIM directly (Def.'s Br. 7-8)—is also irrelevant.[3]

Unlike the cases cited by Defendant, Plaintiffs are not comparing the Funds' fees with non-mutual fund clients. *See, e.g.*, *Jones II*, 611 F. App'x at 361 (pension funds); *Strougo V. BEA Assocs.*, 188 F. Supp. 2d 373, 384 (S.D.N.Y. 2002) ("non-

[3] JPMIM previously misrepresented to the district court that "[n]one of the subadvisory agreements requires a Subadvised Fund to pay JPMIM" directly. RE 117, Def.'s Opp'n Br., Page ID # 2864. JPMIM now acknowledges that at least one of the Subadvised Funds pays JPMIM directly (Def.'s Br. 8 n.5), confirming the irrelevance of this argument.

mutual fund institutional clients"); *Cf. Gallus v. Ameriprise Fin., Inc.*, 675 F.3d 1173, 1180 (8th Cir. 2012) (holding that "the disparity in fees charged to Ameriprise's different clients is likely relevant to whether the fees fall within the arm's-length range . . . .").[4]

JPMIM makes no effort to explain how attaching the "institutional" label to the Sponsoring Advisers of the Subadvised Funds impacts the fee/service comparison with respect to the Subadvised Funds. It does not. As in *BlackRock*:

> [T]he record reflects that [the subadviser] provides substantially the same portfolio management services for the Subadvised Funds that [the adviser] provides to the Funds, using overlapping personnel and pursuing the same or substantially the same investment strategies, research and analysis, technology, systems, and resources. Under these circumstances, Plaintiffs have made a threshold showing of comparability between the investment advisory services rendered by [the adviser and subadviser].

BlackRock, 2018 WL 3075916, at *23 (citation omitted). JPMIM does not dispute any of the facts showing the substantial overlap in advisory services. *See* Pls.' Br. 22-23. Instead, it argues that Plaintiffs' comparison is inapt because JPMIM purportedly provides three additional services to the Funds, but not to the

[4] Defendant suggests that *Jones* involved the type of subadvised fund fee comparisons at issue here. Def.'s Br. 23. But the "institutional client" label in *Jones* included "'separate account' clients, and limited partnerships." *Jones v. Harris Assocs. L.P.*, No. 04-cv-8305, 2007 WL 627640, at *1 (N.D. Ill. Feb. 27, 2007). Subadvised mutual fund fee comparisons were not discussed or analyzed in any of the *Jones* decisions.

Subadvised Funds (*e.g.*, investor relations, cash flow management, and tax liability management). Def.'s Br. 39.

But as in *BlackRock*, factual disputes exist regarding these ancillary or "support services," including: (a) whether the additional services are provided to the Funds under the IAAs in exchange for the advisory fees, as opposed to under separate agreements in exchange for separate fees; and (b) whether those services, even if provided in exchange for the advisory fees, justify the additional $132 million annually charged to the Funds. *See BlackRock*, 2018 WL 3075916, at *24-25. "These are precisely the sort of factual disputes that must be resolved at trial." *Id.* at *24.

A. The Purported Additional Services to the Funds Are Provided Pursuant to Separate Contracts

JPMIM contends that it is responsible for "manag[ing] an entity with tens of thousands of individual retail clients" and meeting "with various investors in the Funds and their financial intermediaries." Def.'s Br. 40-41. However, the Funds pay ***separate fees*** pursuant to separate agreements for shareholder services and investor relations. *See* Pl.'s Br. at 31. According to a JPMIM memo:

- Pursuant to the Distribution Agreement, JPMorgan Distribution Services, Inc. ("JPMDS"), as distributor, is responsible for [redacted]

[redacted][5]

- Pursuant to the Administration Agreement, JPMFM, as administrator, is responsible for preparing communications with shareholders, including [redacted][6]

- Pursuant to the Shareholder Servicing Agreement, JPMDS, as shareholder servicing agent, is responsible for [redacted][7]

JPMIM's argument that the Shareholder Servicing Agreement only "covers ministerial shareholder account services" (Def.'s Br. 41) is belied by the fact that the Funds paid nearly ***$80 million*** in 2014 alone for such services pursuant to that agreement. *See* Pls.' Br. 31.

JPMIM characterizes the testimony from its employees as demonstrating that JPMIM performs investor relations services in the role of the Funds' investment adviser and not pursuant to any other contracts. Def.'s Br. 41. However, the terms

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[5] 2015 State of the Business Memo, RE 112-03, Page ID # 1191; *see also* Distribution Agreement, RE 112-20, Page ID # 1655-56.

[6] 2015 State of the Business Memo, RE 112-3, Page ID # 1192; *see also* Admin. Agreement, RE 112-17, Page ID # 1482-88.

[7] 2015 State of the Business Memo, RE 112-3, Page ID # 1193; *see also* Shareholder Servicing Agreement, RE 112-21, Page ID # 1705-06.

of the contracts and the parties' course of dealing as reflected by contemporaneous documentary evidence—and not Defendant's or any witness's characterization of the contracts—establish which services are provided pursuant to each contract. Nevertheless, JPMIM does not cite to a single piece of evidence to support this assertion. In fact, the Funds' portfolio managers expressly testified that they did not know which agreement they were providing services under. Shanahan Tr., RE 121-5, Page ID # 4900; Swanson Tr., RE 121-6, Page ID # 4911-12.

JPMIM contends that it is responsible for "tax planning strategies," including with respect to "taxable capital gains." Def.'s Br. 42. However, the Funds pay ***separate fees*** pursuant to the Administration Agreement with JPMFM for tax-related services. Admin. Agreement, RE 112-17, Page ID # 1482-83. Defendant represented to the Funds' Board that the Administration Agreement requires JPMFM to [redacted] 2015 State of the Business Memo, RE 112-3, Page ID # 1192. In 2014 alone, the Funds paid more than ***$36 million*** to JPMFM pursuant to the Administration Agreement. Pls.' Br. 31.[8]

[8] JPMIM's contention that, as subadviser, it was subject to the "supervision of the Sponsoring Adviser" (Def.'s Br. 43) says nothing about the services that ***JPMIM*** provides.

As in *BlackRock*, "the parties have presented conflicting evidence as to whether [the adviser] provides additional Support Services to the Funds under the [IAAs] in exchange for the Advisory Fee, as opposed to under separate agreements in exchange for separate fees." 2018 WL 3075916, at *25; *see also MetWest* 9/11/17 Order at A-34.

B. JPMIM's Cost Data Demonstrate that the Purported Additional Services Do Not Explain the Fee Disparity

Even if any Ancillary Services were provided in exchange for the advisory fees, neither JPMIM nor the district court point to any contemporaneous evidence that suggests that the purported differences, individually or collectively, justify the more than $132 million in additional advisory fees charged to the Funds annually. *See BlackRock*, 2018 WL 3075916, at *24 (finding that "to the extent that [BlackRock] actually performed a broader array of services for the Funds than [BlackRock] performed for the Subadvised Funds, questions exist as to how the negligible differences in costs justify the disparity in fees"); *MetWest* 9/11/17 Order at A-34 (finding "triable issues of fact as to the nature and scope of the Oversight Functions Defendant provides to the Fund").

While JPMIM contends that the Court is not required to "engage in a precise calculation of fees" and that JPMIM is merely charging "increased fees for increased services and risk" (Def.'s Br 16), *Jones* requires a "large disparity in fees *that cannot*

be explained by the different services . . . ." 559 U.S. at 350 n.8. Thus, JPMIM's purported additional services must be able to "explain" the differences in fees.

And objective cost and profitability data—sourced from JPMIM's own documents—belie Defendant's argument concerning JPMIM's more limited role with respect to the Subadvised Funds. Dr. Ayres analyzed JPMIM's cost data which show that JPMIM's costs are comparable, if not lower, for the Funds than the Subadvised Funds. Ayres Rpt., RE 119-26, Page ID # 3808-810. JPMIM does not dispute the cost data or Dr. Ayres' analysis. Def.'s Br. 34. Considering a similar cost analysis, the court in *BlackRock* explained:

> Plaintiffs have proffered the comparative cost analysis of Dr. Ayres, who calculated that [BlackRock's] costs for providing services to the Subadvised Funds were comparable to, and sometimes exceeded, BlackRock's costs for providing services to the Funds. Thus, assuming, on this Motion, that Dr. Ayres' cost analysis is accurate, to the extent that [BlackRock] actually performed a broader array of services for the Funds than [BlackRock] performed for the Subadvised Funds, questions exist as to how the negligible differences in costs justify the disparity in fees charged by [BlackRock] . . . .

BlackRock, 2018 WL 3075916, at *24 (citations omitted); *cf. Jones II*, 611 F. App'x at 361 (finding comparison lacking where there was no evidence of comparable costs).

Moreover, Defendant's evidence consists of legally insufficient speculation. For example, JPMIM contends that "[c]ash flows ***could*** be more volatile and of larger volume for the Funds compared to the Subadvised Funds . . . ." Def.'s Br. 41.

This speculative contention is supported only by self-serving testimony of JPMIM employees who vaguely state that they had "to worry a lot more" about the cash flows for the Funds because of increased volatility. *Id*. 42. But Defendants do not put forward any contemporaneous evidence that the Funds actually experienced larger and more volatile cash flows than the Subadvised Funds and how that translated into more work.

Similarly, JPMIM contends that its portfolio management team must devote "substantial time and attention" to tax planning strategies. Def.'s Br. 42. JPMIM cites to a declaration from Mariana Connolly, who conclusorily states that there "are various differences" with respect to tax planning strategies with respect to the Funds and Subadvised funds but relies on one: "tax loss harvesting." Connolly Decl., RE 111-3, Page ID # 6488. And with respect to that one purported difference, Ms. Connolly declares only that her team "***may*** sell securities with capital losses to offset capital gains incurred in the sale of securities," but "do[es] not ***typically*** engage in such strategies for the Subadvised Funds." *Id*. Neither Ms. Connolly nor Defendant identify any specific instance when JPMIM sold securities to harvest tax losses for the Funds, but not for the Subadvised Funds, or any resulting difference in the investment performance of the Funds relative to the Subadvised Funds.

C. Purported Differences in Risk Raise Factual Disputes

> Defendants' argument that [the adviser's] services and [the subadviser's] subadvisory services are not comparable, because of the

> different entrepreneurial, reputational, legal, and regulatory risks assumed by [the adviser], is too fact intensive to be decided on summary judgment.

BlackRock, 2018 WL 3075916, at *26. Here, as in *BlackRock*, "a dispute of material fact exists regarding the degree of risks assumed by [the adviser and subadviser] in performing services for the Funds and the Subadvised Funds, respectively, and whether any differences in risk justify the disparity in fees." 2018 WL 3075916, at *26; *see also MetWest* 9/11/17 Order at A-37 n.13.

The district court's holding that certain risks render Plaintiffs' claims inapt as a matter of law is based solely on JPMIM's expert's conclusory opinion—who has no industry experience (*see* Pls.' Br. 38-39)—that JPMIM faces greater risks as an adviser.[9] But Plaintiff's expert disputed that certain risks are greater, and testified that other purported risks cannot explain the difference in fees. Ayres Rebuttal Rpt., RE 119-16, Page ID # 3629-38; Ayres Tr., RE 121-9, Page ID # 4928. This Court has repeatedly held that this type of "battle of the experts" and expert credibility determination are issues for trial, not summary judgment. *See Davis v. Cintas Corp.*,

[9] Even on appeal, JPMIM does not point to any quantifiable differences in risk, proclaiming only that risk is greater like a window washer working on a higher floor. Def.'s Br. 44. But the services rendered to different clients do not need to be identical for an apt comparison. *Jones*, 559 U.S. at 350. If JPMIM cannot quantify any additional risk, then risk cannot "explain" the $132 million annual fee disparity. *Id*. at 350 n.8. And again, the costs tell a different story.

717 F.3d 476, 493 (6th Cir. 2013); *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 577 n.9 (6th Cir. 2013); *Phillips v. Cohen*, 400 F.3d 388, 399 (6th Cir. 2005).

D. JPMIM's "Peer Fund" Comparisons Are Inapt

There are two competing comparisons for evaluating the advisory fees charged to the Funds: (1) Plaintiffs' comparison: the arm's-length negotiated fees JPMIM receives for providing substantially the same advisory services to the Subadvised Funds; or (2) Defendant's comparison: the fees charged by other investment advisers to their captive funds for unspecified services.

Specifically, JPMIM compares its fees to the fees charged by so-called "peer funds" compiled by Lipper (Def.'s Br. 27-30) and to the fees charged by the advisers of the Subadvised Funds (*id*. at 30)—all comparisons involving captive mutual funds.[10] But, the Supreme Court cautioned against those types of comparisons because such fees may not be the product of negotiations conducted at arm's length. *See Jones*, 559 U.S. at 350-51; *see also Prudential*, 2016 WL 4447037, at *8. Even Defendant's authority cautions against such fee comparisons. *See Pirundini v. J.P. Morgan Inv. Mgmt. Inc.*, No. 17-cv-3070, 2018 WL 1084140, at *7 (S.D.N.Y. Feb. 14, 2018) ("there is often little to no competition between investment advisers for

[10] Contrary to Defendant's mischaracterization, *Jones* does not list "comparative expense ratios" as one of the enumerated "*Gartenberg* factors." Def.'s Br. 19. Rather, *Jones* refers to "comparative fee structure (meaning a comparison of the fees with those paid by similar funds)." *Jones*, 559 U.S. at 345 n.5.

mutual fund business"); *Kalish v. Franklin Advisers, Inc.*, 742 F. Supp. 1222, 1227 (S.D.N.Y. 1990) (fees charged by other advisers to their captive funds "have limited value due to the lack of competition among advisers for fund business") (internal quotations and citation omitted), *aff'd*, 928 F. 2d 590 (2d Cir. 1991).

Moreover, there are questions of fact whether the fees charged to those funds are for services comparable to those provided by JPMIM to the Funds. *See, e.g.*, *Migdal v. Rowe Price-Fleming Int'l*, 248 F.3d 321, 327 (4th Cir. 2001) (finding that comparisons to the fees charged by other adviser-sponsors to their captive mutual funds are "not particularly meaningful precisely because [they] do[] not address the particular services offered by the defendants in this case"); *Pirundini*, 2018 WL 1084140, at *6 (rejecting comparison where there was "no basis for this Court to conclude what investment advisory services the [peer] Funds were provided with, and whether and to what extent they are similar to those provided to the Fund by JPMIM").

Contrary to *Jones*, JPMIM does not advance any argument (or evidence) connecting the fees charged to those captive funds with the services provided. *See Jones*, 559 U.S. at 349-50 (directing courts to "give such comparisons the weight that they merit in light of the similarities and differences between the services that the clients in question require").

Despite Defendant's contention that "no court has ever questioned the use of Lipper data" (Def.'s Br. 29), *BlackRock* considered the relevance of Lipper data in connection with competing fee comparisons at summary judgment and found that consideration of Lipper data "would amount to impermissible weighing of the evidence . . . ." 2018 WL 3075916, at *27. As the court explained:

> [D]rawing all inferences in favor of Plaintiffs on this Motion, the potential exists for a finding at trial that the comparison between [adviser and subadviser] is apt, and therefore, that the Subadvisory Fee received by [the subadviser] constitutes the relevant arm's-length range. **While Lipper provides a competing set of data regarding the appropriate bargaining range, the Court cannot weigh those two comparisons at the summary judgment stage. Accordingly, whether the peer funds identified by Lipper set the true arm's-length range for [the] Advisory Fee is a dispute that must be resolved at trial**.

Id.[11]

Dr. Ayres' testimony, that he had not "found any errors in Lipper data" with respect to expense ratio comparisons (Ayres Tr., RE 113-33, Page ID # 2632), does not imply that Lipper data is a reliable or useful source for comparing advisory fees. Lipper simply compiles rankings based on a mutual fund's reported fees and expenses. It makes no effort to ascertain whether the fees in question are negotiated at arm's length or what services are provided in exchange. *See* Pls.' Br. 43.

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[11] Plaintiffs are not arguing "that it was inappropriate for the District Court to rely on Lipper data . . . ." Def.'s Br. 29. Rather, as the court in *BlackRock* explained, questions of fact exist concerning Lipper comparisons. 2018 WL 3075916, at *27.

While JPMIM claims that the Supreme Court in *Jones* "did not find any issue with the district court's use of Lipper data, nor did it suggest that fee and performance comparisons to other mutual funds were suspect because the services provided may be different" (Def.'s Br. 29), the Supreme Court cautioned that "courts should not rely too heavily on [such] comparisons" and that "courts may give such [fee] comparisons the weight that they merit in light of the similarities and differences between the services that the clients in question require . . . ." 559 U.S. at 349-50.[12]

III. QUESTIONS OF FACT EXIST REGARDING PLAINTIFFS' "OTHER EVIDENCE" OF DISPROPORTIONALITY

Plaintiffs presented "other evidence that the fee is outside the arm's-length range," consistent with *Jones*, 559 U.S. at 350 n.8.

A. Profitability

Plaintiffs do not argue that the JPMIM "just plain made too much money." Def.'s Br. 33. However, the Supreme Court held that an adviser's profitability is a factor to be considered in evaluating whether advisory fees comply with Section 36(b)'s fiduciary duty. *See Jones*, 559 U.S. at 345 n.5; *see also BlackRock*, 2018

[12] *Zehrer v. Harbor Capital Advisors, Inc.*, No. 14-cv-789, 2018 WL 1293230 (N.D. Ill. Mar. 13, 2018), cited by Defendant, involved a different theory of liability and evidence from this action. Specifically, *Zehrer* did not involve a comparison of fees negotiated at arm's length for the defendant's services with independent mutual fund clients such as the Subadvised Funds here.

WL 3075916, at *35 ("[E]vidence that an adviser's profitability is disproportionate to the services rendered may be a sign that the adviser's fees are excessive."). Here, as in *BlackRock*, JPMIM's actual profits from the Funds far exceed what it would have earned pursuant to the fee rates negotiated at arm's length with the Subadvised Funds, raising a question of fact. *See* Ayres Rpt., RE 119-26, Page ID # 3840-43, 3990-93, 3996-01; Pls.' Br. 26.

Defendant does not dispute Plaintiffs' profitability evidence or Dr. Ayres' analysis. *See* Def.'s Br. 31 ("None of Plaintiffs' evidence about profitability or economies of scale is disputed . . . ."). As the court in *BlackRock* explained:

> Should trial reveal that the services provided [by the adviser] are in fact comparable, Plaintiffs may present their theory as proof that [the adviser's] profitability from the Funds is disproportionate to the services that [the adviser] provides to the Funds. Indeed, in light of the substantial disputes regarding the services that [the adviser] actually performs for the Funds, it necessarily follows that a dispute exists regarding the ultimate question on profitability in this case – whether [the adviser's] profitability from the Funds is disproportionate to the services rendered. . . . Accordingly, I find that Plaintiffs have raised a genuine dispute of material fact as to whether [the adviser's] profitability from the Funds is disproportionate to the services provided.

BlackRock, 2018 WL 3075916, at *36.

While Defendant cites ***post-trial*** decisions finding that certain profits did not establish a violation of Section 36(b) based on the facts of those cases, profits such as those garnered by JPMIM here "could very well be excessive" when the totality-of-the-circumstances is considered, as recognized by the very same authority. *See*

Schuyt v. Rowe Price Prime Reserve Fund, Inc., 663 F. Supp. 962, 989 n.77 (S.D.N.Y. 1987) ("The Court wishes to make clear that it is not holding that a profit margin of up to 77.3% can never be excessive . . . . This Court is simply holding that on the facts presented here, the fee schedules . . . represent charges within the range of what would have been negotiated at arm's-length in light of all the surrounding circumstances."); *see also BlackRock*, 2018 WL 3075916, at *37 ("§ 36(b) requires a totality of the circumstances approach, and thus, a profit margin that is not excessive upon certain facts may be excessive under another").[13]

Moreover, JPMIM's margins should be viewed in light of the large size of the Funds. JPMIM's margins translate into more than [redacted] in profits from the Funds from 2013-2015. Ayres Rpt., RE 119-26, Page ID # 3990-93, 3996-01. In contrast, in *Kasilag*, the fund's 80.3% margin resulted in only $8.8 million in annual profits. *See Kasilag*, 2017 WL 773880, at *14, *22.

B. Performance

JPMIM does not dispute Plaintiff's evidence demonstrating that JPMIM's management of the Funds and Subadvised Funds delivered nearly identical

[13] None of the post-trial decisions cited by Defendant involved high profit margins *in combination with* evidence that the adviser provided substantially the same services to independent clients for lower fees. *See Schuyt*, 663 F. Supp. 962; *Kasilag v. Hartford Inv. Fin. Servs.*, No. 11-cv-1083, 2017 WL 773880 (D.N.J. Feb. 28, 2017); *In re Am. Mut. Funds Fee Litig.*, No. 04-cv-5593, 2009 WL 5215755 (C.D. Cal. Dec. 28, 2009), *aff'd sub nom. Jelinek v. Capital Research & Mgmt. Co.*, 448 F. App'x 716 (9th Cir. 2011); *Kalish*, 742 F. Supp. 1222.

investment returns. *See* Def.'s Br. 26. That the Funds and their corresponding Subadvised Funds performed similarly is evidence that the services provided to the Funds and Subadvised Funds are substantially the same and that the fees charged to the Funds are disproportionate to the services provided and outside of the arm's-length range of fees; it certainly raises a question of material fact.

Moreover, Plaintiffs contest that all of the Funds experienced "strong" performance. *See* Pls.' Br. 45 n.26 (stating that while certain Funds outperformed their benchmarks for a 10-year period, they trailed their respective benchmarks for more recent periods). Nevertheless, the mere fact that a mutual fund experienced positive returns does not equate to finding that its fees cannot be excessive. *See Redus-Tarchis v. New York Life Inv. Mgmt. LLC*, No. 14-cv-7991, 2015 WL 6525894, at *7 (D.N.J. Oct. 28, 2015); *see also Migdal*, 248 F.3d at 327-28.[14]

C. Economies of Scale

With respect to the Equity Funds, JPMIM does not dispute that it "may have realized" economies of scale, arguing only that Plaintiffs have failed to present evidence that the economies have not been appropriately shared with the Funds because of certain fee waivers. Def.'s Br. 36-37. However, Plaintiffs have proffered the expert opinion and analysis of Dr. Ayres who testified that his analysis takes into

[14] The only cases cited by Defendant, *Jones II*, 611 F. App'x 359, and *Strougo*, 188 F. Supp. 2d 373, did not involve evidence that the adviser delivered virtually identical investment returns for subadvised funds.

account the fee waivers. Ayres Tr., RE 113-33, Page ID # 2627-28; *see also* Ayres Rpt., 119-26, Page ID # 3846-54. Considering similar evidence and expert analysis—and relying on other courts that have found factual disputes with respect to economies of scale—the court in *BlackRock* concluded that triable issues exist with respect to the economies of scale. 2018 WL 3075916 at *34-35.[15]

With respect to the Bond Funds, Defendant does not dispute any of the authority cited in Plaintiffs' Opening Brief that it is appropriate to look at growth beyond the one-year period preceding the filing of the complaint when analyzing economies of scale. *See* Pls.' Br. 47 n.27; *see also BlackRock*, 2018 WL 3075916, at *30 ("[R]ecognizing that statistical trends outside the one-year period may, in some instances, demonstrate excessive fees within the relevant time period . . . various courts have permitted plaintiffs to present evidence of economies of scale beyond the one-year period preceding the commencement of a § 36(b) action."). Dr. Ayres looked at such growth with respect to the Bond Funds and concluded that economies of scale were likely realized. Ayres Tr., RE 113-33, Page ID # 2626. This is not "speculation" (Def.'s Br. 35); it is an expert's opinion that presents a genuine question of fact that cannot be resolved at summary judgment. *See, e.g.*,

[15] Defendant falsely claims that the Stulz Report is "undisputed" (Def.'s Br. 36); Dr. Ayres submitted a rebuttal report disputing Stulz's opinions regarding the purported sharing of economies of scale. *See* Ayres Rebuttal Rpt., RE 119-16, Page ID # 3638-40.

Davis, 717 F.3d at 493 (holding that "[w]hich [expert's] view to accept is ultimately an issue for the fact finder").

Section 36(b) reflects Congress's recognition that as mutual funds grow larger, it becomes less expensive for investment advisers to provide their services. *Migdal*, 248 F.3d at 326-27. "Congress wanted to ensure that investment advisers passed on to fund investors the savings that they realized from these economies of scale." *Id*. at 327. Here, none of the Funds' fee schedules have breakpoints. A factual dispute exists whether the fee waivers cited by JPMIM were a sufficient means of sharing. *See, e.g., BlackRock*, 2018 WL 3075916, at *35 (rejecting similar argument that "fee concessions" are dispositive on the economies of scale factor at summary judgment).

Plaintiffs' theory does not rest on "rate regulation" or require JPMIM to operate on a "cost-plus" basis. Nor are Plaintiffs claiming that profit margins cannot increase as assets increase. However, increasing profit margins as assets increase is evidence that the adviser has captured the benefits of economies of scale and should be considered in evaluating whether the adviser breached its fiduciary duty under Section 36(b).

IV. JPMIM CONCEDES BOARD APPROVAL IS NOT A BASIS FOR DISMISSAL

JPMIM expressly conceded below that its motion "did not ask for summary judgment based on the Board's approval of the challenged fees." Def.'s Summ J.

Reply, RE 122, Page ID #4959. While Plaintiffs proffered evidence regarding a host of deficiencies with the Board process (Pls.' Br. 50-52), JPMIM did not respond to any of these deficiencies other than calling them "irrelevant to the resolution of this case." Def.'s Br. 52.

Nevertheless, the district court addressed and resolved that issue, despite Plaintiffs' evidence documenting deficiencies in the board approval process. The evidence must be viewed in the light most favorable to Plaintiffs, and these deficiencies raise questions of fact as to how much deference, if any, to attribute to the Board's approval. The district court's finding that these deficiencies would not have made a legally significant difference (Opinion, RE 135, Page ID #6272), "resolves one of the principal disputes between the parties, and is surely not based on an 'undisputed' record . . . ." *Sherwood*, 871 F.2d at 1147.

If a defendant can avoid liability because the board was "experienced and independent," "met a couple of times per year, and reviewed information provided by the adviser, no Section 36(b) claim could ever proceed past summary judgment. This is directly contrary to the legislative intent behind the statute, which provides for litigation to provide an "independent check" on excessive fees. *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108 (1991) ("Congress added § 36(b) to the ICA in 1970 because it concluded that the ***shareholders should not have 'to rely solely on the fund's directors*** to assure reasonable adviser fees . . .'") (citation

omitted). As questions of fact pervade the Board approval process, the district court erred in concluding that "there is no evidence to support a finding that the Board failed to engage in a robust approval process." Opinion, RE 135 at Page ID # 6272.

CONCLUSION

By weighing evidence, making credibility determinations and requiring Plaintiffs to prove their claims, the district court exceeded the bounds of summary judgment procedure. Plaintiffs respectfully request that the Court reverse summary judgment and remand the case for trial.

Dated: August 17, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir. R. 32(a) and Fed. R. App. P. 32(g)(1), I certify that the attached brief contains 6,499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1), and that as required by Fed. R. App. P. 32(a)(5) and (a)(6), the brief uses a plain, roman style with a proportionally spaced font—Times New Roman—and has a typeface of 14 points.

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2018, I electronically filed the foregoing document with the Clerk of this Court by using the Court's CM/ECF system, which accomplished service on all counsel of record.

Dated: August 17, 2018

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