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# Manager of Managers Excessive Fund Fee Cases—An In-Depth Analysis

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- "Manager of Managers" cases: A plaintiff alleges that the adviser provides insufficient services to justify the amount of advisory fee retained—given that the subadviser allegedly does most of the work.
- "Third-Party Subadvised" cases: A plaintiff alleges that an adviser subadvises third-party funds at much lower rates than the adviser charges its own funds, even though the advisory services are substantially similar to the subadvisory services.[1]

This article provides an in-depth analysis of the manager of managers' cases and lessons learned from those cases.

## Legal Framework

Section 36(b) of the Investment Company Act of 1940 imposes a fiduciary duty on investment advisers with respect to the compensation they receive for providing services to mutual funds.[2] An adviser breaches its fiduciary duty if it charges a fund an "excessive fee."[3] The Supreme Court, in *Jones v. Harris Associates L.P.*, instructs that the excessive fee standard is "whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain."[4] A plaintiff has the burden to prove that a fee is "so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining."[5]

The *Jones* Court listed several nonexclusive considerations, known as the *Gartenberg* factors, as set forth in *Gartenberg v. Merrill Lynch Asset Management, Inc.*, that a court should evaluate in an excessive fee case.[6] The *Jones* Court also noted that US Securities and Exchange Commission (SEC) regulations have recognized and formalized *Gartenberg*-like factors.[7]

The *Gartenberg* factors include:

- The adviser's cost in providing the services;
- The extent to which the adviser realizes economies of scale as the fund grows larger;[8]
- The nature and quality of the services provided to the fund and shareholders;
- The profitability of the fund to the adviser;
- Any "fall-out benefits" (collateral benefits that the adviser would not have received but for its relationship with the fund);
- Comparative fee structure (a comparison of the fees with those paid by similar funds); and
- The independence, expertise, care, and conscientiousness of the board in evaluating adviser compensation.[9]

Each of the "manager of managers" excessive fee cases evaluated the relevant case law and *Gartenberg* factors in different order. We will evaluate the factors in the order taken by most courts and most boards in their advisory contract approval process.

## Manager of Manager 36(b) Cases

To date, the following are the 36(b) cases that have relied on the "manager of managers" theory:

| Filing Date | Case | Disposition/Status |
|---|---|---|
| 2/25/11 | **Kasilag v. Hartford Inv. Fin. Services LLC,**<br>No. 11-cv-1083 (D.N.J. filed Feb. 25, 2011) | Judgment on merits for Hartford defendants after four-day bench trial. 2017 WL 773880 (D.N.J. Feb. 28, 2017) [hereinafter Hartford].<br>Affirmed on appeal. 745 F. App'x 452 (3d Cir. 2018). |
| 7/21/11 | **Sivolella v. AXA Equitable Life Ins. Co.,**<br>No. 11-cv-4194 (D.N.J. filed July 21, 2011) | Judgment on merits for AXA defendants after 25-day bench trial. 2016 WL 4487857 (D.N.J. Aug. 25, 2016) [hereinafter AXA].<br>Affirmed on appeal. 742 F. App'x 604 (3d. Cir. 2018). |
| 8/30/13 | **In re Voya Global Real Estate Fund,**<br>No. 13-cv-1521 (D. Del. filed Aug. 30, 2013) | Dismissed via stipulation of dismissal. |
| 3/20/15 | **Cox v. Voya Investments LLC**<br>No. 15-cv-00236 (D. Del. filed March 20, 2015) | Consolidated with In re Voya Global Real Estate Fund [hereinafter Cox] |
| 10/17/13 | **McClure v. Russell Inv. Mgt. Co.,**<br>No. 13-cv-12631 (D. Mass. filed Oct. 17, 2013) | Dismissed via stipulation of dismissal. |
| 12/11/13 | **Curd v. SEI Inv.,**<br>No. 13-cv-7219 (E.D. Pa. filed Dec. 11, 2013) | Dismissed via stipulation of dismissal. |
| 2/4/14 | **Zehrer v. Harbor Capital Advisors,**<br>No. 14-cv-789 (N.D. Ill. filed Feb. 4, 2014) | Summary judgment granted on the merits in favor of Harbor. 2018 WL 1293230 (N.D. Ill. March 13, 2018) [hereinafter Harbor]. |
| 12/23/14 | **Redus-Tarchis v. N.Y. Life Inv. Mgt.,**<br>No. 14-cv-7991 (D.N.J. filed Dec. 23, 2014) | Summary judgment granted on the merits in favor of New York Life. 2018 WL 5307546 (D.N.J. Oct. 10, 2018). |
| 10/30/15 | **N. Valley GI Medical Group v. Prudential Inv. LLC,**<br>No. 15-3268 (D. Md. filed Oct. 30, 2015) | Voluntarily dismissed via stipulation without the payment of any compensation. |
| 12/30/15 | **Ventura v. Principal,**<br>No. 15-cv-481 (S.D. Iowa filed Dec. 30, 2015) | Dismissed via stipulation of dismissal. |
| 1/29/16 | **Obeslo v. Great-West Capital Mgt. LLC,**<br>No. 16-cv-230 (D. Colo. filed Jan. 29, 2016) | Scheduled for trial in January 2020. |
| 4/26/18 | **Winston v. Western Asset Mgt. Co.,**<br>No. 18-cv-03523 (C.D. Cal. filed April 26, 2018) | Dismissed via stipulation of dismissal. |

Of these cases, *AXA*, *Hartford,* and *Harbor* have provided the most substantive guidance regarding how a court considers these types of judicial proceedings. These cases are our primary focus.

## Factual Background of Cases

The manager of managers Section 36(b) excessive fee cases all share the factual similarity of an investment adviser retaining a subadviser to manage a fund's portfolio investments. The adviser typically pays a portion of its advisory fees to the subadviser. The plaintiff then argues that the adviser provides insufficient services to justify the amount of advisory fee retained, alleging that the subadviser does most of the work.

*AXA* concerned 12 mutual funds that supported variable contracts issued by AXA Equitable Insurance Company. The funds' investment adviser was AXA Equitable Funds Management Group, LLC (FMG), which at the time was a separate business unit of the insurance company. The funds' investment management agreements and administrative agreements were with FMG.[10] At issue in the case was whether these contracts "awarded excessive fees to FMG and AXA for investment services that were then delegated to sub-advisers for a much lesser fee."[11] The plaintiffs were variable contract holders, and the case concluded after a 25-day bench trial, with a ruling in favor of the adviser.[12]

In *Hartford*, the plaintiffs were shareholders in six mutual funds advised by Hartford entities.[13] During most of the relevant time period, Wellington Management Company, LLP served as the subadviser to the funds.[14] The court noted that, "much of the core of the case comes down to Defendants' use of subadvisers to meet a portion of their obligations ….,"[15] and specifically the services the adviser provided in exchange for the retained portion of the advisory fee. The case concluded after a four-day bench trial, with a ruling in favor of the adviser.

*Harbor* involved two mutual funds that were advised by Harbor Capital Advisors, Inc.[16] Harbor retained subadvisers for both funds, "creating what it calls a 'manager of managers' structure."[17] "The subadvisers make 'the day-to-day investment decisions' for the [f]unds, albeit contractually subject to Harbor's oversight."[18] "The plaintiff fund shareholders objected to the amount of the fees the funds pay to Harbor."[19] The case was decided by summary judgment in favor of the adviser.

## Analysis

### Board Independence and Conscientiousness

In *Jones v. Harris Associates,* the Supreme Court stated that "a court's evaluation of an investment adviser's fiduciary duty must take into account both procedure and substance."[20] Where a board's process for negotiating and reviewing an adviser's compensation "is robust, a reviewing court should afford commensurate deference to the outcome of the bargaining process."[21] Therefore, a court will review "the independence, expertise, care, and conscientiousness of the board in evaluating adviser compensation" under the *Gartenberg* standard.[22]

In *AXA*, the plaintiffs disputed the impartiality, diversity, care, and conscientiousness of the fund board.[23] The plaintiffs primarily made three claims: (1) the chairman of the board had a conflict of interest because he also was CEO of the management organization; (2) there was a lack of trustee diversity because the trustees were all "Wall Street" types; and (3) management provided virtually all board information and the board did not corroborate this information with third-party, independent consultants.[24]

Before addressing the plaintiffs' specific concerns, the *AXA* court extensively reviewed the board's general practices and procedures, including the number of board meetings, committee meetings, trustee selection and training, and the independent trustees' representation by their own independent counsel.[25] The court went on to find that the defendants had adequately addressed the role of the board chairman. The lead independent trustee, an

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experienced investment management attorney, had testified that best practice may include having a lead independent trustee, as the AXA fund board did, or an independent chair.[26]

The *AXA* court also noted that while many of the trustees had financial service backgrounds, the board was "independent" of management. Furthermore, the court observed the board's independent efforts to ensure that they receive the most comprehensive and accurate materials.[27] Therefore, the court concluded that the plaintiffs did not meet their burden in proving that the board lacked independence or was not careful or conscientious.[28]

The *Hartford* court concluded, at the summary judgment stage, that the independent directors' approval of the adviser compensation "was entitled to substantial weight."[29] The plaintiffs had argued that the board's approval should not be entitled to deference, most importantly because the board did not understand the nature of the services that the adviser versus the subadviser provided.[30] The plaintiffs cited one deposition where an independent director stated that he did not know how tasks were allocated between the adviser and the subadviser. The court, however, stated that a meaningful level of scrutiny should not be applied to a couple of statements "in hundreds of pages of deposition testimony."[31]

In concluding that the board's decisions should be given "substantial weight," the *Hartford* court reasoned that "a plaintiff should not be able to survive summary judgment through armchair quarterbacking and captious nitpicking. Such a standard would put defendants in the untenable posture of defending interminable, manufactured, and protracted litigation involving second-guessing a board's process. Here, the plaintiffs seek to do just that."[32]

Lastly, the *Harbor* plaintiffs made several of the same arguments as the *AXA* and *Hartford* plaintiffs, but alleged different underlying facts. In *Harbor*, the plaintiffs claimed that the board fee decisions should not be given deference because: the board did not negotiate the lowest possible fee or consider alternate advisers; the board was not informed about all relevant information and did not retain third-party experts to analyze profitability materials; and the board was plagued with conflicts of interest.[33] Regarding the lowest fee claim, the *Harbor* court cited the lead independent trustee's testimony that the board is "trying to get a fee that would be competitive and in line with the expected alpha generation of the fund."[34] The court observed that it is only required to consider the range of peer fees to determine if the defendant's fees are comparable.[35]

The *Harbor* plaintiffs further argued that the board did not adequately inform itself about key issues because the profitability materials were misleading.[36] The court, however, stated that the board considered profitability information that both included and excluded the information that the plaintiffs wanted considered. The court further concluded that hiring a third-party expert was not necessary because the board could rely on "their own extensive experience in the industry."[37] The court lastly concluded that there was no evidence that supported a conclusion that any trustees' private interests were in conflict with their duty to the funds' shareholders. In sum, the *Harbor* court found that the plaintiffs did not point to any evidence to contest the board's process or independence and, therefore, the board's decisions were entitled to "substantial weight."[38]

## ■ *Lessons Learned*

In considering the care and conscientiousness claims that plaintiffs have made in manager of managers excessive fee cases, the allegations are ones that generally would be found in other types of Section 36(b) cases as well. In such cases, however, plaintiffs often focus keenly on the board's oversight of the subadviser as well as the manager.

For example, in the *Harbor* case, the plaintiffs claimed that the board should have considered the fund contracting directly with the subadviser, as opposed to the subadviser contracting with the

adviser. The court, in siding with the defendants, pointed out that there was no evidence to suggest that the fact that the board allegedly did not consider an alternative subadvisory arrangement led to less than an arm's-length transaction. In such cases, the information the board receives from the subadviser as well as the adviser is likely to be an area of focus.

## Nature of Services Provided

The "nature and quality of the services provided to the shareholders" is another factor to be considered under the *Gartenberg* test, as adopted by the US Supreme Court in *Jones*.[39] For purposes of this article, we will explore the "nature" and the "quality" of the services separately because the *Hartford* and *Harbor* courts analyzed each item separately (in the *AXA* case, there was not a separate analysis regarding the quality of services provided).

Services provided by investment advisers are delineated in an investment management or investment advisory agreement (collectively, an IMA) with a fund. Under an IMA, an investment adviser typically:

- Provides investment advice to a fund with respect to the fund's investment policies, investments, and purchase and sale of securities;
- Continuously supervises the fund's investment program and performance consistent with the investment objectives and policies of the fund;
- Provides research, economic and statistical data and other information related to the fund;
- Determines the securities and other financial instruments to be purchased and sold for the fund and when to execute such transactions and the portion of fund assets held uninvested; and
- Performs such other duties as may be necessary or appropriate in connection with its services as investment manager.

An investment adviser receives from the fund an investment management fee calculated based on a percentage of the fund's average daily assets under management (AUM). The applicable fee rate is stated in the IMA. Fees may contain various discounts or breakpoints based on the level of assets under management as a fund grows.

An IMA sometimes contemplates the use of a subadviser to assist in the day-to-day management of fund assets. The investment adviser is responsible for selecting the subadviser(s) with board approval. The investment adviser must review everything the subadviser does for the fund and supervise the services provided for a fund. As such, an investment adviser retains overall supervisory responsibility with respect to any subadvisers.

In *AXA*, *Hartford,* and *Harbor*, the respective defendant advisers also provided certain administrative services for their funds as delineated in the applicable IMAs and related agreements. Although they can be variously defined in different agreements, the administrative services provided by the investment adviser can include, *inter alia*, coordinating and overseeing services provided by the transfer agent, custodian, legal counsel, and independent auditors; developing and implementing processes for monitoring compliance with fund investment objectives, polices, and guidelines and with applicable regulatory requirements; and furnishing the fund with such other administrative services as necessary for the efficient operation of the fund.

The plaintiffs' arguments in "manager of managers" cases focus on the use of subadvisers to meet a portion of the adviser's obligations under the IMAs. Under the plaintiffs' theory, only the services performed specifically by the investment adviser should be considered when assessing the appropriateness of the advisory fee; separate and apart from those performed by the subadviser (that is, whether the fee bears a reasonable relationship to the services rendered). This is referred to in the *Hartford* case as the "retained fee" theory.[40]

Each court considered this argument at the merits stage and concluded that the combined services provided by both the adviser and subadvisers

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should be considered against the entire advisory fee. The courts found unpersuasive plaintiffs' attempts to draw distinctions between the services rendered by the defendant advisers and the subadvisers.[41] This is consistent with Section 36(b) and the Supreme Court in *Jones*, which instructs that courts should look at the totality of services rendered by the adviser, including subadvisory services performed under the adviser's supervision, in assessing whether the fees paid to the adviser are within the arm's-length bargaining range.

In *AXA* and *Hartford*, the plaintiffs presented expert witnesses that testified to the appropriateness of looking to just the services provided by the defendant advisers. The expert witness proffered various theories to support these assertions. The courts found these arguments to be unpersuasive.[42]

The *AXA* court found credible the testimony regarding the host of services provided by the defendant adviser and related firms for the funds.[43] The court also took into account ongoing risks borne by the defendant adviser in providing such services. These risks include litigation, reputational, operational, and business risks, all of which may justify a portion of the fees charged.[44] The *AXA* court also noted the plaintiffs' failure to present a "comprehensive breakdown" of the fees that the adviser retained compared to those paid out to subadvisers (and a sub-administrator in this case).[45] Without this information, the court found it "nearly impossible" to determine whether the fee was so disproportionately large that it bore no reasonable relationship to the services rendered.[46]

The *Hartford* court found that the plaintiff's theories ignored the practical realities of how and why advisers hire and pay subadvisers. The court found credible the explanations of the role and risks the defendant adviser faced under the IMAs. The court also noted that the contractual delegation of certain duties to subadvisers specifically was contemplated under the funds' IMAs. As such, the Hartford court considered all services provided under the IMAs in exchange for the fees paid regardless of whether the adviser performed the services or hired others to fulfill those obligations.[47]

The *Harbor* court cited the *Hartford* summary judgment decision in noting that:

> It would be a strange holding to rule that the nature or quality of the services provided by [the investment adviser] were inferior solely because they were contracted out to [subadvisers], when the parties acknowledged this is a possibility in their initial contract. Put differently, what's the difference to the funds if [the investment adviser] perform[s] the services directly or by way of a sub-adviser? The sub-adviser clause in the contract seems to indicate that (barring rejection of the sub-adviser by the Board) there is no difference.[48]

The *Harbor* court concluded that "[d]isregarding those services solely because [the adviser] made the permissible business decision that they were better or more efficiently (or even more inexpensively) performed by [subadviser] is nonsensical."[49] To do otherwise ignores the practical realities of how and why investment advisers hire and pay subadvisers.

## ■ *Lessons Learned*

Investment advisers take on a great deal of responsibility and risk when managing fund assets. Courts agree that whether the investment advisers execute day-to-day trades or hire a subadviser, this should not diminish the nature of services provided in assessing whether an advisory fee is disproportionate to the services provided.

In light of the court decisions to date, prudence suggests stating in a fund's IMA that the adviser is permitted to retain subadvisers to assist in managing the fund. In addition, the IMA should make clear that the adviser continues to bear overall

responsibility for the supervision of the subadviser(s) and management of the fund.

## Quality of Services

In addition to the "nature" of the services provided, the "quality" of those services is a factor courts consider under the *Gartenberg* test.[50] In evaluating the quality of the services provided to funds, the performance of a subject fund against peer funds has been one relevant consideration. This was the case in *Hartford* and *Harbor* (in *AXA*, there was not a separate analysis regarding the quality of services provided, but the *AXA* court seemed to infer that fund performance at or above expectations may demonstrate adequate services to the funds).[51]

In *Hartford*, the plaintiffs and the defendant investment advisers presented three metrics to assess fund performance and to determine the quality of the services provided.[52] The *Hartford* court noted that each of the metrics present a different look at overall fund performance, but no one metric is better or worse than the others. The adviser presented two performance analyses: (1) peer group analysis provided by Lipper, Inc. (a third-party vendor that commonly provides peer group performance analysis for mutual funds); and (2) Dr. Glenn Hubbard, the dean of the Columbia Business School, who provided expert testimony regarding the peer group analysis that he prepared separate from Lipper. The plaintiffs, however, argued that fund performance was poor based solely on the funds' near-universal failure to exceed the performance of their selected index benchmarks (for example, S&P 500 Index, Russell 3000 Index, etc.).[53]

The *Hartford* court noted that "failure to hit a benchmark is not the *sine qua non* of poor performance," and is not dispositive of demonstrating poor services for the funds.[54] Moreover, while benchmarks are certainly a way to assess fund performance, the plaintiffs presented little evidence that the failure to hit benchmarks is a strong indication of poor performance.[55] The court also found the expert testimony of Dr. Hubbard to be competent. Dr. Hubbard noted that while evaluating performance against an index benchmark is one metric, it is a metric that "analyzes performance in a vacuum, because fees are not involved."[56] As such, in measuring performance against a benchmark, "a mutual fund begins in the hole."[57]

The *Hartford* court observed that, based on the performance evidence provided, all but one of the funds performed, at worst, in the middle of the pack against peer funds. As such, the quality factor of the *Gartenberg* analysis "does not point in favor of finding the fees paid [to the adviser] could not have been part of an arm's-length agreement." [58]

Regarding fund performance in the *Harbor* case, the plaintiffs asserted that: (1) the defendant investment adviser should not get "credit" for performance that is the result of the work of the subadvisers; (2) evaluation of the funds' performance should be limited to their performance during the damages period; and (3) at least one of the funds performed worse than comparable funds during that time period.[59]

The court in *Harbor* did not find the plaintiffs' fund performance arguments persuasive.[60] Most importantly, the court noted that engaging subadvisers who rendered quality services to the funds and its shareholders, including the plaintiffs, does not suggest that an adviser deserves no credit for services provided by the subadviser.[61] Moreover, the court noted that the plaintiffs did not provide evidence to support the assertion that the funds underperformed their benchmarks or peer groups. To the contrary, the adviser provided evidence demonstrating that the funds either exceeded benchmark and peer group performance or had negligible underperformance. For these reasons, the *Harbor* court concluded that the plaintiffs "failed to point to evidence from which a reasonable jury could conclude that the funds have not performed at least as well as, if not better than, comparable funds."[62]

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### ■ *Lessons Learned*

A robust and thorough review of fund performance by independent third parties that compares performance against relevant peer groups helps demonstrate the quality of services provided to the funds. In the manager-of-managers structure, courts thus far have agreed that an investment adviser should receive "credit" for a "subadviser's performance" when assessing the quality of services provided to a fund. This finding is fully consistent with the adviser's overall responsibility for all of the affairs of the fund.

## Comparative Fees

Another *Gartenberg* factor is "comparative fee structure (meaning a comparison of the fees with those paid by similar funds)."[63] The Supreme Court, however, cautioned that "[i]f the services rendered [by separate investment advisers] are sufficiently different that a comparison is not probative, the courts must reject such a comparison."[64] In *AXA*, *Hartford*, and *Harbor*, the defendant investment advisers used comparative fee data developed by Lipper, Inc., among other sources, for each respective fund board to analyze fund fees. Even though the plaintiffs objected to these analyses on different grounds, the court in each case found that the fee comparisons were sufficient.

In *AXA*, the plaintiffs claimed that the Lipper data was "not independent, objective, or authoritative."[65] They asserted that the data compared dissimilar funds, such as comparing index and hybrid funds to actively managed funds. In addition, the plaintiffs alleged that fund fees would have been shown to be excessive if the defendants had used proper fee data from the Investment Company Institute. The defendants acknowledged that there was "noise in the data," but they were not aware of better sources and the board also used Strategic Insight as another source.[66] While Lipper did compare index and hybrid funds to actively managed funds, the board asked for a breakout of index funds alone for its analysis.

In siding with the defendants, the *AXA* court noted that the defendants' expert Christopher James provided persuasive testimony regarding the defendants' methodology.[67] James testified that the fund "expense ratios" were "at or about the median, or midpoint, in the industry."[68] Because the court found the testimony of the plaintiff's witnesses "inconsistent" regarding comparative fees, and the testimony of James "credible," the court concluded that, "the board compared the fees on each fund against reliable sources, and determined they were reasonable in the industry."[69] The board recognized that the Lipper index was not an exact comparison, but there was "little proof that the board did not act conscientiously."[70]

Unlike most plaintiffs in excessive fee cases, the *Hartford* plaintiffs did not present evidence of comparative fee structures.[71] The defendant advisers, however, presented two methodologies: (1) comparative fee structures of peer groups that Lipper selected and (2) peer groups that their expert witness Dr. Glenn Hubbard selected.[72] With both the Lipper and Hubbard data, the defendants analyzed comparative fees by "total expense ratios" and the "management fees" alone.

The *Hartford* court concluded that reviewing the management fee alone was sufficient to make its determination (and did not consider evidence related to the total expense ratios). The defendants presented data to the court showing that the management fee of the subject funds compared to their "Lipper Expense Universe."[73] The analysis showed a range of fund management fee rankings—from a fund that ranked from a low of 23/55 (41st percentile) to a high of 28/46 (60th percentile) over a five year period, to another fund that ranked from a low of 8/16 (47th percentile) to a high of 29/35 (82nd percentile) over the same period. The court considered no other comparative fee information.[74]

In *Harbor*, the defendant advisers used Lipper as well as Morningstar data for their fee comparisons.[75] The plaintiffs argued that: the "total expense ratio" that Lipper provided was improper; the sample

sizes of the comparative funds were "too small;" the comparative funds were "small, expensive funds;" the defendants manipulated the Lipper materials; and the challenged fees exceeded averages from a Morningstar study.[76]

With respect to the argument that the total expense ratio was not a proper consideration, the *Harbor* court concluded that, because the Lipper analysis was not limited to total expense ratios but also included comparisons of only advisory fees, the plaintiffs' claim was not persuasive. The court went on to determine that the comparative sample sizes were reasonable and noted that "the Seventh Circuit has affirmed a district court's finding that sample sizes of 10 or 11 peer funds is sufficient…." Lipper's methodology typically compared peer groups of 7 to 20 funds, and this size range is a valid expense comparison according to Lipper.

The *Harbor* court further stated that the plaintiffs did not present any evidence that the defendants "artificially constructed" peer groups to exclude "similar funds with more assets under management or manipulated the Lipper materials." Lastly, the court concluded that there was not a triable issue of fact concerning the plaintiffs' claim that the defendants charged higher fees in light of a particular Morningstar study because the plaintiffs' argument relied on a total expense ratio which was inappropriate comparison "because it includes fees beyond the advisory fee."[77]

### ■ *Lessons Learned*

While the *AXA, Hartford* and *Harbor* courts use different approaches in evaluating comparative fee information, the differences were not related to the manager of managers' structures. The analysis simply considered a fund's management fee and/or total expense ratio, the source of the comparative data, the relevance of the data, and how each fund lined up within its peer group. The courts considered each board's review of the data, but did not set outer limits on how a fund fared compared to its expense peer group.

## Economies of Scale

The extent to which an investment adviser realizes "economies of scale" from managing a fund, and whether any savings are passed along to the fund is another factor courts may consider under the *Gartenberg* analysis.[78] As a fund grows in assets, the cost of managing the fund also may increase, but the cost is unlikely to increase as fast as fund assets may increase.[79] The most common way "savings resulting from economies of scale are shared with investors is through breakpoints" in advisory fee schedules.[80] The plaintiffs in a Section 36(b) case bear a heavy burden to show the existence of economies of scale; they must prove that the per-unit cost of fund transactions decreased as the number of transactions increased.[81]

In *Hartford*, the plaintiffs did not challenge the defendant adviser on economies of scale. However, the plaintiffs in *AXA* and *Harbor* did make economies of scale claims that, in part, were related to the subject funds using subadvisers.

The *AXA* court noted that all of the funds at-issue had breakpoints. However, many of the subadvisory breakpoints occurred before the advisory breakpoints, meaning some savings went to the defendant adviser and not to fund investors.[82] The plaintiffs, moreover, presented three experts on the issue of economies of scale. One expert witness focused on direct costs to the adviser without accounting for other variable costs such as subadvisory fees. The other two witnesses did not measure "unit" costs, which the court noted was a key component to economies of scale.[83] The *AXA* court found that "none of the [p]laintiff's experts satisfactorily quantified a dollar amount for savings achieved by economies of scale, nor how much should have been shared with investors."[84]

In contrast, the adviser provided detailed analysis of how the breakpoints resulted in savings for fund shareholders.[85] Without addressing the plaintiffs' argument regarding the different breakpoint schedules, the *AXA* court noted that "extensive evidence demonstrated that the [b]oard received information

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regarding economies of scale" to prepare it for fee negotiation.[86] The court also noted how the adviser shared potential benefits it received from economies of scale. The court found that the adviser provided the fund board with "extensive information to guide [its] decision-making process, including: data concerning breakpoints for each [f]und, information on the effective fee levels, comparative data to evaluate breakpoints and effective fees for other [f]unds, expense cap information and expense limitations, industry discussions on economies of scale, and added services that [the adviser] provides over time."[87]

The *AXA* court further found that the credible testimony of the adviser's witnesses reflected a conscientious board-review of economies of scale. As such, the court concluded that the plaintiffs did not meet their burden of proof.[88]

The *Harbor* defendant argued that the plaintiffs pointed to "no evidence that the total per-unit cost of servicing the funds declined as the funds grew in size."[89] Additionally, the adviser argued that the contractual breakpoints and fee waivers were adequate to share any realized economies of scale.[90] The *Harbor* plaintiffs argued that economies of scale should be evaluated by looking only at an adviser's internal operating expenses. When evaluated in that manner, the plaintiffs asserted that the adviser realized "significant" economies and did not share them with investors.[91] With respect to the breakpoints and fee waivers, the plaintiffs argued that there was a dispute regarding, among other things, "who 'funded' the reductions because a portion of the fee reduction was the result of a subadviser reducing its fees."[92]

The *Harbor* court concluded that the plaintiffs did not explain why they believed the dispute over who "funded" the reductions "indicates that economies of scale were not shared."[93] The court further found the plaintiffs' arguments were "highly cursory in nature" and did not give rise to a triable issue of fact as to whether economies of scale existed or whether they were adequately shared.[94]

In at least two other manager of managers cases, the plaintiffs put forth arguments concerning an adviser's use of a subadviser and economies of scale: *Voya Investments, LLC* (2015) and *Principal Management Corporation* (2015).[95] While these cases were not decided on the merits, the allegations in the complaints are instructive.

In the complaint against Voya Investments, LLC, the plaintiffs claimed that the "disparity" between defendant adviser's breakpoint schedule and subadviser's breakpoint schedule allegedly reflected that the adviser used the breakpoint mechanism to benefit itself rather than the fund and its shareholders.[96] The adviser negotiated at arm's-length to pay the subadviser much lower fees, with different breakpoints, than the adviser charged to the fund. The plaintiffs alleged that the adviser benefited from its breakpoint arrangement because as the fund grew in size, the overall fee the adviser collected from the fund increased. This was allegedly in part because of the portion of the management fee the adviser collected (that it, in turn, paid to the subadviser) decreased, on the account of the subadviser's different breakpoints schedule.[97]

In the *Principal* case the plaintiffs stated in their complaint that the defendant investment adviser continued to subcontract with the subadvisers to provide advisory services for each fund.[98] However, the adviser's supervision and oversight of the subadvisers allegedly had "not meaningfully increased" as the fund's AUM increased.[99] The adviser allegedly continued to request and evaluate the "same or substantially the same reports and other information" with respect to each subadviser as the fund's AUM increased, and the work or cost to the adviser of reviewing and evaluating the information allegedly "had not increased proportionally."[100] Likewise, the plaintiffs alleged that the adviser was required to monitor compliance with "the same or substantially the same regulatory requirements regardless of a fund's AUM," and the adviser's cost to monitor such compliance allegedly "had not increased proportionally" as the fund's AUM increased.[101]

■ ***Lessons Learned***

Fund boards should consider the impact of any economies of scale resulting from fund AUM growth and the methods by which any economies of scale can be shared with investors. In evaluating the cases decided on their merits, as well as claims made in cases that the courts did not resolve, there are lessons to be learned:

- An investment adviser and subadviser with different breakpoint schedules should be evaluated by management and the fund board. Given the different responsibilities and cost structures, a disparity between the schedules may be appropriate.
- In addition, economies of scale may be evaluated along with adviser profitability. Even if the adviser realizes certain economies of scale, its profitability may continue to be within the range of margins that courts have found to be reasonable and/or the adviser may have been providing services with low or no profitability for years, thus subsidizing the services provided to the fund. This practice may be a form of pricing the fund to scale from inception, and would appear to be a warranted consideration in determining whether additional sharing of economies of scale is warranted.

## Profitability

The Supreme Court in *Jones* stated that a *Gartenberg* factor to consider is "the profitability of the fund to the adviser."[102] Certain unique profitability arguments arise in manager of managers cases as well. For example, the *AXA* plaintiffs asserted that, if the defendants "had properly calculated their profitability by excluding subadvisory and sub-administration fees from direct cost, and reworked the allocated cost methodology or limited those expenses…, [the defendants'] profitability margins would rise dramatically and exceed 90 percent, far above industry norms."[103] Concerning the subadvisory and sub-administration fees, the plaintiffs maintained that classifying those fees as the defendants' "expenses" was improper because those expenses were paid directly from the funds' bank account, not defendants'.[104]

However, the *AXA* court found for the defendants on the profitability issue. The court concluded that classifying subadvisory and sub-administrator fees as expenses "is within ordinary accounting principles."[105] The court largely relied on the testimony of the defendants' expert Dr. William Holder, the Dean of the School of Accounting at the University of Southern California.[106] Among other testimony, the dean noted that defendants' financial statements were audited by PricewaterhouseCoopers, and the auditor provided a "clean" audit opinion.[107] The court also found the dean's testimony was "more credible" than the plaintiffs' expert.[108]

The *AXA* court, moreover, found that the cost allocation methodology that the defendants used was appropriate for what the defendants referred to as "allocated expenses" (which were certain internally billed service expenses.)[109] Again, the court primarily relied on the testimony of the defendants' experts.[110] The defendants used "revenue as its cost-driver," that is, the defendants determined the revenues derived from different business sources, and allocated certain costs based on the percentage of revenue from those sources.[111] The court concluded that the plaintiffs did not demonstrate that the defendants' profitability numbers "were inaccurate due to faulty accounting."[112]

In *Hartford*, the plaintiffs used the same financial expert as in *AXA*.[113] The expert, however, used a different theory to try to persuade the court that subadvisory fees should not be considered in determining defendants' profitability. The expert testified that, because the subadviser "performs virtually all of the actual investment management services and activities," profitability should be based on only defendants' "retained fee."[114] The expert defended his methodology on what he said was the "'economic reality' of the

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situation."[115] In reliance on the expert, the plaintiffs claimed that subadvisory fees were what they referred to as "contra-revenue, which should treat subadvisory fees as neither revenue nor expenses of defendants."[116]

The court in *Hartford*, as with *AXA*, did not adopt the plaintiffs' accounting methodology. The court did not give weight to the plaintiff-suggested methodology, but looked to the profitability reports based on the analysis of Lipper and defendants' expert Glenn Hubbard, the Dean of the Columbia Business School.[117] In disregarding the plaintiffs' expert, the court noted that the expert conceded that treating subadvisory fees as an expense of the adviser was consistent with generally accepted accounting principles (GAAP).[118] The court also noted that the plaintiffs' expert had served on a mutual fund board and testified "that he would not be surprised to learn subadvisory expenses were treated by his board as an expense of the adviser…."[119]

Following the rulings in *AXA* and *Hartford*, the *Harbor* court considered a similar profitability argument. The *Harbor* adviser defendant argued that its pretax profitability of 37.6 percent and 38.5 percent from two funds, respectively, was in line with the mutual fund industry.[120] The plaintiffs, however, claimed that fees paid to the subadvisers should be treated as "pass-through payments" that are not included in the defendant's expenses. Without subadvisory fees, the defendant's profit margins from the funds would range between 89 and 90 percent, according to the plaintiffs. The plaintiffs' rationale was that including subadvisory fees as expenses ignores the "economic and practical realities" that the fees were for services provided to the funds by the subadvisers.[121]

In evaluating the profitability issue at the summary judgment phase, the *Harbor* court noted that the plaintiffs did not dispute that including subadvisory fees as expenses is consistent with GAAP. The court also noted that the plaintiffs did not point to any case law that supported their profitability methodology, and that the only two cases directly on point (*AXA* and *Hartford*) rejected the plaintiff's theory.[122] Moreover, the court observed that the plaintiffs did not dispute that the fund board received materials reflecting the defendants' "profitability both with and without the subadvisory fees."[123] In addition, there was evidence in the record that the board considered both profitability matrices and found that the plaintiffs' suggested method was "unhelpful or inappropriate."[124]

Because the *Harbor* case was being considered at summary judgment, the court stated that the plaintiffs were left to argue that there was a genuine dispute as to how the board weighed the various profitability factors. The court reasoned that the plaintiffs' argument was inconsistent with the Supreme Court's opinion in *Jones*. "As such, the plaintiffs' Monday-morning quarterbacking of the Board's weighing of [defendant's] profitability does not create a triable issue of fact..."[125]

## ■ *Lessons Learned*

In considering these court decisions, certain profitability lessons in the manager of managers context are apparent:

- Fund boards should consider requesting a profitability analysis for each fund to be included in the board materials as part of the advisory contract approval/renewal process (15(c) process).
- Fund boards may consider requesting several analyses of profitability calculated using different methodologies (that is, including and excluding subadvisory fees as an expense to the adviser).[126]
- Fund directors, including the independent directors, should be well informed on the profitability methodology, including any cost allocation methodology to allocate indirect costs. Directors may be deposed, as well as testify in court regarding profitability issues.

- A periodic profitability analysis by a reputable third-party is not required, but may be helpful.
- If profitability issues are litigated, the report/testimony of an experienced and creditable financial expert is paramount.

### "Fallout" Benefits

"Fallout" benefits are "collateral benefits that accrue to the adviser because of its relationship with the mutual fund."[127] Affiliated brokerage commissions are a classic example of a potential fall-out benefit.

The plaintiffs in *AXA* made two novel, insurance-related fallout benefit claims: (1) product wrapper fees, and (2) general account spread. Product wrapper fees generally are insurance contract fees that investors pay as part of a variable annuity contract.[128] The court held that the plaintiffs did not meet their burden of proof to demonstrate that "product wrapper fees constitute fallout benefits."[129] The court also concluded that an insurance company's general account spread also was not a fallout benefit. The court cited the plaintiff's own expert, who acknowledged that a general account and the mutual funds "have nothing to do with each other."[130] The court further disagreed with the plaintiffs that advisory and administrative fees paid to the insurance company should be considered fallout benefits.[131]

In *Hartford*, the plaintiffs did not make any arguments with regard to fallout benefits.[132] The plaintiffs in *Harbor* claimed that distribution and transfer agency services that the adviser's affiliates provided constituted fallout benefits.[133] The court, however, observed that the plaintiffs did not point to any evidence or make any arguments regarding why these fees "militate towards a finding that the advisory fee charged by [the adviser] is excessive."[134] Therefore, at the summary judgment, the court concluded that the plaintiffs did not "raise a triable issue of fact as to this factor."[135]

#### ■ *Lessons Learned*

In each of the cases, the plaintiffs did not make any arguments that would be unique to a manager of managers' structure. However, the cases, along with others, demonstrate that courts generally do not consider ordinary service contracts with advisory affiliates, which are fully disclosed to a fund board, to be a "fallout" benefit under the *Gartenberg* standard.

## Conclusion

Section 36(b) mutual fund excessive fee cases are complex from beginning to end. An analysis of the manager of managers' cases shows that fund advisers and boards of directors should pay particular attention to, among other areas, the nature of services provided by the adviser and any sub-adviser, economies of scale that may be realized by the adviser, and any appropriate adviser profitability analysis. A review of the cases also demonstrates the importance of independent, third-party experts who assist management and the board in carrying out their responsibilities during the fund contract approval/renewal process. If plaintiffs do bring a case, defendant advisers would do well to retain credible, persuasive experts to support their litigation positions.

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## NOTES

1 For example, *In re BlackRock Mut. Funds Advisory Fee Litig.*, 2019 WL 1387450 (D.N.J. Feb. 8, 2019). The *BlackRock* case was the first trial decision based on the "third-party subadvised" or "subadvisory" theory. The court held that the plaintiffs did not carry their burden with respect to each of the *Gartenberg* factors, and judgment in favor of the defendants was, therefore, proper. *Id*. at *36. *See also Goodman v. J.P. Morgan Inv. Mgmt., Inc*., 301 F. Supp. 3d 759 (S.D. Ohio 2018).

In addition, there are always the "plain vanilla" excessive fee cases, that is, a plaintiff simply alleges that the advisory fees are excessive under the relevant standard. For example, *In re Am. Mut. Funds Fee Litig.*, 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); *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923 (2d Cir. 1982) [hereinafter *Gartenberg*].

2 Section 36(b) provides:

> [T]he investment adviser of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company or by the security holders thereof, to such investment adviser or any affiliated person of such investment adviser.

Codified at 15 U.S.C. § 80a–35(b).

3 See *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 541 (1984).

4 *Jones v. Harris Associates L.P.*, 559 U.S. 335 (2010) [hereinafter Jones] (citing *Pepper v. Litton*, 308 U.S. 295 (1939)) (internal quotation marks and italics omitted). *Jones* was decided 9 to 0. *Jones'* procedural history began with the district court's grant of summary judgment for the defendant, applying the *Gartenberg* standard. *Jones v. Harris Associates L.P.*, No. 4 C 8305, 2007 WL 627640 (N.D. Ill. Feb. 27, 2007). The Seventh Circuit Court of Appeals subsequently affirmed the lower court's decision, but disapproved the *Gartenberg* standard in favor of a market-based approach. *Jones v. Harris Assocs. L.P.*, 527 F.3d 627 (7th Cir. 2008).

The *Jones* Supreme Court vacated the judgment of the Seventh Circuit Court of Appeals, finding that a trust law standard would apply, and that *Gartenberg* correctly identified factors relevant to the ultimate question of whether the fee is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining. On remand from the Supreme Court, the Seventh Circuit upheld the district court's decision for the defendant. *Jones v. Harris Associates L.P.*, 611 Fed. Appx. 359, 360 (7th Cir. 2015). The near five-year delay between the Supreme Court's ruling and the remand decision was explained:

> We close with an apology to the parties. After the Rule 54 statements were received, the papers were placed in the wrong stack and forgotten. The court's internal system for tracking cases under advisement does not include remands from the Supreme Court, so the normal process of alerts and ticklers failed.
>
> *Id*. at 362.

*See* ICI Mutual, Section 36(b) Litigation since *Jones v. Harris*: An Overview for Investment Advisers and Fund Independent Directors (July 2016); *see also* R. Robertson, *Fund Governance: The Legal Duties of Investment Company Directors,* Ch. 6 [Board Approval of Advisory Agreement] (Law Journal Press, 2019) [hereinafter Fund Governance].

5 *Jones*, 559 U.S. at 345-46.

6 *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923 (2d Cir. 1982).

7 *Id.* at 344. In this regard, the SEC similarly requires that a fund disclose in certain proxy statements and shareholder reports the factors that a board considered in approving a fund's investment advisory agreement. SEC Proxy Statement Schedule 14A, Item 22; SEC Registration Statement Form N-1A, Item 27.

8 *Jones*, 559 U.S. at 344.

9 *Id.* at 344, n.5 (citing *Gartenberg* at 929–932 (internal quotation marks omitted)).

10 *AXA*, 2016 WL 4487857, at *6. When the plaintiff brought the case, FMG was a wholly owned subsidiary of the insurance company.

11 *Id.* at *7.

12 *Id.* at *5.

13 *Hartford*, 2017 WL 773880, at *3.

14 *Id.*

15 *Id*. at *5.

16 *Harbor*, 2018 WL 1293230, at *1-2.

17 *Id.* at *2.

18 *Id*.

19 *Id*. at *3.

20 *Jones*, 559 U.S. at 337.

21 *Id*.

22 *Id.* at 346 n.5 (citing *Gartenberg*, 694 F. 2d at 929-932); *see* Fund Governance*, supra* n.4*,* at § 6.03.

23 *AXA*, 2016 WL 4487857, at *17.

24 *Id.* at *18.

25 *Id.* at *21-24.

26 *Id.* at *18.

27 *Id.* at *20-21.

28 *Id.* at *25.

29 *Kasilag v. Hartford Inv. Fin. Servs., LLC*, 2016 WL 1394347, at *14 (D.N.J. Apr. 7, 2016), *aff'd*, 745 F. App'x 452 (3d Cir. 2018); *Hartford*, 2017 WL 773880, at *2 n. 2.

30 *Hartford*, 2016 WL 1394347, at *10.

31 *Id*.

32 *Id.* at *40.

33 *Harbor*, 2018 WL 1293230, at *7.

34 *Id.* at *8.

35 *Id*.

36 *Id.* at *9.

37 *Id*.

38 *Id*.

39 *Jones*, 559 U.S. at 346 n.5 (citing *Gartenberg*, 694 F.2d, at 929-932).

40 *Hartford*, 2017 WL 773880, at *13-17.

41 *AXA*, 2016 WL 4487857, at *25-44; *Hartford*, 2017 WL 773880, at *19-22; *Harbor*, 2018 WL 1293230, at *10-11.

42 *AXA*, 2016 WL 4487857, at *25-44; *Hartford*, 2017 WL 773880, at *19-22.

43 *AXA*, 2016 WL 4487857, at *25-44.

44 *Id*. at *37-41.

45 *Id*. at *30.

46 *Id*. at *31.

47 *Hartford*, 2017 WL 773880, at *19-22.

48 *Harbor*, 2018 WL 1293230, at *10 (quoting *Hartford*, 2016 WL 1394347, at *15).

49 *Id*. at *7.

50 Jones, 559 U.S. at 346 n.5 (citing *Gartenberg*, 694 F. 2d at 929-932); *see* Fund Governance*, supra* n.4 at § 6.03.

51 The *AXA* court discussed "fund performance," but stated that fund performance itself was not a *Gartenberg* factor. The *AXA* court noted that courts have been "wary about attaching too much significance to a fund's financial performance." *AXA*, 2016 WL 4487857, at *68 (citation omitted). Moreover, "allegations of underperformance alone are insufficient to provide that an investment adviser's fees are excessive." *Id*. The *AXA* court then noted that the plaintiffs did not demonstrate that the funds performed poorly or that the services provided were inadequate. *Id*. at *68-69.

52 *Hartford*, 2017 WL 773880, at *8-12.

53 *Id.* at *11-12.

54 *Id.* at *23.

55 *Id.* at *22-23.

56 *Id.* at *23.

57 *Id.*

58 *Id.*

59 *Harbor*, 2018 WL 1293230, at *11.

60 *Id.*

61 The *Harbor* court found that the plaintiffs did not respond to the adviser's argument concerning why a fund may not have performed as well as or better than comparable funds. As such, the court found that plaintiffs "forfeited any argument regarding [the fund's] underperformance." *Id.*

62 *Id.* at *12.

63 *Jones*, 559 U.S. at 346, n.5 (citing *Gartenberg*, 694 F.2d, at 929-932); *see* Fund Governance*, supra* n.4*,* at § 6.03.

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[64] *Id.* at 350 (citations omitted) (cited in *AXA*, 2016 WL 4487857, at *64).

[65] *AXA*, 2016 WL 4487857, at *58.

[66] *Id.*

[67] *Id.* at *54.

[68] *Id.* at *59.

[69] *Id.*

[70] *Id.*

[71] *Hartford*, 2017 WL 773880, at *12.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Harbor*, 2018 WL 1293230, at *12.

[76] *Id.*

[77] *Id.*

[78] *Jones*, 559 U.S. at 345; *see* Fund Governance*, supra* n.4*,* at § 6.03.

[79] *AXA*, 2016 WL 4487857, at *51.

[80] *Id.*

[81] *Harbor*, 2018 WL 1293230, at *16.

[82] *AXA*, 2016 WL 4487857, at *51.

[83] *Id.* at *52.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Harbor*, 2018 WL 1293230, at *16.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] Complaint, Cox; Complaint, *Ventura v. Principal Mgt. Corp.*, No. 15-cv-481 (S.D. Iowa filed Dec. 30, 2015) [hereinafter Principal].

[96] Cox Complaint at 19.

[97] *Id.*

[98] Principal Complaint at 35.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Jones*, 559 U.S. at 346 n.5 (citing *Gartenberg*, 694 F. 2d at 929-932); *see* Fund Governance*, supra* n.4, at § 6.03[3].

[103] *AXA*, 2016 WL 4487857, at *45.

[104] *Id.*

[105] *Id.* at *46.

[106] *Id.* at *9.

[107] *Id.* at *45-46.

[108] *Id.* at *8 & *46.

[109] *Id.* at 44, 46-47.

[110] *Id.* at 47.

[111] *Id.* at 46.

[112] *Id.* at 51. The highest pre-tax adviser profitability from a fund in the Hartford case was 79.6 percent. *Id.* at 23.

[113] *Hartford*, 2017 WL 773880, at *13.

[114] *Id.* at 14.

[115] *Id.* at 15.

[116] *Id.* at 17.

[117] *Id.* at 8 and 23.

[118] *Id.* at 16.

[119] *Id.* at 16.

[120] *Harbor*, 2018 WL 1293230, at *13.

[121] *Id.* at *14.

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] In manager of managers' cases, the focus of a plaintiff's allegations and a court's analysis is the profitability of an investment adviser/advisory affiliates from managing the fund. A subadviser typically does not provide profitability information to a fund adviser/board regarding its subadvisory relationship. In addition, we are not aware of any court faulting an adviser/board for not obtaining the subadviser's profitability data. *See generally* In re BlackRock Mut. Funds Advisory Fee Litig., 327 F. Supp. 3d 690, 720 (D.N.J. 2018) (emphases added).

[127] *Jones*, 559 U.S. at 344 n.5 (citing *Gartenberg*, 694 F. 2d at 929-932).

[128] *AXA*, 2016 WL 4487857, at *55.

[129] *Id*. at *56. The *AXA* court cited the testimony of the adviser's CEO stating that he did not think investors buy an insurance contract just to own a particular fund. Hence, contract fees should not be viewed as a fund fallout benefit. *Id.* at 55.

[130] *Id*. at *57.

[131] *Id*. at *57-58

[132] *Hartford*, 2017 WL 773880, at *24.

[133] *Harbor*, 2018 WL 1293230, at *17.

[134] *Id*.

[135] *Id*.

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