NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

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| CYNTHIA ANN REDUS-TARCHIS, FREDRIC OLIVER, BONNIE OLIVER, and MICHAEL PATTI,<br><br>Plaintiffs,<br>v.<br><br>NEW YORK LIFE INVESTMENT MANAGEMENT LLC,<br><br>Defendant. | **OPINION**<br>Civ. No. 14-7991 |

**Walls, Senior District Judge**

Defendant New York Life Investment Management LLC ("NYLIM") moves for summary judgment on all claims asserted by Plaintiffs Cynthia Ann Redus-Tarchis, Fredric Oliver, Bonnie Oliver, and Michael Patti (collectively, "Plaintiffs") under Federal Rule of Civil Procedure 56. ECF No. 87. Plaintiffs oppose. ECF No. 93. Decided without oral argument under Federal Rule of Civil Procedure 78, Defendant's motion is granted.

## PROCEDURAL HISTORY

This matter involves allegedly excessive management fees taken by the investment advisor and manager of four mutual funds in violation of Section 36(b) of the Investment Company Act of 1940. 15 U.S.C. § 80a-35b (hereinafter "Section 36(b)"). The MainStay Large Gap Growth Fund ("Large Cap Fund"), the MainStay Marketfield Fund ("Marketfield Fund"), the MainStay High Yield Corporate Bond Fund ("HY Bond Fund"), and the MainStay High Yield Opportunities Fund ("HY Opps Fund") (collectively, the "Funds") are mutual funds registered under the Investment Company Act of 1940 ("ICA"). ECF No. 26 (Second Am. Compl.) ¶ 20. NYLIM serves as manager and investment advisor for these and other funds. *Id.*

¶¶ 21-23, 31. The gravamen of Plaintiffs' complaint is that NYLIM received fees for managing the Funds that were "so disproportionately large that they bear no reasonable relationship to the services provided by Defendant and could not have been the product of arm's length bargaining," primarily because NYLIM delegated "substantially all of its responsibilities" under its investment-management agreements to subcontractors while retaining a substantial portion of the fees paid under those agreements. *Id.* ¶¶ 4-9.

NYLIM moved to dismiss the Second Amended Complaint on June 19, 2015, ECF No. 31, and Plaintiffs opposed, ECF No. 34. The Court denied NYLIM's motion, applying the six "*Gartenberg* factors" found in *Gartenberg v. Merrill Lynch Asset Management*, 694 F.2d 923 (2d Cir. 1982), and finding that two favored NYLIM, three favored Plaintiffs, and one was neutral. ECF No. 45. Courts consider the *Gartenberg* factors, discussed in depth below, when determining whether fees are excessively large such that they breach the "fiduciary duty with respect to the receipt of compensation for services" imposed by Section 36(b). *See Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 344-46 & 344 n.5 (2010) (citing *Gartenberg* factors approvingly and noting that "*Gartenberg* was correct in its basic formulation of what § 36(b) requires").

## FACTUAL BACKGROUND

By stipulation, the "Relevant Period" refers to the applicable time period for claims and damages for each of the Funds.[1]

### 1. The Funds and Their Management Structure

During the Relevant Period, the HY Bond Fund and Large Cap Fund were each a series within the Mainstay Funds, and the HY Opps Fund and Marketfield Fund were each a series

[1] That period is December 24, 2013 through May 6, 2016 for the Marketfield Funds, the Large Cap Fund, and the HY Bond Fund; and April 21, 2014 through May 6, 2016 for the HY Opps Fund. ECF No. 58.

within the MainStay Funds Trust. ECF No. 88-1 (Def.'s Mot. Summ. J., Statement of Undisputed Material Facts) ¶ 1; ECF No. 93-1 (Pls.' Opp. Mot. Summ. J., Resp. to Def.'s Statement of Undisputed Material Facts) at 1. Each of the Funds were registered companies under the Investment Company Act of 1940 ("ICA"). ECF No. 88-1 ¶ 2; ECF No. 93-1 at 2. NYLIM is a registered investment advisor that currently serves as the investment manager and administrator of the MainStay Group of Funds. ECF No. 88-1 ¶ 3; ECF No. 93-1 at 2. During the Relevant Period, NYLIM served as an investment manager and administrator to each of the Funds. ECF No. 88-1 ¶ 4; ECF No. 93-1 at 3. Under the Management Agreements approved by the Funds' Board of Trustees (the "Board"), NYLIM was responsible for the management and administration of the Funds; Plaintiffs contend, however, that NYLIM was not the sole investment manager and administrator because each Fund's subadvisor also filled that role. ECF No. 88-1 ¶ 5; ECF No. 93-1 at 3.

Under the Management Agreements, NYLIM received fees from the Funds. ECF No. 88-1 ¶ 6; ECF No. 93-1 at 4. Those Agreements required NYLIM to "manage all aspects of the advisory operations of each Fund and the composition of the portfolio of each Fund, including the purchase, retention and disposition of securities therein, in accordance with the investment objectives, policies and restrictions of the Fund[.]" ECF No. 88-1 ¶ 7; ECF No. 93-1 at 5. The Agreements provided that NYLIM "may, through a subadvisory agreement or other arrangement, delegate to a subadvisor any of the duties enumerated . . . provided that [NYLIM] will continue to oversee the services provided by such company or employees[.]" ECF No. 88-1 ¶ 8; ECF No. 93-1 at 6. The Securities and Exchange Commission ("SEC") permitted NYLIM, with the Board's "review and approval," to engage subadvisors, as long as NYLIM provided "general management services" and maintained "overall supervisory responsibility for the general management and investment of each Sub-Advised Fund's assets." ECF No. 88-1 ¶ 9; ECF No. 93-1 at 6. The SEC has approved more than 200 applications for such management structures, known as "manager-of-managers" structures, which have grown in popularity after being introduced in the early 1990s. *Id.* To help manage the Funds, NYLIM entered into subadvisory agreements with three registered investment advisors (the "Subadvisors"): MacKay Shields LLC ("MacKay") for the HY Bond Fund and the HY Opps Fund, Winslow Capital Management, LLC ("Winslow") for the Large Cap Fund, and Marketfield Asset Management LLC ("MAM") for the Marketfield Fund. ECF No. 88-1 ¶ 10; ECF No. 93-1 at 7.

Mackay is an affiliate of NYLIM, and an indirect, wholly-owned subsidiary of NYLIM's parent company, New York Life Investment Holdings LLC, which itself is a subsidiary of New York Life. ECF No. 88-1 ¶ 11; ECF No. 93-1 at 7. It subadvised the HY Bond Fund under an August 1, 2008 agreement (amended February 28, 2013), and the HY Opps Fund under a February 28, 2014 agreement. ECF No. 88-1 ¶¶ 13-14; ECF No. 93-1 at 8. Winslow subadvised the Large Cap Fund under a December 6, 2008 agreement and, later, an October 1, 2014 agreement reached after Winslow's parent company was acquired. ECF No. 88-1 ¶ 18; ECF No. 93-1 at 9. NYLIM entered into an October 5, 2012 subadvisory agreement with MAM, at which time the Marketfield Fund, which had been advised by MAM, was transferred to the MainStay Group of Funds and managed by NYLIM. ECF No. 88-1 ¶ 19; ECF No. 93-1 at 10.

The Management Agreements require NYLIM to provide administrative services to the Funds, including maintaining their books and records, implementing and monitoring their compliance programs, monitoring risks, determining the Funds' net asset values ("NAVs"), and drafting and filing Fund disclosure documents. ECF No. 88-1 ¶ 23; ECF No. 93-1 at 12. Under the Management Agreements, those services and others could be delegated; they permit NYLIM to "enter into one or more contracts with a sub-administrator . . . in which [NYLIM] delegates to such sub-administrator any or all its duties specified in this agreement. . . . [NYLIM] will at all times maintain responsibility for providing the administrative services and will supervise any sub-administrator." ECF No. 88-1 ¶ 24; ECF No. 93-1 at 12-13. During the Relevant Period, State Street Bank and Trust Company ("State Street" or the "Sub-administrator") provided sub-administration and sub-accounting services to the Funds under a January 1, 2011 agreement with NYLIM, amended on October 21, 2013. ECF No. 88-1 ¶ 25; ECF No. 93-1 at 13. State Street performed a number of functions for the Funds, including calculating their daily NAVs, maintaining the general ledger and sub-ledger accounts for calculating the Funds' NAVs, and assisting in administrative operations. ECF No. 88-1 ¶ 26; ECF No. 93-1 at 13-15.

2. **The HY Opps Fund and Marketfield Fund Are Discontinued**

*HY Opps Fund.* On February 17, 2017, the HY Opps Fund merged into the HY Bond Fund. McKenney Decl. Ex. 176. All assets of the HY Opps Fund were transferred to the HY Bond Fund in exchange for shares of the latter, and the HY Opps Fund was liquidated. *Id.* Ex. 175. HY Opps shareholders received a pro rata distribution of shares in the HY Bond Fund. *Id.* The boards of each fund were comprised of the same individuals. *Id.* Being a preexisting fund, the HY Bond Fund appears to have had its own shareholders, and the amount of pre-merger ownership overlap between the two funds, if any, is unclear from the record. *Id.* NYLIM served as investment manager, and MacKay as subadvisor, for both. *Id.*

*Marketfield Fund.* In December 2015, the board of the Marketfield Fund approved a reorganization plan, in which the fund was reorganized as a new fund in the same name (hereinafter "Marketfield 2"), a series of the Trust for Professional Managers.[2] McKenney Decl.

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[2] The original fund was called the "MainStay Marketfield Fund," and the new fund was named the "Marketfield Fund." McKenney Decl. Ex. 168.

Ex. 168. That reorganization occurred on April 8, 2016, after the Marketfield Fund board notified shareholders and received approval from a majority of them. *Id.* Exs. 169, 177. As a "newly formed" fund, Marketfield 2 appears not to have had any pre-existing shareholders. *Id.* Ex. 168. Under the reorganization plan, shareholders of the Marketfield Fund received a pro rata distribution of Marketfield 2 shares on the reorganization date. *Id.* The two funds "had substantially the same investment objective, strategies and policies[.]" *Id.* Ex. 177. But NYLIM did not serve as investment manager for Marketfield 2, which left the Mainstay Group of Funds. *Id.* It is unclear from the record what, if any, overlap in board composition existed between the two funds.

3. **NYLIM's Services**

a. *Investment Consulting Group*

NYLIM performed a number of services before the Relevant Period related to creating, marketing, and organizing the Funds. For instance, NYLIM developed new funds' investment strategies, marketed them, and assumed related entrepreneurial risks. ECF No. 88-1 ¶¶ 28-29; ECF No. 93-1 at 16. It was also responsible for "selecting, evaluating, and recommending to the Board any subadvisors to manage a Fund." ECF No. 88-1 ¶ 30; ECF No. 93-1 at 16. Evaluation of new subadvisors was performed by NYLIM's Investment Consulting Group ("ICG") "through investment-related due diligence" and communicated to the Board via written reports. ECF No. 88-1 ¶ 31; ECF No. 93-1 at 17. Plaintiffs dispute the relevance of these services to their claims because they occurred before the Relevant Period. ECF No. 93-1 at 16-18.

Once a subadvisor was approved by the Board and hired, NYLIM, through ICG, would monitor a Fund's performance, riskiness, and portfolio attributes against relevant benchmarks on an ongoing basis, and issue quarterly reports to the Board containing performance and risk analyses, including comparisons to peer funds. ECF No. 88-1 ¶ 32; ECF No. 93-1 at 18. ICG performed "stress tests" or "scenario analyses" for each Fund, which assessed how Funds would respond to certain events. ECF No. 88-1 ¶ 33; ECF No. 93-1 at 18. ICG maintained a "monitor list" of Funds requiring additional monitoring, and reviewed and reported on their performance to the Board on a quarterly basis. ECF No. 88-1 ¶ 34; ECF No. 93-1 at 19. ICG also worked with other groups at NYLIM to perform Fund remediation, including realignment of performance benchmarks, subadvisor replacement, and other actions. McKenney Decl. Ex. 91. Neither stress tests, monitor-list maintenance, nor Fund remediation are explicitly required by the Management Agreements. ECF No. 88-1 ¶¶ 35, 38; ECF No. 93-1 at 19-20.

ICG met quarterly with the Board's Investment Committee. ECF No. 88-1 ¶ 39; ECF No. 93-1 at 19. It also met quarterly with NYLIM's Investment Governance Committee, an internal committee of senior executives responsible for assessing the investment strategies managed by NYLIM. McKenney Decl. Ex. 91. The Management Agreements do not explicitly require NYLIM to establish an Investment Governance Committee. ECF No. 88-1 ¶ 41; ECF No. 93-1 at 22.

b. *Compliance*

NYLIM's Fund Compliance group monitors the Funds to ensure that they meet their "investment policies, restrictions, and objectives" as outlined in their public filings and elsewhere. ECF No. 88-1 ¶ 42; ECF No. 93-1 at 22. When Fund Compliance identified any potential non-compliance with policies, restrictions, or objectives, NYLIM discussed the issues with the compliance department of the affected subadvisor. ECF No. 88-1 ¶ 43; ECF No. 93-1 at 22. NYLIM also ensured via annual on-site diligence reviews and frequent communication that, under Rule 38a-1 of the ICA, each subadvisor and sub-administrator had implemented effective policies and procedures. ECF No. 88-1 ¶ 44; ECF No. 93-1 at 23. The Compliance Department also interviewed relevant personnel, conducted forensic testing, conducted quarterly reviews of brokerage activity, monitored large trades, and performed other oversight. ECF No. 88-1 ¶¶ 45-47; ECF No. 93-1 at 23.

NYLIM's Compliance Committee, which includes NYLIM's Chief Executive Officer and Chief Compliance Officer ("CCO"), Kevin Bopp, met semi-annually to address compliance issues and projects. ECF No. 88-1 ¶ 49; ECF No. 93-1 at 24. The Management Agreements do not explicitly require that NYLIM create or maintain a Compliance Committee. ECF No. 88-1 ¶ 50; ECF No. 93-1 at 24. The CCO provided the Board with quarterly reports and updated the Board in person at quarterly meetings. McKenney Decl. Ex. 62. He also met monthly with the chair of the Board's Risk and Compliance Oversight Committee. ECF No. 88-1 ¶ 56; ECF No. 93-1 at 26. The Compliance Department reviewed and updated each Fund's prospectus annually in an "extensive process." McKenney Decl. Ex. 2 at 52 (Bopp testifying regarding "a general view of the process"). It also provided the Board with quarterly "comprehensive compliance report[s]" summarizing the results of its testing. *Id.* Ex. 91.

Stephen Fisher, former President of the Funds, testified that NYLIM retained various compliance duties, including those related to prospectuses, "percentage of assets in a particular security," and "[o]verall oversight of the code of ethics." ECF No. 88-1 ¶ 57; ECF No. 93-1 at 26. Numerous NYLIM personnel and other resources were dedicated to oversight of the Funds. ECF No. 88-1 ¶¶ 59-61; ECF No. 93-1 at 27-28. NYLIM also performed a risk management function, which was led by a Chief Risk Officer. ECF No. 88-1 ¶ 70; ECF No. 93-1 at 32.

c. *Fund Administration and Accounting*

NYLIM's Fund Administration and Accounting ("FAA") group reviewed State Street's calculation of the NAV for accuracy on a daily basis. ECF No. 88-1 ¶ 73; ECF No. 93-1 at 33. The FAA group also completed more detailed reviews of the accuracy of a Funds' NAV as needed. ECF No. 88-1 ¶ 74; ECF No. 93-1 at 33. Although the initial drafts of the Funds' financial statements are prepared by the Sub-administrator, the drafts are reviewed by the FAA group, which worked with State Street to finalize the statements. ECF No. 88-1 ¶ 77; ECF No. 93-1 at 34-35. The FAA group oversaw the Sub-administrator through weekly teleconferences to address open projects and through detailed monthly reviews of State Street's performance against various metrics. ECF No. 88-1 ¶ 78; ECF No. 93-1 at 35.

d. *NYLIM's Support of the Board*

NYLIM also maintained a Board Administration Group, headed by Scott Harrington, who acted as a key liaison between the Board and NYLIM to help ensure Board effectiveness. ECF No. 88-1 ¶ 82; ECF No. 93-1 at 36. Harrington, who reported directly to NYLIM President Fisher, testified that his support of the Board is "a full year process." ECF No. 88-1 ¶¶ 83-84; ECF No. 93-1 at 36-37. Fisher testified that NYLIM undertakes a "tremendous amount of work" to prepare the materials for Board meetings and that the process of preparing for meetings and responding to Board follow-up requests was "quite rigorous and all year round." ECF No. 88-1 ¶ 86; ECF No. 93-1 at 37.

**STANDARD OF REVIEW**

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute between the parties must be both genuine and material to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A disputed fact is material where it would affect the outcome of the suit under the relevant substantive law. *Scott v. Harris*, 550 U.S. 372, 380 (2007). A dispute is genuine where a rational trier of fact could return a verdict for the non-movant. *Id.*

The movant bears the initial burden to demonstrate the absence of a genuine issue of material fact for trial. *Beard v. Banks*, 548 U.S. 521, 529 (2006). Once the movant has carried this burden, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts" in question. *Scott*, 550 U.S. at 380 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). "[W]ith respect to an issue on which the nonmoving party bears the burden of proof . . . the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. *Jersey Cent. Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1109 (3d Cir. 1985). The party opposing the motion for summary judgment cannot rest on mere allegations and instead must present actual evidence that creates a genuine issue as to a material fact for trial. *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1130-31 (3d Cir. 1995).

Each party must support its position by "citing to particular parts of materials in the record . . . or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts. *Scott*, 550 U.S. at 380. At this stage, "the judge's function is not . . . to weigh the evidence and determine the truth of the matter." *Anderson*, 477 U.S. at 249.

**DISCUSSION**

Congress enacted the ICA in 1940 to address "its concern with the potential for abuse inherent in the structure of investment companies." *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984) (quoting *Burks v. Lasker*, 441 U.S. 471, 480 (1979)). Unlike most corporations, an investment company, or mutual fund, is "typically created and managed by a pre-existing external organization known as an investment adviser." *Id.* The investment advisor "generally supervises the daily operation of the fund and often selects affiliated persons to serve on the company's board of directors," creating a relationship that is "fraught with potential conflicts of interest." *Id.* (quoting *Burks*, 441 U.S. at 481).

Section 36(b) of the ICA, as amended in 1970, gives mutual funds and their shareholders some protection from these potential conflicts by imposing a "fiduciary duty" on investment advisers and their affiliates. *Id.* at 539. Section 36(b) provides that "investment company advisors owe shareholders in investment companies a fiduciary duty with respect to determining and receiving their advisory fees." *Green v. Fund Asset Management, L.P.*, 286 F.3d 682, 684 (3d Cir. 2002) (citing 15 U.S.C. § 80a-35(b)).

Plaintiffs who are shareholders in an investment company may bring suit on behalf of the investment company against an advisor for breach of fiduciary duty, provided that they own shares at the time the action is initiated and continue to own shares throughout the pendency of the litigation. *Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins. Co. (U.S.A.)*, 677 F.3d 178, 182-83 (3d Cir. 2012). A Section 36(b) suit is "similar to a derivative action in that it is brought on behalf of the investment company," and "any recovery obtained in a § 36(b) action will go to the company rather than the plaintiff." *Id.* at 182 (internal quotation omitted). "[D]amages are not recoverable for any period prior to one year before the action was instituted," in this case December 23, 2014. ECF No. 1; *Green*, 286 F.3d at 685 (citing 15 U.S.C. § 80a-35(b)(3)).

Plaintiffs have the burden of proving the breach of fiduciary duty. *Green*, 286 F.3d at 684. "[T]o face liability under § 36(b), an investment adviser must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining." *Jones*, 559 U.S. at 346. To determine whether an investment adviser's fee is excessive for the purposes of § 36(b), "a court must examine the relationship between the fees charged and the services rendered by the investment adviser." *Krantz v. Prudential Invs. Fund Mgmt. LLC*, 305 F.3d 140, 143 (3d Cir. 2002), *cert. denied*, 537 U.S. 1113 (2003).

The Second Circuit in *Gartenberg* identified six factors for courts to consider when determining whether fees are excessively large: "(a) the nature and quality of services provided to fund shareholders; (b) the profitability of the fund to the adviser-manager; (c) fall-out benefits; (d) economies of scale; (e) comparative fee structures [in other mutual funds], and (f) the independence and conscientiousness of the trustees." *Krinsk v. Fund Asset Mgmt., Inc.*, 875 F.2d 404, 409 (2d Cir.), *cert. denied*, 493 U.S. 919 (1989) (citing *Gartenberg*, 694 F.2d at 929-30); *see Kasilag v. Hartford Inv. Fin. Servs., LLC*, Civ. No. 11-1083, 2017 WL 773880, at *18-24 (D.N.J. Feb. 28, 2017) (applying *Gartenberg* factors) (*Kasilag II*), *aff'd*, No. 17-1653, 2018 WL 3913102 (3d Cir. Aug. 15, 2018). These factors are non-exclusive, and courts should consider "all relevant circumstances" where other factors merit consideration. *Jones*, 559 U.S. at 347.

Ultimately, "the [ICA] does not require courts to engage in precise calculation of fees representative of arm's-length bargaining." *Id.* at 352 (citation omitted).

**1. Standing**

As a threshold matter, the Court must address NYLIM's contention that, as to two of the Funds, Plaintiffs' claims must fail because those funds no longer exist and, consequently, that Plaintiffs lack statutory standing to assert claims relating to those funds. ECF No. 88 at 39-40. The HY Opps Fund and the Marketfield Fund have both ceased to exist. The HY Opps Fund was liquidated on February 17, 2017, and its shares were cancelled, with shareholders receiving a pro rata distribution of shares in the HY Bond Fund. The Marketfield Fund reorganized by an April 8, 2016 "Agreement and Plan of Reorganization," under which the Marketfield Fund reconstituted into a new fund.

Section 36(b) actions may be brought "by the [SEC], or by a security holder" in a fund. 15 U.S.C. § 80a-35(b). The Third Circuit has recognized that "Section 36(b) plainly requires that a party claiming a breach of the fiduciary duty imposed by that legislative provision be a security holder of the investment company at the time the action is initiated," and that "[i]mposing a *continuous* ownership requirement throughout the pendency of the litigation assures that the plaintiff will adequately represent the interests of the security holders in obtaining a recovery for the benefit of the company." *Santomenno*, 677 F.3d at 183 (emphasis in original). Plaintiffs were "security holder[s]" in the Marketfield Fund and HY Opps Fund at the time they initiated this action, and thus satisfy the first standing requirement, but have failed (through no fault of their own) to *remain* "security holder[s]" throughout the pendency of this action, and thus do not satisfy the second.

Noting *Santomenno*'s conclusion that Section 36(b) lawsuits are derivative actions subject to the "continuous ownership" requirement, NYLIM contends that because the HY Opps and Marketfield Funds either liquidated or reorganized during the pendency of Plaintiffs' lawsuit, Plaintiffs' claims relating to those funds must be dismissed for lack of continuous ownership. ECF No. 88 at 39-40. For support, NYLIM looks to cases dismissing state-law shareholder derivative suits where the company had merged or dissolved. *Id.* Plaintiffs respond that they satisfy the continuous-ownership requirement because "[t]he rights held by the Marketfield Fund and HY Opps Fund were not extinguished when the Funds were reorganized," but were instead assigned to the "acquiring" funds. ECF No. 93 at 36.

More to the point, Plaintiffs cite a Massachusetts case for the proposition that "standing is not lost 'where the merger is in reality a reorganization which does not affect [the] plaintiff's ownership of the business enterprise.'" ECF No. 93 at 38 (citing *Billings v. GTFM, LLC*, 449 Mass. 281, 293 (2007)). The *Billings* court, in that excerpt, quotes the Delaware Supreme Court in *Lewis v. Anderson*, which held that under Delaware law, "[a] plaintiff who ceases to be a shareholder, whether by reason of a merger or for any other reason, loses standing to continue a derivative suit." 477 A.2d 1040, 1049 (Del. 1984). The *Anderson* court recognized two exceptions to that rule: "(1) where the merger itself is the subject of a claim of fraud; and (2) where the merger is in reality a reorganization which does not affect plaintiff's ownership of the business enterprise." *Anderson*, 477 A.2d at 1046 n.10. The *Billings* court found that *Anderson*'s reasoning applied equally under Massachusetts law. *Billings*, 449 Mass. at 293 n.24.

Plaintiffs contend that the latter *Anderson* exception applies here. ECF No. 93 at 37-38. Citing case law of federal courts sitting in diversity, NYLIM counters that "[i]n stock-for-stock transactions, like the transactions by which Plaintiffs exchanged their shares of the HY Opps

Fund and Marketfield Fund for shares of entirely separate legal entities, derivative plaintiffs' standing is extinguished." ECF No. 94 at 15. Neither party addresses that this is an action under federal, not state law. *See In re Pittsburgh & L.E. R. Co. Secs. And Antitrust Litig.*, 543 F.2d 1058, 1066-67 (3d Cir. 1976) (standing to assert federal-law cause of action is a question of federal law). Nor do the parties address the circumstance that, while the Supreme Court has found that a Section 36(b) action is derivative in nature, *see Daily Fund*, 464 U.S. at 535 n.11, it differs from a traditional shareholder derivative suit in that it asserts a cause of action that the corporation cannot, by the plain language of the statute, itself assert. 15 U.S.C. § 80a-35(b) (providing for actions "by the [Securities and Exchange] Commission, or by a security holder" only).

The questions for the Court are thus (i) whether *Anderson*'s exceptions (or some equivalents) to the continuous-ownership rule apply in Section 36(b) cases; and (ii) if yes, whether the second exception applies on the facts of this case.

a. *Applicability of the* Anderson *Exceptions*

The Court is unaware of any Section 36(b) precedent applying *Anderson*-like exceptions to the continuous-ownership rule. Yet federal courts have applied similar exceptions to the continuous-ownership standing requirement in derivative actions asserting federal claims. *See, e.g., Arnett v. Gerber Scientific, Inc.*, 566 F. Supp. 1270, 1273 (S.D.N.Y. 1983) (applying exception analogous to *Anderson*'s first exception in derivative action under federal antitrust laws); *Fischer v. CF & I Steel Corp.*, 599 F. Supp. 340, 347 (S.D.N.Y. 1984) (considering plaintiffs' argument under second *Anderson* exception, but concluding that merger "was in fact a significant reorganization of the two companies" falling outside the exception). It is true that those cases rooted their standing analyses in Federal Rule of Civil Procedure 23.1, which governs derivative actions, while the Supreme Court in *Daily Income* found that Rule 23.1 does not apply to Section 36(b) claims. 464 U.S. 523 (1984). But the Third Circuit in *Santomenno* observed that "[a] continuous ownership requirement gives effect to th[e] 'undeniably derivative' nature of a Section 36(b) claim" that the Supreme Court recognized in *Daily Income*. 677 F.3d at 184 (quoting *Daily Income*, 464 U.S. at 535 n.11). The *Santomenno* court further noted that a continuous-ownership requirement accords with Section 36(b)'s derivative nature by "assur[ing] that the plaintiff will adequately represent the interests of the security holders in obtaining a recovery for the benefit of the company." *Id.* at 183.

The Court sees no reason why established exceptions to the continuous-ownership rule should not apply in Section 36(b) cases. If anything, the unique nature of Section 36(b) claims—assertable only by the corporation's shareholders, and not by the corporation itself, even though the "right asserted" in such a claim is a "right of the corporation," *Daily Income*, 464 at 535 n.11—weighs in favor of permitting such exceptions. One of the principal justifications for the continuous-ownership rule is that, in the case of a merger or reorganization that extinguishes stock ownership in the disappearing entity, any cause of action possessed by that entity passes to the surviving entity, whose board may decide whether to pursue that action. *See Lewis v. Ward*, 852 A.2d 896, 903 (Del. 2004) (noting that, in case of merger, "derivative claims pass by operation of law to the surviving corporation, whose board of directors then has the sole right and standing to prosecute the action"). But that justification does not apply where, as in the case of a Section 36(b) action, the claims cannot be asserted by the board of directors. To permit no exceptions to the continuous-ownership rule would permanently extinguish the rights of funds to recover excessive fees from their advisors and managers in cases where those funds undergo even the simplest or most inconsequential structural change. Application of the second exception accords with the *Santomenno* court's justification for retaining the continuous-ownership rule in Section 36(b) actions: where a post-reorganization corporation is fundamentally identical to that which preceded it, courts can be "assure[d] that the plaintiff will adequately represent the interests of the security holders in obtaining a recovery for the benefit of the company." 677 F.3d at 183.

b. *Whether the Second* Anderson *Exception Applies*

The second *Anderson* exception applies "where [a] merger is in reality a reorganization which does not affect plaintiff's ownership of the business enterprise." *Anderson*, 477 A.2d at 1046 n.10. It is commonly known as the "mere reorganization" exception. *Ward*, 852 A.2d at 904. Courts find standing under this exception where the surviving entity is different from the disappearing entity in name or structure only. *Compare Schreiber v. Carney*, 447 A.2d 17, 22 (Del. Ch. 1982) (applying reorganization exception, pre-*Anderson*, to a merger which resulted in "the shareholders of the old company owning all the shares of the new holding company," and noting that the exception would not apply to "mergers with outside or pre-existing corporations with substantial assets"); *and Helfand v. Gambee*, 136 A.2d 558, 562 (Del. Ch. 1957) (applying reorganization exception, pre-*Anderson*, where plaintiff simply had "two pieces of paper rather than one" after the corporation split into two new corporations under antitrust consent decree); *with Ward*, 852 A.2d at 904 (refusing to apply mere-reorganization exception where merging entities "were two distinct corporations, each with its own board of directors, assets and stockholders," and merger was thus "far more than a corporate reshuffling"); *and Bonime v. Biaggini*, 1984 WL 19830, at *3 (Del. Ch. Dec. 7, 1984) (refusing to apply mere-reorganization exception after "merger of two distinct corporations each of which had separate boards, officers, assets and stockholders") *aff'd*, 505 A.2d 451 (Del. 1985).

Here, former shareholders in the HY Opps Fund and Marketfield Fund do not now simply have "two pieces of paper rather than one," and their funds were not merely transferred to a holding company and otherwise left unchanged. The HY Opps Fund merged into the HY Bond Fund, which existed before the merger with its own shareholders and investment strategies. Consequently, while there was post-merger continuity in board composition, there was not continuity in shareholder composition or fund strategy. The Marketfield Fund's reorganization was, in a sense, the inverse of the HY Bond Fund's. Marketfield 2 did not exist before the Marketfield Fund's reorganization, resulting in a post-reorganization continuity in shareholder composition. But there was not continuity in board or management composition because Marketfield 2 left the Mainstay Group of Funds, and NYLIM no longer managed or controlled it.

The Court finds that the mere-reorganization exception does not apply on these facts, which more closely resemble those in which courts have dismissed for lack of standing after stock-for-stock mergers or bankruptcy-court reorganizations. *See Hantz v. Belyew*, 194 Fed. App'x 897, 898-99 (11th Cir. 2006) (affirming derivative-suit dismissal for lack of standing where plaintiffs lost shareholder status in bankruptcy reorganization); *In re Mercury Interactive Corp. Derivative Litig.*, 487 F. Supp. 2d 1132, 1136 (N.D. Ca. 2007) (finding no standing under continuous-ownership rule where plaintiffs' shares sold during a cash-out merger); *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348 (Del. 1988) (same); *In re Merrill Lynch & Co. Secs., Deriv. & ERISA Litig.*, 597 F. Supp. 2d 427, 429-30 (S.D.N.Y. 2009) (applying Delaware law and finding no standing where plaintiffs ceased to be shareholders after stock-for-stock transaction). Summary judgment is granted to NYLIM on Counts 1 and 4.

### 2. The *Gartenberg* Factors

Of the six *Gartenberg* factors, nearly all of the parties' dispute focuses on the independence and conscientiousness of the Trustees. But independent and conscientious Board approval (or lack thereof) does not short-circuit the *Gartenberg* analysis. *See In re BlackRock Mut. Funds Advisory Fee Litig.*, No. CV141165FLWTJB, 2018 WL 3075916, at *20 (D.N.J. June 21, 2018) ("Notwithstanding the considerable weight that I will accord the Board's decision to approve [the fund's] Advisory Fee in this case, I must still determine whether Plaintiffs have adduced other evidence that the Advisory Fee charged by [the fund] 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."). The Court will assess all six *Gartenberg* factors in turn.[3]

#### a. *Factor One: Nature and Quality of the Services Provided to the Funds*

Plaintiffs object to the amount of NYLIM's services it contracted out to subadvisors, arguing that NYLIM delegated "most" of its advisory responsibilities to subadvisors. ECF No. 93-2 ¶¶ 17, 21, 24, 29. NYLIM acknowledges that it delegated certain advisory tasks to subadvisors, but disputes Plaintiffs' characterizations of the extent of that delegation. ECF No. 94-1 at 3-8. Neither side disputes that the Management Agreements explicitly give NYLIM the right to delegate "any or all its duties" to a subadvisor. *See* ECF No. 88-1 ¶ 24; ECF No. 93-1 at 12-13. Because NYLIM was acting in accordance with this contractual right, the nature of the services provided tips in its favor. *See Zehrer v. Harbor Capital Advisors, Inc.*, No. 14 C 00789, 2018 WL 1293230, at *10 (N.D. Ill. Mar. 13, 2018) (nature of services weighed in favor of defendant fund advisor because contracts between advisor and funds "explicitly permit [the advisor] to retain subadvisers and contain provisions outlining the scope of [the advisor's]

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[3] Indeed, as in *Blackrock*, "many of the arguments that Plaintiffs attempt to couch within the confines of Board deference are better addressed within the *Gartenberg* factors." 2018 WL 3075916, at *20 n.36.

obligation regarding the compensation and oversight of subadvisers"); *Kasilag v. Hartford Inv. Fin. Servs., LLC*, No. CV 11-1083 (RMB/KMW), 2016 WL 1394347, at *15 (D.N.J. Apr. 7, 2016) (*Kasilag I*) (rejecting contention that "the proper services to be considered are only those directly performed by the" defendants; "what's the difference to the Funds if the [defendants] perform the services directly or by way of a sub-adviser?").

"In evaluating the quality of the services provided to funds, other courts have compared the performance of challenged funds against peer funds." *Zehrer*, 2018 WL 1293230, at *11 (collecting cases). When "the funds [the defendant] was advising did as well as, if not better than, comparable funds," this factor tips in favor of the defendant. *Jones v. Harris Assocs. L.P.*, 611 F. App'x 359, 361 (7th Cir. 2015).[4] NYLIM proffered little evidence by which to compare the Funds' performance with that of peer funds. *See* ECF No. 88-1 ¶¶ 305-20. Most of its discussion of this issue deals with the Board's consideration of the Funds' performance, with only cursory reference to statements by a Board member that the performances of the HY Bond Fund and the Large Cap Fund "compared favorably to [their] peer group." *Id.* ¶¶ 318, 320. But NYLIM provides no evidence by which a trier of fact could compare the Funds' performance. Plaintiffs offer evidence that the Large Cap Fund and the HY Bond Fund both failed to hit NYLIM's performance benchmark in any year from 2013 through 2016. *See* ECF No. 93-1 at 128.[5] The Court in *Kasilag II* discounted similar evidence, though, noting that the plaintiffs there "presented little evidence that the failure to hit a benchmark is a strong indication of poor performance." 2017 WL 773880, at 22. So too here, where Plaintiffs have failed to explain why the Court or a trier of fact should compare the Funds' performance against NYLIM's

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4 The Court will not discount the Funds' performance simply because some of NYLIM's contractual responsibilities were carried out by subadvisors. *See Zehrer*, 2018 WL 1293230, at *11.

5 NYLIM does not dispute Plaintiffs' figures. *See* ECF No. 94-2 at 18-20.

benchmarks. Consequently, neither party has presented sufficient evidence for the quality of the services rendered to tip in their favor.

Because the nature of the services rendered favors NYLIM, this *Gartenberg* factor tips slightly in NYLIM's favor.

b. *Factor Two: Profitability of the Funds to NYLIM*

"Section 36(b) does not prohibit an investment adviser from making a profit, nor does it regulate the level of profit." *In re Am. Mut. Funds Fee Litig.*, No. CV 04-5593 GAF (RNBX, 2009 WL 5215755, at *50 (C.D. Cal. Dec. 28, 2009), *aff'd sub nom. Jelinek v. Capital Research & Mgmt. Co.*, 448 F. App'x 716 (9th Cir. 2011). That a fund manager "just plain made too much money" is "not an acceptable approach" under this factor. *Kalish v. Franklin Advisers, Inc.*, 742 F. Supp. 1222, 1237 (S.D.N.Y. 1990), *aff'd*, 928 F.2d 590 (2d Cir. 1991).

NYLIM proffers evidence that its profit margins for the Large Cap Fund ranged from 48% to 46% in the Relevant Period, and for the HY Bond Fund from 52% to 53%. ECF No. 88-1 ¶ 285.[6] Plaintiffs dispute the accuracy of these figures. *See* ECF No. 93-1 at 115-16.

Courts have blessed pre-tax profit margins both higher and lower than NYLIM's. *See Kasilag II*, 2017 WL 773880, at *22 (factor tips in favor of defendants where pre-tax profits ranged between 45.6% and 80.3%); *see also Krinsk v. Fund Asset Mgmt. Inc.*, 715 F. Supp. 472, 494 (S.D.N.Y. 1988) (pre-tax margins up to 33%); *Schuyt v. Rowe Price Prime Reserve Fund, Inc.*, 663 F. Supp. 962, 978 (S.D.N.Y.) (estimated pre-tax margins up to 77.3%), *aff'd*, 835 F.2d 45 (2d Cir. 1987); *Meyer v. Oppenheimer Mgmt. Corp.*, 707 F. Supp. 1394, 1401

[6] These figures are NYLIM's pre-distribution profit margins. NYLIM also provides post-distribution profit margins that are substantially lower, ECF No. 88-1 ¶ 285, but Plaintiffs argue that considering post-distribution figures is inappropriate here. ECF No. 93-1 at 116. The Court agrees, *see Kalish*, 742 F. Supp. at 1237 (distribution expenses should not be considered by trustees when voting on advisory fees), and will consider NYLIM's pre-distribution profit margins.

(S.D.N.Y.1988) (pre-tax margins up to 89%), *aff'd*, 895 F.2d 861 (2d Cir. 1990). "Plaintiffs have failed to meet their burden of establishing that the Funds were so profitable that their fee could not have been negotiated at arm's-length." *Kasilag II*, 2017 WL 773880, at *23. This factor tips in favor of NYLIM.

c. *Factor Three: Fall-Out Benefits Realized by NYLIM*

NYLIM claims that the Board concluded that its relationship with the Funds does not results in any fall-out benefits, ECF No. 88-1 ¶¶ 301-04, and argues that discovery has revealed no evidence to the contrary, ECF No. 88 at 38. Plaintiffs do not address fall-out benefits in their brief, ECF No. 93 at 34-36, but contend that Board chair Peter Meenan's deposition testimony raises a genuine question as to whether NYLIM received such benefits, ECF No. 93-2 ¶¶ 166-68. NYLIM argues that Plaintiffs waived any argument as to this factor by not raising it in their brief. ECF No. 94 at 2-3.[7]

The Court concludes that Plaintiffs have failed to raise a genuine issue of material fact as to fall-out benefits, which the Supreme Court has defined as "collateral benefits that accrue to the adviser because of its relationship with the mutual fund[.]" *Jones*, 559 U.S. at 345 n.5. *Gartenberg* noted that "the burden rested with the plaintiff to 'demonstrate that the benefits were so substantial that they rendered the Manager's fee so disproportionately large as to label its negotiation a breach of fiduciary duty within the meaning of § 36(b).'" *Krinsk*, 715 F. Supp. at

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[7] The Court rejects NYLIM's contention that Plaintiff waived any argument as to fall-out benefits by failing to raise it in their brief. NYLIM references only a single district court decision that is not binding on this Court. Indeed, the Court can find no controlling authority for the proposition that an argument is waived if raised only in a Rule 56.1 statement but not in a brief. And such a rule would be at odds with Rule 56's requirement that there be no "genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). Under this rule, summary judgment is inappropriate "if the *evidence* is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248 (emphasis added). Though Plaintiffs may not have raised arguments about fall-out benefits in their brief, they have proffered *evidence* regarding such benefits. The Court will consider whether that evidence is sufficient to withstand summary judgment.

494 (citing *Gartenberg*, 694 F.2d at 932). Plaintiffs have not met that burden. Their evidence of such benefits is scant, limited to Meenan's testimony that NYLIM sometimes develops relationships with financial intermediaries who "are impressed with what NYLIM is doing" on behalf of the funds. ECF No. 93-4 at 196-98. But Plaintiffs have made no effort to describe or quantify these benefits. *Compare Sivolella v. AXA Equitable Life Ins. Co.*, No. 11CV4194PGSDEA, 2016 WL 4487857, at *62 (D.N.J. Aug. 25, 2016) (no evidence of fall-out benefits where "Plaintiffs did not submit proofs defining [alleged benefit], nor did they calculate the amount of this fall-out benefit"), *aff'd sub nom. Sivolella for use & benefit of EQ/Common Stock Index Portfolio v. AXA Equitable Life Ins. Co.*, No. 16-4241, 2018 WL 3359108 (3d Cir. July 10, 2018), *with Kasilag I*, 2016 WL 1394347, at *17 (question of material fact as to whether more than $23.7 million in fall-out benefits rendered fee excessive). Because Plaintiffs have not attempted to quantify the alleged fall-out benefits, this factor weighs in favor of NYLIM.

d. *Factor Four: Economies of Scale Realized by NYLIM*

According to NYLIM, "Plaintiffs cannot establish that economies of scale existed in the Funds," and they cannot "credibly dispute the adequacy of the Funds' breakpoints without an expert opinion[.]" ECF No. 88 at 35. Plaintiffs do not respond in their brief, ECF No. 93 at 34-36, but they allege that the Funds did not share economies of scale with their investors because their compensation increased while their assets under management ("AUM") decreased, ECF No. 93-2 ¶¶ 148-56. NYLIM replies that Plaintiffs waived any argument as to this factor by not raising it in their brief. ECF No. 94 at 2-3.[8]

Economy of scale is defined as, "A decline in a product's per-unit production cost resulting from increased output[.]" Black's Law Dictionary (10th ed. 2014). "In the mutual fund

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[8] As before, the Court rejects NYLIM's claim that Plaintiffs waived any argument as to economies of scale by failing to raise it in their brief.

industry, output is the amount of assets under management." *Sivolella*, 2016 WL 4487857, at *56. "In § 36(b) cases, the plaintiff's burden in demonstrating economies of scale is twofold. First, the plaintiff must demonstrate that economies of scale were, in fact, realized. Second, if the threshold showing is made, the plaintiff must then demonstrate that the savings realized from economies of scale were not sufficiently shared with the Fund and its shareholders." *BlackRock*, 2018 WL 3075916, at *28 (quotation and citation omitted).

i. HY Bond Fund

From 2013 to 2014, the HY Bond Fund's AUM stayed constant, while NYLIM's compensation from that Fund increased by over $400,000. ECF No. 93-2 ¶ 155. Plaintiffs have not carried their burden of demonstrating economies of scale because a mutual fund achieves economies of scale only when its AUM increases. *See Sivolella*, 2016 WL 4487857, at *56. But the HY Bond Fund's AUM remained constant. Plaintiffs point to no decisions finding economies of scale in these circumstances, and so have failed to prove economies of scale regarding the HY Bond Fund.

ii. Large Cap Fund

The Large Cap Fund's AUM increased by $1.1 billion from 2013 to 2014, and NYLIM's compensation rose by over $5 million, while the Fund's Effective Management Fee Rate remained constant. ECF No. 93-2 ¶¶ 157-58; ECF No. 94-1 at 59. Again, Plaintiffs provide no evidence of the Large Cap Fund's expenses during this period, but even evidence of reduced costs would be insufficient. "[A]lthough the Third Circuit has not yet addressed a plaintiff's burden of proof in showing that economies of scale were realized, courts within both the Second and Ninth Circuits have found that economies of scale cannot be inferred solely from the fact that operating expenses declined at a time when the at-issue fund's assets grew. *BlackRock*, 2018 WL 3075916, at *30 (citing *Krinsk*, 875 F.2d at 411 (affirming district court's finding that economies of scale could not be inferred from fact that ratio of expenses to revenues declined when fund grew) and *In re Am. Mut. Funds Fee Litig.*, 2009 WL 5215755, at *28-29, 51-52 (rejecting expert's assertion that economies of scale could be inferred from fact that ratio of expenses to assets did not increase proportionally)). Plaintiffs provide no other evidence of economies of scale. This factor weighs in favor of NYLIM.

e. *Factor Five: Comparability of NYLIM's Fees to Those Paid by Other Similar Funds*

The Supreme Court has cautioned against "any categorical rule regarding the comparisons of the fees charged different types of clients." *Jones*, 559 U.S. at 349. In addition, "courts should not rely too heavily on comparisons with fees charged to mutual funds by other advisers" because these fees "may not be the product of negotiations conducted at arm's length." *Id.* at 350-51. As a result, this Court must "be wary of inapt comparisons" between the Funds at issue in this action and other funds that may have different characteristics or investment objectives. *Id.* at 350.

Plaintiffs argue that the Board considered fees paid by mutual funds dissimilar to the Funds in this case and that the Board's conclusion regarding comparative fees is invalid. *See* ECF No. 93 at 28-30. Specifically, Plaintiffs complain that the report provided by the Board's advisor, Strategic Insight ("SI"), contained different median management fees from a report SI provided to the public that utilized a better sample of peer funds. *Id.* at 29-30. The public SI data, which Plaintiffs prefer, show the Large Cap Fund charging a management fee 5.6 basis points above the median (0.605 versus 0.549) and the HY Bond Fund fee 2.7 basis points below the median (0.547 versus 0.574). ECF No. 93-2 ¶ 128. NYLIM responds that the relevant test is not whether the Funds charges fees above the median but rather their fees were outside the range of fees charged by comparable funds. ECF No. 94 at 4.

The Court agrees with NYLIM. Plaintiffs' argument seems to be that this factor must tip in their favor simply because "NYLIM's expenses[ on three of four Funds] exceeded the medians[.]" ECF No. 93 at 36. But two of the three Funds on which Plaintiffs contend the fees exceed the medians—the HY Opps Fund and the Marketfield Fund—are not at issue because, as discussed, Plaintiffs do not have standing regarding those Funds. Of the other two funds, one—the HY Bond Fund—charges fees *below* the median. *See* ECF No. 93-2 ¶ 128; ECF No. 94-1 at 49-50 (NYLIM "dispute[s]" Plaintiffs' medians but under either party's medians the HY Bond Fund's fees are below average).

This leaves only the Large Cap Fund, which according to Plaintiffs' evidence charges a fee 5.6 basis points above the median of comparable funds (0.605 versus 0.549). *See* ECF No. 93-2 ¶ 128. But "merely because one or two mutual funds pay lower investment advisory fees than what the Fund pays does not suggest that the fee rate [NYLIM] charges the Fund is necessarily outside 'the range of what would have been negotiated at arm's-length[.]'" *Pirundini v. J.P. Morgan Inv. Mgmt. Inc.*, 309 F. Supp. 3d 156, 165-66 (S.D.N.Y. 2018) (quoting *Gartenberg* 694 F.2d at 928); *see also Paskowitz v. Prospect Capital Mgmt. L.P.*, 232 F. Supp. 3d 498, 505 (S.D.N.Y. 2017) ("[C]harging a fee that is above the industry average does not violate Section 36(b)."). NYLIM proffers evidence (the SI report provided to the Board) that the Large Cap Fund's Management Fee is in the 58th percentile—hardly outside the range charged comparable funds. Plaintiffs' evidence (the public SI report), by contrast, simply shows that the Large Cap Fund's fee is above the median of a different group of comparable funds, with no information as to whether the Large Cap Fund is in the 51st percentile or 99th percentile of that group. ECF No. 88-4 at 136. Plaintiffs have failed to raise a question of material fact as to whether the Large Cap Fund's fees fall outside the range of those charged by comparable funds. This *Gartenberg* factor tips in favor of NYLIM.

f. *Factor Six: Independence and Conscientiousness of the Trustees*

The final *Gartenberg* factor is the "expertise of the independent trustees of a fund, whether they are fully informed about all facts bearing on the investment adviser's service and fee, and the extent of care and conscientiousness with which they perform their duties[.]" *Jones*, 559 U.S. at 349 (quoting *Gartenberg*, 694 F.2d at 930). "Where a board's process for negotiating and reviewing investment-adviser compensation is robust, a reviewing court should afford commensurate deference to the outcome of the bargaining process." *Id.* at 351 (citing *Burks v. Lasker*, 441 U.S. 471, 484 (1979)). "Thus, if the disinterested directors considered the relevant factors, their decision to approve a particular fee agreement is entitled to considerable weight, even if a court might weigh the factors differently," but if "the board's process was deficient or the adviser withheld important information, the court must take a more rigorous look at the outcome." *Id.* To prevail on this factor, Plaintiffs must overcome a "presumption under the ICA that natural persons are disinterested." *Migdal v. Rowe Price-Fleming Intern., Inc.*, 248 F.3d 321, 331 (4th Cir. 2001) (citing 15 U.S.C. § 80a-15(c)).

NYLIM contends that "[t]he Independent Trustees met frequently and reviewed and considered voluminous materials regarding each *Gartenberg* factor"; "negotiated at arms'-length with NYLIM regarding implementation of additional breakpoints and fee waivers"; and "demanded on many occasions that NYLIM include additional materials for their consideration." ECF No. 88 at 31-32.

Plaintiffs respond that the Board employed a flawed fee-approval process because (i) it "misconceived its 'watchdog' role"; (ii) it employed a deficient process; (iii) it "was not fully and accurately informed"; and (iv) "there is no admissible evidence from the independent trustees" regarding how the Board used the information NYLIM provided. ECF No. 93 at 10.

i. Failure as "Watchdog"

Plaintiffs' first contention, that the Board failed in its "watchdog" role, is based on two excerpts of deposition testimony. In the first, the Board's Rule 30(b)(6) witness testified that he views the relationship between NYLIM and the Board "as a fiduciary partnership." *Id.* at 11. In the second, Board chair Meenan "expressed concern that NYLIM personnel not think he was 'too picky' when he suggested that NYLIM's comparison of the Marketfield Fund's performance to the S&P 500 Index benchmark was inappropriate." *Id.* at 11-12.

This is crucial evidence because the Investment Company Act "interposes disinterested directors as 'independent watchdogs' of the relationship between a mutual fund and its adviser." *Jones*, 559 U.S. at 348. But on this evidence alone no reasonable jury could find that the Board lacked independence. The Board deferring to NYLIM's judgment in certain undefined situations is not enough: "Coziness may indicate willingness to defer to an interested trustee but, without a financial or personal conflict (such as nepotism), it is not a breach of a fiduciary duty." *Zehrer*, 2018 WL 1293230, at *9. Indeed, Courts have found conflicts of interest compromising a board's independence only on much more egregious facts. *See, e.g.*, *In re AllianceBernstein Mut. Fund Excessive Fee Litig.*, No. 04 CIV. 4885(SWK), 2005 WL 2677753, at *5 (S.D.N.Y. Oct. 19, 2005) (trustees not independent where at least one held positions of President and Chief Operating Officer of fund advisor while serving as fund trustee). Plaintiffs have failed to raise a question of fact regarding the Board's independence.

ii. Deficient Process

Next, Plaintiffs claim that the Board failed to adhere to SEC regulations in reviewing and approving the Management Agreements in a number of ways. *First*, the Board did not review Management Agreements before renewing them each year, and did not review subadvisory agreements. ECF No. 93 at 14. *Second*, the Board did not review or assess NYLIM's subadministration agreements with State Street. *Id.* at 15. *Third*, the Board did not assess the "nature, extent, and quality of services" on a fund-by-fund basis, choosing instead to assess each advisor and subadvisor based on aggregate performance over each advisor's and subadvisor's portfolio of funds. *Id.* at 15-16. *Fourth*, the Board did not educate itself regarding the split of management compensation between NYLIM and its subadvisors. *Id.* at 16. *Fifth*, the Board did not separately consider the reasonableness of the fees charged for different services (advisory, subadvisory, transfer agency, and distribution), and instead considered them in the aggregate. *Id.* at 16-17. *Sixth*, the Board impermissibly considered NYLIM's profitability when assessing transfer agency and distribution fees. *Id.* at 17-18. *Seventh*, the independent trustees' experts either undermined NYLIM's litigation positions or were inapposite, and the Board ignored their legal counsel's advice. *Id.* at 18-20.

Regarding Plaintiffs' first two objections, Plaintiffs point to no statute or regulation requiring the Board to review the Management Agreements or the subadvisory agreements annually. Plaintiffs' only support for this purported rule is Board chair Meenan's testimony, which is not binding on this Court. In any event, Meenan's testimony simply acknowledges that the Board must review the Management Agreements and subadvisory agreements at some point; he never states that the agreements must be reviewed every year. *See* ECF No. 94-3 at 17-18.

Plaintiffs' third argument, that the Board did not assess the "nature, extent, and quality of services" on a fund-by-fund basis raises a question of fact. It is undisputed that the Board's counsel advised that the "fees uniquely applicable to each Fund should be considered separately." ECF No. 93-2 ¶ 65; ECF No. 94-1 at 24. Yet the factual record is unclear as to whether the Board did so. When asked if the Board reviews the "nature and quality of services to be provided by the advisers . . . on a fund-by-fund basis," Meenan responded, "No. We view it in the aggregate for each adviser and subadvisor that are serving the funds." ECF No. 94-3 at 23-24. NYLIM responds that the Board was advised by counsel "to focus on 'the reputation and capabilities of the Adviser, the financial stability of the operations, the types of services provided under an Advisory Contract, [and] how complex or demanding those services may be'—qualities that do not vary from fund to fund." ECF No. 94-1 at 23-24. But NYLIM errs on two counts. First, counsel advised the Board to "consider *all aspects* of services rendered to a Fund by an Adviser," listing the above factors as "example[s.]" ECF No. 88-5 at 181 (emphasis added). And second, NYLIM provides no support for its contention that the enumerated considerations do not vary from fund to fund. Indeed, NYLIM acknowledges providing "unique services . . . to specific funds[.]" ECF No. 94-1 at 24. Whether the Board considered the nature and quality of NYLIM's services in relation to its fees "on a fund-by-fund" basis is unclear from the factual record, so Plaintiffs have established a question of material fact.

Plaintiffs' fourth objection is unavailing because they take issue only with the Board's process of educating itself regarding the fees split between NYLIM and its subadvisor MacKay. ECF No. 93 at 16. But MacKay was a wholly-owned subsidiary of NYLIM's parent company. ECF No. 88-1 ¶ 11; ECF No. 93-1 at 7. And the Board's retained expert, Bobroff Consulting ("Bobroff"), advised that "[c]ommon industry practice is to estimate mutual fund investment management profitability on a consolidated basis for the parent organization[.]" ECF No. 88-2 at 447.[9] No reasonable jury could find that the Board lacked conscientiousness in ignoring the fees split between NYLIM and MacKay.

Plaintiffs' fifth and sixth contentions, that the Board erred in considering NYLIM's fees—advisory, subadvisory, transfer, and distribution—and costs—advisory, transfer, and distribution—in the aggregate rather than separately, also fail. Meenan testified that the Board has for several years "separated the distribution and transfer agent activities from the management contract and expense review" of NYLIM's fees and costs, ECF No. 88-2 at 269, and Plaintiffs provide no record evidence for their assertion that the Board lumped together subadvisory and advisory fees, *see* ECF No. 93-2 ¶ 74.[10]

Plaintiffs finally object that the Board (1) received an opinion from Bobroff that establishes that NYLIM's fees were excessive, (2) received a flawed report from SI, and (3) ignored its counsel's advice. ECF No. 93 at 18. Plaintiffs highlight a Bobroff conclusion from 2005—eight years before the Relevant Period—that the subadvisory fees paid to NYLIM's corporate affiliate MacKay were excessive. Even if true, this conclusion is both too minor and too temporally attenuated to cast doubt on NYLIM's fees in the Relevant Period. The Court has already rejected Plaintiffs' objections to the SI report on comparable fees, and Plaintiffs cite no support for their contention that the Board could not hire SI because SI was also a consultant to NYLIM.[11] And Plaintiffs' allegation that the Board ignored its counsel's advice simply

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9 Plaintiffs have adduced no evidence calling into question Bobroff's conclusion.

10 Other than the fees for MacKay, which the Court addressed above.

11 Plaintiffs' argument is also undermined by a letter from SI's Senior Managing Director to the Board disclosing the existence, nature, and size of SI's "ongoing business relationship" with NYLIM. *See* ECF No. 88-8 at 35.

reiterates their third argument above, on which the Court already found a question of fact. Plaintiffs have failed to raise any further questions of fact regarding the Board's process.

iii. Not Fully and Accurately Informed

Plaintiffs contend next that the Board approved NYLIM's management fees based on incomplete and inaccurate information. In particular, Plaintiffs first claim that the Board did not have enough evidence to understand that NYLIM's services "were not substantial" because NYLIM's role is principally "oversight" of the subadvisors. ECF No. 93 at 22-25. The crux of this argument is that there is no evidence that the Board understood precisely how little work NYLIM's purportedly "significant services" entailed. *Id.* at 22. Plaintiff's assertions do not go to the Board's consideration of NYLIM's services, but rather to the nature of the services themselves: Plaintiffs maintain that NYLIM's role in overseeing State Street was minimal because State Street had a 99.98% accuracy rate, and that NYLIM employed only 50 to 75 people to service 80 to 85 funds. *Id.* at 22-24. Plaintiffs have come forward with no evidence—in particular, no expert testimony—to support their contention that these figures demonstrate a minimal workload for NYLIM. As NYLIM retorts, Plaintiffs have no *evidence* that State Street's accuracy rate reduces NYLIM's workload, nor that NYLIM understaffs the Funds. ECF No. 94 at 9-11. Because Plaintiffs bear the burden of proving a breach of the fiduciary duty, *Green*, 286 F.3d at 684, they have failed to demonstrate a question of material fact regarding the Board's conscientiousness on this point.

Plaintiffs also argue that the Board could not conscientiously assess Fund performance because it received erroneous figures on the Funds' returns. ECF No. 93 at 26-27. Specifically, Plaintiffs assert that "NYLIM grossly inflated [2014] performance to the Board for the Large Cap and HY Bond Funds"—reporting 10.32% and 1.29% returns to the Board despite reporting

4.25% and -3.27% returns to the SEC. ECF No. 93-2 ¶ 134. Plaintiffs' contention is based on selective references to page 31 of the Board disclosure. *See* ECF No. 93-4 at 26. A bar chart on that page provides a 10.32% rate of return for the Large Cap Fund in 2014. But page 30 explains, "Sales loads are not reflected in the bar chart. If they were, returns would be less than those shown." *Id.* at 25. Meanwhile a table on page 31, below the bar chart, indicates that the Large Cap Fund's "Return Before Taxes" was 4.25%, the same as reported to the SEC. *Id.* at 26. Likewise for the HY Bonds Fund, which has a bar chart showing a higher-than reported growth rate accompanied by the same caveat language—"Sales loads are not reflected in the bar chart. If they were, returns would be less than those shown."—and then a table showing the -3.27% rate of return disclosed to the SEC. *Id.* at 16-17. Because it is undisputed that the Board reviewed this document, ECF No. 93-2 ¶ 134, there is no question of fact as to whether they were sufficiently informed regarding Fund performance.

Plaintiffs further contend that the Board considered inaccurate information regarding fees charged by comparable funds because it received a report about funds that differed materially from NYLIM's Funds. ECF No. 93 at 28-30. According to Plaintiffs SI's fee comparisons were "inapt" because SI compared the Large Cap Fund to smaller, more expensive funds, and the HY Bonds Fund to equity funds. *Id.* at 28-29. But inapt fee comparisons are insufficient to raise a question of material fact: Plaintiffs must "demonstrate that, if presented, the supposedly withheld or misleading information would have altered the Board's review or negotiation process." *BlackRock*, 2018 WL 3075916, at *19 (finding independence and conscientiousness factor in favor of defendants even though plaintiffs assert that the board considered incomplete or misleading information regarding (1) the services the advisor provided to the funds, (2) the costs of managing the funds, and (3) economies of scale). As discussed above on the fifth *Gartenberg* factor, any discrepancy between the comparable fees SI reported to the Board and Plaintiffs' preferred group of comparable funds is minor. Plaintiff has not carried its burden of showing that these slight differences could lead a reasonable juror to question the Board's conscientiousness.

Finally, the Board was supposedly misled regarding the Funds' compensation, profit, and costs in that the Profitability Report the Board received did not distinguish between NYLIM and its subadvisors when reporting NYLIM's services or costs. ECF No. 93 at 31-34. Regarding NYLIM's costs, "Plaintiffs point to no case law holding that profitability should be reported in the manner they advocate." *Zehrer*, 2018 WL 1293230, at *14. Other decisions have specifically endorsed treating subadvisory fees as expenses for the purpose of profitability reporting. *See, e.g.*, *Kasilag II*, 2017 WL 773880, at *22 ("consider[ing] profitability inclusive of [subadvisor's] fees"); *Sivolella*, 2016 WL 4487857, at *50-51 ("The Court finds that reporting sub-adviser and sub-administrator fees as expenses is within ordinary accounting principles."). And regarding NYLIM's services, Plaintiffs fail to explain why the Board should have "compared NYLIM's compensation with that of its sub-advisors." ECF No. 93 at 31. Given NYLIM's contractual right to delegate "any or all its duties" to a subadvisor, ECF No. 88-1 ¶ 24, the Court is not persuaded that the Board could not adequately assess NYLIM's services or profitability without a report listing the subadvisors' services separately from NYLIM's.

iv. <u>No Admissible Evidence from Independent Trustees</u>

Plaintiffs finally contend that NYLIM has proffered no admissible evidence on any *Gartenberg* factor other than the Board's independence and conscientiousness. ECF No. 93 at 34-36. This is not a factual dispute, nor does it pertain to this *Gartenberg* factor. In any event, NYLIM does submit evidence on the other *Gartenberg* factors, *see supra*—it does so in its

Statement of Undisputed Material Facts. *See* ECF No. 88-1. The Court need not ignore record evidence simply because NYLIM fails to reference it in its brief. This evidence may be available for the trier of fact at trial, so the Court can consider it at summary judgment. *See Gonzalez v. Sec'y of Dep't of Homeland Sec.*, 678 F.3d 254, 262 (3d Cir. 2012) (If evidence "would be admissible at trial . . . , it is admissible for the purpose of summary judgment.").

v. Conclusion

Plaintiffs have made many objections to the independence and conscientiousness of the Board in approving NYLIM's fees. On the one hand, Plaintiffs have raised a question of material fact as to whether the Board followed its counsel's advice to assess the "nature, extent, and quality of services" on a fund-by-fund basis. On the other hand, Plaintiffs have failed to raise any doubts as to the Board's independence or the quality of the information it considered. And in the scheme of the Board's entire consideration of the *Gartenberg* factors, whether the Board assessed NYLIM's services on a fund-by-fund basis or in the aggregate is a relatively minor dispute. This Court is not supposed to engage in "judicial second-guessing of informed board decisions." *Jones*, 559 U.S. at 352. The Court concludes that no reasonable jury could find that the sixth *Gartenberg* factor tips in favor of Plaintiffs.

**CONCLUSION**

As discussed, all six *Gartenberg* factors tip in favor of NYLIM. Upon weighing these factors, no reasonable jury could conclude that NYLIM charges fees "so disproportionately large that [they] bear[] no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining." *Jones*, 559 U.S. at 346. NYLIM's motion for summary judgment is granted. An appropriate order follows.

DATE: 9 October 2018

William H. Walls
Senior United States District Court Judge