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Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOAN OBESLO; ANNE HALL; TINA GORRELL-DEYERLE, on behalf of Empower Funds, Inc.; DUPLASS, ZWAIN, BOURGEOIS, PFISTER & WEINSTOCK APLC 401(K) PLAN,

Plaintiffs,

v.

EMPOWER CAPITAL MANAGEMENT, LLC; EMPOWER ANNUITY INSURANCE COMPANY OF AMERICA,

Defendants - Appellees.

SCHNEIDER WALLACE COTTRELL KONECKY LLP,

Attorney - Appellant.

NATIONAL CONSUMER LAW CENTER; NATIONAL ASSOCIATION OF CONSUMER ADVOCATES; THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Amici Curiae.

No. 22-1291

JOAN OBESLO; ANNE HALL; TINA GORRELL-DEYERLE, on behalf of Empower Funds, Inc., Plaintiffs, v. EMPOWER CAPITAL MANAGEMENT, LLC; EMPOWER ANNUITY INSURANCE COMPANY OF AMERICA, Defendants - Appellees. ------------------------------ SCHLICHTER BOGARD & DENTON LLP, Attorney - Appellant. ------------------------------ NATIONAL CONSUMER LAW CENTER; NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, Amici Curiae.	No. 22-1292

Appeals from the United States District Court for the District of Colorado (D.C. No. 1:16-CV-00230-CMA-SKC)

Mark T. Johnson (Todd M. Schneider with him on the briefs), Schneider Wallace Cottrell Konecky LLP, Emeryville, California, for Attorney – Appellant Schneider Wallace Cottrell Konecky LLP.

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

Frederick R. Yarger, Wheeler Trigg O'Donnell LLP, Denver, Colorado (Teresa G. Akkara and William P. Sowers, Wheeler Trigg O'Donnell LLP, Denver, Colorado; Robert M. Little and Adam Regoli, Empower, Greenwood Village, Colorado, with him on the brief) for Defendants – Appellees.

Karen Handorf, Todd Collins, and Natalie Lesser, Berger Montague PC, Philadelphia, Pennsylvania, filed an amici curiae brief for the National Consumer Law Center and the National Association of Consumer Advocates.

Brian D. Boone and Julia R. Gentile, Alston & Bird LLP, Charlotte, North Carolina; Tara S. Morrissey and Jennifer B. Dickey, U.S. Chamber Litigation Center, Washington, D.C., filed an amicus curiae brief for the Chamber of Commerce of the United States of America.

Before **TYMKOVICH**, **McHUGH**, and **MORITZ**, Circuit Judges.

McHUGH, Circuit Judge.

Two law firms that represented Plaintiffs in this litigation, Schlichter Bogard & Denton LLP ("SBD") and Schneider Wallace Cottrell Konecky LLP ("SWCK"), appeal the district court's order imposing sanctions against them under 28 U.S.C. § 1927. Plaintiffs' counsel represented individual shareholders and an employee retirement plan in a lawsuit claiming that the investment company, investment adviser, and recordkeeper (collectively "Empower") servicing their mutual funds charged excessive fees in violation of its fiduciary duties under § 36(b) of the Investment Company Act. Following denial of Empower's summary judgment and *Daubert* motions, the case proceeded to a bench trial where the district court ruled in favor of Empower. Thereafter, the court

sanctioned Plaintiffs' counsel for "recklessly pursu[ing] their claims through trial despite the fact that they were lacking in merit" and held SWCK and SBD jointly and severally liable for $1.5 million in Empower's trial costs, expenses, and attorneys' fees. App. at 863.

We conclude the district court abused its discretion and therefore reverse the district court's order imposing sanctions. Accordingly, we do not reach the issues of SWCK and SBD's joint and several liability or the court's denial of SWCK's motion to amend the judgment.

I. BACKGROUND

A. The Investment Company Act

Congress passed the Investment Company Act of 1940 ("ICA"), Pub. L. No. 76-768, 54 Stat. 789 (codified as amended at 15 U.S.C. § 80a-1–80a-64), to regulate investment companies, protect mutual fund shareholders, and address the "'potential conflicts of interest'" arising in "the relationship between a fund and its investment adviser." *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 339 (2010) (quoting *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984)). "'A mutual fund is a pool of assets, consisting primarily of a portfolio of securities, and belonging to the individual investors holding shares in the fund'"—that is, the shareholders. *Id.* at 338 (brackets omitted) (quoting *Burks v. Lasker*, 441 U.S. 471, 480 (1979)). The investment advisor is a separate entity that "creates the mutual fund, . . . selects the fund's directors, manages the fund's investments, and provides other services." *Id.*

As part of its 1970 amendments to the IAC, Congress added § 36(b), "which impose[d] a fiduciary duty on investment advisers and their affiliates." *Obeslo v. Great-W. Life & Annuity Ins. Co.*, 6 F.4th 1135, 1141 (10th Cir. 2021); *see* 15 U.S.C. § 80a-35(b) (ICA § 36(b)). Under § 36(b), "investment advisers owe shareholders a fiduciary duty with respect to setting and collecting their fees, and . . . paying affiliates from mutual fund assets." *Obeslo*, 6 F.4th at 1141 (citing 15 U.S.C. § 80a-35(b)). Section 36(b) also created a shareholder private right of action for breach of that fiduciary duty. *Id.* (citing 15 U.S.C. § 80a-35(b)).

To prove a breach of fiduciary duty under § 36(b), shareholders "must show the investment adviser's compensation is 'so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining.'" *Id.* (quoting *Jones*, 559 U.S. at 346). Shareholders must also establish the amount of "actual damages resulting from the breach." *Id.* (quoting 15 U.S.C. § 80a-35(b)(3)). Such damages may not "exceed the amount of compensation or payment received" by the investment advisor and are not recoverable "for any period prior to one year before the action was instituted." 15 U.S.C. § 80a-35(b)(3).

When evaluating plaintiffs' claims of breach under § 36(b), courts must consider all relevant factors, including the six *Gartenberg* factors outlined by the Second Circuit. *See Jones*, 559 U.S. at 349 ("[T]he Act requires consideration of all relevant factors . . ."); *id.* at 344 (outlining factors from *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923, 930 (2d Cir. 1982)). The *Gartenberg* factors are: (1) "'the adviser-manager's cost in providing the service, [including] the extent to which the adviser-

manager realizes economies of scale as the fund grows larger, and the volume of orders which must be processed by the manager,'" *id.* at 344 (quoting *Gartenberg*, 694 F.2d at 930) (ellipses omitted); (2) "the nature and quality of the services provided to the fund and shareholders;" (3) "the profitability of the fund to the adviser;" (4) "any 'fall-out financial benefits,' those collateral benefits that accrue to the adviser because of its relationship with the mutual fund;" (5) "comparative fee structure (meaning a comparison of the fees with those paid by similar funds);" and (6) "the independence, expertise, care, and conscientiousness of the board in evaluating adviser compensation," *id.* at 344 n.5 (quoting *Gartenberg*, 694 F.2d at 929–30).

In *Jones*, the Supreme Court discussed application of the latter two factors. First, the Court held that comparisons to the fees charged by similar funds should be given "the weight that they merit in light of the similarities and differences between the services that the clients in question require," but cautioned that "courts must be wary of inapt comparisons" and "should not rely too heavily on comparisons with fees charged to mutual funds by other advisors," which too "may not be the product of negotiations conducted at arm's length." *Id.* at 350–51. Second, the Court held that disinterested directors' decision to approve a given fee arrangement, having considered all the relevant information, "is entitled to considerable weight, even if a court might weigh the factors differently." *Id.* at 351. The Court further cautioned that "§ 36(b) does not call for judicial second-guessing of informed board decisions" and courts should not supplant directors' judgment "without additional evidence that the fee exceeds the arm's-length range." *Id.*

at 352. But "where the board's process was deficient or the adviser withheld important information, the court must take a more rigorous look at the outcome." *Id.* at 351.

In the past decade, federal courts have seen increased litigation under § 36(b). *See* Eben P. Colby, David S. Clancy & Aaron T. Morris, *An Update on Excessive Fee Litigation Under the Investment Company Act*, 27 Sec. Litig. 10, 10–11 (2017) (discussing the wave of § 36(b) litigation following *Jones* and the lack of plaintiff-favorable outcomes); Quinn Curtis, *The Past and Present Mutual Fund Fee Litigation Under 36(b)*, *in* Research Handbook on the Regulation of Mutual Funds (William A. Birdthistle & John Morley eds., 2018) (discussing § 36(b) litigation following *Jones*). Although more shareholders have pursued claims under § 36(b), to date no shareholder-plaintiff has ever succeeded in a § 36(b) claim of breach of fiduciary duty. *See* Curtis, *supra* at 1 ("[S]ection 36(b) has never resulted in a verdict for plaintiffs.").

B. Factual History

Empower, formerly Great-West Funds, Inc., is an investment company that has issued approximately sixty separate mutual funds (the "Funds"). These Funds are overseen by Empower's Board of Directors (the "Board"). The majority of the Board members are independent, and the Board engages in an annual process of reviewing and approving the fees charged to the Funds, under 15 U.S.C. § 80a-15(c). Pursuant to an investment advisory agreement approved by the Board, Empower Capital Management,

LLC ("ECM")[1] is the Funds' investment adviser. ECM hires and monitors sub-advisers to direct individual funds' investment strategy. ECM also prepares weekly performance reports, conducts fund performance reviews, and "provides a 120-person, in-house investment administration team [to] conduct[] fund accounting, valuation, bookkeeping, financial reporting, expense accounting, tax, and compliance services." *Obeslo*, 6 F.4th at 1141–42. ECM charges shareholders an advisory fee for its services.

Empower Annuity Insurance Company of America ("EAICA")[2] is the parent company of ECM and provides administrative and record keeping services to the Funds, pursuant to an administrative services agreement approved by the Board. Customer organizations hire EAICA to develop and maintain retirement plans for their employees, typically following a competitive bidding process. As the plan sponsor, customer organizations have a fiduciary duty to select prudent investment options to offer plan participants. EAICA helps plan sponsors set up customized employee retirement plans, selecting from available investment options including the Funds. These sorts of EAICA-administered retirement plans are the main vehicle through which the Funds are sold; the Funds are not available to the public.

Plan participants who select the Funds as part of their retirement portfolios become the Funds' shareholders. EAICA provides record keeping services directly to

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[1] Empower Capital Management, LLC was formerly Great-West Capital Management, LLC.

[2] Empower Annuity Insurance Company of America was formerly Great-West Life & Annuity Insurance Company.

these shareholders, including: "maintaining mutual fund records, performing sub-accounting of plan participant shareholdings, distributing investment materials such as quarterly statements and prospectuses, distributing dividends and other payments, [and] responding to shareholder queries." *Id.* at 1142. EAICA also provides shareholder services through "call centers, a mobile app, a website, and on-site meetings." *Id.* EAICA charges some, but not all, share classes of the Funds a 0.35% administrative services fee for its services.

Relevant to this matter are Empower's S&P Mid Cap 400 Index Fund, S&P 500 Index Fund, S&P Small Cap 600 Index Fund, Real Estate Index Fund, Templeton Global Bond Fund, and Lifetime Funds for 2025, 2035, 2045, and 2055.[3] Each of these Funds has an associated "total expense ratio," which is the "total of all fees charged to shareholders in exchange for the services provided to the Fund." App. at 791. This accounts for ECM's advisory fee and EAICA's administrative services fee.

[3] The S&P 400, 500, and 600 Index Funds each track the performance of those indexes. The Real Estate Index Fund tracks an index of real estate investment trusts. The Templeton Global Bond Fund "is a clone of an existing retail fund that . . . a third-party[] sells to the general public." *Obeslo*, 6 F.4th at 1143 (internal quotation marks and brackets omitted). The same third-party also "serves as the subadviser to GWCM for the [] Templeton Global Bond Fund." *Id.* The Lifetime Funds are "target date retirement mutual funds that invest in other mutual funds." Sealed App. at 425. Thus, the Lifetime Funds are "asset allocation [f]unds," which in turn invest in other funds. *Id.* at 424.

C. Procedural History

1. The Underlying Shareholder Action

Individual Plaintiffs, Joan Obeslo, Anne Hall, and Tina Gorrell-Deyerle are shareholders of the Funds who invested through their employee retirement plans. The Duplass Plan is an EAICA-administered retirement plan whose participants own shares in the Funds. The individual Plaintiffs and the Duplass Plan were represented by Appellants SBD and SWCK, respectively.

The individual Plaintiffs alleged ECM charged excessive advisory fees, and EAICA charged excessive administrative service fees, in violation of their fiduciary duty under § 36(b). *See* Complaint, *Obeslo v. Great-West Cap. Mgmt., LLC*, No. 1:16-cv-00230 (D. Colo. Jan. 29, 2016), ECF No. 1; Complaint, *Obeslo v. Great-West Life & Annuity Ins. Co.*, No. 1:16-cv-03162 (D. Colo. Dec. 23, 2016), ECF No. 1. The Duplass Plan, on behalf of its plan participants, also alleged ECM charged excessive advisory fees in violation of § 36(b). *See* Complaint, *Duplass, Zwain, Bourgeois, Pfister & Weinstock, APLC 401(k) Plan v. Great-West Cap. Mgmt., LLC*, No. 1:16-CV-01215 (D. Colo. May 20, 2016), ECF No. 1.

a. Plaintiffs' damages expert

During discovery, Plaintiffs disclosed their retention of J. Chris Meyer as an expert in financial management, economics, and the mutual fund industry. Mr. Meyer's expert report outlined his opinions "regarding the investment management fees received by [ECM] and the administrative services fees received by [EAICA]." Sealed App. at 181. In addition to providing his analysis and opinions regarding the alleged

excessiveness of Empower's fees, Mr. Meyer proposed three means of calculating an appropriate measure of damages. First, regarding the advisory fees ECM charged to Empower's S&P Mid Cap 400 Index Fund, S&P 500 Index Fund, S&P Small Cap 600 Index Fund, Real Estate Index Fund, and Templeton Global Bond Fund, and the administrative service fees charged by EAICA, Mr. Meyer opined that damages could be measured based on the difference between the fees charged and the average fees assessed to peer-funds offered by Empower. Second, regarding the advisory fees ECM charged to the Lifetime Funds, Mr. Meyer opined that no top-level fee should have been charged because the Lifetime Funds were structured as asset allocation funds, invested in underlying funds from which Empower already made a significant profit. And third, Mr. Meyer opined that the preceding damages measures should be compounded "to account for how much the Funds would have appreciated had those excessive fees been restored." *Id.* at 276. Mr. Meyer estimated total damages of $89,739,845.[4]

b. Empower's motion for summary judgment

Following discovery, Empower moved for summary judgment on two alternative bases. First, Empower argued there was no genuine dispute of material fact as to any of the *Gartenberg* factors such that Empower was entitled to judgment as a matter of law. Second, Empower asserted that "[e]ven if Plaintiffs' claims could survive under the *Gartenberg* factor analysis, . . . Plaintiffs cannot prove damages, an essential element of

[4] Mr. Meyer's expert report estimated damages from 2015 through 2017 and, according to Plaintiffs, would be updated prior to trial.

their claim." Sealed App. at 128. The court denied Empower's motion, finding there was a genuine dispute of material fact regarding whether the Funds' advisory and administrative fees were so high they could not have been the product of arm's length bargaining. The court took a "rigorous look at the outcome" under the *Gartenberg* factors and found there were genuine disputes of material fact with respect to each factor, with many appearing to weigh in Plaintiffs' favor. App. at 1340 (quoting *Jones*, 559 U.S. at 351).

In evaluating the parties' evidence, the court repeatedly cited statements from Mr. Meyer pertaining to the *Gartenberg* factors. But the court also noted Empower's critiques of Mr. Meyer's opinions, including that (1) his profitability calculations indicated Empower's profits were "within the range of what courts have found to be acceptable," *id.* at 1351; (2) many of the challenged Funds were below the asset levels at which he testified mutual funds begin to realize economies of scale; and (3) he erred in calculating Empower's costs and failed to account for Empower's "undisputed sharing of potential economies of scale through breakpoints, fee favors, fee reductions, and reinvestment services," *id.* at 1359.

The district court declined to rule on the issue of damages, despite Empower having moved for summary judgment on the independent, alternative basis that Plaintiffs could not prove actual damages.

c. Empower's Daubert motion

In the lead-up to trial, Empower moved to strike Mr. Meyer, pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589–95

(1993).[5] The district court denied Empower's motion, concluding that Mr. Meyer was qualified to testify as an expert and that his proffered opinions met the threshold requirements of relevance and reliability to be admissible at trial. First, the court concluded Mr. Meyer was qualified to testify regarding mutual fund products and services, economies of scale, profitability, fall-out benefits, and damages based on his education in financial management and economics and his experience working in the mutual fund industry. The court noted that "gaps or other flaws in the relevant qualifications of . . . [Mr. Meyer] go to the weight and credibility to be accorded to [his] opinions and not to the admissibility of those opinions." App. at 637 (quoting *Nicastle v. Adams Cnty. Sheriff's Off.*, No. 10-cv-00816-REB-KMT, 2011 WL 1655547, at *5 (D. Colo. Apr. 29, 2011)).

Next the court considered the reliability of Mr. Meyer's methodology for opining on the *Gartenberg* factors and the calculation of damages. It concluded that Mr. Meyer "consider[ed] information relevant to the fees at issue and then reach[ed] an opinion about whether those fees were excessive in light of the applicable standard, his education,

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[5] Under *Daubert*, the district court is tasked with "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand," in accordance with Federal Rules of Evidence 702 and 401, respectively. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587, 597 (1993); *Goebel v. Denver & Rio Grande W. R.R. Co.*, 346 F.3d 987, 991–92 (10th Cir. 2003). Faced with Empower's motion to strike Mr. Meyer, Plaintiffs had to demonstrate Mr. Meyer was qualified to render an opinion by "knowledge, skill, experience, training, or education," Fed. R. Evid. 702, and that his employed methodology was "based on sufficient data, sound methods, and the facts of the case," *Roe v. FCA US LLC*, 42 F.4th 1175, 1181 (10th Cir. 2022) (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)).

and his experience." *Id.* at 640. The court construed Empower's arguments against admission of Mr. Meyer's testimony as criticizing his qualifications, credibility, and ultimate conclusions, rather than the reliability of his methodologies. The court reiterated that it found Mr. Meyer was qualified, his credibility was a proper issue for cross examination, and at the *Daubert* stage a court's focus is on "an expert's methodology rather than the conclusions it generated." *Id.* at 641 (quoting *Crew Tile Distrib., Inc. v. Porcelanosa L.A., Inc.*, 763 F. App'x 787, 796 (10th Cir. 2019) (unpublished)). Furthermore, the court noted that many of Empower's arguments relating to Mr. Meyer's conclusions were based on non-binding authority. While acknowledging such caselaw "may suggest that Mr. Meyer's conclusion is inaccurate" and "may ultimately prove to be persuasive," the court was unconvinced that it established Mr. Meyer's methods and opinions were inherently unreliable and inadmissible. *Id.* at 642. The court "caution[ed] the parties not to overstate the effect of non-binding legal authority." *Id.*

Ultimately, considering Mr. Meyer's educational background and experience, the court concluded his methods were "sufficiently reliable for him to offer his opinions at trial" and his "opinions [were] not 'so fundamentally unsupported that they can offer no assistance to the trier of fact.'" *Id.* (quoting *First Union Nat'l Bank v. Benham*, 423 F.3d 855, 862 (8th Cir. 2005)). The court further concluded that Mr. Meyer's opinions met the baseline requirement of relevance under Federal Rule of Evidence 401 and *Daubert* "because they relate to whether the fees at issue are excessive as well as the applicable amount of damages." *Id.* Ultimately, the court held Plaintiffs had sufficiently

demonstrated Mr. Meyer was qualified, and his testimony reliable and helpful, such that his expert testimony was admissible.

d. Trial

An eleven-day bench trial ensued. Over the course of trial, the court heard testimony from thirteen fact witnesses including the three individual Plaintiffs: Ms. Hall, Ms. Gorrell-Deyerle, and Ms. Obeslo; and a representative trustee of the Duplass Plan, Michael Pfister. The court also heard testimony from independent members of the Board, Empower's leadership, and Empower's employees. Empower's leadership and employees generally testified regarding "the market in which Defendants compete, how Defendants function as business entities, the process of corresponding with the Board in order to set the fees at issue, and Defendants' profitability." *Id* at 795. Plaintiffs and Empower also submitted deposition designations from former employees and leadership of Empower, a shareholder and trustee of the Duplass Plan, and the Duplass Plan's independent financial adviser. The court heard additional testimony from three expert witnesses. Plaintiffs called Mr. Meyer as their damage expert. Defendants called Professor Arthur Laby, an expert in mutual fund governance, and Dr. Glenn Hubbard, an expert in financial analysis, mutual fund fee analysis, and economies of scale.

After Plaintiffs rested their case, Empower moved for judgment on partial findings pursuant to Federal Rule of Civil Procedure 52(c). The court denied Empower's motion, noting it was "a very complicated case" and, "for [] peace of mind in making the decision," the court "want[ed] to hear from the defendants' witnesses, in particular, the

experts." *Id.* at 3114. Thus, exercising its discretion under Rule 52, the court declined to render any judgment until the close of evidence.

At the conclusion of trial, the district court thanked both parties' counsel for "the time and effort [they] put into preparing for . . . trial" as well as "the professionalism and the respectfulness that [counsel] showed to one another." *Id.* at 3513. The court ordered both parties to submit proposed findings of fact and conclusions of law and concluded by telling counsel, "[y]ou all have done a fabulous job . . . it was very well tried by both sides." *Id.* at 3519.

e. Judgment on the merits

Following trial, the court issued its findings of fact and conclusions of law. In sum, the court found that Plaintiffs had "failed to meet their burden of proof with respect to *all* of the *Gartenberg* factors" and that "Plaintiffs' claims fail[ed] for the independent reason that they did not establish that *any* actual damages resulted from Defendants' alleged breach of fiduciary duty." *Id.* at 799.

i. *Gartenberg* factors

Regarding the *Gartenberg* factors, the court found Empower's proposed findings of fact were well-supported by the record and that each factor weighed in favor of Empower. The court commented that Plaintiffs' trial testimony had "limited probative value with respect to whether [Empower's] fees were excessive." *Id.* at 793. Furthermore, the court found that, "even though they did not have the burden to do so, Defendants [had] presented persuasive and credible evidence that overwhelmingly proved [] their fees were reasonable and [] they did not breach their fiduciary duties." *Id.* at 800.

In summary, the court concluded that:

> The Board was independent, qualified, and it engaged in a robust process in approving Defendants' fees. As a result, the Board's decision to approve the fees [was] entitled to substantial deference.
>
> The Advisory Fees and Administrative Fee were within the range of comparable funds.
>
> Plaintiffs failed to quantify any alleged economies of scale or show that those economies were not adequately shared with shareholders.
>
> Defendants' profits were within the range of their competitors.
>
> Defendants provided extensive, high-quality services in exchange for their fees.
>
> Plaintiffs failed to identify any significant fall-out benefits that Defendants acquired.

Id. at 799–800 (citing *Jones*, 559 U.S. at 351) (citations to the record omitted). Because Plaintiffs had failed to meet their burden of proof as to any of the *Gartenberg* factors, the court concluded they had not proved Defendants breached their fiduciary duties under § 36(b).

ii. Actual damages

The court also held Plaintiffs had failed to prove actual damages. The court found Mr. Meyer, Plaintiffs' only witness who attempted to calculate damages, was "thoroughly discredited on cross examination." *Id.* at 800. The court noted "abundant examples of . . . weaknesses and inconsistencies in Mr. Meyer's testimony" and ultimately "found Mr. Meyer's testimony to be non-credible." *Id.* at 801. Moreover, the court concluded the "specific theories regarding Plaintiffs' alleged damages" advanced by Mr. Meyer were "legally flawed." *Id.* It reasoned that § 36(b) limits shareholders' recovery to the "actual

damages resulting from the breach of fiduciary duty," and actual damages are limited to restitution of the excessive portion of the fee received. *Id.* (quoting 15 U.S.C. § 80a-35(b)(3)). The district court summarized Mr. Meyer's testimony as opining that Plaintiffs' damages should include "(1) the extent to which some Funds had fees that exceeded the average or median of their peers; (2) some fees that should be completely eliminated; and (3) the lost investment opportunities that resulted from the excessive fees." *Id.* at 802. The court determined the theories underlying each of these three damages analyses were "fundamentally flawed." *Id.* at 805.

First, the court concluded that "charging a fee that is above the industry average does not violate Section 36(b)." *Id.* at 802 (quoting *Pirundini v. J.P. Morgan Inv. Mgmt. Inc.*, 309 F. Supp. 3d 156, 165 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 538 (2d Cir. 2019)). The court remarked that, logically, "industry average fees cannot possibly set the outer bounds of arm's-length bargaining for purposes of calculating damages—if they could, half of all mutual funds would have 'excessive' fees." *Id.*

Second, the court reasoned that "total disgorgement of a fee is inappropriate absent evidence the adviser performed *no services*." *Id.* According to the district court, Mr. Meyer opined that the entirety of ECM's advisory fee charged to the Lifetime Funds was an overcharge but nevertheless conceded that ECM did provide services to the Lifetime Funds in addition and apart from the services advisors provided to the underlying funds. *Id.* at 802–03. Citing out-of-circuit caselaw, the court concluded this doomed Mr. Meyer's complete disgorgement theory because "actual damages would be the difference between the fee paid and a fee that would have been 'fair'—i.e., a fee that

could have been negotiated at arm's length." *Id.* at 803 (quoting *Kasilag v. Hartford Inv. Fin. Servs., LLC*, No. cv-11-1083-RMB-KMW, 2016 WL 1394347, at *20 (D.N.J. Apr. 7, 2016), *aff'd*, 745 F. App'x 452 (3d Cir. 2018)). According to the district court, where ECM had provided some services for the Lifetime Funds, a fairly negotiated fee would be greater than zero.[6] Thus, the court concluded there was no legal basis or factual support for Plaintiffs' contention that the entirety of the Lifetime Funds' top-level fee constituted recoverable damages. *Id.* at 803–04.

And third, the court determined that "[t]he legislative history of § 36(b) makes clear that 'lost gains' are not 'actual damages' recoverable under the statute." *Id.* at 804 (citing *In re Evangelist*, 760 F.2d 27, 29–30 (1st Cir. 1985)). In the court's view, Mr. Meyer's damage theory based on completely disgorging certain fees and compounding damages "with supposed lost investment returns" would violate § 36(b)'s explicit prohibition of recovery exceeding "'the amount of compensation or payments received'" by investment advisors. *Id.* at 804–05 (quoting 15 U.S.C. § 80a-35(b)(3)).

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[6] The court also rejected Plaintiffs' contention that any top-level fee charged on the Lifetime Funds was unreasonable where ECM earned sufficient profit on the underlying funds because it would amount to impermissible rate regulation. App. at 803. The court observed Mr. Meyer's position that ECM's fees would still be unreasonable "even if the Funds were unprofitable" contradicted his position that the fees charged "were excessive because of the Funds' profitability." *Id.* at 803–04. In contrast, the court found Dr. Hubbard, Empower's expert, credibly testified that "'it is actually common' for asset allocation funds to charge a top-level fee" and that "'it makes sense to focus on the total expense ratio for the [L]ifetime [F]unds' . . . because 'the total expense ratio is what you pay . . . as a consumer.'" *Id.* at 804 (quoting *id.* at 3249, 3241); *see also id.* ("[I]n 2015 and 2016, 83% and 87% (respectively) of all asset allocation funds had a top-level fee.").

Having concluded that each of Plaintiffs' three damages theories were "fundamentally flawed," and Mr. Meyer's opinions were "entitled to *no weight*," the court found the record "devoid of any evidence" suggesting Plaintiffs had "sustained actual damages as a result of the fees that Defendants charged." *Id.* at 805. Because Plaintiffs had failed to prove that Empower had breached its fiduciary duties under § 36(b) or that Plaintiffs had suffered actual damages, the court concluded Empower was entitled to judgment in its favor based on "two independent grounds." *Id.* Accordingly, the court entered judgment in favor of Empower. *Id.* at 806–07.

f. Appeal on the merits

Individual Plaintiffs appealed, and a panel of this court affirmed the district court's judgment on the merits. Because the panel concluded "the district court did not err in holding Plaintiffs [had] failed to prove Defendants breached their fiduciary duty under § 36(b)," it did not review the court's additional finding that "Plaintiffs [had] failed to meet their burden with respect to damages." *Obeslo*, 6 F.4th at 1159 n.19.

2. Imposition of Sanctions

Following the district court's judgment on the merits, Empower moved for sanctions under 28 U.S.C. § 1927. Empower argued Plaintiffs' counsel unreasonably multiplied the proceedings by continuing to trial "despite lacking any legally cognizable evidence of . . . actual damages." App. at 808. Empower claimed it had repeatedly pointed out the legal flaws in Plaintiffs' damages theories in its motion for summary judgment, motion to strike Mr. Meyer, and trial brief. According to Empower, it was "irrelevant that Plaintiffs' claims survived through trial," particularly when the court had

reserved opining on the issue of damages until after trial and had denied summary judgment relying in-part on opinions proffered by Mr. Meyer, who was thoroughly discredited at trial. *Id*. at 821. Empower contended that, had Plaintiffs' counsel objectively reevaluated the merit of their arguments, they should have realized that their damages theories were legally foreclosed.

Plaintiffs' counsel opposed Empower's motion for sanctions and contended that Empower had "misstate[d] the evidence and arguments that Plaintiffs presented." *Id.* at 836. According to Plaintiffs, if the court had found Empower breached its fiduciary duty under § 36(b), then it "would have had to determine what fee could have resulted from arm's length bargaining (i.e., what a reasonable fee would have been)" and restored the excess funds to shareholders. *Id.* at 837. Plaintiffs' counsel argued they presented sufficient evidence and reasoned arguments, apart from Mr. Meyer's opinions, showing that a reasonable fee could be measured by Empower's internal calculation of peer-fund's average fees, and that arm's-length bargaining would have resulted in no top-level fee on the Lifetime Funds. Plaintiffs' counsel further asserted that, since the court found Empower had not breached its fiduciary duty, and that the fees charged were not excessive, the issue of whether Plaintiffs could recover lost investment gains "became moot." *Id.* at 843. Thus, Plaintiffs' counsel claimed their advancement of a compounded damages theory did not cause or prolong the trial.

The district court granted Empower's motion for sanctions. The court concluded sanctions were warranted "because Plaintiffs' counsel recklessly pursued their claims through trial despite the fact that they were lacking in merit." *Id.* at 863. In the court's

view, had Plaintiffs' counsel objectively reviewed Empower's proffered evidence and considered the weaknesses Empower pointed out in Mr. Meyer's opinions, it would have been obvious Empower's fees were not excessive. The court opined that "[i]f Plaintiffs had accurately represented the limitations of Mr. Meyer's expert opinions, it is highly likely that this case would not have survived Defendants' Motion for Summary Judgment." *Id.* at 864. Additionally, the court agreed with Empower that, had Plaintiffs' counsel "t[aken] into account the flaws that [Empower] pointed out with respect to Mr. Meyer's opinions, they should have recognized that they had no plausible means of establishing actual damages."[7] *Id.* at 863. Thus, the court held Plaintiffs' counsel liable for Empower's costs, expenses, and attorneys' fees reasonably incurred from the first day of trial until the date Empower filed its motion for sanctions.

Following further briefing from the parties, the court ordered entry of sanctions, pursuant to § 1927, "in the amount of $1,500,000 in favor of [Empower] and against the law firms of [SWCK] and [SBD], jointly and severally." *Id.* at 1224. Plaintiffs' counsel appealed, arguing the district court abused its discretion by imposing sanctions against them under § 1927. SWCK separately argues the court abused its discretion by holding SWCK jointly and severally liable for the entirety of sanctions.

[7] The court further noted that the "decision to continue through trial was inherently lawyer driven" and that counsel's strong incentive to continue litigation, disproportionate to their clients' interest, only emphasized counsel's dereliction of their duty to objectively evaluate their claims' merits. App. at 865.

II. DISCUSSION

Plaintiffs' counsel raises three core arguments contending the district court abused its discretion by awarding sanctions. First, Plaintiffs' counsel argue it was reasonable for them to believe their § 36(b) claims were colorable, and to proceed to trial, when the claims had survived Empower's summary judgment motion, Mr. Meyer survived scrutiny under *Daubert*, and the court denied Empower's Rule 52 motion at trial. Second, Plaintiffs' counsel argue the court's conclusion that Plaintiffs' damages theories conflicted with nonbinding caselaw is insufficient to justify sanctions. And third, Plaintiffs' counsel argue the district court's award of sanctions would have a chilling effect on legitimate, zealous advocacy for shareholders' § 36(b) claims.[8] We consider each argument in turn.

[8] Plaintiffs' counsel distinguishes other cases, cited by the district court and Empower, imposing § 1927 sanctions and argues their § 36(b) claims were not so clearly frivolous as to warrant sanctions. But, as counsel acknowledges, even if the cited cases present more egregious conduct than occurred here, they do not "establish[] a floor below which a court could not permissibly impose sanctions." *Baca v. Berry*, 806 F.3d 1262, 1277 (10th Cir. 2015). *See* SBD Br. at 38 n.5 ("Appellants cite these . . . cases as examples to illuminate the distinction between legitimate zeal and frivolous litigation, not to contend that these cases set a floor below which a court could not permissibly impose sanctions."). Additionally, contrary to Plaintiffs' counsel's suggestion, the court did not impose sanctions because the decision to proceed was lawyer-driven but found the apparently lawyer-driven nature of the case exacerbated Plaintiffs' counsel's failure to objectively evaluate their claims. *See supra* n.6. Thus, even were we to conclude the court's characterization was clearly erroneous, such a holding would be immaterial to our review of the court's decision to impose sanctions.

A. Standard of Review

We review the district court's sanctions award for abuse of discretion. *Frey v. Town of Jackson*, 41 F.4th 1223, 1244 (10th Cir. 2022). But when the district court's "exercise of [] discretion *depended* on the resolution of a purely legal issue, we review that issue de novo." *Baca v. Berry*, 806 F.3d 1262, 1268 (10th Cir. 2015) (emphasis in original) (internal quotation marks omitted). "A district court abuses its discretion when it (1) fails to exercise meaningful discretion, such as acting arbitrarily or not at all, (2) commits an error of law, such as applying an incorrect legal standard or misapplying the correct legal standard, or (3) relies on clearly erroneous factual findings." *Farmer v. Banco Popular of N. Am.*, 791 F.3d 1246, 1256 (10th Cir. 2015); *see also Dansie v. Union Pac. R.R. Co.*, 42 F.4th 1184, 1198 (10th Cir. 2022) ("A district court abuses its discretion when its decision is arbitrary, capricious or whimsical or falls outside the bounds of permissible choice in the circumstances." (quotation marks omitted)). A factual finding is clearly erroneous only if it "wholly lacks support in the record or if, after reviewing the evidence, we are definitively and firmly convinced that the district court made a mistake." *Hayes v. SkyWest Airlines, Inc.*, 12 F.4th 1186, 1194 (10th Cir. 2021).

B. Sanctions Under 28 U.S.C. § 1927

Section 1927 provides that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. The district court has "broad discretion to sanction

attorneys it determines unreasonably multiplied the proceedings." *Frey*, 41 F.4th at 1245. However, we have cautioned that § 1927 represents "an extreme standard, and fees should be awarded only in instances evidencing a serious and standard disregard for the orderly process of justice," lest the court "dampen the legitimate zeal of an attorney in representing his client." *Baca*, 806 F.3d at 1268 (internal quotation marks omitted).

Importantly, sanctions under § 1927 do not require a finding of subjective bad faith, rather "any conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court is sanctionable."[9] *Baca*, 806 F.3d at 1268 (quotation marks and brackets omitted). "An attorney becomes subject to § 1927 sanctions 'by acting recklessly or with indifference to the law, as well as by acting in the teeth of what he knows to be the law.'" *Braley v. Campbell*, 832 F.2d 1504, 1511 (10th Cir. 1987) (quoting *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985)). Additionally, "[c]ontinuing to pursue claims after a reasonable attorney would realize they lacked merit can warrant sanctions under § 1927." *Frey*, 41 F.4th at 1245; *see also Steinert v. Winn Grp., Inc.*, 440 F.3d 1214, 1224 (10th Cir. 2006) (discussing precedent recognizing "§ 1927's incentive for attorneys to regularly re-evaluate the merits of their claims and to avoid prolonging meritless claims"); *Reliance Ins. Co. v. Sweeney Corp.*, 792 F.2d 1137, 1138 (D.C. Cir. 1986) (including "decisions that reflect a reckless

[9] On the other hand, an attorney's "[s]ubjective good faith" does not provide a "safe harbor to protect an attorney who brings an action that a competent attorney could not under any conceivable justification reasonably believe not frivolous." *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987).

indifference to the merits of a claim" as conduct sanctionable under § 1927), *cited with approval in Braley*, 832 F.2d at 1511. "[W]e are entitled to demand that an attorney exhibit some judgment. To excuse objectively unreasonable conduct by an attorney would be to state that one who acts 'with an empty head and a pure heart is not responsible for the consequences.'" *Braley*, 832 F.2d at 1512 (quoting *McCandless v. Great Atl. & Pac. Tea Co.*, 697 F.2d 198, 200 (7th Cir. 1983)).

The district court sanctioned Plaintiffs' counsel under § 1927 because they "recklessly pursued their claims through trial despite the fact that they were lacking in merit." App. at 863. In support, the court held that, had Plaintiffs' counsel objectively reviewed the pretrial evidence and the weaknesses in Mr. Meyer's opinions, they "should have recognized that they had no plausible means of establishing actual damages or 'the outer bounds of arm's length bargaining,'" both necessary to the success of their § 36(b) claim. *Id.* (quoting *Jones v. Harris Assocs. L.P.*, 611 F. App'x 359, 360 (7th Cir. 2015) (unpublished)).

We conclude the court abused its discretion by awarding sanctions under the present circumstances. The pretrial record does not support a finding that Plaintiffs' counsel "[c]ontinu[ed] to pursue [their] claims after a reasonable attorney would realize they lacked merit." *Frey*, 41 F.4th at 1245. Furthermore, the district court's finding that Plaintiffs' counsel inaccurately represented Mr. Meyer's opinions prior to trial is clearly erroneous. And finally, the district court and Empower wholly relied on nonbinding precedent to discredit Plaintiffs' damages theories; the law in this circuit does not demonstrate that Plaintiffs' counsel advanced their damages theories in reckless

indifference to law we must follow or "in the teeth of what [they] kn[ew] to be the law," *Braley*, 832 F.2d at 1511 (quoting *In re TCI Ltd.*, 769 F.2d at 445). For these reasons, we conclude the court's imposition of sanctions "falls outside the bounds of permissible choice in the circumstances." *Dansie*, 42 F.4th at 1198 (quotation marks omitted).

C. The Pretrial Record Does Not Support Sanctioning Plaintiffs' Counsel for Proceeding to Trial

As support for its imposition of sanctions, the district court reasoned that Plaintiffs' counsel should have understood their claims were lacking in merit based on the pretrial evidence presented by Empower and the weaknesses Empower identified in Mr. Meyer's opinions. But Plaintiffs' counsel note that the same claims, expert opinions, and proffered evidence had survived Empower's summary judgment, *Daubert*, and Rule 52 motions. Plaintiffs' counsel contend the court "actually considered and rejected" the same arguments from Empower that it "later embraced as a basis for both its decision on the merits and its order imposing sanctions." SWCK Br. at 23. Thus, Plaintiffs' counsel argue the court inappropriately sanctioned them "for the very same reasons that it previously decided were insufficient to preclude the case from going to trial." *Id.* at 18. We agree.

The district court's assertion that Plaintiffs' counsel "recklessly pursued their claims through trial despite the fact that they were lacking in merit," App. at 863, "wholly lacks support in the [pretrial] record." *Hayes*, 12 F.4th at 1194. Rather, the court affirmed that Plaintiffs had presented meritorious, triable issues as to each of the *Gartenberg* factors; approved of Mr. Meyer's proffered testimony in denying Empower's summary

judgment and *Daubert* motions; and failed to provide any record support for its assertion that Plaintiffs inaccurately represented the limitations of Mr. Meyer's testimony. Thus, we conclude the court abused its discretion by sanctioning Plaintiffs' counsel.

1. Plaintiffs' Claims Survived Summary Judgment Based on the Same Evidence Presented at Trial

"[E]ven when claims survive summary judgment or a directed verdict," the same principles of § 1927 apply such that denial of summary judgment does not *per se* preclude the imposition of sanctions under § 1927. Empower Br. at 29; *see Danielson-Holland v. Standley & Assocs., LLC*, 512 F. App'x 850, 854 (10th Cir. 2013) (unpublished) (sanctioning counsel, even though he proceeded to trial on a claim that survived motions for summary judgment and directed verdict, because "[t]he evidence supporting that claim actually was insufficient to go forward"). That said, "[a]bsent misrepresentation to the court, a party is entitled to rely on a court's denial of summary judgment and JMOL . . . as an indication that the party's claims were objectively reasonable and suitable for resolution at trial." *Medtronic Navigation, Inc. v. BrainLAB Medizinische Computersysteme GmbH*, 603 F.3d 943, 954 (Fed. Cir. 2010), *quoted with approval by Danielson-Holland*, 512 F. App'x at 854; *see also Browning v. Kramer*, 931 F.2d 340, 345 (5th Cir. 1991) ("[O]ne might well wonder how a case could be so frivolous as to warrant sanctions if it has sufficient merit to get to trial."); *cf. In re Ruben*, 825 F.2d 977, 988 (6th Cir. 1987) ("The denial of the motions for summary judgment precludes a sanction on the ground that the claims against them were legally insufficient."). "[D]enials of motions for summary judgment . . . [are] in essence

determinations that the cases contained meritorious, triable issues." *Baca*, 806 F.3d at 1272 (citing *Medtronic Navigation, Inc.*, 603 F.3d 943; *Browning*, 931 F.2d 340; *In re Ruben*, 825 F.2d 977).

At the outset, it is worth clarifying the scope of the district court's summary judgment ruling, which explicitly and inexplicably omitted consideration of Plaintiffs' proof of damages. Empower moved for summary judgment on the independent, alternative basis that "[e]ven if Plaintiffs' claims could survive under the *Gartenberg* factor analysis, . . . Plaintiffs cannot prove damages, an essential element of their claim." Sealed App. at 128. Empower argued Plaintiffs' damages theories were legally deficient based on the persuasive authority of nonbinding caselaw.[10] Far from actually considering Empower's arguments, the court was entirely silent on the issue of damages, stating:

> [B]ecause the [c]ourt finds that the plaintiffs have raised sufficient facts to create a genuine dispute as to whether defendants' fees were the product of an arm's length negotiation, the [c]ourt denies the defendants' Motion for Summary Judgment. The [c]ourt also notes that defendants moved for summary judgment on the issue of damages. Because the [c]ourt is denying this, the [c]ourt need not address that portion.

[10] Empower advanced the same arguments regarding the legal deficiency of Plaintiffs' damages theories in its *Daubert* motion, Rule 52 motion, and proposed findings of fact and conclusions of law.

App. at 1363.[11] While Plaintiffs' counsel may "rely on [the] court's denial of summary judgment and JMOL . . . as an indication that [their] claims were objectively reasonable and suitable for resolution at trial," they may not so rely on the court's silence. *Medtronic Navigation, Inc.*, 603 F.3d at 954. Thus, we agree with Empower that the denial of summary judgment did not serve as an endorsement of Plaintiffs' damages theories.

However, the court's summary judgment ruling did address the merits of Plaintiffs' claims regarding breach under § 36(b) and denied Empower's motion on that basis. The court concluded Plaintiffs had presented sufficient evidence regarding each of the *Gartenberg* factors to create a genuine dispute as to whether Empower's fees were so disproportionately high that they could not have been the product of an arm's-length negotiation. This was, "in essence [a] determination[] that the case[] contained meritorious, triable issues" as to Plaintiffs' claims that Empower breached its fiduciary duties under § 36(b). *Baca*, 806 F.3d at 1272. If Plaintiffs indeed "had no plausible means of establishing . . . the outer bounds of arm's length bargaining," then their claim of breach under § 36(b) should not have proceeded past summary judgment. App. at 863; *see Jones*, 559 U.S. at 346 ("[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.").

[11] Actual damages is an element of a § 36(b) claim, which Plaintiffs bear the burden of proving. *See* 15 U.S.C. § 80a-35(b)(3). Thus, a failure of proof regarding damages would provide an independently sufficient basis for granting summary judgment. Accordingly, if the district court agreed Plaintiffs' damages theories were legally infirm, Empower was entitled to judgment as a matter of law.

To later sanction Plaintiffs' counsel for failing to sustain their burden of proof at trial, or to anticipate their inability to do so, based on the same evidence available at summary judgment, was an abuse of the court's discretion. It stretches the reach of § 1927 too far to sanction Plaintiffs' counsel for "[c]ontinuing to pursue claims after a reasonable attorney would realize they lacked merit," *Frey*, 41 F.4th at 1245, where the court itself did not realize they lacked merit when presented with the same evidence and arguments at summary judgment. Thus, the court acted arbitrarily and "outside the bounds of permissible choice" in sanctioning Plaintiffs' counsel for failing to anticipate the weakness of their case relative to Empower's evidence, when the court had evaluated the same evidence and found it sufficient to raise a triable issue of fact as to Empower's breach of fiduciary duty. *Dansie*, 42 F.4th at 1198.

2. The Courts' Pretrial Rulings Were Made with Full Awareness of Mr. Meyer's Proffered Testimony

Furthermore, the pretrial record offers no support for the court's finding that Plaintiffs' counsel recklessly proceeded to trial in disregard of the fatal flaws in Mr. Meyer's proffered testimony. Again, the same testimony was relied on by the court in denying Empower's summary judgment and *Daubert* motions. First, the court's summary judgment ruling was made with full view of Mr. Meyer's expert report, rebuttal report, and deposition testimony. In denying Empower's motion for summary judgment, the court repeatedly cited statements from Mr. Meyer. While the court noted Empower's critiques of Mr. Meyer's opinions, it distinguished Empower's cited caselaw and held that genuine disputes of material fact remained regarding each *Gartenberg* factor. Indeed,

viewing the evidence in the light most favorable to Plaintiffs, the district court concluded that many of the *Gartenberg* factors weighed in favor of Plaintiffs.

Moreover, the court had full view of Mr. Meyer's work experience, expert report, and deposition testimony in considering Empower's *Daubert* motion. Yet, the court found Mr. Meyer met the minimum requirements to testify as an expert at trial: he was qualified, and his proffered opinions were sufficiently relevant and reliable to be admissible. While acknowledging Empower's criticism of Mr. Meyer's qualifications, credibility, and conclusions, the court determined these issues went to the weight to be accorded to Mr. Meyer's testimony, not its admissibility, and were more properly subjects for cross examination. Additionally, the court noted that many of Empower's arguments were based on nonbinding authority and, while such authority may ultimately prove persuasive, the court "caution[ed] the parties not to overstate the effect of non-binding legal authority." App. at 642.

This approval of Mr. Meyer's proffered testimony at summary judgment and under *Daubert* contrasts with the court's sanction of Plaintiffs' counsel for failing to "realize[] the weaknesses in Mr. Meyer's testimony." *Id.* at 864. Were Mr. Meyer unqualified based on education and experience, his opinions legally irrelevant to the issues of breach and damages under § 36(b), or his reasoning and methodologies invalid, he should have been excluded from testifying as an expert. The court permitted Plaintiffs' counsel to proceed to trial with Mr. Meyer's expert testimony and found Plaintiffs had presented sufficient evidence to raise genuine issues of material fact as to the excessiveness of Empower's fees. "Absent misrepresentation to the court," Plaintiffs'

counsel was entitled to rely on those rulings "as an indication that [their] claims were objectively reasonable and suitable for resolution at trial." *Medtronic Navigation, Inc.*, 603 F.3d at 954. To then sanction Plaintiffs' counsel for proceeding to trial, based on the same expert testimony and evidence, was arbitrary, not supported by the pretrial record, and an abuse of discretion. To the extent the court sanctioned Plaintiffs' counsel for failing to "realize[] the weaknesses in Mr. Meyer's testimony," App. at 864, the court acted "outside the bounds of permissible choice," *Dansie*, 42 F.4th at 1199 n.8.

3. There is No Record Evidence that Plaintiffs' Counsel Misrepresented the Evidence or Mr. Meyer's Proffered Testimony

Lastly, the court's sanctions order asserted that "[i]f Plaintiffs had accurately represented the limitations of Mr. Meyer's expert opinions, it is highly likely that this case would not have survived Defendants' Motion for Summary Judgment." App. at 864. But the court provided no reference to the record or substantiation of what inaccurate representations Plaintiffs made regarding Mr. Meyer's expert opinions. Nor has Empower done so on appeal. *See* Empower Br. at 21, 36 (repeating the court's assertion but without any specification of *what* inaccurate representations Plaintiffs' counsel made). And our own review of the record finds no such inaccurate representations by Plaintiffs' counsel. Plaintiffs have consistently asserted the same damages theories, supported by Mr. Meyer's same expert opinions, which Empower has likewise consistently argued against. The only change or inconsistency notable from the record is between the court's treatment of Mr. Meyer's opinions in ruling on Empower's summary judgment and *Daubert* motions and its sanction of Plaintiffs' counsel for failing to "realize[] the

weaknesses in Mr. Meyer's testimony that were likely to be exposed on cross examination." *Id.* There is no indication that Plaintiffs' counsel misrepresented their evidence to the court and no finding by the court that "[t]he evidence supporting [their] claim [of breach] actually was insufficient to go forward" past summary judgment. *Danielson-Holland*, 512 F. App'x at 854.

In the absence of support in the record, and with none indicated by the court or Empower, the court's finding that Plaintiffs inaccurately represented the limitations of Mr. Meyer's opinions at summary judgment was clearly erroneous and an abuse of discretion. *See Hayes*, 12 F.4th at 1194 ("A fact finding is clearly erroneous only where it wholly lacks support in the record or if, after reviewing the evidence, we are definitively and firmly convinced that the district court made a mistake.").

* * *

For these reasons, we conclude the court abused its discretion by sanctioning Plaintiffs' counsel for failing to anticipate the weakness of its claims and for failing to realize the weaknesses in Mr. Meyer's expert testimony. At summary judgment, the court concluded that Plaintiffs had presented sufficient evidence to create genuine issues of material fact as to each of the *Gartenberg* factors relevant to whether Empower charged disproportionate fees in violation of its fiduciary duties. In doing so, the court repeatedly referenced Mr. Meyer's opinions and found they supported the existence of triable issues of fact. Similarly, in denying Empower's *Daubert* motion, the court had full view of Mr. Meyer's qualifications and proffered opinions, yet it found him qualified to testify as an expert, and his opinions relevant and reliable to the issue of damages. Given these

rulings, Plaintiffs' counsel did not "act[] in a way the court could have justifiably found to be objectively unreasonable" by proceeding to trial on the same evidence, arguments, and expert witness that sustained its claims through summary judgment and a *Daubert* challenge.[12] *Baca*, 806 F.3d at 1277. The pretrial record in this case does not support such a finding. Further, there is no support for the court's assertion that Plaintiffs' counsel inaccurately represented the limitations of Mr. Meyer's expert opinions. Thus, the court's findings that Plaintiffs' counsel failed to objectively review the evidence or realize the weaknesses in Mr. Meyer's testimony are unsupported by the record and clearly erroneous. The court abused its discretion in sanctioning Plaintiffs' counsel on these bases.

D. Plaintiffs' Damages Theories Did Not Contravene Well Established Law

Another basis for the court's sanctions was Plaintiffs' counsels' failure to realize the "fatal legal flaws upon which [Mr. Meyer's] opinions were based." App. at 864.

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[12] Plaintiffs' counsel also contends the court's denial of Empower's Rule 52 motion indicated their claims had plausible merit. While a court's ruling denying judgment as a matter of law or judgment on partial findings may retrospectively indicate that counsel did not recklessly "[c]ontinu[e] to pursue claims after a reasonable attorney would realize they lacked merit," *Frey v. Town of Jackson, Wyo.*, 41 F.4th 1223, 1245 (10th Cir. 2022), coming at the close of a plaintiff's case, the court's ruling could not affect plaintiff's decision to proceed to trial, *see Medtronic Navigation, Inc. v. BrainLAB Medizinische Computersysteme GmbH*, 603 F.3d 943, 954 (Fed. Cir. 2010) ("[A] party is entitled to rely on a court's denial of . . . JMOL . . . as an indication that the party's claims were objectively reasonable and suitable for resolution at trial."); *Baca*, 806 F.3d at 1271–72 (rejecting appellant's "complaints about the court's process" because they "g[ot] the chronology backwards[;] . . . [s]tatements made in [an] order could not have 'invited' sanctionable conduct months earlier"). Thus, denial of Empower's Rule 52 motion could not have informed Plaintiffs' counsel's decision to proceed to trial.

Indeed, attorneys may be subject to § 1927 sanctions for "acting recklessly or with indifference to the law, as well as [] acting in the teeth of what [they] know[] to be the law." *Braley*, 832 F.2d at 1511 (quoting *In re TCI Ltd.*, 769 F.2d at 445). We have upheld sanctions against attorneys for recklessly pursuing "patently meritless" claims "with indifference to well-established law." *Steinert*, 440 F.3d at 1225 (citing Supreme Court precedent which foreclosed appellant's claims); *see also Baca*, 806 F.3d at 1276 (noting that "[t]he law with which the [appellants] must grapple to show their claim was colorable is well established"). In reviewing § 1927 sanctions based on counsel's pursuit of legally meritless claims, we have held that "it is irrelevant whether [another district has] opined on th[e] point. The question is whether such a[] [claim] could be or was grounded in law we must follow." *Baca*, 806 F.3d at 1276. Thus, whether Plaintiffs' counsel proceeded to trial in reckless disregard of the fatal legal flaws in their damages theories looks to whether Plaintiffs' damages theories were foreclosed by the law of this circuit.

Plaintiffs advanced three legal theories for the calculation of actual damages under § 36(b). First, Plaintiffs contended damages could be measured based on the difference between the fee charged and the average fee assessed to peer-funds managed by Empower. Second, Plaintiffs argued Empower should have charged no top-level fee to the Lifetime Funds, because those Funds were invested in underlying core funds on which Empower already made a significant profit. Third, Plaintiffs sought to compound those damages by the lost investment gains which shareholders' Funds "would have appreciated had those excessive fees been restored." Sealed App. at 276. Plaintiffs'

counsel argue the proper calculation of § 36(b) damages "remains to this day an unsettled question in this Circuit" and is "not so clear-cut of an issue that Plaintiffs' attorneys acted with a 'serious and standard disregard for the orderly process of justice'" by advancing their proposed damages theories. SBD Br. at 48 (quoting *Baca*, 806 F.3d at 1268).

Empower contends Plaintiffs' counsel reasonably should have known their damages theories were legally precluded because Empower repeatedly pointed to caselaw rejecting the very same arguments. But the cases Empower relies upon are not binding in this circuit. *See Jones*, 611 F. App'x at 360; *Amron v. Morgan Stanley Inv. Advisors Inc.*, 464 F.3d 338, 345 (2d Cir. 2006); *In re Evangelist*, 760 F.2d at 29–30; *In re Gartenberg*, 636 F.2d 16, 18 (2d Cir. 1980); *Pirundini*, 309 F. Supp. 3d at 165 n.10; *Paskowitz v. Prospect Cap. Mgmt. L.P.*, 232 F. Supp. 3d 498, 505 (S.D.N.Y. 2017); *Sivolella v. AXA Equitable Life Ins. Co.*, No. 11-cv-4194-PGS-DEA, 2016 WL 4487857, at *70–71 (D.N.J. Aug. 25, 2016), *aff'd*, 742 F. App'x 604 (3d Cir. 2018); *Kasilag*, 2016 WL 1394347, at *19–20; *Kamen v. Kemper Fin. Servs., Inc.*, 659 F. Supp. 1153, 1164 (N.D.

Ill. 1987).[13] Empower has acknowledged these authorities are not binding but criticizes Plaintiffs for similarly invoking nonbinding authorities in support of their damages theories. We see nothing wrong with either party's reliance on non-binding authority. In the absence of controlling authority, decisions from other courts that have considered the issue can be helpful in formulating the law in this circuit. While that authority may or may not ultimately prove persuasive, citing it cannot form the basis for finding a claim

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[13] Of the persuasive authorities Empower cites, only *Sivolella* and *Kasilag*, both unpublished cases from the District of New Jersey, include substantive discussion of what damages are available under § 36(b). *See Sivolella v. AXA Equitable Life Ins. Co.*, No. 11-cv-4194-PGS-DEA, 2016 WL 4487857, at *71 (D.N.J. Aug. 25, 2016), *aff'd* , 742 F. App'x 604 (3d Cir. 2018); *Kasilag v. Hartford Inv. Fin. Servs., LLC*, No. cv-11-1083-RMB-KMW, 2016 WL 1394347, at *19–20 (D.N.J. Apr. 7, 2016), *aff'd*, 745 F. App'x 452 (3d Cir. 2018). Both cases opined that actual damages under § 36(b) are measured as "the difference between the fee paid and a fee that would have been 'fair'—i.e., a fee that could have been negotiated at arm's length." *Sivolella*, 2016 WL 4487857, at *71 (citing *Krasner v. Dreyfus Corp.*, 500 F. Supp. 36, 42 (S.D.N.Y. 1980) ("[A]ctual damages" means the "amount by which the . . . fee [level] exceeded a fair fee.")); *see also Kasilag*, 2016 WL 1394347, at *19–20 (similar). *Sivolella* additionally held that complete disgorgement would not be appropriate where the evidence shows the investment adviser provided some services in exchange for the fees charged. 2016 WL 4487857, at *71 (concluding complete disgorgement of fees was inappropriate where "nothing in the record demonstrated that [adviser] performed no duties"). While the district court ultimately found these cases persuasive, they are not binding precedent in this circuit or even in the District of New Jersey.

Other nonbinding authorities cited by Empower hold that charging a fee that is above the industry average cannot alone constitute a breach of § 36(b). *See* App. at 802 (citing *Pirundini*, 309 F. Supp. 3d 156, 165 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 538 (2d Cir. 2019); *Chill v. Calamos Advisors LLC*, 417 F. Supp. 3d 208, 261 (S.D.N.Y. 2019)). But these authorities do not establish what Empower argues is the law—that damages can be recovered only for that portion of the fee which exceeded the maximum fee that possibly could have resulted from arm's-length bargaining—only that an adviser has not *breached* its fiduciary duty unless it charged such an excessive fee. Thus, not only are these cases not binding precedent in this circuit, they opine on the element of breach, not the measure of actual damages, under § 36(b).

was frivolous. And arguing for a rule contrary to that adopted in a non-precedential case does not evidence reckless disregard of well-established law.

To date, no Supreme Court or Tenth Circuit case has opined on the proper approach to ascertaining damages under § 36(b). Outside the litigation of this case, neither has any district court within the Tenth Circuit. In *Jones*, the Supreme Court did consider "what a mutual fund shareholder must prove in order to show that a mutual fund investment adviser breached the 'fiduciary duty with respect to the receipt of compensation for services that is' imposed by § 36(b)." 559 U.S. at 338 (quoting 15 U.S.C. § 80a-35(b)). But the Court's interpretation of § 36(b) focused on the element of proving breach, not actual damages. The Court's ultimate holding—that "to 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"—may have implications for what theories of damages will be deemed acceptable, but no methodology has yet been adopted by precedent this court must follow. *Id.* at 346.

To be sure, looking to the statutory text of the ICA, § 36(b) does set some limits on actual damages. Damages are only recoverable for a period of "one year before the action was instituted." 15 U.S.C. § 80a-35(b)(3). And an award of damages is "limited to the actual damages resulting from the breach of fiduciary duty and shall in no event exceed the amount of compensation or payment received" by the investment adviser. *Id.* The First Circuit has interpreted this limitation, together with the legislative history of § 36(b), as "prevent[ing] recovery of profits generated by excess payment" and "recovery

of special damages in excess of the payments made by the investment company" to the investment adviser. *In re Evangelist*, 760 F.2d at 30 (discussing § 36(b)(3) in the context of determining whether a shareholder claim under § 36(b) is legal or equitable in nature and whether shareholder-claimant was entitled to a jury trial). As Empower has noted, this interpretation would appear to foreclose Plaintiffs' recovery of lost investment returns. Importantly, however, it is not binding precedent in this circuit.[14]

The district court was ultimately persuaded by out-of-circuit caselaw that Plaintiffs had failed to produce legally cognizable evidence of actual damages. But Plaintiffs' damages theories were not "patently meritless" and advanced "with indifference to well-established law," *Steinert*, 440 F.3d at 1225, or "in the teeth of what [counsel] kn[ew] to be the law," *Braley*, 832 F.2d at 1511 (quoting *In re TCI Ltd.*, 769 F.2d at 445). Because Plaintiffs' legal theories were not foreclosed by "law we must follow," *see Baca*, 806 F.3d at 1276, they were not frivolous and advanced in reckless disregard of the law and Plaintiffs' counsel's duties to the court. The district court's contrary conclusion, and imposition of sanctions, was an error of law and an abuse of the court's discretion.

[14] Only one other circuit has defined actual damages under § 36(b). In an unpublished opinion, the Fourth Circuit held that actual damages cannot include so-called "flight damages": the "transactional and administrative expenses that accrued when, upon learning of the state and federal actions against Defendants, investors redeemed their shares." *Steinberg v. Janus Cap. Mgmt., LLC*, 457 F. App'x 261, 267 (4th Cir. 2011). Plaintiffs have claimed no such damages, and in any event this decision too is not binding on this circuit.

E. The Instant Sanctions Would Chill Legitimate, Meritorious Advocacy

Upholding the sanctions in this matter would chill legitimate, zealous advocacy in an area where plaintiffs already face a high barrier to success on the private right of action provided by Congress.[15] Although no shareholder plaintiff has won a § 36(b) claim, no court has imposed § 1927 sanctions on § 36(b) claimants' counsel for attempting to litigate such claims. The pretrial record in this matter gave Plaintiffs' counsel no reason to anticipate their claims were so meritless as to risk sanctions by proceeding to trial. In the realm of § 36(b) litigation, where no plaintiff has succeeded in the fifty years since the creation of a private right of action, the specter of such unforeseeable sanctions would deter prospective litigants and their counsel from pursuing enforcement of shareholders' rights under § 36(b).

Section 1927 presents "an extreme standard" for imposing sanctions, and we have cautioned that "fees should be awarded only in instances evidencing a serious and standard disregard for the orderly process of justice." *Baca*, 806 F.3d at 1268 (internal quotation marks omitted). We have instructed courts to "strictly construe the statute to

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[15] The National Association of Consumer Advocates, Amici supporting Plaintiffs' counsel, add that the instant sanctions would serve to discourage enforcement of private rights of action by shareholders and consumers attempting to enforce their rights under § 36(b) and other consumer protection statutes. The Chamber of Commerce, Amici supporting Empower, argues the instant sanctions should be affirmed because of the important role sanctions play in deterring the proliferation of meritless litigation. While sanctions are an appropriate tool to deter frivolous litigation and misconduct, they are not appropriate in the instant case where the pre-trial record and applicable law do not support a conclusion that Plaintiffs' counsel unreasonably proceeded to trial in reckless disregard of their claim's factual merit or legal viability.

guard against dampening the legitimate zeal of an attorney in representing his client." *Id.* (internal quotation marks and brackets omitted). Here, the district court gave Plaintiffs' counsel no indication that their claims were meritless or that their expert was unqualified, instead allowing the case to proceed despite Empower's repeated efforts to challenge both the merits and the measure of damages. To allow the district court's sanctions to stand under these circumstances would dampen legitimate pursuit of shareholders' § 36(b) claims.

Plaintiffs' counsel did not act in "serious and standard disregard for the orderly process of justice" by continuing to advance their client's § 36(b) claims. *Id.* (quotation marks omitted). Plaintiffs' counsel did not "multipl[y] the proceedings . . . unreasonably and vexatiously" by continuing to advance their claims when their legal theories were not foreclosed by binding precedent in this jurisdiction, when the court determined Plaintiffs had sufficient evidence to proceed to trial and declined multiple opportunities to opine on the merits of Plaintiffs' evidence and theories of damages, and when nothing in the record supports the district court's finding that Plaintiffs' counsel misrepresented Mr. Meyer's theories or testimony. 28 U.S.C. § 1927. Thus, the imposition of sanctions was not based on a strict construction of § 1927 and would effectively suppress shareholder litigation under § 36(b) beyond the currently high barrier to success in litigating such claims.

III. CONCLUSION

In sum, the district court abused its discretion by sanctioning Plaintiffs' counsel. The record does not support a finding that Plaintiffs' counsel "[c]ontinu[ed] to pursue

[their] claims after a reasonable attorney would realize they lacked merit," *Frey*, 41 F.4th at 1245, and the law in this circuit does not demonstrate that Plaintiffs' counsel advanced their damages theories in reckless indifference to the law or "in the teeth of what [they] kn[ew] to be the law," *Braley*, 832 F.2d at 1511 (quoting *In re TCI Ltd.*, 769 F.2d at 445). To maintain sanctions under such circumstances would chill legitimate, meritorious advocacy for shareholders' rights under § 36(b).

Because we conclude that the district court abused its discretion by sanctioning Plaintiffs' counsel, we REVERSE the court's imposition of sanctions.

22-1291, 22-1292, *Obeslo v. Empower Capital, et al.*

TYMKOVICH, Circuit Judge, dissenting.

The majority concludes the district court abused its discretion in granting sanctions because reasonable lawyers would not have realized their claims lacked merit. I disagree with this conclusion. Sanctions were wholly justified in this case based on counsels' abusive conduct in unreasonably prolonging baseless litigation. Judge Arguello presided over a seven-year odyssey involving complex but ultimately groundless multi-million dollar claims against Empower and correctly concluded sanctions were justified. I see no abuse of discretion.

A district court has discretion to award sanctions under 28 U.S.C. § 1927 "unless it is arbitrary, capricious, whimsical, or [a] manifestly unreasonable judgment." *Burke v. Regalado*, 935 F.3d 960, 1011 (10th Cir. 2019). We afford deferential review to the district court's decision and will not reverse unless we have "a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010) (quoting *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997)). Because it was not a clear error of judgment to determine plaintiffs' counsel unreasonably prolonged a meritless case, and it did not exceed the bounds of permissible choices to award attorney's fees incurred during trial, I respectfully dissent.

Section 1927 prohibits attorneys from unreasonably and vexatiously multiplying the proceedings in any case. A necessary corollary to this principle requires "attorneys to

regularly re-evaluate the merits of their claims and to avoid prolonging meritless claims." *Steinert v. Winn Grp., Inc.*, 440 F.3d 1214, 1224 (10th Cir. 2006). Attorneys thus have an *ongoing and independent duty* to objectively reevaluate their claims from beginning to end. A district court may impose sanctions when an attorney intentionally or recklessly disregards that duty. *Baca v. Berry*, 806 F.3d 1262, 1268 (10th Cir. 2015) ("[A]ny conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court[] is sanctionable." (second alteration in original) (citing *Hamilton v. Boise Cascade Exp.*, 519 F.3d 1197, 1202 (10th Cir. 2008)).[1]

Nor does § 1927 limit the imposition of sanctions to a specific timeframe. Sanctions can be imposed even after the end of litigation. *See Steinert*, 440 F.3d at 1223 ("We simply conclude that § 1927 sanctions are not untimely if sought or imposed after final judgment."); *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO*, 948 F.2d 1338, 1345 (2d Cir. 1991) ("[Section 1927] imposes an obligation on attorneys throughout the entire litigation to avoid dilatory tactics."); *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 102 (3d Cir. 2008) ("[T]he determination of what are truly excess costs, expenses, and attorney fees cannot be determined until the close of the litigation." (quoting *Vandeventer v. Wabash Nat'l Corp.*, 893 F. Supp. 827, 845-46 (N.D. Ind. 1995)). No case holds that sanctions become unavailable when a court declines to dispose of a case at summary judgment or to strike an expert under *Daubert*.

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[1] We have held that § 1927 does not require a finding of bad faith. *See Hamilton*, 519 F.3d at 1202.

Instead, the text of § 1927 does not place any time limitation on the court's ability to grant sanctions.

The district court imposed sanctions on two independent grounds. First, it found counsel should have known the testimony of their expert, Mr. Meyer, would be generally inadequate and legally flawed. It also found plaintiffs' counsel produced no other evidence to support their claim beyond his credulous testimony. Despite these grounds, the majority finds the court abused its discretion in imposing sanctions because the defendants highlighted the problems in Mr. Meyer's opinions and his credibility in their pretrial motions, and because the same evidence plaintiffs presented at trial was presented to survive these pretrial motions. Thus, the majority argues the court effectively induced plaintiffs into believing they had a green light to proceed to trial.

But the district court was bound by certain limitations in deciding these pretrial motions. Plaintiffs' counsel had the independent duty to *objectively* review the merits of their claim. The court's denial of summary judgment and a *Daubert* motion did not allow them to abdicate that duty.[2]

[2] The majority finds the district court's denial of defendants' Rule 52 motion indicates that plaintiffs did not recklessly pursue their claims. But Judge Arguello explained that "for [her] peace of mind in making the decisions, [she] want[ed] to hear from the defendants' witnesses, in particular, the experts from the defendants." App. 3114. In her role as factfinder in this bench trial, she had discretion to deny this motion. And she determined it would be helpful to hear from both parties before rendering judgment. *See Jones v. Est. of Cole*, 483 F. App'x 468, 472 n.4 (10th Cir. 2012) ("In addressing a Rule 52(c) motion, the court . . . exercises its role as factfinder.") (quoting *United States v. $242,484.00 in U.S. Currency*, 389 F.3d 1149, 1172 (11th Cir. 2004)).

In deciding the defendants' motion for summary judgment, the district court had to view the facts and draw reasonable inferences in the light most favorable to plaintiffs. And plaintiffs' counsel persuaded the court to allow their claim to proceed because of their representations about what Mr. Meyer would demonstrate at trial. In its denial of summary judgment, the district court found there was a genuine dispute of material fact as to whether the defendants' fees were unreasonable because plaintiffs' expert "purports to show that . . . defendants charged some fees that could not be explained by the quality of the defendants' services." App. 1362. The district court allowed plaintiffs to proceed because of what Mr. Meyer would eventually substantiate at trial. In *Danielson-Holland v. Standley & Associates, LLC*, we affirmed sanctions because the plaintiff failed to produce evidence he promised to present in his opposition to summary judgment. 512 F. App'x 850, 853 (10th Cir. 2013). Similarly, here, Mr. Meyer admitted at trial that the district court allowed the case to continue because it relied on certain statements in his expert report that he should not have included. App. 3024-25. It was not manifestly unreasonable for the district court to find plaintiffs' counsel should have realized before trial that Mr. Meyer's testimony would be insufficient.

Mr. Meyer's conclusions on actual damages—an essential element of plaintiffs' claim—were not brought to light until trial. The district court expressly reserved ruling on the issue of damages in its denial of summary judgment, and the majority agrees that the district court's silence on Mr. Meyer's damages theories did not serve as an endorsement. In denying the defendants' *Daubert* motion, the district court's review was limited to whether Mr. Meyer met the minimum qualifications to testify at trial. The

court declined to focus on Mr. Meyer's conclusions but did question whether his conclusions on damages were factually accurate in its denial of the motion. App. 641-42. Thus, the district court never approved of Mr. Meyer's testimony on damages before trial, and plaintiffs' counsel should have recognized they had no plausible means for establishing actual damages at trial.

The majority finds the district court abused its discretion because no Tenth Circuit or Supreme Court precedent has established a calculation for damages, and thus Mr. Meyer's damages theories could not be legally meritless. But Mr. Meyer's theories were not just meritless, they were flawed. At trial, Mr. Meyer admitted that his damages calculations did not consider relevant information:

> Q. And when you calculated damages in this case for 2017, did you take into account all the money that went back to shareholders pursuant to that expense cap limitation?
> A. I did not.
> Q. Well, wouldn't you want to?
> . . .
> A. But did it – I'm sorry. I did not -- was not aware that there was a dollar amount, though, as a result.
> Q. You're not aware, for example, that when you calculated the damages on the Templeton Global Bond Fund, that about $250,000 of those fees was returned to the fund because of those expense cap limitations; correct?
> A. Correct.

App. 2979.

He also admitted that his damages calculations were abnormal:

> Q. And you took the lowest fee fund, weighted it five times, and then determined the average?
> A. This was their analysis. Yes.
> Q. And -- well, but you used it; correct? Do you think --

> A. Correct.
> Q. Do you think that's the proper way to determine whether a fee is excessive, is to take one fund that is the lowest fee, weight it twice -- five times as much as any other fund, and then calculate an average? Do you think that's the appropriate way to calculate a peer group?
> A. That is not the way you would normally calculate a peer group.

App. 3045.

Just as Mr. Meyer's flawed theories on damages came to light at trial, so too did his lack of credibility. The court declined to opine on Mr. Meyer's credibility in denying the defendants' *Daubert* motion—it believed it would be better addressed during cross-examination at trial. In this bench trial, Judge Arguello had two roles to play: the role of finder of fact and the role of judge in making conclusions of law. As factfinder, she relied on the parties to educate her about the case.[3] Because this case involved a complicated shareholder-derivative action under § 36(b) of the ICA, it would certainly have been helpful to hear from the experts at trial before making findings of fact and conclusions of law. And it was not until trial that the district court saw "abundant" examples of weaknesses and inconsistencies in Mr. Meyer's testimony and determined he lacked credibility. One example of his lack of credibility is his unawareness of key regulatory requirements in the industry:

> Q. What does Great-West do to file the form NPX?
> A. Excuse me?

[3] In a hearing on the defendants' motion for summary judgment, Judge Arguello told both parties this was the first time she had dealt with an Investment Company Act case like this and was not as familiar with all the complexities as the attorneys were. App. 1280, 1284.

> Q. What does Great-West Capital Management do for the funds when it has to file a form NPX?
> A. I'm not sure.
> Q. Have you heard of a form NPX?
> . . .
> Q. What about form N-PORT? What does Great-West have to do for form N-PORT?
> A. Again, I'm not aware.
> Q. Can you please describe for the Court what Great-West has to do to comply with the SEC's new liquidity rules?
> A. Again, I'm not aware.
> Q. You're not aware --
> A. I'm not aware of what the rule is.
> Q. Isn't that one of the most major SEC rulemaking initiatives over the last three years?
> A. I would suppose it is. I'm not sure.
> Q. You've never heard of it?
> A. I have heard of it; I am not familiar with it.

App. 2988-89.

The second ground for sanctions was that counsel failed to objectively review the evidence before trial. The district court points to the defendants' pretrial motions as "red flags" that should have put plaintiffs' counsel on notice as to the flaws in their case. At trial, plaintiffs failed to meet their burden of proof on all the *Gartenberg* factors and did not establish any actual damages. The court determined that a reasonable attorney objectively reviewing the evidence in this case would have realized its fatal flaws and dismissed before trial, especially because the defendants overwhelmingly demonstrated their fees were reasonable.

The majority finds *Medtronic Navigation, Inc. v. BrainLAB Medizinische Computersysteme GmbH* instructive, but this case is distinguishable. 603 F.3d 943 (Fed. Cir. 2010). In *Medtronic*, the Federal Circuit reversed an award of sanctions and

held that "[a]bsent misrepresentation[4] to the court, a party is entitled to rely on a court's denial of summary judgment and JMOL . . . as an indication that the party's claims were objectively reasonable and suitable for resolution at trial." *Id.* at 954. Importantly, the Federal Circuit found that there was sufficient evidence to justify proceeding through trial. *Id.* at 957. Here, however, the district court determined there was insufficient evidence to support plaintiffs' claim, and we agreed in a separate appeal of this case.[5] *See also Danielson-Holland*, 512 F. App'x at 854 (distinguishing *Medtronic* because the evidence supporting the claim was insufficient to go to trial). Therefore, it was not a manifestly unreasonable judgment to determine that plaintiffs' counsel proceeded to trial when they knew there was no basis to proceed.

The district court also noted that plaintiffs' counsel purposefully manufactured this case, solicited clients, and were highly motivated to litigate because of how much they stood to earn—even when it became clear the best course would have been to dismiss their case. These findings are not manifestly unreasonable, and we should conclude that the district court did not abuse its discretion in granting sanctions on this second ground.

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[4] Although we do not require a misrepresentation to the court, even if we did, Judge Arguello noted that plaintiffs' counsel misrepresented Mr. Meyer's credibility: "If Plaintiffs had accurately represented the limitations of Mr. Meyer's expert opinions, it is highly likely that the case would not have survived Defendants' Motion for Summary Judgment." App. 864. The cross-examination of Mr. Meyer is evidence enough that plaintiffs' counsel misrepresented his credibility.

[5] On appeal, we found plaintiffs presented no evidence establishing the outer bounds of arm's-length bargaining and why defendants' fees were outside that range. *Obeslo v. Great-West Life & Annuity Ins. Co.*, 6 F.4th 1135 (10th Cir. 2021).

Indeed, the sanctions, while sizeable, are only a fraction of what the defendants spent to defend themselves.

The unintended but predictable consequence of the majority opinion is to provide a safe harbor for parties who unreasonably proceed to trial after persuading a court to deny a motion for summary judgment or a *Daubert* motion. The majority worries about the chilling effect of imposing sanctions under these circumstances. But the purpose of § 1927 is to chill exactly this kind of conduct—frivolous cases that rely entirely on one non-credible expert. The purpose of § 1927 is to prevent the vexatious multiplication of proceedings, and "[n]o multiplication of proceedings would be more vexatious than one which gave a frivolous claim the appearance of trial-worthy merit." *Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 481 (5th Cir. 2012).

Attorneys have an independent duty to continually reevaluate their claims to avoid prolonging a meritless case. The failure to do so is sanctionable. Here, plaintiffs' counsel failed to avoid prolonging a meritless case. For these reasons, I conclude that the district court did not abuse its discretion in awarding sanctions against plaintiffs' counsel.

I would affirm the district court and remand for apportionment consistent with what SWCK argued in its motion to amend the district court's order granting sanctions.