UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Alan Willis,

Plaintiff,

v. **Case No. 2:12–cv–604**

Big Lots, Inc., *et al.*, **Judge Michael H. Watson**

Defendants. **Magistrate Judge Jolson**

OPINION AND ORDER

Defendants move to exclude the opinions of Plaintiffs' proposed expert, Bjorn I. Steinholt ("Steinholt"), pursuant to Federal Rule of Evidence 702. Mot. Exclude, ECF No. 81. For the following reasons, the Court denies Defendants' motion.

I. FACTS AND PROCEDURAL HISTORY

The facts of this case were described in detail in the Court's Opinion and Order on Defendants' motion to dismiss, ECF No. 49. Accordingly, the Court states herein merely that this securities action involves allegations that, during a period of time in 2012, Defendant Big Lots, Inc. ("Big Lots") and several of its officers wrongfully inflated the value of Big Lots' stock by concealing from the public the true financial condition of the company. The action further alleges that, at the same time, and while Big Lots was buying back millions of shares of its

own stock, individual defendants and other company insiders sold large quantities of their own stock for a total of over $33 million.

This Court previously granted in part and denied in part Defendants' motion to dismiss. Op. & Order, ECF No. 49. Plaintiffs currently have pending a motion to certify the class and to appoint Class Representatives and Class Counsel. ECF No. 60. In support of that motion, Plaintiffs offer Steinholt's report, ECF No. 60-3, which Defendants seek to exclude, ECF No. 81.

II. STANDARD OF REVIEW

The admissibility[1] of expert witness testimony is governed by Federal Rule of Evidence 702, which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

[1] Plaintiffs do not contest that it is proper for the Court to consider Defendants' *Daubert* motion at the class certification stage where Plaintiffs rely heavily on Mr. Steinholt's report to prove the requirements of class certification. The Court, likewise, finds it proper to consider Defendants' motion prior to resolving Plaintiffs' motion for certification. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354 (2011) ("[The district court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that this is so . . . .") (citations omitted).

This rule reflects the well-established judicial precedent that expert testimony must be both relevant and reliable and that district courts must act as "gatekeepers" in determining the admissibility of such testimony. *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 429 (6th Cir. 2007) (discussing *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999)). "[T]he gatekeeping inquiry must be tied to the facts of a particular case, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Id.* at 430 (internal quotation marks and citation omitted). Although "not a definitive checklist or test," some factors that may bear on the analysis are:

> (1) whether a theory or technique . . . can be (and has been) tested; (2) whether the theory has been subjected to peer review and publication; (3) whether, with respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys general acceptance within a relevant scientific community.

Id. at 429–30 (internal quotation marks and citations omitted). Moreover, "expert testimony prepared solely for purposes of litigation, as opposed to testimony flowing naturally from an expert's line of scientific research or technical work, should be viewed with some caution." *Id.* at 434.

The proponent of expert testimony must establish its admissibility by a preponderance of proof. *Nelson v. Tenn. Gas Pipeline, Co.*, 243 F.3d 244, 251 (6th Cir. 2001) (citing *Daubert*, 509 U.S. at 592 n.10). Whether to admit expert

testimony is within the district court's discretion. *Johnson*, 484 F.3d at 429 (citation omitted).

III. ANALYSIS

Steinholt offers an economic opinion as to whether the market in which Big Lots' stock traded was efficient[2] during the Class Period and whether it is possible to calculate damages on a classwide basis in a manner consistent with Plaintiffs' theory of liability. Both of these opinions would help the Court determine facts in issue with respect to Plaintiffs' pending motion for class certification. Accordingly, the Court will consider Steinholt's opinion so long as he is qualified and the remaining factors set forth in Federal Rule of Evidence 702(b)–(d) are met.

A. Steinholt Qualifies as an Expert

Defendants argue the Court should exclude Steinholt's opinions because he is not a qualified expert on financial economics.

"To qualify as an expert under Rule 702, a witness must first establish his expertise by reference to 'knowledge, skill, experience, training, or education.'" *Pride v. BIC Corp.*, 218 F.3d 566, 577 (6th Cir. 2000) (quoting Fed. R. Evid. 702). This requirement, however, "has always been treated liberally." *Id.* (citation omitted). The issue "is not the qualifications of a witness in the abstract, but

[2] Whether the market in which Big Lots' stock traded was efficient bears on whether Plaintiffs can invoke the presumption of reliance established in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) based on the fraud-on-the-market theory, which, in turn, informs the Court's analysis of whether common issues of reliance will predominate over individual issues of reliance for class certification purposes.

whether those qualifications provide a foundation for a witness to answer a specific question.'" *Rose v. Truck Ctrs., Inc.*, 388 F. App'x 528, 533 (6th Cir. 2010) (internal quotation marks and citation omitted).

Defendants critique Steinholt's *curriculum vitae*, arguing that he is not affiliated with an academic or research institution, that he does not hold a degree in economics, and that he has not authored any academic publications, made any presentations to academic conferences, or performed any research in the field of financial economics. Rather, Defendants label Steinholt as a "professional litigation consultant." Mot. Exclude 3, ECF No. 81. Defendants contend that Steinholt's experience as a paid consultant and testifying expert cannot form the basis for the "knowledge, skill, experience, training, or education" required by Rule 702. Moreover, they caution that this Court should not accept Steinholt as a qualified expert simply because other courts have done so previously.

Defendants' argument is not well taken. Although the Court will not simply accept an expert's self-identification as such, the Court is mindful that the Sixth Circuit employs a liberal view of what qualifications satisfy the Rule 702 requirement. *Bradley v. Ameristep, Inc.*, 800 F.3d 205, 208–09 (6th Cir. 2015). Defendants, by pointing out Steinholt's educational background and lack of affiliation with an academic or research institution, focus on his academic credentials. Steinholt's *curriculum vitae* shows that, although he may not qualify

as an expert under the "education" portion of Rule 702, he qualifies as an expert due to his experience in the areas of market efficiency and damages.

"Whether a proposed expert's experience is sufficient to qualify the expert to offer an opinion on a particular subject depends on the nature and extent of that experience." *Id.* at 209. Steinholt is a Chartered Financial Analyst ("CFA"), has worked for several financial valuation and economic consulting firms since 1990, and has, in that work, conducted various financial and economic analyses. Steinholt Rpt. Ex. A at 1–2, ECF No. 60-3. Additionally, he has provided expert testimony specifically regarding market efficiency or damages in over twenty other cases, *id.* at 3–6, and no court has ever excluded his testimony. Steinholt Dep. 15:11–16:3, ECF No. 75-8. This experience is sufficient to qualify Steinholt as an expert under Rule 702. *See* Fed. R. Evid. 702, advisory committee's notes ("Nothing in this amendment is intended to suggest that experience alone . . . may not provide a sufficient foundation for expert testimony."). Defendants may probe any deficiencies in Steinholt's background or credentials on cross-examination. *See United States v. Cunningham*, 679 F.3d 355, 379 (6th Cir. 2012).

B. Steinholt's Opinions are Reliable

Defendants attack the reliability of Steinholt's opinion regarding market efficiency on two fronts. First, they contend that his opinion is a legal one, rather than an economic one, and was prepared solely for litigation. Second, they contend that his event study was unreliable.

1. Steinholt Offers an Economic Opinion

Defendants argue Steinholt's opinion on market efficiency is not reliable because the citations to case law in his report indicate that his opinion amounts to a legal, rather than an economic, opinion. They also contend that his opinion is not based on research that he performed independent of this litigation but rather was prepared solely for the purpose of this litigation.

"Expert testimony 'may not define legal terms, and mere recitation of legal principles . . . is not appropriate expert testimony.'" *Lim v. Miller Parking Co.*, 526 B.R. 202, 216 (E.D. Mich. 2015) (quoting *Killion v. KeHE Distribs., LLC*, 761 F.3d 574, 592–93 (6th Cir. 2014)); *Killion*, 761 F.3d at 593 (finding recitation of legal principles is not appropriate expert testimony (citing *Berry v. City of Detroit*, 25 F. 3d 1342, 1353 (6th Cir. 1994))). Moreover, "expert testimony prepared solely for purposes of litigation, as opposed to testimony flowing naturally from an expert's line of scientific research or technical work, should be viewed with some caution." *Johnson v. Manitowoc Boom Trucks, Inc.*, 484 F.3d 426, 434 (6th Cir. 2007).

Insofar as Defendants assert that Steinholt cannot properly opine on legal principles, their argument is well taken. Steinholt is not an expert on the law, and the Court will disregard any portion of his report that reflects his understanding or explanation of case law or that offers legal opinions.

However, Steinholt's reference to case law does not render his entire report inadmissible, and Defendants are incorrect in characterizing his ultimate opinion as a legal opinion. At bottom, Defendants' argument is that Steinholt's

opinion regarding market efficiency is not based on the current state of scientific understanding in the field of economics because he performed his economic analyses pursuant to five factors established in the district court case *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989). The *Cammer* court identified five factors that have since been widely used in securities litigation to determine whether a market in which a particular stock traded was efficient for purposes of invoking *Basic's* presumption of reliance. Defendants, through their expert Dr. Paul Gompers ("Dr. Gompers"), contest the usefulness of the *Cammer* factors for determining market efficiency, asserting that accepted academic literature does not find the first four *Cammer* factors relevant to a determination of market efficiency. *See* Gompers Dep. 187:6–189:10, ECF No. 78-2 (testifying that, from a financial economist's perspective, only the fifth *Cammer* factor, the direct test, can provide evidence of market efficiency). Because financial economists disagree that the *Cammer* factors show market efficiency, Defendants' argument goes, Steinholt's analysis of those factors is not a reliable methodology for determining market efficiency. Moreover, they contend, because he refers to *Cammer* for his analysis of market efficiency, his ultimate opinion on market efficiency is a legal opinion.

It may be that many financial economists, including Dr. Gompers, dispute the relevancy of the first four *Cammer* factors to a determination of market efficiency, but the *Cammer* factors nonetheless reflect the *legal* standard for market efficiency and have been considered by the Sixth Circuit in such

determinations. *See Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990) (considering the five *Cammer* factors in its efficiency analysis); *Wilkof v. Caraco Pharm. Labs., Ltd.*, 280 F.R.D. 332, 343 (E.D. Mich. 2012) ("The Sixth Circuit has recognized the usefulness of these factors in determining market efficiency." (citing *Freeman*, 915 F.2d at 199)). In fact, this argument has been offered and rejected by Dr. Gompers before. In rejecting the same arguments pursued by Defendants and Dr. Gompers, the district court for the Northern District of Illinois aptly stated, "Defendants rely on factors that are not legally relevant. This does not mean that Defendants (or their expert, Paul Gompers) are incorrect in what they say—it means that Defendants (and their expert) often describe a different conception of an efficient market than is used by the law." *In re Groupon, Inc. Sec. Litig.*, No. 12 C 2450, 2015 WL 1043321, at *11 (N.D. Ill. Mar. 5, 2015) (internal quotation marks and citations omitted).

Accordingly, the Court will not exclude Steinholt's analyses regarding market efficiency[3] merely because he performed economic analyses with respect to the pertinent legal factors, even though Dr. Gompers states that financial economists disagree with the use of those factors. Steinholt's consideration of the *Cammer* factors in opining on market efficiency does not render his methodology unreliable and does not turn his economic opinion into a legal one.

[3] As noted above, the Court will not consider Steinholt's "legal" explanation of *Cammer* or any legal opinion.

Nor is the Court persuaded by Defendants' argument that Steinholt's opinion is unreliable as it was prepared solely for purposes of litigation. Steinholt utilized an event study in considering the fifth *Cammer* factor, and there is no evidence that he conceived, executed, or invented that methodology solely for use in this litigation.

C. Steinholt's Event Study is Reliable

Defendants next attack the reliability of Steinholt's event study.[4] They do not argue that an event study is an unreliable method of testing for market efficiency. Rather, they contend that Steinholt unreliably executed the event study in this case for two reasons. First, Defendants contend that Steinholt's selection of the dates for inclusion in the event study likely introduced bias into the results. Second, Defendants assert that Steinholt's event study is likely unreliable because he failed to perform testable *ex-ante* hypotheses for the events that he tested.

Steinholt's event study was based on six event days, two of which are the corrective disclosure dates. The other four days included in the event study correspond to Defendants' financial releases.

[4] An event study is "a generally accepted technique for measuring how a security's price reacts to new, unexpected information about the issuing company." *Plumbers & Pipefitters Nat. Pension Fund v. Burns*, 967 F. Supp. 2d 1143, 1151 (N.D. Ohio 2013). Plaintiffs often use event studies in order to prove the fifth *Cammer* factor—whether there is empirical evidence of "a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price," *Cammer*, 711 F. Supp. at 1287.

Defendants contend that Steinholt's inclusion of the corrective disclosure dates likely introduced bias into the event study because Steinholt already knew that large price declines followed the corrective disclosures, and, therefore, his selection of those dates as event dates virtually rigged the event study in favor of a finding of market efficiency.

Defendants' argument is not well taken. Steinholt chose an objective criterion for event dates—Big Lots' 2012 financial releases. He considered every financial release date during 2012, not just the corrective disclosure dates. Steinholt Rpt. ¶ 37, ECF No. 60-3. That the objective criterion incorporated corrective disclosure dates does not undermine the reliability of the methodology employed in the event study. *Wilkof*, 280 F.R.D. at 346 ("The Court agrees that the logical approach is [to] examine whether a correlation exists on the days following [Defendant's] release of significant new information."); *W. Palm Beach Police Pension Fund. v. DFC Global Corp.*, No. 13-6731, 2016 WL 4138613, at *13 (E.D. Penn. Aug. 4, 2016) (accepting an event study that included corrective disclosure dates).

Defendants next argue that Steinholt failed to perform testable *ex-ante* hypotheses[5] for the four event days that were not corrective disclosure days. That is, Mr. Steinholt failed to determine ahead of time whether the information

[5] This refers to an expert developing a hypothesis about whether a stock price should have reacted to a company-specific event, and, if so, hypothesizing about the expected direction of the price change *before* analyzing whether the price did, in fact, change and in what direction. Gompers Rpt. ¶ 72, ECF No. 75-9.

released in those financial releases was considered positive or negative and failed to then determine ahead of time whether he expected the excess returns on those days to be positive or negative. In other words, he did not test whether the stock price movement associated with those days was in an expected direction. Scientific literature, Defendants argue, states that a proper event study test for market efficiency requires an *ex-ante* hypothesis.

Dr. Gompers' report cites academic sources in support of his contention that a proper event study for purposes of determining market efficiency requires an *ex-ante* hypothesis. Gompers Rpt. ¶¶ 70–81, ECF No. 75-9. Further, at least one court has concluded that an event study was not reliable in part because the expert failed to perform an *ex-ante* hypothesis. *See Bell v. Ascendant Solutions, Inc.*, 2004 WL 1490009, at *4 (N.T. TX, July 1, 2004) ("[T]he use of true values, rather than absolute values, is generally accepted in the field of financial economics, and absolute values have never been used to test for market efficiency.").

Nonetheless, Defendants' argument is not well taken for several reasons. First, although Dr. Gompers cites an academic article that apparently states that it is necessary to develop an *ex-ante* hypothesis in an event study testing market efficiency, Gompers Rpt. ¶ 72–74, ECF No. 75-9 (citing A. Craig MacKinlay, "Event Studies in Economics and Finance," *Journal of Economic Literature*, Vol 35 (Mar. 1997), p. 16), he fails to specify whether the event study described by Mr. MacKinlay is testing market efficiency as defined by financial economists or

as defined by courts for purposes of securities litigation, or whether it makes no difference.

Moreover, several courts have rejected the notion that a failure to include a directional hypothesis is fatal to an event study on market efficiency for purposes of securities litigation. *DFC Global Corp.*, 2016 WL 4138613, at *13; *Forsta AP-Fonden v. St. Judge Med., Inc.*, 312 F.R.D. 511, 521 n.5 (D. Minn. 2015) (finding a directionality analysis, while it could make an event study more robust, is not necessary); *Petrie v. Elec. Game Card, Inc.*, 308 F.R.D. 336, 354 (C.D. Cal. 2015) ("[L]ack of evidence about the direction of the price impact is not necessarily fatal to an event study, [but] it can be relevant to how much weight the study is given.").

Further, Dr. Gompers does not argue that the failure to perform an *ex-ante* hypothesis affected the outcome in this event study. That is, he does not argue that the price movement was inconsistent with an efficient market on any of the four days that Steinholt failed to perform an *ex-ante* hypothesis. While the Court understands that Defendants' argument challenges the methodology of Steinholt's event study rather than the outcome, it is significant that Defendants do not contend that Steinholt's failure to perform an *ex-ante* hypothesis affected the outcome of the event study in any way. *See DFC Global Corp.*, 2016 WL 4138613, at *13 ("[W]ithout an attack on the underlying numbers, the Court ultimately concludes that the fifth *Cammer* factor points toward market efficiency.").

D. Steinholt's Damages Opinion is Relevant

As noted above, expert evidence must be both reliable and relevant to be admissible. *Johnson*, 484 F.3d at 429 (citing *Kumho*, 526 U.S. at 147). With respect to Steinholt's damages opinion, Defendants attack the latter requirement, arguing that the damages opinion is not grounded in the actual facts of this case and therefore fails *Daubert's* "relevance" or "fit" requirement. Mot. Exclude 17–19, ECF No. 81.

The relevance requirement ensures that an expert's testimony assist the trier of fact.[6] *See United States v. LeBlanc*, 45 F. App'x 393, 400 (6th Cir. 2002). Such testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute[.]" *Id.* (internal quotation marks and citation omitted). In other words, "there must be a connection between the scientific research or test result being offered and the disputed factual issues in the case in which the expert will testify." *Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000) (citing *Daubert*, 509 U.S. at 592).

Defendants argue that Steinholt's damages opinion rests on generalities about what methodologies work to calculate damages in other securities cases and lacks an explanation about how he would calculate damages based on the facts of this specific case. They contend that Steinholt fails to account for how he would disaggregate losses attributable to statements this Court has deemed non-

[6] Or, in this case, the Court in a class certification analysis.

actionable or how he would allocate inflation across different misstatement dates. Mot. Exclude 17–18, ECF No. 81.

Defendants' relevance argument is not well taken. Steinholt's opinion is that he could calculate damages on a class-wide basis consistent with Plaintiffs' theory of liability in this case. That opinion will assist the Court in ruling on Plaintiffs' motion to certify a class, as certification requires Plaintiffs to establish that damages are calculable in a manner consistent with Plaintiffs' theory of liability. Accordingly, his opinion is relevant.

Though framed as a relevancy argument, Defendants' attack is more grounded in the scientific reliability of Steinholt's damages opinion. However, Steinholt's opinion that he will be able to calculate damages on a class-wide basis consistent with Plaintiffs' theory of liability is not unreliable as grounded in mere generalities about what damages calculations have worked in other securities cases. True, Steinholt explains how such a framework works generally: he states that an event study can be used to quantify the amount investors overpaid for stock (inflation) throughout the Class Period. *Id.* ¶ 56. He explains that individual damages would be calculated based on that daily inflation and the class member's actual purchases and sales. *Id.* And he further states that he would modify those economic damages to incorporate the PSLRA's 90-day bounce-back provision in order to determine the recoverable damages. *Id.* ¶ 57. And it is also true that Steinholt states that the proposed event study

damages framework is used in "numerous securities cases going to trial." *Id.* ¶ 58.

However, it is clear from the statements above and Steinholt's deposition testimony that his opinion took into consideration whether an event study could be applied to the facts of this case. In his deposition, Steinholt explained in detail how the model would be applied to the facts of this case assuming that April 23, 2012, and August 23, 2012, were the only corrective disclosure dates, but he stated that the model could be tweaked to account for information that becomes available throughout litigation of the case, including confounding factors. Steinholt Tr. 69:25–78:11, ECF No. 75-8. He also testified that he could determine the starting point for inflation and that that date would affect the outcome of the analysis. *Id.* 86:13–87:10. While Defendants contend that Steinholt does not explain how he would disaggregate losses attributable to statements the Court has found are non-actionable, Steinholt explained that his "proposed methodology only includes damages from the remaining actionable statements, so there is no reason to reduce any damages for non-actionable statements." Steinholt Rebuttal Rpt. ¶ 21, ECF No. 78-3; *see also* Steinholt Tr. 88:10–15, ECF No. 75-8. *Accord Hatamian v. Advanced Mirco Devices, Inc.*, Case No. 14–cv–226, 2016 WL 1042502, at *9 (N.D. Cal. Mar. 16, 2016) (rejecting the same arguments Defendants make here). The Court discerns nothing about Steinholt's proposed methodology for calculating damages that would be inconsistent with Plaintiffs' theory of liability in this case.

Fairly construed, Defendants' argument is not really that Steinholt's damages opinion is irrelevant or that it is not tied to Plaintiffs' theory of liability but rather that his opinion "fails to account for the facts of this case" in the sense that he has not already performed the damage calculation specific to this case. But that is not required at this stage of the litigation. As discussed above, Steinholt has set forth a methodology for later calculating damages on a class-wide basis. He stated that such a methodology has been applied in other securities cases and explained how it is both workable and consistent with Plaintiffs' theory of liability in this particular case. His damages opinion is therefore both relevant and reliable, and, accordingly, the Court will consider it in conjunction with Plaintiffs' motion for class certification.

IV. CONCLUSION

Plaintiffs have shown by a preponderance of the evidence that Steinholt is qualified and that his opinions are both relevant and reliable. Accordingly, Defendants' motion to exclude, ECF No. 81, is **DENIED**. The Court will not, however, consider any of Steinholt's opinions that amount to legal opinions.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT