UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

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Mr. John Joseph Kulewicz
Vorys, Sater, Seymour & Pease
P.O. Box 1008
Columbus, OH 43215

Mr. Brian K. Murphy
Murray, Murphy, Moul and Basil
1114 Dublin Road
Suite 150
Columbus, OH 43215

Re: Case No. 17-303, *Big Lots, Inc., et al*
Originating Case No. : 2:12-cv-00604

Dear Counsel:

The Petition for Permission to Appeal, filed pursuant to Fed. R. App. P. 5, has been docketed as case number **17-303**.

The Clerk's office will send you additional information as soon as the Court has finished its customary screening and issued a ruling on the petition. In the meantime, only the usual appearance forms must be filed within 7 days. An interested party may file a response within 10 days of service of the petition, unless other instructions are made. Fed. R. App. P. 5(b)(2).

Sincerely yours,

s/Jeanine R. Hance
Case Manager
Direct Dial No. 513-564-7037

Enclosure

OFFICIAL COURT OF APPEALS CAPTION FOR 17-303

In re: BIG LOTS, INC.; STEVEN S. FISHMAN; JOE R. COOPER; CHARLES HAUBIEL, II; TIMOTHY A. JOHNSON

Petitioners

CASE NO. _____

In the United States Court of Appeals for the Sixth Circuit

IN RE BIG LOTS, INC., STEVEN S. FISHMAN, JOE R. COOPER, CHARLES W. HAUBIEL II AND TIMOTHY A. JOHNSON,

Petitioners

ON PETITION PURSUANT TO FED. R. CIV. P. 23(f) FOR PERMISSION TO APPEAL THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, ENTERED ON MARCH 17, 2017 (DKT. NO. 88), GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION IN *ALAN WILLIS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED V. BIG LOTS, INC., ET AL.*, NO. 2:12-CV-00604

PETITION FOR PERMISSION TO APPEAL PURSUANT TO FED. R. CIV. P. 23(f)

John J. Kulewicz
William D. Kloss, Jr.
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
(614) 464-5634
(614) 464-6360
jjkulewicz@vorys.com
wdklossjr@vorys.com

Michael A. Paskin
Timothy G. Cameron
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
mpaskin@cravath.com
tcameron@cravath.com

Attorneys for Petitioners

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, Big Lots, Inc., Steven S. Fishman, Joe R. Cooper, Charles W. Haubiel II and Timothy A. Johnson ("Petitioners") make the following disclosure:

Big Lots, Inc. is a publicly traded company with no parent corporation. No publicly held company owns ten percent or more of Big Lots, Inc.'s outstanding shares. There is no publicly owned corporation not a party to the appeal that has a financial interest in the outcome.

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INTRODUCTION

This securities class action raises issues of first impression in the Sixth Circuit under the Supreme Court's landmark decisions in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("*Halliburton II*") and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). The district court's ruling certifying a class effectively nullifies those decisions, making class certification virtually automatic in any Rule 10b-5 class action involving a stock price decline. This Court should grant defendants' application for an immediate appeal on four issues.

First, the district court erred in holding that defendants bore the burdens of *both* production and persuasion in rebutting the fraud-on-the-market presumption of reliance under *Halliburton II*. That apportionment of responsibility is inconsistent with *Halliburton II* and with Federal Rule of Evidence 301, both of which place on defendants only the burden of *production* to set forth "[a]ny showing that severs the link between the alleged misrepresentation" and the price paid. Defendants satisfied that burden by producing unrebutted evidence—the report of plaintiffs' own expert—that *none* of the alleged misstatements was associated with a statistically significant stock price increase. But rather than shift the burden back to plaintiffs to demonstrate the existence of a price impact at the time of the alleged misstatements, the district court wrongly held that the burden remained with defendants to disprove a speculative "theory" of "price

maintenance" for which plaintiffs offered no evidence.

Second, instead of focusing on the "front end" price impact of the alleged misstatements, the district court misinterpreted *Halliburton II* in holding defendants to the additional burden of proving "that there was no statistically significant price impact following the corrective disclosures." Beyond misapplying *Halliburton II*, the district court's approach would make the presumption of reliance essentially unrebuttable in any case involving a stock price decline.

Third, the district court erred in certifying a class even though plaintiffs did not proffer a damages methodology that, as required by *Comcast*, "measures only those damages" resulting from their actionable theory of fraud.

Fourth, the district court erred in holding that plaintiffs' claims were "typical" of a class of investors relying on the fraud-on-the-market presumption, which presumes that the market price of a stock is a reliable measure of its value. Plaintiffs' investment decisions were premised on the belief that the market price for Big Lots stock was *not* an accurate or reliable measure of its value, thus rebutting the presumption of reliance and exposing the representative plaintiffs to unique defenses that render their claims atypical.[1]

[1] Defendants reserve their right to raise additional arguments in a substantive

In recognition of the importance that these issues hold for securities class action litigation, several other circuit courts have granted Rule 23(f) petitions in cases raising virtually identical issues.[2] Likewise, this Court recently entertained a Rule 23(f) petition on similar issues and summarily reversed the district court's class certification decision without ordering merits briefing. *In re BancorpSouth, Inc.*, No. 16-0505, 2016 WL 5714755 (6th Cir. Sept. 6, 2016).

STATEMENT OF THE ISSUES

1. Whether the fraud-on-the-market presumption of reliance recognized in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), is governed by Federal Rule of Evidence 301.

2. Whether defendants can rebut the *Basic* presumption through evidence that the alleged misstatements did not have a statistically significant impact on the price of the stock at the time of purchase, as contemplated by *Halliburton II*, or if, when plaintiffs assert a speculative "price maintenance"

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appeal, if granted, including, for example, the district court's finding that plaintiffs proved market efficiency despite the methodological flaws of their expert's event study.

[2] *See* Order Granting Leave to Appeal, *Strougo v. Barclays PLC*, No. 16-450 (2d Cir. June 15, 2016); Order Granting Leave to Appeal, *In re Goldman Sachs Group, Inc.*, No. 15-3179 (2d Cir. Jan. 26, 2016); Order Granting Leave to Appeal, *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 15-90038 (5th Cir. Nov. 4, 2015); Order Granting Leave to Appeal, *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, No. 14-8020 (8th Cir. Sept. 24, 2014).

theory, defendants must also prove the absence of a price decline following the alleged corrective disclosures.

3. Whether this Court should review the district court's erroneous certification of a class where the classwide damages methodology proffered by plaintiffs does not "measure only those damages" resulting from their theory of fraud, as required by *Comcast*.

4. Whether this Court should review the district court's erroneous conclusion that the claims of representative plaintiffs, who based their investment decisions on the premise that the market price of defendant's stock was *not* an accurate or reliable measure of the stock's intrinsic value at the time of their purchases, are nevertheless "typical" of alleged classwide claims based on fraud-on-the-market reliance, which presumes that the market price of a stock is an accurate and reliable measure of value.

STATEMENT OF THE CASE

A. Plaintiffs' Allegations

Plaintiffs allege in the operative complaint that statements made in Big Lots press releases on February 2, 2012 and March 2, 2012 about financial results from FY 2011 and projections for FY 2012 sales were false and misleading and "artificially inflated the price of Big Lots stock." (Am. Compl., RE 18, Page ID# 232-33, 237-40.) The district court dismissed all claims concerning the

statements from these two releases. (MTD Op., RE 49, Page ID# 1509-12.) Later on March 2, 2012, Big Lots held an investor conference call. Plaintiffs allege that Big Lots made 30 false statements during that call that inflated Big Lots' stock price. (Am. Compl., RE 18, Page ID# 234-36, 237-39.) The district court ruled that 18 of those statements were not actionable because plaintiffs had failed to allege that they were false, because they were protected by the PSLRA safe harbor, or because they were immaterial, nonspecific puffery, while allowing plaintiffs' case to proceed with respect to the remaining alleged false statements. (*See generally* MTD Op., RE 49, Page ID# 1512-21.)

Plaintiffs allege that, on nine additional dates from March 7 to June 6, 2012, Big Lots made material false statements about sales trends and performance that artificially increased its stock price. Again, in the motion to dismiss opinion, the district court ruled that many of those statements are not actionable, while allowing the case to proceed on a limited subset. (*See generally id.*, Page ID# 1521-42.)

Plaintiffs allege Big Lots made "corrective disclosures" on April 23, 2012, and August 23, 2012. (Am. Compl., RE 18, Page ID# 249, 258.) On April 23, the Big Lots issued a press release revising downward its sales projections for the first quarter of FY 2012 based on sales trends that had weakened through the month of April. (*Id.*, Page ID# 249.) Notably, April 23 is

also a date on which plaintiffs alleged fraud for Big Lots' purported failure to provide complete corrective information. (*Id.*, Page ID# 251.) On August 23, Big Lots disclosed that sales had fallen short of expectations for the second quarter of FY 2012, that the company was revising downward its 2012 full year financial guidance, and that it had made various organizational changes. (*Id.*, Page ID# 258, 279-80.)

B. The Evidence of a Lack of Price Impact

In support of their class certification motion, plaintiffs' expert, Bjorn Steinholt, performed a regression analysis that measured the company-specific residual return for Big Lots stock on each day in the proposed class period. Mr. Steinholt's own calculations for each of the remaining dates on which plaintiffs allege that Big Lots made false statements show that *none* of the alleged misrepresentations was associated with a statistically significant increase in the price of Big Lots' stock. (*See* Gompers Rpt., RE 75-9, Page ID# 3557-58; Steinholt Rpt., RE 60-3, Page ID# 1994-98.)

C. Plaintiffs' Investment Decisions

The two class representatives relied upon sophisticated professional investment advisors in deciding to purchase Big Lots stock. Plaintiffs' advisors all employed investment methodologies that were premised on exploiting inefficiencies in the way the market translated publicly-available information into

stock price—both as a general matter and in connection with the specific Big Lots purchases at issue here. Three of the advisors used proprietary methods to identify stocks that they believed were underpriced by the market relative to their independent assessment of intrinsic value. The remaining advisor made no attempt to value companies but, through an analysis of technical factors, sought to take advantage of inefficiencies in the market's translation of publicly available information into stock prices. Accordingly, the advisors *all* bought Big Lots stock for the class representatives based on their assessments that the public market had *not* efficiently translated the available information into price.

D. The Class Certification Opinion

On March 17, 2017, the district court granted plaintiffs' motion for class certification.

First, the district court held defendants did not meet their burden of "proving that there was no price impact" under *Halliburton II*. (Ex. A (Class Certification Op.) 37-38.) While the court agreed with defendants that "Steinholt's regression analysis does not show a statistically significant price increase associated with any of the nine alleged misrepresentation dates," (*id.* 35), it held that defendants also had the burden of disproving the "theory" of "price maintenance" by showing "that there was no statistically significant price impact following the corrective disclosures in this case," (i*d.* 36, 40).

Second, the district court held plaintiffs satisfied their burden under *Comcast* because their expert "proposes to use an event study to calculate damages" and the expert's opinion was admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In its separate *Daubert* opinion, issued the same day, the district court held that Mr. Steinholt's "opinion took into consideration whether an event study could be applied to the facts of this case." (Ex. B (*Daubert* Op.) 16.)

Third, the district court held plaintiffs satisfied the typicality requirement because "value investors may invoke the *Basic* presumption at the class certification stage" and because plaintiffs' investment advisors did not indicate that they "would have purchased Big Lots' stock even if they had known of the fraud." (Ex. A 14, 16 (emphasis omitted).)

ARGUMENT

Rule 23(f) gives this Court broad discretion to permit an appeal from an order granting class certification. *See In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002). This Court has recognized that appeal should be allowed in cases, like this one, involving "a novel or unsettled question" that "is of relevance not only in the litigation before the court, but also to class litigation in general." *Id.* at 960. Moreover, courts have recognized that "very few securities class actions are litigated to conclusion, so review of [a] novel and important legal issue . . . may be

possible only through the Rule 23(f) device." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004).

I. THIS COURT SHOULD CORRECT THE DISTRICT COURT'S FUNDAMENTAL MISUNDERSTANDING OF *HALLIBURTON II* AND THE FRAUD-ON-THE-MARKET PRESUMPTION.

The "fundamental premise" of the fraud-on-the-market doctrine is "that an investor presumptively relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 813 (2011) ("*Halliburton I*"). The *Basic* presumption holds that "if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price." *Halliburton II*, 134 S. Ct. at 2414. It follows that, if the misrepresentation "affected the stock price" and the plaintiff thereafter "purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's misrepresentation." *Id.*

In *Halliburton II*, the Supreme Court held that a defendant must be afforded the opportunity to rebut the *Basic* presumption at the class certification stage by showing there was no price impact "*at the time of [the] transaction*." *Id.* at 2416 (emphasis added); *see also id.* at 2414 (defining "price impact" simply as "whether the alleged misrepresentations affected the market price *in the first*

place") (emphasis added). The Court explained that "[p]rice impact is . . . an essential precondition for any Rule 10b-5 class action" and that "[w]hile *Basic* allows plaintiffs to establish that precondition indirectly, it does not require courts to ignore a defendant's direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply." *Id.* at 2416.

Halliburton II also explained *how* a defendant can rebut the presumption by showing lack of price impact. The Court observed that "plaintiffs themselves can and do introduce evidence of the *existence* of price impact in connection with 'event studies'—regression analyses that seek to show that the market price of the defendant's stock tends to respond to pertinent publicly reported events." *Id.* at 2415. The Court noted that such event studies, like Mr. Steinholt's in this case, may include as events the dates of "the alleged misrepresentations that form the basis of the [plaintiff's] suit." *Id.* The Court explained that, when such an event study "shows no price impact with respect to the specific misrepresentation challenged in the suit[,] [t]he evidence . . . thus shows an efficient market, on which the alleged misrepresentation had no price impact." *Id.* Certifying a class in the face of such evidence would be "inconsistent with *Basic*'s own logic." *Id.*

That evidentiary showing is exactly what defendants put forth here. Defendants presented unrebutted evidence—the event study of plaintiffs' own expert—that *none* of the alleged misstatements was associated with a statistically significant increase in the price of Big Lots stock. (*See* Steinholt Rpt., RE 60-3, Page ID# 1994-98.) The district court accepted that evidence of lack of price impact. (*See* Ex. A 35 ("Steinholt's regression analysis does not show a statistically significant price increase associated with any of the nine alleged misrepresentations dates.").)

Despite that showing, the district court held defendants had not rebutted the presumption. The court invoked a "price maintenance theory" under which "a misrepresentation can have a price impact not only by raising the stock's price but also by maintaining a stock's already artificially inflated price." (Ex. A 36.) The court reasoned that "price impact is demonstrated either through evidence that a stock's price rose in a statistically significant manner after a misrepresentation *or* that it declined in a statistically significant manner after a corrective disclosure." (*Id.* (emphasis added).) Accordingly, the district court held defendants had the burden of "proving that there was no price impact" by "showing that there was no statistically significant price increase after a misrepresentation was made" *and* "that there was no statistically significant price impact following the corrective disclosures in this case." (*Id.* 37, 40.)

The district court made two fundamental legal errors.

First, the court applied the wrong evidentiary standard and disregarded Federal Rule of Evidence 301. *See Basic*, 485 U.S. at 245. Under Rule 301, "the party against whom a presumption is directed has *the burden of producing evidence* to rebut the presumption. But this rule does not shift *the burden of persuasion*, which remains on the party who had it originally." Fed. R. Evid. 301 (emphasis added). A presumption is "rebutted 'upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact.'" *In re Yoder Co.*, 758 F.2d 1114, 1118 (6th Cir. 1985); *see also ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 149 (2d Cir. 2007) (finding that a party satisfies the "burden of presenting evidence" under Rule 301 "as long as the evidence could support a reasonable jury finding the 'nonexistence of the presumed fact'"); *accord Lupyan v. Corinthian Colls. Inc.*, 761 F.3d 314, 320 (3d Cir. 2014) (the "quantum of evidence" required under Rule 301 to rebut a presumption "in a civil case is 'minimal'"). *Basic* itself cites Rule 301, 485 U.S. at 245, and the Supreme Court further explained in *Halliburton II* that "*[a]ny showing* that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff . . . will be sufficient to rebut the presumption of reliance." 134 S. Ct. at 2415 (emphasis added). Here, defendants amply met their burden by presenting precisely the evidence contemplated in *Halliburton II*. The district court

disregarded Rule 301 and *Halliburton II* in holding that "the burden should rest on a defendant to *prove* lack of price impact" and explicitly refused to "flip[] the burden onto plaintiffs to prove price impact" once defendants produced evidence rebutting the presumption. (*See* Ex. A 38.) In doing so, the district court expressly declined to follow the Eighth Circuit's opinion in *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 782 (8th Cir. 2016). *See also Comcast*, 133 S. Ct. at 1432 (Rule 23 "does not set forth a mere pleading standard" and "a party seeking to maintain a class action 'must affirmatively demonstrate his compliance'" with the Rule).

This legal error was compounded by the court's erroneous acceptance of a "theory" in the face of contrary *evidence*. Even if defendants had the ultimate burden of proof (which they did not), they carried that burden by a preponderance of the evidence, because the *only* price impact evidence before the district court was Mr. Steinholt's event study, which shows that there was no statistically significant residual price increase on the alleged misstatement dates. Plaintiffs and the district court speculate that the alleged misstatements could have maintained prior price inflation,[3] but as the Eighth Circuit held in *Best Buy*, plaintiffs'

[3] The district court's invocation of *Burges v. BancorpSouth, Inc.* to support the price maintenance theory is misplaced. No. 3-14-1564, 2016 WL 1701956 (M.D. Tenn. Apr. 28, 2016); Ex. A 39. Last September, this Court summarily vacated

speculative price maintenance theory "provided no *evidence* that refuted defendants' overwhelming evidence of no price impact." 818 F.3d at 783 (emphasis added).[4]

Second, the district court fundamentally misinterpreted the Supreme Court's statement in *Halliburton II* that the *Basic* presumption "'could be rebutted by appropriate evidence,' including evidence that *the asserted misrepresentation (or its correction)* did not affect the market price of the defendant's stock." 134 S. Ct. at 2414 (emphasis added). Evidence of no price impact either on the misstatements dates *or* the disclosure dates will suffice to rebut the presumption. The parenthetical "or its correction" is a recognition that, if there is no statistically significant stock price decline on the alleged "correction" date, it follows that no inflation came out of the stock on that date, and therefore the stock price was not

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Burges on a Rule 23(f) petition raising issues substantially similar to those here, explaining that the district court failed to "rigorously analyze Plaintiffs' claims before certifying the action as a class action." *In re BancorpSouth, Inc.*, No. 16-0505, 2016 WL 5714755, at *1 (6th Cir. Sept. 6, 2016).

[4] This case is even more straightforward because plaintiffs allege that misstatements at the beginning of the class period caused Big Lots' stock price to *increase*, not that they maintained some pre-existing inflation. (*See, e.g.*, Am. Compl., RE 18, Page ID# 239 (alleging "March 2, 2012 statements had a direct effect on Big Lots' stock price, *driving it up 3%*" and "after defendants' false March 7, 2012 statements, Big Lots' stock price again *increased* 3%.") (emphasis added); Page ID# 245 ("Defendants' false March 26 and March 27, 2012 statements had a direct effect on Big Lots' stock price *driving it up* to its Class Period high of $46.81.") (emphasis added).)

inflated at the time the plaintiffs purchased, which is the time that matters. The converse, however, is not also true. The fact that a stock price declined at a particular point in time proves nothing about whether the price was impacted by an earlier misstatement.

Requiring proof that an alleged corrective disclosure did not cause a price decline renders the *Basic* presumption virtually unrebuttable in any Rule 10b-5 case involving a stock price drop so long as plaintiffs make an unsupported assertion of "price maintenance." As the district court acknowledged, defendants are barred under *Halliburton I* from arguing at the class certification stage that a stock price decline was not corrective of the prior alleged misstatement or that the price decline could "otherwise be explained by some additional factors revealed then to the market," because those issues go to "loss causation." (Ex. A 36 (citing *Halliburton I*, 563 U.S. at 812).) Thus, the district court's reasoning deprives the defendants of any meaningful "opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock." *Halliburton II*, 134 S. Ct. at 2417.

II. PLAINTIFFS FAILED TO ARTICULATE A CLASSWIDE DAMAGES METHODOLOGY CONSISTENT WITH THEIR THEORY OF LIABILITY, AS REQUIRED UNDER *COMCAST*.

In *Comcast*, the Supreme Court held that, to satisfy the Rule 23(b) predominance requirement, a plaintiff must articulate a methodology for

calculating classwide damages in a manner that is consistent with the plaintiff's theory of liability. 133 S. Ct. at 1433. District courts must conduct a "rigorous analysis" to determine whether the plaintiff's methodology "measure[s] only those damages attributable to that theory." *Id.*

Far from conducting a "rigorous analysis," the district court simply accepted the assurances of plaintiffs' expert, Mr. Steinholt, that he can calculate damages consistently with plaintiffs' theory of liability. The court devoted only a single paragraph of its class certification opinion to the conclusion that "Plaintiffs have satisfied *Comcast*," noting that Mr. Steinholt proposes to use "an event study" and holding that, for the reasons stated in the court's separate *Daubert* opinion, "the proffered methodology is consistent with Plaintiffs' theory of liability and survives a *Daubert* attack."[5] (*See* Ex. A 26.)

In the *Daubert* opinion, however, the district court unquestioningly accepted that (a) "Steinholt's opinion is that he could calculate damages on a class-wide basis consistent with Plaintiffs' theory of liability in this case" (Ex. B 15); (b) Mr. Steinholt made "statements" indicating that "his opinion took into

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[5] An expert opinion at the class certification stage faces a substantially lower bar for admissibility under *Daubert* than the "rigorous analysis" required of an expert's proposed damages model under *Comcast*. *Compare Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (trial judge has "considerable leeway" in determining reliability under *Daubert*) *with Comcast*, 133 S. Ct. at 1433 (requiring a "rigorous analysis" of plaintiffs' damages model).

consideration whether an event study could be applied to the facts of this case" (*id.* at 16); and (c) Mr. Steinholt "stated that the model could be tweaked to account for information that becomes available throughout litigation of the case, including confounding factors" (*id.*). Mr. Steinholt did not explain how he "could" do that, and the district court did not endeavor to analyze whether it "could" be done.[6]

In accepting Mr. Steinholt's assertions about what analysis he "could" perform in the future, without any analysis—let alone the "rigorous" analysis that *Comcast* requires[7]—the district court failed to address the fundamental shortcoming in Mr. Steinholt's proposed approach: Mr. Steinholt proposes to use a "constant inflation" model, which assumes that 100% of the residual decline in Big Lots' stock price on the alleged corrective disclosure dates represents the constant, uniform amount (or percentage)[8] by which the price was inflated during

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[6] Neither Mr. Steinholt nor the district court contends that the event study that Mr. Steinholt did prepare for class certification (*see supra* pp. 10-11) was designed to calculate classwide damages based on plaintiffs' theory of liability—it was not. *See also* Steinholt Deposition Tr., RE 75-8, Page ID# 3457-58.

[7] The district court did not hold an evidentiary hearing or oral argument. The district court also denied defendants' application for leave to file a sur-reply and rebuttal expert report, (Ex. A. 7), to address plaintiffs' position on the key issues asserted for the first time in their reply, together with a new expert report. The district court thus accepted plaintiffs' positions on the central issues after declining to hear from defendants and their expert as to why those positions are wrong.

[8] Mr. Steinholt argues his proposed methodology is not necessarily a "constant

the class period. (*See* Steinholt Deposition Tr., RE 75-8, Page ID# 3391-92, 3473-74.) That is not consistent with plaintiffs' theory of liability. Plaintiffs' theory, as alleged in the operative complaint, is that the stock price was inflated by multiple alleged misstatements on each of eleven different days. Dozens of those statements already have been held to be not actionable, because plaintiffs failed to allege that they were false or they are protected by the PSLRA safe harbor (*see* MTD Op., RE 49, Page ID# 1509-42), and liability may not ultimately be proven as to some or all of the remaining statements. Mr. Steinholt's model assumes that it makes no difference which of the alleged misrepresentations remain in the case—under his model, the entire residual stock price decline represents compensable damages no matter what statements, or how many, remain. (*See* Steinholt Rebuttal Rpt., RE 78-3, Page ID# 4668-69.) While he might promise that he "could" deal with such issues at a later stage, he fails to detail how, and the district court failed to engage in any analysis of the issue.

Rather, the district court simply accepted Mr. Steinholt's assertion that his "proposed methodology only includes damages from the remaining actionable statements, so there is no reason to reduce any damages for non-

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dollar inflation" methodology because he could purportedly measure inflation on a percentage or dollar basis. (*See* Steinholt Rebuttal Rpt., RE 78-3, Page ID# 4661-63.) That argument misses the point. Whether measured in dollar or percentage terms, his proposed methodology still provides for a *constant* measure of inflation on each day between the alleged misrepresentation and disclosure.

actionable statements." (*See* Ex. B 16.)[9] This makes no sense, particularly because dozens of the nonactionable statements pled by plaintiffs are alleged in the operative complaint to have artificially increased the price of Big Lots stock. *See, e.g.*, Am. Compl., RE 18, Page ID# 239, 245. But Mr. Steinholt's model miraculously, and based on no analysis, attributes the entirety of the residual stock price decline on the alleged corrective disclosure dates to actionable fraud, without any consideration of the impact of other non-actionable disclosures on those dates. (*See* Steinholt Rebuttal Rpt., RE 78-3, Page ID# 4668-69.) Plaintiffs' theory that each statement contributed to an inflated stock price cannot be reconciled with Mr. Steinholt's model, which attributes all inflation on a given date to whatever statements happen to remain actionable on that date. This flouts *Comcast*'s instruction that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable" to plaintiffs' liability theory. 133 S. Ct. at 1433.

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[9] The district court cited *In re VHS of Mich., Inc.*, 601 F. App'x 342 (6th Cir. 2015) in finding plaintiffs satisfied *Comcast*. (Ex. A 26.) But in *VHS*, this Court upheld class certification under *Comcast* because plaintiffs' expert proposed one damages model consistent with either of two mutually exclusive theories of liability, so that there was "no chance of aggregated damages attributable to rejected liability theories." 601 F. App'x at 344. That is not the case here. By failing to disaggregate inflation due to non-actionable statements (or providing detail on how exactly to go about such an exercise based on the specifics of plaintiffs' case), Mr. Steinholt necessarily would aggregate damages attributable to rejected liability theories.

III. THE CLASS REPRESENTATIVES—WHO EXPRESSLY DID NOT RELY ON THE INTEGRITY OF THE MARKET PRICE IN PURCHASING BIG LOTS STOCK—ARE NOT TYPICAL.

A proposed class representative in a fraud-on-the-market securities case is "atypical of the class" if he individually is "subject to an arguable defense of non-reliance on the market." *In re Harcourt Brace Jovanovich, Inc. Sec. Litig.*, 838 F. Supp. 109, 113 (S.D.N.Y. 1993). "*Basic* does afford defendants an opportunity to rebut the presumption of reliance with respect to an *individual plaintiff* by showing that he did not rely on the integrity of the market price in trading stock." *Halliburton II*, 134 S. Ct. at 2412 (emphasis added). Since the "individual plaintiffs" at issue here are the proposed class representatives, rebutting the presumption of reliance as to them renders their claims atypical and precludes class certification. *See Harcourt*, 838 F. Supp. at 113-14.

Two recent opinions examined the factors that demonstrate an individual plaintiff's non-reliance on the market price of defendants' stock. *See GAMCO Inv'rs, Inc. v. Vivendi, S.A.*, 927 F. Supp. 2d 88 (S.D.N.Y. 2013); *see also In re Vivendi Universal, S.A. Sec. Litig.*, 123 F. Supp. 3d 424 (S.D.N.Y. 2015). In those cases, the stock price "factored into [p]laintiffs' investment decision only as a comparator with" their own assessments of the stocks' true value. *GAMCO*, 927 F. Supp. 2d at 94, 97; *see also Vivendi*, 123 F. Supp. 3d at 427. Furthermore, the plaintiff in *GAMCO* found the corrective disclosure and

resulting stock price decline to be a buying opportunity—plaintiffs increased their holdings pursuant to the philosophy that the price was cheaper but the company's "intrinsic value" was unchanged, thereby resulting in a "*more* attractive investment." 927 F. Supp. 2d at 101-02.

Here, in finding plaintiffs typical of the class, the district court misunderstood *Halliburton II*, *GAMCO* and *Vivendi*. (Ex. A 12-16.) Like in *GAMCO* and *Vivendi*, the class representatives' advisors viewed Big Lots stock as having an intrinsic value determined by their own fundamental research and analysis, and sought to take advantage of *inefficiencies* in the market's processing of publicly-available information into stock prices. One investment advisor also found that the market price decline following the August 23 disclosure made Big Lots a *more attractive* investment (notwithstanding the alleged fraud that had been revealed to the market on that date), such that four days later it bought 1,787 more shares. (*See* Cain Deposition Tr., RE 76-6, Page ID# 4188.) Like the plaintiff in *Vivendi*, the "truth" did not matter, as once that "truth" was revealed to the market, the advisor deepened plaintiff's investment in defendant's stock.

Whether the class as a whole can rely on the *Basic* presumption of reliance to satisfy the predominance requirement of Rule 23 is a wholly different inquiry from whether particular plaintiffs can survive an individualized rebuttal of non-reliance on the integrity of the market price. As the Supreme Court explained,

"That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate." *Halliburton II*, 134 S. Ct. at 2412. But the inquiry here is not one of predominance but one of typicality, because the "occasional" class members in this case are the proposed class representatives. Accordingly, the district court erred in finding that *GAMCO* and *Vivendi* do not apply at the class certification stage. (Ex. A 14-15.) That this is, as the district court stated, an individual defense examining the stock purchases of "individual plaintiffs" is exactly the point—the presumption of reliance is rebutted as to the class representatives, making their claims atypical of the putative class as a whole. (*Id.* 15.)

CONCLUSION

Petitioners respectfully urge this Court to grant this petition.

Respectfully submitted,

VORYS, SATER, SEYMOUR AND PEASE LLP

by

s/ John J. Kulewicz

John J. Kulewicz
William D. Kloss, Jr.

Members of the Firm

52 East Gay Street, P.O. Box 1008
Columbus, OH 43216-1008
(614) 464-6360
jjkulewicz@vorys.com
wdkloss@vorys.com

CRAVATH, SWAINE & MOORE LLP

Michael A. Paskin
Timothy G. Cameron

Members of the Firm

825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1430
mpaskin@cravath.com
tcameron@cravath.com

Attorneys for Defendants-Petitioners

NOTICE OF ADDENDUM

Pursuant to Rule 5(b)(1)(E) of the Federal Rules of Appellate Procedure, Petitioners attach the following:

Exhibit A: Opinion and Order Granting Lead Plaintiff's Motion for Class Certification and to Appoint Class Representatives and Class Counsel (Mar. 17, 2017) (Dkt. No. 88);

Exhibit B: Opinion and Order Denying Defendants' Motion to Exclude the Proffered Opinions of Plaintiffs' Expert, Bjorn I. Steinholt (Mar. 17, 2017) (Dkt. No. 87).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 5(c)(1) because this brief contains 5,195 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 2016 in 14-point Times New Roman.

Dated: March 31, 2017

s/ *John J. Kulewicz*
John J. Kulewicz

CERTIFICATE OF SERVICE

I hereby certify that the following is a list of all counsel for all Respondents, on whom the foregoing was served by email on March 31, 2017:

MURRAY MURPHY MOUL + BASIL LLP
Joseph F. Murray
Brian K. Murphy
1114 Dublin Road
Columbus, OH 43215
murray@mmmb.com
murphy@mmmb.com

SULLIVAN, WARD, ASHER & PATTON, P.C.
Cynthia J. Billings
1000 Maccabees Center
25800 Northwestern Highway
Southfield, MI 48075
cbillings@swappc.com

ROBBINS GELLER RUDMAN & DOWD LLP
David W. Mitchell
Lucas F. Olts
Austin P. Brane
Brian E. Cochran
Kevin A. Lavelle
655 West Broadway, Suite 1900
San Diego, CA 92101
davidm@rgrdlaw.com
lolts@rgrdlaw.com
abrane@rgrdlaw.com
bcochran@rgrdlaw.com
klavelle@rgrdlaw.com

BOTTINI & BOTTINI, INC.
Francis A. Bottini
Yury A. Kolesnikov
7817 Ivanhoe Avenue, Suite 102
La Jolla, CA 92037
fbottini@bottinilaw.com
ykolesnikov@bottinilaw.com

Signed at Columbus, Ohio, on March 31, 2017.

VORYS, SATER, SEYMOUR AND PEASE LLP

Attorney for Defendants-Petitioners

By s/ *John J. Kulewicz*
John J. Kulewicz

EXHIBIT A

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

Lead Plaintiff, City of Pontiac General Employees' Retirement System ("City of Pontiac"), moves for class certification as well as for appointment of itself and Teamsters Local 237 Additional Security Benefit Fund ("Local 237") as Class Representatives and the law firm Robbins Geller Rudman & Dowd LLP ("Robbins Geller") as Class Counsel. Mot. Certify, ECF No. 60. Defendants oppose, ECF No. 74, and move for leave to file a sur-reply, ECF No. 79. For the following reasons, Defendants' motion for leave to file a sur-reply is **DENIED**, and Plaintiffs' motion is **GRANTED**.

I. BACKGROUND

A detailed description of the allegations in this case is set forth in the Court's January 21, 2016, Opinion and Order granting in part and denying in part Defendants' motion to dismiss. Opinion and Order, ECF No. 49. To summarize, Plaintiffs allege the following:

Big Lots, Inc. ("Big Lots") is a broadline closeout retailer whose stock is traded on the New York Stock Exchange ("NYSE"). Big Lots' business model involves sourcing merchandise through closeout deals, such as where the merchandise has been overproduced, discontinued, or rejected by other retailers. Big Lots' merchandising operations is divided into six categories.

Big Lots' performance had been marginal before the middle of fiscal year 2011. In response, Big Lots implemented new strategies focusing on the company's key merchandising categories and hired Doug Wurl ("Wurl") as Executive Vice President of Merchandising. Sales initially improved, but Wurl made changes to the merchandising operations that impaired the company's ability to meet sales targets going forward. For instance, Wurl attempted to move Big Lots away from its closeout business model and into a more conventional retail model. Wurl's strategy conflicted with the vision of other company leaders and often left merchandising employees having to implement inconsistent directives. Many merchandising employees were either fired by Wurl or left the company out of dissatisfaction. With Big Lots' merchandising capabilities significantly diminished, the company was eventually unable to meet sales targets across merchandise categories.

Nonetheless, Defendants provided false and misleading information—primarily via press releases, conference calls, and forms filed with the Securities and Exchange Commission—to investors regarding Big Lots' performance and

prospects between March 2, 2012, and August 23, 2012, which artificially inflated the price of Big Lots' stock.

The truth of Big Lots' financial condition began to emerge on April 23, 2012, when Big Lots issued a press release (after the close of the markets for the day) updating financial forecasts for the first quarter of fiscal year 2012 and noting that the company expected U.S. store sales to be slightly negative compared to its March 2, 2012, guidance. On April 24, 2012, the price of Big Lots' stock plummeted 24% from its closing price the previous day. On August 23, 2012, Big Lots announced Wurl's resignation and released earnings results for the second quarter of fiscal year 2012, showing that Big Lots had failed to meet quarterly projections.[1] Big Lots' stock price fell 20.8% by the close of trading on August 23, 2012.

Throughout this period, between March 2, 2012, and August 23, 2012, Big Lots was buying back millions of shares of its own stock. At the same time, the individual defendants and other company insiders who knew the true state of the company sold large amounts of their own shares at the artificially inflated prices for proceeds exceeding $33 million.

The Court previously granted in part and denied in part Defendants' motion to dismiss. Opinion and Order, ECF No. 49. Lead Plaintiff City of Pontiac now seeks certification of a plaintiff Class consisting of:

[1] The April 23, 2012, and August 23, 2012, disclosures are referred to herein as "corrective disclosures."

> All persons who purchased the common stock of Big Lots, Inc. between March 2, 2012 and August 23, 2012, and who were damaged thereby. Excluded from the Class are defendants, the officers and directors of the Company, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest.

Mot. Cert. 1, ECF No. 60. City of Pontiac and Local 237 also seek appointment as Class Representatives and the appointment of Robbins Geller as Class Counsel.

II. STANDARD OF REVIEW

A court may certify a class action only if it meets the requirements of Federal Rule of Civil Procedure 23(a) and either Rule 23(b)(1), (b)(2), or (b)(3).

Rule 23(a) sets forth four prerequisites that every class action must meet:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition to meeting each of those four requirements, every class action must meet one of the following Rule 23(b) criterion:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b).

This Court recently set forth the general rules that apply to any class certification analysis:

> Plaintiff bears the burden of proof on her motion for class certification. *Golden v. City of Columbus*, 404 F.3d 950, 965 (6th Cir. 2005) (citing *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L.Ed.2d 740 (1982)). The United States Supreme Court summarized that burden as follows:
>
> > The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. To come within the exception, a party seeking to maintain a class action must

> affirmatively demonstrate his compliance with Rule 23. The Rule does not set forth a mere pleading standard. Rather, a party must not only be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a).
>
> *Comcast v. Behrend*, —— U.S. ——, 133 S.Ct. 1426, 1432, 185 L.Ed.2d 515 (2013) (internal quotations and citations omitted).

As for the Court's responsibility under Rule 23, it is well established that "certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.' " *Id.* (quoting *Wal–Mart Stores, Inc. v. Dukes*, —— U.S. ——, 131 S.Ct. 2541, 2551–52, 180 L.Ed.2d 374 (2011)). Oftentimes, that "rigorous analysis" requires the Court to "probe behind the pleadings before coming to rest on the certification question," which frequently will entail "overlap with the merits of the plaintiff's underlying claim." *Id.* "That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* (internal quotations omitted).

The Supreme Court has cautioned, however, that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, —— U.S. ——, 133 S. Ct. 1184, 1194–95, 185 L. Ed. 2d 308 (2013) (citing *Wal–Mart Stores*, 131 S. Ct. at 2551). In other words, district courts may not "turn the class certification proceedings into a dress rehearsal for the trial on the merits." *In re Whirlpool*, 722 F.3d 838, 851–52 (6th Cir. 2013) (citing *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012)).

McDonald v. Franklin Cty., Ohio, 306 F.R.D. 548, 555–56 (S.D. Ohio 2015).

With these principles in mind, the Court proceeds to consider Plaintiffs' motion for class certification and Defendants' motion for leave to file a sur-reply. The Court does so in reverse order.

III. ANALYSIS

A. Motion for Leave to File Sur-reply

Defendants move to file a sur-reply to Plaintiffs' motion for class certification, arguing that Plaintiffs advance new arguments in their reply brief to which Defendants must be afforded an opportunity to respond.

Local Rule 7.2(a)(2) prohibits the filing of any memoranda beyond a motion, response, and reply, except upon leave of court "for good cause shown." S.D. Ohio Civ. R. 7.2(a)(2).

Contrary to Defendants' contention, Plaintiffs did not raise new arguments for the first time in their reply brief. Plaintiffs' reply brief was properly limited to responding to arguments Defendants raised in their response. Accordingly, there is no "good cause" for filing a sur-reply, and Defendants' motion to do so is **DENIED**.

B. Motion to Certify

1. Rule 23(a)

a. Numerosity

To prove numerosity, Plaintiffs must demonstrate that the putative class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "There is no strict numerical test for determining impracticability of joinder." *In Re Am.*

Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996) (citing *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 523 n. 24 (6th Cir. 1976), *cert. denied*, 429 U.S. 870, 97 (1976)). Indeed, "[t]he numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. of the Nw., Inc., v. EEOC*, 446 U.S. 318, 330 (1996). Although "the exact number of class members need not be pleaded or proved, . . . impracticability of joinder must be positively shown, and cannot be speculative." *McGee v. East Ohio Gas Co.*, 200 F.R.D. 382, 389 (S.D. Ohio 2001) (internal quotation marks and citations omitted). "When class size reaches substantial proportions, however, the numerosity requirement is usually satisfied by the numbers alone." *Ross v. Abercrombie & Fitch Co.*, 257 F.R.D. 435, 442 (S.D. Ohio 2009). Notably, "The numerosity requirement is generally assumed to have been met in class action suits involving nationally traded securities." *Id.* (collecting cases).

Here, Plaintiffs state that the exact number of potential Class Members is unknown. However, Defendants admit that Big Lots' stock was traded on the NYSE during the Class Period. Answer ¶ 187, ECF No. 57. Moreover, Plaintiffs submit evidence that the stock had an average daily trading volume in excess of 1.5 million shares and was owned in part by about 450 large institutional investors during the Class Period. Steinholt Rpt. ¶¶ 21, 28, ECF No. 60-3.

The Court finds this evidence sufficient to satisfy Rule 23's numerosity requirement. *See, e.g., Taylor v. CSX Transp., Inc.*, 264 F.R.D. 281, 288 (N.D. Ohio 2007) (finding the numerosity requirement satisfied when the class definition encompassed forty individuals); *Kelly v. Montgomery Lynch & Assocs., Inc.*, No. 1:07-

CV-919, 2007 WL 4562913, at *3 (N.D. Ohio Dec. 19, 2007) (finding fifty class members would be sufficient to satisfy the numerosity requirement). Notably, Defendants do not contest Plaintiffs' satisfaction of the numerosity requirement.

b. Commonality

To prove commonality, Plaintiffs must prove that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (quoting *Falcon*, 457 U.S. at 157). The claims "must depend on a common contention . . . of such a nature that is capable of classwide resolution—which means that determination of its truth or its falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*

This case involves common contentions—namely, that Defendants made the same misrepresentations and omissions to the investing public regarding Big Lots' sales results and merchandising operations and that the individual defendants engaged in insider trading. Whether Defendants made certain misrepresentations and omissions, whether such misrepresentations and omissions were material, and whether Defendants acted with the requisite scienter, are all common issues capable of classwide resolution. Indeed, "[q]uestions of misrepresentation, materiality, and scienter are the 'paradigmatic common question[s] of law in a securities fraud class action.'" *Ross*, 257 F.R.D. at 443 (quoting *Bovee v. Coopers & Lybrand*, 216 F.R.D. 596, 609 (S.D. Ohio

2003)). To that end, courts have repeatedly found this requirement satisfied in securities actions. *See, e.g.*, *Schleicher v. Wendt*, 618 F.3d 679, 681 (7th Cir. 2010) (listing common questions in securities-fraud litigation); *Ross*, 257 F.R.D. at 443 (citing cases that have found the requirement "easily" satisfied by the presence of similar common questions).

The Court finds Plaintiffs have satisfied this requirement, and, again, Defendants do not contend otherwise.

c. Typicality

To prove typicality, Plaintiffs must prove that the Class Members' claims are "fairly encompassed by the named plaintiffs' claims." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc) (quoting *In re Am. Med. Sys.*, 75 F.3d at 1082). This requirement ensures that the class representative's interests are aligned with the interests of the class members so that, by pursuing his or her own interests, the class representative also advances the class members' interests. *Id.*

A class representative's claim is typical of the class if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Sys.*, 75 F.3d at 1082 (quoting 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, § 3.01, at 3–4 (3d ed. 1992)). The class representative's claims need not be factually identical to the class members'

claims in order to satisfy the typicality requirement, which is liberally construed. *Senter*, 532 F.2d at 525 n.31.

Moreover, "[t]he threshold for satisfying the typicality prong is a low one," *Salvagne v. Fairfield Ford Inc.*, 264 F.R.D. 321, 328 (S.D. Ohio 2009), and "[i]n instances wherein it is alleged that the defendants engaged in a common scheme relative to all members of the class, there is a strong assumption that the claims of the representative parties will be typical of the absent members." *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1035 (N.D. Miss. 1993).

The claims asserted by City of Pontiac and Local 237 are typical of the claims of the Class. All of the Class Members' claims are based on the same legal theory—that Defendants violated §§10(B), 20(a), and 20A of the Securities Exchange Act of 1934 by making the same misrepresentations and omissions. As is true for the rest of the Class, City of Pontiac and Local 237 each purchased shares of Big Lots' stock during the Class Period, *see* Murray Decl. Ex. B, ECF No. 60-2; Goldberg Decl. Ex. 1, ECF No. 60-6, and both contend they relied on the misrepresentations and omissions through the fraud-on-the-market theory and suffered damages when Big Lots' stock price eventually reflected the truth.

Defendants do not dispute the above but rather argue that typicality is lacking because City of Pontiac and Local 237, as Class Representatives, are subject to the unique defense of non-reliance on the market.

"[C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the

litigation." *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 59 (2nd Cir. 2000) (internal quotation marks and citation omitted). However, unique defenses will destroy typicality only "where the defenses against the named representatives are likely to usurp a significant portion of the litigant's time and energy, and there is a danger that the absent class members will suffer if their representative is preoccupied with defenses unique to it." *Bentley v. Honeywell Intern., Inc.*, 223 F.R.D. 471, 484 (S.D. Ohio 2004) (internal quotation marks and citations omitted).

Defendants contend that, in this case, City of Pontiac and Local 237 utilized investment advisors in making investment decisions such as purchasing Big Lots stock. Defendants further contend that the advisors making the investment decisions for City of Pontiac and Local 237 determined the intrinsic value of Big Lots' stock through their own research and analysis, not through reliance on the market price of Big Lots' stock. City of Pontiac and Local 237's non-reliance on the market, Defendants contend, destroys typicality because class certification in this case relies on the fraud-on-the-market theory of reliance and the corresponding *Basic* presumption.[2] For support, Defendants cite to

[2] The fraud-on-the-market theory underpins a presumption of reliance, recognized by the Supreme Court in *Basic v. Levinson*, 485 U.S. 224 (1988), that is discussed in more detail *infra*. Generally, the *Basic* presumption is a manner in which a court can presume that a class of individuals relied on a defendant's misrepresentations through the class's reliance on the integrity of a stock's market price, which is presumed to reflect any public misrepresentation made by a defendant. If a class representative did not rely on the integrity of a stock's market price, his or her claim does not rest on the fraud-on-the-market theory, or, consequently, the *Basic* presumption, and his or her claim would thus

GAMCO Investors, Inc. v. Vivendi, S.A., 927 F. Supp. 2d 88, 102 (S.D.N.Y. 2013); *In re Vivendi Universal, S.A. Securities Litig.*, 123 F. Supp. 2d 424, 426–27 (S.D.N.Y. 2015), and *Blank v. Jacobs*, No. 03–CV–2111(JS)(MLO), 2009 WL 3233037, at *5 (E.D.N.Y Sept. 30, 2009) for the proposition that a class representative's reliance on its own assessment of the value of a stock, rather than the market, makes the representative subject to a unique defense and destroys typicality.

Defendants' argument is not well taken. Indeed, "[c]ourts have routinely rejected the argument defendant[s] now advance[]." *In re Diamond Foods, Inc., Securities Litig.*, 295 F.R.D. 240, 252 (N.D. Cal. 2013) (citations omitted); *see also id.* at 253 (distinguishing *GAMCO*). The Court in *In re Diamond Foods* stated it bluntly:

> That an investment advisor thinks it is smarter than the rest of the market in evaluating truthful public data in the market should not be a license for manipulators to pump false information into the public domain to grossly inflate a stock price. Most investors think they are a little smarter than average and see opportunities others have missed. Still, they all rely on publicly available data (with the exception, of course, of investors trading on insider information).

Id. at 253.

In fact, *Blank* and *GAMCO* were decided prior to the Supreme Court's decision in *Halliburton II*, which stated:

> [T]here is no reason to suppose that even [defendant's] main counterexample—the value investor—is as indifferent to the integrity

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not be typical of the remainder of the class members' claims in a fraud-on-the-market case.

> of market prices as [defendant] suggests. Such an investor implicitly relies on the fact that a stock's market price will eventually reflect material information—how else could the market correction on which his profit depends occur? To be sure, the value investor "does not believe that the market price accurately reflects public information *at the time he transacts*." *Post*, at 2423. But to indirectly rely on a misstatement in the sense relevant for the *Basic* presumption, he need only trade stock based on the belief that the market price will incorporate public information within a reasonable period. The value investor also presumably tries to estimate *how* undervalued or overvalued a particular stock is, and such estimates can be skewed by a market price tainted by fraud.

Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2411 (2014) (*Halliburton II*) (emphasis in original).[3]

In re Vivendi Universal, the third case Defendants cite for support, was decided after *Halliburton II*, specifically recognized that *Halliburton II* "rejected" the argument "that value investors are universally indifferent to the integrity of market prices[,]" and noted that "value investors may invoke the *Basic* presumption at the *class certification stage* . . . ." *In re Vivendi Universal*, 123 F. Supp. 3d at 433, 437 (emphasis in original).

Though it was ultimately determined that the defendant was able to rebut the *Basic* presumption of reliance in both *GAMCO* and *In re Vivendi Universal*, those cases are factually distinguishable from the allegations made at this stage,

[3] *Blank* is further distinguishable from the case *sub judice* in that, in *Blank*, one of the putative class representatives had relied on inside information from the defendant when it purchased the stock at issue. *Blank*, 2009 WL 3233037, at *5.

GAMCO is further distinguishable in that it was not decided in the context of determining typicality for class certification but rather for whether the defendant rebutted the *Basic* presumption of reliance after a trial on the merits. *GAMCO*, 927 F. Supp. 2d at 91.

in this case. First, neither the *GAMCO* nor *In re Vivendi Universal* decision was made at the class certification stage. Rather, they were both made in the course of post-trial proceedings wherein the defendant attempted to rebut the presumption of reliance with respect to individual plaintiffs. *See GAMCO*, 927 F. Supp. 2d at 90; *In re Vivendi Universal*, 123 F. Supp. 3d at 425. Second, in *GAMCO*, the defendant showed that the plaintiff would have purchased the security at issue even if it had known of the fraud. *See GAMCO Investors, Inc. v. Vivendi Universal, S.A.*, 838 F.3d 214, 218 (2nd Cir. 2016) (finding the district court did *not* hold that a defendant can rebut the presumption of reliance by simply showing that a plaintiff was a value investor but rather held that the particular plaintiff in that case, GAMCO (who was neither a class representative nor a member in the related class action), would have bought the security even if it had known of the fraud). Likewise, in *In re Vivendi Universal*, the class member testified that he was not misled by the fraud and that the truth would not have mattered to him even if he had known it. *In re Vivendi Universal*, 123 F. Supp. 3d at 436. Thus, neither case held, at the class certification stage, that a plaintiff's status as a value investor defeated typicality.

In this case, the Court has reviewed the portions of Robert Benton's ("Benton"), Ronald Mushock's ("Mushock"), Randell Cain's ("Cain"), and Janna Sampson's ("Sampson") depositions that Defendants cite for support of their

typicality argument.[4] None testified that they were not misled by fraud or that they would have purchased Big Lots' stock even if they had known of the fraud. Accordingly, this case is distinguishable from *GAMCO* and *In re Vivendi Universal*. Defendants offer no cases holding that the mere fact that a class member is a value investor is, alone, enough to defeat *Basic's* presumption of reliance, and the Court has found none. As such, the Court rejects Defendants' argument that typicality is destroyed due to unique non-reliance defenses as to the proposed Class Representatives and instead finds that Plaintiffs have satisfied the typicality requirement.

d. Adequacy

Courts analyzing Rule 23(a)(4)'s adequacy of representation requirement must consider two criteria: "(1) the representative must have common interests with unnamed members of the class; and (2) it must appear that the representative[] will vigorously prosecute the interests of the class though qualified counsel." *Senter*, 532 F.2d at 525 (citing *Gonzales v. Cassidy*, 474 F.2d 67, 73 (6th Cir. 1973)). The first criterion overlaps the typicality and commonality requirements. *In re Am. Med. Sys.*, 75 F.3d at 1083; *see also Ross*, 257 F.R.D. at 447 ("The first requirement . . . acts to ensure that the representatives have interests co-extensive with, rather than antagonistic to, the interests of the other class members." (citation omitted)).

[4] Benton, Mushock, Cain, and Sampson were the 30(b)(6) representatives from the investment advisors to City of Pontiac and Local 237.

The second criterion "raises concerns about the competency of class counsel." *Falcon*, 457 U.S. at 157 n.13. "Plaintiff must have sufficient financial and personal involvement to encourage it to prosecute the action vigorously, and adequate resources and legal representation to meet the demands of maintaining the action. Further, class counsel must be qualified, experienced, and generally able to conduct the litigation." *Ross*, 257 F.R.D. at 450 (citations omitted). A court may deny certification when the class representatives have "so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." *Bovee*, 216 F.R.D. at 615 (citations omitted).

City of Pontiac and Local 237 contend, and the Court agrees, that they will fairly and adequately protect the interests of the Class. Turning to the first criterion, City of Pontiac's and Local 237's interests align with the interests of the rest of the Class. As mentioned above, both parties purchased Big Lots' stock during the Class Period, when it is alleged that the prices were inflated due to Defendants' misrepresentations and omissions, and, like the rest of the Class, both parties allegedly sustained damages when the price of stock fell after the truth came to light. Moore Decl. ¶ 6, ECF No. 60-5; Murray Decl. Ex. 1, ECF No. 60-2; Goldberg Decl. ¶ 4 & Sch. A, ECF No. 60-6.

Defendants disagree and argue that City of Pontiac cannot represent plaintiffs who bought stock after April 23, 2012. Defendants state that City of Pontiac sold the last of its Big Lots stock on August 17, 2012, and argue that,

therefore, City of Pontiac suffered no loss following the August 23, 2012, corrective disclosure. Defendants contend City of Pontiac not only lacks incentive to demonstrate inflation between April 23, 2012, and August 23, 2012, but actually has an incentive to minimize such inflation in order to recover greater damages for itself in connection with the April 23 corrective disclosure. Accordingly, Defendants assert, City of Pontiac's interests are antagonistic to the interests of the Class members who purchased stock after April 23, 2012.

"This argument regarding potential interclass conflict has been rejected by the majority of judges . . . ." *In re Diamond Foods, Inc.*, 295 F.R.D. at 254 (citations omitted). "Courts have . . . repeatedly recognized that putative intra-class conflicts relating to the times at which particular class members purchased their securities, and which could potentially motivate different class members to argue that the securities were relatively more or less inflated at different time periods, relate to damages and do not warrant denial of class certification." *Id.* (internal quotation marks and citations omitted); *see also Thorpe v. Walter Inv. Mgmt., Corp.*, No. 1:14–cv–20880–UU, 2016 WL 4006661, at *9 (S.D. Fla. Mar. 16, 2016) ("The substantial majority of courts that have addressed the propriety of class certification based on the timing of the class representative's sales or purchases have found, however, that the timing of the transactions does not necessarily create fundamentally divergent interests with the putative class. Rather, the supposed intra-class conflict based on the timing at which stock positions were divested or acquired is principally a damages issue, which is an

inquiry premature at the class certification stage." (collecting cases)); *Bovee*, 216 F.R.D. at 610 ("[T]he traditional rule is that a plaintiff class should be certified despite conflicts over damages issues between early and late sellers of stock." (internal quotation marks and citations omitted)). The Court finds that all of the Class Members have an interest in proving that Big Lots' stock was artificially inflated during the Class Period and therefore finds that City of Pontiac's interest is not antagonistic to the Class Members who purchased stock after April 23, 2012.

Turning to the second criterion, City of Pontiac and Local 237 have sufficient financial and personal involvement to encourage them to prosecute the action vigorously and have adequate resources and legal representation to meet the demands of maintaining the action. Specifically, the Court finds City of Pontiac and Local 237 have significant financial incentive to achieve the best results possible for the Class due to their significant investment, and substantial losses, in Big Lots' stock during the Class Period. *See* Murray Decl. Ex. 1, ECF No. 60-2; Moore Dep. 121:19–20, ECF No. 74-1; Goldberg Decl. Sch. A, ECF No. 60-6. Moreover, City of Pontiac has been adequately representing the putative Class since its appointment as lead plaintiff. Since that appointment, City of Pontiac, through counsel, filed an eighty-three page Amended Complaint and partially succeeded in defending against a motion to dismiss. Am. Compl., ECF No. 18, Opinion and Order, ECF No. 49.

Moreover, both City of Pontiac and Local 237 have committed to actively directing this litigation by attending hearings, depositions, and/or trial, and by overseeing the preparation of pleadings. Murray Decl. ¶ 8, ECF No. 60-5; Goldberg Decl. ¶ 6, ECF No. 60-6. Walter Moore ("Moore"), Chairman of City of Pontiac's Board of Trustees, testified that City of Pontiac receives monthly reports on the case and personally reviewed the complaint, responses to the complaint, requests for documentation, and requests for interrogatories. Moore Dep. 85: 2–9, 95:2–8, ECF No. 74-1. Mitch Goldberg ("Goldberg"), Director of Local 237, testified that he reviewed "all the documents," including the complaint, the Court's Opinion and Order on Defendants' motion to dismiss, and all of the motions and rulings made until his deposition. Goldberg Dep. 27:4–28:4, ECF No. 74-4. City of Pontiac and Local 237 participated in responding to documents requests and interrogatories from Defendants. Moore Dep. 35:23–36:10, ECF No. 74-1, Goldberg Dep. 38:3–19, 42:22–43:19, ECF No. 74-4. Moreover, both City of Pontiac and Local 237 have recognized their fiduciary duty as Class Representatives and have pledged to protect the best interests of the Class by "obtain[ing] the largest recovery for the class consistent with good faith and meritorious advocacy." Moore Decl. ¶ 7–8, ECF No. 60-5; Goldberg Decl. ¶ 5, ECF No. 60-6.

Defendants contend that City of Pontiac and Local 237 lack the requisite knowledge about the case and have failed, and will fail, to direct the litigation. Defendants cite portions of Moore's deposition, wherein he testified generally to

City of Pontiac's process of determining whether to become involved in litigation, and fault Moore for failing to identify specific materials that formed the basis for City of Pontiac's decision to participate in this litigation. Moore Dep. 73:7-11, 86:12–19, 120:24-121:6, ECF No. 74-1. However, Moore was testifying as a corporate representative, and he testified that the general practice was for the board to consider a presentation by local counsel and then to vote on whether to become involved. Moore, however, was not personally present at the meeting at which City of Pontiac's board voted to become involved in this litigation. *Id.* at 73:18–75:5, 77:14–80:3, 86:6–10. Nonetheless, he testified to a basic understanding of the case, as did Goldberg on behalf of Local 237. *Id.* at 121:7–122:21; Goldberg Dep. 88:19–89:19, ECF No. 74-4. That is all that is required. *W. Palm Beach Police Pension Fund v. DFC Glob. Corp.*, No. CN 13–6731, 2016 WL 4138613, at *10 (E.D. Pa. Aug. 4, 2016). As this Court has recognized:

> [I]n securities cases . . . where the class is represented by competent and zealous counsel, class certification should not be denied simply because of a perceived lack of subjective interest on the part of the named plaintiffs unless their participation is so minimal that they virtually have abdicated to their attorneys the conduct of the case. To require less would permit attorneys essentially to serve as class representatives; to require more could well prevent the vindication of the legal rights of the absent class members under the guise of protecting those rights.

Bovee, 216 F.R.D. at 615 (quoting *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987)). The Court is satisfied that City of Pontiac and Local 237 have the requisite knowledge about the case to serve as adequate representatives.

Further, there can be no serious dispute that Robbins Geller is qualified, experienced, and generally able to conduct the litigation. As noted in the Court's Opinion and Order appointing Robbins Geller as lead counsel, the firm secured the largest recovery to date in a shareholder class action while serving as lead counsel in *In re Enron Corp. Securities Litigation*, 2005 U.S. Dist. LEXIS 39867 (S.D. Tex. Dec. 22, 2005). Opinion and Order 9, ECF No. 17. Defendants do not question Robbins Geller's ability to conduct the litigation.

Nonetheless, Defendants offer a slew of additional arguments as to why City of Pontiac and Local 237 are inadequate representatives, none of which have merit. First, the fact that Moore testified that City of Pontiac leaves the litigation strategy to counsel does not render City of Pontiac an inadequate representative. *See Bovee*, 216 F.R.D. at 616 (finding named representative could rely on the expertise of counsel). Nor does the fact that City of Pontiac and Local 237 learned of this case through a monitoring agreement render them inadequate to serve as Class Representatives. *Plumbers & Pipefitters Nat. Pension Fund v. Burns*, 292 F.R.D. 515, 523 (N.D. Ohio 2013) ("Courts have routinely rejected attacks on the propriety of portfolio monitoring agreements . . . ." (citations omitted)).

Defendants further contend that Local 237's representative, Goldberg, improperly changed his deposition testimony after conferring with counsel and that, therefore, Local 237 is an inadequate Class Representative. Defendants assert that Goldberg's "shifting testimony following what appears to have been

improper coaching by Robbins Geller will be the subject of discovery and cross-examination at trial by the Defendants." Resp. 33, ECF No. 74. They argue that the inquiry into this alleged improper conduct will detract from the substantive allegations in the case and will prejudice absent Class Members, citing two non-binding district court cases for the proposition that such conduct renders Local 237 inadequate. *Id.* at 34 (citing *Rocco v. Nam Tai Elecs., Inc.*, 245 F.R.D. 131, 136–37 (S.D.N.Y. 2007); *Kline v. Wolf*, 88 F.R.D. 696, 700 (S.D.N.Y. 1981)).

Those cases are distinguishable. In *Kline*, the proposed representatives were subject to unique defenses regarding their reliance on the market, 88 F.R.D. at 698–99, and it was one proposed representative's refusal to answer questions regarding her reliance (i.e., a "failure to comply with [a] proper discovery inquiry") that the court stated it could consider in determining whether she would live up to her fiduciary obligation as a representative. *Id.* at 700. In *Rocco*, the putative named representative was determined to be inadequate because he, *inter alia*, delayed discovery by four months. *Rocco*, 245 F.R.D. at 133 n.1, 136–37.

Here, the "shifting" deposition testimony referenced by Defendants relates to Local 237's knowledge of the case, which is relevant only for purposes of satisfying the adequacy requirement during class certification. Goldberg's challenged testimony did not relate to the merits of the underlying litigation at all, and, needless to say, did not involve any issues, such as reliance, that could lead to a unique defense to the merits of Local 237's claims. Goldberg Dep. 72:25–

73:23, 161:9–186:6, ECF No. 74-4. The Court has already found that Local 237 possesses the requisite knowledge of the case to serve as an adequate representative. Accordingly, the Court finds unpersuasive Defendants' argument that Goldberg's "shifting testimony" will be the subject of extended discovery or cross-examination at trial such that it will detract from the substantive allegations in the case.

For the reasons addressed above, the Court finds City of Pontiac and Local 237 are adequate Class Representatives.

e. Conclusion

The Court finds that Plaintiffs have satisfied the Rule 23(a) criteria for class certification. Accordingly, the Court next considers whether Plaintiffs have satisfied a Rule 23(b) criterion.

2. Rule 23(b)

Plaintiffs seek certification pursuant to Rule 23(b)(3), which requires a showing that common questions of fact or law predominate over any individual questions and that a class action is superior to other available methods for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

a. Predominance

"To meet the predominance requirement, a plaintiff must establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof." *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 353 (6th Cir. 2011)

(citation omitted). "Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) ("*Halliburton I*") (quoting Fed. R. Civ. P. 23(b)(3)). "The elements of a private securities fraud claim based on violations of § 10(b) and Rule 10b-5 are: (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Id.* (internal quotation marks and citations omitted). Despite the many common issues identified above as part of the Rule 23(a) analysis, Defendants contend, as do many defendants in securities actions, that the elements of reliance and damages preclude certification in this case as individual inquiries will predominate over any common issues. The Court addresses these arguments in reverse order.

i. Classwide Damages

Defendants, citing *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), argue that Plaintiffs cannot establish predominance because their expert, Mr. Steinholt, failed to advance a methodology for calculating damages on a classwide basis in a manner that is consistent with their theory of liability and the Court's earlier ruling on Defendants' motion to dismiss.

As Plaintiffs advance a methodology for calculating damages on a classwide basis, they must show that the methodology is consistent with their theory of liability. *Comcast*, 133 S. Ct. at 1433.

Plaintiffs have satisfied *Comcast*. Specifically, Mr. Steinholt proposes to use an event study to calculate damages on a classwide basis. For the reasons stated in the Court's Opinion and Order denying Defendants' *Daubert* motion, the Court finds that the proffered methodology is consistent with Plaintiffs' theory of liability and survives a *Daubert* attack.[5] *See also In re VHS of Mich., Inc.*, 601 F. App'x 342, 344 (6th Cir. 2015) ("*Comcast* applies where multiple theories of liability exist, those theories create separable anticompetitive effects, and the combined effects can result in aggregated damages. . . . Where there is no chance of aggregated damages attributable to rejected liability theories, the Supreme Court's concerns do not apply."). Accordingly, the Court finds that individual damages issues will not predominate over common issues in this case.

ii. Reliance

Defendants also argue that individual issues of reliance on Defendants' alleged misrepresentations will predominate over common issues.

"The reliance element [of a § 10(b) and Rule 10b-5 securities fraud claim] 'ensures that there is a proper connection between a defendant's

[5] The cases Defendants cite on this point are inapposite, and other courts have held that event studies such as the one proposed by Mr. Steinholt are acceptable for calculating damages on a classwide basis in securities litigation. *See, e.g.*, *Hatamian v. Advanced Micro Devices, Inc.*, No. 14–cv–226 YGR, 2016 WL 1042502, at *9 (N.D. Cal. Mar. 16, 2016).

misrepresentation and a plaintiff's injury.'" *Halliburton II*, 134 S. Ct. at 2407 (quoting *Amgen Inc. v. Conn. Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1192 (2013)). "The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was aware of a company's statement and engaged in a relevant transaction . . . based on that specific misrepresentation." *Halliburton I*, 563 U.S. at 810. But, in *Basic v. Levinson*, the Supreme Court "recognized that requiring such direct proof of reliance would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market" because, even if the plaintiff could show that he was aware of the misrepresentation, he would have to "show a speculative state of facts, *i.e.*, how he would have acted . . . if the misrepresentation had not been made." *Halliburton II*, 134 S. Ct. at 2407 (citing *Basic*, 485 U.S. at 245 (1988)). The Supreme Court also recognized that such a requirement would essentially prevent security fraud cases from proceeding as class actions because if every plaintiff had to prove direct reliance on a defendant's misrepresentation, individual issues of reliance would predominate over common issues, preventing class certification. *Id.* at 2408 (citing *Basic*, 485 U.S. at 242).

"To address those concerns, *Basic* held that securities fraud plaintiffs can in certain circumstances satisfy the reliance element of a Rule 10b-5 action by invoking a rebuttable presumption of reliance, rather than proving direct reliance on a misrepresentation." *Id.* This rebuttable presumption was based on the

"fraud-on-the-market" theory, "which holds that 'the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations.'" *Id.* (quoting *Basic*, 485 U.S. at 246). The presumption is that:

> [a]n investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations . . . may be presumed for purposes of a Rule 10b-5 action.

Basic, 485 U.S. at 247.

To invoke the *Basic* presumption, "a plaintiff must prove that: (1) the alleged misrepresentations were publicly known, (2) they were material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock between when the misrepresentations were made and when the truth was revealed." *Halliburton II*, 134 S. Ct. at 2413 (citing *Basic*, 485 U.S. at 248; *Amgen*, 133 S. Ct. at 1198).

The presumption is rebuttable, however, and a defendant may rebut the presumption of reliance with "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Basic*, 485 U.S. at 248. For example, a defendant could rebut the presumption with evidence that "the misrepresentation did not, for whatever reason, actually affect the market price, or that the plaintiff would have bought or sold the stock even had he been aware that the stock's price was tainted by fraud." *Halliburton II*, 134 S. Ct. at 2408.

In this case, Plaintiffs invoke *Basic's* presumption of reliance in order to demonstrate that common issues of reliance predominate over individual issues. Defendants argue that Plaintiffs fail to show the market in which Big Lots' stock traded was efficient, which prevents invocation of the *Basic* presumption of reliance. Further, Defendants contend that even if Plaintiffs can invoke the *Basic* presumption, Defendants have rebutted that presumption.

Without the *Basic* presumption of reliance, each plaintiff would have to show direct reliance, individual issues of reliance would predominate over common issues, and class certification would be improper. Thus, the first issue is whether Plaintiffs can invoke *Basic's* presumption of reliance, which, in this case, hinges on whether the market in which Big Lots' stock traded was efficient.

In evaluating whether the market in which a security traded was efficient, many courts, including courts in this circuit, look for the following five factors, first set forth in *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989): (1) a large weekly trading volume; (2) the existence of a significant number of reports by securities analysts; (3) the existence of market makers and arbitrageurs in the security; (4) the eligibility of the company to file an S-3 Registration Statement; and (5) a history of immediate movement of the stock price caused by unexpected corporate events or financial releases. *See Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990). Further, the Sixth Circuit has stated that "securities traded in national secondary markets such as the New York Stock Exchange . . . are well suited for application of the fraud on the market theory."

Freeman, 915 F.2d at 199 ("The high level of trading activity ensures that information from many sources is disseminated into the marketplace and consequently is reflected in the market price. This is the premise upon which the fraud on the market theory rests.").

Defendants do not contest that Big Lots' stock traded on the NYSE or that Plaintiffs have proved the first four *Cammer* factors, and the Court finds those factors easily met.

Specifically, with respect to the first factor, during the Class Period, Big Lots' common stock had a reported average weekly trading volume of 7.4 million shares. Steinholt Rpt. ¶ 22, ECF No. 60-3; *Id.* at Ex. B. This amounted to a weekly turnover of over 11% of its outstanding shares, *id.*, which well exceeds the 2% benchmark justifying a "strong presumption" of efficiency, which was referenced in *Cammer*. *See*, 711 F. Supp. 1264 at 1286 (citing Bromberg & Lowenfels, *4 Securities Fraud and Commodities Fraud*, § 8.6 (Aug. 1988)); *see also Plumbers & Pipefitters Nat'l Pension Fund v. Burns*, 967 F. Supp. 2d 1143, 1149 (N.D. Ohio 2013) ("An average weekly trading volume of two percent or more of outstanding shares triggers a 'strong presumption' of market efficiency . . ." (quoting *Cammer*, 711 F. Supp. at 1286)).

With respect to the second factor, "at least 16 different brokerage firms covered and provided investment recommendations on Big Lots during the Class Period." Steinholt Rpt. ¶ 24, ECF No. 60-3; *Id.* at Ex. C. Similar analyst coverage has been found indicative of market efficiency in this circuit. *See, e.g.*,

Burns, 967 F. Supp. 2d at 1162 (finding fifteen analysts sufficient to support a finding of market efficiency).

The third *Cammer* factor considers the number of market makers and arbitrageurs. *See*, 711 F. Supp. at 1286. Transactions on the NYSE, such as those involving Big Lots' stock, go through a designated market maker ("DMM"), Steinholt Rpt. ¶ 27, ECF No. 60-3, which has been found to satisfy this factor. *Vinh Nguyen v. Radient Pharm. Corp.*, 287 F.R.D. 563, 573 (C.D. Cal. 2012). In addition, there were twelve supplemental liquidity providers for Big Lots' common stock with a volume in excess of one million shares from March 2012 through August 2012. Steinholt Rpt. ¶ 27 n.28, ECF No. 60-3. The Court finds that the DMM and supplemental liquidity providers satisfy this factor. *See Hayes v. MagnaChip Semiconductor Corp.*, No. 14–cv–01160–JST, 2016 WL 7406418, at *6 (N.D. Cal. Dec. 22, 2016).

With respect to the fourth *Cammer* factor, Big Lots was eligible to file a Form S-3 Registration Statement for the entire Class Period, meaning it was an SEC reporting company for at least twelve months and had an average of $75 million in voting stock held by non-affiliates during the sixty-day period prior to filing. Steinholt Rpt. ¶ 30, ECF No. 60-3.

Thus, the first four *Cammer* factors are satisfied in this case. Defendants contend, however, that the first four factors are mere prerequisites for a finding of efficiency. Defendants assert that Plaintiffs cannot prove that a certain stock traded efficiently without proof of the fifth factor, a history of immediate

movement of the stock price caused by unexpected corporate events or financial releases, and that Plaintiffs fail to prove the fifth factor in this case.

Plaintiffs reject the notion that they must prove the fifth *Cammer* factor in order to show market efficiency, arguing that Defendants' position effectively renders the first four factors meaningless and turns the fifth factor from a "factor" into a "requirement."

The Court need not resolve this dispute because Plaintiffs have satisfied the fifth *Cammer* factor in this case. Steinholt performed an event study in this case. To do so, he used a regression analysis to determine the statistical relationship between Big Lots' stock price returns and the returns on market and/or industry indices during a control period. Steinholt Rpt. ¶ 32, ECF No. 60-3. He then compared the actual stock price return on each event day[6] to the return predicted by the regression to determine any excess return ("the stock's return on the event day net of market and industry factors"). *Id.* The excess return determines the p-value, "the probability of an equal or greater absolute return occurring randomly. A price movement with a p-value of 5% or less is defined as being statistically significant at the 5% level." *Id.*

Steinholt's event study showed that five out of the six financial releases were followed by statistically significant price movements at the 5% level. *Id.* ¶ 37. Steinholt reported that "[t]he cumulative probability of five or more days out

[6] Steinholt analyzed six event days in 2012, the days on which Big Lots issued financial releases that year. *Id.* ¶ 33.

of six being statistically significant at the 5% level simply by chance is less than one in more than half a million." *Id.* From this event study, Steinholt opined that there was a cause and effect relationship between financial releases and an immediate response in stock price. *Id.* ¶¶ 37–38.

Defendants attack Steinholt's event study, arguing that it was scientifically unreliable due to Steinholt's failure to perform an *ex-ante* hypothesis for the events he tested and because Steinholt included the corrective disclosure dates in the event study, which, Defendants contend, biased the study's results. These arguments mirror the arguments Defendants made in their *Daubert* motion and are rejected for the same reasons stated in the Court's Opinion and Order denying that *Daubert* motion. Accordingly, the Court finds Steinholt's event study is acceptable proof of *Cammer* factor five as it is empirical evidence of a cause and effect relationship between Big Lots' financial releases and an immediate response in Big Lots' stock price.

In sum, the Court finds that all of the *Cammer* factors weigh in favor of finding market efficiency. Therefore, Plaintiffs can invoke *Basic's* presumption of reliance.

Defendants, however, contend that even if Plaintiffs can invoke *Basic's* presumption of reliance, Defendants can successfully rebut that presumption with evidence of a lack of price impact (i.e., that the misrepresentation did not affect the stock price).

The *Basic* presumption:

> actually incorporates two constituent presumptions: First, if a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price. Second, if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's misrepresentation.

Halliburton II, 134 S. Ct. at 2414. Thus, "*Basic* allows plaintiffs to establish [price impact] indirectly." *Id.* at 2416.

Because a lack of price impact would defeat "the basis for finding that the fraud had been transmitted through market price," a lack of price impact would necessarily defeat a plaintiff's ability to invoke *Basic's* presumption of reliance. *Id.* at 2415–16 (internal quotation marks and citation omitted). As discussed above, without the presumption of reliance, "[e]ach plaintiff would have to prove reliance individually, so common issues would not 'predominate' over individual ones, as required by Rule 23(b)(3)." *Id.* at 2416. Thus, price impact is "an essential precondition for any Rule 10b-5 class action." *Id.* at 2416. A defendant can thus defeat the presumption of reliance at the class certification stage with evidence of a lack of price impact. *Id.* at 2414–15.

Defendants assert that there are two ways of proving a lack of price impact: (1) by showing that the alleged misrepresentations did not cause a stock price to increase (what Defendants refer to as "front-end price impact"), or (2) by showing that the alleged corrective disclosure did not cause the stock price to

decrease (what Defendants refer to as "back-end price impact"). Resp. 22, ECF No. 74 (citing *Halliburton II*, 134 S. Ct. at 2414). Here, Defendants attempt to show that the alleged misrepresentations did not cause Big Lots' stock price to increase in a statistically significant manner.[7]

Defendants are correct in arguing that Steinholt's regression analysis does not show a statistically significant price increase associated with any of the nine alleged misrepresentation dates. Steinholt Rpt. Ex. E, ECF No. 60-3. However, the Court does not agree with Defendants' reading of *Halliburton II* as to the manners in which they may show a lack of price impact or with the cases Defendants cite in support of their argument. Namely, to the extent Defendants attempt to distinguish between price impact and loss causation temporally—that price impact is the movement in a stock's price at the time a misrepresentation is made and loss causation is the drop in price after a corrective disclosure—the Court disagrees with that distinction.

Price impact is the consideration of "whether the alleged misrepresentations affected the market price in the first place." *Halliburton I*, 131 S. Ct. at 814 (citations to the docket omitted). The Court does not read *Halliburton I or II* as holding that the price of a stock must rise after a misrepresentation in order for the misrepresentation to affect the stock price.

[7] Defendants' expert, Dr. Paul Gompers ("Gompers"), did not provide any affirmative opinion of his own regarding price impact. Gompers Dep. 212:6–213:2, ECF No. 78-2. Rather, his opinion on price impact was solely that Steinholt's regression analysis does not prove that the misrepresentations caused price inflation.

Rather, the price maintenance theory—the theory that a misrepresentation can have a price impact not only by raising a stock's price but also by maintaining a stock's already artificially inflated price—is consistent with the Supreme Court's discussion of price impact. Accordingly, price impact is demonstrated either through evidence that a stock's price rose in a statistically significant manner after a misrepresentation or that it declined in a statistically significant manner after a corrective disclosure.[8] *See Halliburton II*, 134 S. Ct. at 2414 (a defendant can rebut the presumption of price impact with "evidence that the misrepresentation (or its correction) did not affect the market price of the defendant's stock").

Loss causation, on the other hand, is the showing "that the defendant's deceptive conduct caused [the plaintiff's] claimed economic loss." *Halliburton I*, 131 S. Ct. at 807. In other words, loss causation is the showing that the price impact was caused by "the correction to a prior misleading statement and that the subsequent loss could not otherwise be explained by some additional factors revealed then to the market." *Id.* at 812 (internal quotation marks and citations omitted).

[8] Indeed, Defendants' expert, Dr. Gompers, stated in his report that demonstrating that the alleged misstatements caused a positive and statistically significant price increase was only one "possible way for Mr. Steinholt to show that inflation was created . . . ." Gompers Rpt. ¶ 13, ECF No. 75-9. Dr. Gompers recognized that Steinholt actually invoked the price maintenance theory. *Id.*; Gompers Dep. 218:23–219:14, ECF No. 78-2.

Therefore, to successfully rebut the *Basic* presumption, a defendant cannot simply show that a price did not rise after a misrepresentation.

With respect to the price maintenance theory, Defendants do not contest that Steinholt's regression analysis shows a statistically significant price decrease associated with the corrective disclosure dates. Steinholt Rpt. ¶¶ 41, 44 (stating that decrease in Big Lots' stock price following the corrective disclosures on April 23, 2012, and August 23, 2012, was statistically significant at the 1% level); *Id.* at Ex. E, ECF No. 60-3. Moreover, Dr. Gompers testified that there are several types of analyses that could demonstrate price impact under the price maintenance theory and that Steinholt's analysis could not conclusively demonstrate whether there was price impact under that theory. Gompers Dep. 219: 16–222:7, ECF No. 78-2. Yet, Dr. Gompers failed to conduct such analyses to affirmatively determine whether there was price impact under the price maintenance theory.

Rather than proving that there was no price impact under the price maintenance theory, Defendants urge the Court to reject the price maintenance theory altogether. Defendants primarily cite *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 782 (8th Cir. 2016) for support. In that case, however, instead of putting the onus on the defendants to show a lack of price impact under the price maintenance theory, the Eighth Circuit first determined that the misrepresentations did not cause the stock's price to rise (which the court concluded was evidence of no price impact) and then put the burden on the

plaintiffs to show that the price maintenance theory rebutted that evidence of no price impact. *Id.* at 782–83. That analysis flips the burden onto plaintiffs to prove price impact under their advanced theory when the burden should rest on a defendant to prove lack of price impact in order to rebut *Basic's* presumption at this stage, *see Halliburton II*, 134 S. Ct. at 2417 (Ginsburg, Breyer, Sotomayor, JJ., concurring) ("[T]he Court recognizes that it is incumbent upon the defendant to show the absence of price impact.").

The other cases cited by Defendants are inapposite. For example, in *City of Sterling Heights*, 2015 WL 5097883 (D.N.J. Apr. 19, 2005), the defendants attempted to rebut the *Basic* presumption by arguing there was no evidence of loss causation, which the court held was a merits determination not applicable at the class certification stage. *Id.* at *11. Moreover, that court actually held that a lack of price movement following fourteen alleged misrepresentations did not defeat the presumption where those misrepresentations repeated misrepresentations that did increase the stock price, implicitly accepting the inflation-maintenance theory. *Id.* at 12 n.8 ("[I]t also does not necessarily follow from the mere absence of a statistically significant change in the stock price that there was no price impact. It is possible that those statements assisted in maintaining an inflated price for Prudential's stock—a possibility that Defendants do not rule out.") In *In re Moody's Corp. Securities Litigation*, the court found the defendants rebutted the presumption of reliance by showing *both* that the misrepresentations were not associated with a price increase *and* that there was

no corrective disclosure date associated with a price decline that could "prov[e] a link between the misrepresentation and the price for the class as Plaintiffs seek to define it." 274 F.R.D. 480, 493 (S.D.N.Y. 2011). That conclusion is consistent with this Court's analysis above.

It appears the United States Court of Appeals for the Sixth Circuit has not considered the price maintenance theory of price impact. However, the price maintenance theory has been accepted as cognizable by at least three circuits. *See In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 258 (2nd Cir. 2016) ("[I]t is hardly illogical or inconsistent with precedent to find that a statement may cause inflation not simply by *adding* it to a stock, but by maintaining it."); *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1314 (11th Cir. 2011) ("[C]onfirmatory information that wrongfully *prolongs* a period of inflation—even without increasing the *level* of inflation—may be actionable under the securities laws."); *Schleicher*, 618 F.3d at 683–84.

Moreover, at least one district court in this circuit has accepted the price maintenance theory. *See Burges v. BancorpSouth, Inc.*, 2016 U.S. Dist. LEXIS 56802, at *8–9 (M.D. Tenn. Apr. 28, 2016) ("*Halliburton* says only that defendants may present evidence that the misrepresentation did not in fact affect the stock price, not that the price impact is determined only at the time of the alleged misrepresentations."), *vacated on other grounds*, *In re BancorpSouth, Inc.*, 2016 U.S. App. LEXIS 16936 (6th Cir. 2016).

This Court agrees with the reasoning of those courts that have recognized the price maintenance theory of price impact. The court in *Hatamian v. Advanced Micro Devices, Inc.*, 2016 WL 1042502 (N.D. Cal. Mar. 16, 2016), aptly characterized and rejected Defendants' position when it said:

> Defendants essentially invite the Court to focus exclusively on price impact at the time of a misrepresentation, ignoring price impact at the time of a corrective disclosure. Price impact in securities fraud cases is not measured solely by price increase on the date of a misstatement; it can be quantified by decline in price when the truth is revealed. This is because lack of a statistically significant price increase does not necessarily equate to lack of price impact. As Professor Coffman explains, a misrepresentation may not cause a statistically significant change in price because misstatements are not made in a vacuum and other information can offset or confound the effects of a particular misrepresentation. It is also possible that "a misstatement could serve to maintain the stock price at an artificially inflated level without also causing the price to increase further. Thus, Defendants' evidence that there was no statistically significant price impact on certain misstatement dates cannot alone persuade where, as here, expert reports show statistically significant price impacts on each disclosure date."

See, 2016 WL 1042502, at *7 (citations omitted).

In sum, the Court rejects the notion that a defendant can rebut *Basic's* presumption of price impact solely by showing that there was no statistically significant price increase after a misrepresentation was made. Defendants failed to show that there was no statistically significant price impact following the corrective disclosures in this case. Accordingly, Defendants have failed to rebut the presumption of reliance, individual issues of reliance will not predominate over common issues, and the predominance requirement of Rule 23(b)(3) is satisfied.

b. Superiority

Finally, before certifying a class under Rule 23(b)(3), the Court must find that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). To make this decision, the Court considers: (1) the class members' interests in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already begun by or against class members; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the likely difficulties in managing a class action. *Id.*

Defendants do not contest that a class action is a superior method for adjudicating this case, and the Court finds this requirement satisfied. The Class Members have little interest in individually controlling separate actions as the amount of individual damages is likely to be small. "[S]mall awards weigh in favor of class suits." *Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich.*, 654 F.3d 618, 630 (6th Cir. 2011) (citing *Beattie v. Century Tel, Inc.*, 511 F.3d 554, 567 (6th Cir. 2007)). The Court is not aware of any litigation concerning this controversy that has already begun by or against the Class Members. Concentrating litigation of the claims in this forum is desirable as the Undersigned is also handling the corresponding shareholder derivative suit. Last, the difficulties in managing a class action do not outweigh the benefits of certifying a class in this case.

"It is well-recognized that class actions are a particularly appropriate means for resolving securities fraud actions," *Ross*, 257 F.R.D. at 455 (internal quotation marks and citations omitted), and, here, class action is clearly the superior method of adjudicating this case.

C. Motion to Appoint Class Counsel

"When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under [Federal Rule of Civil Procedure] 23(g)(1) and (4)." Fed. R. Civ. P. 23(g)(2). Rule 23(g)(1) requires the Court, in appointing class counsel, to consider: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A). Rule 23(g)(1) also lists other matters the Court may consider and actions the Court may take in appointing Class Counsel. Fed. R. Civ. P. 23(g)(1)(B)–(E). Rule 23(g)(4) requires Class Counsel to "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4).

In this case, Robbins Geller has done significant work in identifying and investigating the potential claims in the action, as evidenced by its filing as Lead Counsel of an eighty-page Amended Complaint, ECF No. 18, that partially survived Defendants' motion to dismiss, ECF No. 49. Counsel's experience in handling class actions was discussed previously by the Court in the Order

appointing Robbins Geller as Lead Counsel, ECF No. 17. To say the least, Robbins Geller has extensive experience in handling class actions. Counsel's Amended Complaint and briefing on both Plaintiffs' motion for class certification and Defendants' *Daubert* motion demonstrate its knowledge of the applicable law. The Court has no reason to believe Robbins Geller will be unable to commit the resources necessary to represent the Class or will fail to fairly and adequately represent the interests of the Class.

Accordingly, pursuant to Rule 23(g), the Court **APPOINTS** Robbins Geller as Class Counsel.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs have established the requirements for class certification under Rule 23(a) and 23(b)(3). Accordingly, Plaintiffs' motion for class certification is **GRANTED.** The Court **CERTIFIES** the following Class:

> All persons who purchased the common stock of Big Lots, Inc. between March 2, 2012 and August 23, 2012, and who were damaged thereby. Excluded from the Class are defendants, the officers and directors of the Company, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which defendants have or had a controlling interest.

Moreover, City of Pontiac and Local 237 are **APPOINTED** as Class Representatives, and Robbins Geller is **APPOINTED** as Class Counsel.

Within **TWENTY-ONE DAYS** of the date of entry of this Opinion and Order, the parties shall submit an agreed-upon form of notice, a joint proposal for

dissemination of the notice, and the timeline for opting out of the action. Plaintiffs must bear the costs of the notice, which shall include mailing by first-class mail.

Finally, counsel for both sides are **ADVISED** that citations in all further briefing must include a reference to the ECF entry where the exhibit can be found. Such reference shall appear in the citations throughout the brief, not simply in a table at the front of the brief.

The Court wasted valuable time searching for the exhibits referenced in the briefing during the course of ruling on these motions. For example, the Court had to flip between the substantive brief and the "citation conventions" or "appendix of defined terms," at the beginning of each brief, where they existed, every time an exhibit was cited in the more than 230 pages of briefing in connection with these motions in order to locate the various exhibits. Moreover, defense counsel's "citation conventions" itself described certain exhibits merely in reference to other exhibits. *See, e.g.*, Resp. vii, ECF No. 74 (describing the Benton Deposition as "Exhibit H to the Herman Declaration" without any reference to where the Herman Declaration itself can be found on the docket and without any recognition that the exhibits to such declaration are listed on the docket as exhibits 1-11 rather than alphabetically).

IT IS SO ORDERED.

Michael H. Watson

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

EXHIBIT B

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.

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[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. Jude 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