UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: DAVOL, INC./C.R. BARD, INC., POLYPROPYLENE HERNIA MESH PRODUCTS LIABILITY LITIGATION

Case No. 2:18-md-2846

JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

This document relates to:
Stinson v. Davol, Inc., et al.
Case No. 2:18-cv-01022

EVIDENTIARY MOTIONS OPINION & ORDER No. 31

Before the Court is Defendants' Motion to Exclude the Opinions and Testimony of Plaintiff's Expert Robert W. Johnson. (ECF No. 94.) For the reasons that follow, Defendants' motion is **GRANTED IN PART** and **DENIED IN PART**.

I. Background[1]

Plaintiff's case is the third bellwether trial selected from thousands of cases in this multidistrict litigation ("MDL") against Defendants. The Judicial Panel on Multidistrict Litigation described the cases in this MDL as "shar[ing] common factual questions arising out of allegations that defects in defendants' polypropylene hernia mesh products can lead to complications when implanted in patients, including adhesions, damage to organs, inflammatory and allergic responses, foreign body rejection, migration of the mesh, and infections." (No. 2:18-md-02846, ECF No. 1 at PageID #1–2.)

The relevant facts here are that in 2015 Plaintiff underwent a right inguinal hernia repair

[1] For a more complete factual background, the reader is directed to the Court's summary judgment opinion and order in this case. (Dispositive Motions Order ("DMO") No. 7, ECF No. 225.) All docket citations are to the *Stinson* case, 2:18-cv-1022, unless otherwise noted.

with an Extra-Large PerFix Plug mesh, a product manufactured by Defendants. In 2017, Plaintiff underwent exploratory surgery to determine if he had a recurrent hernia or nerve entrapment because of chronic pain in his right groin area. The explanting surgeon, Dr. Radke, noted extensive scarring and found "a large ball approximately 2.5 cm in diameter of rolled up mesh next to the pubic tubercle." (ECF No. 89-22 at PageID #1134.) Dr. Radke removed the mesh, which he described as "slow going and extremely difficult" because of the significant scarring. (*Id.*) Dr. Radke then repaired the hernia with another of Defendants' products, Bard Marlex Mesh. (*Id.*) Even after the explant surgery, Plaintiff claims to have continuing chronic pain and other complications.

The crux of Plaintiff's claims is that Defendants knew of certain risks presented by the PerFix Plug device but marketed and sold the device despite these risks and without appropriate warnings, causing Plaintiff's injuries. Plaintiff alleges that the polypropylene in the PerFix Plug degrades after implantation, which enhances the chronic inflammatory response in the body. (ECF No. 124 at PageID #4826.) Plaintiff also claims that the inflammation and resulting fibrosis are exacerbated by the PerFix Plug's shape, weight, and pore size. Plaintiff also claims that the PerFix Plug is susceptible to migration and has a high incidence of chronic pain. (*Id.*) According to Plaintiff, Defendants downplayed the rate and severity of complications caused by the PerFix Plug, even when faced with reports of negative outcomes, which created an unreasonable risk of significant and permanent harm to patients. (*Id.*)

Plaintiff brings this action to recover for injuries sustained as a result of the implantation of the PerFix Plug, alleging that Defendants knew of the risks presented by the device but marketed and sold it despite these risks and without appropriate warnings. After summary judgment, the following claims remain for trial: design defect, failure to warn, negligence, breach of express

warranty, and breach of implied warranty; the Court has reserved judgment on Plaintiff's claims for manufacturing defect, certain damages, and claims related to his current Bard Mesh implant.

II. Legal Standard

Evidentiary rulings are made subject to the district court's sound discretion, *Frye v. CSX Trans., Inc.*, 933 F.3d 591, 598 (6th Cir. 2019), including the admissibility of expert testimony, *United States v. Dunnican*, 961 F.3d 859, 875 (6th Cir. 2020). This role, however, is not intended to supplant the adversary system or the role of the jury. *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 531–32 (6th Cir. 2008). Arguments regarding the weight to be given to any testimony or opinions of an expert witness are properly left to the jury. *Id.* "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993).

The burden is on the party offering the expert opinions and testimony to demonstrate "by a preponderance of proof" that the expert evidence is admissible. *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 251 (6th Cir. 2001). Any doubts regarding the admissibility of an expert's testimony should be resolved in favor of admissibility. *See Jahn v. Equine Servs., PSC*, 233 F.3d 382, 388 (6th Cir. 2000) ("The Court [in *Daubert*] explained that Rule 702 displays a 'liberal thrust' with the 'general approach of relaxing the traditional barriers to "opinion" testimony.'" (quoting *Daubert*, 509 U.S. at 588)); Fed. R. Evid. 702 advisory committee's note to 2000 amendment ("A review of the case law after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.").

The district court's role in assessing expert testimony is a "gatekeeping" one, ensuring that only admissible expert testimony is submitted to the jury; its role is not to weigh the expert

testimony or determine its truth. *United States v. Gissantaner*, 990 F.3d 457, 463 (6th Cir. 2021) (quoting *Daubert*, 509 U.S. at 597). Expert testimony, *i.e.*, testimony given by "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education," is admissible 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. In this circuit, "[t]he Rule 702 analysis proceeds in three stages." *United States v. Rios*, 830 F.3d 403, 413 (6th Cir. 2016). "First, the witness must be qualified by 'knowledge, skill, experience, training, or education.' Second, the testimony must be relevant, meaning that it 'will assist the trier of fact to understand the evidence or to determine a fact in issue.' Third, the testimony must be reliable." *In re Scrap Metal Antitrust Litig.*, 527 F.3d at 529 (quoting Fed. R. Evid. 702.).

First, an expert witness must be qualified by "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. "[T]he issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." *Madej v. Maiden*, 951 F.3d 364, 370 (6th Cir. 2020) (quoting *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994)). "[T]he only thing a court should be concerned with in determining the qualifications of an expert is whether the expert's knowledge of the subject matter is such that his opinion will likely assist the trier of fact in arriving at the truth. The weight of the expert's testimony must be for the trier of fact." *Mannino v. Int'l Mfg. Co.*, 650 F.2d 846, 851 (6th Cir. 1981). A party's expert need only meet the "'minimal qualifications' requirement—not one who could teach a graduate seminar on the subject." *Burgett v. Troy-Bilt LLC*, 579 F. App'x 372, 377 (6th Cir. 2014) (quoting *Mannino*, 650 F.2d at 851); *see*

also Dilts v. United Grp. Servs., LLC, 500 F. App'x 440, 446 (6th Cir. 2012) ("An expert's lack of experience in a particular subject matter does not render him unqualified so long as his general knowledge in the field can assist the trier of fact.").

Second, expert testimony must be relevant. Expert testimony is relevant if it will "help the trier of fact to understand the evidence or to determine a fact in issue." *Bradley v. Ameristep, Inc.*, 800 F.3d 205, 208 (6th Cir. 2015) (quoting *United States v. Freeman*, 730 F.3d 590, 599–600 (6th Cir. 2013)); Fed. R. Evid. 702(a). "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert*, 509 U.S. at 591 (quoting 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[02], p. 702–18 (1988)). "This requirement has been interpreted to mean that scientific testimony must 'fit' the facts of the case, that is, 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). This is a case specific inquiry. *Madej*, 951 F.3d at 370 ("Whether an opinion 'relates to an issue in the case' or helps a jury answer a 'specific question' depends on the claims before the court.").

Third, expert testimony must be reliable. Rule 702 provides the following general standards to assess reliability: whether "the testimony is based on sufficient facts or data," whether "the testimony is the product of reliable principles and methods," and whether "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(b)–(d). To evaluate reliability of principles and methods, courts consider "'testing, peer review, publication, error rates, the existence and maintenance of standards controlling the technique's operation, and general acceptance in the relevant scientific community,'" though these "factors 'are not dispositive in every case' and should be applied only 'where they are reasonable measures of the

reliability of expert testimony.'" *In re Scrap Metal*, 527 F.3d at 529 (citations omitted); *see Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999) (describing these factors as "flexible" (quoting *Daubert*, 509 U.S. at 594)). The objective of the reliability requirement is to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152.

III. Analysis

Defendants challenge the opinions of Plaintiff's expert Robert W. Johnson. According to Defendants, Mr. Johnson's opinions regarding Defendants' financial condition and ability to pay a punitive damages award are irrelevant, unreliable, developed solely for the purposes of litigation, and are beyond his qualifications. Therefore, Defendants argue, Mr. Johnson's opinions should be excluded.

Defendants also moved to exclude Mr. Johnson's opinions in the first two bellwether cases, *Johns v. C.R. Bard, Inc., et al.*, Case No. 18-cv-1509, and *Milanesi, et al. v. C.R. Bard, Inc., et al.*, Case No. 18-cv-1320. In *Johns*, the Court excluded as irrelevant Mr. Johnson's opinions because they pertained to the financial condition of Becton Dickinson, Defendants' parent company, which was not a party to that action. (Case No. 18-cv-1509, ECF No. 460, Evidentiary Motions Order ("EMO") No. 12.) In *Milanesi*, the Court again excluded Mr. Johnson's opinions regarding the financial condition of Becton Dickinson. (Case No. 18-cv-1320, ECF No. 220, EMO No. 20 at PageID #14999–1500.) Shortly before trial in *Milanesi*, the plaintiffs sought to supplement Mr. Johnson's previous report to add information regarding Defendants' financial condition, rather than Becton Dickinson's. (*See* Case No. 18-cv-1320, ECF No. 340.) Defendants objected to the proposed supplemental report, arguing that it was not a supplement but instead was a set of entirely

new undisclosed opinions. (Case No. 18-cv-1320, ECF No. 343.) The Court did not rule on this motion because the jury did not find that Defendants were guilty of intentional misconduct or gross negligence (Case No. 18-cv-1320, ECF No. 380 at PageID #19083), and the trial therefore did not proceed to a punitive damages phase.

A. Relevance

1. Net Worth

Plaintiff seeks to offer opinions from Mr. Johnson regarding Defendants' financial condition and ability to pay an award of punitive damages should trial proceed to a punitive damages phase. Defendants first argue that Mr. Johnson's opinions are irrelevant because there is no disagreement as to Defendants' net worth for the relevant years. (ECF No. 94 at PageID #2288.) Defendants also claim that many of the fifteen metrics used by Mr. Johnson to inform his opinions are "irrelevant or only marginally relevant" to Defendants' financial condition. (*Id.*) For example, they claim that executive compensation, capital expenditures, and market capitalization have nothing to do with Defendants' ability to pay punitive damages. (*Id.*) According to Defendants their net worth, and not the metrics used by Mr. Johnson, is what is relevant to a determination of punitive damages. (*Id.* at PageID #2292.)

Plaintiff responds that net worth is not the sole metric that should be considered by the jury, and that Maine law permits the jury to consider "a wider range of factors when evaluating a defendant's ability to pay a punitive damage award." (ECF No. 118 at PageID #4289.) According to Plaintiff, limiting the considerations to net worth would deprive the jury of context, and the fifteen factors used by Mr. Johnson are necessary for Plaintiff "to put on enough evidence for the jury to (with expert help) synthesize all relevant, available indicators of [Defendants'] financial health." (*Id.* at PageID #4290–91.) He addresses the three factors mentioned by Defendants in

their motion: capital expenditures, market capitalization, and executive compensation. According to Plaintiff, these factors are necessary to show a company's disposable income and what it feels it can afford to spend without undue hardship. (*Id.* at PageID #4291.) Plaintiff also relies on the difference between Bard's net worth and the price for which it was acquired by Becton Dickinson. At the time of the sale, Bard calculated its net worth at $1.7 billion, and it was acquired by Becton Dickinson for $24 billion. (ECF No. 118 at PageID #4291.) The $1.7 billion net worth figure "excluded the values of [Bard's] name recognition, business reputation, cultivated markets, and established relationships with customers, vendors, and employees," making Defendants' insistence that the jury only consider net worth unreasonable. (*Id.* at PageID #4292.) Plaintiff also argues that Defendants confuse "prejudice" with "persuasiveness." He claims that the "prejudicial effects require at least *some* explanation on the part of Defendants beyond a bare cry that the jury will punish them merely for being wealthy," and the bifurcation of the liability and punitive damages phases mitigate any possible prejudice. (*Id.* at PageID #4293.)

Defendants' argument that net worth is the only relevant consideration in assessing their financial condition is not persuasive. They cite to no Maine law to support the contention that net worth should be the only information presented to the jury. The context provided by Mr. Johnson will help the jury to understand Defendants' financial condition. If Defendants believe the factors other than net worth are not indicative of their financial condition, they may present that argument on cross examination. However, the Court does agree, as it did in *In re E.I. Du Pont de Nemours & Co.*, that executive compensation is not relevant and therefore not admissible. *See In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, No. CV 2:13-MD-2433, 2015 WL 5882084, at *2 (S.D. Ohio Oct. 5, 2015) ("Additionally, the Court agrees with DuPont that executive compensation is not relevant to show defendants' ability to pay a punitive damages award.")

(internal quotation omitted).

2. Historical Financial Data

Defendants next argue that Mr. Johnson's reliance on historical financial data is not appropriate. They point out that in *Johns* both parties agreed that the jury should only consider Defendants' financial information for two years prior to the Becton Dickinson-Bard merger (Case No. 18-cv-1509, ECF No. 570 at PageID #30639), but Mr. Johnson's report covers data from 2013 through 2017. (ECF No. 94 at PageID #2289.) Defendants also point to another case in which Mr. Johnson's opinions regarding historical financial data was rejected, and his testimony was limited to information about the defendants' current financial condition. *See Pooshs v. Phillip Morris USA, Inc.*, 287 F.R.D. 543, 549–50 (N.D. Cal. 2012).

Plaintiff responds that five years is an appropriate period of time to show the jury the "whole story" of Defendants' financial status, and claims that Defendants agreed to a five-year period via email in *Milanesi*. (ECF No. 118 at PageID #4293.) However, Defendants argue that Plaintiffs misconstrue the agreement. In the stipulation, the parties agree to a timeframe of 2013 to 2017 for financial discovery. (ECF No. 118-1 at PageID #4307.) The parties agreed that the information could be used in a punitive damages phase of any bellwether trial; however, the parties also agreed that any such use was "subject to objection as to relevancy, including without limitation *which years within this timeframe are appropriate to be used*." (*Id.* (emphasis added).) Therefore, Defendants did not agree without qualification that financial information from 2013 through 2017 would be admissible for the purposes of punitive damages.

Plaintiff describes 2015 and 2016 as "cherry-picked" and Defendants' "favorite two years." (ECF No. 118 at PageID #4294.) However, it was Plaintiff's counsel who in *Johns* requested the use of those two years, stating that "we should deal with the two most recent years before the

Becton Dickinson purchase because that would be the closest in time to now," and "I would suggest two years, 24 months right before the closing." (Case No. 18-cv-1509, ECF No. 570 at PageID #30639.) Additionally, Plaintiff points to no authority to support his argument that a five year time frame is appropriate.

This Court has previously limited Mr. Johnson's opinions regarding a defendant's financial condition to "the last two years." *See In re E. I. du Pont de Nemours*, 2015 WL 5882084 at *2 (citing *In re Heparin Prod. Liab. Litig.*, 273 F.R.D. 399, 409 (N.D. Ohio 2011)). The Court finds that the same limitation is appropriate here, and that Mr. Johnson may only use financial data from the two years prior to the Becton Dickinson-Bard merger.

B. Reliability

According to Defendants, Mr. Johnson "simply regurgitates financial numbers that are publicly available," and this recitation will not assist the jury. (ECF No. 94 at PageID #2291.) However, the fact that his opinions are based on publicly available financial data does not mean that they will not assist the jury. Rather than reciting facts and figures, Mr. Johnson "will be able to summarize vast amounts of financial data and assist the jury to understand what that data means." (ECF No. 118 at PageID #4295.) As this Court held in *In re E.I. Du Pont de Nemours & Co.*:

> In the Court's view, there are a limited number of ways to explore DuPont's financial condition. There are the SEC filings and proxy statements, which are admissible as admissions and excluded from the hearsay rule. These filings could be explained by counsel during closing arguments. However, that avenue would leave no room for clarifying questions and is a poor way to provide helpful information to the jury. DuPont can then explore the perceived weaknesses in Mr. Johnson's analysis and conclusions, as well as his work as an expert witness. These issues go to the weight of the evidence, not its admissibility.

In re E. I. Du Pont De Nemours & Co. C-8 Pers. Inj. Litig., 345 F. Supp. 3d 920, 930 (S.D. Ohio 2015). As another court noted regarding Mr. Johnson's testimony, "the jury requires someone in

possession of the necessary knowledge and expertise to explain the relevant summaries and charts." *In re Yasmin & YAZ (Drospirenone) Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 3:09-MD-02100-DRH, 2011 WL 6732819, at *7 (S.D. Ill. Dec. 16, 2011).

Additionally, Defendants argue that because Mr. Johnson's opinions are not tethered to "any objective or recognized test," they cannot satisfy the requirements of Rule 702. (ECF No. 94 at PageID #2293.) Defendants attempt to tie the untested nature of his methodology to the fact that he has testified solely on behalf of plaintiffs and has never testified that a company was not financially sound. (*Id.* at PageID #2293–94.) They also highlight the fact that Mr. Johnson's methodology has not been peer reviewed and is not generally accepted among professional economists. (*Id.* at PageID #2294–96.)

Plaintiff responds that Mr. Johnson's methodology is sound "because he uses uncontested, publicly-available figures," and that Defendants' reliability arguments go to the weight of Mr. Johnson's testimony, not its admissibility. (ECF No. 118 at PageID #4297–98.) He also dismisses Defendants' arguments that lack of testing or peer review render Mr. Johnson's opinions unreliable. According to Plaintiff, "[p]eer review of mathematical analysis does not make the analysis any more or less valid." (*Id.* at PageID #4298.) *Daubert* provides that peer review is "a relevant, but not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised." *Daubert*, 509 U.S. at 579. Lack of peer review on its own is not enough to render Mr. Johnson's methodology unreliable. *See Daubert*, 509 U.S. at 594, 113 S.Ct. 2786 (any doubts should be resolved in favor of admissibility). The same applies to Defendants' arguments regarding rate of error and general acceptance. The Court "*may* consider" factors including a known or potential rate of error or general acceptance, but the "emphasis on the word 'may' thus reflects *Daubert's* description of

the Rule 702 inquiry as 'a flexible one,'" and "*Daubert* makes clear that the factors it mentions do *not* constitute a 'definitive checklist or test.'" *Kumho Tire*, 526 U.S. at 149–50 (emphasis in original) (internal citations omitted). Plaintiff does not dispute that Mr. Johnson's methodology is not generally accepted. However, "a reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." *Daubert*, 509 U.S. at 594 (internal quotation omitted).

C. Prepared Solely for the Purposes of Litigation

Defendants next argue that Mr. Johnson's opinions should be excluded because they were prepared solely for the purpose of litigation. (ECF No. 94 at PageID #2296–97.) However, as this Court has previously noted, "expert testimony is not typically excluded as unreliable expert-for-hire opinions if 'a proposed expert's testimony flows naturally from his own current or prior research (or field work),' which is 'in line with the notion that an expert who testifies based on research he has conducted independent of litigation provides important, objective proof that the research comports with the dictates of good science.'" (Case No. 18-cv-1320, ECF No. 273, EMO No. 23 at PageID #16799.) As Plaintiff points out, Mr. Johnson has become "intimately familiar with the financial ongoings of large companies," and "[h]is '45-year work history includes years as a securities analyst, a director of marketing, a director of corporate acquisition policy, an assistant to a comptroller, a senior economic consultant, and the president of two companies specializing in providing expert witness testimony regarding damages.'" (ECF No. 118 at PageID #4300 (quoting *Gerald v. R.J. Reynolds Tobacco Co.*, No. ST-10-CV-631, 2018 WL 4062154, at *7 (V.I. Super. Ct. June 12, 2018)).) This is enough to demonstrate that Mr. Johnson is not the type of patent expert for hire that would render his opinions unreliable.

D. Qualifications

Defendants argue that Mr. Johnson is not qualified to opine as to Defendants' ability to pay punitive damages, and adopt the arguments from their prior filings in *Johns* and *Milanesi*. (ECF No. 94 at PageID #2297–98.) In 1970, Mr. Johnson obtained his B.A. in Business Administration with a major in Economics from Baruch College, and in 1973 he obtained his M.B.A. from Stanford with a major in Finance and Investments. (ECF No. 94-1 at PageID #2322.) Between 1972 and 1981, he worked for various companies in several positions, such as a securities analyst, portfolio manager, and a vice president of marketing. (*Id.* at PageID #2322–23.) Between 1981 and 1988 he worked at firms which performed economic analysis of litigation damages, and in 1988 he started his own firm analyzing damages, where he has worked since. (*Id.* at PageID #2322.) He has qualified as an expert witness at the state and federal level in over 40 states. (*Id.*) He has also authored several publications, mostly on structured settlements, and is a member of the American Economic Association, the Western Economic Association, and a founding member of the National Association of Forensic Economists. (*Id.* at PageID #2325, 2323.) Reviewing his background as a whole, the Court finds that Mr. Johnson is qualified by "knowledge, skill, experience, training, or education" sufficient to qualify him as an expert on Defendants' financial condition. Fed. R. Evid. 702.

IV. Conclusion

For the reasons set forth above, Defendants' Motion to Exclude the Opinions and Testimony of Mr. Johnson (ECF No. 94) is **GRANTED IN PART** and **DENIED IN PART**.

IT IS SO ORDERED.

6/6/2023
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE