

No. 23-3162

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GWYNETH GILBERT,
STEPHANIE ANDREWS, et al.
Plaintiffs - Appellants,

v.

LANDS' END, INC., and
LANDS' END OUTFITTERS, INC.,
Defendants - Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin
Case nos. 3:19-cv-823 & 3:19-cv-1066
The Honorable Judge James D. Peterson

PRINCIPAL BRIEF AND REQUIRED SHORT APPENDIX OF
THE ANDREWS APPELLANTS

TERRELL HOGAN YEGELWEL, P.A.

Wayne Hogan

hogan@terrellhogan.com

Bruce A. Maxwell

maxwell@terrellhogan.com

233 East Bay Street, 8th Floor

Jacksonville, Florida 32202

Telephone: (904) 632-2424

URBAN & TAYLOR S.C.

Jay A. Urban

jurban@wisconsininjury.com

4701 N. Port Washington Road

Milwaukee, WI 53212

Telephone: (414) 906-5333

CREED & GOWDY, P.A.

Bryan S. Gowdy (*Counsel of Record*)

bgowdy@appellate-firm.com

filings@appellate-firm.com

Dimitrios A. Peteves

dpeteves@appellate-firm.com

865 May Street

Jacksonville, Florida 32204

Telephone: (904) 350-0075

Counsel for the Andrews Appellants

DISCLOSURE STATEMENT

This brief is filed on behalf of the Andrews Plaintiffs / Appellants.

The following is a list of each Andrews Plaintiff / Appellant:

1	Abamonte, Joseph	38	Banks, Dana
2	Abate, Julie	39	Barauskas, Christina
3	Abbey, Kimberly	40	Baretta, Debra
4	Adams, Alina	41	Barnes, Denise A.
5	Adams, Kathy	42	Barnett (Martin), Lynda
6	Adams, Korey	43	Barrera, Kimberly
7	Adams-Conner, Carol	44	Barthelemy, Angela
8	Ailor, Maria Esther	45	Bazanstone, Javier
9	Alfaro, Erica	46	Beckstrand, John
10	Allen, Cynthia	47	Behrends, Cori
11	Allen, Alexandria	48	Bell, Linda
12	Allison, Sharon	49	Bell, Kelly
13	Alminar, Eeva	50	Benatti, Maura
14	Alvarado, Ashley	51	Berg, Cindy
15	Alves, Barbara	52	Berzel, Cynthia
16	An, Kyoungmi	53	Besner, Michael
17	Anderson, Jami Lyn	54	Betson, Nicole
18	Anderson, Rika	55	Bever, Jean
19	Anderson, Marcella	56	Bez, Kathlyn
20	Anderson, Talja	57	Bhardwaj, Mona
21	Anderson, Tracey	58	Biasucci, Polly
22	Andrews, Stephanie	59	Biggers, Sabrina
23	Andrews-Winey, Victoria	60	Bigler, Sacha
24	Annmer, Carlis	61	Bishop, Sharon
25	Anthony, Patricia	62	Black, Janet
26	Antonelli, Annmarie	63	Blake-Wilks, Julia
27	Arana, Hilary	64	Blevins, James
28	Arch-Hayosteck, Rochelle	65	Blitz, Frances
29	Arroyo-Roppo, Maia	66	Bodene, Kathleen
30	Artis, Nakisha	67	Bodznick, Christy
31	Atkins, Stacey	68	Boerma, Mary
32	Audsley, Bonnie	69	Bolduc, Amanda
33	Augustin, Lyn	70	Bolla, Lorraine
34	Austin, Janelle	71	Bowden, Marilyn
35	Aviles, Nina	72	Bowers, Karen
36	Baird, Lawrence	73	Bowman, Erika
37	Baldoz, Jenni	74	Brabeck, Christine

75	Bradley, Jaclyn	119	Conway, Diane
76	Brand, Madolyn	120	Cooper, Kathleen
77	Breedlove, Kathleen	121	Corona, Gerallee
78	Brennan, Eileen	122	Corsello, Denise
79	Brenner, Cherie	123	Cortis, Michael
80	Brewer, Monica	124	Cotnoir, Kathleen
81	Britt, Kate	125	Couvillion, Susan
82	Brown, Allison	126	Cowling, Marsha
83	Brown, Elizabeth	127	Cox, Dredrick
84	Bruce, Jennifer	128	Craps, Bryce
85	Bryant-Bunus, Joyce	129	Creech, Linda
86	Bryson, Denise	130	Crowell, Angela
87	Bucci, Jacqueline Jacki	131	Cuchiara, Carmen
88	Bundy, Jenny	132	Culberson, Travis
89	Buono, Kayla	133	Davis, Jo-Lynne
90	Burgueno, Pascale	134	Davis, Toynal
91	Burrey, Erin	135	Davis, Elaine
92	Butler, Faye	136	Davis, Sonja
93	Cain, Cha	137	Dawkins-Hendricks, Tia
94	Caldarella, Antonietta	138	Dealy, Anne
95	Calvao, Priscilla	139	Dean, Cana D'nan
96	Calvert, Amanda	140	Deangelis, Tamara
97	Campbell, Kathy	141	Dela, Alexandra
98	Caner, Maryellen	142	Delapenha, Jennifer
99	Carns, Laurette	143	Del-Banio, Diane
100	Carpentieri, Janet	144	Demaggio, Veronica
101	Carter, Deborah	145	Dennis, Kay
102	Caudill, Sherry	146	Devega, Herny
103	Challis, Tiffany	147	Deveny, Joann
104	Chavez, Denise	148	Diamond, Nancy
105	Cheung, Pauline	149	Dibella, Kayla
106	Chiaccio, Joseph	150	Dieu, Nagelah
107	Christensen-Dahl, Deborah	151	Dinges, Linda
108	Clark, Breonte	152	Dingle, Matthew Sean
109	Clary, Janis	153	Dirienzo, Joanna
110	Cleveland, Erin	154	Disangro, Michelle
111	Cocherell, Ronda	155	Disantis, Karen
112	Cochrane, Gigi	156	Dixon, Nina
113	Cole, Emma	157	Doherty, Samantha
114	Coleman, Autumn	158	Dolezal, Margaret
115	Coleman (Troutman), Andrea	159	Dorman, Nancy
116	Collins, Jacquelyn	160	Doss, Michele
117	Comerford, Katherine	161	Drewe, Laura
118	Constant, Donna	162	Dross, De Vere Dreger Von

163	Duhamel, Louise	207	Gold, John
164	Dunn, Molly	208	Goleski, Linda
165	Duranthon, Harriett	209	Gondek, Ma1yjo
166	Durnshia, Cynthia	210	Gonzalez, Amber
167	Dyssegard, Jan	211	Grady, Trena
168	Edwards, Johnny	212	Grant, Jamie
169	Edwards, Margaret	213	Granvold, Chandra
170	Egland, Brent	214	Gray, Shannon
171	Ellis, Gina	215	Gray, Kathleen
172	Erick, Cheryle	216	Green, Jennifer
173	Espinosa, Jessica	217	Greer, Misha
174	Etherton, Junko	218	Gregory, Reiauh
175	Fan-ell, Deborah	219	Griffin, Kelci
176	Faner, Lawrence	220	Griffith, Carmen
177	Fanis, Eva	221	Groulx, Nevine
178	Faulk, Leslie	222	Guinn, Gregory
179	Fazio, Nicole	223	Guna, Stephanie
180	Fiedler, Melissa	224	Hadler, Debra
181	Fine, Jamie	225	Haeffner, Christa
182	Fitch, Kimberly	226	Hair, Molly
183	Fitzgerald, Alicia	227	Hale, Dorothy
184	Fletcher, Kathy	228	Hallagan, Karen
185	Flynn, Kathryn	229	Hall-Shipman, Linda
186	Foote, Ashleigh	230	Hammer, Kristine
187	Forthofer, Charles	231	Handke, Claudette
188	Fortuna, Lisa	232	Hannigan, Victoria
189	Franzen, Judith	233	Hansen, Barbara
190	Fuentes, Belissa	234	Hansen, Darla
191	Fuji, Myra	235	Hansen, Teresa
192	Fultz, Twila	236	Hansen, Regina
193	Gaddy, Deborah	237	Harding, Samantha
194	Gaither, Jada	238	Harminder, Samra
195	GaiTison, Bailey	239	Harris, Kelli
196	Garcia, Norma	240	Harris, Kelly
197	Garcia, Denise	241	Hayden Bell, Lewis
198	Garcia, Prima	242	Hayes, Spencer
199	Garrett, Judy	243	Haynes, Pam
200	Genova, Karen	244	Hayward, Cathie
201	Gentry, Michele	245	Heffelfinger, Phyllis
202	Gerard, Sarah	246	Heist, Kelli
203	Germann, Jane	247	Heist, Nelly
204	Gest, Amy	248	Held-Szlasa, Cindy
205	Glover, Blair	249	Henchal, Shawn
206	Godbolt, Mari	250	Henley, Bronwyn

251 Henning, Laura
252 Hensley, Susan
253 Herny, Tanisha
254 Herrera, William
255 Hershberger, Laura
256 Hobson, Tori
257 Hodge, Katharine
258 Hodges, Cheri
259 Hogan, Lisa
260 Hollingsworth, Judy
261 Hotvedt, Heather
262 Housholder, Kari
263 Howard, Lindsey
264 Howell, Jeannie
265 Hu Tzu, Ming
266 Huismann, Julie
267 Hunt, Stephanie
268 Hutson, Kendra
269 Hyman, Angela
270 Isidore, Ursula
271 Jackson, Kenneth
272 Jackson, Paula
273 Jackson, Laura
274 Jagielo, Kaitlyn
275 Jay, Karen
276 Johnke-Henzler, Kari
277 Johnsen, Shalmon
278 Johnson, Benita
279 Johnson, Beth
280 Jones, Tamika
281 Jones, Tonise
282 Jones, De Jur Veronique
283 Joyce, Christopher
284 Kaminski, Kenneth
285 Kane, Jackie
286 Karr, Kasandra
287 Karrick, Amanda
288 Kaupiko, Ruta
289 Kearse, Marie
290 Keaton, Erika
291 Kelly, Sondra
292 Kem, Brenda
293 Kemmer, Dianne
294 Kessler-Carrington, Heidi

295 Kha, Cindy
296 Kidd, Teni
297 Kim, Jennifer
298 Kirkland, Judie
299 Kirslenor, George
300 Kitts, Leah
301 Knapp, Alan
302 Koopmeiners, Wendy
303 Kostora, Stephen
304 Kovary, Kate
305 Kowalczyk, Kristen
306 Kramer, Ellen
307 Kretchman, Suprena
308 Kruppa, Jill
309 Kruse, Keny
310 Kuba, Tsipora
311 Kubal, Corinne
312 Kuhn, Deborah
313 Labbe, Renee
314 Labow, Joan
315 Lachaussee', Milissa
316 Lackten, Laura
317 Lacorte, Vernon
318 Lamkins, Lisa
319 Larsen, Marguerite
320 Larson, Lisa
321 Laygo, Maria
322 Lazard, Sylvia
323 Lazenby, Jonathan
324 Leal, Adena
325 Lehman, Karen
326 Lelvis, Eva
327 Lemmens, Sheila
328 Leonardo, Elizabeth
329 Lepor-Friberg, Beth
330 Leslie, Pamela
331 LeSueur, Gena
332 Liberatore, Ann Marie
333 Lindseth, Geraldine
334 Lizotte, Carissa
335 Lockhart, Toni
336 Locksley, Kimberly
337 Lovelace, Tonya
338 Love-Linn, Dana

339	Lunde, Christy	382	Mizrahi, Jessica
340	Lundstrom, Diane	383	Mogan, Richard
341	Maddick, Kristen	384	Molina, Leyda
342	Maitin, Susan	385	Monroe, Gary
343	Maldonado, Jose	386	Montgomery-Brock, Diana
344	Manalo, Rhea	387	Moore, Sharon
345	Marchildon, Janine	388	Moore, Bromley
346	Marsh, Deborah	389	Morgan, Daisy
347	Martin, Sarah	390	Morgan (Thomas), Vonda
348	Martin-Botha, Gislaine	391	Morrill-Furman, Melissa
349	Martiny, Nadim	392	Morris, Venetia
350	Marty, Deb	393	Morrison, Michelle
351	Marzouq, Eman	394	Morse, Patrick
352	Marzullo, Elizabeth	395	Motor, Melinda
353	Mason, Hasan	396	Mueller, Ann
354	Mathews, Michael	397	Mughrabi, Wesam
355	Mathieu, Sarah	398	Muhammad, Adilah
356	Mavrogiorgos-Spencer, Demitrios	399	Mulligan, Rebecca
357	Maxwell, Jamere	400	Munzenmayer, Rosemary
358	McBride, Tangee	401	Muro, Bonnie
359	McCarron, Michelle	402	Murphree, Janet
360	McDonald, Catherine	403	Murphy, Deborah
361	McDonald, Margaret	404	Murray, Wanda
362	McDonnell, Dawn	405	Nadeau, Ayten
363	McEntire, ShayLyn	406	Nakagami, Yumiko
364	McGarrity, Victoria	407	Nardo, Kimloan
365	Mcintosh, Sharon	408	Nasman, Kathryn
366	McIntosh, Kaitlyn	409	Neal, Britteny
367	McKay, Cheryl	410	Neeb, Jenee
368	McKenzie, Elizabeth	411	Nelson, Janet
369	McLaughlin, Victoria	412	Nelson, Cheryl
370	McNeil, Stacey	413	Nelson, Kathleen
371	McNulty, Deborah	414	Neuman, Staci
372	McTigue, George	415	Newland, Susan
373	Meade, Carmen	416	Nichelson, Deanne
374	Meadows, Kimberly	417	Noah, Charlene
375	Menda, Mae Naomi	418	Nordyke, Beth
376	Meyer, Wallie Maria	419	Noreen, Michele
377	Miller, Lynn	420	Nugent, Yvette
378	Miller, Lisa	421	Odafe, Hannah
379	Miller, Margaret	422	O'Donnell, Siobhan
380	Milton, Joan Tonney	423	Okedeyi, Muhammed
381	Misurelli, Nicole	424	Olson, Kristina
		425	Ondriezek, Kody

426	O'Neale, Benda	470	Rezutko, Donna
427	Orgeron, Evelyn	471	Rhynes, Stephanie
428	Owens, Penny	472	Rice, Christina
429	Pace, Cintia	473	Richa, Kimberly
430	Padau, Mary	474	Richardson, Leicha
431	Page-Nelson, Gina	475	Roberts, Ashley
432	Parnell, Kayla	476	Roeber, Deborah
433	Parsons, Jacqueline	477	Rohlf, Kristin
434	Partyka, Stanley	478	Rohlik, Margareta
435	Patterson, Angela	479	Rojas, Keri
436	Pedretti, Kimberly	480	Rojas, Shamil
437	Pedroni, Jeanette	481	Rooney, Peter
438	Pelargus, Konstanze	482	Rostkowski, Rebecca
439	Pence, Susan	483	Rustad, Tammy
440	Peny, Brian	484	Sallander, Becky
441	Perez, Francisca	485	Sanders, Danielle
442	Perez, Virginia	486	Sanderson Cook, Brenda
443	Perez, Karina	487	Santamaria, Monica
444	Pergola, Jodi	488	Satterfield, Lisa
445	Pergola, Joanne	489	Saudargas, Nagisa
446	Perry, Chelsea	490	Saunders, Beatrice
447	Peterson, Laurie	491	Schaefer, Meghan
448	Peterson-Fong, Tina	492	Schiefer, Philip
449	Petrone, Nancy	493	Schilling, Katie
450	Phelps, Lindsay	494	Schmidt, Kristine
451	Phillips, Chase	495	Schuschel, Sonya
452	Picault-Cadet, Yanick	496	Scoggins, Brandis
453	Pickett, Gina	497	Sedustine, Cynthia
454	Pierce, Jennifer	498	Seehausen, Aimee
455	Pierce (Malloy), Anita	499	Seibert, Lisa
456	Pinon, Beatrice	500	Seymour, Elizabeth
457	Pipkin, Tina	501	Shackelford, Lisa
458	Porterfield, Mario	502	Shaker, Kristen
459	Power, Andrea	503	Shanklin, Rachel
460	Provost, Shana	504	Sheldon, Rebecca
461	Quigley, Jacqueline	505	Shelton, Tiffany
462	Quinn (Treleven), Rachelle	506	Sheppard, Alethea
463	Qvistorff, Antoinette	507	Sherack, Michelle
464	Ramos, Laquail	508	Sherrill, Kathryn
465	Raymond-Green, Julia	509	Shippee, Dellane
466	Reed, Mary	510	Shorkey, Brenda
467	Reed, Debbie	511	Sinsley, Melynda
468	Reinke, Lois	512	Smith, Dana
469	Remus, Margaret	513	Smith, Amber

514	Smith, Angela	558	Tucker, Tina
515	Smith, Salinah	559	Uddin-Bameswright, Lisa
516	Snellgrove, Emily	560	Ude, Kathryn
517	Soto, Franchesca	561	Umali, Julianne
518	Spease, Karen	562	Unsworth, Teri
519	Spiller, Carolyn	563	Vaknin, Tirana
520	Spradling, Angie	564	Valdez, Lynda
521	Spurlock, Staci	565	Vanderbrink, Rosemay
522	Stalnaker, Rachael	566	Vangrieken, Caroline
523	Stanley-Stewart, Debra	567	Vanrisseghem, John
524	Stevenson, D'Ericka	568	Vejfors, Malin
525	Stewart, Suzanne	569	Victory, Allyson
526	Stickley, Colette	570	Voris, Marina
527	Stokes, Karen	571	Vrey, Kerri
528	Stone, Nikki	572	Wagner, Graeme
529	Street, Ayfer	573	Waitt, Janice
530	Strieter, Jill	574	Walker, Carol
531	Suemnicht-Laack, Lisa	575	Walker, Wende
532	Sutherland, Patricia	576	Walker, Lisa
533	Sydeski, Rebecca	577	Walters, Lauri
534	Sylves, Colleen	578	Warner, Michelle
535	Sypniewski, Lynn	579	Washington, Vernell
536	Talley, Randa	580	Washington-Clanton, Troye
537	Tangen, Rebeccah	581	Weida, Kate
538	Tannous, Arza	582	Weimer, Leah
539	Tas, Delik (Dilek)	583	Wesley, Emily
540	Tate, Susan	584	Whaley, Robin
541	Taylor, Tracy Elizabeth	585	White, Diane
542	Taylor, Tisha	586	Wigdahl, Melanie
543	Tesch, Laurie	587	Wilbert, Vanessa
544	Thompson, Holly	588	Willet, Randi
545	Thompson, Jason	589	Willette, Lisa
546	Thompson, Susan	590	Williams, Kathy
547	Thorup, Troy	591	Williams, Adreean
548	Thurab, Juliet	592	Wilson, Dena
549	Tobin, Kimberly	593	Winkler, Johanna
550	Todd, Chase	594	Winslow, Terri
551	Tompkins, Kristin	595	Wood, Cindy
552	Tomson, Linda	596	Woodcock, Lisa
553	Torres, Henrique	597	Wotipka, Leah
554	True, Diana	598	Wright, Linda
555	Trzaska, Andrea	599	Yon, Amy
556	Tschishow, Kathleen	600	Young, Kathy Duncan Lane
557	Tucker, Hope	601	Yunker, Bonnie

602 Zaluzhny, Anna
603 Zieman, Julia

604 Zopfi, Patricia
605 Zrizri, Christina

Attached are disclosure forms for each attorney listed on the cover sheet of this brief.

/s/ Dimitrios A. Peteves
Attorney

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-3162Short Caption: Gwyneth Gilbert, et al v. Lands' End, Inc., et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**



PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

See attached list of 605 Andrews Plaintiffs

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Creed & Gowdy, P.A.; Girardi & Keese; Terrell Hogan Yegelwel, P.A.; Urban & Taylor, S.C.; Winder Law Firm

[THIS SECTION HAS BEEN REVISED]

- (3) If the party, amicus or intervenor is a corporation:

- i) Identify all its parent corporations, if any; and

N/A

- ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

- (4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

- (5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Bryan S. Gowdy Date: 05/28/2024

Attorney's Printed Name: Bryan S. Gowdy

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).

Yes



No



Address: 865 May Street, Jacksonville, FL 32204

Phone Number: 904-350-0075

Fax Number: _____

E-Mail Address: bgowdy@appellate-firm.com; filings@appellate-firm.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-3162Short Caption: Gwyneth Gilbert, et al v. Lands' End, Inc., et al

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PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

See attached list of 605 Andrews Plaintiffs

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Creed & Gowdy, P.A.; Girardi & Keese; Terrell Hogan Yegelwel, P.A.; Urban & Taylor, S.C.; Winder Law Firm

[THIS SECTION HAS BEEN REVISED]

- (3) If the party, amicus or intervenor is a corporation:

- i) Identify all its parent corporations, if any; and

N/A

- ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

- (4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

- (5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Dimitrios A. Peteves

Date: 05/28/2024

Attorney's Printed Name: Dimitrios A. Peteves

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).

Yes

☐

No

☒

Address: 865 May Street, Jacksonville, FL 32204

Phone Number: 904-350-0075

Fax Number: _____

E-Mail Address: dpeteves@appellate-firm.com; filings@appellate-firm.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-3162Short Caption: Gwyneth Gilbert, et al v. Lands' End, Inc., et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

See attached list of 605 Andrews Plaintiffs

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Creed & Gowdy, P.A.; Girardi & Keese; Terrell Hogan Yegelwel, P.A.; Urban & Taylor, S.C.; Winder Law Firm

[THIS SECTION HAS BEEN REVISED]

- (3) If the party, amicus or intervenor is a corporation:

- i) Identify all its parent corporations, if any; and

N/A

- ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

- (4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

- (5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Wayne Hogan Date: 05/28/2024

Attorney's Printed Name: Wayne Hogan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).

Yes

☐

No

☒

Address: 233 East Bay Street, 8th Floor, Jacksonville, Florida 32202

Phone Number: (904) 632-2424

Fax Number: _____

E-Mail Address: hogan@terrellhogan.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-3162Short Caption: Gwyneth Gilbert, et al v. Lands' End, Inc., et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**



PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

See attached list of 605 Andrews Plaintiffs

- (2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Creed & Gowdy, P.A.; Girardi & Keese; Terrell Hogan Yegelwel, P.A.; Urban & Taylor, S.C.; Winder Law Firm

[THIS SECTION HAS BEEN REVISED]

- (3) If the party, amicus or intervenor is a corporation:

- i) Identify all its parent corporations, if any; and

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- ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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- (5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Bruce A. Maxwell

Date: 05/28/2024

Attorney's Printed Name: Bruce A. Maxwell

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).

Yes

☐

No

☒

Address: 233 East Bay Street, 8th Floor, Jacksonville, Florida 32202

Phone Number: (904) 632-2424

Fax Number: _____

E-Mail Address: maxwell@terrellhogan.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-3162Short Caption: Gwyneth Gilbert, et al v. Lands' End, Inc., et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**



PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

- (1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

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Creed & Gowdy, P.A.; Girardi & Keese; Terrell Hogan Yegelwel, P.A.; Urban & Taylor, S.C.; Winder Law Firm

[THIS SECTION HAS BEEN REVISED]

- (3) If the party, amicus or intervenor is a corporation:

- i) Identify all its parent corporations, if any; and

N/A

- ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

- (4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

- (5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Jay A. Urban Date: 05/28/2024

Attorney's Printed Name: Jay A. Urban

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).

Yes

☐

No

☒

Address: 4701 N. Port Washington Road, Milwaukee, WI 53212

Phone Number: (414) 906-5333

Fax Number: _____

E-Mail Address: jurban@wisconsininjury.com

STATEMENT REGARDING ORAL ARGUMENT

The Andrews Appellants request oral argument. Oral argument is appropriate under the criteria of Federal Rule of Appellate Procedure 34(a) because this appeal is not frivolous, the dispositive issues have not been authoritatively decided, and the decisional process would be significantly aided by oral argument.

Specifically, oral argument will assist this Court in understanding the evidence of defect in a new line of Delta Air Lines employee uniforms supplied by Lands' End but made of fabrics from subcontractor mills in China, Sri Lanka, and Vietnam that failed to fix dyes into the fabrics resulting in the uniforms bleeding dyes and harmful substances onto Plaintiffs' skin and property (an effect known in the industry as "crocking"). Oral argument will further assist this Court in understanding the evidence of general causation—that is, that the defective uniforms were capable of causing the various physical injuries the hundreds of individual Plaintiffs suffered soon after wearing the new uniforms. Oral argument will demonstrate that the district court usurped the role of the jury by granting summary judgment despite genuine disputes of material fact and by weighing expert testimony.

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JURISDICTIONAL STATEMENT

This case involves claims of physical injury and property damage by hundreds of individual Delta employees resulting from defective uniforms manufactured by Lands' End. The operative complaint pleads eight counts. Doc. 48.

The physical injury claims of the individual Delta employees were in federal court because count 7 of the operative complaint also pleaded their individual property damage claims under the Magnuson-Moss Warranty Act. Doc. 48 at 23–24.¹ The jurisdictional requirements of the act were met because “[t]he amount in controversy with respect to the Plaintiffs’ individual claims meets or exceeds the sum or value of \$25,” “[t]here are more than 100 individuals in the Class,” and “the amount in controversy meets or exceeds the sum or value of \$50,000 (exclusive of interest and costs) computed on the basis of all claims to be determined in this suit.” Doc. 48 at 24 ¶ 114; *see also Ware v. Best Buy Stores, L.P.*, 6 F.4th 726, 731 (7th Cir. 2021) (discussing these jurisdictional requirements). Accordingly, the district court had federal-question jurisdiction over

¹ Unless otherwise noted, “Doc.” citations refer to the documents on the district court’s docket in case number 3:19-cv-823.

count 7 under 28 U.S.C. § 1331. And because the district court had federal-question jurisdiction, it also had supplemental jurisdiction over the remaining individual state law claims under 28 U.S.C. § 1367.

The district court also had subject-matter jurisdiction under the Class Action Fairness Act—specifically, 28 U.S.C. § 1332(d)(2)(A)—because the aggregated amount in controversy exceeded \$5,000,000, exclusive of interest and costs, and because a class action² was asserted in which any member of a class of plaintiffs is a citizen of a state different from any defendant. Doc. 48 at 12 ¶ 33. Specifically, Defendants Lands’ End, Inc. and Lands’ End Business Outfitters, Inc.³ were citizens of Delaware and Wisconsin. Doc. 48 at 12 ¶¶ 30–31. Meanwhile, at least one plaintiff was a citizen of a state other than Delaware and Wisconsin. For

² The district court denied Plaintiffs’ motion for class certification. Doc. 165. As the court noted, however, “[t]he decision not to certify a class does not divest the court of jurisdiction under the Class Action Fairness Act.” Doc. 221 at 5 n.3. This Court has held the same. *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806 (7th Cir. 2010) (“We assumed . . . that federal jurisdiction under the Class Action Fairness Act does not depend on certification, and we now join [the Eleventh Circuit] in so holding.”); *see also Greenberger v. GEICO Gen. Ins.*, 631 F.3d 392, 396 (7th Cir. 2011) (“*Cunningham* held that a district court’s denial of class certification does not oust the court’s subject-matter jurisdiction.”). Neither the Andrews Plaintiffs nor the Gilbert Plaintiffs sought a joint trial; thus, they did not assert jurisdiction as a “mass action” under 28 U.S. C. § 1332(d)(11).

³ The caption of the operative complaint mistakenly lists “Lands’ End Outfitters, Inc.” as a defendant. As indicated in the body of the complaint, the correct entity is “Lands’ End Business Outfitters, Inc.” Doc. 48 at 12 ¶ 31.

example, Plaintiff Stephanie Andrews was a citizen of Texas. Doc. 48 at 9 ¶ 17.

This Court has appellate jurisdiction under 28 U.S.C. § 1291 because this appeal is from a final decision of a district court. The clerk of the district court entered final judgment on October 12, 2023. Doc. 248. Plaintiffs timely filed their notice of appeal on November 9, 2023. Doc. 249. This Court then remanded for entry of a corrected judgment, explaining that “[a]n amended notice of appeal is unnecessary; the original joint appeal will come into force once a proper judgment has been entered.” Doc. 257 at 2. On February 20, 2024, the clerk of the district court entered a corrected judgment. Doc. 258.

STATEMENT OF THE ISSUES

Lands' End supplied a new line of uniforms for Delta employees by using subcontractors in China, Sri Lanka, and Vietnam. The uniforms were defective because they bled dye and harmful substances onto Plaintiffs' bodies and property (a process called "crocking"). Several of Plaintiffs' experts, including an expert epidemiologist, opined as to general causation—that the uniforms were capable of causing the various physical injuries that the hundreds of individual Plaintiffs suffered soon after beginning to wear the uniforms. The district court granted summary judgment on Plaintiffs' physical injury claims, having concluded that there was no evidence of defect. The court also excluded the causation opinions of Plaintiffs' experts and, having done so, concluded that there was no evidence of general causation. Did the court err and usurp the role of the jury?

TABLE OF PARTIES

Shorthand	Parties
Andrews Plaintiffs/ Andrews Appellants	The 605 named Plaintiffs/ Appellants who are not the Gilbert Plaintiffs/Appellants. ⁴
Gilbert Plaintiffs/ Gilbert Appellants	Gwyneth Gilbert, Michael Marte, Monica DeCrescentis, Rachel Abukhdeir, and Lorna McCalla
Lands' End	Lands' End, Inc. and Lands' End Business Outfitters, Inc.
Plaintiffs	Andrews Plaintiffs and Gilbert Plaintiffs

⁴ In response to an order of the district court, Lands' End filed lists of all Plaintiffs in the case, confirming with Plaintiffs that "the lists are accurate." Doc. 230. The lists totaled to 610 Plaintiffs. Doc. 230-1; Doc. 230-2. Five of those are the Gilbert Plaintiffs; the remaining 605 are the Andrews Plaintiffs.

INTRODUCTION

Lands' End's new uniforms for Delta Air Lines employees transferred dye and harmful substances onto the employees' bodies and property. Plaintiffs, hundreds of individual employees and a putative class, sued Lands' End to recover for their physical injuries and property losses.

Plaintiffs' textiles expert found that the uniforms were defective because they transferred dye including various substances onto other surfaces (the industry term when this happens is "crocking"). Plaintiffs also presented experts who explained that the substances are known to cause health symptoms. And Plaintiffs presented an expert epidemiologist who opined as to general causation: that the uniforms are capable of causing the physical injuries that Plaintiffs suffered.

Despite all this evidence, the district court granted summary judgment on Plaintiffs' physical injury claims. First, the court concluded that there was no evidence of defect. Second, after excluding Plaintiffs' experts' causation opinions, the court stated that there was no evidence of general causation. Plaintiffs appeal because the district court usurped the role of the jury by granting summary judgment despite genuine disputes of material fact and by weighing expert testimony.

STATEMENT OF THE CASE

I. Course of proceedings

A. The Gilbert Plaintiffs' complaint (No. 3:19-cv-823)

In October 2019, Gwyneth Gilbert and Michael Marte filed a class-action complaint in the Western District of Wisconsin on behalf of a putative class of 64,000 Delta employees. Doc. 1. The complaint sought to recover for physical injuries and property damage suffered by the employees as a result of uniforms manufactured by Lands' End. Doc. 1.

B. The Andrews Plaintiffs' complaint (No. 3:19-cv-1066)

In December 2019, over 500 individually-named Delta employees—the first named being Stephanie Andrews—filed a complaint in the Western District of Wisconsin. Doc. 1 (3:19-cv-1066). The complaint likewise sought to recover for physical injuries and property damage suffered by the employees as a result of uniforms manufactured by Lands' End. Doc. 1 (3:19-cv-1066). However, the Andrews Plaintiffs were represented by different law firms than the Gilbert Plaintiffs. *Compare* Doc. 1 at 25 (No. 3:19-cv-823), *with* Doc. 1 at 26 (No. 3:19-cv-1066).

C. The cases are consolidated

The district court consolidated the two cases. Doc. 35. The court ruled that “[t]he *Gilbert* and *Andrews* case[s] will proceed as a single

case” and that “[t]he parties should make all future filings in the [*Gilbert*] case only.” Doc. 35 at 1.

The Gilbert Plaintiffs later filed an amended complaint adding two new plaintiffs: Monica DeCrescentis and Rachel Abukhdeir. Doc. 43. The Andrews Plaintiffs also filed a separate amended complaint. Doc. 46.

In response, the district court entered an order noting that it “consolidated these cases for all purposes.” Doc. 47 at 1. The court said “there is no reason to have two operative complaints on the docket,” and it ordered Plaintiffs to “merge their complaints into a single unified pleading.” Doc. 47 at 1–2.

D. The consolidated complaint

Plaintiffs filed a consolidated complaint. Doc. 48. The consolidated complaint pleaded eight claims: (1) negligence, (2) design defect, (3) manufacturing defect, (4) failure to warn, (5) breach of express warranty, (6) breach of implied warranty, (7) violation of the Magnuson-Moss Warranty Act, and (8) injunctive relief. Doc. 48 at 17–26.

E. The scheduling order

The district court ordered the parties to jointly submit a scheduling order. Doc. 115. The parties did so. Doc. 117. The district court then adopted the parties' proposed schedule. Doc. 155.

The scheduling order provided a deadline for "dispositive motions applicable to either all Plaintiffs or to groups of Plaintiffs similarly situated with respect to some aspect of their claims." Doc. 117 at 3. Critically, however, the scheduling order stated that the deadline "does not include dispositive motions that are specific to a particular individual, including individual *specific causation issues* or the sufficiency of Plaintiffs' Rule 26(a)(2)(C) disclosures." Doc. 117 at 3 (emphasis added).

F. Summary judgment on the physical injury claims and exclusion of expert causation opinions

Lands' End moved to exclude the causation opinions of three of Plaintiffs' experts: Dr. Michael Freeman, Dr. Fred Apple, and Dr. Pamela Scheinman. Doc. 180; Doc. 183; Doc. 188. Lands' End also moved for summary judgment on Plaintiffs' physical injury claims. Doc. 196.

The district court granted all four motions in a single order. Doc. 221. The court concluded that Plaintiffs failed to show a genuine dispute of fact as to the existence of a defect. Doc. 221 at 6–10. The court also

excluded the experts' causation opinions under Federal Rule of Evidence 702. Doc. 221 at 12–31. Having excluded the causation opinions, the court concluded that Plaintiffs failed to demonstrate a genuine dispute of fact as to general causation. Doc. 221 at 31–32. The court did not address whether there was a genuine dispute of fact as to specific causation. Doc. 221 at 31–32.

Lands' End had also moved to exclude Plaintiffs' rule 26(a)(2)(C) experts—treating physicians who would have opined as to specific causation for 174 plaintiffs—but the district court declared that motion moot. Doc. 221 at 2, 33.

G. The parties settle the property damage claims

After granting summary judgment on the physical injury claims, the district court recognized that “the only claims that remain to be adjudicated in this case are those relating to property damage.” Doc. 229 at 2. The court ordered the parties to file agreed lists of (A) the plaintiffs who did not assert property damage claims; and (B) the plaintiffs who did assert property damage claims. Doc. 229 at 4–5.

Lands' End filed the agreed lists. Doc. 230. Exhibit A listed 355 plaintiffs without property damage claims. Doc. 230-1. Exhibit B listed

255 plaintiffs with property damage claims. The district court dismissed the 355 plaintiffs listed in Exhibit A. Doc. 231. The parties later filed a joint notice of settlement stating that “there are no remaining claims to litigate.” Doc. 240.

H. Final judgment

The district court entered an order dismissing Plaintiffs’ property damage claims with prejudice pursuant to the parties’ settlement. Doc. 247. The clerk then entered a final judgment, Doc. 248, and Plaintiffs filed a notice of appeal, Doc. 249.

This Court later remanded for the district court to enter a corrected judgment. Doc. 257. This Court explained that “[a]n amended notice of appeal is unnecessary; the original joint appeal will come into force once a proper judgment has been entered.” Doc. 257 at 2. The district court then entered a corrected judgment. Doc. 258.

II. Statement of facts

A. Plaintiffs

Plaintiffs are current or former employees of Delta Air Lines. Doc. 48 at 2. Many are flight attendants. *See* Doc. 48-1. They have varied backgrounds, including college education and decades of service working for Delta and other airlines. *E.g.*, Doc. 80-1 at 5 (10:6–11:23); Doc. 80-2

at 5 (12:24–13:22); Doc. 80-8 at 9:3–10:19; Doc. 80-13 at 5–6 (13:24–14:20).

B. The Lands' End uniforms

In May 2018, Delta began requiring 64,000 of its employees to wear new uniforms from Lands' End. Doc. 197 at 14. Lands' End contracted with third-party mills and factories for the fabrics and to manufacture the uniforms. Doc. 59 at 3 (6:5–8:14). The fabric mills and factories were overseas, including in China, Sri Lanka, and Vietnam. Doc. 59 at 19 (72:3–14), 25–26 (96:19–97:15).

Lands' End did not specify the types of dyes or chemicals for the fabric mills to use. *See* Doc. 59 at 3–4 (8:19–22). Instead, Lands' End provided the final color standard, and the fabric mills determined what types of dyes and chemicals to use. Doc. 59 at 4 (9:1–5). The fabric mills did not tell Lands' End the dyes and chemicals they used, and Lands' End did not ask what dyes or chemicals the mills used. Doc. 59 at 4 (9:6–23).

The uniform collection included various styles for different employees depending on gender and work duties. *See* Doc. 60-1 at 3, 38–47. There were between 60–100 different styles. Doc. 59 at 26 (98:14–25). The uniforms were designed to include performance finishes, such as

stain release and moisture-wicking properties. *See* Doc. 60-1 at 50–67. Uniforms were treated with different finishes depending on the garment and the contractor. Doc. 60-2; Doc. 221 at 3.

The uniforms featured several colors including a red color called “cruising cardinal,” but the lead color was a purple color called “passport plum.” Doc. 59 at 25 (93:18–22, 95:6–18). Below is a picture of uniforms featuring the passport plum color:



Doc. 173 at 3.

C. The uniforms have crocking issues.

The cruising cardinal and passport plum uniforms had crocking issues—that is, they transferred dye onto other surfaces. Doc. 59 at 5 (14:18–23), 25 (93:23–94:4). For example, the following photograph shows crocking from a uniform:



Doc. 60-6 at 18; *see also* Doc. 60 at 2 ¶ 7.

D. Delta employees complain about crocking and health issues.

Within several weeks of the rollout of the uniforms, Lands' End received complaints about the uniforms. Doc. 58 at 4 (11:15–12:4); Doc. 59 at 21 (77:3–6). The majority involved passport plum. Doc. 58 at 7 (24:1–9). Most of the crocking complaints were about a style called the IFS (in-flight service) signature dress. Doc. 58 at 7 (23:11–25); *see also* Doc. 60-1 at 4 ¶ 19.

Employees complained that the passport plum bled onto their skin and property. Doc. 58 at 11 (39:12–18). For example, one employee reported that “even after machine washings, she was noticing purple stains that were coming off her armpits onto a wash cloth during a shower.” Doc. 58 at 19 (71:12–21). Other employees also complained that “purple staining was coming off their skin while bathing or showering.” Doc. 58 at 19 (71:22–72:1). Rashes and itching were the health symptoms most reported by employees reacting to the uniforms. Doc. 58 at 10–11 (36:25–37:5), 21 (79:3–5).

Not only did employees complain to Lands' End, but they also complained about the uniforms to their doctors and sought treatment for their symptoms. *See generally* Doc. 194-1; *see also* Doc. 194 at 2 ¶ 2. For

example, one plaintiff was diagnosed with “[r]espiratory irritant exposure with vocal cord dysfunction,” and her doctor stated that “[he] could find no medical explanation for the symptoms [the plaintiff] has been having, other than the fact that something in the dress may be aerosolized and causing respiratory tract irritation.” Doc. 194-5 at 11.

One doctor diagnosed several plaintiffs with various conditions and stated that “there is a substantial degree of evidence from an epidemiologic perspective that employees are being impacted by these new uniforms.” Doc. 194-1 at 9, 17. Another doctor “personally witnessed [a] patient break out within minutes of changing to [her] uniform.” Doc. 194-1 at 5. And a third doctor opined “without a reasonable doubt, the uniform is the cause of [the patient’s] allergic dermatitis.” Doc. 194-1 at 10.

In June 2019, the National Institute for Occupational Health and Safety (NIOSH) issued a report concerning the uniforms. Doc. 60-9. The report concluded that “[i]t is possible that textile chemicals in the uniforms or the physical irritant properties of the uniform fabrics have caused skin symptoms among Delta employees.” Doc. 60-9 at 7.

In July 2019, Lands' End transferred the responsibility for handling employee complaints to Delta. Doc. 58 at 5 (13:6–21). By that point, Lands' End had received 2,470 complaints. Doc. 58 at 6–7 (20:1–21:21).

E. Lands' End does not change the uniforms despite third-party testing showing the presence of irritating and toxic chemicals.

After receiving complaints, Lands' End hired Bureau Veritas to test a worn and a new passport plum IFS signature dress for volatile organic compounds. Doc. 59 at 12 (43:25–44:19). Bureau Veritas issued a report summarizing the results of the testing. Doc. 60-18.

The report stated that “[c]hemical emissions from the uniforms were found to contain several chemicals that are known to be irritating and potentially toxic.” Doc. 60-18 at 6–7. Emissions of volatile organic compounds “were greatest for the worn sample dress as compared with the new dress.” Doc. 60-18 at 2. The report concluded that “[t]his can be related to the various types of personal care items (i.e., deodorants, lotions, perfumes) used by the wearer as well as any washing detergents used to launder the dress.” Doc. 60-18 at 2.

It was foreseeable to Lands' End that Delta employees would use deodorant and perfume while wearing the uniforms. Doc. 59 at 24–25

(92:23–93:6). Lands’ End did not change the chemicals or dyes used in the uniforms after receiving the Bureau Veritas report. Doc. 59 at 13 (46:24–47:1, 47:24–48:3), 24 (91:4–7).

F. Delta hires a third-party to test the uniforms, and the report notes the presence of a chemical above threshold amounts.

Delta hired a third party, Intertox, to test the uniforms. Doc. 59 at 15 (56:19–24), 16 (58:14–20). Notably, the uniforms tested by Intertox were all *unworn*. Doc. 58 at 26 (97:16–98:1). Nevertheless, the testing showed that two items—an apron and a women’s red coat pants—failed the OEKO-TEX 100 standard, “which is one of the most rigorous standards for textile safety in the world.” *See* Doc. 59 at 16 (60:19–22). The apron and pants “failed to pass” due to the presence of perfluorooctanoic acid. Doc. 59 at 16 (22–25).

In November 2019, Delta changed its policy and allowed its employees to not wear the Lands’ End uniforms. Doc. 59 at 23 (85:9–15).

G. Dr. Peter Hauser – textiles expert

Dr. Peter Hauser is an expert in textile chemistry. Doc. 177 at 1–2. He is a former president of the American Association of Textile Chemists

and Colorists (AATCC), an organization that develops standards of testing for textile products. Doc. 71 at 20 (75:15–77:21).

Dr. Hauser prepared a report in this case. Doc. 177. He was also deposed. Doc. 71; Doc. 171. Lands' End did not challenge Dr. Hauser's opinions. Doc. 197 at 17 n.5; Doc. 219 at 7 n.2.

Dr. Hauser opined that, for multiple reasons, “the dye process implemented relative to the subject Delta uniforms was improper, inadequate, *defective* and not in compliance with industry standards.” Doc. 177 at 4 (emphasis added).

First, he explained that the AATCC—“the only U.S. association with applicable testing”—as well as the European OEKO-TEX and H&M standards, provide that “garments should not transfer dyes to other [surfaces] once the manufacturing process is completed.” Doc. 177 at 4.

Second, Dr. Hauser's review of testing performed by Lands' End's mill and dye suppliers indicated that “the uniforms were not properly afterwashed or otherwise scoured, a process by which the removal of unfixed dye from the fabrics is completed prior to the application of finishes to the product which in this industry, would commonly include stain

resistors, water repellants, fire retardants and permanent press type features.” Doc. 177 at 4–5

Third, review of testing performed by Lands’ End indicated that “insufficient testing occurred, which was not in compliance with generally accepted industry standards or other quality control measures concerning color fastness or crocking.” Doc. 177 at 5. Dr. Hauser opined that Lands’ End should have conducted certain AATCC tests. Doc. 177 at 5.

Dr. Hauser opined that, “had sufficient testing been performed and the fabric appropriately afterwashed or scoured . . . , the *obvious defect* with the transfer of dye to various fabrics and even metal chairs used within the Delta Airlines industry would not have occurred.” Doc. 177 at 5–6 (emphasis added).

Dr. Hauser reviewed the results of tests performed by Vartest Laboratories on the uniforms. Doc. 177 at 6. Tests in October 2020 verified that crocking occurred and “confirmed the transfer of Fluorine, Sodium, Magnesium and Silicon with the purple excess dye that crocked off the tested garments.” Doc. 177 at 6. Tests in January 2021 further verified that crocking occurred and “confirmed the transfer of fluorine with the purple excess dye that crocked off a tested garment.” Doc. 177 at 6. And

tests in February 2021 “confirm[ed] the transfer of chemicals along with the excess dye which crocked off the tested garments.” Doc. 177 at 6.

H. Dr. Michael Freeman – epidemiology expert

Dr. Michael Freeman is an expert in forensic medicine and epidemiology. Doc. 173 at 2. Dr. Freeman prepared a report in this case. Doc. 173. He was also deposed. Doc. 169.

Dr. Freeman noted that Plaintiffs’ counsel had the Lands’ End uniforms tested at three independent laboratories: ALS Environmental, Enthalpy Analytical, and TexTest Labs. Doc. 173 at 5. Dr. Freeman determined that “[t]ests of the uniforms found the presence of chemicals and heavy metals more than industry accepted safe levels for garments.” Doc. 173 at 5. “These chemicals included formaldehyde, mercury, chromium, antimony, fluorine, and bromine.” Doc. 173 at 5. Dr. Freeman explained that several of these substances are known to cause a variety of health symptoms. Doc. 173 at 19–20.

Dr. Freeman also noted that 982 plaintiffs completed a questionnaire issued by Lands’ End. Doc. 173 at 8–9. The instructions on the questionnaire warned that “responses are being given *under penalty of perjury*. You must give complete and accurate answers.” Doc. 173 at 26

(emphasis added). The end of the questionnaire also included a verification requiring the respondent to sign and “declare *under penalty of perjury* [that] the foregoing Answers to the Questionnaire are within my personal knowledge and are *true and correct*.” Doc. 173 at 28 (emphasis added). Lands’ End incorrectly represented to the district court that the questionnaire responses were “unverified.” Doc. 197 at 26.

One of the questions asked the respondent to “list any and all health symptoms or conditions you presently have or have had in the past that you claim are a result of the Uniforms.” Doc. 173 at 9. Dr. Freeman collected and analyzed the data from the questionnaires. Doc. 173 at 8–9.

Dr. Freeman’s analysis revealed that 29.1% of respondents (286/982) reported transfer of color from the uniforms to other surfaces, including their skin, and in some cases excreted in sweat and urine. Doc. 173 at 9, 16. Moreover, of the 915 respondents who wore the uniforms, many reported experiencing a variety of symptoms after wearing the uniforms:

	n (%)
Total	915
Respiratory	525 (57.4)
Dermatological	796 (87.0)
Musculoskeletal	83 (9.1)
Systemic	260 (28.4)

Cardiovascular	132 (14.4)
Genitourinary	87 (9.5)
Neurological	348 (38.0)
Reproductive	67 (7.3)
Visual	90 (9.8)
GI	62 (6.8)
Endocrine	21 (2.3)
None reported	7 (0.8)

Doc. 173 at 10.

Dr. Freeman discussed two methods for determining general causation: (1) the Bradford Hill method “distilled into a 3-step approach”; and (2) the Naranjo algorithm. Doc. 173 at 14–15. Dr Freeman used both methods to opine as to general causation. Doc. 173 at 16–23.

1. The Bradford Hill method

“Bradford Hill is a scientific framework used to analyze whether an association between two variables is causal, named after epidemiologist Sir Austin Bradford Hill.” *In re Onglyza and Kombiglyze Prods. Liab. Litig.*, 93 F.4th 339, 344 n.2 (6th Cir. 2024). “Bradford Hill is undeniably a reliable methodology.” *Id.* at 347. Indeed, Lands’ End recognized that the Bradford Hill method is “a well-known epidemiological tool.” Doc. 180 at 7. The district court did not rule otherwise. Doc. 221 at 13.

Dr. Freeman distilled the Bradford Hill method into a three-step approach that considers (1) the *plausibility* of the suspected causal

relationship; (2) the *temporal* aspects of the relationship; and (3) the likelihood that an *alternative cause* other than the suspected cause accounts for the observed relationship. Doc. 173 at 14–15.

As for plausibility, Dr. Freeman opined that “exposure to chemicals in dyes and finishes in the [uniforms] very *plausibly* resulted in the health problems that [Plaintiffs] experienced.” Doc. 173 at 20. In support, he noted that because the toxins were “found to be present in the garments, and readily transferred from the garments to the bodies of the Delta employees wearing them,” “the mechanism by which the exposure to the toxins has occurred is easily established.” Doc. 173 at 20.

Dr. Freeman further noted that “[a]t least 4 of the chemicals and metals . . . are well-established causes of acute and chronic illness in a variety of systems (skin, respiratory, neurologic, gastrointestinal, *i.a.*).” Doc. 173 at 20. And he noted that “[p]rior reports of similar illness have been described which closely match the complaints observed among the plaintiffs.” Doc. 173 at 20. Dr. Freeman stated that “[s]pecific Hill criteria concerning plausibility that are met with the reviewed evidence are consistency, coherence, analogy, specificity, biologic plausibility,

experiment, dose-response, and dechallenge (which is also associated with temporality).” Doc. 173 at 20 n.37.

As for temporality, Dr. Freeman opined that his evaluation “demonstrated strong findings, including both an appropriate temporal sequence and satisfied dechallenge criterion.” Doc. 173 at 21. Specifically, the appropriate temporal sequence was satisfied because there was a statistically significant change in the number of symptomatic body systems reported by respondents *after* wearing the uniforms compared to those reported *before* wearing the uniforms. Doc. 173 at 20. The dechallenge criterion—that is, whether the adverse effect improves or resolves in a temporally appropriate sequence when the exposure ceases—was satisfied because “for at least 48% (444 of 915) of the Delta employees who completed the Lands’ End questionnaires[,] their symptoms either resolved or improved after they stopped wearing the new uniform items.” Doc. 173 at 21. Dr. Freeman also noted that “[r]echallenge (return of symptoms when the garments were worn again)” was “present . . . for at least 10% (100 of 915) of the respondents.” Doc. 173 at 21.

As for alternative causes, Dr. Freeman identified “no apparent alternative explanations for the symptoms and injuries attributed by Delta

personnel to the wearing of the new Lands' End uniforms.” Doc. 173 at 21. Indeed, as he explained at his deposition, there were no plausible alternative causes in light of the number of employees that complained and the timing of their complaints. Doc. 169 at 34 (130:8–131:23).

2. The Naranjo algorithm

The Naranjo algorithm “consists of 10 questions that incorporate elements of the Hill criteria.” Doc. 173 at 15. Points are assessed based on the answer to each question, “and the probability of causation is assigned via a score termed definite, probable, possible or doubtful.” See Doc. 173 at 15. Dr. Freeman explained that, “[while] the Naranjo scale was designed for the investigation of drug-related [adverse reactions], it has analogous applicability to the adverse reactions associated with any known toxic exposure with a close temporal relationship to effects plausibly related to the exposure.” Doc. 173 at 15.

The total score from Dr. Freeman’s application of the Naranjo algorithm was 10, “which falls under the category of a *definitely related* adverse reaction to exposure.” Doc. 173 at 23 (emphasis altered).

* * *

Plaintiffs relied on the opinions of Dr. Hauser, Dr. Freeman, and two other experts in opposition to Lands' End's motion for summary judgment. As set forth *infra* in the Argument section, the district court erred in granting summary judgment on Plaintiffs' physical injury claims.

SUMMARY OF ARGUMENT

This Court should reverse the district court's grant of summary judgment on Plaintiffs' physical injury claims. The district court usurped the role of the jury by granting summary judgment despite genuine disputes of material fact and by weighing expert testimony.

First, the district court erred in concluding that there was no evidence of defect. Plaintiffs' textiles expert, Dr. Peter Hauser, clearly identified the defect: the uniforms transferred dye along with other substances onto other surfaces (a process called "crocking"). Plaintiffs' other experts opined that the transferred substances are known to cause health problems. Taken together, the expert opinions provide a sufficient basis for a reasonable jury to find that the uniforms were defective.

Second, the district court erred in concluding that there was no evidence of general causation. It is undisputed that Dr. Michael Freeman—an expert in forensic medicine and epidemiology—addressed general causation. The district court erred in excluding Dr. Freeman's causation opinions under Federal Rule of Evidence 702. The court's concerns are either mistaken or go to the weight of Dr. Freeman's opinions—not their

admissibility. Notably, the court erred in rejecting Dr. Freeman's reliance on the questionnaires signed under penalty of perjury.

Third, this Court should not reach the issue of specific causation in the first instance. The district court did not decide whether there was a genuine dispute of material fact as to specific causation. Rather, the court concluded only that Plaintiffs have no admissible evidence to prove their theory of *general* causation.

If this Court were to decide the issue of specific causation in the first instance, this Court would also have to decide in the first instance the subsidiary issue of whether summary judgment on specific causation was premature in light of the district court's scheduling order. Further, this Court would have to decide in the first instance the subsidiary issue of whether Plaintiffs' rule 26(a)(2)(C) experts should be excluded. What's more, 96 plaintiffs would still have unchallenged evidence of specific causation. All of this counsels against this Court deciding the issue of specific causation in the first instance.

STANDARD OF REVIEW

This appeal concerns the district court’s grant of summary judgment, which was based in part on the district court’s exclusion of expert testimony under Federal Rule of Evidence 702.

This Court “review[s] a district court’s grant of summary judgment de novo, viewing all evidence and drawing all reasonable inferences in favor of the non-moving party.” *Bruno v. Wells-Armstrong*, 93 F.4th 1049, 1053 (7th Cir. 2024).

This Court “review[s] de novo whether a court applied the Rule 702 framework properly but more specific decisions to admit or exclude expert testimony—once properly classified as such—for an abuse of discretion.” *Chicago Joe’s Tea Room, LLC v. Village of Broadview*, 94 F.4th 588, 596 (7th Cir. 2024).

Under the abuse-of-discretion standard, “so long as the district court adhered to *Daubert*’s requirements, [this Court] shall not disturb the district court’s findings unless they are manifestly erroneous.” *Artis v. Santos*, 95 F.4th 518, 525 (7th Cir. 2024) (cleaned up).

ARGUMENT

I. The district court erred in granting summary judgment on the physical injury claims.

Six of Plaintiffs' eight claims (negligence, design defect, manufacturing defect, failure to warn, breach of express warranty, and breach of implied warranty) sought to recover damages for physical injuries. Doc. 48 at 17–23. The district court granted summary judgment on Plaintiffs' physical injury claims. Doc. 221.

Specifically, the court concluded that Plaintiffs failed to “meet their burden of proof” as to the existence of a defect. Doc. 221 at 6–10. The court also excluded Plaintiffs' expert causation opinions under Federal Rule of Evidence 702. Doc. 221 at 12–31. Having excluded the causation opinions, the court declared that Plaintiffs failed to “meet their burden of proof” as to general causation. Doc. 221 at 31–32. The court did not address whether Plaintiffs created a genuine dispute of fact as to specific causation. Doc. 221 at 31–32.

The district court erred in concluding that there were no genuine disputes of fact as to defect. *Infra* § I.B. The court also erred in excluding Dr. Freeman's general causation opinions, which demonstrate a genuine dispute of material fact as to general causation. *Infra* § I.C. Like the

district court, this Court should not reach the issue of specific causation. *Infra* § I.D. Before making those arguments, this brief first addresses the applicable law. *Infra* § I.A.

A. The substantive law of Wisconsin controls.

Plaintiffs' physical injury claims arise under state law. Plaintiffs argued that Wisconsin law applied. Doc. 206 at 33. Lands' End argued the choice of law did not matter. Doc. 197 at 18–19; *see also* Doc. 219 at 27 n.12. The district court agreed with Lands' End. Doc. 221 at 5. It reasoned that “[t]here are only two elements of product liability law at issue . . . : (1) the existence of a defect; and (2) whether the defect caused plaintiffs’ injuries.” Doc. 221 at 5–6. The court noted that “those two elements generally are consistent across all jurisdictions” and that “the parties agree[d] that plaintiffs must show both a defect and causation to succeed on their claims.” Doc. 221 at 6.

This Court has held that “[w]hen there is no dispute over which state’s law applies, the court will apply the substantive law of the state in which the federal court sits.” *Kolchinsky v. W. Dairy Transp., LLC*, 949 F.3d 1010, 1013 n.2 (7th Cir. 2020). Accordingly, this brief will apply the substantive law of Wisconsin.

B. There were genuine disputes of fact as to defect.

The district court concluded that, to prevail on their physical injury claims, Plaintiffs must prove the existence of a defect by expert testimony. Doc. 221 at 6–8. Plaintiffs do not dispute that requirement.

The district court next determined that Plaintiffs “failed to respond to Lands’ End’s argument that they lack of [sic] evidence of a specific defect related to [P]laintiffs’ personal injury claims.” Doc. 221 at 7. However, the court was mistaken. Plaintiffs’ brief in opposition to Lands’ End’s motion for summary judgment argued that there was “evidence of a crocking defect.” Doc. 206 at 20; *see also* Doc. 206 at 35–36.

Indeed, despite determining that Plaintiffs purportedly “failed to respond,” the district court said it could “fairly infer that [P]laintiffs’ theory is that the alleged defect in the uniforms is the use of chemicals and heavy metals in conjunction with the failure to properly after-wash the garments, allowing excess dye to remain on the garment and eventually bleed off with chemicals onto [P]laintiffs”—that is, a crocking defect. Doc. 221 at 7. As the district court acknowledged, “[d]epending on whether the manufacturer followed Lands’ End’s specifications, this theory could support either a manufacturing defect or a design defect.” Doc. 221 at 7.

Accordingly, Plaintiffs did not waive the issue of defect. Like the district court, this Court should “consider whether the evidence [P]laintiffs discuss in their brief could satisfy their burden to prove the existence of a defect.” Doc. 221 at 7; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (holding that a nonmoving party who bears the burden of proof at trial may oppose a summary judgment motion “by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves”).

Turning to the evidence of defect, the district court ruled that Plaintiffs could not rely on Dr. Hauser’s opinions because his opinions were purportedly limited to property damage. Doc. 221 at 8. Again, the district court was mistaken. Dr. Hauser broadly opined that the uniforms were “defective” because they crocked—that is, the uniforms transferred dye including various substances onto other surfaces. Doc. 177 at 4–6. And that included, for example, his conclusion from testing studies that there was a “transfer of chemicals *along with* the excess dye which crocked off the tested garments.” Doc. 177 at 6 ¶ 17.

To be sure, Dr. Hauser—not being an epidemiologist—stuck to his lane as an expert on textiles and testified that he was not opining “about

how [c]rocking may have impacted health,” “about chemicals or elements like heavy metals,” or “about any health effects these elements may have caused.” Doc. 171 at 4 (220:23–221:8), 7 (233:25–234:5). But that does not mean his opinions cannot be used to establish the existence of a defect. In ruling otherwise, the district court improperly conflated the existence of a defect with the issue of causation.

To determine the existence of a defect, Wisconsin applies the “consumer-contemplation test.” *Murphy v. Columbus McKinnon Corp.*, 405 Wis. 2d 157, 174–75, 192 (Wis. 2022). Under that test, a defect exists when the product is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics.” *Id.* at 175 (citation omitted).

Dr. Hauser’s testimony allows the jury to understand the nature of the crocking defect: that the uniforms transfer dye, chemicals, and heavy metals onto the wearers’ bodies. Doc. 177 at 4–6. In turn, the testimony of Plaintiffs’ other experts allows the jury to understand the danger of the crocking defect: that those substances are harmful to humans. Taking this evidence together, a jury could reasonably find that the uniforms

were dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased the uniforms—that is, an airline employee mandated to work for extended periods wearing the crocking uniforms.

Indeed, Dr. Freeman’s report explains that “[t]ests of the uniforms identified the presence of chemicals and heavy metals at more than industry accepted safe levels for garments.” Doc. 173 at 19. His report then discusses several of those chemicals and heavy metals and notes that they are known to cause a variety of health symptoms. Doc. 173 at 19–20.

Similarly, Dr. Apple testified that the uniforms “are found to have these metals and chemicals that . . . are well scientifically medically founded to cause all the symptomologies [he] described in [his] Rule 26 Report.” Doc. 168 at 32 (124:12–20). And Dr. Scheinman testified that there were reports that “show[] that the uniforms have mercury or other heavy metals that have been associated with causing hair loss.” Doc. 170 at 38 (149:1–5); *see also* Doc. 170 at 44 (171:20–173:22).

The district court did not exclude the opinions of Drs. Freeman, Apple, and Scheinman about the substances the evidence shows crocked off

with the unfixed dyes. Instead, the court merely excluded their “*causation* opinions.” Doc. 221 at 12 (emphasis added); *see also* Doc. 221 at 19 (“Freeman’s opinions *on general and specific causation* will be excluded.” (emphasis added)); *id.* at 26 (same as to Dr. Apple); *id.* at 27 (same as to Dr. Scheinman).

Moreover, Plaintiffs are not required to rely on just one expert to establish a defect. Instead, “a jury may draw reasonable inferences from the evidence even though there is no ‘expert’ testimony directly on point.” *Anderson v. Combustion Eng’g, Inc.*, 647 N.W.2d 460, 465 (Wis. Ct. App. 2002). “[P]eople often put a case together with testimony on one point from one expert, testimony on a second point from a second expert, etc., and evidence from non-experts.” *Walsh v. Chez*, 583 F.3d 990, 994 (7th Cir. 2009).

For example, in *Eghnayem v. Boston Scientific Corp.*, 873 F.3d 1304, 1311 (11th Cir. 2017), the plaintiff claimed that a product was defective. The defendant appealed from the jury verdict for the plaintiff, arguing that there was insufficient evidence of defect. *Id.* The Eleventh Circuit affirmed, explaining that the combined testimony of two experts allowed the jury to find that the product was defective. *Id.* at 1320.

Indeed, even though neither expert testified to the ultimate issue of defect, “[w]hen taken in concert, th[e] expert testimony provided a sufficient foundation for a reasonable jury to conclude” that the product was defective. *Id.* “The ultimate question [of defect] was for a jury to decide.” *Id.*

Here, too, the ultimate question of whether the uniforms were defective was for the jury to decide. *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 759 (Wis. 2001) (noting that the “trier of fact is to find a product to be defective and unreasonably dangerous”). Taken together, the expert opinions provide a sufficient basis for a reasonable jury to find that the uniforms were defective. Plaintiffs did not need to rely only on the testimony of one expert.

C. The district court erred in excluding Dr. Freeman’s opinions on general causation, which demonstrate a genuine dispute of material fact as to general causation.

As the district court noted, “[g]eneral causation refers to whether the substance or substances at issue are *capable* of causing the harm alleged.” Doc. 221 at 11; *accord Higgins v. Koch Dev. Corp.*, 794 F.3d 697, 701 (7th Cir. 2015). The district court ruled that, to prevail on their physical injury claims, Plaintiffs must prove general causation by expert testimony. Doc. 221 at 11.

It is undisputed that Plaintiffs' expert Dr. Freeman did opine as to general causation, as the district court acknowledged. Doc. 221 at 12 ("Freeman offers both *general* and specific causation opinions in his report. He opines that the Lands' End uniforms *were capable of causing*, and were the most likely cause of, plaintiffs' various health problems." (emphasis added)). Lands' End acknowledged this, too. Doc. 219 at 8 ("Dr Freeman's report offers opinions on both *general* and specific causation" (emphasis added)).⁵

The district court erred in excluding Dr. Freeman's opinions on general causation. As set forth below, the district court's concerns are either mistaken or go the weight of Dr. Freeman's opinions—not their admissibility.

1. Dr. Freeman identified an association.

The district court ruled that Dr. Freeman "skips the first step of a valid Bradford Hill epidemiological analysis: he fails to identify an association between the Lands' End uniforms and plaintiffs' symptoms that is based on epidemiological or other reliable data." Doc. 221 at 14. Not so.

⁵ This is in contrast to Dr. Apple, the nature of whose opinion was disputed. Despite Plaintiffs' arguing that Dr. Apple opined as to general causation, Lands' End argued—and the district court agreed—that Dr. Apple opined only as to specific causation. Doc. 221 at 20–21.

As Plaintiffs explained below, “there are actually [statistically] significant associations between flight attendant uniforms shown in both a prior 2017 study and Dr. Freeman’s own analysis.” Doc. 213 at 18.

Indeed, Dr. Freeman’s report discusses a study published by Harvard professors in a peer-reviewed journal in 2017. Doc. 173 at 18 (citing Eileen McNeely et al., *Symptoms related to new flight attendant uniforms*, 17 BMC Public Health 972 (2017)). That study evaluated the association between new uniforms and health symptoms reported by Alaska Airlines flight attendants after the introduction of the uniforms. Doc. 214-2 at 2. The study “found that the introduction of new flight attendant uniforms was *associated* with quantifiable health effects.” Doc. 214-2 at 8 (emphasis added).

Specifically, the study found positive associations with multiple symptoms, eight of which were statistically significant and one of which was slightly outside the threshold for statistical significance:

Symptoms	Odds ratio ⁶	Statistically significant (P Value)
Eye pain/dry eyes/itchy eyes	5.8	Yes (<0.001)
Blurred vision	2.5	Yes (0.009)
Combined EENT (eye, ear, nose, throat)	2.0	Yes (0.001)
Cough	2.3	Yes (0.011)
Hoarseness/loss of voice	3.7	Yes (0.001)
Combined lower respiratory	2.4	Yes (0.001)
Itchy/irritated skin	2.2	Yes (0.012)
Rash/hives	1.9	Yes (0.011)
Multiple chemical sensitivity symptoms	2.2	Slightly outside (0.061)

Doc. 214-2 at 5.

The district court said that “Lands’ End did not design or manufacture the uniforms for the Alaska [Airlines] . . . employees, and [Dr.] Freeman presents no evidence that the materials, finishes, chemicals, or heavy metals in the Lands’ End uniforms are the same as those found in other airline employee uniforms.” Doc. 221 at 15. However, the court ignored that the Alaska Airlines study “was not designed to identify specific harmful compounds or to estimate dose-response thresholds.” Doc. 214-2 at 8. “Rather, the purpose of th[e] study was to provide information

⁶ Odds ratio is “[a] measure of association, often used in epidemiology. For example, if 10% of all people exposed to a chemical develop a disease, compared with 5% of people who are not exposed, then the odds of the disease in the exposed group are $10/90 = 1/9$, compared with $5/95 = 1/19$ in the unexposed group. The odds ratio is $(1/9)/(1/19) = 19/9 = 2.1$. An odds ratio of 1 indicates no association.” National Research Council, *Reference Manual on Scientific Evidence* 291 (3d ed. 2011).

regarding the likelihood that textile exposures may be *associated* with health effects among flight crew.” Doc. 214-2 at 8 (emphasis added). That is precisely why Dr. Freeman cited the study: to identify an *association* between the introduction of new airline uniforms and various health symptoms.

Moreover, “the chemical compound concentrations [in the Alaska Airlines uniforms] varied by garment and material tested.” Doc. 214-2 at 7. As the study authors noted, “the chemical compounds that can potentially be found in the materials are dependent on the different chemical panels included, the methods of analysis, and the materials tested.” Doc. 214-2 at 7. Here, too, as the district court recognized, “[t]he testing results have varied, showing that the garments were treated with different types of finishes, depending on the garment and the manufacturing facility.” Doc. 221 at 3.

Not only did Dr. Freeman identify an association based on the Alaska Airlines study, but he also did so based on his evaluation of the verified plaintiff questionnaires in this case. Specifically, the respondents reported an average of 2.70 symptoms in all body systems affected *after* the uniforms were introduced, compared to an average of 0.15 symptoms

affected *before* the uniforms were introduced. Doc. 173 at 20. Dr. Freeman noted that this difference was “statistically significant ($p\text{-value} < 0.05$).” Doc. 173 at 20. And he explained that it “can also demonstrate a strong *association*, since the number of symptomatic body systems after the exposure (wearing the new uniforms) was over 18 times greater than before the exposure.” Doc. 173 at 20–21 (emphasis added and omitted).

2. Dr. Freeman reliably applied the Bradford Hill method.

The district court ruled that “[e]ven if [Dr.] Freeman had identified adequate evidence of an association between the Lands’ End uniforms and the [P]laintiffs’ symptoms, his report does not apply the Bradford Hill causation criteria properly.” Doc. 221 at 15. Namely, the district court faulted Dr. Freeman for distilling the Bradford Hill method into a three-step approach. Doc. 221 at 15–16.

To begin, the Bradford Hill method has never depended on a fixed set of elements that must be met in every case. Indeed, what the district court called “criteria,” Sir Hill described as “viewpoints from all of which we should study association” and not “hard-and-fast rules of evidence that *must* be obeyed.” Doc. 182-1 at 6. Sir Hill expressly noted that

“[n]one of [his] nine viewpoints can bring indisputable evidence for or against the cause-and-effect hypothesis and none can be required as a *sine qua non*.” Doc. 182-1 at 6.

The Reference Manual on Scientific Evidence likewise teaches that “there is no threshold number [of factors] that must exist” and “[o]ne or more factors may be absent even when a true causal relationship exists.” National Research Council, *Reference Manual on Scientific Evidence* 599–600 (3d ed. 2011). Courts have recognized the same. *E.g.*, *In re Zoloff Prods. Liab. Litig.*, 858 F.3d 787, 796 (3d Cir. 2017) (“[T]he Bradford Hill criteria . . . are neither an exhaustive nor a necessary list.”); *Milward v. Acuity Spec. Prods. Grp.*, 639 F.3d 11, 17 (1st Cir. 2011) (“Although Hill identified nine viewpoints, it is generally agreed that this list is not exhaustive and that no one type of evidence must be present before causality may be inferred.”); *Cook v. Rockwell Int’l Corp.*, 580 F. Supp. 2d 1071, 1098 (D. Colo. 2006) (“Defendants cite no authority, scientific or legal, that compliance with all, or even one, of these factors is required The scientific consensus is, in fact, to the contrary.”).

Contrary to the district court’s implication, Dr. Freeman did not rely solely on his own writings to support a categorized three-step

approach. In his report, Dr. Freeman cited an article in a peer-reviewed journal that was authored by him *and two other authors*. Doc. 173 at 15 n.9 (citing Michael D. Freeman, Christopher J. Centeno & Sean S. Kohles, *A Systematic Approach to Clinical Determinations of Causation in Symptomatic Spinal Disk Injury Following Motor Vehicle Crash Trauma*, 1 PM&R 951 (2009)). In turn, that article cited two more articles in peer-reviewed journals: one of which Dr. Freeman did not author, and another in which he was one of three co-authors. See Freeman et al., *A Systematic Approach*, *supra*, at 953 & nn. 12–13 (citing Alfred S. Evans, *Causation and Disease: A Chronological Journey*, *The Thomas Parran Lecture*, 108 Am. J. Epidemiol. 249 (1978); Michael D. Freeman, Annette M. Rossignol & Michael L. Hand, *Forensic Epidemiology: A systematic approach to probabilistic determinations in disputed matters*, 15 J. Forensic Leg. Med. 281 (2008)). Dr. Freeman also cited a Tenth Circuit decision affirming the admission of expert testimony based on the three-step approach. Doc. 173 at 15 n.11 (citing *Etherton v. Owners Ins.*, 829 F.3d 1209, 1218–23 (10th Cir. 2016)).

Dr. Freeman further explained at his deposition that “there are actually two authors before [him] who talked about distilling the steps” and

“there are several authors after [him] who have done it.” Doc. 169 at 37 (143:13–19). He said “[t]he methodology has been cited probably 30 or 40 times in literature.” Doc. 169 at 37 (143:19–21). Thus, the district court’s criticism of Dr. Freeman’s opinion based on a purported lack of support in the literature is unfounded, especially given that “[t]here is no requirement ‘that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness.’” *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929 (8th Cir. 2001) (quoting *Heller v. Shaw Indus.*, 167 F.3d 146, 155 (3d Cir. 1999)); accord *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 354 (5th Cir. 2007); *Dickenson v. Cardiac & Thoracic Surgery of E. Tenn.*, 388 F.3d 976, 980–81 (6th Cir. 2004).

In any event, as Dr. Freeman explained, “the three steps [approach] is convenient because it helps categorize the different types of criteria within the nine.” Doc. 169 at 37 (142:15–17). In other words, Dr. Freeman still considered the nine Hill criteria.

The district court said that “[o]ne important Bradford Hill criterion that Freeman failed to assess was the dose-response relationship.” Doc. 221 at 16. Yet, Dr. Freeman’s report expressly addressed dose-response

relationship: “[a]n important finding from the questionnaire responses was that the frequency in which the uniforms were worn demonstrated a dose-response relationship.” Doc. 173 at 20. That is, “[d]ose-response was clearly demonstrated by the increase in the number of symptoms and involved systems that correspond with the increased frequency of exposure to the garments.” Doc. 173 at 23. Dr. Freeman plainly stated that “dose-response” was one of the “[s]pecific Hill criteria concerning plausibility that are met with the reviewed evidence” in this case. Doc. 173 at 20 n.37.

The district court faulted Dr. Freeman for not “attempt[ing] to determine the dose of any substance to which a plaintiff could have been exposed by wearing a particular garment in the Lands’ End uniform line.” Doc. 221 at 16. However, the court overlooked that “[e]vidence of a dose-response relationship as bearing on whether an inference of *general* causation is justified is analytically distinct from determining whether evidence of the dose to which a plaintiff was exposed is required in order to establish *specific* causation.” *Reference Manual on Scientific Evidence*, *supra*, at 603 n.161 (emphasis added); *see also In re Testosterone Replacement Therapy Prods. Liab. Litig.*, No. 14 C 1748, 2018 WL 4030585, at *7 (N.D. Ill. Aug. 23, 2018) (rejecting argument that expert needed to

“identify the specific dose” to opine as to general causation); *Vandestreek v. Lockheed Martin Corp.*, No. 6:21-cv-1570, 2023 WL 6396087, at *4–5 (M.D. Fla. Sep. 27, 2023) (same).

Indeed, the two decisions on which the district court relied both concerned opinions on *specific* causation—not *general* causation. See Doc. 221 at 16; see also *Cunningham v. Masterwear Corp.*, 569 F.3d 673, 674–75 (7th Cir. 2009) (expert opined that the plaintiffs’ symptoms “were caused” by the substance at issue); *Higgins v. Koch Dev. Corp.*, No. 3:11-cv-81, 2013 WL 6238650, at *8 (S.D. Ind. Dec. 3, 2013) (expert opined that the plaintiff’s injuries were “the direct result of” the substance at issue). Neither the district court nor *Lands’ End*—which also cited the two decisions, Doc. 181 at 16—appreciated the difference between general and specific causation.

There is a difference. Where, as here, the issue is general causation, a dose-response analysis merely evaluates whether “the greater the exposure, the greater the risk of disease.” *Reference Manual on Scientific Evidence, supra*, at 603. That is exactly what Dr. Freeman evaluated. He divided the plaintiffs who answered questionnaires into two groups—those who wore the uniform *less* than four times a week, and those who

wore the uniform *more* than four times a week—and he compared the number of symptoms reported and systems affected. *See* Doc. 173 at 20. The results demonstrated a dose-response relationship because “[e]mployees who wore items less [than] 4 times per week reported an average of 3.72 symptoms involving 2.48 systems,” whereas “employees that wore uniform articles 4 or more times a week had a mean of 4.38 symptoms associated with 2.75 systems.” Doc. 173 at 20.

The district court disregarded Dr. Freeman’s dose-response analysis because it was based on the plaintiff questionnaires and “[Dr.] Freeman admitted at deposition that that information was self-reported and imprecise, and that it did not provide any statistically significant information regarding dose-response.” Doc. 221 at 16–17. However, as argued *infra* § I.C.3., the district court’s concerns about the questionnaires go only to the weight a jury might give to Dr. Freeman’s opinions, not their admissibility.

There is no requirement that Dr. Freeman’s dose-response analysis be statistically significant for it to be reliable. *E.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 40 (2011) (“A lack of statistically significant data does not mean that medical experts have no reliable basis for

inferring a causal link between a drug and adverse events.”); *In re Prempro Prods. Liab. Litig.*, 738 F. Supp. 2d 887, 892 (E.D. Ark. Aug. 30, 2010) (“[S]tatistical significance, by itself, should not mechanically control whether an epidemiological analysis is sufficiently reliable to be admissible.”); see also Sir Austin Bradford Hill, *The Environment and Disease: Association or Causation?*, 58 Proc. Royal Soc’y Med. 295, 299 (1965), available at Doc. 182-1 at 6 (disagreeing that statistical significance is always required).

Moreover, Dr. Freeman did not say that his dose-response analysis was statistically *insignificant*. Instead, he merely noted that he did not evaluate the statistical significance of his dose-response analysis. Doc. 169 at 45 (175:14–176:15). That goes to the weight of his opinions, not their admissibility. *E.g.*, *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 83 (3d Cir. 2017) (“In certain cases, failure to perform a statistical adjustment may simply diminish the weight of an expert’s finding. The question of whether a study’s results were properly calculated or interpreted ordinarily goes to the weight of the evidence, not to its admissibility.”); *In re High-Tech Emp. Antitrust Litig.*, No. 11–CV–02509, 2014 WL 1351040, at *15 (N.D. Cal. Apr. 4, 2014) (“[T]he fact that these two

variables are not statistically significant at the 1%, 5%, and 10% levels goes to the weight, not the admissibility of Dr. Leamer’s model.”).

3. The district court’s expressions about the questionnaires go to weight, not admissibility.

The district court said that Dr. Freeman’s opinions “are based almost entirely on unreliable data,” referring to the plaintiff questionnaires. Doc. 221 at 17. The district court’s expressions of concern about the questionnaires go only to the weight of Dr. Freeman’s opinions, not to their admissibility.

As this Court has explained, “[r]eliability . . . is primarily a question of the validity of the methodology employed by an expert, *not the quality of the data used* in applying the methodology or the conclusions produced.” *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013) (emphasis added). “Whether [an expert] selected the best data set to use . . . is a question for the jury, not the judge.” *Id.* at 809. “Assuming a rational connection between the data and the opinion . . . , an expert’s reliance on faulty information is a matter to be explored on cross-examination; it does not go to admissibility.” *Id.*

For example, in *Stollings v. Ryobi Technologies, Inc.*, 725 F.3d 753, 766 (7th Cir. 2013), the district court excluded an expert because the

court concluded that a piece of data on which the expert relied was unreliable. This Court disagreed. *Id.* at 766–67. Even though the data “was undoubtedly a rough estimate,” this Court held that “[t]he judge should have let the jury determine how the uncertainty about [the accuracy of the data] affected the weight of [the expert’s] testimony.” *Id.* at 767.

Of course, “an expert must employ ‘those kinds of facts or data’ on which experts in the field would reasonably rely.” *Manpower*, 732 F.3d at 809 (citation omitted). For example, a forensic accounting expert could not base a recruiting firm’s earnings projections “on changes in the size of the white rhino population in Africa.” *Id.* But it is not unreasonable for an epidemiologist to rely on self-reported data like the plaintiff questionnaires on which Dr. Freeman relied. Indeed, the Alaska Airlines study that Dr. Freeman discussed—which was published in a peer-reviewed epidemiology journal—also relied on “self-reported health symptoms.” Doc. 214-2 at 1. *See also Allen v. Int’l Bus. Machs. Corp.*, No. 94–264, 1997 WL 34501372, at *27 (D. Del. Dec. 18, 1997) (“[W]here routine databases are not available for case ascertainment of [medical conditions], epidemiologists generally rely upon alternative approaches for the identification of affected individuals, such as self-reported symptoms.”).

As this Court has explained, “[m]edical professionals reasonably may be expected to rely on self-reported patient histories.” *Walker v. Soo Line R. Co.*, 208 F.3d 581, 586 (7th Cir. 2000). “In situations in which a medical expert has relied upon a patient’s self-reported history and that history is found to be inaccurate, district courts usually should allow those inaccuracies in that history to be explored through cross-examination.” *Id.*

Other courts have ruled the same. *E.g.*, *In re Flint Water Cases*, No. 16-10444, 2023 WL 6279521, at *5 (E.D. Mich. Sep. 26, 2023) (noting that “[d]ata-gathering via self-reports appears to have been subject to peer review and to have reasonably wide acceptance” and that caselaw “d[id] not support the claim that methodologies that gather data based on self-reporting should generally be excluded as unreliable under *Daubert* and Rule 702”); *Edgett v. Union Pac. R.R. Co.*, No. 8:18-cv-407, 2021 WL 1238498, at *9 (D. Neb. Apr. 1, 2021) (“Dr. Newman’s lack of quantitative data is not fatal to the admissibility of his opinion, the lack of such data is typical in epidemiological cases. Dr. Newman’s reliance on qualitative data—including self-reported exposure over thirty years—is appropriate under these circumstances. Any alleged shortcomings in his evaluation

are properly the subject of cross-examination and do not call for exclusion of the testimony.”).

Lands’ End asserted below that the questionnaire responses were “unverified.” Doc. 197 at 26. But Lands’ End misled the district court. The instructions on the questionnaire warned that “responses are being given under *penalty of perjury*. You must give complete and accurate answers.” Doc. 173 at 26 (emphasis added). The end of the questionnaire also included a verification requiring the respondent to sign and “declare under *penalty of perjury* [that] the foregoing Answers to the Questionnaire are within my personal knowledge and are *true and correct*.” Doc. 173 at 28 (emphasis added).

Although the district court noted that “[t]he questionnaires were not drafted by epidemiologists or other scientists to evaluate association or causation” and that they “were not designed to control for errors or subjective responses,” the district also acknowledged the questionnaires *were* “developed by counsel for Lands’ End.” Doc. 221 at 17. Thus, Lands’ End can hardly fault Dr. Freeman for relying on the questionnaires providing information Lands’ End thought significant.

Further, Dr. Freeman understood and acknowledged the limitations of the questionnaires. *See* Doc. 169 at 32–33 (124:4–127:3). It is one thing for an expert to ignore limitations in the data on which he relies; it is a different thing for an expert to acknowledge the limitations. *See Tillman v. C.R. Bard, Inc.*, 96 F. Supp. 3d 1307, 1331–32 (M.D. Fla. 2015) (rejecting challenge to the reliability of the data underlying Dr. Freeman’s opinions and emphasizing that Dr. Freeman “acknowledge[d] the weaknesses in the . . . data and explain[ed] his reasoning for finding th[e] data to be a reliable source of information”).

Here, Dr. Freeman had access to the questionnaire form and understood how it was drafted. *See* Doc. 173 at 26–28. Indeed, he emphasized that the questionnaire was appropriately drafted to eliminate concerns about temporality;

Q. [F]or any potential causal factor there may be some window of time that is appropriate in which to assess the temporal connection, but what that window of time is would vary depending on what the factor is and what the latency is of the potential medical problem?

A. Right. I mean fortunately that issue or question is sort of eradicated with the way the questionnaire was worded, which says . . . what problems did you have after you started wearing the outfit. . . . [T]here are multiple facets of temporality that are inherent in the way the questionnaire was worded.

Doc. 169 at 46 (180:22–181:14).

In sum, the district court’s concerns about the design of the questionnaire go to weight, not admissibility. *E.g.*, *In re Tasigna Prods. Liab. Litig.*, No. 6:21-md-3006, 2024 WL 1343157, at *4 (M.D. Fla. Jan. 15, 2024) (criticisms of a study’s “design[]” went “to weight and not admissibility because they attack the quality of the data and not how [the expert] utilized it”); *Gomez v. Am. Med. Sys. Inc.*, No. CV-20-00393, 2021 WL 1163087, at *13 (D. Ariz. Mar. 26, 2021) (“The details of the study go to weight, not admissibility of the opinions.”); *see also U.S. v. Various Gold, Silver and Coins*, No. 3:11–cv–01179, 2013 WL 5947292, at *5 (D. Or. Oct. 30, 2013) (“To the extent the Government has specific arguments about the format of the questions or the manner in which the questionnaire was taken, those allegations bear on the weight of the evidence, not its admissibility.” (cleaned up)).

As for subjectivity of responses, Dr. Freeman recognized that many of the symptoms at issue are inherently subjective. He explained that “[i]f someone said they had skin irritation from wearing the . . . uniform, it’s like saying bananas make me nauseous. No external person can validate that but it can be perfectly true.” Doc. 169 at 21 (80:18–22). *See also id.*

at 30 (115:21–116:4) (“I don’t truly know whether any of these symptoms are actually experienced because it is an individual experience like the bananas make me nauseous thing. Only you can tell me what your symptoms are. . . . It’s a subjective complaint. It’s not an objective finding.”). Again, the district court’s concerns about subjectivity necessarily go to the weight of Dr. Freeman’s opinions, not their admissibility. *E.g.*, *Hananburgh v. Metro-N. Commuter R.R.*, No. 13–CV–2799, 2015 WL 1267145, at *6 (S.D.N.Y. Mar. 18, 2015) (“[Defendant’s] contention that [the expert] places undue weight on subjective evidence such as Plaintiff’s own account of the incident—go to the weight, not the admissibility, of [the expert’s] testimony.”).

The district court emphasized that “[t]he questionnaires were completed only by plaintiffs in this matter after litigation began” and that the respondents “had a financial interest in answering that they had experienced medical symptoms after they started wearing the uniforms.” Doc. 221 at 17. But, again, the court ignored that the questionnaires were signed “under penalty of perjury.” Doc. 173 at 28. This made the questionnaire responses tantamount to declarations under 28 U.S.C. § 1746—which “must be credited” by courts at summary judgment. *See Rowe v.*

Gibson, 798 F.3d 622, 627 (7th Cir. 2015). If courts must credit such evidence, how could it be unreliable for Dr. Freeman to do the same?

Not only did the potential for penalty of perjury minimize bias, but so did the sheer volume of responses and the fact that fewer symptoms were reported by those who wore the uniforms less frequently. As Dr. Freeman explained, it is unreasonable to believe that the 982 plaintiffs who answered the questionnaires collectively conspired to falsify their responses and contrive such a pattern:

[W]e don't have the ability for everybody who worked four days or less and everybody who worked four days or more to get together and say you report more symptoms and I'll report less symptoms and that way we'll really fool this guy who is there doing the analysis.

So we have external ways of checking to see are these data valid. So that's part of the purpose of . . . what I did was to describe . . . essentially the epidemiologic curve or epidemiologic information to say is this consistent with what we think would be exposure to something that makes people sick.

And so that's very much considered in my processes as well as a matter of . . . rolling all together and drawing conclusions. You take into account all of the evidence.

. . . .

[T]he benefit to me is that I have over 900 questionnaires. And so I get to see how consistent they are across the questionnaires. So I'm seeing real effects within these questionnaires, not artifactual effects.

Might someone report an extra symptom, sure. Is that possible, sure. Is there any evidence that that's the case, none whatsoever.

Doc. 169 at 47 (184:20–187:9).

In any event, the potential for bias in questionnaire responses goes to the weight of Dr. Freeman's opinions, not their admissibility. In *Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000), this Court rejected a challenge to an accounting expert even though his opinions were the product of “financial information furnished by [*the plaintiff*] and assumptions given him by *counsel* of the effect of the termination on [the plaintiff's sales].” (emphasis added). As this Court noted in a later decision, “[n]otwithstanding that the data the accountant used to make his projections came from the [plaintiff] and the [plaintiff's] counsel, [this Court] concluded that the district court's admission of the evidence was permissible because the methodology the accountant had employed ‘was well within the competence of a C.P.A.’” *Manpower, Inc.*, 732 F.3d at 807 (citation omitted). “That the expert accountant in *Tuf* could opine on future earnings on the basis of information supplied by *counsel* should make clear that the reliability of the data itself is not the object of the *Daubert* inquiry.” *Id.* at 808.

Other courts have similarly held that “possible bias in the data underlying an expert’s opinion ‘is a subject for cross-examination, and goes to the weight, not the admissibility, of the expert testimony.’” *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950, 2022 WL 814074, at *14 (S.D.N.Y. Mar. 17, 2022) (citation omitted); *see also, e.g., Auto. Ins. Co. of Hartford v. Electrolux Home Prods., Inc.*, No. 10-CV-011, 2012 WL 6629238, at *2 (S.D.N.Y. Dec. 12, 2012) (“Potential sample bias is a subject for cross-examination, and goes to the weight, not the admissibility, of the expert testimony.”); *Senne v. Kansas City Royals Baseball Corp.*, 591 F. Supp. 3d 453, 482 (N.D. Cal. 2022) (ruling that potential for “self-interest bias” in a survey went “to the weight of the evidence and not its admissibility”).

The district court faulted Dr. Freeman for not “review[ing] any medical records or tak[ing] any steps to confirm whether the information in the questionnaires was accurate.” Doc. 221 at 18. But, as described above, Dr. Freeman explained that the sheer volume of responses and the fact that fewer symptoms were reported by those who wore the uniforms less frequently indicates that the responses were sufficient for use in the

analysis. Doc. 169 at 47 (184:20–187:9). Dr. Freeman also explained that the questionnaire responses were akin to a medical record:

Q. So what you were working from was purely self-reported symptoms, right?

A. Well, I would call it to a certain extent a medical history. So I'm getting a medical history from people saying, I had XYZ symptom. That is a medical history, even though they're reporting on a Lands' End questionnaire.

Doc. 169 at 17 (63:7–14).

What's more, Dr. Freeman explained that the lack of medical records was less of a concern because the symptoms at issue "aren't particularly complicated." Doc. 169 at 17 (63:15–20) ("So the specific diagnosis attributable to it might be something just like rash, hair loss, respiratory difficulty. Those aren't particularly complicated."). He distinguished the symptoms at issue from a more complicated medical condition like ovarian cancer. Doc. 169 at 17 (63:20–64:2) ("If someone says, I developed ovarian cancer after I was exposed to the clothing, for example, that is a completely different question. That is one that would require, of course, analysis of medical records.").

The district court cited two decisions to support its exclusion of Dr. Freeman's causation opinions based on the court's concerns about the

questionnaires, but both decisions are inapposite. Doc. 221 at 18. One concerned an employment-discrimination suit in which the plaintiff's "industrial relations" expert was excluded because "[s]he admitted that even though it was her usual practice to interview actors on both sides of a discrimination claim, she did not talk to either [the plaintiff] or his supervisors. Indeed, she did not even bother to review any sworn deposition testimony." *Smith v. Ill. Dep't of Transp.*, 936 F.3d 554, 558 (7th Cir. 2019). The other decision involved the exclusion of expert physicians who purported to conduct a differential diagnosis of multiple plaintiffs without reviewing the plaintiffs' medical records. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 758–62 (3d Cir. 1994). Here, by contrast, Dr. Freeman agreed that he was "not offering any opinions as to any clinical or medical diagnosis for any of the plaintiffs." Doc. 169 at 21 (79:24–80:3).

Finally, the district court noted that "the questionnaires provide no information about Delta employees who wore the uniforms but did not report any symptoms; employees who did not wear the uniforms but reported symptoms; or employees who did not wear the uniforms and did not report any symptoms." Doc. 221 at 18. In other words, the district court faulted Dr. Freeman for not using a control group. Yet, Dr. Freeman

explained that he was not doing a “case control study.” Doc. 169 at 28 (108:18–109:23). Instead, he said he was “doing a sort of retrospective longitudinal study.” Doc. 169 at 29 (112:11–15). Again, the district court’s concerns go to weight, not admissibility. *See Deutsch v. Novartis Pharmas. Corp.*, 768 F. Supp. 2d 420, 446 (E.D.N.Y. 2011) (ruling that objections to expert’s reliance on a study because it was “a retrospective non-controlled observational study limited to multiple myeloma patients, go to weight and not the admissibility of the opinion”); *Mathews v. Novartis Pharmas. Corp.*, No. 3:12–cv–314, 2013 WL 5780415, at *18 (S.D. Ohio Oct. 25, 2013) (same).

4. The district court did not rule that Dr. Freeman unreliably applied the Naranjo algorithm.

In addition to the Bradford Hill method, Dr. Freeman also used the Naranjo algorithm to determine general causation. Doc. 169 at 60 (234:8–18). The district court did not rule that Dr. Freeman unreliably applied Naranjo algorithm. Doc. 221. Instead, the court referenced the Naranjo algorithm only in connection with Dr. Freeman’s opinion on *specific* causation. Doc. 221 at 19. And even then, the court did not address whether Dr. Freeman reliably applied the Naranjo algorithm. Doc. 221 at 19.

Accordingly, to the extent this Court concludes that the district court did not err in otherwise excluding Dr. Freeman's opinions on general causation, this Court should remand for the district court to address in the first instance whether Dr. Freeman reliably applied the Naranjo algorithm to opine as to general causation.

D. This Court should not reach the issue of specific causation in the first instance.

“It is fundamental that this Court, in the exercise of its appellate jurisdiction, ordinarily will not consider a question which the district court, without objection by either party, failed to decide.” *Sharp v. Ford Motor Credit Co.*, 615 F.2d 423, 424 n.1 (7th Cir. 1980). Instead, where such a question arises, this Court ordinarily remands for the district court to decide the question in the first instance. *E.g.*, *Planned Parenthood of Ind. & Ky., Inc. v. Marion Cnty. Prosecutor*, 7 F.4th 594, 606 (7th Cir. 2021); *Hernandez v. Cook Cnty. Sheriff's Off.*, 634 F.3d 906, 916–17 (7th Cir. 2011); *FMS, Inc. v. Volvo Constr. Equip. N. Am., Inc.*, 557 F.3d 758, 763 (7th Cir. 2009). After all, this Court is a “court of review and not of first instance.” *Joseph Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3. F.3d 994, 998 (7th Cir. 1993) (emphasis added).

Here, the district court did not decide whether there was a genuine dispute of material fact as to specific causation. Doc. 221 at 31–32. Rather, the court concluded only that “[P]laintiffs have no admissible evidence to prove their theory of *general* causation.” Doc. 221 at 32 (emphasis added).

Indeed, Plaintiffs argued that any ruling on specific causation was premature because of the district court’s scheduling order. Doc. 206 at 36–39. Although that scheduling order provided a deadline for dispositive motions, it expressly stated that the deadline “does not include dispositive motions that are specific to a particular individual, including individual *specific causation* issues or the sufficiency of Plaintiffs’ Rule 26(a)(2)(C) disclosures.” Doc. 117 at 3 (emphasis added). Further, the district court denied as “moot” Lands’ End’s motion to exclude the testimony of Plaintiffs’ rule 26(a)(2)(C) experts—treating physicians who would have opined as to specific causation for 174 plaintiffs. Doc. 221 at 2, 32–33.

It would be improper for this Court to decide the issue of specific causation in the first instance. To do so, this Court would also have to resolve the subsidiary issue of whether summary judgment on specific

causation was premature in light of the district court's scheduling order. *See* Doc. 206 at 36–39. It would be odd for this Court to make such a determination in the first instance, as the enforcement of a scheduling order is subject to the district court's discretion. *See Abellan v. Lavelo Prop. Mgmt, LLC*, 948 F.3d 820, 830 (7th Cir. 2020) (“Enforcement or modification of a final pretrial order is within the district court's sound discretion.”). The district court did not exercise that discretion here. Thus, this Court—a court of review—cannot determine whether the district court abused that discretion.

Additionally, this Court would also have to decide in the first instance the subsidiary issue of whether Plaintiffs' rule 26(a)(2)(C) experts should be excluded. Again, that issue also involves the district court's discretion, because Lands' End argued that the treating physicians were not timely disclosed as retained experts under rule 26. Doc. 192. “[T]rial courts retain broad discretion to limit and manage discovery under Rule 26 of the civil rules.” *Geiger v. Aetna Life Ins. Co.*, 845 F.3d 357, 365 (7th Cir. 2017) (citation omitted).

Finally, Lands' End's motion to exclude Plaintiffs' rule 26(a)(2)(C) experts did not challenge the treating physicians of 96 plaintiffs. Doc. 192

at 4–5 & n.1.⁷ In other words, there are 96 plaintiffs whose evidence of specific causation is unchallenged by Lands’ End. Doc. 192 at 4–5 & n.1; *see also* Doc. 197 at 10–11. So even if this Court were to decide the issue of specific causation, that decision would not impact 96 plaintiffs.

For example, one treating physician stated that “[he] could find no medical explanation for the symptoms [the plaintiff] has been having, other than the fact that something in the dress may be aerosolized and causing respiratory tract irritation.” Doc. 194-5 at 11. Another treating physician diagnosed several plaintiffs with various conditions and stated “that there is a substantial degree of evidence from an epidemiologic perspective that employees are being impacted by these new uniforms.” Doc. 194-1 at 9, 17. And a third treating physician opined “without a reasonable doubt, the uniform is the cause of [the patient’s] allergic dermatitis.” Doc. 194-1 at 10.

Not only is the treating physician testimony evidence of specific causation, but it is also evidence of general causation. *See C.W. ex rel. Wood v. Textron, Inc.*, 807 F.3d 827, 838–39 (7th Cir. 2015) (“[T]here may

⁷ As Lands’ End noted, 174 plaintiffs disclosed treating physicians. Doc. 192 at 4. Lands’ End challenged only the treating physicians related to 103 plaintiffs. Doc. 192 at 5 n.1. And even “of those 103 Plaintiffs, 25 Plaintiffs have additional treating physician disclosures” that Lands’ End did not challenge. Doc. 192 at n.1.

be a case where a rigorous differential etiology is sufficient to help prove, if not prove altogether, *both* general and specific causation.”); *accord Moncel v. Flavor Dev. Corp.*, 995 N.W.2d 495, *4 (Wisc. Ct. App. 2023) (unpublished). Indeed, as one court has recognized, the issues of general causation and specific causation should not be considered in isolation; courts should consider them together. *See Henderson v. Lockheed Martin Corp.*, No. 6:21-cv-1363, 2023 WL 11108737, at *8–9 (M.D. Fla. Sep. 18, 2023).

In sum, if this Court were to decide the issue of specific causation in the first instance, it would also have to decide two subsidiary discretionary questions in the first instance. What’s more, 96 plaintiffs would still have unchallenged evidence of specific causation. All of this counsels against this Court deciding the issue of specific causation in the first instance. Instead, this Court should remand for the district court to address the issue.

CONCLUSION

This Court should reverse and remand for further proceedings. Specifically, this Court should reverse: (1) the corrected final judgment, dated February 20, 2024, Doc. 258; and (2) the district court's order granting summary judgment on the physical injury claims and excluding the causation opinions of Plaintiffs' experts, dated July 8, 2022, Doc. 221.

TERRELL HOGAN YEGELWEL, P.A.**Wayne Hogan**

hogan@terrellhogan.com

Bruce A. Maxwell

maxwell@terrellhogan.com

233 East Bay Street, 8th Floor

Jacksonville, Florida 32202

Telephone: (904) 632-2424

URBAN & TAYLOR S.C.**Jay A. Urban**

jurban@wisconsininjury.com

4701 N. Port Washington Road

Milwaukee, WI 53212

Telephone: (414) 906-5333

CREED & GOWDY, P.A./s/ Dimitrios A. Peteves**Dimitrios A. Peteves**

dpeteves@appellate-firm.com

Bryan S. Gowdy

bgowdy@appellate-firm.com

filings@appellate-firm.com

865 May Street

Jacksonville, Florida 32204

Telephone: (904) 350-0075

Counsel for the Andrews Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Circuit Rule 32(c) because it contains 13,240 words, not including words in items excluded under Federal Rule of Appellate Procedure 32(f).

/s/ *Dimitrios A. Peteves*
Attorney

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Certificate

Pursuant to Circuit Rule 30(d), I certify that this short appendix includes all the materials required by Circuit Rules 30(a) and (b).

/s/ Dimitrios A. Peteves
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GWYNETH GILBERT, MICHAEL MARTE,
MONICA DESCRESSENTIS, RACHEL ABUKHDEIR,
and STEPHANIE ANDREWS, et al.,

Plaintiffs,

v.

LANDS' END, INC.,

Defendant.

OPINION and ORDER

19-cv-823-jdp
19-cv-1066-jdp

Plaintiffs in these consolidated cases are 603 current and former Delta Air Lines employees who allege that their uniforms, which were manufactured by defendant Lands' End, Inc., transferred dye onto clothing and other property and caused health problems, including skin rashes, hair loss, difficulty breathing, and headaches. Plaintiffs sue Lands' End for negligence, strict design defect, manufacturing defect, failure to warn, breach of implied warranty, and violation of the Magnuson-Moss Warranty Act.¹ The case is proceeding on two tracks: track 1 is for issues that affect all plaintiffs or large groups of plaintiffs; track 2 is for issues specific to individual plaintiffs.

Lands' End has filed several track 1 motions, seeking rulings that would apply to all plaintiffs' personal injury claims. First, Lands' End moves to exclude the testimony and opinions of plaintiffs' causation experts on the grounds that the experts' opinions are based on unreliable methods and unsound data. Dkt. 183; Dkt. 180; Dkt. 188.² Second, Lands' End

¹ In a previous order, the court granted summary judgment to Lands' End on plaintiffs' breach of express warranty claims. Dkt. 165.

² Docket citations are to case number 19-cv-823-jdp.

moves to exclude plaintiffs' Rule 26(a)(2)(C) experts (treating physicians for 174 plaintiffs) on the ground that the treating physicians did not form causation opinions during the course of treatment. Dkt. 191. Third, Lands' End moves for summary judgment on plaintiffs' personal injury claims, arguing that without their experts, plaintiffs cannot prove that the Lands' End uniforms were defective or caused plaintiffs' health problems. Dkt. 196. Lands' End also argues that the claims of three plaintiffs are precluded by decisions of the New York Workers' Compensation Board.

For the reasons below, the court will grant the motions to exclude the expert opinions of Fred Apple, Ph.D., Pamela Scheinman, M.D., and Michael Freeman, Ph.D., because their opinions are not based on reliably applied and scientifically valid methods. In light of this ruling, the court will grant defendants' motion for summary judgment on plaintiffs' personal injury claims because plaintiffs have failed to submit evidence sufficient to show that the Lands' End uniforms were defective or that a defect in the uniforms caused their health problems. Because plaintiffs' personal injury claims will be dismissed, the court need not address the parties' disputes regarding issue preclusion, and the court will deny as moot Lands' End motion to exclude the testimony of plaintiffs' Rule 26(a)(2)(C) treating physicians.

With the personal injury claims resolved, the court will ask the parties to confer and report to the court with a schedule for resolving the remaining claims for property damage and breach of warranty.

BACKGROUND FACTS

Lands' End manufactured nearly 100 different garments as part of a new line of Delta uniforms, including dresses, skirts, shirts, blouses, sweaters, jackets, and pants. The garments

were treated with a variety of chemical additives and finishes to make them stretchy, wrinkle- and stain-resistant, anti-static, and deodorizing. The uniforms were worn by approximately 64,000 Delta employees. Since the general distribution of the new uniforms in 2018, Lands' End has received approximately 2,470 complaints from Delta employees about the uniforms. Lands' End divided the complaints into the following categories: skin irritation (1,192); allergies (419); and crocking (358). Lands' End also received a smaller number of complaints that did not fall into these categories, including complaints about hair loss and headaches.

Plaintiffs allege that chemicals and heavy metals used in the finishes of the Lands' End uniforms leached onto their skin and aerosolized, causing plaintiffs to experience numerous health problems, including: contact dermatitis, rashes, blisters, boils, hives, bruising, eczema, scarring, hair loss, follicle inflammation, respiratory distress, vocal cord disfunction, breathing difficulties, shortness of breath, coughing, tightness of chest, blurred vision, dry eyes, nosebleeds, ringing ears, sinus problems, headaches, fatigue, muscle weakness, anxiety, swollen lymph nodes, anaphylactic symptoms, and auto-immune conditions. Plts.' Am. Cpt., Dkt. 48, ¶ 5.

Both Lands' End and plaintiffs' counsel commissioned testing from third-party testing agencies to assess the degree of crocking and the amount of chemicals and heavy metals contained in individual garments from the uniform line. The testing results have varied, showing that the garments were treated with different types of finishes, depending on the garment and the manufacturing facility. Testing by Intertox and Bureau Veritas found no levels of chemicals or metals exceeding industry standards. Dkt. 56-24; Dkt. 186-1. Most testing results from various agencies showed formaldehyde levels below industry standards, but testing from TextTest showed four garments with total formaldehyde levels above the recommended

extractable limits of 75 ppm. Dkt. 55-13. Testing from Vartest labs showed that some garments crocked dye, and that the chemical fluorine leached out with purple dye. Dkt. 141-5; Dkt. 177-2. ALS testing showed the presence of chromium, nickel, antimony, and mercury in some garments, but none at levels that exceeded industry standards. Dkt. 177-2. And testing by Enthalpy Analytical showed the presence of chromium, nickel, and mercury in some garments, though not at levels above industry standards. *Id.*

ANALYSIS

Plaintiffs bring negligence and strict product liability claims to recover damages for personal injuries they say were caused by the Lands' End uniforms. Lands' End contends that plaintiffs cannot succeed on their personal injury claims because they cannot prove that the uniforms were defective or that any defect could have caused, or actually caused, plaintiffs' health problems. In particular, Lands' End argues that plaintiffs lack the expert testimony that they need to prove both the existence of a defect and causation. The court first will discuss the law that applies to plaintiffs' claims, and then will consider the parties' arguments relating to summary judgment and plaintiffs' experts.

A. Choice of law

Plaintiffs' negligence and strict product liability claims are governed by state law. But plaintiffs are citizens of 40 different states, and their alleged injuries occurred throughout the country, so there is a question about what state laws should apply to plaintiffs' claims. The court has jurisdiction over plaintiffs' state law claims under the Class Action Fairness Act, 28 U.S.C. § 1332(d), because the amount in controversy exceeds \$5,000,000 and at least one

plaintiff is a citizen of a state other than Wisconsin, where Lands' End is headquartered.³ CAFA jurisdiction is a type of diversity jurisdiction, and a court sitting in diversity applies the choice-of-law rules of the forum state to determine which state's substantive law applies to the plaintiffs' claims. *See Atl. Cas. Ins. Co. v. Garcia*, 878 F.3d 566, 569 (7th Cir. 2017). Under Wisconsin's choice-of-law rules, there is a presumption that the law of the forum state applies unless non-forum contacts are more significant. *Drinkwater v. Am. Fam. Mut. Ins. Co.*, 2006 WI 56, ¶ 40, 290 Wis. 2d 642, 658, 714 N.W.2d 568, 576. Courts also consider the following factors: predictability of results; maintenance of interstate and international order; simplification of the judicial task; advancement of the forum's governmental interests; and application of the better rule of law. *Id.*

Plaintiffs say that the court should apply Wisconsin law to their tort claims because Wisconsin is the forum state and Lands' End is headquartered here, Plts.' Br., Dkt. 206, at 17, but plaintiffs do not evaluate whether Wisconsin's contacts with the parties and injuries are more or less significant than any other forum's contacts. Lands' End disagrees that Wisconsin law should apply, but it says that it is unnecessary to resolve choice of law at this stage because there are no material differences among the laws of the various potential jurisdictions that would affect the outcome of their pending motions.

The court concludes that it is unnecessary to resolve choice of law at this stage. There are only two elements of product liability law at issue in Lands' End's motion for partial summary judgment: (1) the existence of a defect; and (2) whether the defect caused plaintiffs'

³ In a previous order, the court denied plaintiffs' motion to certify a class of current and former Delta Air Lines employees. Dkt. 165. The decision not to certify a class does not divest the court of jurisdiction under the Class Action Fairness Act. *See Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 807 (7th Cir. 2010).

injuries. Although products liability law varies from state to state, those two elements generally are consistent across all jurisdictions. *See* 63 Am. Jur. 2d Products Liability § 531 (“The chief elements which a plaintiff must prove in [a products liability claim] are: (1) the defective and (according to most authorities) unreasonably dangerous condition of the defendant’s product; and (2) a causal connection between such condition and the plaintiff’s injuries or damages.”); *Burton v. E.I. du Pont de Nemours & Co., Inc.*, 994 F.3d 791, 818 (7th Cir. 2021) (“Both causes of action [negligence and strict liability] require a plaintiff to prove that the product causing injury was ‘defective.’”) (*quoting Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 2009 WI 78, n.7, 319 Wis. 2d 91, 106, 768 N.W.2d 674, 681). And the parties agree that plaintiffs must show both a defect and causation to succeed on their claims. Plts.’ Br., Dkt. 211, at 21; Dfts.’ Br., Dkt. 196, at 22. So in evaluating Lands’ End’s motion for partial summary judgment, the court will assume that, regardless which state law applies, plaintiffs can prevail on their negligence and strict product liability claims only by showing both: (1) that the Land’s End uniforms were defective; and (2) that the defect caused plaintiffs’ personal injuries.

B. Existence of a defect

Lands’ End argues that plaintiffs have no evidence to prove that the Lands’ End uniforms worn by plaintiffs were defective. In Wisconsin and many other jurisdictions, the law recognizes three categories of product defects: manufacturing defects, design defects, and defects based on a failure to adequately warn. *See Burton*, 994 F.3d at 818 (Wisconsin law); Restatement (Third) of Torts: Prod. Liab. § 2; Restatement (Second) of Torts § 402A. A product has a manufacturing defect when it deviates from the manufacturer’s specifications, and that deviation causes it to be unreasonably dangerous. *Godoy*, 2009 WI 78, ¶ 29. A product has a design defect when the design itself is the cause of the unreasonable danger. *Id.* And a

product is defective based on a failure to adequately warn when an intended use of the product is dangerous, but the manufacturer did not provide sufficient warning or instruction. *Id.*

Plaintiffs' amended complaint alleges that the uniforms had all three types of defects. Plts.' Am. Cpt., Dkt. 48, ¶¶ 60–89. But plaintiffs failed to respond to Lands' End's argument that they lack of evidence of a specific defect related to plaintiffs' personal injury claims. Plaintiffs' failure to respond could be reason enough to conclude that plaintiffs cannot satisfy the requirement to show that Lands' End uniforms were defective. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver.") But the court will consider whether the evidence plaintiffs discuss in their brief could satisfy their burden to prove the existence of a defect.

Plaintiffs argue in their response brief that their personal injuries were caused by chemicals and heavy metals in the uniforms, which plaintiffs breathed or absorbed into their bodies because the garments were not properly scoured or after-washed during the manufacturing process. Based on plaintiffs' arguments, the court can fairly infer that plaintiffs' theory is that the alleged defect in the uniforms is the use of chemicals and heavy metals in conjunction with the failure to properly after-wash the garments, allowing excess dye to remain on the garment and eventually bleed off with chemicals onto plaintiffs. Depending on whether the manufacturer followed Lands' End's specifications, this theory could support either a manufacturing defect or a design defect.

Lands' End argues that plaintiffs need expert testimony to prove that those characteristics in a garment constituted a defect, Dft.'s Br., Dkt. 197, at 23, and plaintiffs concede the point by failing to argue otherwise. *See Bonte*, 624 F.3d at 466. The court agrees that a lay jury would not have the knowledge or experience to determine whether any garment

in the Lands' End uniform line was defective. A jury would not know whether and at what levels specific chemicals or heavy metals in a garment are dangerous to humans, whether a garment was been properly scoured or after-washed, whether the failure to properly scour or after-wash a garment could cause dangerous chemicals or heavy metals from a garment to leach out of a garment, and whether a person could absorb chemicals or heavy metals in amounts capable of causing the health problems alleged by plaintiffs. Expert testimony is clearly required. *See City of Cedarburg Light & Water Comm'n v. Allis-Chalmers Mfg. Co.*, 33 Wis. 2d 560, 568, 149 N.W.2d 661, 662 (1967) (expert testimony needed to resolve disputes involving technical, scientific, or medical matters outside the common knowledge or experience of jurors).

Plaintiffs point primarily to the report of Dr. Peter Hauser, their textiles expert, as evidence that the failure to properly after-wash and scour the uniforms was a manufacturing and design defect that caused excess crocking and transferred dye to plaintiffs' personal property. Plts.' Br., Dkt. 206, at 20. But Hauser's report limited his opinions to plaintiffs' property damage claims. Hauser Rep., Dkt. 177, ¶¶ 15, 16. He did not opine that crocking in the garments would transfer an amount of chemicals or heavy metals sufficient to cause toxicity, and he testified at his deposition that he was not giving any opinions about chemicals, heavy metals, or defects in the uniforms that may have affected plaintiffs' health. Hauser Dep., Dkt. 171, at 220–21, 234. He also testified that many of the substances found during uniform testing, including flourine, magnesium, sodium, and silicon, were either substances that are used frequently in garments or that were found in low levels that would not be concerning to him. *Id.* at 266–69, 277–78. Plaintiffs cannot rely on Hauser's testimony to prove that there was a manufacturing or design defect in the Lands' End uniforms related to their health problems.

Plaintiffs' other experts did not provide opinions about any specific defect in the uniforms either. Dr. Michael Freeman, plaintiffs' epidemiology expert, testified that he was not offering any opinions about the quality or nature of the textiles, the chemicals contained in the textiles, or whether the uniforms were defectively manufactured or designed. Freeman Dep., Dkt. 169, at 78–79. Freeman also did not provide any opinions about a failure to warn.

Dr. Fred Apple, plaintiffs' toxicology expert, was retained to offer opinions on causation, and he did not identify any specific manufacturing, design, or warning defect in his report. He stated in his report that certain substances were present in the uniforms at “extremely high levels” or “elevated levels,” Apple Rep., Dkt. 172, at 5–7, but he testified that the test results he reviewed showed “quite a bit of variability” as to whether a garment contained metals, Apple Dep., Dkt. 168, at 122, and that he was not an expert on textiles or crocking. *Id.* at 95. He testified that he did not know the allowable limits or regulatory values for any of the substances in the uniforms, *id.* at 132–33, the dose at which any of the chemicals or heavy metals involved could cause any symptom in a person, or whether a toxic level of any chemical could be transferred from the uniforms to a person. *Id.* at 88, 131. Apple's opinions do not address whether any defect in the manufacturing or design of the uniforms rendered them unreasonably dangerous. His testimony does not satisfy plaintiffs' burden of proving a defect.

Plaintiffs' third retained expert, Dr. Pamela Scheinman, is a dermatologist, not a textile expert, and she did not identify a defect in the design, manufacturing, or marketing of the uniforms. Her opinions concern the causal connection between chemicals and heavy metals in the uniforms and plaintiffs' dermatological, respiratory, and ocular symptoms. Scheinman Rep., Dkt. 175. She did not interpret laboratory testing results or opine that the presence of certain chemicals, or chemicals at certain levels, rendered the uniforms dangerous or defective.

Scheinman testified at her deposition that she was not an expert in toxicology or exposure limits, Scheinman Dep., Dkt. 172, at 30, 55, 163–64, that she was not providing an opinion about which specific metals or chemicals caused plaintiffs’ symptoms, *id.* at 165, that she did not know the exposure level required to cause specific symptoms, *id.* at 172–73, and that she did not try to match different chemicals, metals, or garments with the plaintiffs’ symptoms. *Id.* at 169.

The existence of a defect is a required element of plaintiffs’ product liability claims, and plaintiffs were required to come forward with admissible evidence to support every element on which they bear the burden of proof. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Plaintiffs rely, essentially, on a simplistic post-hoc theory, that because some flight attendants reported reactions after wearing the new uniforms, the uniforms must be defective. But Rule 702 and the *Daubert* standard requires a more robust showing. Plaintiffs’ experts did not address whether the Lands’ End uniforms contained a defect that caused plaintiffs’ health problems, and plaintiffs have presented no other evidence from which a reasonable jury could conclude that a deviation in the manufacturing of the uniforms rendered them unreasonably dangerous, that the uniform design rendered them unreasonably dangerous, or that Lands’ End failed to provide sufficient warning regarding the dangers of the uniforms. Therefore, plaintiffs do not have the necessary evidence to support their personal injury product liability claims.

C. Causation

Even if plaintiffs had presented evidence that the Lands’ End uniforms were defective, plaintiffs have failed to present admissible evidence sufficient to prove causation. To succeed on their personal injury claims, plaintiffs must show that the uniform’s alleged defect—the

presence of chemicals and heavy metals in improperly scoured garments—caused their injuries. *See Burton*, 994 F.3d at 824.

The parties agree that plaintiffs’ negligence and strict product liability claims are similar to toxic tort claims, for which plaintiffs must prove both general and specific causation. Dfts.’ Br., Dkt. 196, at 18–19; Plts.’ Br., Dkt. 206, at 24. General causation refers to whether the substance or substances at issue are *capable* of causing the harm alleged. *See C.W. ex rel. Wood v. Textron, Inc.*, 807 F.3d 827, 831 (7th Cir. 2015). Specific causation refers to whether the substance did, in fact, cause the particular harm alleged by a particular individual. *Id.* Plaintiffs do not dispute Lands’ End’s assertion that they must present expert testimony to prove that substances in the uniforms could have caused, and actually caused, their health problems. And as with the existence of a defect discussed above, the court agrees that plaintiffs’ theory of personal injury requires expert testimony. A lay jury could not determine on its own whether toxins in the Lands’ End uniforms entered plaintiffs’ body through dermal or respiratory exposure and caused the numerous health problems alleged by plaintiffs.

Plaintiffs rely on the opinions of three retained experts to prove general causation for all plaintiffs and specific causation for a portion of plaintiffs: Dr. Michael Freeman, the epidemiologist; Dr. Fred Apple, the toxicologist; and Dr. Pamela Scheinman, the dermatologist. Lands’ End argues that these experts’ opinions should be excluded because they are based on unreliable methodologies and unsound data.

In assessing whether the expert opinions are admissible, the court serves as a gatekeeper to ensure that the proffered expert testimony meets the requirements of Federal Rule of Evidence 702. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The court must ensure that the expert is qualified, that the

expert's opinions are based on reliable methods and reasoning, and that the expert's opinions will assist the jury in deciding a relevant issue. Fed. R. Evid. 702; *Myers v. Ill. Cent. R.R. Co.*, 629 F.3d 639, 644 (7th Cir. 2010). Courts can examine the reliability of an expert's principles and methods by looking at factors such as whether the scientific theory or technique can be (and has been) tested; whether the theory or technique has been subjected to peer review and publication; whether a particular technique has a known potential rate of error; and whether the theory or technique is generally accepted in the relevant scientific community. *Burton*, 994 F.3d at 826; *Schultz v Azko Nobel Paints, LLC*, 721 F.3d 426, 431 (7th Cir. 2013) (citing *Daubert*, 509 U.S. at 593–94). When these standards are applied to the expert opinions of Freeman, Apple, and Scheinman, it is clear that the causation opinions must be excluded.

1. Dr. Michael Freeman, Ph.D.

Dr. Michael Freeman is an epidemiologist, forensic consultant, and professional expert witness who has provided expert opinion in at least 350 trials and 900 depositions. Freeman Dep., Dkt. 169, at 44. Most of those cases involved traffic accidents and medical negligence claims, but Freeman also has provided expert opinion in environmental exposure cases. *Id.* Freeman offers both general and specific causation opinions in his report. He opines that the Lands' End uniforms were capable of causing, and were the most likely cause of, plaintiffs' various health problems. Freeman Rep., Dkt. 173, at 24.

Epidemiologic studies are often the best evidence of general causation in toxic exposure cases, and scientists frequently rely on epidemiological data to establish an association between a chemical and a disease or set of symptoms. See Michael D. Green, D. Michael Freedman, & Leon Gordis, "Reference Guide on Epidemiology," *Reference Manual on Scientific Evidence* 551–52 (Federal Judicial Center 3d ed. 2011) ("Epidemiology focuses on the question of general

causation (i.e., is the agent capable of causing the disease?)”); *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 882 (10th Cir. 2005)(“[E]pidemiology is the best evidence of general causation in a toxic tort case.”); *Rains v. PPG Indus., Inc.*, 361 F. Supp. 2d 829, 834 (S.D. Ill. 2004) (“Epidemiologic studies are the primary, generally accepted methodology for demonstrating a causal relation between a chemical and the set of symptoms or a disease.”).

Epidemiologists generally use a two-part process for determining causation. First, they assess whether there is an association between exposure to a drug or toxin and a disease. *See Reference Manual on Scientific Evidence* 374, 566, 598–600 (“[T]he first question an epidemiologist addresses is whether an association exists between exposure to the agent and disease.”). An association exists between exposure to a substance and a disease when the two “occur together more frequently than one would expect by chance.” *Id.* at 566. An association does not prove a cause-effect relationship, but if an association is found based on epidemiological or other scientific data, an epidemiologist can assess whether the association reflects a causal relationship by applying the nine-part “Bradford Hill criteria.” *Reference Manual on Scientific Evidence* 600; *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 783, 986 N.Y.S.2d 389, 9 N.E.3d 884 (2014) (“Although a causal relationship is one possible explanation for an observed association between an exposure and a disease, an association does not necessarily mean that there is a cause-effect relationship.”). The Bradford Hill criteria include: (1) plausibility; (2) strength of association; (3) consistency; (4) biological gradient (dose-response relationship); (5) specificity of the association; (6) analogy; (7) temporality; (8) experiment (cessation of exposure); and coherence. Dkt. 182-1, Austin Bradford Hill, “The Environment and Disease: Association or Causation?,” 58 Proc. Royal Soc’y Med. 295 (1965).

Freeman purports to rely on the Bradford Hill criteria and the epidemiological processes for determining causation outlined in the *Reference Manual on Scientific Evidence*. Freeman Rep., Dkt. 173, at 1. But Freeman does not actually apply those methods in his report.

Freeman skips the first step of a valid Bradford Hill epidemiological analysis: he fails to identify an association between the Lands' End uniforms and plaintiffs' symptoms that is based on epidemiological or other reliable data. See *Reference Manual on Scientific Evidence* 598–99 (“We emphasize that these [Bradford Hill] guidelines are employed only *after* a study finds an association, to determine whether that association reflects a true causal relationship”); *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prod. Liab. Litig.*, 174 F. Supp. 3d 911, 925 (D.S.C. 2016) (“Courts exclude expert testimony that attempts to start at step two, applying the Bradford Hill criteria without adequate evidence of an association.”) (citing cases). To evaluate a potential association, an epidemiologist generally would compare the health of people exposed to a substance (the treatment group) to that of persons not exposed (the control group) to determine whether the exposure to the substance is associated with an increased rate of disease or symptoms. *Reference Manual on Scientific Evidence* 218–19. But Freeman did not conduct this sort of analysis, as he identified no control group and conducted no analysis of the treatment group, which would be the approximately 64,000 Delta employees who wore the uniforms and were potentially exposed to the substances at issue. In fact, he did not conduct any epidemiological studies to determine whether there was an association between any of the Lands' End uniform items and any of plaintiffs' health symptoms, nor does he cite to any peer-reviewed epidemiological or toxicological studies that found an association between the chemicals he cites and the alleged health symptoms. There is nothing in Freeman's report analyzing whether individuals wearing the Lands' End uniforms developed the specific health

problems identified by plaintiff “more frequently than one would expect by chance.” *Reference Manual on Scientific Evidence* 566. Without such a comparison, one cannot determine whether the reported frequency of symptoms among Delta employees who wore the uniforms is higher than, lower than, or equal to that among Delta employees who did not wear the uniforms.

Plaintiffs argue that Freeman found an association between the uniforms and plaintiffs’ symptoms based on prior reports of health problems by American airline employees, Alaska airline employees, and Transportation Security Administration employees. Plaintiffs argue that one significant study showing evidence of association was the Harvard Flight Attendant Health Study, which was conducted by Harvard’s School of Public Health, and which found an association between the introduction of new Alaska airlines uniforms and employee health problems between 2007 and 2015. But Freeman does not explain in his report why complaints by employees of other airlines is evidence of an association between plaintiffs’ symptoms and the uniforms at issue in this case. Lands’ End did not design or manufacture the uniforms for the Alaska, American, or TSA employees, and Freeman presents no evidence that the materials, finishes, chemicals, or heavy metals in the Lands’ End uniforms are the same as those found in other airline employee uniforms.

Even if Freeman had identified adequate evidence of an association between the Lands’ End uniforms and the plaintiffs’ symptoms, his report does not apply the Bradford Hill causation criteria properly. “[A]n expert must do more than just state that she is applying a respected methodology; she must follow through with it.” *Brown*, 765 F.3d at 773.

First, Freeman asserts that the Bradford Hill criteria can be “distilled into a 3-step approach” that considers only plausibility, temporality, and alternative causation. Freeman Rep., Dkt. 173, at 14–15. The only support he cites for this approach are two articles that he

wrote on the topic: a non-peer reviewed guest editorial published in an orthopedics journal and an article about motor vehicle crashes. He cites no scientific support for using his distilled three-step approach to assess causation in a toxic exposure case.

Second, although he states that his three-step approach incorporates all of the Bradford Hill criteria, his analysis does not clearly address all nine criteria. Plaintiffs attempt to remedy this in their brief, explaining how Freeman's opinion can fit into the Bradford Hill analysis. But all of Freeman's opinions must be contained in his expert report, and plaintiffs cannot attempt to expand on Freeman's opinions or fix deficiencies in his report through attorney briefing.

One important Bradford Hill criterion that Freeman failed to assess was the dose-response relationship. He did not attempt to determine the dose of any substance to which a plaintiff could have been exposed by wearing a particular garment in the Lands' End uniform line, despite testifying at his deposition that such information would be important to a causation analysis. Freeman Dep., Dkt. 169, at 97, 166–67. *See Cunningham v. Masterwear Corp.*, 569 F.3d 673, 675 (7th Cir. 2009) (expert testimony properly excluded where expert presented no evidence or scientific literature to link level and duration of exposure to alleged symptoms); *Higgins v. Koch Dev. Corp.*, No. 3:11-CV-81-RLY-WGH, 2013 WL 6238650, at *9 (S.D. Ind. Dec. 3, 2013) (expert's opinion that did not discuss extent of exposure and failed to rely on medical literature was "not sufficient methodology for proving causation"). Plaintiffs respond that Freeman relied on information about how often plaintiffs wore their uniforms, measured in days, and compared that to the number of symptoms the plaintiffs' reported, to determine whether there was a dose-response relationship." But Freeman admitted at deposition that that

information was self-reported and imprecise, and that it did not provide any statistically significant information regarding dose-response. Freeman Dep., Dkt. 169, at 176.

Freeman's reliance on self-reported information leads to the third, and perhaps most significant, problem with Freeman's report: his opinions are based almost entirely on unreliable data. Freeman's causation analysis relies on data he summarized from questionnaires completed by 982 plaintiffs. Freeman Dep., Dkt. 169, at 58–59. Plaintiffs were asked to self-report which uniform items they wore, whether they wore each item “occasionally, weekly, or daily,” the health symptoms that they alleged were caused by the uniform, whether they experienced any of those symptoms prior to when they first wore the uniform, and to list any respiratory, cardiovascular, or dermatological illness that they did not attribute to the uniform. Dkt. 173, at 26–27. But Freeman provides no basis for relying on the questionnaire data to identify a causal relationship between exposure to chemicals in the garments and the symptoms reported by plaintiffs. The questionnaires were not drafted by epidemiologists or other scientists to evaluate association or causation, as they were in the Harvard study on which Freeman relies, and the questionnaires were not designed to control for errors or subjective responses. The questionnaires instead were developed by counsel for Lands' End to gather information and streamline discovery.

The questionnaires were completed only by plaintiffs in this matter after litigation began, that is, they were completed only by Delta employees who already had alleged health injuries from the uniforms. Freeman admitted that some of the answers in the questionnaires were vague, contradictory, erroneous, or ambiguous. Freeman Dep., Dkt. 169, at 183–84, 201, 204. Freeman also conceded that the plaintiffs had a financial interest in answering that they had experienced medical symptoms after they started wearing the uniforms. Freeman Dep.,

Dkt. 169, at 188–89. He also agreed that the questionnaires could not show whether the plaintiffs actually experienced the symptoms that they alleged. *Id.* at 115 (“I don’t truly know whether any of these symptoms are actually experienced because it is an individual experience like the bananas make me nauseous kind of thing.”). Nonetheless, Freeman did not review any medical records or take any steps to confirm whether the information in the questionnaires was accurate. Freeman Dep., Dkt. 169, at 99. Freeman’s admitted failure to account for potentially unreliable information undermines all of his opinions. *See Reference Manual on Scientific Evidence* 583 (“In reviewing the validity of an epidemiologic study, the epidemiologist must identify potential biases and analyze the amount or kind of error that might have been induced by the bias.”); *Smith v. Illinois Dep’t of Transportation*, 936 F.3d 554, 558 (7th Cir. 2019) (expert testimony properly excluded where expert did not interview plaintiff or review deposition testimony and “omitted a substantial set of facts from her analysis, and instead relief only on what appears to be plaintiff-curated records”); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 762 (3d Cir. 1994) (“[W]here [doctors] based their conclusion as to a plaintiff’s symptoms solely on the plaintiff’s self-report of illness in preparation for litigation, the district court acted within its discretion in excluding the testimony as based on an unreliable source of information.”).

The questionnaires also don’t provide information about all of the groups that should be evaluated in an epidemiological study. Specifically, the questionnaires provide no information about Delta employees who wore the uniforms but did not report any symptoms; employees who did not wear the uniforms but reported symptoms; or employees who did not wear the uniforms and did not report any symptoms. An accurate epidemiological causation

analysis would compare the probability of a health outcome in an exposed group to an unexposed group, but Freeman's report includes no such analysis.

Freeman also provides a specific causation opinion, concluding that the Lands' End uniforms likely caused the health symptoms of 276 plaintiffs. But this opinion is based on unreliable epidemiological methods also. Freeman purports to reach his specific causation opinions by applying the "Naranjo algorithm," which is also known as the "Adverse Drug Reaction Probability Scale." Lands' End argues that the Naranjo algorithm applies only in the context of assessing adverse drug reactions, and that Freeman has cited no scientific literature that would supporting using the algorithm to assess causation in this case.

Plaintiffs do not argue that Freeman could reliably reach a specific causation opinion by applying the Naranjo algorithm. Instead, plaintiffs argue that Freeman applied the Naranjo algorithm as part of a "totality-of-the-evidence" methodology. But Freeman never discussed a "totality-of-the-evidence" methodology in his report or at his deposition. And Freeman's opinion is not consistent with the way courts describe a "totality" or "weight of the evidence" methodology. *See, e.g., Milward v. Acuity Specialty Prod. Grp., Inc.*, 639 F.3d 11, 17–18 (1st Cir. 2011) (describing "weight of evidence" approach in six steps). Although plaintiffs cite *Milward*, they do not explain how Freeman applied any of the six steps identified in that case. It is apparent that he did not—he did not explain how he chose and weighed the evidence that he reviewed or how he considered and weighed plausible explanations. Nor did Freeman explain how he accounted for weaknesses in the data, such as ambiguous questionnaire results and potential bias. Plaintiffs cannot avoid the errors of Freeman's report by attempting to reframe his methodology. For all of these above reasons, Freeman's opinions on general and specific causation will be excluded.

2. Dr. Fred Apple, Ph.D

Dr. Apple is forensic toxicologist, chemist, and medical examiner who specializes in therapeutic drug monitoring and forensic postmortem toxicology. Apple Dep., Dkt. 168, at 12. Apple has no experience or background in textile or garment testing, but Lands' End does not challenge Apple's expertise or qualifications, so the court will assume that he is qualified to offer the opinions that he provides. The gist of his opinions, which are set forth in Apple's seven-page report, are the following: (1) garment testing performed by others shows that the uniforms were not color-fast and contained chemicals and heavy metals; (2) according to scientific literature, some of the chemicals and heavy-metals found in the uniforms can cause various health problems; (3) plaintiffs suffered from various health problems; and (4) the chemicals or heavy metals in the uniforms caused plaintiffs' health problems. Apple Rep., Dkt. 172, at 4–7.

As an initial matter, the parties dispute whether Apple's opinions are “general causation” or “specific causation” opinions. Lands' End argues that Apple's opinions relate to “specific causation” because Apple purports to provide an opinion about the causes of the specific plaintiffs' health problems, while plaintiffs say that they are proffering Apple only to support their general causation theory that the uniforms “were capable of causing the toxic health effects experienced by the plaintiffs.” Plts.'s Br., Dkt. 211, at 6, 11.

Defendants are correct. A toxicologist offering an opinion on general causation would consider whether a specific substance *could* cause the specific effect claimed by the plaintiff at the specified exposure, duration, frequency, timing, and route. *See Higgins v. Kock Dev. Corp.*, 794 F.3d 697, 701 (7th Cir. 2015) (“General causation refers to whether the substance at issue had the capacity to cause the harm alleged.”). But Apple never opines that the specific heavy

metals and chemicals in the uniforms were *capable* of causing the symptoms that plaintiffs suffered. Instead, Apple opines that the uniforms *caused* the specific toxic health effects alleged by plaintiffs. Apple Rep., Dkt. 172, ¶ 9; ¶ 11 (“the symptoms or injuries complained of . . . were proximately caused by heavy metals and chemicals leeching or otherwise bleeding out from the uniforms”). His opinion is a specific causation opinion. In any event, regardless whether Apple provides a specific or general causation opinion, the court will exclude it under Rule 702 because the Apple’s opinions are not based on a scientifically valid methodology.

Apple’s report does not purport to rely on any particular methodology to evaluate the causal link between plaintiffs’ symptoms and the various substances Apple cites as being present in garment testing results. Nor could Apple explain during his deposition what methodology he applied. When asked to explain the basis for his causation opinion, Apple testified:

I’m basing my opinions on the facts that uniforms are found to have these metals and chemicals and these metals and chemicals are well scientifically medically founded to cause all the symptomologies I described in my Rule 26 report as an example.

Id. at 124. When asked to explain his methodology further, Apple stated:

The substantial causal factors of causation is you have evidence of crocking, you have evidence of symptoms consistent with the heavy metals and the chemicals that were crocked, you have evidence of flight attendants having crocking on their clothing and on their bodies, you have evidence in some cases if you remove that it disappears so to me that is — to me a scientifically and medically sound methodology to follow what’s happening here.

Id. at 162.

These statements don’t describe a methodology based on sound toxicological principles, and they undermine the value of Apple’s report. *See Zamecnik v. Indian Prairie School Dist. No.*

204, 636 F.3d 874, 880–81 (7th Cir. 2011) (failure to describe methodology in report undermines expert’s opinion); *Minix v. Canarecci*, 597 F.3d 824, 835 (7th Cir. 2010) (“The expert must explain the methodologies and principles supporting the opinion.”).

Expert toxicologists generally determine causal connections between a substance and a symptom or disease by identifying the substance at issue, assessing whether the plaintiff was exposed to the substance in a manner that could lead to absorption in the body, and evaluating whether the dose to which the plaintiff was exposed was sufficient to cause the symptom or disease. *See* Bernard D. Goldstein & Mary Sue Henifin, “Reference Guide on Toxicology,” *Reference Manual on Scientific Evidence* 561–62 (Federal Judicial Center, 3d ed. 2011) (describing assessments that expert toxicologist should make to support causation opinions); *Wintz By & Through Wintz v. Northrop Corp.*, 110 F.3d 508, 513 (7th Cir. 1997) (affirming exclusion of expert toxicologist’s opinion because it was based on unreliable methodology, and citing discussion in *Reference Manual on Scientific Evidence*); *Korte v. Exxonmobil Coal USA, Inc.*, 164 F. App’x 553, 557 (7th Cir. 2006) (same). But that is not the type of analysis that Apple describes in his report or at his deposition. Instead, Apple’s report is perfunctory, lacks substance, and offers no explanation of the science that he purports to apply in arriving at his causation conclusions.

Apple did not perform the first step of a toxicology analysis by attempting to identify which substances caused which of plaintiffs’ symptoms, let alone discuss the toxicology of those substances. He lists various chemicals that were found at various levels in various test results, Apple Rep., Dkt. 172, ¶ 10, but he does not link any of the substances to any symptoms or health concerns in his report. Plaintiffs respond that Apple did not identify any specific chemicals of concern or link chemicals to symptoms, because “each of the substances at issue

in this case is biologically capable of causing the majority of the symptoms experienced by Plaintiffs.” Plts.’ Br., Dkt. 211, at 14. To support their assertion, plaintiffs attach a “symptoms chart” to their brief, Dkt. 211-1, but plaintiffs don’t identify the source of the chart. According to Lands’ End, the chart does not qualify as scientific evidence because it comes from a Facebook group of Delta flight attendants, but in any event, Apple disclaimed relying on the chart for his opinions. Apple. Dep., Dkt. 168, at 151–53. The unsourced chart cannot overcome Apple’s failure to identify the substances for which he was assessing a potential causal link. *See Aurand v. Norfolk Southern Ry. Co.*, 802 F. Supp. 2d 950, 955 (N.D. Ind. 2011) (excluding expert toxicologist in part because his report, which listed a number of chemicals, did not “specifically identify the carcinogenic chemicals to which plaintiffs were exposed, nor do the conclusions state which agent or agents caused the plaintiffs’ cancers”).

Nor did Apple perform the second basic step of a toxicology analysis: evaluating the route of exposure. This step concerns whether and how any plaintiff could have absorbed an amount of substance sufficient to cause a symptom. Apple states in his report that plaintiffs were exposed to heavy metals and chemicals by bleeding or leaching from the fabric onto their skin, or by the heavy metals and chemicals becoming airborne and inhaled. Apple Rep., Dkt. 172, ¶ 11. But Apple did not identify which chemicals could have been absorbed dermally or which chemicals could have become airborne and inhaled, or at what levels the substances could be absorbed or inhaled, even though he admitted at his deposition that toxicity varies by route of exposure and chemical form or compound. Apple Dep., Dkt. 168, at 74–77. He also did not discuss any scientific sources containing such information. See also *Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904–05 (7th Cir. 2007) (affirming exclusion of expert report that

failed to articulate “any scientifically physiological explanation as to how [drug at issue] would cause arterial thrombosis.”)

Third, Apple did not address the level at which any substance could cause any symptom, or whether any garment in the Lands’ End uniform line released any substance at any dangerous level. Apple states in his report that certain substances were present in the uniforms at “extremely high levels” or “elevated levels,” Apple Rep., Dkt. 172, at 5–7, but he admitted at his deposition that he did not know the dose at which any of the chemicals or heavy metals involved could cause any symptom, that that he was unaware of the dose of substances to which any plaintiff was actually exposed, that he had made no attempt to discern that information, and that he did not think that determining dose was necessary to assess a causal connection between an exposure and a symptom. Apple Dep., Dkt. 168, at 51, 55, 132–33, 138. Apple instead testified that he did not need to determine or even hypothesize as to the particular dose to which any plaintiff was exposed, because, although a person’s response to a chemical or heavy metal can be affected by the length of time someone is exposed to the toxin, *id.* at 69, “every individual experiences differences in the reactiveness to chemicals in metals.” Apple Dep., Dkt. 168, at 63–64, 68, 80.

Contrary to Apple’s testimony, it is generally important to know the level of exposure to a substance because a “central tenet” of toxicology is that “all chemical agents are intrinsically hazardous—whether they cause harm is only a question of dose.” *Reference Manual on Scientific Evidence* 636. *See also Williams v. Mosaic Fertilizer, LLC*, 889 F.3d 1239, 1246 (11th Cir. 2018) (“When analyzing an expert’s methodology in toxic tort cases, the court should pay careful attention to the expert’s testimony about the dose-response relationship. This attention is due because dose-response is ‘the hallmark of basic toxicology.’”) (citation omitted); *Mitchell*

v. Gencorp Inc., 165 F.3d 778, 781 (10th Cir. 1999) (“Scientific knowledge of the harmful level of exposure to a chemical plus knowledge that plaintiff was exposed to such quantities are minimal facts necessary to sustain the plaintiff’s burden in a toxic tort case.”) (citations omitted). Apple’s failure to acknowledge the importance of dose in assessing causation renders his opinion unreliable.

As they did with Freeman’s report above, plaintiffs try to salvage Apple’s opinion by arguing that Apple applied a “totality-of-the-evidence” methodology to form his opinions. But, like Freeman, Apple never discussed a “totality-of-the-evidence” methodology in his report or at his deposition. Nor is Apple’s opinion consistent with a “totality of the evidence” methodology. *See Milward*, 639 F.3d at 17–18. Like Freeman, Apple did not explain how he chose and weighed the evidence that he reviewed, how he considered and weighed plausible explanations, or how he accounted for weaknesses in the data, such as testing results that showed no detectable levels of heavy metals or chemicals in the uniforms, or that many of the chemicals he discusses are commonly found in foods, drinking water, soil, ambient air, consumer products, and the human body.

In sum, Apple’s report contains no indication that his opinions are the product of reliable principles and methods, and no indication that in formulating his opinion, he applied valid principles and methods reliably to the facts of the case. His report is nothing more than factual recitations and conclusions without any rational connection between them. *See Rowe v. Gibson*, 798 F.3d 622, 627 (7th Cir. 2015) (“A court should not ‘admit opinion evidence that is connected to existing data only by the ipse dixit of the expert.’”) (*quoting General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)); *Zamecnik*, 636 F.3d at 881 (“Mere conclusions, without a hint of an inferential process, are useless to the court.”); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316,

319 (7th Cir. 1996) (“[A]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.”) (citation omitted); *Higgins*, No. 3:11-CV-81-RLY-WGH, 2013 WL 6238650, at *9 (“His opinion essentially boils down to exposure to chlorine gas may cause the types of symptoms seen in Plaintiffs, ergo, chlorine exposure caused the symptoms. This does not allow the court to assess what, if any, methodology was used in arriving at these conclusions.”). So the court will exclude his opinions. Plaintiffs cannot rely on Apple’s report to prove that the claimed exposures to chemicals in the uniforms can result in the reported health injuries (general causation), or that the claimed exposures resulted in the reported health injuries of specific plaintiffs (specific causation).

3. Dr. Pamela Scheinman, M.D.

Dr. Scheinman is a board-certified dermatologist who has taught and practiced in the field of dermatology for more than 30 years, including at Harvard Medical School, University of Rochester School of Medicine and Dentistry, George Washington University Medical Center, and Tufts University School of Medicine. She has particular expertise and interest in patch testing and allergic contact dermatitis. Scheinman opines in her report that the allergens and toxins in the Lands’ End uniforms “proximately caused” plaintiffs’ dermatological symptoms, respiratory symptoms, ocular symptoms, alopecia, and sensitization. Scheinman Rep., Dkt. 175, at 4. Scheinman’s opinion is based on her review of partial medical records for 15 plaintiffs, positive patch testing of the uniforms from three plaintiffs, a portion of the garment testing results for third-party testing agencies, and a chart compiled by plaintiffs’ counsel summarizing the medical injuries alleged by plaintiffs. *Id.* at 5; Scheinman Dep., Dkt. 170, at 79–85. Plaintiffs offer Scheinman’s opinions to prove general causation for all plaintiffs

and specific causation for the 15 plaintiffs whose medical records Scheinman reviewed. However, all of Scheinman's causation opinions are inadmissible.

Scheinman makes broad statements about causation for all plaintiffs in her report, but she qualified her causation opinions significantly during her deposition. She testified that to accurately assess what caused each plaintiffs' health problems would require a complex and fact-dependent analysis for each individual, which she admittedly did not perform. Scheinman Dep., Dkt. 170, at 34–37. For example, to determine the cause of a patient's skin problem, Scheinman generally would talk to the patient or review the patient's complete medical history, conduct a physical examination or view pictures, order lab work or a biopsy, order patch testing, rule out potential causes, and depending on the circumstances, suggest changes to the patient's skin care products, textiles, or diet. *Id.* at 41–43, 53–54. *See also id.* at 100 (“Q: Would you ever diagnoses a patient yourself without ever having spoken to the patient or seen medical records? A. Would I diagnose a patient without having seen them or seeing the medical records; in general no.”). Scheinman conceded that she did not have sufficient information to conduct that analysis for any plaintiff. *Id.* at 92, 100. She admitted that she did not speak to any plaintiff, that she did not know whether the medical records she reviewed for 15 plaintiffs were representative of all plaintiffs, and that she had seen only a few poor photocopies of plaintiffs' skin conditions. *Id.* at 89, 99–100. She testified that if a substantial portion of the claimed symptoms were self-reported she would “want to see validation” by “someone else looking at it,” *id.* at 85, but admitted that she made no attempt to match up plaintiffs' self-reported questionnaire data and their medical records, *id.* at 80. When asked whether she had “information one way or the other about whether the uniforms were a contributing cause of

skin rashes for any employees other than [the 15 plaintiffs] whose records [she] reviewed already,” Scheinman responded:

I mean I can only summarize, but yes. I can’t—without seeing them, I can’t. But it does seem suspicious. It seems like a smoking gun to me.

Id. at 92.

Scheinman’s deposition testimony confirms that she did not apply valid dermatological methods to reach her opinions about general causation for all plaintiffs. Her general causation opinions amount to unsupported speculation, not an expert opinion supported by any acceptable scientific method. *See Naeem*, 444 F.3d at 608 (“Talking off the cuff—deploying neither data nor analysis—is not an acceptable methodology.”) (citation omitted); *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 705 (7th Cir. 2009) (“[A] medical expert’s ultimate opinion must be grounded in the scientific process and may not be merely a subjective belief or unsupported conjecture.”).

There are several other problems with Scheinman’s expert opinions relating to both general and specific causation. Scheinman did not determine causation for those the 15 plaintiffs for whom she reviewed medical records by using any reliable methodology. She reviewed only a portion of their medical records, did not talk to or examine them, and did not attempt to link any particular plaintiffs’ symptom to any particular garment, let alone a specific allergen in a garment. She also failed to rule out other potential causes. *See Donaldson v. Johnson & Johnson*, — 4th —, No. 21-2028, 2022 WL 2145276, at *7 (7th Cir. June 15, 2022) (“Obviously, a statement that there are no secondary causes apparent in a tiny portion of the medical record does not exclude secondary causes.”).

In addition, although Scheinman offers opinions in her report about the cause of all plaintiffs' respiratory symptoms, eye symptoms, alopecia, and sensitization, she conceded during her deposition that her opinions on these topics were speculative. She testified that she had no experience in diagnosing respiratory conditions, Scheinman Dep., Dkt. 170, at 111, and that she had relied on the partial medical records from two or three people and testing results from one or two garments to conclude that all plaintiffs' respiratory problems were caused by off-gassing of formaldehyde or other allergens from the uniforms. Scheinman Dep., Dkt. 170, at 134–35. She admitted that she would need to know more about a patients' prior respiratory history to determine whether respiratory symptoms were caused by the uniforms. *Id.* at 132. Similarly, Scheinman testified that she would want to know about a patient's history of ocular symptoms before determining the cause of new ocular symptoms, *id.* at 145, and to diagnose sensitization, she would have to conduct patch testing. *Id.* at 177. To determine the cause of alopecia, Scheinman testified that she would want to know whether the patient had a history of alopecia, whether they wore a uniform piece with a heavy metal that has been associated with causing hair loss, and whether the patient had that heavy metal in their bloodstream. *Id.* at 148–49. Scheinman did not have access to that information for any plaintiff. In light of the numerous caveats that Scheinman made during her deposition, her opinions regarding general and specific causation in her report are essentially meaningless.

Plaintiffs argue that Scheinman's opinions are supported by reliable methodologies for three reasons: (1) she used the methods of her discipline; (2) she applied the "Mathias criteria" to assess causation; and (3) she compared plaintiffs' skin complaints with surveillance studies of occupational contact dermatitis rates. But these arguments are unpersuasive. Scheinman admitted during her deposition that she did not use a generally-accepted medical decision-

making process, such as reviewing medical records, examining the patient, and conducting patch testing, to determine causation in this case. Instead, Scheinman applied the information she obtained from partial medical records of 15 plaintiffs and positive patch testing results from three plaintiffs to reach conclusions about medical causation for 603 plaintiffs, despite knowing that each plaintiff wore different garments containing different chemicals and suffered from various alleged health problems. Plaintiffs have not shown that Scheinman's methods were reliable or generally accepted by dermatologists for assessing causation.

Scheinman's purported application of the Mathias criteria also does not render her opinion reliable. Scheinman states her in report that she relied on seven criteria set forth in a 1989 article by Dr. Toby Mathias: "Contact Dermatitis and Workers' Compensation: Criteria for Establishing Causation and Aggravation." Scheinman Rep., Dkt. 175, at 6–7. Scheinman testified that only four of the seven criteria need to be satisfied to establish causation, and that at least four are established for plaintiffs. But Scheinman then admitted at her deposition that the Mathias criteria are to be applied by a treating physician who is physically examining the individual patient. Scheinman Dep., Dkt. 170, at 241. She was unable to cite to any scientific literature that supported her application of the Mathias criteria to diagnose contact dermatitis among individuals who she never treated or even spoke to, and for whom she had reviewed only partial medical records. She also admitted during her deposition that Mathias's article does not support extrapolating from the results of one patient to any other patient, and she admitted she could not apply the criteria accurately for any of the plaintiffs for whom she did not review medical records. Schneinman Dep., Dkt. 170, at 242, 270–71 ("Q: For everybody else who is a Delta employee who reported some skin symptoms, you do not currently have enough information to, for each one of those people individually, answer these questions, yes

or no? A. That's correct. Absolutely.""). Scheinman's reference to the Mathias criteria does not save her report.

Scheinman's comparison of the rates of skin complaints among Delta employees in 2018 and 2019 to data regarding occupational contact dermatitis rates in the United Kingdom from 2002 to 2005 also is not a reliable method of determining causation. Scheinman states in her report that approximately 1.3% of Delta flight attendants filed dermal complaints, which was 38 to 100 times more frequent than the surveillance results from United Kingdom studies. She concludes that the high rate of dermal complaints among Delta employees supports a finding that the Lands' End uniforms caused skin problems. But the Delta data is based on the unreliable self-reported skin symptoms from Delta employees, whereas the United Kingdom surveillance studies used information provided by treating physicians who had specifically diagnosed occupational contact dermatitis in individuals in a wide range of occupations. Scheinman does not explain why the data from the Delta flight attendant population is comparable to the United Kingdom population, or why comparing the data would be a valid method of determining causation.

In sum, although Scheinman is a highly qualified dermatologist, her opinions in this case are not supported by the methods she acknowledges are used in her field. Her opinions will be excluded. "A supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are based upon some recognized scientific method." *Clark v. Takata Corp.*, 192 F.3d 750, 759 (7th Cir. 1999).

D. Summary

The court concludes that plaintiffs lack the required expert evidence to establish that the new Delta uniforms were defective. And because the court is excluding the opinions of Dr.

Freeman, Dr. Apple, and Dr. Scheinman, plaintiffs have no admissible evidence to prove their theory of general causation—that the chemicals or heavy metals in the Lands’ End uniforms transferred to plaintiffs at doses capable of causing the particular health problems that they suffered. Lands’ End contends that plaintiffs cannot succeed on their personal injury claims without demonstrating general causation, a point plaintiffs don’t dispute. *See Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 881 (10th Cir. 2005) (“Plaintiff[s] must first demonstrate general causation because without general causation, there can be no specific causation.”).

Plaintiffs have failed to meet their burden of proof on two essential elements of their personal injury claims, and Lands’ End is entitled to summary judgment on those claims. The court need not consider the parties’ arguments regarding plaintiffs’ treating physician disclosures or issue preclusion for those plaintiffs whose claims were denied by a workers’ compensation board.

The parties shall submit a joint proposed scheduling order by the deadline set forth below addressing how this case should proceed on plaintiffs’ remaining claims for property damage and breach of warranty.

ORDER

IT IS ORDERED that:

1. Defendant Lands’ End’s motion in limine to exclude the opinions of Michael Freeman, Dkt. 180, is GRANTED.
2. Defendant Lands’ End’s motion in limine to exclude the opinions of Fred Apple, Dkt. 183, is GRANTED.
3. Defendant Lands’ End’s motion in limine to exclude the opinions of Pamela Scheinman, Dkt. 188, is GRANTED.

4. Defendant Lands' End's motion in limine to exclude the testimony of plaintiffs' Rule 26(a)(2)(C) experts, Dkt. 191, is DENIED as moot.
5. Defendant Lands' End's motion for partial summary judgment, Dkt. 196, is GRANTED.
6. The parties shall confer and submit a joint proposed scheduling order by July 14, 2022 addressing how this case should proceed on plaintiffs' remaining claims relating to property damage and breach of warranty.

Entered July 8, 2022.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GWYNETH GILBERT, et al.,

Plaintiffs,

v.

19-cv-823-jdp

LANDS' END, INC.,

Defendant.

STEPHANIE ANDREWS, et al.,

Plaintiffs,

v.

19-cv-1066-jdp

LANDS' END, INC. and

LANDS' END OUTFITTERS, INC.,

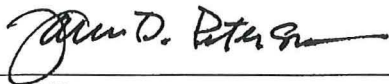
Defendants.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendants Lands' End, Inc. and Lands' End Outfitters, Inc. as to the entirety of these actions and Plaintiffs shall take nothing for their claims. In accordance with this Court's August 18, 2021 Order granting Defendant's Motion for Partial Summary Judgment, judgment is entered for Defendants on Plaintiffs' breach of express warranty claim arising under the theory that Plaintiffs were not "100% satisfied" with the uniforms in dispute. Likewise, for the reasons set forth in this Court's July 8, 2022 Order granting Defendant's Motion for Summary Judgment, judgment is entered for Defendants on Plaintiffs'

personal-injury claims, no matter the cause of action on which such claims are based. Finally, in accordance with the Parties' settlement agreement and this Court's October 4, 2023 Order, all of Plaintiffs' property-damage claims, no matter the cause of action, are dismissed with prejudice. There being no remaining claims before this Court, Plaintiffs' Amended Consolidated Complaint is dismissed in its entirety and with prejudice.

Approved as to form this 16th day of February, 2024.



James D. Peterson
District Judge

 Deputy Clerk
Joel Turner
Clerk of Court

2/20/2024
Date