No. 23-03162

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GWYNETH GILBERT and 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 District of Wisconsin
Case Nos. 3:19-cv-823 & 3:19-cv-1066
The Honorable Judge James D. Peterson

JOINT BRIEF OF APPELLEES LANDS' END, INC. AND LANDS' END OUTFITTERS, INC.

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-03162

Short 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):

Lands' End Inc. and Lands' End Outfitters, Inc.

(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:

Latham & Watkins LLP

(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/ U. Gwyn Williams Date: November 30, 2023

Attorney's Printed Name: U. Gwyn Williams

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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n/a

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

n/a

Attorney's Signature: /s/ Nathan Sandals Date: November 30, 2023

Attorney's Printed Name: Nathan Sandals

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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n/a

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

n/a

Attorney's Signature: /s/ Avery Borreliz Date: November 30, 2023

Attorney's Printed Name: Avery Borreliz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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JURISDICTIONAL STATEMENT

Pursuant to Fed. R. App. P. 30(b)(1), Defendants-Appellees Lands' End, Inc. and Lands' End Outfitters, Inc.[1] (collectively, "Lands' End") submit this jurisdictional statement relevant only to the Gilbert Appellants-Plaintiffs ("Gilbert Plaintiffs"), because the Gilbert Plaintiffs' jurisdictional statement is neither complete nor correct.[2]

Lands' End does not dispute that the United States District Court for the Western District of Wisconsin had jurisdiction over the consolidated cases, but this Court lacks jurisdiction over the Gilbert Plaintiffs' appeal because they do not have standing to make the arguments they assert on appeal, all of which have to do with property damage. There are no Plaintiffs (not the Gilbert Plaintiffs or any other individually named Plaintiff in either case) who have viable property damage claims remaining in this litigation. The 255 Plaintiffs who did pursue property damage claims through this litigation have fully, finally, and irrevocably settled their claims, which were dismissed with prejudice. *See* Dkt. 240, 247; *see infra* 11. All other individually named Plaintiffs, including the Gilbert Plaintiffs, ultimately did not pursue property damage claims below, were dismissed as a result, do not appeal that dismissal, and thus cannot represent the alleged class and lack standing to bring property damage claims on appeal. As a result, this Court lacks subject matter

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[1] The caption of the operative complaint misnames "Lands' End Business Outfitters, Inc." as "Lands' End Outfitters, Inc." and treats it as a separate entity. In fact, it is a division of Lands' End, Inc.

[2] Lands' End considers the jurisdictional statement of the Andrews Appellants-Plaintiffs ("Andrews Plaintiffs") complete and correct.

jurisdiction over the Gilbert Plaintiffs' claims (or indeed, any property damage claim, no matter the appellant). *See, e.g.*, *Badaiki v. Cameron Int'l Corp.,* No. 21-20628, 2023 WL 8721048, at *7 (5th Cir. Dec. 8, 2023) (finding court lacks jurisdiction on appeal "[b]ecause the parties have 'completely settled their differences'" (citations omitted)); *Ballard v. Bank of Am., N.A.*, No. 8:12-CV-1698-JST, 2013 WL 4807193, at *4 (C.D. Cal. Sept. 6, 2013) (finding plaintiff without claims lacked standing to seek to certify a class).

STATEMENT OF THE ISSUES

1. Whether the District Court properly granted summary judgment finding Lands' End had not breached an express warranty for "100% satisfaction" with the Delta uniforms when Plaintiffs failed to put forth ***any*** evidence that ***any*** Plaintiff who complied with the express warranty's requirements was denied a refund.
2. Whether the District Court abused its discretion in denying class certification for the Gilbert Plaintiffs' property damage claims due to crocking where there was no evidence of any common defect and the Court found myriad individualized factual determinations would erode any efficiencies gained through class treatment.
3. Whether the District Court abused its discretion in excluding Plaintiffs' experts' opinions when they used unreliable methodologies and data to support both their general and specific causation opinions.
4. Whether the District Court properly granted partial summary judgment on Plaintiffs' personal injury claims because Plaintiffs provided no evidence of

any alleged defect in the Delta uniforms capable of causing their personal injuries and failed to put forward any admissible expert evidence to establish general causation.

INTRODUCTION

At every stage before the District Court, Plaintiffs failed to set forth sufficient evidence to support their claims, let alone justify class treatment of those claims. Their evidence still entirely lacking, the Gilbert and Andrews Plaintiffs use a combined 122 pages of briefing to present a convoluted and duplicative recitation that aims to distract and mislead the Court. On appeal, Plaintiffs imply that the District Court somehow mismanaged the litigation and complain that the District Court granted partial summary judgment while fact discovery was still open (though Plaintiffs, too, moved for summary judgment before discovery closed). *See, e.g.*, Andrews Br. at 9, 65; Dkt. 128, Pls.' Mot. for Partial Summ. J. But the case proceeded below in a sensible and logical fashion, consistent with the schedule and tracking to which Plaintiffs agreed. *See* Dkt. 117.

Ultimately, no amount of misdirection or post hoc procedural complaints changes the bottom line: Plaintiffs had no evidence that Lands' End breached an express warranty, no evidence of a common defect to support class certification for their property damage claims, and no evidence of defect or causation to support their personal injury claims. This appeal is nothing more than an attempt to bring new arguments (which are waived) or reframe old ones (which fail). The Court should affirm in full.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Uniform Apparel Agreement

On October 14, 2016, Lands' End agreed with Delta Air Lines, Inc. ("Delta") to manufacture garments for certain Delta employees' uniforms ("Uniform(s)"). *See* Dkt. 60-1, Uniform Apparel Agreement, ("UAA").[3] The Delta Uniforms comprise at least 95 different individual items, including different garments for men and women, a range of different colors, and different pieces for various job functions across Delta's workforce. *See* Dkt. 60-1 at Exs. D, E (UAA).

When Delta launched its new uniform line, Delta gave (at no cost) a "core kit" of Uniform pieces to each employee who would wear the Uniform. *See* Dkt. 82-1, Ex. A Tr. Heist Dep., at 142:22–144:8 ("Heist Dep."). Delta also gave an allotment of "points" to each employee, allowing each to receive additional Uniform pieces at no cost; only after using the "core kit" and the "points" allotment would any employee pay out of pocket if they wanted more Uniforms. *See, e.g.*, Dkt. 82-2, Ex. B Tr. Valdez Dep., at 34:8–16 ("Valdez Dep."); Dkt. 60-1 § 4 (UAA).

Under Section 8.B of the UAA ("100% Satisfaction Warranty"), Lands' End agreed and warranted:

> [I]f at any time, for any reason, … any actively employed Employee is not 100% satisfied with their Products (even if they have been washed, worn and/or embroidered), they can return them at any time during the Term or for eighteen (18) months after the Term (so long as Delta continues to include the affected Products in its [uniform line]) for a refund or exchange as set forth

[3] All docket numbers are for the *Gilbert* matter.

> below … For Delta purchases within an Allotment,[4] the Employee may elect whether to receive an exchange or Allotment credit; if the Employee chooses an Allotment credit; Seller will refund Delta for the amount paid by Delta for that Allotment amount.

Dkt. 60-1 § 8 (UAA). Lands' End also warranted, under Section 9 of the UAA ("Lab Testing Warranty"), Lands' End warranted that the garments would meet a "good" rating on independent lab tests, including for: wet/dry crocking (color transfer from the garment onto something else); colorfastness to cleaning; abrasion; laundry performance; pilling; and resilience of fabric. *Id.*, § 9.A.3 (UAA). The UAA required that the Uniform "be colorfast and uniformly dyed and preshrunk within industry uniform tolerances (meet or exceed American Society for Testing and Materials (ASTM) and American Association of Textile Chemists and Colorists (AATCC) standards)." *Id.* at Ex. G.

B. Lands' End's Testing of the Delta Uniform

Lands' End conducted extensive development and production testing for the Delta Uniform, as it does with all of its products, and engaged several accredited third-party testing agencies to test, inspect, and certify that the Delta Uniforms were produced according to Lands' End's safety, quality, and technical compliance standards. *See* Dkt. 59, Dep. Michael Perrotti, at 6:7–8:18, 69:2–70:2, 75:12–76:7 ("Perrotti Dep.").

Over 1,000 Delta employees "wear tested" the Delta Uniform before Delta introduced it company-wide. *See* Dkt. 60-1 § 3 (UAA). "Wear testers" wore the Delta

[4] The "Allotment" refers to the Delta-provided "points" described in the preceding paragraph.

Uniform from December 2016 to March 2017, and none reported that the Delta Uniform crocked or caused adverse physical reactions. *See* Dkt. 60-9, National Institute for Occupational Safety and Health Report June 26, 2019, at 2.

C. Lands' End's and Delta's Response to a Few Complaints

When the Uniform launched on May 28, 2018, approximately 64,000 Delta employees began wearing it when working. *See* Dkt. 82-1 at 23:21–24:10 (Heist Dep.). Thereafter, Delta and Lands' End received a few complaints about the Uniform, generally related to color transfer onto skin or property from some of the purple and red Uniform garments. *See* Dkt. 59 at 17:5–8 (Perrotti Dep.); Dkt. 60-7, Ex. Dep. Sersh at 12:2–4 ("Sersch Dep."). Lands' End engaged Bureau Veritas, a third-party testing agency, to test the Uniform to determine a root cause or causes for reported issues. *See* Dkt. 59 at 23:2–14 (Perrotti Dep.); Dkt. 60-7 at 60:20–62:23 (Sersch Dep.). After extensive testing, Bureau Veritas determined that wearers who used more than the recommended amount of laundry detergent or certain personal care products (such as deodorants, lotions, or perfumes) with the Uniform could experience "excessive[] run[ning]" of dye. *See* Dkt. 59 at 92:5–13 (Perrotti Dep.). In parallel, Lands' End reimbursed several Delta employees who experienced crocking onto personal items after they submitted to Lands' End pictures of the damage they experienced and a receipt for a replacement item. *See* Dkt. 60-7 at 24:20–23, 27:19–28:10 (Sersch Dep.). Additionally, some of the individual Plaintiffs returned their uniforms and took advantage of Lands' End's refund policy, and all described the process as relatively simple. *See, e.g.*, Dkt. 82-6, Ex. F Tr. Warner Dep., at 28:12–23 ("Warner Dep.").

II. PROCEDURAL BACKGROUND

On October 3, 2019, Plaintiffs Gwyneth Gilbert and Michael Marte filed their complaint in the United States District Court for the Western District of Wisconsin on behalf of themselves and a proposed nationwide class, seeking class-wide compensatory damages for property damage, personal injuries, and medical monitoring. *See Gilbert v. Lands' End*, No. 19-cv-00823, Dkt. 1.[5]

On December 31, 2019, 525 named Plaintiffs (the "Andrews Plaintiffs") filed a separate complaint in the same court, alleging similar injuries from the Delta Uniform and seeking similar relief on behalf of themselves individually and a proposed nationwide class. *See Andrews v. Lands' End*, No. 19-cv-01066.[6] Following the District Court's consolidation of the two cases, Plaintiffs voluntarily abandoned class adjudication for personal injury claims or medical monitoring, leaving only individual personal injury and property damage claims and a purported class for property damage.[7] *Compare* Dkt. 1 *with* Dkt. 48.

A. Plaintiffs' September 25, 2020 Demand Letter and Lands' End's Response

Nearly a year after commencing litigation, Plaintiffs' counsel sent a letter to Lands' End's counsel demanding "a full refund on behalf of all Plaintiffs pursuant to Paragraph 8B of the Uniform Apparel Agreement." Dkt. 139, Defs.' Statement of

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[5] Although the Gilbert Plaintiffs' original complaint alleged claims for property damage, those Plaintiffs later declined to pursue those claims. *See* Dkt. 230-1, 231.
[6] The number of named Plaintiffs varied throughout the litigation. At the time of summary judgment on the personal injury claims, there were 603 named Plaintiffs. *See* Dkt. 164, 166.
[7] Individual Plaintiffs asserted solely personal injury claims, solely property damage claims, or both.

Proposed Findings of Fact in Supp. of Its Opp. to Pls.' Mot. for Partial Summ. J. and Cross-Mot. for Partial Summ. J., ¶¶ 11–12 ("Defs.' First SOF").

Lands' End responded promptly, explaining that the UAA contained specific procedures for initiating and completing a return, and that the Agreement did not entitle Plaintiffs to a "full refund" without first completing the requisite return of the garments. Dkt. 139 ¶¶ 13–14 (Defs.' First SOF). Plaintiffs never responded to Lands' End's letter nor provided any evidence that they returned their Uniform to Lands' End and were denied an exchange or refund. Dkt. 139 ¶ 15, 17 (Defs.' First SOF); *see also* Dkt. 165, Order, at 8 ("Class Cert. and Warranty Op.").

B. Motion to Certify Class and Motion for Summary Judgment for Breach of Express Warranty

Plaintiffs' attempts to pursue class-wide relief were unsuccessful. Plaintiffs attempted to certify a class under Rule 23(b)(3) for breach of warranty and sought summary judgment that Lands' End breached the 100% Satisfaction Warranty. *See* Dkt. 55, 128. Lands' End opposed class certification and filed a cross-motion for summary judgment. *See* Dkt. 79, 137. The District Court granted summary judgment to Lands' End because Plaintiffs had no record evidence that any class members had both followed the return policy ***and*** were denied a refund or exchange; in fact, in many instances the opposite was true. *See* Dkt. 165 at 9 (Class Cert. and Warranty Op.).

Plaintiffs also sought certification of a proposed sub-class ("Crocking Sub-Class") of class members "who [ ] experienced the bleeding of color(s) and/or crocking from the Lands' End Uniforms onto personal property," Dkt. 56 at 12–19, advancing

a breach of warranty theory. In tandem, Plaintiffs sought summary judgment that, as to any Plaintiffs who had experienced crocking, Lands' End had breached the Lab Testing Warranty. Dkt. 128 at 19–22. Lands' End opposed class certification of the Crocking Sub-Class because individual issues predominated and class treatment was not a superior method of adjudicating the issues. *See* Dkt. 79.

The District Court denied Plaintiffs' motion for partial summary judgment on the Lab Testing Warranty because there were genuine factual disputes about "whether the uniform pieces that crocked were defective . . . how much crocking or color transfer is acceptable in the industry, whether Lands' End uniforms met industry and UAA standards, and whether crocking was caused by factors outside Lands' End's control." Dkt. 165 at 14–15 (Class Cert. and Warranty Op.). On class certification, the District Court agreed with Lands' End and explained that the only common question that Plaintiffs presented, which was not an issue in dispute, was whether "Lands' End warranted to provide uniforms without material defects." *Id.* at 11. Because Plaintiffs failed to establish that common proof could establish whether the Uniform crocked at levels that would breach the Lab Testing Warranty, Plaintiffs failed to prove commonality and predominance. *Id.* at 14.

C. Motion for Summary Judgment on Personal Injury Claims[8]

[8] It is improper for the Gilbert Plaintiffs to "rely upon and incorporate…by reference the Andrews Plaintiffs' recitation of the facts and law" pertaining to the personal injury claims. *See* Gilbert Br. at 23. In fact, the Gilbert Plaintiffs' incorporation by reference of the entirety of the Andrews Plaintiffs' brief violates the "spirit of [the] previous orders" and the rules of this Circuit. *United States v. Ashman*, 964 F.2d 596, 597–98 (7th Cir. 1992); *7th Circuit Practitioner's Handbook* 112–13 (2020 ed.).

After the District Court denied Plaintiffs' motion for class certification, Plaintiffs then pursued individual compensatory damages for alleged personal injuries. Those claimed injuries varied widely, encompassing approximately forty different types of health issues, ranging from rashes and itching to blurred vision and increased heart rate. *See* Dkt. 48, 117. To efficiently address the hundreds of individual claims, the parties and the District Court agreed to proceed on two tracks: the first to address issues that affected all Plaintiffs or large groups of Plaintiffs, and the second track for issues specific to individual Plaintiffs. *See* Dkt. 117, 221 at 1 ("Personal Injury Op.").

In an attempt to meet their burden to prove that the Uniform caused their alleged personal injuries, Plaintiffs disclosed three experts: Dr. Michael Freeman, an epidemiologist, Dr. Fred Apple, a toxicologist, and Dr. Pamela Scheinman, a dermatologist. Dkt. 198, Defs.' Proposed Findings of Fact in Supp. of Mot. for Summ. J., ¶ 7 ("Defs.' Second SOF").[9] Perhaps recognizing that their experts could not establish specific causation, 174 of the Plaintiffs also made treating physician disclosures pursuant to Fed. R. Civ. P. 26(a)(2)(C). *Id.* ¶ 11.

Lands' End moved to exclude Drs. Freeman, Apple, and Scheinman's opinions, Dkt. 180, 183, 188, which motions the District Court granted "because their opinions are not based on reliably applied and scientifically valid methods." Dkt. 221 at 2

[9] Plaintiffs also disclosed a textile expert who testified that the crocking from the uniforms was defective because of a failure to afterwash or scour the uniforms, but he was explicit that his opinions were not related to any potential medical issues. Dkt. 177, Expert Report of Peter J. Hauser, at 5–6 ("Hauser Rep."); Dkt. 171, Dep. of Peter J. Hauser, at 220:17–221:3, 308:16–18 ("Hauser Dep.").

(Personal Injury Op.). The District Court also granted Lands' End's 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," *id.* at 2, and thus Plaintiffs failed to meet their burden of proof on two essential elements of their personal injury claims, *id.* at 32.

III. FINAL JUDGMENT

As a result of the District Court's Orders, the only claims that survived Lands' End's two successful motions for summary judgment were individuals' claims for property damage based on crocking. *See* Dkt. 229 ("[I]f a plaintiff has a claim for property damage, she may still pursue that claim under any cause of action named in the complaint."). At that point, 355 Plaintiffs (including the Gilbert Plaintiffs) were dismissed because they did not assert a property damage claim in a sworn statement or discovery response.[10] Dkt. 231. The remaining 255 Plaintiffs advanced property damage claims due to crocking. On July 19, 2023, the Parties informed the District Court that Lands' End and those 255 Plaintiffs had reached an agreement to settle and fully resolve the remaining claims. Dkt. 240, Notice of Settlement. On February 20, 2024, the District Court entered final judgment in favor of Lands' End

[10] Because it had never been entirely clear which of the individually named Plaintiffs actually intended to assert a claim for property damage, it was then necessary to determine which of the 610 individual Plaintiffs still wanted to pursue such a claim. Accordingly, all Plaintiffs were given time to provide a sworn statement that they had experienced property damage, if they had not already done so in a prior discovery response. Anyone who did not provide such a statement (or prior discovery response) was dismissed from the case. *See* Dkt. 229, 230-1, 230-2, 231.

on all claims, and those 255 Plaintiffs' property damage claims were dismissed with prejudice. Dkt. 258, Final J.

On appeal, the status of Plaintiffs' various claims is reflected in the following chart:

Claim/Theory	**Disposition**	**Cite**	**On Appeal?**
Nationwide class for personal injury	Voluntarily abandoned	*Compare* Dkt. 1 *with* Dkt. 48.	No
Nationwide class for property damage	Certification denied	*See* Dkt. 165 at 14 (Class Cert. and Warranty Op.).	Yes
Crocking Sub-Class for property damage	Certification denied	Dkt. 165 at 11, 14 (Class Cert. and Warranty Op.).	Yes (but see *infra*, claims were settled)
Individual claims for breach of "100% Satisfaction" express warranty	Summary judgment granted to Lands' End	Dkt. 165 at 9 (Class Cert. and Warranty Op.).	Yes
Individual property damage claims for breach of "Lab Testing" express warranty	Summary judgment denied; settled	Dkt. 165 at 14–15 (Class Cert. and Warranty Op.).	No
Putative property damage claims of Plaintiffs such as Gilbert	Dismissed after failure to provide sworn statement/discovery supporting claim	Dkt. 229, 230-1, 231.	No
All other individual claims for property damage	Settled	Dkt. 240.	No
Individual claims for personal injury	Summary judgment granted to Lands' End	Dkt. 221 at 32 (Personal Injury Op.).	Yes
Dr. Freeman's Opinion	Excluded	Dkt. 221 at 2 (Personal Injury Op.).	Yes
Dr. Apple's Opinion	Excluded	Dkt. 221 at 2 (Personal Injury Op.).	No
Dr. Scheinman's	Excluded	Dkt. 221 at 2	No

Opinion		(Personal Injury Op.).	

SUMMARY OF THE ARGUMENT

Despite filing a joint notice of appeal, Plaintiffs improperly submitted two briefs: one challenging the District Court's ruling applicable to property damage and the other challenging the District Court's ruling applicable to personal injury. Even with the extra ink, Plaintiffs have no arguments that warrant reversing the District Court or remanding for further consideration.

First, on their property damage claims, Plaintiffs (A) failed to show that Lands' End breached the 100% Satisfaction Warranty, as there is no record evidence Lands' End failed to meet its obligations under the UAA; and (B) did not satisfy their burden of showing that the alleged property damage claims due to crocking were capable of class resolution, particularly when there are no remaining individual Plaintiffs with property damage claims who could represent a class or pursue these arguments on appeal. Second, on their personal injury claims, Plaintiffs (A) have no evidence of a defect capable of causing Plaintiffs' alleged personal injuries, and (B) have insufficient evidence of both general and specific causation. For all of these reasons, the District Court's Orders should be affirmed.

STANDARDS OF REVIEW

This Court "review[s] de novo a district court's grant of summary judgment, viewing the facts in the light most favorable to the non-moving party. Summary judgment is proper when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." *Ludwig v. United States*, 21 F.4th 929, 931 (7th Cir. 2021) (citations omitted).

As to class certification, "this court reviews such decisions deferentially, and will 'reverse a district court's ruling regarding class certification only when we conclude that the district court abused its discretion in reaching its decision.'" *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008) (citations omitted).

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. Vill. of Broadview*, 94 F.4th 588, 596 (7th Cir. 2024). "[S]o 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 GILBERT PLAINTIFFS' PROPERTY DAMAGE ARGUMENTS FAIL BECAUSE THEY GAVE NO EVIDENCE TO THE DISTRICT COURT THAT LANDS' END BREACHED THE 100% SATISFACTION WARRANTY, AND CLASS CERTIFICATION IS NOT WARRANTED

A. The Gilbert Plaintiffs Have No Evidence That Lands' End Breached the 100% Satisfaction Warranty

There is no dispute that the 100% Satisfaction Warranty had a condition precedent before Lands' End was required to issue any refund: an individual must return his or her uniform. There was no evidence before the District Court that any Plaintiff who met that condition precedent did not receive the promised refund. Applying *de novo* review, the Court should affirm the decision below for three reasons. First, because the District Court relied on an ***undisputed factual record*** in granting Lands' End's motion for summary judgment on the 100% Satisfaction Warranty, Plaintiffs have no viable, record-based argument that this Court should reverse. Second, Plaintiffs now raise a new argument that the terms of the 100% Satisfaction Warranty are unreasonable and ask this Court to rewrite the terms, all so Plaintiffs can circumvent the return requirement. Plaintiffs' new argument is waived and legally unsupported; the Court should reject it. And third, Plaintiffs now conflate two different express warranty provisions: the 100% Satisfaction Warranty, by which Lands' End warranted it would provide a refund for any reason so long as the employee returned the Uniform, and the Lab Testing Warranty, by which Lands' End warranted that the Uniform would meet certain lab testing standards for colorfastness and other attributes. But conflating these warranties cannot save Plaintiffs' warranty claims.

1. Plaintiffs Lack Record Evidence That They Fulfilled the Condition Precedent to the 100% Satisfaction Warranty

To affirm the District Court's grant of partial summary judgment on Plaintiffs' 100% Satisfaction Warranty claim, the Court need only apply the unambiguous text of a contractual term to the undisputed facts. Under Delaware law, which the parties chose in the UAA, the text of the express warranty controls. *See In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 56–57 (Del. 2019). Here, the contractual text and the record evidence foreclose Plaintiffs' argument.

As the District Court recognized, to prove a breach of the 100% Satisfaction Warranty, Plaintiffs necessarily had to "prove compliance with any conditions precedent that Lands' End has imposed with respect to the warranty." Dkt. 165 at 6 (Class Cert. and Warranty Op.) (citing *Staging Dimensions, Inc. v. KP Walsh Assocs., Inc.*, No. CPU4-19-001377, 2020 WL 1428120, at *5 (Del. Com. Pl. Mar. 19, 2020); 6 Del. C. § 2-313(1)). But there was no evidence that any active Delta employee returned his or her Uniform per Lands' End's return process and was then denied a refund or exchange.[11] *See* Dkt. 165 at 7–8 (Class Cert. and Warranty Op.). To the contrary, Lands' End submitted unrefuted evidence that Delta employees who returned garments to Lands' End found the process to be relatively simple and could exchange or receive refunds for their Uniforms. *See id.* at 8. Lands' End does not dispute, and has never disputed, that then-current Delta employees would be entitled

[11] Although not a basis for the District Court's decision, many Plaintiffs could not show monetary damages, even if they had returned their garments to Lands' End, because they did not pay for them in the first place. *See supra* 4.

to a refund of any money paid for their Uniforms if they were not 100% satisfied, provided those employees properly returned their Uniform to Lands' End. Plaintiffs lost below because they presented no evidence that Lands' End failed to pay refunds ***after*** returns were made.

2. Plaintiffs Waived Any Argument that the 100% Satisfaction Warranty Terms Are Unreasonable

With no evidence that Plaintiffs complied with the 100% Satisfaction Warranty's condition precedent, Plaintiffs now ask instead that this Court strike that term from the contract as "simply unreasonable." Gilbert Br. at 31.[12] This argument fails for two reasons. First, Plaintiffs did not raise this argument below, and it is waived. *See, e.g.*, *Fednav Intern. Ltd. v. Cont'l Ins. Co.*, 624 F.3d 834, 841 (7th Cir. 2010) ("[A] party may not raise an issue for the first time on appeal.").[13]

Second, even if it were not waived, Plaintiffs' unreasonableness argument fails on the merits. A requirement to return a garment to obtain a refund is not unreasonable. *See, e.g.*, *Becker v. Cont'l Motors, Inc.*, 709 F. App'x 263, 267 (5th Cir.

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[12] Below, Plaintiffs argued only that a later Delta communication "modified" the UAA such that Plaintiffs were not required to return their uniforms. *See* Dkt. 128, Br. in Supp. of Pls.' Mot. for Partial Summ. J., at 16 ("Pls.' Warranty Claims Mot."). That argument was not an unreasonableness argument; it was a contract modification argument. To the extent that Plaintiffs still make that argument (which is not clear from their briefing), the UAA only permits modification when in writing and signed by both Lands' End and Delta, which never occurred. Dkt. 60-1 § 20.A (UAA).

[13] Even if Plaintiffs had suggested in broad strokes, at any point below, that the UAA requirements were unreasonable—though they did not—"brief reference[s] to the unreasonableness of the…Contract" are insufficient. *Always Towing & Recovery, Inc. v. City of Milwaukee*, 2 F.4th 695, 707 (7th Cir. 2021) (citations omitted). Waiver applies "when the party failed to present that specific argument to the district court, even though the issue may have been before the district court in more general terms." *Fednav Intern. Ltd.*, 624 F.3d at 841.

2017) (finding no breach of express warranty without evidence that seller refused to repair or replace parts). Plaintiffs appear to argue that the condition precedent of returning the garments before receiving a refund was "unreasonable" because Plaintiffs never actually saw the UAA. Gilbert Br. at 32. As a matter of common sense, it is hard to imagine that any consumer would not understand that a product must be returned in order to receive a refund (otherwise consumers could claim dissatisfaction with a product and receive a refund but continue using the product). And as a matter of law, Plaintiffs' claim fails because Delaware law requires the party making a claim for breach of warranty "produce evidence of reliance on the express warranty." *Barba v. Carlson*, C.A. No. N11C-08-050 MMJ, 2014 WL 1678246, at *5 (Del. Super. Ct. Apr. 8, 2014). If, as Plaintiffs assert, "they were never informed" of the UAA's terms, Gilbert Br. at 32, they could not rely on it, nor could any particular representation form the "basis of the bargain" with Lands' End, which Plaintiffs concede is required for breach of warranty. *See* 6 Del. C. § 2-313(1)(a); Gilbert Br. at 29.

At bottom, the plain terms of the UAA foreclosed Plaintiffs' 100% Satisfaction Warranty claim and forecloses reviving that claim now on appeal. As the District Court recognized, the terms of the express warranty were clear, and "Lands' End has repeatedly promised to honor its warranty if actively employed Plaintiffs return their uniforms." Dkt. 165 at 9 (Class Cert. and Warranty Op.). Plaintiffs never accepted that offer, even after Lands' End responded to Plaintiffs' demand letter by offering a refund to ***anyone*** who returned their Uniforms. No Plaintiff alleged that, for any

reason, they were unable to return their Uniforms at that point. Dkt. 139 ¶¶ 11–17 (Defs.' First SOF). Because there is no evidence that Lands' End breached the 100% Satisfaction Warranty, summary judgment was proper, and the Court should affirm.

3. Plaintiffs' Conflation of Warranties Provides No Basis for Relief

To distract the Court from their failure to put material facts in dispute, Plaintiffs' brief focuses on the Lab Testing Warranty, which is irrelevant to the 100% Satisfaction Warranty. Dkt. 60-1 § 9 (UAA). Plaintiffs argue that, by "providing the Uniforms, which suffered extensive crocking and were not suitable for their intended purpose," Lands' End somehow breached the 100% Satisfaction Warranty. Gilbert Br. at 30. Although crocking may be relevant to the Lab Testing Warranty, Plaintiffs do not explain how simply providing the Uniforms (in any condition) could breach the 100% Satisfaction Warranty. By the terms of the 100% Satisfaction Warranty, the condition of the Uniform is actually irrelevant; under that provision, ***anything*** subjectively unsatisfactory to the user can be the basis for a refund or exchange, ***so long as*** the Uniform is returned.

Ultimately, the District Court did not enter judgment on the merits for Lands' End or Plaintiffs on the Lab Testing Warranty claim.[14] *See* Dkt. 165. Accordingly, there is no Lab Testing Warranty decision for Plaintiffs to challenge on appeal. And because Plaintiffs still have no evidence that they met the condition precedent of the 100% Satisfaction Warranty, Plaintiffs' conflation of two different express warranties

[14] For Plaintiffs who pursued property damage claims, individual claims for property damage related to the Lab Testing Warranty were settled and dismissed with prejudice. *See supra* 11–12.

does not save their claims.

B. The District Court Was Within Its Discretion to Deny Class Certification to the Crocking Sub-Class

The District Court ably exercised its discretion to conclude that Plaintiffs' proposed sub-class of Delta employees who experienced property damage due to crocking failed to meet Rule 23's requirements. This Court should affirm because: (1) there are no Appellants with still-existent property damage claims, and thus the question of whether a class could be certified is moot, and (2) even if there were any Plaintiff who could still properly press for a property damage class, the District Court was correct that the proposed class failed to meet the standards for commonality, predominance, or superiority. *See* Dkt. 165 at 10–14 (Class Cert. and Warranty Op.).

1. This Court Lacks Jurisdiction Over Any Property Damage Claims or Arguments

Although Plaintiffs now seek reconsideration of the denial of class certification for the proposed Crocking Sub-Class, there are in fact no Plaintiffs with existing property damage claims, and any argument about class certification is moot. The Plaintiffs party to these actions below can be divided into two groups: those who asserted and actually pursued property damage claims, and those who were named in a complaint that broadly asserted property damage claims for all Plaintiffs but later chose not to pursue such a claim. As to the former group, all Plaintiffs who actually pursued property damage claims settled those claims. *See supra* 11. And once the settlement had been reached, the District Court dismissed the settling Plaintiffs' claims with prejudice. *See* Dkt. 247. As a result, none of those Plaintiffs have a property damage claim left to pursue—regardless of the results of this

appeal—and none could serve as a class representative for the Crocking Sub-Class. Accordingly, this Court lacks jurisdiction over settled claims—including class claims arising from those claims—and the issue is now moot. *See Badaiki,* 2023 WL 8721048, at *7; *Wegscheid v. Local Union 2911*, 117 F.3d 986, 991 (7th Cir. 1997) (finding "[t]he case became moot when the settlement of the count…gave the plaintiffs all the relief they sought…").

As to the latter group of Plaintiffs—those who chose not to pursue a property damage claim—their claims were also dismissed below, and none have appealed that ruling. *See supra* at 11, n.10. This group includes the Gilbert Plaintiffs, whose appellate brief now seeks reversal of the denial of class certification on property damage claims. But their property damage claims were dismissed in January 2023 because they did not indicate any intent to actually pursue a claim for property damage. *See* Dkt. 230-1, 231 (dismissing 355 Plaintiffs, including the Gilbert Plaintiffs).[15] The Gilbert Plaintiffs (and others similarly situated) do not appeal that dismissal and cannot pursue property damage claims now. *See Fednav Intern. Ltd.*, 624 F.3d at 841.

Because Plaintiffs' individual property damage claims were settled or dismissed and not appealed, none of them could adequately represent a class of

[15] Plaintiffs allege that Plaintiff "Decrescentis, who received reimbursement for $156.60, did not attempt to get reimbursed for the second set of sheets that were ruined as a result of crocking because she knew it would be denied." Gilbert Br. at 17. But Ms. Decrecentis did not assert property damage in a sworn statement or discovery response. *See* Dkt. 230-1, 231 (dismissing Ms. DeCrescentis).

individuals who allegedly suffered property damage due to crocking. *Santiago v. City of Chicago*, 19 F.4th 1010, 1018 (7th Cir. 2021) (finding representative "must be a member of the putative class and have the same interest and injury as other members" (citations omitted)). Plaintiffs chose to define their Crocking Sub-Class as those Delta employees who suffered property damage due to crocking, and now that all property damage claims have been settled or dismissed, no Plaintiff can represent that class. *Id.* Accordingly, Plaintiffs' appeal regarding the District's Court denial of class certification for property damage claims is moot, and this Court lacks subject matter jurisdiction.

2. Plaintiffs Did Not Prove that the Proposed Class Met Rule 23's Commonality, Predominance, or Superiority Requirements

Even if there was some Plaintiff who could properly appeal the denial of class certification, the District Court did not abuse its discretion in finding that the proposed class did not meet the Rule 23 requirements. *See* Fed. R. Civ. P. 23; *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014).

a. Plaintiffs Failed to Prove Commonality

As to commonality, Plaintiffs claim that they "clearly identified a common defect with respect to the Crocking Sub-Class that can be resolved on a class-wide basis," Gilbert Br. at 39, but they showed no such thing. In fact, Plaintiffs have not even argued that whether all of the Uniforms are defective is a common question of fact that can be resolved on a class-wide basis. Merely stating that the "common defect" is that the "Uniforms crock" does not make that a question common to the class, much less one that can be resolved on a class-wide basis. Perhaps the question

of whether crocking is a defect could be a common issue if the case involved just one garment, manufactured in the same place and to the same specifications, and worn and cared for by all wearers in identical fashion. But that hypothetical scenario could not be further from the cases presented here.

As an initial matter, the undisputed evidence was that not all garments in the Delta Uniform line experienced crocking, and indeed not even all purple or red garments crocked. *See* Dkt. 139 ¶ 40 (Defs.' First SOF). Beyond that, the District Court acknowledged the laundry list of individual determinations affecting crocking, including "what uniform piece class members wore, how the class members treated their garments, the amount of crocking class members experienced, the amount of property damage that occurred, if any, or whether the class members already received compensation from Lands' End."[16] Dkt. 165 at 13 (Class Cert. and Warranty Op.). There would be little common evidence as to each of the nearly 100 different Uniform pieces (in different colors, different fabrics, and with different performance finishes), such that evidence of crocking in some garments would prove a defect across ***all*** Uniform pieces. That is not the stuff of a manageable class. *See, e.g.*, *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 815 (7th Cir. 2012) ("If, to make a prima

[16] Even Plaintiffs acknowledge that the Uniform line consisted of "several garments" with variations in "chemical additives and finishes," "most" of the garments were treated with a stain repellent, the Uniforms were manufactured at different locations overseas, manufacturing mills determine how to apply the uniform dye, and, despite not providing any evidentiary support for the statement, "some of the Uniform pieces have higher chemical contents than others." Gilbert Br. at 8, 11–12. Plaintiffs also concede that Bureau Veritas, "a world leader in laboratory testing, inspection, and certification" showed "the dye's running was allegedly due to outside additives, such as deodorant, perfume and excess laundry detergent." Gilbert Br. at 12, n.8.

facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question." (citations omitted)).

What's more, even if there had been just one Uniform item at issue, Plaintiffs still had no evidence of a common defect as to any individual item. Proof that a garment (or particular type of garment) crocked does not necessarily prove the existence of a ***defect*** in that garment, much less in all others. The record reflects that individual analysis would be required to determine whether crocking constituted a defect that might entitle a particular wearer to proceed with a breach of warranty claim. Indeed, Dr. Hauser's sworn testimony contradicted Plaintiffs' theory that evidence of crocking in certain Uniform pieces was sufficient to constitute common evidence of a defect.[17] Dr. Hauser explained that ***some*** level of crocking is acceptable in industry practice—in other words, crocking, standing alone, was not common evidence of a defect. Dkt. 139 ¶ 36 (Defs.' First SOF); *see* Dkt. 165 at 12 (Class Cert. and Warranty Op.). Dr. Hauser also testified that the manufacturer and the

[17] Although Plaintiffs now argue that Plaintiffs' textile expert, Dr. Hauser, stated in his report that "garments should not transfer dyes," the District Court properly excluded Dr. Hauser's report from its consideration on class certification because Plaintiffs had failed to disclose lab analyses on which Dr. Hauser relied. Dkt. 75, Order Granting Mot. for Sanctions. It is not clear that Plaintiffs challenge that exclusion on appeal, but even if they mean to do so, there is no support for the argument that the District Court abused its discretion in leveling that sanction for Plaintiffs' discovery misconduct. *See, e.g.*, *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 743 (7th Cir. 1998). Further, while Plaintiffs criticize the District Court for citing Dr. Hauser's report in the Class Certification and Warranty Opinion, Dkt. 165, Plaintiffs apparently fail to appreciate that the District Court decided two ***separate*** issues—class certification and partial summary judgment on the Lab Testing Warranty claim—in the same opinion. The District Court properly excluded Dr. Hauser's report from consideration on class certification while considering the report in determining whether to grant summary judgment for breach of the Lab Testing Warranty.

customer are free to apply whatever crocking standard they choose. Gilbert Br. at 42; Dkt. 139 ¶ 37 (Defs.' First SOF). Consistent with that practice, as the District Court recognized, the UAA did not state that any crocking constituted a defect. *See* Dkt. 165 at 12 (Class Cert. and Warranty Op.). Instead, the UAA required only that the uniforms meet certain testing thresholds. *See* Dkt. 60-1 § 9.A.3, Exs. G, H, I (UAA). And even Plaintiffs' own testing of the Uniform showed that all crocking was within established standards. Dkt. 139 ¶ 41 (Defs.' First SOF). Further, Dr. Hauser admitted that several independent factors can impact whether, and to what extent, crocking occurs. For example, Dr. Hauser admitted that a manufacturer is not responsible for a consumer's failure to follow a garment's care instructions. Dkt. 139 ¶ 38 (Defs.' First SOF). As the record shows, at least three Plaintiffs never read the care instructions for the Uniform and therefore do not know if they followed them. Dkt. 139 ¶ 39 (Defs.' First SOF). Importantly, the overwhelming majority of Delta employees who wore the uniform ***did not*** experience crocking. Dkt. 139 ¶ 40 (Defs.' First SOF). This kind of individual analysis would be required for ***every*** Plaintiff. Accordingly, the District Court did not abuse its discretion in finding the Plaintiffs failed to demonstrate commonality.

b. Plaintiffs Failed to Prove Predominance and Superiority

The District Court also did not abuse its discretion in concluding that individual inquiries predominated such that a class was not a superior method for resolution. *See* Fed. R. Civ. P. 23(b)(3). Plaintiffs failed to prove that "the same evidence will suffice for each member to make a *prima facie* showing or the issue is

susceptible to generalized, class-wide proof." *Gorss Motels, Inc. v. Brigadoon Fitness, Inc.*, 29 F.4th 839, 844 (7th Cir. 2022). In Plaintiffs' proposed class, ***every*** class member's claim would—at least—require evidence of each garment worn, where it was manufactured, what dye lots were used, how the garment was laundered, whether it crocked, the amount of crocking, whether the Plaintiff suffered property damage due to crocking, and the extent of the property damage. The list goes on. As the District Court recognized, "plaintiffs have not shown that they would prove that Lands' End provided defective garments to the proposed class members, or that class members suffered a common injury as a result of a common defect." Dkt. 165 at 13–14 (Class Cert. and Warranty Op.).

Although Plaintiffs argue that "the need for individual proof alone does not necessarily preclude class certification," Gilbert Br. at 46 (citing *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010)), the cases on which Plaintiffs rely are inapposite. *See* Gilbert App. Br. at 37, 46. In those cases, the alleged defect or misconduct was common to all class members,[18] such that the need for individualized

[18] *See Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800–02 (7th Cir. 2013) (approving class with "common issue of liability": whether design of washing machine was defective in allowing mold to accumulate); *Pella Corp.*, 606 F.3d at 392, 396 (certifying class alleging that all company windows have same defect leading to same premature wood rot problems); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911, 912 (7th Cir. 2003) (certifying class where plaintiffs alleged single source of pollution contaminated water supply); *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992) (approving class with "common question": whether defendants operated schools pursuant to scheme to defraud and deceive students). Plaintiffs misread *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 602 (7th Cir. 2014) to suggest that a common question existed there regarding roofing shingles' compliance with national standards. *See* Gilbert App. Br. at 37. But the *IKO Roofing* court did ***not***, in fact, rule on or find a common question; the court remanded class certification. *Id.* at 604.

determinations as to ***the amount of damages or "suffering"*** did not preclude class certification to answer common liability questions.[19] Here, Plaintiffs have not set out any path for the District Court to determine if there is a common defect for all class members through common evidence. Thus, this case bears more resemblance to *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1086 (7th Cir. 2014), where the Court questioned whether plaintiffs had even "***identified*** a common issue" in asserting—with no evidence—an intention to rely on common proof while disregarding the numerous individualized issues that would need litigating. *Id.* (emphasis in original).

Without evidence of a defect common to all Delta Uniform garments, and with myriad individual issues, Plaintiffs' proposed Crocking Sub-Class cannot "meaningfully facilitate or simplify the resolution of the remaining issues" in this case. *See Hostetler v. Johnson Controls, Inc.*, No. 3:15-cv-226 JD, 2018 WL 3868848, at *12 (N.D. Ind. Aug. 15, 2018). Accordingly, the District Court did not abuse its discretion in declining to certify the Crocking Sub-Class.

II. THE ANDREWS PLAINTIFFS' ARGUMENTS REGARDING THEIR PERSONAL INJURY CLAIMS FAIL BECAUSE THEY HAVE NO EVIDENCE, ADMISSIBLE OR NOT, OF A DEFECT OR CAUSATION

The appeal relating to personal injury claims fails on three grounds. First, Plaintiffs have no evidence of a defect in the Uniforms related to their alleged personal injuries. Second, Plaintiffs' expert evidence was insufficient to establish general causation and specific causation, and they cannot skirt this Court's

[19] Individualized damages concerns were not a basis for the District Court's decision denying class certification. Dkt. 165 at 14 (Class Cert. and Warranty Op.).

jurisdiction by requesting remand.

A. Plaintiffs Failed to Provide Any Evidence of a Defect

The District Court properly granted summary judgment as to Plaintiffs' personal injury claims because (among other failings) Plaintiffs presented no evidence of a defect capable of causing their injuries. The court below recognized that Plaintiffs did nothing more than "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." Dkt. 221 at 10 (Personal Injury Op.). Seventh Circuit law is clear that such a theory does not suffice. *See Kallal v. CIBA Vision Corp., Inc.,* 779 F.3d 443, 445–46 (7th Cir. 2015) ("The record needs to show more than *post hoc, ergo propter hoc*: the mere fact that a person suffers pain when using a product does not, by itself, prove that the product is defective.").

Plaintiffs now attempt to cobble together the requisite expert evidence on defect, but it is too little, too late. None of the arguments presented by Plaintiffs here are sufficient to warrant reversal, even under the applicable *de novo* standard.

1. Plaintiffs Failed To Respond To Lands' End's Defect Arguments Below And Cannot Do So Now

Plaintiffs previously "failed to respond to Lands' End's argument that they lack evidence of a specific defect related to plaintiffs' personal injury claims," Dkt. 221 at 7 (Personal Injury Op.), and cannot attempt to do so for the first time on appeal. Plaintiffs do not dispute that their personal injury claims required evidence of a defect, nor do they dispute that such evidence had to come from expert testimony. Further, they do not seem to dispute that none of the three medical experts presented

in support of their personal injury claims offered the requisite opinion as to the existence and nature of the supposed defect. That failure properly ended their claims. *See, e.g.*, *Kallal v. Ciba Vision Corp.,* No. 09 C 3346, 2013 WL 328985, at *4 (N.D. Ill. Jan. 28, 2013), *aff'd sub nom. Kallal v. CIBA Vision Corp.*, 779 F.3d 443 (7th Cir. 2015).

Plaintiffs now suggest, though, and for the first time, that it is necessary to combine the opinions of their experts to find evidence of defect. In addition to the medical experts proffered for the personal injury claims, Plaintiffs also had a textiles expert, whose opinions pertained only to the property damage claims. So although that textile expert expressly disclaimed any opinion as to health effects, Dkt. 171 at 220:17–221:3 (Hauser Dep.), Plaintiffs nonetheless now suggest that their property damage expert's opinions on garment crocking should have been sufficient, when read together with the medical expert opinions that "transferred substances are known to cause health problems," to raise a genuine factual dispute as to defect. Andrews Br. at 28.

But Plaintiffs' "combined" expert argument comes too late. Below, Plaintiffs failed to present any argument or evidence of a defect capable of causing their alleged personal injuries, and they cannot now attempt to close the gaps in their claims with waived arguments. *See, e.g.*, Dkt. 221 at 7 (Personal Injury Op.) (citing *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010)). Although Plaintiffs argue they previously stated there was "evidence of a crocking defect," Andrews Br. at 33, Plaintiffs' "perfunctory and underdeveloped" argument below is waived on appeal.

Hershinow v. Bonamarte, 735 F.2d 264, 266 (7th Cir. 1984).

2. Plaintiffs' Evidence of a Crocking Defect is Insufficient to Support Their Personal Injury Claims

Even if not waived, Plaintiffs' "combined" expert argument would be insufficient to prove that crocking was a defect relevant to their personal injury claims. Plaintiffs' theory of the case would have required expert testimony to the effect that the Uniforms were defective because they (a) contained excessive levels of harmful substances (b) capable of being released in the atmosphere or transferred to a wearer's skin (c) in amounts that could cause personal injury. But instead, Plaintiffs have, at most, evidence that some—but not all—Uniforms contained certain potentially harmful substances,[20] and the dyes in some—but not all—Uniforms could and did transfer (but only some of the time, in some circumstances). Nor do Plaintiffs have expert opinion that any of that necessarily qualifies as a ***defect*** in the garments. Even further, Plaintiffs do not have any evidence of what substances were in the dyes that could transfer, let alone evidence that such substances ***actually*** transferred to the skin or were released into the air, nor have Plaintiffs put forward any evidence of the amounts of any harmful substances that were transferred or released into the air. In short, they simply have not done enough to allow a jury to connect the dots, other than through mere guesswork.

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[20] Plaintiffs have not narrowed their "defect" theory to a single substance or any substances common to all garments; collectively, Plaintiffs alleged various of the Uniform garments contained varying substances, including fluorine, sodium, magnesium, silicon, silicone, chromium, bromine, barium, nickel, antimony, mercury, and/or formaldehyde, in various amounts. *See* Dkt. 48 at ¶ 59; Dkt. 173 at 5–7.

a. Plaintiffs' Property Damage Expert's Opinion is Unrelated to Personal Injury Claims

Dr. Hauser, Plaintiffs' textile expert, was the only expert to provide any opinion about the existence of ***any*** alleged defect in the Uniform, which he asserted was crocking due to failure to afterwash or scour the garments. Dkt. 177 at 5–6 (Hauser Rep.); Dkt. 171 at 220:17–221:8 (Hauser Dep.). But Dr. Hauser's opinion did not support Plaintiffs' argument that there was, in fact, a defect (and not just a common outcome of the garment dying process). Dr. Hauser admitted that some level of crocking is normal; that is, ***not defective***. Dkt. 165 at 12 (Class Cert. and Warranty Op.) (citing Dkt. 71 at 95 (Hauser Dep.)). Crucially, Dr. Hauser provides no path to determine which Uniforms exceeded normal dye transfer or whether a Uniform is defective if it did, in fact, exceed normal dye transfer. Plaintiffs want a jury to infer that because a dye can sometimes transfer color to other surfaces, any chemicals in that garment would ***necessarily*** transfer along with the dye, and that such an occurrence would render a garment defective. But Dr. Hauser did not provide that opinion, let alone the foundation for such an opinion, and neither did Plaintiffs' personal injury experts; they did not even discuss dye transfer. Plaintiffs offered no expert testimony that could allow a jury to draw those inferences, and neither this Court nor the court below can expect a jury to know the technical aspects of textiles and chemicals.

Even if Dr. Hauser had offered an opinion—though he did not—that some particular set of garments were defective because they transferred more than a normal amount of dye, that would be, ***at most***, evidence of a defect relating to

property damage.[21] For instance, if Dr. Hauser opined that a flight attendant's purple dress exhibited excessive transfer of purple dye, at most, that might be evidence supporting that the dress was defective for a claim, for instance, that the purple dye had stained the wearer's undergarments.

Dr. Hauser offered no opinions that the dye transferred by crocking was itself harmful to human health. He did not opine that when dye transferred from a garment, other chemicals or substances in the garment could transfer, too, or be absorbed into humans through dermal or other exposure. Dr. Hauser also provided no opinion on the amount of absorption, if any, that was harmful, nor did he opine that any garment that could have harmful substances transfer along with dye in the crocking process was necessarily defective.

In relying so heavily on Dr. Hauser's opinion, Plaintiffs ignore that their personal injury claims are not limited to instances where there was alleged excessive dye transfer; instead, they claim that some Plaintiffs suffered health effects even in the absence of dye transfer. Dr. Hauser's opinion cannot—and indeed, does not—provide any evidence of a defect that could cause Plaintiffs' myriad alleged symptoms, especially in instances where there was no dye transfer at all.

Without an opinion that the Uniforms defectively transferred or released harmful substances, Plaintiffs have no evidence by which they can show a defect—let

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[21] Dr. Hauser was not opining "about how crocking may have impacted health" "about chemicals or elements like heavy metals" or "about any health effects these elements may have caused." Andrews Br. at 34–35; Dkt. 221 at 8 (Personal Injury Op.) (citing Dkt. 171 at 220–21, 234 (Hauser Dep.). For the reasons stated *supra*, all individual and class property damage claims cannot be appealed now.

alone a defect that could cause the Plaintiffs' alleged personal injuries. *See Kallal,* 779 F.3d at 445–46.[22] The District Court was correct in concluding that Plaintiffs' "simplistic post-hoc theory" was not "robust" enough to meet the requirements of Rule 702 and *Daubert*. Dkt. 221 at 10 (Personal Injury Op.).

b. Plaintiffs' Personal Injury Experts Did Not Opine on Defect

It is too late now for Plaintiffs to contort the testimony of their personal injury experts to create evidence of defect. In fact, all three of the medical experts expressly disclaimed that they were offering an opinion as to the existence or nature of a purported defect.

Two of Plaintiffs' personal injury experts, Drs. Apple and Scheinman, testified ***only*** on substance levels found on the garments in third-party laboratory testing, and offered no opinions that such levels constituted a defect in those garments or, critically, how much of the substances could have transferred from the garments to the wearer. And the lab results on which the experts relied do not draw conclusions about or even discuss a defect.

At best, Drs. Apple and Scheinman cite results of laboratory testing on some

[22] Plaintiffs argue that Wisconsin's "consumer-contemplation test" should apply, but neither Plaintiffs nor the District Court conducted a choice of law analysis for the individual Plaintiffs' claims. *See* Dkt. 221 at 5–6 (Personal Injury Op.). While Plaintiffs define a defect as existing 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," Andrews Br. at 35 (citing *Murphy v. Columbus McKinnon Corp.*, 405 Wis. 2d 157, 175 (Wis. 2022)), Plaintiffs provided no evidence to support that the uniforms were "dangerous" let alone to an extent beyond that contemplated by an ordinary consumer.

garments, some of which allegedly showed substances at "elevated" levels. *See, e.g.*, Dkt. 56-11, 56-12, 56-13, 56-15, 69-1. But their opinions go no further than that. Dr. Apple relied on cherry-picked, inconsistent test results (commissioned by Plaintiffs' counsel) and partial medical records from just twenty-four Plaintiffs to conclude that wearing the Lands' End uniforms caused all the self-reported symptoms of the 603 Plaintiffs; Dr. Apple never stated which substances, at "elevated" levels, are sufficiently "dangerous" to constitute a defect, by Plaintiffs' own definition, Andrews Br. at 35, instead positing—contrary to accepted toxicological principles—that exposure to the substances in any amount can cause symptoms in any individual. Dkt. 172, Expert Report of Fred Apple, at 5–7 ("Apple Rep."); Dkt. 168, Dep. Dr. Fred S. Apple, at 95:21–98:8 ("Apple Dep."). Similarly, Dr. Scheinman reviewed fifteen counsel-selected partial medical records, and at deposition admitted she could only opine on specific causation for those fifteen Plaintiffs. Dkt. 170, Dep. Pamela Scheinman, at 279:15–25 ("Scheinman Dep."). But Dr. Scheinman never connected the test results and fifteen medical records to an inherent defect across all Uniforms for 603 Plaintiffs. Not only have those experts' opinions been excluded as unreliable,[23] but Plaintiffs' textiles expert, Dr. Hauser, contradicted the assertion that mere presence of ***any*** level of those substances constituted a defect. *See* Dkt. 171 at 266:18–267:17, 268:22–269:15, 277:20–278:2 (Hauser Dep.) (substances found

[23] In this appeal, Plaintiffs do not appear to contest the exclusion of Drs. Apple and Scheinman's testimony, and Plaintiffs thus have abandoned any challenge to those exclusions by not raising them in their opening brief. *See, e.g.*, *Montanez v. Powers*, 43 F. App'x 987, 989 (7th Cir. 2002).

were ***normal in garments*** or were found in very low levels which were not concerning).

Dr. Freeman's opinion fares no better. Dr. Freeman asserted "[t]here is abundant evidence that the uniforms were transferring dye and dye-related chemicals and heavy metals to the bodies of the Delta employees who wore them." Dkt. 173, Expert Report of Michael D. Freeman, at 16 ("Freeman Rep."). Yet Dr. Freeman cites no evidence that the dye transfer (if any) was a defect that could cause Plaintiffs' alleged injuries. Moreover, as the District Court recognized, Dr. Freeman "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 also did not provide any opinions about a failure to warn." Dkt. 221 at 9 (Personal Injury Op.) (citing Dkt. 169, Dep. Michael Freeman, at 78–79 ("Freeman Dep.")). Plaintiffs cannot now reshape Dr. Freeman's testimony to fit the mold of an opinion they need but that Dr. Freeman disclaimed.

c. Plaintiffs Cannot Ask the Jury To Connect the Dots Between Experts' Opinions

As described above, Plaintiffs now attempt to cobble together evidence by suggesting that a jury could combine Dr. Hauser's and Dr. Freeman's unrelated testimony. But the "combination" of Dr. Hauser and Dr. Freeman is insufficient and improper.

Although it may be true, as Plaintiffs contend, that "people 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," Andrews App. Br. at 37 (quoting *Walsh v. Chez*, 583 F.3d 990, 994 (7th Cir. 2009)), the jury cannot draw inferences between expert opinions on "technical, scientific or medical matters" because a lack of on-point expert testimony "results in an insufficiency of proof."[24] *Gopalratnam v. Hewlett-Packard Co.*, No. 13-cv-618-PP, 2017 WL 1067768, at *3 (E.D. Wis. Mar. 21, 2017), *aff'd*, 877 F.3d 771 (7th Cir. 2017). Here, the technical, scientific, and medical gaps abound.

If Plaintiffs' theory was that the Uniforms were defective because they contained (1) excessive levels of harmful substances, (2) capable of being released, (3) in amounts that could cause personal injury, even taking Drs. Hauser and Freeman together does not get them there. Dr. Hauser's opinion says nothing about any of those the three elements, so he does not even offer the jury a "dot" to which it could connect any other evidence. For his part, Dr. Freeman said nothing reliable about "excessive levels" of substances (he referenced lab testing but relied on the wrong reference standards),[25] does not opine about whether those substances could be

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[24] Plaintiffs again misread the caselaw. "[A] jury may draw reasonable inferences from the evidence even though there is no 'expert' testimony directly on point" in instances where "the jury is asked to reach a conclusion that is not capable of mathematical certainty," such as apportionment of fault in a comparative negligence case. *Anderson v. Combustion Eng'g, Inc.*, 647 N.W.2d 460, 465 (Wis. App. Ct. 2002). Here, the jury cannot infer the level of crocking that is inherently "defective," the amount of crocking, or the amount of alleged chemicals in the garments that ***could*** cause any of more than forty alleged health effects, because doing so would ask the jury to draw "speculative and impermissible" inferences. *United States ex rel. Calderon v. Carrington Mortg. Servs., LLC,* 70 F.4th 968, 980 (7th Cir. 2023), *cert. denied sub nom. United States v. Carrington Mortg. Servs., LLC,* 144 S. Ct. 331 (2023).

[25] Although an expert can rely on testing done by a third party, he must have some basis for understanding that testing and validating its reliability. *See, e.g.*, *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 789 (7th Cir. 2017). Dr. Freeman has no background in textiles,

released through dye transfer, and ignored entirely the amount of any transfer. Again, there are no dots for the jury to connect to find a defect. Simply put, there is no way to tie together Dr. Hauser's and Dr. Freeman's unrelated opinions to create the evidence Plaintiffs need, as the District Court recognized:

> [A] lay jury would not have the knowledge or experience to determine whether any garment in the Lands' End uniform line was defective… [and] Plaintiffs' experts did not address whether the Lands' End uniforms contained a defect that caused plaintiffs' health problems.

Dkt. 221 at 7–8, 10 (Personal Injury Op.). Accordingly, Plaintiffs' lack of defect evidence independently warrants affirming the District Court's grant of partial summary judgment.

B. Because Plaintiffs Had No Evidence of General or Specific Causation, the District Court Properly Granted Summary Judgment on Plaintiffs' Personal Injury Claims

Plaintiffs' personal injury claims also failed at summary judgment on causation. In all of their personal injury claims, Plaintiffs were required to "establish general causation before moving to specific causation." *Wells v. SmithKline Beecham Corp.*, 601 F.3d 375, 378 (5th Cir. 2010). Expert testimony on causation is ***necessary*** in all "[p]ersonal injury cases involving pharmaceuticals, toxins or medical devices

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the chemicals contained in textiles, or determining defects in how textiles are manufactured or designed, and thus cannot understand or validate these laboratory tests. Dkt. 221 at 9 (Personal Injury Op.) (citing Dkt. 169 at 78–79 (Freeman Dep.)). Dr. Freeman misinterpreted the garment testing results he relied upon by using the wrong benchmarks for measuring industry standard limits, comparing test results measuring ***total*** values with industry standards for ***extractable*** values. *See* Dkt. 173 at 6 (Table 2) (Freeman Rep.). When Bureau Veritas and Intertox conducted the proper comparison of extractable values and limits on extractable values, none of the tests showed levels that exceeded industry standards. *See* Dkt. 169 at 151:7–152:6, 159:11–25 (Freeman Dep.); Dkt. 178, Expert Report of Marion J. Fedoruk, at 21, 24 ("Fedoruk Rep.") (conflating total levels with extractable levels lacks scientific validity).

[that] involve complex questions of medical causation beyond the understanding of a lay person." *In re Baycol Prods. Litig.*, 321 F. Supp. 2d 1118, 1126 (D. Minn. 2004). Simply, to defeat summary judgment, Plaintiffs needed to provide expert testimony to assist the jury in understanding medical and scientific concepts and conclusions about textiles, dyes, chemicals, toxins, and medical diagnoses.

Recognizing this requirement, Plaintiffs attempted to use Dr. Freeman, an epidemiologist, to provide expert opinion evidence of general causation. But because Dr. Freeman's opinion did not reliably apply an accepted scientific method, the District Court properly excluded his opinion. Without his or any other expert's opinion, Plaintiffs have insufficient evidence of general causation and cannot now try to bootstrap specific causation opinions to satisfy the preliminary requirement for general causation.

1. Plaintiffs Attempted to Satisfy General Causation Through Dr. Freeman, But His Opinions Were Properly Excluded

Contrary to Plaintiffs' arguments, the District Court did not abuse its discretion in excluding Dr. Freeman's opinions. Dr. Freeman used questionnaire responses that Plaintiffs prepared ***as part of this litigation*** to conduct a modified Bradford Hill analysis (a nine-factor test used to measure the likelihood of causation in epidemiology after finding an association between the alleged substance and observed effect) to opine on general causation. As the District Court found, Dr. Freeman's "methodology" was improper and unreliable for at least three reasons. First, Dr. Freeman failed to identify an association between the uniforms and the alleged health effects ***before*** conducting his Bradford Hill analysis, as the

methodology requires. Second, Dr. Freeman applied a version of the Bradford Hill criteria which he modified without explanation or support in science or in peer-reviewed literature and which did violence to the scientific underpinning of the Bradford Hill analysis. And third, the questionnaire responses on which Dr. Freeman bases his analysis are unvalidated, biased, and completely unreliable.

a. Dr. Freeman Did Not Identify an Association Between the Uniforms and Plaintiffs' Alleged Health Effects

Dr. Freeman's first error was skipping the preliminary inquiry to a valid Bradford Hill epidemiological analysis: he failed to identify an association between the Lands' End Uniforms and Plaintiffs' symptoms that is based on epidemiological or other reliable data. *See, e.g.*, Federal Judicial Center, *Reference Manual on Scientific Evidence* 598–99 & n.141 (3d ed. 2011), https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf ("*Reference Manual on Scientific Evidence*"). As the District Court recognized, "[t]o 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." Dkt. 221 at 14 (Personal Injury Op.). But Dr. Freeman did not have a control group and did not analyze the treatment group—all 64,000 Delta employees who wore the Uniforms; indeed, Dr. Freeman did not conduct any analysis that could show an association between Plaintiffs' claimed injuries and the uniforms. *See id.*

Plaintiffs attempt to account for this glaring gap by arguing that because Dr. Freeman cited a study about uniforms manufactured by different companies and

worn by employees of companies other than Delta, he identified "an association between the introduction of new airline uniforms and various health symptoms." Andrews Br. at 42–43. But Dr. Freeman admitted those study participants were not consistent over the study timeframe, Dkt. 169 at 118:1–19 (Freeman Dep.), and he did not address any of the potential additional limitations of the cited study. *See Caraker v. Sandoz Pharms. Corp.*, 188 F. Supp. 2d 1026, 1032 (S.D. Ill. 2001). That is not the stuff of sound scientific method,[26] and such an opinion cannot suffice as Bradford Hill's prerequisite association determination.

b. Dr. Freeman Did Not Otherwise Reliably Apply the Bradford Hill Methodology

Setting aside that it was scientifically improper to conduct a Bradford Hill analysis absent a threshold association determination, Dr. Freeman's modified Bradford Hill assessment was entirely unreliable, warranting the District Court's exclusion of his testimony. Dr. Freeman did not assess crucial Bradford Hill analysis factors, including dose-response, and did not have sufficient scientific support for his three-factor test.

In the guise of a Bradford Hill analysis, Dr. Freeman strayed from accepted scientific methods to apply a new test that ignored critical factors. "To reliably apply [Bradford Hill], an expert must, at minimum, 'explain 1) how conclusions are drawn

[26] Plaintiffs cannot now, on appeal, shoehorn Dr. Freeman's temporality findings into a threshold association determination for a Bradford Hill analysis. *See* Andrews Br. at 42–43. Temporality is certainly one of the Bradford Hill factors, but it can only be addressed ***after*** the threshold association finding. *See In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prods. Liab. Litig.*, 174 F. Supp. 3d 911, 925 (D.S.C. 2016).

for ***each*** Bradford Hill criterion and 2) how the criteria are weighed relative to one another.'" *See In re Flint Water Cases*, No. 16-10444, 2024 WL 21786, at *3 (E.D. Mich. Jan. 2, 2024) (citations omitted) (emphasis added). Dr. Freeman's test only attempted to assess plausibility, temporality, and alternative causes (though Dr. Freeman failed to actually consider alternative causes), and wholly ignored other Bradford Hill factors: Strength, Consistency, Specificity, Biological Gradient (also known as dose-response), Coherence, Experiment, and Analogy. *See* Dkt. 178 at 32 (Fedoruk Rep.). Although Plaintiffs now argue "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," Andrews Br. at 44, Plaintiffs misunderstand that the Bradford Hill analysis requires that the scientist ***assess*** all of the factors, even if a causal determination does not require that all factors be present. *See In re Flint Water Cases*, 2024 WL 21786, at *3. Dr. Freeman did not assess several factors and, accordingly, he did not reliably apply the Bradford Hill methodology. *See* Dkt. 221 at 15 (Personal Injury Op.).

Most significantly, Dr. Freeman (and all of Plaintiffs' other experts) failed to conduct a proper dose-response analysis, one of the Bradford Hill factors. Dr. Freeman never tried to analyze at what level of exposure certain chemicals ***could*** cause Plaintiffs' alleged symptoms. *See supra* 35. Courts in this Circuit routinely exclude exposure-based expert opinions that fail to scientifically account for dose. *See, e.g.*, *Higgins v. Koch Dev. Corp.*, No. 3:11-cv-81-RLY-WGH, 2013 WL 6238650, at *8–9 (S.D. Ind. Dec. 3, 2013). Although Dr. Freeman compared the "frequency in

which the uniforms were worn" to the number of symptoms Plaintiffs reported, which Plaintiffs now term a dose-response analysis, Andrews Br. at 46–47, Dr. Freeman's "frequency" "analysis" is nothing more than basic arithmetic from Plaintiffs' own unvalidated, biased self-reporting. As the District Court explained, Dr. Freeman "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." Dkt. 221 at 16 (Personal Injury Op.) (citing Dkt. 169 at 97, 166–67 (Freeman Dep.)) (emphasis added).[27]

Even if he could shortcut his Bradford Hill analysis, Dr. Freeman's three-part test is not scientifically validated. Despite Plaintiffs' protestations, Andrews Br. at 44–45, the only support Dr. Freeman cited in his report in favor of using his three-factor test were two articles he authored—a non-peer reviewed guest editorial and an

[27] Dr. Freeman, by his own admission, does not have "the ability to say this item specifically is the one that caused – you know, X number of symptoms." Dkt. 169 at 92:20–23 (Freeman Dep.); *see Aurand v. Norfolk S. Ry. Co.*, 802 F. Supp. 2d 950, 955 (N.D. Ind. 2011) (excluding expert opinion that failed to identify which specific chemical caused plaintiffs' injuries).

article about motor vehicle crashes—and one car crash case.[28] On appeal, Plaintiffs wade through other articles cited to in Dr. Freeman's article and produce only a ***single*** article in which Dr. Freeman was not an author. Andrews Br. at 44–45. A methodology backed by one inapposite case and one article without Dr. Freeman's pen does not a sufficiently accepted method make. *See C.W. ex rel. Wood v. Textron, Inc.*, 807 F.3d 827, 837 (7th Cir. 2015) ("The studies were so dissimilar to the facts presented in this litigation that it was not an abuse of discretion for the District Court to have rejected the experts' reliance on them." (citations omitted)).

Considering Dr. Freeman's faulty "methodology," the District Court was within its discretion to find that Dr. Freeman could not purport to link Plaintiffs' alleged health symptoms to the Lands' End Uniforms or provide any useful opinion on general or specific causation. Dkt. 221 at 15, 19 (Personal Injury Op.); *see Wintz ex rel. Wintz v. Northrop Corp.*, 110 F.3d. 508, 513–14 (7th Cir. 1997).

c. Dr. Freeman Relied On Entirely Unreliable Data

Finally, the District Court did not abuse its discretion in determining that the

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[28] The differences between a car crash and Plaintiffs' claims are obvious. In *Etherton v. Owners Ins. Co.*, the court found that Dr. Freeman's three-part methodology was scientifically valid only where (1) as to plausibility, he showed "the medical literature is rampant with evidence that rear-end-impact motor vehicle crashes can lead to lumbar spine injury" and relied on his work as an instructor at the Spine Research Institute; (2) as to temporality, "examined [Plaintiff's] medical records to determine whether the injury coincided with the collision"; and (3) as to alternative causes, the expert "testified that he ruled out alternative explanations" based on "physical examination[s]," "diagnostic testing," and "the lack of predated records." 829 F.3d 1209, 1220–22 (10th Cir. 2016). Here, Dr. Freeman's analysis fell short at every step: he cited no medical literature showing that the Lands' End Uniforms can cause all (or even any) of Plaintiffs' alleged symptoms; he did not examine medical records or conduct physical examinations for any Plaintiffs; and he did not consider ***any*** alternative causes.

data that Dr. Freeman relied on was so flawed as to render his methodology entirely unreliable. Dr. Freeman's analysis relied wholly on Plaintiffs' responses to questionnaires drafted by Lands' End's counsel—for purposes of streamlining the litigation—about which Uniforms they wore, for how long, and what symptoms they alleged; he had no data on these critical facts other than questionnaire responses. As the District Court found, Dr. Freeman provided "no basis for relying on the [Plaintiffs'] questionnaire data to identify a causal relationship between exposure to chemicals in the garments and the symptoms reported by plaintiffs." Dkt. 221 at 17 (Personal Injury Op.).

Dr. Freeman's reliance on self-reported symptoms from financially interested Plaintiffs (whose reports were made ***after*** litigation commenced) cannot form a "sufficient" basis for his opinion. *See Burns v. Sherwin-Williams Co.*, 78 F.4th 364, 373–74 (7th Cir. 2023) (excluding expert opinion because it was not "'based on sufficient facts or data'" (citations omitted)). Even Dr. Freeman recognized the inherent problems with this data. First, the questionnaires, which were drafted by lawyers, not scientists or doctors, were not written or designed to control for Plaintiffs' subjective, self-reported responses, and "[a]nything that is self-reported is subjective." *See* Dkt. 169 at 126:6–7 (Freeman Dep.); *see also Muha v. Encore Receivable Mgmt., Inc.*, 516 F. Supp. 2d 959, 963 (E.D. Wis. 2007), *rev'd on other grounds*, 558 F.3d 623 (7th Cir. 2009) (finding data "unreliable" because survey was designed by plaintiffs' counsel). Second, as Dr. Freeman acknowledged, the questionnaires could not show whether the plaintiffs actually experienced the

symptoms that they alleged. Dkt. 169 at 115 (Freeman Dep.) ("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."). Although he recognized the inherent subjectivity of the data, Dr. Freeman did not review any medical records (although such records were available) or take any steps to confirm whether the information in the questionnaires was accurate. Dkt. 169 at 99 (Freeman Dep.). Dr. Freeman's admitted failure to account for potentially unreliable information undermines his opinions. *See* Dkt. 221 at 18 (Personal Injury Op.) (citing *Reference Manual on Scientific Evidence* 583); *Smith v. Ill. Dep't of Transport.*, 936 F.3d 554, 558–59 (7th Cir. 2019) (excluding expert opinion where expert did not interview plaintiff and relied "only on…plaintiff-curated records").

Although Plaintiffs make much of the District Court's assessment of Dr. Freeman's data as a question of weight rather than admissibility, Plaintiffs' reliance on *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796 (7th Cir. 2013), and its progeny is misplaced because the sufficiency of the data does, in fact, go to admissibility. As further evidence that the District Court was correct, Federal Rule of Evidence 702 was recently amended to clarify what has long been the law: Plaintiffs must "demonstrate[] to the court that it is more likely than not that:…the testimony is based on sufficient facts or data;… and [] the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." Fed. R. Evid. 702. And the notes to the amended Rule announce: "[M]any courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the

expert's methodology, are questions of weight and not admissibility. ***These rulings are an incorrect application of Rules 702 and 104(a)***." Fed. R. Evid. 702 (Advisory Committee Notes, 2023) (emphasis added).

Plaintiffs' argument that Lands' End must credit the questionnaire responses also fails because Plaintiffs conflate "unverified" data, Andrews Br. at 54, with unvalidated data. Consistent with Lands' End's argument below, the questionnaires are unvalidated—meaning they are not statistically validated—not that they were not verified as that term is used in discovery. *See* Dkt. 181, Defs.' Mot. to Excl. the Ops. of Michael Freeman, at 20 ("Freeman Mot."). Dr. Freeman could not rely on the self-reported responses for the purpose of attempting to conduct a statistical analysis when they were drafted to obtain certain discovery information, not a statistically valid data set. Further, regardless of who drafted the questionnaires or whether they were given under the penalty of perjury, self-reported symptoms by financially interested individuals are not reasonably used in epidemiological studies. *See, e.g.*, *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 762 (3d Cir. 1994) (finding court acted within its discretion to exclude doctors' conclusions based "solely on the plaintiff's self-report of illness in preparation for litigation"); *see also* Fed. R. Evid. 703.

Because Dr. Freeman used unreliable data—all of which was created by litigants after this case commenced—there was "simply too great an analytical gap between the data and opinion proffered" and "it is not an abuse of discretion under *Daubert* to exclude that testimony." *Textron*, 807 F.3d at 837. As a result, Plaintiffs had no record evidence of general causation. On that basis alone, the District Court

properly granted partial summary judgment on all of Plaintiffs' personal injury claims, and this Court should affirm.

2. Any Evidence of Specific Causation That Some Plaintiffs Might Have Does Not Suffice to Meet the Requirement of Proving General Causation

Plaintiffs also incorrectly argue that no proof of general causation was needed because some individuals had evidence of specific causation. Andrews Br. at 67. As described earlier, some individual Plaintiffs also made Fed. R. Civ. P. 26(a)(2)(C) disclosures from their treating physicians. But even the Plaintiffs who did so cannot now save their personal injury claims by using ***specific*** causation evidence to establish ***general*** causation. To do so would stand the required order of proof on its head. Plaintiffs were required to—but did not—***first*** adduce competent evidence that the Uniform is capable of causing the condition at issue, and may not rely upon purported evidence of specific causation as a substitute for failing to establish general causation. *See, e.g., Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 887 (10th Cir. 2005).

Although Plaintiffs argue that certain individuals had treating physician evidence that the Uniforms "caused" their injuries, their examples, at best, speak to specific causation and miss the mark. *See, e.g.*, *Textron*, 807 F.3d at 831 ("General causation examines whether the substance… 'had ***the capacity*** to cause the harm alleged[.]' Specific causation, by contrast, examines whether the substance did, ***in fact***, cause the harm alleged." (emphasis in original)). For example, Plaintiffs point to evidence that 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." Andrews Br. at 16 (citing Dkt. 194-5 at 11).

But Plaintiffs' treating physicians have no requisite expertise or knowledge as to whether the Lands' End Uniforms were generally capable of causing some forty-odd different alleged injuries. The treating physicians did not test the Uniforms; did not know what substances were in the Uniforms, which of those substances could transfer to the skin or through the air, which, if any, substances ***did*** transfer to the skin or through the air, and whether the specific amounts transferred (i.e. dose), if any, could cause the claimed ailment; and had no knowledge or opinion as to whether the Uniforms were defective such that they could cause Plaintiffs' individual injuries. Rather, while treating their patients, some treating physicians wrote in the patient's medical notes that the Uniforms ***may*** have caused that individual's specific injuries. Such evidence would be insufficient to prove specific causation, much less to do double duty and save Plaintiffs' personal injury claims by also sufficing to prove general causation.

3. Remand for Determination of Specific Causation Is Not Warranted

Finally, after failing to provide any evidence of general causation, Plaintiffs try to skirt this Court's jurisdiction by asking the Court, if it reverses on the other issues raised in the Andrews Plaintiffs' appeal, to remand the issue of specific causation. But that requested relief is both improper and unwarranted.

As an initial matter, to be clear, remand could only even potentially come into play ***if*** this Court finds that the District Court was wrong to grant summary judgment

as to defect, ***and*** it abused its discretion in excluding Dr. Freeman's testimony, ***and if*** this Court determines Plaintiffs provided sufficient evidence to establish general causation. For the reasons described previously, Plaintiffs cannot prevail on any of these.

But even if this Court concluded that there was sufficient evidence of both defect and general causation, there would be no need for remand. Contrary to Plaintiffs' protestations, this Court could itself decide whether Plaintiffs submitted adequate evidence of specific causation to defeat summary judgment based on the record below. *See, e.g.*, *Thornton v. M7 Aerospace LP*, 796 F.3d 757, 763–64 (7th Cir. 2015).

Review of the record evidence below would show that nearly all Plaintiffs also lacked admissible evidence of specific causation. Under Track 1, *see supra* 10, the parties were to address any issues that could be dealt with as to all or large groups of Plaintiffs. Most Plaintiffs (508, to be exact) relied entirely on the retained expert witnesses for evidence regarding specific causation,[29] but those expert witnesses, including their specific causation opinions, were properly excluded.[30] As a result,

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[29] These Plaintiffs either did not disclose treating physicians or, if they were one of the 174 Plaintiffs who did disclose treating physicians, they disclosed only treating physicians who did not form a causation opinion during the course of treatment. *Meyers v. Nat'l R.R. Passenger Corp. (Amtrak)*, 619 F.3d 729, 734–35 (7th Cir. 2010).

[30] Plaintiffs argue that the District Court did not rule that Dr. Freeman unreliably applied the Naranjo algorithm for his specific causation analysis, but that is not so. The District Court explained that Dr. Freeman's specific causation "opinion is based on unreliable epidemiological methods also." Dkt. 221 at 19 (Personal Injury Op.). Dr. Freeman did not explain how he chose and weighed the evidence (the questionnaire data) for his specific causation analysis, how he accounted for weaknesses in the data he relied on, or why the Adverse Drug Reaction Probability Scale could be utilized outside of adverse drug reactions.

whether those 508 Plaintiffs had evidence of specific causation was ripe in Track 1, and none of those Plaintiffs had expert testimony for specific causation (let alone general causation).

Given Plaintiffs' lack of any admissible expert testimony and any evidence of specific causation, let alone the threshold question of general causation, the District Court properly granted partial summary judgment on all of Plaintiffs' personal injury claims.

CONCLUSION

For the foregoing reasons, the District Court's Orders should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 7th Cir. R. 32(c) because it contains 13,987 words, excluding the parts exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Seventh Circuit Rule 32(b) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Century Schoolbook font that is 12 point or larger.

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