IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

GYANT PROPERTIES LLC	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:25-CV-00064-O**
	§	
NATIONAL FIRE & MARINE INSURANCE COMPANY	§	
	§	
	§	
Defendant.	§	

ORDER

Before the Court are Defendant's Motion for Summary Judgment (ECF No. 25), Brief in Support (ECF No. 26), and Appendix in Support (ECF No. 27); Plaintiff's Motion for Partial Summary Judgment (ECF No. 33), Brief in Support (ECF No. 34), Appendix in Support Part One (ECF No. 35), and Appendix in Support Part Two (ECF No. 36); Plaintiff's Response (ECF No. 41), Brief in Support (ECF No. 42), and Appendices in Support (ECF Nos. 43, 44, 43, 46); Defendant's Response (ECF No. 47), Brief in Support (ECF No. 48), and Appendices in Support (ECF Nos. 49, 50); Plaintiff's Reply (ECF No. 51); Defendant's Reply (ECF No. 52); Defendant's Motion to Strike or Limit the Opinions and Testimony of Plaintiff's Experts Tyler Melton, Howard Watson, Michael Mitchell, and Empire Roofing (ECF No. 59), Brief in Support (ECF No. 60), and Appendix in Support (ECF No. 61); Plaintiff's Response (ECF No. 88), Brief in Support (ECF No. 89), and Appendix in Support (ECF No. 90); and Defendant's Reply (ECF No. 93). Having reviewed the briefing and relevant caselaw, Defendant's Motion for Summary Judgment (ECF No. 25) is **GRANTED** in part and **DENIED** in part; Plaintiff's Motion for Partial Summary Judgment (ECF No. 33) is **DENIED**; and Defendant's Motion to Strike or Limit (ECF No. 59) is **DENIED**.

I. BACKGROUND[1]

This case is an insurance dispute regarding claims for hail and windstorm damage to three properties that Plaintiff, Gyant Properties LLC ("Plaintiff"), owns across Tarrant County, Texas. Plaintiff brings claims for anticipatory breach of contract, breach of contract, violations of certain provisions of Chapter 541 and 542 the Texas Insurance Code, breach of the duty of good faith and fair dealing, and violations of certain provisions of Chapter 17 of the Texas Deceptive Trade Practices Act ("DTPA"). Essentially, for two of the properties, Plaintiff claims Defendant, National Fire & Marine Insurance Company ("Defendant"), underpaid the damages owed under the contract, in addition to other extra-contractual claims. The policy provides coverage for wind/hail damage but also has a separate deductible for wind/hail damage in addition to other exclusions that relate to wear/tear, previous defects, and cosmetic exclusions. Plaintiff claims the damage was caused by a March 16, 2023, hailstorm, which would fall under the coverage period. Defendant claims the damage to the different properties occurred before the coverage period began, falls under an exception of uncovered damages, or does not meet the wind/hail deductible.

Defendant filed its motion for summary judgment on all claims. ECF No. 25. Plaintiff then filed its motion for partial summary judgment on only the Texas Insurance Code Violations. ECF No. 33. Defendant then filed a motion to strike Plaintiff's non-retained experts. The motions are now ripe for the Court's review.

[1] Unless otherwise specified, the Court's recounting of the facts in this case is drawn from briefing submitted by the parties. *See generally* Def.'s Br. Supp. Mot. Summ. J., ECF No. 26; Pl.'s Br. Supp. Mot. Summ. J., ECF No. 34; Pl.'s Br. Supp. Resp., ECF No. 42; Def.'s Br. Supp. Resp., ECF No. 48; Pl.'s Reply, ECF No. 51; and Def,'s Reply, ECF No. 52.

II. LEGAL STANDARD

A. Federal Rule of Civil Procedure 56(a)

The Court may grant summary judgment when the pleadings and evidence show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). Summary judgment is not "a disfavored procedural shortcut, but rather . . . an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (internal quotation marks and citation omitted).

"[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute as to any material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant must inform the court of the basis for its motion and demonstrate from the record that no genuine dispute as to any material fact exists. *Celotex*, 477 U.S. at 323. The Court must view the evidence in the light most favorable to the nonmovant. *Ion v. Chevron USA, Inc.*, 731 F.3d 379, 389 (5th Cir. 2013). And if there appears to be some support for disputed allegations, such that "reasonable minds could differ as to the import of the evidence," the Court must deny the motion for summary judgment. *Anderson*, 477 U.S. at 250.

"The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). "The opposing parties' failure to produce proof as to any essential element of a claim renders all other facts immaterial." *2223 Lombardy Warehouse, LLC v. Mount Vernon Fire Ins. Co.*, No. 3:17-CV-2795-D, 2019 WL

1583558, at *6 (N.D. Tex. Apr. 12, 2019) (Fitzwater, J.). Summary judgment is mandatory if the parties fail to meet this burden. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

B. Federal Rule of Civil Procedure 26(a)(2)

Federal Rule of Civil Procedure 26(a)(2) governs disclosures of expert testimony. For nonretained experts, a report is not required. However, under Rule 26(a)(2)(C), the offering party must disclose "(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify." FED. R. CIV. P. 26(a)(2)(C). "This Rule, adopted in 2010, is intended to ensure that an opposing party has some notice of what the nonretained expert will testify about." *Everett Fin., Inc. v. Primary Residential Mortg., Inc.*, Civil Action No. 3:14-CV-1028-D, 2017 WL 90366 (N.D. Tex. Jan. 10, 2017) (Fitzwater, J.) (citing 8A Charles Alan Wright, et. al., *Federal Practice and Procedure* § 2031.2, at 92 (3d ed. 2010 & Supp. 2016)).

C. Federal Rule of Civil Procedure 37

Federal Rule of Civil Procedure 37 lays out the consequences for failure to meet the requirements of Rule 26(a)(2). Under Rule 37, "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." FED. R. CIV. P. 37(c)(1). In the Fifth Circuit, four factors are considered: "(1) the importance of the evidence; (2) the prejudice to the opposing party of including the evidence; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation for the party's failure to disclose." *Bailey v. Shell W. E&P Inc.*, 609 F.3d 710, 729 (5th Cir. 2010).

III. ANALYSIS

A. Motion to Strike Experts

Plaintiff offers the nonretained expert testimonies of Tyler Melton, Howard Watson, Michael Mitchell, and Empire Roofing Company. Defendant argues that Plaintiff's expert disclosures are insufficient because they do not include anything substantive about the witness' expected testimony.[2] For all four experts, the disclosure states the expert:

> is a roofing contractor and is anticipated to testify and render opinions concerning the roof at the properties, roofing system(s), damage(s) to the roof/roofing system(s), causation of damage(s) to the properties, including the roof/roofing system(s) at the properties, scope of repair(s)/replacement(s) of damage(s) at the properties, cost to repair/replace damage(s) at the properties, professional and industry standards related to roof(s)/roofing system(s), damage and repair/replacement of roof(s)/roofing system(s) and any other areas/topics previously listed.[3]

Plaintiff argues this is sufficient because Defendant already knew the identities of all four experts, has deposed three of them, and both parties have used discovery products involving these witnesses in motions.[4]

"Although the court is not aware of any controlling precedent that governs the level of detail required in disclosures under this Rule, some principles are found in persuasive authority." *Everett Financial, Inc. v. Primary Residential Mortgage, Inc.*, Civil Action No. 3:14-CV-1028-D, 2017 WL 90366 (N.D. Tex. Jan. 10, 2017) (Fitzwater, J.). The disclosure must state opinions, not merely topics of testimony. *See Carr v. Montgomery Cnty., Tex.*, Civil Action No. H–13–2795, 2015 WL 5838862, at *3 (S.D. Tex. Oct. 7, 2015) (Miller, J.) (finding insufficient "Dr. Heller will have opinions about the subject of Carr's depression and future treatment . . ." (internal quotation marks omitted)); *see also Tolan v. Cotton*, Civil Action No. H–09–1324, 2015

[2] Def.'s Br. Supp. Mot. Strike 10, ECF No. 60.
[3] Def.'s App. Supp. Mot. Strike Ex. B (Pl.'s Expert Disclosures), App. 001–004, ECF No. 61-1.
[4] Pl.'s Br. Supp. Resp. to Mot. Strike 6, ECF No. 89.

WL 5332171, at *7 (S.D. Tex. Sep. 14, 2015) (Harmon, J.) (asserting in a conclusory fashion that the nonretained experts "will offer opinions and testimony regarding Robert Tolan's prospects as a major league baseball playere before and after his injuries . . ."); *Brown v. Joseph Cory Holdings, LLC*, Civil Action No. 4:13-CV-044-Y, 2014 WL 12585673, at *1 (N.D. Tex. Apr. 1, 2014) (Means, J.) ("Plaintiff's vague assertion that she will testify regarding her experience as an employee in the delivery industry hardly puts Defendant on notice regarding the extent of her testimony."). Because Defendant is not provided with any summary of the experts' opinions as to facts or opinions to which the experts will testify, Plaintiff's disclosures fail to comply with Rule 26(a)(2)(C).

Having concluded that Plaintiff did not comply with Rule 26(a)(2)(C) the Court now determines in its discretion whether to strike the reports and opinions or to impose some lesser sanction, like leave to amend. *Kim v. Nationwide Mut. Ins. Co.*, 614 F. Supp. 3d 475, 485 (N.D. Tex. 2022) (Fitzwater, J.) (explaining the sanctions the Court can impose for failure to comply with the expert report requirement). Here, trial is in less than four weeks, and discovery has closed. Although Plaintiff has offered no good reason for the failure to comply with Rule 26, the exclusion of these experts would likely drastically change Plaintiff's case. Also, the prejudice to Defendant seems harmless considering all but Empire Roofing were deposed.[5] Therefore, considering the four factors in *Bailey*, 609 F.3d at 729, and Federal Rule of Civil Procedure 37, the Court determines Tyler Melton, Howard Watson, Michael Mitchell, and Empire Roofing Company's expert testimony is **ADMISSIBLE**. Plaintiff **SHALL** amend its expert disclosures to comply with Rule 26 **no later than February 16, 2026**, to avoid a harsher sanction. Therefore, Defendant's motion to strike is **DENIED**.

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[5] *Id.* at 21.

Defendant also argues that non-retained expert Tyler Melton cannot testify about the replacement cost estimates for the properties.[6] Defendant's argument is: because Melton did not generate the estimates himself—*i.e.*, they were generated by someone within his company—he lacks the first-hand knowledge required to testify as a Rule 26(a)(2)(C) expert.[7] It is true that, generally, a non-retained expert cannot testify to information he only obtained in preparation for litigation. *See Eagle Oil & Gas Co. v. Travelers Prop. Cas. Co. of America*, Civil Action No. 7:12-cv-133, 2014 WL 3744976, at *7 (N.D. Tex. Jul. 30, 2014) (O'Connor, J.) (explaining that non-retained experts are only exempt from the report requirement because they have first-hand factual knowledge of the case). However, as Plaintiff points out, Melton *does* have first-hand knowledge of the Xactimate estimates, even if he did not go into the Xactimate program himself, because the information that was input into Xactimate was provided by Melton and was calculated at his direction.[8] Having staff complete tasks and gather data relevant to the expert's analysis, as Melton did here, is appropriate and does not transform him from a nonretained expert to a retained expert. *See MGMTL, LLC v. Strategic Tech.*., No. 20-2138-WBV-MBN, 2022 WL 474161, at *4 (E.D. La. Feb. 16, 2022) (reasoning that distinguishing between retained experts and non-retained experts should be done "in a common sense manner" (internal quotation marks omitted)). Therefore, Defendant's motion limit Melton's testimony regarding cost-estimates is **DENIED**.

B. Summary Judgment

1. Breach of Contract

First, the Stuart property was sold, and Plaintiff is no longer prosecuting breach of contract claims for that property.[9] For the other two properties, the disputed material question is whether

[6] Def.'s Br. Supp. Mot. to Strike 14–16, ECF No. 60.
[7] *Id.* at 16.
[8] Pl.'s Br. Supp. Resp. to Mot. Strike 25, ECF No. 89.
[9] Pl.'s Br. Supp. Mot. Summ. J. 11, ECF No. 34.

there was prior storm damage, such that Plaintiff needs to segregate the damage. *See Markel American Ins. Co. v. Lennar Corp.*, 342 S.W.3d 704, 709 (Tex. Civ. App. — Houston [14th Dist.] 2011) ("[T]he doctrine of concurrent causation . . . is a rule embodying the basic principle that insureds are not entitled to recover under their insurance policies unless they prove their damage is covered by the policy."). Defendant claims Plaintiff's breach of contract claim fails because Plaintiff's retained expert, David Day, does not provide any basis or calculation to segregate the March 16, 2023, hail damages from other perils.[10] *See Lyons v. Miller Cas. Ins. Co*., 866 S.W.2d 597, 601 (Tex. 1993) ("When covered and excluded perils combine to cause an injury, the insured must present some evidence affording the jury a reasonable basis on which to allocate the damage."); *see also Wallis v. United Services Auto. Ass'n*, 2 S.W.3d 300, 303 (Tex. App. — San Antonio 1999, pet. denied) ("The burden of proof is on the insured to segregate the damages attributable solely to the covered peril.").

In response, Plaintiff argues there is nothing to segregate because "[t]here was no prior storm damages and the roofs were in good condition [before the storm] as [Defendant] . . . internally reported within its own loss control file documents."[11] *See Advanced Indicator and Mfg., Inc. v. Acadia Ins. Co.*, 50 F.4th 469, 477 (5th Cir. 2022) ("An insured may carry its burden by putting forth evidence demonstrating that the loss case solely from a covered cause . . . . [B]ecause a jury could reasonably find that all of [the] loss comes from a covered cause, the concurrent causation doctrine does not bar recovery."). Plaintiff also points to additional testimony from its non-retained experts, all of whom state that the damage was exclusively caused by the hailstorm of March 16, 2023.[12]

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[10] Def.'s Br. Supp. Mot. Summ. J. 18, ECF No. 26.
[11] Pl.'s Br. Supp. Resp. to Mot. Summ. J. 10, ECF No. 42.
[12] *Id.* at 24–25.

Defendant is correct that Plaintiff's expert David Day does not support Plaintiff's sole-cause argument. Although David Day's later depositions state that the March 16 storm was the sole cause,[13] Day's expert reports clearly opine that there were concurrent causes.[14] However, Plaintiff's non-retained experts, their affidavits, and depositions, do support the claim that all the damage that occurred was solely due to the March 16 storm.[15] Plaintiff also claims that the loss control files show that, even per Defendant's own inspections, there was no storm damage to any of the properties.[16]

Viewing this evidence in the light most favorable to Plaintiff, a reasonable jury could find that the March 16, 2023, storm was the *only* cause of the damage to the buildings. To be sure, Defendant offers evidence to the contrary. But this evidence serves only to create a factual dispute. Therefore, Defendant's motion for summary judgment on the breach of contract claim is **DENIED**.

2. Extra-Contractual Violations

Plaintiff and Defendant both moved for summary judgment on the Texas Insurance Code violations. The Court addresses each motion in turn.

Plaintiff's motion on the extra-contractual claims is **DENIED** because without first establishing a right to benefits under the policy, or an independent injury, which it did not plead, the Court or a jury cannot impose any extra-contractual liability. *See USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 489–90 (Tex. 2018) ("An insured cannot recover any damages based on an insurer's statutory violation unless the insured establishes a right to receive benefits under

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[13] Def.'s Reply 8–9, ECF No. 52.

[14] Def.'s App. Supp. Mot. Summ. J. Ex. 21, 22 (Day Reports) App. 2349, 2362, ECF No. 27-29. David Day's expert report concludes for both the Seminary and Bryan Irvin property "there have been multiple storms represented by the multiple damages to the AC foils, the largest and most damaging hail fell on March 16, 2023." *Id.*

[15] Pl.'s Br. Supp. Resp. 25, ECF No. 42.

[16] *Id.* at 10.

the policy or an injury independent of a right to benefits."); *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127, 134-37 (Tex. 2019) (no Chapter 541 recovery where no rights to benefits is shown); *Hinojos v. State Farm Lloyds*, 619 S.W.3d 651, 658 (Tex. 2021) (Chapter 542 liability "depends on the existence of an unpaid amount" owed under the policy); *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806, 813 (Tex. 2019) (insured must prove both policy liability and Chapter 542 noncompliance).

Defendant's motion on the extra contractual claims is **DENIED in part** because the Texas Prompt Payment Act violations based on Tex. Ins. Code. Ann. §§ 542.058 and 542.060 depend upon the amount Defendant must pay, if any. *See Casey v. State Farm Lloyds*, Civil Action No. 3:21-cv-346, 2022 WL 3702024, at *7 (N.D. Tex. Aug. 26, 2022) (Lindsay, J.) (denying motion for summary judgment on claims under Tex. Ins. Code Ann. §§ 542.058 and 542.060 where genuine issue of material fact existed regarding amount insurer was obligated to pay on insured's claim); *Patton v. Meridian Sec. Ins. Co.*, 3:21-cv-1409, 2022 WL 2992878, at *18 (N.D. Tex. July 28, 2022) (Fish, J.) (denying insurer's motion for summary judgment on plaintiff's claim that insurer violated §§ 542.058 and 542.060 of the Texas Insurance Code because "[i]t is possible that the jury will find that [the insurer] breached the insurance contract by failing to pay more than what it has already paid"). Thus, the Court denies Defendant's motion for summary judgment with respect to Plaintiff's Texas Prompt Payment claim based on violations of §§ 542.058 and 542.060 of the Texas Insurance Code.[17]

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[17] Plaintiff also claims one property—the Seminary property—violates the Texas Prompt Payment Act, TEX. INS. CODE § 542.055, because "Defendant waited approximately three months to take action on Plaintiff's claim for the Seminary property." Pl.'s Br. Supp. Resp. to Def.'s Mot. Summ. J. 28, ECF No. 41. However, the evidence establishes that Defendant reached out to Plaintiff to initiate the claim, but it was Plaintiff who did not reach out in response to Defendants. Def.'s Br. Supp. Resp. 2, ECF No. 47. Therefore, Defendant's motion is **GRANTED** as to Plaintiff's § 542.055 claim regarding the Seminary Property.

And for the two remaining properties, at most Plaintiff reveals a bona fide dispute, *see State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 44 (Tex. 1998) ("Evidence establishing only a bona fide coverage dispute does not demonstrate bad faith."), which does not give rise to any extra-contractual liability. *See Lyons v. Miller Cas. Ins. Co.*, 866 S.W.2d 597, 600 (Tex. 1993). Defendant's estimates are based on findings of adjusters and engineers,[18] and Plaintiff's higher estimates alone do not establish bad faith on Defendant's part. *See State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 448 (Tex. 1997) (while the insurer's reliance on expert report alone does not establish good faith, Plaintiff cannot carry burden absent evidence the report was not objectively prepared or was unreasonable). Plaintiff has presented no other evidence that indicates anything more than a reasonable battle between the experts. Therefore, Defendant's motion is **GRANTED in part**.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment (ECF No. 25) is **GRANTED** for all extra-contractual claims except for those based on violations of Tex. Ins. Code. Ann. §§ 542.058 and 542.060 and is **DENIED** for the breach of contract claim; Plaintiff's Motion for Partial Summary Judgment (ECF No. 33) is **DENIED**; and Defendant's Motion to Strike or Limit (ECF No. 59) is **DENIED**. Plaintiff **SHALL** amend its expert report to comply with Rule 26 **no later than February 16, 2026**, to avoid a harsher sanction.

SO ORDERED on this **12th day** of **February 2026**.

Reed O'Connor
CHIEF UNITED STATES DISTRICT JUDGE

[18] Def.'s Br. Supp. Resp. 13, ECF No. 47.