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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Pedro G. Montalvo, et al.,  
  
Plaintiffs,  
  
v.  
  
American Family Mutual Insurance  
Company, et al.,  
  
Defendants.

No. CV-12-02297-PHX-JAT

**ORDER**

Pending before the Court is Defendant American Family Mutual Insurance Company (“American Family”)’s Motion for Partial Summary Judgment (Doc. 48). The Court now rules on the motion.

**I. Background**

The facts of this case, construed in the light most favorable to Plaintiffs Pedro G. Montalvo and Rihilma S. Montalvo, are as follows.<sup>1</sup> Plaintiffs purchased a homeowners

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<sup>1</sup> On a motion for summary judgment, the Court construes any disputed facts in the light most favorable to the non-moving party. *See Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004).

In considering the facts of this case, the Court encountered numerous issues concerning the quality of briefing by counsel for both parties. Defendant’s statement of facts contains erroneous references to the record, *see, e.g.*, (Doc. 49 ¶ 20) (erroneous cite to Exhibit 8), fails to include pinpoint citations to documents in the record, *see, e.g.*, (*id.* ¶ 2) (failure to cite the specific page of the policy), and misquotes its own policy, *see, e.g.*, (*id.* ¶ 3) (misstating “appraisal” instead of “arbitration”). Plaintiffs’ controverting statement of facts misstates the evidence, *see, e.g.*, (Doc. 55 ¶ 14) (misinterpreting Getty’s e-mail), improperly contains legal arguments, *see, e.g.*, (*id.* ¶¶ 26, 30), misstates Plaintiffs’ names, *see id.* at 10 (“Attorneys for Plaintiff Tropitoga Circle Condominium Homeowners Association”), and their response is both missing citations to the record, *see, e.g.*, (Doc. 54 at 2:8-24), and riddled with grammatical errors, *see, e.g.*, (*id.* at 3:3,

1 insurance policy (the “Policy”) from American Family. (Doc. 49-1 at 3). The Policy  
2 covers “risks of accidental direct physical loss to property described in Coverage A –  
3 Dwelling and Dwelling Extension, unless the loss is excluded in this policy.” (*Id.* at 9).  
4 Excluded losses include “faulty, inadequate, or defective . . . construction, renovation,  
5 repair, remodeling or renovation; . . . materials used in construction, reconstruction,  
6 repair, remodeling or renovation; . . . design, workmanship, or specifications.” (*Id.* at 11).  
7 The Policy also specifies the timing of payment for losses as follows:

8           **Loss Payment.** We will adjust all losses with you. We will  
9 pay you unless some other party is named in the policy or is  
10 legally entitled to receive payment. Loss will be payable 30  
11 days after we receive your properly completed proof of loss  
12 and:

- 11           a.       we reach agreement with you;
- 12           b.       there is an entry of a final judgment; or
- 13           c.       there is a filing of an arbitration award with us.

14 (*Id.* at 12) (emphasis omitted).

15           On October 5, 2010, a hail storm occurred in the Phoenix metropolitan area. On  
16 August 17, 2011, Plaintiffs first reported a claim to American Family for damage caused  
17 by this hail storm. (Doc. 49-1 at 31). American Family’s claim notes report the  
18 description of the claim as “roof damage to the tiles on the roof, swimming pool damage,  
19 siding damageg [sic].” (*Id.*)

20           American Family assigned the claim to Pacesetter Claims Service, which  
21 employed Cheryl Batstone as a field adjuster. (*Id.* at 62). Ms. Batstone began her career  
22 as an adjuster in March 2011; the October 2010 hail storm was the first storm for which  
23 she had adjusted the subsequent insurance claims. (Doc. 55-2 at 12:19-13:11). On August  
24 24, 2011, Ms. Batstone inspected Plaintiffs’ property and identified storm-related damage  
25 to window screens and two air conditioning units. (Doc. 49-1 at 62). Plaintiffs expressed  
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27 3:14, 7:14). Where Plaintiffs have disputed a fact but offered no evidence, such as at Doc.  
28 55 ¶ 29, the Court has searched for Plaintiffs’ assertion in American Family’s evidence  
but otherwise cannot conclude a *genuine* dispute of fact exists. Fed. R. Civ. P. 56(e);  
LR Civ 56.1(b).

1 to Ms. Batstone that their adjuster had found additional property damage. (Doc. 55-2 at  
2 102:14-22). Nevertheless, Ms. Batstone estimated repair costs of \$546.94 for the damage  
3 that she had identified, which did not exceed Plaintiffs' \$2,500 deductible. (Doc. 49-1 at  
4 62). On August 28, 2011, American Family notified Plaintiffs via letter that "no payment  
5 can be issued at this time." (*Id.* at 73).

6 On October 4, 2011, Plaintiffs called American Family and requested an extension  
7 of time with respect to their claim. American Family declined to grant an extension. (*Id.*  
8 at 55-56). On December 15, 2011, Plaintiffs, through counsel, sent a demand letter to  
9 American Family accusing American Family of acting in bad faith with respect to their  
10 claim. (*Id.* at 75). In the letter, Plaintiffs asserted that their independent adjuster had  
11 found substantial damage to the property totaling \$126,642.68 and threatened to file a  
12 lawsuit in fifteen days if American Family did not settle for \$145,000. (*Id.* at 77, 79).

13 In response to Plaintiffs' letter, American Family sent two contractors to  
14 Plaintiffs' property to investigate the damage. (*Id.* at 54). During Getty Engineering  
15 Services ("Getty")'s January 10, 2012 inspection of the property, Plaintiff Pedro  
16 Montalvo and Plaintiffs' counsel's representative Doug Austin were present but gave  
17 only limited answers or withheld answers to Getty's background questions regarding the  
18 property.<sup>2</sup> (*Id.* at 89; Doc. 55-3 at 2). On January 12, 2012, Getty sent a list of  
19 background questions to Plaintiffs' counsel to be answered by Mr. Montalvo. (Doc. 49-1  
20 at 113-14). Plaintiffs' counsel promised to "do [his] best" to answer the questions in a  
21 timely manner. (*Id.* at 117).

22 Following the report of American Family's air conditioning contractor that one air  
23 conditioning unit needed to have its condenser fins repaired and the other two units  
24 needed to be replaced, American Family paid Plaintiffs \$10,798.15 less recoverable

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26 <sup>2</sup> Although Plaintiffs claim that Mr. Montalvo was not present during the  
27 inspection, (Doc. 55 ¶ 14), the evidence clearly shows that the inspection occurred from 1  
28 p.m. to 4:45 p.m. with Mr. Montalvo arriving sometime after 3:30 p.m. when Getty's  
assistant structural engineer, Mike Hennessy, was conducting the inspection. (Doc. 55-3  
at 2). *See also* (Doc. 49-1 at 93) ("Mr. Montalvo was also present for approximately the  
last 10 minutes of the inspection.").

1 depreciation and deductible, for a total of \$5,489.15. (Doc. 49 ¶¶ 18-19; Doc. 55 ¶¶ 18-  
2 19).

3 On February 13, 2012, Getty informed Plaintiffs' counsel that Mr. Montalvo's  
4 failure to respond to the background questions regarding the property was delaying  
5 Getty's report. (Doc. 49-1 at 133). On March 26, 2012, American Family sent Plaintiffs'  
6 counsel a letter asking for the background information. (*Id.* at 135). Plaintiffs answered  
7 three days later. (Doc. 49 ¶ 22; Doc. 55 ¶ 22). Getty issued its report on April 30, which  
8 resulted in American Family paying Plaintiffs \$17,413.27 less recoverable depreciation,  
9 deductible, and credit for previous payments, for a total of \$3,402.42. (Doc. 49 ¶¶ 23-24;  
10 Doc. 55 ¶¶ 23-24).

11 American Family sent Getty's report to Plaintiffs' counsel along with an  
12 explanation as to the adjustment of Plaintiffs' claim based upon Getty's findings. (Doc.  
13 49 ¶ 26; Doc. 55 ¶ 26). American Family's letter stated that it was covering roof tiles  
14 with "cosmetic edge chip damage," those damaged "by foot fall," but not those damaged  
15 due to manufacturing defects or improper installation. (Doc. 49-1 at 148). American  
16 Family declined to cover the windows because those damages were, according to  
17 American Family, due to a ladder and gunfire. (*Id.* at 149). American Family declined to  
18 cover the pool deck because it found no hail damage, only normal cracks and wear and  
19 tear. (*Id.*) American Family covered hail damage to the inside pool surface in one  
20 location and declined to cover the other damage to the pool surface as non-hail damage.  
21 (*Id.* at 150). American Family covered the gutter damage and some stucco repair but not  
22 for cracked and smashed areas damaged by blunt force objects or faulty construction. (*Id.*  
23 at 151). American Family also covered window screens. (*Id.* at 152).

24 Plaintiffs subsequently sent American Family a second demand letter reiterating  
25 the same \$145,000 demand. (*Id.* at 155). American Family responded that it believed it  
26 had properly adjusted Plaintiffs' claim, and offered to take the claim to appraisal. (*Id.* at  
27 167). On September 28, 2012, Plaintiffs filed this lawsuit. (Doc. 1-1).

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1     **II. Summary Judgment Standard**

2             Summary judgment is appropriate when “the movant shows that there is no  
3 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
4 of law.” Fed. R. Civ. P. 56(a). “A party asserting that a fact cannot be or is genuinely  
5 disputed must support that assertion by . . . citing to particular parts of materials in the  
6 record, including depositions, documents, electronically stored information, affidavits, or  
7 declarations, stipulations . . . admissions, interrogatory answers, or other materials,” or by  
8 “showing that materials cited do not establish the absence or presence of a genuine  
9 dispute, or that an adverse party cannot produce admissible evidence to support the fact.”  
10 *Id.* 56(c)(1)(A), (B). Thus, summary judgment is mandated “against a party who fails to  
11 make a showing sufficient to establish the existence of an element essential to that party’s  
12 case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v.*  
13 *Catrett*, 477 U.S. 317, 322 (1986).

14             Initially, the movant bears the burden of pointing out to the Court the basis for the  
15 motion and the elements of the causes of action upon which the non-movant will be  
16 unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to  
17 the non-movant to establish the existence of material fact. *Id.* The non-movant “must do  
18 more than simply show that there is some metaphysical doubt as to the material facts” by  
19 “com[ing] forward with ‘specific facts showing that there is a *genuine* issue for trial.’”  
20 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (quoting  
21 Fed. R. Civ. P. 56(e) (1963) (amended 2010)). A dispute about a fact is “genuine” if the  
22 evidence is such that a reasonable jury could return a verdict for the non-moving party.  
23 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-movant’s bare  
24 assertions, standing alone, are insufficient to create a material issue of fact and defeat a  
25 motion for summary judgment. *Id.* at 247–48. However, in the summary judgment  
26 context, the Court construes all disputed facts in the light most favorable to the non-  
27 moving party. *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004).

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1 **III. Plaintiffs' Expert Disclosures**

2 American Family asserts that Plaintiffs have not disclosed any admissible material  
3 evidence disputing Getty and Falcon Air's reports, and therefore there is no question of  
4 fact for the jury as to whether American Family owes Plaintiffs additional amounts under  
5 the Policy. (Doc. 48 at 9). Specifically, American Family argues that two pieces of  
6 Plaintiffs' evidence are inadmissible: (1) the insurance estimate purportedly authored by  
7 Austin Insurance Services and (2) the report of RB Engineering (the "RB Report"). (*Id.* at  
8 10).

9 **A. Background**

10 Plaintiffs' initial demand letter to American Family stated that Plaintiffs' counsel  
11 had sent an independent adjuster to Plaintiffs' property and that "[a] copy of this  
12 independent adjuster's report is enclosed." (Doc. 49-1 at 75). The enclosed report was  
13 captioned as "Statement of Loss" and listed the adjuster as David Chami (Plaintiffs'  
14 counsel), with the insurance company as "Price Law Group, APC." (*Id.* at 78). The report  
15 also listed the "Claim Rep." as "David Chami" and the "Contractor Company" as "Price  
16 Law Group LLC." (*Id.* at 80).

17 Plaintiffs' initial disclosure statement included a complete copy of this estimate  
18 (the "Loss Estimate"), which Plaintiffs identified as "Report of Doug Settell, of Austin  
19 Insurance Services, dated October 1, 2011." (*Id.* at 175). The complete estimate includes  
20 thirty-nine pages of photographs of Plaintiffs' property, with each photo listed as "Taken  
21 By: David Chami." *See (id.* at 191-229). Plaintiffs also in their initial disclosure statement  
22 listed Doug Settell as a witness expected to be called at trial. (*Id.* at 173).

23 With respect to the RB Report, Plaintiffs disclosed this report for the first time in  
24 their first supplemental disclosure statement. (*Id.* at 231-32). The RB Report is an  
25 engineering report provided by RB Engineering, Inc. and concludes there is hail damage  
26 to Plaintiffs' property. (*Id.* at 235-38). Plaintiffs did not disclose any other information  
27 concerning the report or list that the report's author, Ron Bittler, would testify as a  
28 witness.

1 The Court's Rule 16 Scheduling Order (Doc. 14) ordered that all expert  
2 disclosures were due on August 9, 2013. (Doc. 14 at 2). All responsive expert disclosures  
3 were due on September 13, 2013. All rebuttal expert disclosures were due October 11,  
4 2013. The discovery cut-off deadline was December 20, 2013. (*Id.*)

5 **B. Rule 26(a) Standard**

6 Federal Rule of Civil Procedure ("Rule") 26(a)(2)(A) requires a party to disclose  
7 the identity of any expert witness it may use at trial. Unless otherwise ordered, the  
8 disclosure must include a written report prepared by the witness. Fed. R. Civ. P.  
9 26(a)(2)(B). The parties are required to make this disclosure at the time that the court  
10 orders. *Id.* 26(a)(2)(D). When a party fails to make a timely disclosure required by Rule  
11 26(a), "the party is not allowed to use that information or witness to supply evidence on a  
12 motion, at a hearing, or at a trial" unless it proves that its failure was "substantially  
13 justified or is harmless." Fed. R. Civ. P. 37(c)(1); *Torres v. Los Angeles*, 548 F.3d 1197,  
14 1213 (9th Cir. 2008).

15 The Ninth Circuit Court of Appeals ("Court of Appeals") has enumerated four  
16 factors in determining "whether a violation of a discovery deadline is justified or  
17 harmless: . . . (1) prejudice or surprise to the party against whom the evidence is offered;  
18 (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of the  
19 trial; and (4) bad faith or willfulness involved in not timely disclosing the evidence."  
20 *Lanard Toys Ltd. v. Novelty, Inc.*, 375 F. App'x 705, 713 (9th Cir. 2010) (citing *David v.*  
21 *Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003)).

22 If a court concludes that a discovery deadline violation is not substantially justified  
23 or harmless, it has "particularly wide latitude" in its discretion to "issue sanctions under  
24 Rule 37(c)(1)." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th  
25 Cir. 2001). Rule 37(c) is intended to provide a "self-executing," "automatic sanction  
26 provid[ing] a strong inducement for disclosure of material," Fed. R. Civ. P. 37 advisory  
27 committee's note (1993). Thus, the rule provides for the automatic exclusion of the  
28 testimony of an untimely disclosed expert witness. *See* Fed. R. Civ. P. 37(c)(1); *Yeti by*

1 *Molly*, 259 F.3d at 1106 (citing *Ortiz-Lopez v. Sociedad Espanola de Auxilio Mutuo Y*  
2 *Beneficiencia de Puerto Rico*, 248 F.3d 29, 35 (1st Cir. 2001)).

3 **C. Expert Testimony Requirements**

4 Federal Rule of Evidence (“FRE”) 702 permits a witness “who is qualified as an  
5 expert by knowledge, skill, experience, training, or education” to “testify in the form of  
6 an opinion or otherwise if . . . the expert’s scientific, technical, or other specialized  
7 knowledge will help the trier of fact to understand the evidence or to determine a fact in  
8 issue.” Fed. R. Evid. 702. A witness not testifying under FRE 702 may offer opinion  
9 testimony only if such testimony is rationally based on the witness’s perception, “helpful  
10 to clearly understanding the witness’s testimony or to determining a fact in issue,” and  
11 “not based on scientific, technical, or other specialized knowledge within the scope of  
12 Rule 702.” Fed. R. Evid. 701.

13 **D. Analysis**

14 **1. Plaintiffs’ Estimate**

15 The parties first dispute whether the author of the Loss Estimate is David Chami,  
16 Plaintiffs’ counsel, or Doug Settell of Austin Insurance Services. *See* (Doc. 48 at 10-11;  
17 Doc. 54 at 7). Although Mr. Settell’s name is nowhere to be found in the estimate and  
18 every reference within the corners of the document points to Mr. Chami as author,  
19 because Mr. Settell later signed a declaration stating that he authored Plaintiffs’ Estimate,  
20 (Doc. 49-1 at 257), the Court will assume for purposes of this motion that Mr. Settell is  
21 the author.

22 The next issue is whether Mr. Settell is a testifying expert witness or a testifying  
23 lay witness. Plaintiffs contend that “Mr. Settell is not an expert nor does he need to be to  
24 discuss the cost to repair the damages at the [sic] Plaintiffs’ home.” (Doc. 54 at 8).  
25 Plaintiffs thus argue that because Mr. Settell would not present testimony at trial under  
26 FRE 702, 703, or 705, the expert report requirements of Rule 26(a)(2)(B) do not apply.  
27 However, the Court finds that Mr. Settell’s testimony would be within the scope of FRE  
28 702.



1 Mr. Settell's opinion testimony as to the cost of repairing Plaintiffs' house requires  
2 him to give his expert opinion as to the cost of such repairs. His testimony expresses an  
3 opinion as to the estimated cost and is based upon his experience as an insurance adjuster,  
4 as he attests in his declaration. *See* (Doc. 49-1 at 257) ("I have worked as both an  
5 insurance staff adjuster, insurance claims manager and independent insurance adjuster for  
6 over 10 years and I am qualified to inspect for wind and hail related damage to  
7 property."). Mr. Settell has no personal knowledge of the cost because the repairs have  
8 not yet been completed; if Plaintiffs had repaired their house and Mr. Settell had personal  
9 knowledge of those payments, he would be qualified to testify as a fact witness within a  
10 matter of his personal knowledge. Indeed, lay witnesses may testify to "particularized  
11 knowledge by virtue of [their] experience[s]" even if the subject matter is "specialized or  
12 technical[,] because the testimony is based upon the layperson's personal knowledge  
13 rather than on specialized knowledge within the scope of Rule 702." *Donlin v. Philips*  
14 *Lighting N. Am. Corp.*, 581 F.3d 73, 81 (3d Cir. 2009).

15 In this case, however, Mr. Settell's testimony regarding the estimate repair costs  
16 falls within the scope of specialized knowledge. Plaintiffs may not attempt to evade FRE  
17 702's requirements "through the simple expedient of proffering an expert in lay witness  
18 clothing." Fed. R. Evid. 701 advisory committee notes to 2000 amendments. Although  
19 Plaintiffs offer numerous decisions of Arizona state courts in an attempt to argue to the  
20 contrary, (Doc. 54 at 8), none of these decisions apply the *Federal Rules of Civil*  
21 *Procedure*. In conclusion, Mr. Settell's proffered testimony is expert testimony within the  
22 scope of FRE 702.<sup>3</sup>

23 Because Mr. Settell's testimony is within the scope of FRE 702, Plaintiffs were  
24 required to disclose a written report pursuant to Rule 26(a)(2)(B). Their failure to do so is  
25 a violation of the discovery rules.

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27 <sup>3</sup> Plaintiffs also argue that Mr. Settell's testimony is similar to that of American  
28 Family's adjusters and Plaintiffs allege American Family has not disclosed their adjusters  
as experts. (Doc. 54 at 9). Plaintiffs do not support this assertion with citations to the  
record and even if true, this is an issue for Plaintiffs to raise in the first instance rather  
than as a defense to failure to comply with the disclosure rules.

1                                   **2.     The RB Report**

2           With respect to the RB Report, Plaintiffs do not dispute that they failed to comply  
3 with Rule 26(a)(2)(A) by failing to identify Ron Bittler as a witness presenting expert  
4 testimony. (Doc. 54 at 10).

5                                   **3.     Failure to Comply with Rule 26**

6           Plaintiffs argue that their failures to comply with Rule 26 are harmless because  
7 American Family was aware of the reports and had notice of the subject of the experts’  
8 testimony. (*Id.* at 8, 10). The Court concludes Plaintiffs’ failures were not harmless.

9           Turning to the first factor enumerated in *Lanard Toys*, the Court finds Plaintiffs’  
10 non-disclosure created substantial prejudice to American Family. At the time that  
11 American Family’s responsive expert disclosures were due, Plaintiff had disclosed only  
12 that Mr. Settell authored the Loss Estimate and that he had some experience as an  
13 adjuster. *See* (Doc. 49-1 at 257). This disclosure was grossly inadequate, *see* Fed. R. Civ.  
14 P. 26(a)(2)(B), and placed American Family in the prejudicial position of having to make  
15 any responsive expert disclosures without notice as to the specifics of Mr. Settell’s  
16 opinion. Plaintiffs’ disclosure of the Loss Estimate failed to state with any specificity the  
17 information required by Rule 26(a)(2)(B)(i)-(vi). Although it can be inferred from the  
18 Loss Estimate that Mr. Settell will express the opinion that the repair estimate contained  
19 in that report is reasonable, the disclosure does not specify the full extent of the data  
20 relied upon in reaching those opinions, any exhibits, Mr. Settell’s publications authored  
21 in the previous ten years, a list of cases in which he has served as an expert, and his  
22 compensation, as required. *See* Fed. R. Civ. P. 26(a)(2)(B)(i)-(vi).

23           Plaintiffs’ disclosure with respect to Mr. Bittler and the RB Report is also  
24 procedurally defective. Plaintiffs never disclosed that Mr. Bittler would be a testifying  
25 witness and thus American Family never deposed him. Plaintiffs have not disclosed any  
26 information about Mr. Bittler other than the contents of the RB Report.

27           In *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817 (9th Cir. 2011),  
28 the plaintiff disclosed her non-medical expert reports four-and-a-half months late, after

1 the defendant's deadline for disclosing experts had also expired. 644 F.3d at 826-27. The  
2 Court precluded the experts from testifying in the plaintiff's case-in-chief. *Id.* at 827. The  
3 Court of Appeals agreed that the nondisclosure created "obvious prejudice" because the  
4 defendant had made "decisions regarding defense experts under the belief that [the  
5 plaintiff's] non-medical experts would not be testifying in her case-in-chief" and the  
6 defendant's experts had "developed their opinions and wrote their reports without  
7 knowing the scope of [the plaintiff's] experts' opinions."<sup>4</sup> *Id.* at 827.

8 Here, like the defendant in *Goodman*, American Family was unable to determine  
9 from Plaintiffs' inadequate disclosures whether it needed to retain experts to rebut Mr.  
10 Bittler's and Mr. Settell's testimony. Plaintiffs argue that American Family did not need  
11 to know the substance of this testimony because American Family was aware of the  
12 contents of the Loss Estimate and the RB Report. (Doc. 54 at 8, 10). Plaintiffs also argue  
13 that, in effect, American Family suffered no prejudice because even without Plaintiffs'  
14 disclosures, American Family had "already retained an [e]ngineer and named him as a  
15 testifying expert." (*Id.* at 10). But Plaintiffs do not get to unilaterally determine whether  
16 the other party suffers prejudice as a result of non-disclosure.

17 This is not a case where Plaintiffs have substantially complied with the rule but a  
18 minor, technical failing (such as the inadvertent failure to disclose an exhibit that will be  
19 used to summarize the expert opinions) is at issue. Plaintiffs have clearly failed to comply  
20 with the basics of the rule, and their attempt to downplay the significance of this failure  
21 to comply by speculating as to American Family's prejudice (or lack thereof) is  
22 unavailing. The Court has previously rejected such attempts to circumvent the clear  
23 mandate of Rule 26, and will do so again. *See Cable v. City of Phoenix*, 2013 WL  
24 6532023, at \*5 (D. Ariz. Dec. 13, 2013). As the Court remarked in *Cable*, "[t]he purpose  
25 of the expert disclosure rule is to 'provide opposing parties reasonable opportunity to

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26  
27 <sup>4</sup> Although the Court of Appeals agreed with the Court on this point, it nonetheless  
28 reversed on a separate disclosure issue, concluding that the plaintiff's late disclosure of  
her treating physicians' expert reports would be permitted because the scope of a treating  
physician's written report requirement was unsettled prior to the *Goodman* case. 644 F.3d  
at 826.

1 prepare for effective cross examination and perhaps arrange for expert testimony from  
2 other witnesses.” *Id.* (quoting *Rembrandt Vision Techs., L.P. v. Johnson & Johnson*  
3 *Vision Care, Inc.*, 725 F.3d 1377, 1381 (Fed. Cir. 2013) (citation omitted)). Plaintiffs’  
4 failure to disclose its expert reports deprived American Family of this reasonable  
5 opportunity, substantially prejudicing it.

6 As to the second factor, the ability of American Family to cure the prejudice, the  
7 Court finds this factor also weighs strongly against Plaintiffs. Plaintiffs still have not  
8 disclosed the required expert reports even after the discovery deadlines expired.  
9 Moreover, as in *Cable*, all of the disclosure deadlines have expired and the instant motion  
10 for summary judgment is pending. American Family has no opportunity to cure the  
11 prejudice at this late stage.

12 Plaintiffs offer no argument concerning the third *Lanard Toys* factor, the  
13 likelihood of disruption of the trial. However, the Court’s Rule 16 Scheduling Order  
14 warned the parties that “because the deadlines set forth herein will trigger setting a trial  
15 date, the Court deems these deadlines to be the equivalent of a firm trial date.” (Doc. 14  
16 at 6). *See also Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2004) (“If  
17 [the plaintiff] had been permitted to disregard the deadline for identifying expert  
18 witnesses, the rest of the schedule laid out by the court months in advance, and  
19 understood by the parties, would have to have been altered as well. Disruption to the  
20 schedule of the court and other parties in that manner is not harmless.”). This factor  
21 weighs in favor of American Family because Plaintiffs have not shown that they intend to  
22 disclose the Rule 26 reports, even untimely. Cross-examining Plaintiffs’ experts at trial  
23 without a properly disclosed expert report would be highly disruptive to the trial process.

24 Finally, the fourth factor asks the Court to consider the bad faith or willfulness  
25 involved in not timely disclosing the expert reports. The Court finds no evidence that  
26 Plaintiffs initially acted in bad faith or that their initial failure to disclose was willful.  
27 However, Plaintiffs are unrepentant and have not disclosed the expert reports, even  
28 untimely, in an effort to mitigate their failings. After a certain amount of time elapses, an

1 inadvertent failure to comply with Rule 26 becomes willful by virtue of the noncompliant  
2 party's knowledge of its violation and its continual, knowing refusal to attempt to remedy  
3 its violation. In this case, Plaintiffs had every opportunity to request an extension of time  
4 or otherwise bring problems to the Court's attention. This they failed to do.<sup>5</sup>

5 The Court concludes that exclusion of Mr. Bittler's and Mr. Settell's testimony is  
6 the appropriate sanction for Plaintiffs' failure to disclose as required under Rule 26(a).  
7 *See* Fed. R. Civ. P. 37(c)(1); *cf. Quevado v. Trans-Pacific Shipping, Inc.*, 143 F.3d 1255,  
8 1258 (9th Cir. 1998) (upholding exclusion of expert testimony when the plaintiff tardily  
9 identified the expert and disclosed the expert's report one-and-a-half months later along  
10 with his opposition to the defendant's motion for summary judgment). Accordingly, the  
11 Court will not consider this testimony in ruling on American Family's motion for  
12 summary judgment.

#### 13 **IV. Breach of Contract Claim**

14 American Family moves for summary judgment on Plaintiffs' breach of contract  
15 claim. (Doc. 48 at 1). American Family's first argument is that because the Policy  
16 specifies that payment for losses is to be made upon the occurrence of any of three  
17 conditions (agreement with the insured, entry of a final judgment, or filing of an  
18 arbitration award) and none of these conditions has yet occurred, American Family's  
19 obligation to pay has not yet arisen. (*Id.* at 6-7). The clear purpose of the loss payment  
20 provision of the Policy is to specify the final timing of payment once the amount of a loss  
21 is settled; in other words, the provision tells the insured when it can expect the check to  
22 be in the mail. The answer is within thirty days. *See* (Doc. 49-1 at 12) ("Loss will be  
23 payable 30 days after . . .").

24 The timing of payment is unrelated to American Family's obligation to pay  
25 Plaintiffs for covered property damage, which arises upon the occurrence of such damage

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26  
27 <sup>5</sup> The Court notes Plaintiffs requested, twenty days after the deadline expired, an  
28 extension of time to disclose expert reports. (Doc. 35). But Plaintiffs moved only to  
extend the deadline so that they could disclose an additional expert. *See (id.* at 3-4).  
Plaintiffs did not attempt to correct their deficiencies with respect to Mr. Bittler and Mr.  
Settell. The Court denied this motion. (Doc. 39).

1 and proper notification to American Family. *See (id. at 13)* (“What You Must Do in Case  
2 of Loss”). Under American Family’s proposed interpretation of the loss payment  
3 provision, American Family could unilaterally defeat its obligations merely by choosing  
4 not to agree to settle a claim. This interpretation is unreasonable.

5 American Family next argues that Plaintiffs have failed to identify the policy  
6 provisions that American Family allegedly breached. (Doc. 56 at 1). American Family  
7 claims that “a disagreement about the scope and cost of repair does not mean American  
8 Family breached the contract.” (*Id.*) But American Family has a contractual obligation  
9 under the Policy to “cover risks of accidental direct physical loss” to covered property,  
10 (Doc. 49-1 at 9), subject to exclusions for, among other things, construction defects or  
11 faulty materials. Here, the parties dispute whether the damage to Plaintiffs’ property was  
12 caused by hail, a covered cause of loss. The outcome of this factual question determines  
13 whether American Family is obligated under the Policy to pay for Plaintiffs’ damages  
14 and whether American Family breached its contractual obligation by failing to make such  
15 payment.

16 Because a question of fact remains for the jury, the Court will not grant summary  
17 judgment on Plaintiffs’ claim for breach of contract.<sup>6</sup>

18 **V. Bad Faith Claim**

19 American Family moves for summary judgment on Plaintiffs’ claim for breach of  
20 the implied covenant of good faith and fair dealing. (Doc. 48 at 1).

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23 <sup>6</sup> American Family labels its motion as a motion for partial summary judgment on  
24 the theory that if Plaintiffs’ breach of contract and bad faith claims were dismissed, the  
25 parties could nonetheless proceed to determine the amount American Family owes on the  
26 claim. (Doc. 48 at 1). There can be no such thing as non-breaching contract damages. At  
27 trial, if Plaintiffs establish that American Family’s liability on Plaintiffs’ claim exceeds  
what American Family has paid to date, American Family has breached the contract. If  
Plaintiffs are unsuccessful in making this showing, American Family has not breached  
the contract.

28 American Family’s motion cannot be a motion for partial summary judgment  
because if granted it would dispose of all of Plaintiffs’ claims in this case. Thus, the  
Court treats it as a motion for summary judgment.

1           **A.     Legal Standard**

2           “The tort of bad faith arises when the insurer ‘intentionally denies, fails to process  
3 or pay a claim without a reasonable basis.’” *Zilisch v. State Farm Mut. Auto. Ins. Co.*,  
4 995 P.2d 276, 279-80 ¶ 20 (Ariz. 2000) (quoting *Noble v. Nat’l Am. Life Ins. Co.*, 624  
5 P.2d 866, 868 (1981)). The tort recognizes that “in buying insurance[,] an insured usually  
6 does not seek to realize a commercial advantage but, instead, seeks protection and  
7 security from economic catastrophe.” *Rawlings v. Apodaca*, 726 P.2d 565, 570 (Ariz.  
8 1986). However, “[b]ecause of the disparity in bargaining power and the nature of the  
9 contract, the insurer receives both premium and control.” *Id.*

10           In the case of first-party insurance, “the insurer sets the conditions for both  
11 presentment and payment of claims.” *Id.* This dual role gives the insurer “an almost  
12 adjudicatory responsibility.” *Id.* “Although the insured is not without remedies if he  
13 disagrees with the insurer, the very invocation of those remedies detracts significantly  
14 from the protection or security which was the object of the transaction.” *Id.* Thus, the  
15 contract between insurer and insured gives rise to the insurer’s obligation “implicit in the  
16 contract and the relationship . . . to play fairly with its insured.” *Id.*; *see also Zilisch*, 995  
17 P.2d 279-80 ¶ 20 (an insurer owes its insured duties of equal consideration, fairness, and  
18 honesty). Accordingly, an insurer may be liable for bad faith even if it has not breached  
19 an express covenant of the insurance contract. *See Deese v. State Farm Mut. Auto. Ins.*  
20 *Co.*, 838 P.2d 1265, 1270 (Ariz. 1992).

21           An insured alleging a bad faith claim against his insurer must show (1) the insurer  
22 acted unreasonably and (2) the insurer knew or recklessly disregarded the fact that its  
23 conduct was unreasonable. *Zilisch*, 995 P.2d at 280 ¶ 22; *Noble*, 624 P.2d at 868. “The  
24 first prong of the test for bad faith is an objective test based on reasonableness. The  
25 second prong is a subjective test, requiring the plaintiff to show that the defendant  
26 insurance company committed consciously unreasonable conduct.” *Milhone v. Allstate*  
27 *Ins. Co.*, 289 F. Supp. 2d 1089, 1094 (D. Ariz. 2003) (citing *Trus Joist Corp. v. Safeco*  
28 *Ins. Co.*, 735 P.2d 125, 134 (Ariz. Ct. App. 1986)).

1 In *Zilisch*, the Arizona Supreme Court confirmed that two types of insurer  
2 misconduct may give rise to a bad faith claim. First, an insurer may be liable for bad faith  
3 if it denies a claim that was not fairly debatable. *Zilisch*, 995 P.2d at 280 ¶ 22; *see also*  
4 *Deese*, 838 P.2d at 1269. The question of whether an insurer believed the claim to be  
5 fairly debatable is generally a fact question for the jury, although a court may rule on the  
6 issue as a matter of law “[i]f the plaintiff offers no significantly probative evidence that  
7 calls into question the defendant’s belief in fair debatability.” *Young v. Allstate Ins. Co.*,  
8 296 F. Supp. 2d 1111, 1116 (D. Ariz. 2003); *see also Bronick v. State Farm Mut. Auto.*  
9 *Ins. Co.*, 2013 WL 3716600, at \*6 (D. Ariz. July 15, 2013).

10 Second, an insurer is liable for bad faith if it acted unreasonably in processing a  
11 claim, regardless of the claim’s merits. *Zilisch*, 995 P.2d at 280 ¶ 22 (“[I]f an insurer acts  
12 unreasonably in the manner in which it processes a claim, it will be held liable for bad  
13 faith ‘without regard to its ultimate merits.’” (quoting *Deese*, 838 P.2d at 1270)). Thus,  
14 an insurer commits bad faith if during the “investigation, evaluation, and processing of  
15 the claim, the insurer acted unreasonably and either knew or was conscious of the fact  
16 that its conduct was unreasonable.” *Id.*

17 **B. Analysis**

18 One basis for Plaintiffs’ bad faith claim is that American Family wrongfully  
19 attempted to “recapture depreciation on air conditioning units that had already been  
20 settled.” (Doc. 54 at 14). This claim is predicated on alleged discrepancies in American  
21 Family’s calculation of its payments before and after Getty issued its report. After Falcon  
22 Air inspected Plaintiffs’ property and issued its report, American Family paid Plaintiffs  
23 based upon a replacement cost value of \$10,573 for the air conditioning units less  
24 recoverable depreciation of \$2,809. (Doc. 49-1 at 127). Following Getty’s report,  
25 American Family issued a second payment to Plaintiffs that, although it adjusted for the  
26 previous payment, changed the amount of recoverable depreciation for the air  
27 conditioning units to \$5,190.50. (*Id.* at 143).

28 American Family offers evidence showing that its first estimate erroneously



1 calculated depreciation upon only one of the two air conditioning units being replaced.  
2 The documentation for that estimate shows that of the \$10,573 in total air conditioning  
3 replacement costs, \$5,618 was allocated to the first unit less depreciation of \$2,809. (*Id.*  
4 at 128). The second unit had a replacement cost of \$4,673 but depreciation was listed as  
5 \$0. (*Id.*) In the supporting documentation for American Family's second payment, the  
6 second unit is listed as having depreciation of \$2,381.50. (Doc. 55-5 at 7). American  
7 Family claims that the second estimate corrected the mistakenly-omitted depreciation  
8 from the first estimate. (Doc. 56 at 3).

9         However, at the summary judgment stage the Court draws all reasonable  
10 inferences in the light most favorable to the non-movant. Although a jury may ultimately  
11 accept American Family's explanation for the discrepancy, viewing the inferences in the  
12 light most favorable to Plaintiffs, the reason for American Family's depreciation  
13 adjustment is a question of fact for the jury. This is particularly so because American  
14 Family had previously denied Plaintiffs an extension of the requirement that repairs be  
15 completed within one year from the date of loss. (*Id.* at 55-56). Because the date of loss  
16 in this case is October 5, 2010, the effect of American Family's adjustment to recoverable  
17 depreciation was thus to permanently reduce the value of Plaintiffs' claim.<sup>7</sup>

18         American Family may have a legitimate, reasonable explanation for this  
19 discrepancy but on the present record the Court cannot conclude as a matter of law that  
20 American Family is entitled to summary judgment.<sup>8</sup> Plaintiffs have shown sufficient  
21 evidence from which a reasonable juror could conclude that American Family knew that  
22 its processing of Plaintiffs' claim was unreasonable.

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24  
25 <sup>7</sup> Recoverable depreciation is recoverable by the insured only if the insured  
26 actually completes and pays for repairs. *See Rosenblum v. Safeco Ins. Co.*, 24 Cal. Rptr.  
3d 427, 430 n.4 (Ct. App. 2005).

27 <sup>8</sup> American Family contends that Plaintiffs' inability to collect recoverable  
28 depreciation is not evidence of unreasonable claim processing. (Doc. 56 at 6). But the  
sudden increase in the amount of recoverable depreciation over a five-month span when  
American Family knew that Plaintiffs could not collect this amount could be evidence of  
unreasonable claim processing, at least for purposes of summary judgment.

1 **VI. Punitive Damages**

2 American Family moves for summary judgment on Plaintiffs’ claim for an award  
3 of punitive damages on Plaintiffs’ bad faith claim. (Doc. 48 at 16). American Family  
4 argues that Plaintiffs have failed to show American Family acted with the requisite intent  
5 to support an award of punitive damages. (*Id.*)

6 **A. Legal Standard**

7 Although an award of punitive damages is available in claims for insurance bad  
8 faith, it is available only in “those cases in which the defendant’s wrongful conduct was  
9 guided by evil motives.” *Rawlings*, 726 P.2d at 578. The insured must prove that the  
10 insurer’s “evil hand was guided by an evil mind,” which may exist when the insurer  
11 intended to injure the insured or when the insurer “consciously pursued a course of  
12 conduct knowing that it created a substantial risk of significant harm to others.” *Id.* The  
13 insurer’s conduct must have been “aggravated, outrageous, malicious or fraudulent.” *Id.*  
14 “Indifference to facts or failure to investigate are sufficient to establish the tort of bad  
15 faith but may not raise to the level required by the punitive damage rule.” *Id.*

16 **B. Analysis**

17 In this case, none of American Family’s actions rise to a level justifying punitive  
18 damages. Considering all of the evidence and reasonable inferences in the light most  
19 favorable to Plaintiffs, Plaintiffs have established a question of fact as to whether  
20 American Family acted in bad faith. Plaintiffs have not, however, pointed to an iota of  
21 evidence from which a jury could infer that American Family acted with an evil mind. At  
22 best, Plaintiffs can show that American Family’s estimates were inaccurate, incompetent,  
23 and unreasonable. This may establish a bad faith claim.

24 Plaintiffs have many complaints with American Family’s claims process: the sharp  
25 increase in recoverable depreciation, failure to include payment for general contractor  
26 overhead and profit despite internally acknowledging that it was owed, *see* (Doc. 49-1 at  
27 37), the suggestion that replacement roof tiles may be available on the internet, and use of  
28 an adjuster with little experience. Some of these complaints do not justify an inference in

1 favor of bad faith, much less punitive damages. For example, although Plaintiffs  
2 repeatedly crusade against American Family “demand[ing] that Plaintiff attempt to find  
3 [replacement tiles] on Craigslist,” (Doc. 54 at 3), American Family made no such  
4 demand. Instead, American Family noted in its internal claim notes:

5 I suspect the next argument is that this tile is not available.  
6 The contractor will need to check Craigslist in the Phoenix  
7 area for compatible tiles. Also ABC supply of glendale [sic]  
8 may be able to get new tiles from California [sic] if these are  
9 Monier or Lifetile shingles. The [sic] need to ask for the  
10 BORAL brand.

11 (Doc. 49-1 at 40). This is not evidence of an evil mind, merely a rational one. Nor do  
12 American Family’s actions with respect to contractor overhead and profit constitute such  
13 evidence. *See* (Doc. 49-1 at 37).

14 No reasonable juror could conclude from the evidence that American Family acted  
15 with an evil mind justifying punitive damages. Accordingly, the Court will grant  
16 summary judgment for American Family on the issue of punitive damages.

17 **VII. Conclusion**

18 The Court finds that questions of fact for the jury exist on Plaintiffs’ claims for  
19 breach of contract and breach of the implied covenant of good faith and fair dealing.  
20 Plaintiffs are not entitled to an award of punitive damages, however, because that claim  
21 fails as a matter of law.

22 For the foregoing reasons,

23 **IT IS ORDERED** granting in part and denying in part American Family’s Motion  
24 for Partial Summary Judgment (Doc. 48).

25 Dated this 1st day of July, 2014.

26  
27  
28  
  
James A. Teilborg  
Senior United States District Judge