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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHAWN HAMPTON, et al.,

Plaintiffs,

v.

ALLSTATE CORPORATION, et al.,

Defendants.

CASE NO. C13-0541JLR

ORDER

I. INTRODUCTION

Before the court are: (1) Defendants Allstate Indemnity Company and Allstate Insurance Company’s (collectively “Allstate”) motion for summary judgment (Allstate Mot. (Dkt. # 55), and (2) Plaintiffs Shawn and Charity Hampton, Wesley Stancil, and Martin and Linda Sprinkle’s motion for partial summary judgment (Plfs. Mot. (Dkt. # 52).) The court previously entered summary judgment dismissing Plaintiffs’ claims for bad faith and breach of contract as time-barred based on Plaintiffs’ concessions with respect to these claims. (11/12/13 Order (Dkt. # 26) at 5 (citing JSR (Dkt. # 8) at 2;

1 9/16/13 Resp. (Dkt. # 15) at 3.) The parties present dueling motions relating to
2 Plaintiffs' sole remaining claim for violation of Washington State's Consumer Protection
3 Act ("WCPA"), RCW §§ 19.86.010, *et seq.* The court has considered the motions, all
4 submissions filed in support of and opposition thereto, the balance of the record, and the
5 applicable law. Being fully advised, and no party having requested oral argument, the
6 court GRANTS Allstate's motion for summary judgment, and DENIES Plaintiffs'
7 motion for partial summary judgment as MOOT.

8 **II. BACKGROUND**

9 This is a dispute between Allstate and several of its insureds. Plaintiffs insured
10 their homes in Glenoma, Washington, through Allstate. (2d Am. Compl. (Dkt. # 37)
11 ¶ 3.1.) On January 7, 2009, a series of landslides caused damage to structures and
12 personal property on Plaintiffs' properties. (*See id.* ¶¶ 3.3-3.7; Allstate Mot at 3.)
13 Plaintiffs claim that the landslides were the result of logging activity on the hillside above
14 their properties. (*Id.* ¶¶ 3.3-3.4.)

15 The parties are in dispute regarding whether Mr. Stancil and the Hamptons
16 provided notice to Allstate of their claims in 2009. Plaintiffs offer a note in the insurance
17 agent's file as evidence that Mr. Stancil telephoned on January 12, 2009, to notify
18 Allstate of his claim. (Bricklin Decl. (Dkt. # 53) Ex. D at 4.) Mr. Stancil, however, has
19 testified that he remembers few details concerning the conversation. (3/3/14 Wathen
20 Decl. Ex. S (Dkt. # 58-20) at 16:17-18:17; 43:21-44:18.) In addition, Mr. Hampton
21 testifies that he reported the claim to his insurance agent, Bob Baker, shortly after his
22 property was damaged by the landslides in 2009. (Hampton Decl. (Dkt. # 54) ¶ 2.) Mr.

1 Baker, however, has testified that he did not have any such conversation with Mr.
2 Hampton. (3/3/14 Wathen Decl. Ex. O (Dkt. # 58-16) at 22:16-23:3.) Neither Plaintiffs
3 nor Allstate have asserted that the Sprinkles notified Allstate of their claim in 2009. (*See*
4 *id.* at 23:17-24:11; Allstate Resp. (Dkt. # 58) at 4; Plfs. Mot. at 6 (“The Sprinkles were
5 misled by the policy’s exclusion of flood and earth movement perils and did not make a
6 claim at all”))

7 The parties agree, however, that Plaintiffs submitted written notification of their
8 losses and the claims on their policies to Allstate in mid-December 2011. (2/11/14
9 Wathen Decl. (Dkt. # 55-1) ¶¶ 3-5, Exs. A (Dkt. # 55-2), B (Dkt. # 55-3), C (Dkt. # 55-
10 4).) Around the same time, Plaintiffs brought suit in Lewis County against the companies
11 that had logged the hillside and against the upslope landowner. (*See* 8/28/13 Allstate
12 Mot. (Dkt. # 13) at 2, 7; *see* Plfs. Mot. at 7; 8/28/13 Aragon Decl. (Dkt. # 14) Ex. N (Dkt.
13 # 14-14) (attaching verdict form).)

14 On December 22, 2011, Allstate requested documentation supporting Plaintiffs’
15 claims. (2/11/14 Wathen Decl. Ex. D (Dkt. # 55-5).) On December 28, 2011, Allstate
16 inspected Plaintiffs’ residences. (*See id.* Ex. E (Dkt. # 55-6).) On January 26, 2012,
17 Allstate reiterated its request for documents supporting Plaintiffs’ claims. (*Id.* Ex. F
18 (Dkt. # 55-7).) On March 9, 2012, Allstate requested expert reports regarding the cause
19 of the landslide. (*Id.* Ex. H (Dkt. # 55-9).) On March 12, 2012, counsel for Plaintiffs
20 informed Allstate that Plaintiffs had not received any expert reports in their litigation
21 against the logging companies and landowner. (*Id.* Ex. I (Dkt. # 55-10).) On April 18,
22

1 2012, Allstate retained geological expert Robert Pride to examine the cause of the
2 landslide. (*Id.* Ex. K (Dkt. # 55-12); Bricklin Decl. (Dkt. # 53) Ex. E.)

3 On April 24, 2012, Plaintiffs' counsel informed Allstate of Plaintiffs' intent to
4 withdraw their claims.¹ (*See* 2/11/14 Wathen Decl. Ex. L (Dkt. # 55-13).) On May 8,
5 2012, Plaintiffs' counsel confirmed in writing Plaintiffs' withdrawal of their claims. (*See*
6 *id.* Ex. M (Dkt. # 55-14).) Plaintiffs acknowledge that they withdrew their claims with
7 Allstate out of concern that the results of Mr. Pride's investigation and opinion
8 concerning the cause of the landslide might undermine their claims against the logging
9 companies which were about to go to trial. (Plfs. Mot. at 7.)

10 On December 14, 2012, in Plaintiffs' Lewis County lawsuit, the jury returned a
11 verdict finding the only remaining defendant in the suit to be not negligent. (9/16/13
12 Resp. (Dkt. # 15) at 4; Aragon Decl. Ex. N.)

13 On February 21, 2013, Plaintiffs requested that their homeowners' claims with
14 Allstate be reopened. (2/11/14 Wathen Decl. Ex. N (Dkt. # 55-15).) Six days later, on
15 March 4, 2013, Plaintiffs filed this lawsuit against Allstate in state court. (Not. of
16 Removal (Dkt. # 1) Ex. C (attaching state court complaint).) Plaintiffs initially asserted
17 three causes of action against Allstate: (1) breach of contract, (2) insurance bad faith, and
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19

20 ¹ Plaintiffs state in their motion that they initially asked Allstate to hold its investigation
21 in abeyance, but Allstate refused. (Plfs. Mot. at 7.) Plaintiffs, however, cite no evidence of this
22 fact in the record and do not explain how holding the investigation in abeyance as opposed to
withdrawing the claim altogether would make a difference with respect to any of their claims
against Allstate.

1 (3) violation of the WCPA. (*See id.* Ex. C at ¶¶ 4.1-4.6.) On March 25, 2013, Allstate
2 removed the action to federal district court. (*See id.*)

3 The court set a deadline with respect to initial disclosures of June 10, 2013. (Ord.
4 re: Initial Discl. (Dkt. # 6) at 1.) On August 15, 2013, more than two months following
5 the court's imposed deadline, Plaintiffs provided their initial disclosures to Allstate.
6 (2/11/14 Wathen Decl. Ex. P (Dkt. # 55-17); Plfs. Initial Discl. (Dkt. # 12).) The
7 damages listed in Plaintiffs' initial disclosures include items damaged in the mudflow or
8 landslide. (2/11/14 Wathen Decl. Ex. P at 2, Ex. A; Plfs. Initial Discl.) The list does not
9 include any expenses that Plaintiffs expressly identify as related to Allstate's
10 investigation of Plaintiffs' insurance claims, Allstate's alleged failure to investigate,
11 Allstate's alleged violation of one of Washington State's insurance regulations, or any
12 other alleged unfair or deceptive act by Allstate. (*See generally id.*)

13 On August 28, 2013, Allstate filed an early motion for summary judgment. The
14 court granted summary judgment with respect to Plaintiffs' claims for breach of contract
15 and insurance bad faith based on Plaintiffs' repeated admission that these claims were
16 time barred. (11/12/13 Order at 5.) The court, however, denied Allstate's motion for
17 summary judgment with respect to Plaintiffs' claim for violation of the WCPA. (*See id.*
18 at 5-11.)

19 At his January 7, 2014, deposition, Mr. Stancil testified that the damages listed in
20 Plaintiffs' initial disclosures are the only damages that he is claiming in this lawsuit.
21 (2/11/14 Wathen Decl. Ex. Q (Dkt. # 55-18) (attaching Stancil Dep.) at 23:23-24:3 ("Q:
22 As you sit here today, are you claiming anything other than the damages that you have set

1 | forth that in [Plaintiffs' initial disclosures]? A: Right now I can't think of anything
2 | else.”.) He also testified that none of Allstate's actions had caused any damage to his
3 | property or business. (*Id.* at 33:24-34:11.)

4 | Mr. Sprinkle testified at his January 8, 2014, deposition that the items listed in
5 | Plaintiffs' initial disclosures included all of his personal property that was damaged by
6 | the 2009 landslide, but did not include any damage to his real property. (2/11/14 Wathen
7 | Decl. Ex. R (Dkt. # 55-19) (attaching M. Sprinkle Dep.) at 23:20-25:6.) He also testified,
8 | however, that the property damage he is claiming in this lawsuit is the same as the
9 | property damage he claimed in the Lewis County suit against those parties allegedly at-
10 | fault for the landslide that damaged his property. (*Id.* at 27:7-25.) In any event, Mr.
11 | Sprinkle testified that none of Allstate's actions had caused any damage to his property or
12 | business. (*Id.* at 37:24-38:4.)

13 | Ms. Sprinkle confirmed in her January 8, 2014, deposition that Plaintiffs' initial
14 | disclosures contained “the universe” of what she was claiming in this lawsuit. (3/3/14
15 | Wathen Decl. (Dkt. # 58) Ex. S (Dkt. # 58-20) (attaching L. Sprinkle Dep.) at 12:15-
16 | 13:6.) When asked if any of Allstate's actions had damaged her property, Ms. Sprinkle
17 | stated that Allstate had “[d]amaged her life,” because it “could have made it better.” (*Id.*
18 | at 13:7-13.) When counsel for Allstate clarified that he was referring to damage that
19 | Allstate's actions may have caused to her tangible property, as opposed to emotional
20 | damages, Ms. Sprinkle responded, “No.” (*Id.* at 13:11-22.) In addition, Ms. Sprinkle
21 | confirmed that none of Allstate's actions had caused any damage to her business. (*Id.* at
22 | 13:23-25.)

1 Mr. Hampton testified during his January 8, 2014, deposition that the items listed
2 in Plaintiffs' initial disclosures are the damages that he is claiming in this lawsuit.
3 (2/11/14 Wathen Decl. Ex. T (Dkt. # 55-21) (attaching Hampton Dep.) at 28:1-16.) He
4 also confirmed that none of Allstate's actions had caused damage to his property. (*Id.* at
5 40:15-17.) He did state, however, that Allstate's actions had damaged his horse breeding
6 business. (*Id.* at 40:18-25.) Mr. Hampton testified that he breeds horses on his property
7 and sells the colts. (*Id.* at 41:2-5.) He testified that, because Allstate failed to pay his
8 claim in 2009, he could not repair the fences on his property. (*Id.* at 41:6-23.) Because
9 his fences were down, he could not keep his stallion separated from his five mares, and as
10 a result he had to geld the stallion. (*Id.*) He testified that he was selling each colt for
11 \$2,000.00 before he ended his horse breeding business. (*Id.* at 41:11-12.) He testified
12 that he had operated the business since 2006 and earned approximately between
13 \$10,000.00 and \$25,000.00 during that time period. (*Id.* at 43:14-44:1.) He also stated
14 that he did not have a license for the business, did not operate the business under a
15 business name, operated solely in cash, had no records of any of the income he had
16 earned, and had not reported any of the income on his tax returns. (*Id.* at 41:24-42:2;
17 43:5-13.)

18 The alleged damage to Mr. Hamptons' horse breeding business was not described
19 or listed in Plaintiffs' initial disclosures. (*See generally* Plfs. Initial Discl.) Mr.
20 Hampton's January 8, 2014, deposition was the first time Plaintiffs disclosed these
21 alleged damages.
22

1 The discovery period closed on January 13, 2014—just a few days following
2 Plaintiffs’ depositions. (Min. Ord. (Dkt. # 9) at 1.) Plaintiffs did not supplement their
3 initial disclosures or provide a computation of the damages that Mr. Hampton asserts he
4 lost in his horse breeding business within the discovery period. (*See generally Dkt.*) At
5 the time that Allstate filed its motion for summary judgment on February 11, 2014,
6 Plaintiffs still had not supplemented or updated their list or their calculation of damages
7 contained in their initial disclosures. (*See generally Dkt.*) Plaintiffs did not file a
8 supplementation to their initial disclosures until March 6, 2014—nearly two months
9 following the close of discovery and three days after Plaintiffs filed their response to
10 Allstate’s motion for summary judgment. (*See Plfs. Supp. Discl. (Dkt. # 62).*) Plaintiffs’
11 supplemental disclosure was filed almost three months after the January 13, 2014,
12 discovery cutoff, and nearly a month following the February 11, 2014, dispositive
13 motions deadline. (Sched. Ord. (Dkt. # 9).) Plaintiffs’ supplemental disclosure does not
14 include a list or computation any of the damages Mr. Hampton testified at his January 8,
15 2014, deposition he had incurred with respect to his horse breeding business. (*See*
16 *generally Plfs. Supp. Discl.*)

17 Following the close of discovery, Allstate now moves a second time for summary
18 judgment with respect to Plaintiffs’ WCPA claim. (*See generally Allstate Mot.*) Allstate
19 asserts that it is entitled to summary judgment because Plaintiffs have failed to prove
20 certain required elements of their WCPA claims including damages and causation.
21 Specifically, Allstate asserts that Plaintiffs cannot prove that they incurred an injury to
22 their business or property caused by Allstate’s alleged unfair or deceptive conduct.

1 (Allstate Mot. at 2.) Plaintiffs, on the other hand, move for partial summary judgment
2 with respect to the other elements of their WCPA claims. (Plfs. Mot. at 1-2.)
3 Specifically, Plaintiffs assert that undisputed facts establish that Allstate has engaged in
4 violations of Washington State’s insurance regulations which constitute a per se unfair
5 trade practice and a per se impact on the public interest. (*See generall* Plfs. Mot.) The
6 court GRANTS Allstate’s motion for summary judgment and consequently DENIES
7 Plaintiffs’ motion for partial summary judgment as MOOT.

8 **III. ANALYSIS**

9 **A. Standards on Summary Judgment**

10 Summary judgment is appropriate if the evidence, when viewed in the light most
11 favorable to the non-moving party, demonstrates “that there is no genuine dispute as to
12 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
13 P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cnty. of*
14 *L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial burden of
15 showing there is no genuine issue of material fact and that he or she is entitled to prevail
16 as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her
17 burden, then the non-moving party “must make a showing sufficient to establish a
18 genuine dispute of material fact regarding the existence of the essential elements of his
19 case that he must prove at trial” in order to withstand summary judgment. *Galen*, 477
20 F.3d at 658. The court is “required to view the facts and draw reasonable inferences in
21 the light most favorable to the [non-moving] party.” *Scott v. Harris*, 550 U.S. 372, 378
22 (2007).

1 **B. Injury and Causation under the WCPA**

2 A claim under the WCPA requires proof of five elements: “(1) [an] unfair or
3 deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact,
4 (4) injury to plaintiff in his or her business or property, [and] (5) causation.” *Hangman*
5 *Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 533 (Wash. 1986).
6 Before a WCPA injury may be found, the claimant must establish an injury to his or her
7 business or property. *Id.* The injury, however, “need not be great.” *Mason v. Mortg.*
8 *Am., Inc.*, 792 P.2d 142, 148 (Wash. 1990). The final element requires the existence of a
9 causal link between the deceptive act and the injury suffered. *Schmidt v. Conerstone,*
10 *Invs., Inc.*, 795 P.2d 1143, 1152 (Wash. 1990). Indeed, harm from the insurer’s bad faith
11 acts is an element of every action for bad faith handling of an insurance claim or for
12 violation of the WCPA. *Coventry Assocs. v. Am. States Ins. Co.*, 961 P.2d 933, 935-36
13 (Wash. 1998). Allstate asserts that it is entitled to summary judgment because Plaintiffs
14 fail to demonstrate any facts in support of elements four or five of their WCPA claims.
15 (Allstate Mot. at 12-14.)

16 Allstate asserts that, with the possible exception of damage to Mr. Hampton’s
17 horse breeding business, not one Plaintiff identified any damage to property or business
18 caused by any of Allstate’s actions. (Mot. at 11-14.) Indeed, with the exception of Mr.
19 Hampton’s horse breeding business, all Plaintiffs have denied any damage to their
20 property or business caused by Allstate’s actions. (2/11/14 Wathen Decl. Ex. Q
21 (attaching Stancil Dep.) at 33:24-34:11; *id.* Ex. R (attaching M. Sprinkle Dep.) at 37:24-
22 38:4; *id.* Ex. S (attaching L. Sprinkle Dep.) at 13:23-25; *id.* Ex. T (attaching Hampton

1 Dep.) at 40:15-41:23; 43:14-44:1.) Allstate asserts that Plaintiffs’ disclosure of the
2 alleged damage to Mr. Hampton’s horse breeding business was untimely and should be
3 excluded.

4 Despite Mr. Hampton’s deposition testimony, Plaintiffs do not assert damages to
5 Mr. Hampton’s horse breeding business in response to Allstate’s motion for summary
6 judgment on their WCPA claims. (*See generally* Plfs. Resp.) Indeed, Plaintiffs do not
7 refer to these damages at all in their responsive memorandum. (*See generally id.*)
8 Instead, Plaintiffs assert that they incurred “investigative expenses as a direct result of
9 Allstate’s failure to investigate [their] claims.” (Plfs. Resp. at 5.) As evidence of these
10 expenses, Plaintiffs cite to their expert reports in this litigation. (*Id.* (citing Plfs. Discl.
11 Expert Witnesses (Dkt. ## 28, 31).) The court addresses each of these arguments and
12 categories of damages in turn.

13 **1. The Alleged Damage to Mr. Hampton’s Horse Breeding Business Is Not**
14 **Applicable to Plaintiffs’ WCPA claim**

15 The damages to Mr. Hampton’s horse breeding business are not applicable to his
16 WCPA claim. Mr. Hampton testified that the damage to his horse breeding business
17 occurred because Allstate failed to cover the cost to repair fences under his homeowner
18 policy. (2/11/14 Wathen Decl. Ex. T at 41:6-23.) Plaintiffs are barred from seeking
19 coverage under their policies for the landslide in question. The one-year suit limitation
20 clause in Plaintiffs’ policies required Plaintiffs to bring any suit or action against Allstate
21 within one year after inception of the loss or damage. (Aragon Decl. (Dkt. # 14) Ex. A
22 (Dkt. # 14-1) at 21.) Plaintiffs have acknowledged that their coverage action is time-

1 | barred by this clause (JSR (Dkt. # 8) at 2; 9/16/13 Resp. (Dkt. # 15) at 3), and the court
2 | previously entered summary judgment in favor of Allstate on this claim (11/12/13 Order
3 | at 5). Indeed, any action based on the policies would have been time-barred before
4 | Plaintiffs' counsel provided written notice of the claims to Allstate in December 2011,
5 | before Plaintiffs withdrew their claims in late April or early May, 2012, and before
6 | Plaintiffs reopened their claims in February, 2013.

7 | If Mr. Hampton's claim had arisen in the context of a third-party reservation of
8 | rights case, then he might still have a claim for coverage by estoppel through his WCPA
9 | claim. *See Coventry Assocs.*, 961 P.2d at 939 (citing *Safeco Ins. Co. of Am. v. Butler*, 823
10 | P.2d 499, 505-06 (Wash. 1992)). Plaintiffs' homeowner policies, however, fall within
11 | the first party context. In *Coventry*, the Washington Supreme Court held that in the
12 | context of first party policies, such as Plaintiffs' homeowner policies, coverage by
13 | estoppel is not an appropriate remedy. *Coventry*, 961 P.2d at 939-40. Thus, even if
14 | Allstate's actions constituted a per se violation of the WCPA and a per se impact on the
15 | public interest as argued in Plaintiffs' motion for partial summary judgment (*see*
16 | *generally* Plfs. Mot.), Plaintiffs are not entitled to coverage under their policies or
17 | damages that they might have been able to assert with respect to their coverage claims as
18 | a part of their WCPA claim. Thus, any claim for damages arising out of Mr. Hampton's
19 | claim for coverage, including the repair of his fences, is time-barred, and cannot be
20 | revived through his WCPA claim.

21 | In any event, as noted above, Plaintiffs do not assert Mr. Hampton's alleged
22 | damages to his horse breeding business in response to Allstate's summary judgment

1 motion on Plaintiffs' WCPA claim. (*See generally* Plfs. Resp.) This may be an implicit
2 recognition by Plaintiffs that, despite their WCPA claim, the policy's suit limitation
3 clause precludes Mr. Hampton from pursuing his claim that Allstate wrongfully denied
4 coverage with respect to the repair costs for his fences. *See e.g. Simms v. Allstate Ins.*
5 *Co.*, 621 P.2d 155, 159 (Wash. Ct. App. 1980) (applying contractual limitation period to
6 plaintiff's contract claim despite allegations of bad faith); *see also Hunter v. Regence*
7 *Blue Shield*, No. 56638-5-I, 2006 WL 2396643, at *6 (Wash. Ct. App. Aug. 21, 2006)
8 (unpublished) ("[T]he contractual limitation period would be enforceable even in the face
9 of bad faith by Regence.") (citing *Simms*, 621 P.2d at 159); *Schaeffer v. Farmers Ins.*
10 *Exchange*, No. 48818-0-1, 2002 WL 662889, at *5 (Wash. Ct. App. Apr. 22, 2002)
11 (unpublished) ("The policy's suit limitation clause precludes [plaintiff] from pursuing its
12 claim that Farmers wrongfully denied coverage.") (citing *Coventry*, 961 P.2d 933).
13 Based on the foregoing case law and analysis, the court concludes that the alleged
14 damage to Mr. Hampton's horse breeding business is not cognizable with respect to his
15 WCPA claim and cannot serve as evidence supporting elements four and five of his
16 claim.

17 **2. Plaintiffs' Disclosure of Evidence of Damage to Mr. Hampton's Horse**
18 **Breeding Business is Untimely and Should Be Excluded**

19 Even if, however, the alleged damage to Mr. Hampton's horse breeding business
20 was cognizable with respect to his WCPA claim, Allstate argues that the court should
21 disregard it. Allstate asserts that, despite the fact that Mr. Hampton must have known of
22 the alleged damages to his horse breeding business shortly after the landslide occurred in

1 2009, Plaintiffs failed to disclose these damages in their Federal Rule of Civil Procedure
2 26(a)(1)(A)(iii) initial disclosures, have never provided a “computation” of these
3 damages as required by the same Rule, and have never included these damages or any
4 computation thereof in any supplemental disclosures as required by Rule 26(e)(1). (*See*
5 *Allstate Mot.* at 13.) In addition, Allstate argues that Plaintiffs’ supplementation of its
6 disclosures nearly two months after the discovery cut-off is untimely and should be
7 excluded. (*See Allstate Reply* (Dkt. # 63) at 1, n.2.)

8 Rule 37(c)(1) forbids the use of any information required to be disclosed by Rule
9 26(a) that is not properly disclosed. *See R & R Sails, Inc. v. Ins. Co. of Penn.*, 673 F.3d
10 1240, 1246 (9th Cir. 2012) (quoting *Yeti by Molly Ltd. V. Deckers Outdoor Corp.*, 259
11 F.3d 1101, 1106 (9th Cir. 2001)). Specifically, Rule 37(c)(1) provides:

12 If a party fails to provide information or identify a witness as required by
13 Rule 26(a) or (e), the party is not allowed to use that information or witness
14 to supply evidence on a motion, at a hearing, or at a trial, unless the failure
15 was substantially justified or is harmless.

16 In addition to or instead of this sanction, the court, on motion and after
17 giving an opportunity to be heard:

18 (A) may order payment of the reasonable expenses, including attorney's
19 fees, caused by the failure;

20 (B) may inform the jury of the party’s failure; and

21 (C) may impose other appropriate sanctions, including any of the orders
22 listed in Rule 37(b)(2)(A)(i)-(vi).

23 Fed. R. Civ. P. 37(c)(1). The party facing sanctions bears the burden of proving that its
24 failure to disclose the required information was substantially justified or is harmless.

25 *Torres v. City of L.A.*, 548 F.3d 1197, 1213 (9th Cir. 2008). Plaintiffs make no such

1 showing with respect to their failure to provide information concerning the alleged
2 damages to Mr. Hampton's horse breeding business in either their initial or supplemental
3 disclosures. Indeed, as noted above, Plaintiffs do not refer to Mr. Hampton's horse
4 breeding business at all in their responsive memorandum to Allstate's motion. (*See*
5 *generally* Plfs. Resp. (Dkt. # 59).)

6 The exclusion of evidence under Rule 37(c)(1) has been described "as a self-
7 executing, automatic sanction to provide a strong inducement for disclosure of material."
8 *Yeti by Molly*, 259 F.3d at 1106. Nevertheless, where it would effectively constitute
9 dismissal of a claim, the court must consider (1) whether the party's noncompliance
10 involves willfulness or bad faith, as well as (2) the availability of lesser sanctions. *R & R*
11 *Sails*, 673 F.3d at 1247. Because Plaintiffs also rely on other alleged damages (namely,
12 alleged investigative costs) to support their WCPA claim (*see* Plfs. Resp. at 1-2, 4-6), it is
13 unclear if exclusion of Mr. Hampton's alleged damages to his horse breeding business
14 would "amount[] to a dismissal of a claim." *R & R Sails*, 673 F.3d at 1247. The court
15 need not decide this issue, however, because even if the higher bar set forth in *R & R*
16 *Sails* is applicable, exclusion as a sanction is warranted here.

17 First, the court finds that Plaintiffs' failure to include Mr. Hampton's alleged
18 damages to his horse breeding business in their initial and supplemental disclosures was
19 willful. Plaintiffs acknowledge that "with regard to detailing [their] losses, [they] have
20 not been perfect." (Plfs. Resp. at 16.) They offer the excuse that their "focus" was on
21 certain losses arising under the policy. (*Id.* at 16-19.) As discussed above, however,
22 because Plaintiffs have acknowledged that their coverage claims are time-barred, these

1 damages are not recoverable and cannot be revived through their WCPA claim. Thus,
2 Plaintiffs failed to identify any damages in their initial or supplemental disclosures that
3 are applicable to their WCPA claim. (*See generally* Plfs. Initial Discl.; Plfs. Supp. Discl.)

4 Mr. Hampton testified that because Allstate did not cover his claim to repair his
5 fences, he was forced to geld his stallion in the spring of 2009, which ended his horse
6 breeding business. (2/11/14 Wathen Decl. Ex. T at 40:18-41:23.) Thus, based on the
7 factual record, there is no doubt that Mr. Hoffman would have known of these damages
8 no later than Spring 2009—shortly after the landslide occurred. Despite this knowledge,
9 Plaintiffs did not include a description of, documentation for, or a calculation of these
10 damages in their initial disclosures. (*See generally* Plfs. Initial Discl.) Further, in
11 response to Allstate’s present motion for summary judgment, which expressly argues that
12 Mr. Hampton’s alleged damages should not serve as an underpinning for Plaintiffs’
13 WCPA claim (*see* Mot. at 6-7, 12-13), Plaintiffs fail to respond to Allstate’s argument
14 concerning Mr. Hampton’s horse breeding business or even mention the business at all in
15 their responsive memorandum (*see generally* Plfs. Resp.). Finally, despite being apprised
16 of the issue by Allstate’s present motion, Plaintiffs again fail to include Mr. Hampton’s
17 alleged damages to his horse breeding business, or a calculation of those damages, in
18 their subsequent late-filed supplemental disclosures. (*See generally* Plfs. Supp. Discl.)
19 Having been expressly apprised of the issue by Allstate’s motion, the only reasonable
20 interpretation of the factual record is that Plaintiffs deliberately and willfully omitted any
21 reference to Mr. Hampton’s alleged damages to his horse breeding business in their
22 supplemental disclosures.

1 Second, the court finds that lesser sanctions would not alleviate the harm caused to
2 Allstate by Plaintiffs' failure to include Mr. Hampton's alleged damages in their
3 disclosures. In determining the appropriateness of sanctions, the court ordinarily
4 considers: "1) the public's interest in expeditious resolution of litigation; 2) the court's
5 need to manage its docket; 3) the risk of prejudice to the defendants; 4) the public policy
6 favoring disposition of cases on their merits; [and] 5) the availability of less drastic
7 sanctions." *Wendt v. Host Intern'l, Inc.*, 125 F.3d 806, 814 (9th Cir. 1997). In this case,
8 the first three of these factors—the public's interest in expeditious resolution of litigation,
9 the court's need to manage its docket, and the risk of prejudice to Allstate—all weigh in
10 favor of exclusion. Despite Mr. Hampton's knowledge of the alleged harm to his horse
11 breeding business in the spring of 2009, Allstate did not learn of these alleged damages
12 until nearly five years later at Mr. Hampton's January 8, 2014 deposition. The discovery
13 cut-off occurred just five days later on January 13, 2014. (Min. Ord. at 1.) Thus, there
14 was virtually no time for Allstate to inquire further or conduct any follow-up discovery
15 into Mr. Hampton's business. Further, the trial in this matter is scheduled on May 12,
16 2014, which is less than one month away. (*Id.*) Permitting Plaintiffs to introduce this
17 evidence now would require a delay in the trial date to provide Allstate with the
18 opportunity to conduct further discovery.

19 Ordinarily, the public policy favoring disposition of cases on the merits would
20 weigh against exclusion, but here, Plaintiffs have virtually abandoned any claim Mr.
21 Hampton may have had concerning alleged damages to his horse breeding business.
22 Plaintiffs fail to even mention these alleged damages in response to Allstate's second

1 motion for summary judgment on Plaintiffs' WCPA claims (*see generally* Plfs. Resp.)
2 and also fail to include any reference to these damages in their late-filed supplemental
3 disclosures (*see generally* Plfs. Supp. Discl.). The court is left to conclude that Plaintiffs
4 no longer seek a disposition on the merits concerning these damages. Based on the
5 foregoing, the court finds that exclusion, rather than an alternate form of sanctions, is
6 warranted. As a result, even if the damage to Mr. Hampton's horse breeding business
7 were cognizable with respect to Plaintiffs' WCPA claim, the court would not consider it
8 here.

9 **3. Plaintiffs' Expert Witness Expenses Are Not Cognizable As WCPA** 10 **Damages**

11 The only damages that Plaintiffs raise to establish elements four and five of their
12 WCPA claims in response to Allstate's motion for summary judgment are expenses
13 Plaintiffs allegedly incurred to investigate their coverage claims when Allstate allegedly
14 refused to do so. (*See* Plfs. Resp. at 2-3, 5 ("As long as plaintiffs incurred investigative
15 expenses due to Allstate's failure to investigate, plaintiffs have established the fourth and
16 fifth elements of their CPA claim.")) Under Washington law, such investigative
17 expenses can be recovered as damages in a WCPA action to the extent the expenses were
18 incurred as direct result of the carrier's breach of contract or bad faith. *See Coventry*, 961
19 P.2d at 938-39.

20 The only evidence of investigative expenses that Plaintiffs identify and
21 substantiate, however, consists of the costs associated with retaining the expert witnesses
22 whom Plaintiffs have named in this lawsuit. (*See* Plfs. Resp. at 5 ("Nor is there any

1 | doubt that plaintiffs have incurred investigative expenses. Plaintiffs have filed reports
2 | (on time) from three experts.”.) One exception to the rule announced in *Coventry* with
3 | respect to investigative expenses relates to the costs litigants incur in the WCPA litigation
4 | itself. Washington courts have repeatedly held that costs incurred in having to prosecute
5 | a WCPA claim are not sufficient to show injury to property or business—the fourth
6 | element of a WCPA claim. *See Panag v. Farmers Ins. Co. of Wash.*, 204 P.3d 885, 901
7 | (Wash. 2009) (“The cost of instituting a [W]CPA action . . . could not, itself, constitute
8 | injury.”); *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 825 P.2d 714, 721
9 | (Wash.Ct.App.1992) (“[M]ere involvement in having to . . . prosecute a CPA
10 | counterclaim is insufficient to show injury to her business or property.”). Indeed, in
11 | *Ledcor Industries (USA), Inc. v. Mutual of Enumclaw Insurance Co.*, 206 P.3d 1255
12 | (Wash. Ct. App. 2009), the Washington Court of Appeals specifically held that expert
13 | witness fees and other expenses in the WCPA litigation itself were not cognizable
14 | injuries under the WCPA. *Id.* at 1262. Because the investigative expenses Plaintiffs
15 | assert in response to Allstate’s motion relate to the retention of expert witnesses in this
16 | litigation, such expenses cannot establish an evidentiary basis to support element four—
17 | injury to property or business—of Plaintiffs’ WCPA claims.²

18 |
19 |
20 | ² Although Plaintiffs have not asserted this argument in their responsive memorandum,
21 | there is evidence on the record indicating that Plaintiffs initially retained one of their present
22 | expert witnesses, Mr. Chris Brummer, prior to this litigation for purposes of their Lewis County
lawsuit against the logging companies. (*See* 9/16/13 Bricklin Decl. (Dkt. # 16) Exs. B, C, D
(attaching three declarations from Mr. Brummer with captions from Plaintiffs’ Lewis County
litigation).) Plaintiffs have described their claims against the logging companies in Lewis
County as “far larger than their insurance claims” against Allstate. (Plfs. Mot. at 7.) The

1 Because Plaintiffs have failed to come forward with any evidence establishing
2 either elements four—injury to Plaintiffs’ business or property—or five—a causal link
3 between Allstate’s alleged deceptive act and the injury Plaintiffs suffered—the court
4 concludes that Allstate is entitled to summary judgment with respect to Plaintiffs’ WCPA
5 claim.³ Because the court GRANTS Allstate’s motion for summary judgment, Plaintiffs’
6 motion for partial summary judgment with respect to elements one, two, and three of
7 their WCPA claim is MOOT. Accordingly, the court DENIES Plaintiffs’ motion for
8 partial summary judgment.⁴

10 evidence indicates that Mr. Brummer was initially hired to pursue Plaintiffs’ claims against the
11 logging companies in Lewis County and then subsequently hired by Plaintiffs to serve as an
12 expert witness in this lawsuit as well. (*See id.* Ex. D ¶ 1 (“I [Chris Brummer] previously filed
13 two declarations in this [Lewis County] case. I file this [third] declaration in response to
14 statements made in the recently filed Declaration of Ed Heavey and in pleadings filed by
15 defendants in response to the pending partial summary judgment motion [in the Lewis County
16 litigation].”); Plfs. Expert Witness. Discl. (Dkt # 28) ¶ 3 (identifying Mr. Brummer as an expert
17 witness in this case).) There is no evidence in the record, however, in the form of a declaration
18 or otherwise, that Plaintiffs hired Mr. Brummer prior to this litigation to investigate Plaintiffs’
19 claims against Allstate or as a direct result of any of Allstate’s alleged unfair or deceptive actions
20 in this case. As the party opposing summary judgment and with the burden of proof at trial,
21 Plaintiffs cannot rest of their allegations, but rather have an obligation under Federal Rule of
22 Civil Procedure 56 to come forward with “significant probative evidence” as to each element of
their WCPA claims. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (party
opposing summary judgment must come forward with significant probative evidence as to each
element of the claim on which it bears the burden of proof). Here, Plaintiffs failed to establish
the fifth element of their WCPA claim—the existence of a causal link between Allstate’s alleged
unfair or deceptive acts and the expenses Plaintiffs incurred with respect to their retention of Mr.
Brummer prior to the present lawsuit. Accordingly, in the absence of any such causal evidence,
Plaintiffs’ retention of Mr. Brummer prior to their institution of this lawsuit does not alter the
court’s conclusion with respect to Allstate’s motion for summary judgment.

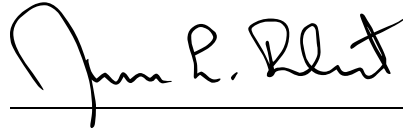
³ Because the court grants Allstate’s motion for summary judgment on this ground, it
need not consider other alternative bases for summary judgment raised in Allstate’s motion.

⁴ In their memorandum in response to Plaintiffs’ motion for partial summary judgment,
Allstate moves to strike certain portions of Plaintiffs’ motion for lack of foundation under

1 **IV. CONCLUSION**

2 Based on the foregoing, the court GRANTS Allstate’s motion for summary
3 judgment with respect to Plaintiffs’ sole remaining claims under the WCPA (Dkt. # 55)
4 and DENIES Plaintiffs’ motion for partial summary judgment (Dkt. # 52) as MOOT. In
5 addition, because the court’s order today eliminates the need to conduct a trial, the court
6 DENIES as MOOT Allstate’s motions in limine (Dkt. # 69).

7 Dated this 18th day of April, 2014.

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10 JAMES L. ROBART
11 United States District Judge

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21 Federal Rule of Evidence 901. (Allstate Resp. (Dkt. # 58) at 1-2.) Because the court denies
22 Plaintiffs’ motion for partial summary judgment, the court also denies Allstate’s motion to strike
as moot.