

No. 25-10533

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

H5R, L.L.C.,
Plaintiff - Appellant,

v.

SCOTTSDALE INSURANCE COMPANY,
Defendant - Appellee.

On Appeal from the United States District Court
for the Northern District of Texas, Dallas Division
Civil Case No. 3:23-cv-01197-K

BRIEF OF APPELLEE
SCOTTSDALE INSURANCE COMPANY

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Party:	Counsel of record:
Appellee/Defendant	
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STATEMENT REGARDING ORAL ARGUMENT

Appellee Scottsdale Insurance Company believes that the issues raised in this appeal are not novel and do not require oral argument. The issues raised on appeal may be determined based on the parties' briefs and the appellate record.

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JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of Texas, Dallas Division had subject-matter jurisdiction over this case pursuant to 28 U.S.C. 1332(a) because the dispute is between citizens of different states and the amount in controversy exceeds the sum of \$75,000.00, exclusive of interest and costs. Appellant H5R LLC is a limited liability company whose sole member is Haileyesus Z. Hailu, a citizen of the State of Texas, and therefore H5R is a citizen of the State of Texas. ROA.83, ROA.1693-96. Appellee Scottsdale Insurance Company is a corporation organized under the laws of Ohio which maintains its principal place of business in Arizona, and is therefore a citizen of the States of Texas and Arizona. ROA.89, 1696-97. H5R sought monetary relief of between \$250,000 and \$1,000,000 dollars. ROA.55.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because the judgment is a final judgment of a United States District Court in this circuit. The District Court entered a final judgment on March 25, 2025 following its acceptance of the Findings, Conclusions, and Recommendation of the United States Magistrate Judge on Scottsdale Insurance Company's Motion for Summary Judgment. ROA.1810. The final judgment disposed of all H5R LLC's claims. H5R filed a timely notice of appeal on April 17, 2025. ROA.1822.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Pursuant to Fed. R. App. P. 28(b)(2), Scottsdale generally accepts the statement of the Issues Presented for Review in H5R's brief, although the argumentative position of the statement is not agreed. Without seeking to add to the issues to be resolved on appeal, Scottsdale believes the following issues have been raised:

1. Whether the District Court erred in overruling H5R's objection to the statement "the claim file shows that Scottsdale denied the claim following receipt of the engineer's report no later than September 9, 2021" contained in the declaration supporting Scottsdale's Motion for Summary Judgment, on the asserted basis of "hearsay and an unsupported factual conclusion." ROA.484, 1059, 1746, 1809.

2. Whether the District Court erred in overruling H5R's objection to the CoreLogic hail verification report (attached to claim-stage expert Horne's report) and conclusion in litigation expert Moody's report that "to the extent that any of the noted distress in the corrugated cementitious tile roof was related to hail it is more probable than not that it occurred on May 24, 2011," both attached to Scottsdale's Motion for Summary Judgment, on the asserted basis of "unsupported factual and legal conclusions." ROA.654, 801, 1059-1060, 1746-1748, 1809.

3. Whether the District Court erred in granting summary judgment in favor of Scottsdale on H5R's breach of contract claim, on the asserted basis that the CoreLogic hail verification report showed .75-inch hail occurring at the location on March 24, 2019 and one mile from the location on August 16, 2020, both occurring in prior policy periods with Scottsdale. ROA.654, 1061-1062, 1752-1755, 1809.

a. And, relatedly, whether H5R's lawsuit covered multiple policy periods or only the one policy period covering the February 15, 2021 loss date identified in H5R's Amended Petition and discovery responses. ROA.1061-1062, 1752-1755, 49-50, 399 no. 1.

4. Whether the District Court erred in granting summary judgment in favor of Scottsdale on H5R's common law and bad faith claims, asserted on the same basis. ROA.1064, 1755, 1809.

5. Whether the District Court erred in granting summary judgment in favor of Scottsdale on H5R's Insurance Code Chapter 542 claim, asserted on the same basis. ROA.1065-1066, 1756, 1809.

6. Whether the District Court erred in granting H5R's Motion to Strike the Opinions and Testimony of H5R's Retained Testifying Expert, Terry Moore, on the asserted basis that Moore was "uncompensated" and thus a non-retained expert. ROA.1735, 1772, 1802, 1807.

STATEMENT OF THE CASE

I. THE UNDERLYING INSURANCE CLAIM

A. *The Scottsdale Policy and the Loss*

H5R filed suit claiming “In the spring of 2021, water began penetrating the House.” ROA.50. H5R’s discovery responses stated that H5R “does not know the exact date of the loss, but believes it occurred in January or February of 2021.” ROA.399. Scottsdale first began providing insurance to H5R covering the residential rental property located at 2665 Farmers Branch Lane, Dallas, Texas 75234 (the “Property”) on December 18, 2018. ROA.483 ¶ 3. Scottsdale issued a renewal policy to H5R which insured the Property for the policy period December 18, 2020 to December 18, 2021 under Policy No. CPS7285116 (the “Policy”). ROA.494. The Property is listed as premises number three, building number one on under the Schedule of Locations, and under a “Basic” notation for Covered Causes of Loss. ROA.498, 555.

The Policy provided coverage for “direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.” ROA.556. With regard to the “Covered Causes of Loss,” the Policy states:

A. Covered Causes of Loss

When Basic is shown in the Declarations, Covered Causes of Loss means the following:

...

4. Windstorm or Hail, but not including:

- a. Frost or cold weather;**
- b. Ice (other than hail), snow or sleet, whether driven by wind or not;**
- c. Loss or damage to the interior of any building or structure, or the property inside the building or structure, caused by rain, snow, sand or dust, whether driven by wind or not, unless the building or structure first sustains wind or hail damage to its roof or walls through which the rain, snow, sand or dust enters . . .**
ROA.577.

The Policy expressly excludes “leakage or discharge of water . . . from any part of a system or appliance containing water. . . unless the leakage or discharge occurs because the system or appliance was damaged by a Covered Cause of Loss.” ROA.580. The Policy provides coverage only for “loss commencing during the policy period shown in the Declarations . . .” ROA.572.

On April 9, 2021, H5R’s representative Haileyesus Hailu reported a claim for roof and interior water damage to the Property resulting from the February 15, 2021 winter freeze event known as winter storm Uri. ROA.483 ¶ 3, ROA.597. The first notice of loss indicates that Hailu reported a date of loss of February 15, 2021, and reported “snow and ice caused water to leak from roof, wall, floor through property, pipe burst underneath kitchen sink” as the cause of damage to the Property. ROA.483 ¶ 3, ROA.598. Scottsdale acknowledged the claim in writing on April 9, 2021. ROA.483 ¶ 3, ROA.600.

B. *Scottsdale's Claim Investigation*

Scottsdale commenced its investigation of H5R's claim the day it was reported, and assigned the adjustment of the claim to claims associate John Sayre. ROA.483 ¶ 4. On April 9, 2021, Sayre spoke with Hailu to discuss the claim and the extent of damages claimed by H5R. ROA.483 ¶ 4, ROA.596-97. During that conversation, Hailu reported water damage inside the Property following a pipe burst under the sink, and that he was unaware whether interior water damages arose from the roof or from the sink. ROA.483 ¶ 4, ROA.596-97. Sayre also informed Hailu that Scottsdale would set an inspection of the Property with the use of a field adjuster. ROA.483 ¶ 4, ROA.596-97. Sayre retained AllCat Claims Service to inspect the Property. ROA.483 ¶ 4, ROA.601.

AllCat Claims Service independent adjuster Ryan Watkins inspected the Property on April 20, 2021. ROA.483 ¶ 4, ROA.596. Watkins authored a report finding damage to the roof of the Property that was not consistent with snow, ice or freeze. ROA.483, 602. Following AllCat's inspection, Sayre informed Hailu that an engineering inspection was necessary to determine the cause of loss. ROA.483 ¶ 5, ROA.595. On May 4, 2021, Sayre retained engineering firm EFI Global ("EFI") for additional investigation into the cause of damage to the roof and interior of the Property. ROA.483 ¶ 5, ROA.595. EFI engineer Gregory A. Horne, P.E. inspected

the Property. ROA.483 ¶ 6, ROA.637. On August 20, 2021, EFI sent Scottsdale its investigation report which produced the following conclusions:

1. Atypically cold temperatures coupled together with snow fall occurred at the subject property on and around the date of loss.
2. Snow and ice loads around the date of loss have not damaged the roof structure on the house.
3. The presence of snow and ice on the roof has not damaged the roof tiles.
4. Multiple holes related to hail impact were observed in the roof tiles. The damaged roof tiles predate the date of loss. The damaged roof tiles should be replaced.
5. Cracks and separations inside and outside the house are due to differential foundation movement. Mature trees adjacent to the foundation are desiccating the clay soil under the foundation causing the foundation to move.
6. EFI did not observe damage related to the reported plumbing leak.

ROA.484 ¶ 6, ROA.645.

C. Scottsdale's Claim Decision

On or about September 9, 2021 Scottsdale issued a disclaimer letter to Hailu denying the claim. ROA.484 ¶ 6, ROA.593. Scottsdale received a letter from H5R's counsel Jeffery Sandberg on or about March 22, 2022 requesting a status update on the Claim. ROA.484 ¶ 7, ROA.592, 744. Scottsdale reassigned the handling of the claim to claim associate Daniel Mason ("Mason"). ROA.484 ¶ 7. Scottsdale responded in writing with a letter dated March 27, 2022 providing that, pursuant to the EFI report, Scottsdale had denied the claim because the determined

causes of damage to the Property were not covered under the Policy. ROA.745-48. The letter advised that the engineer had observed hail impacts on the roof. ROA.747. However, any impact from hail would be a separate occurrence from H5R's original claim for winter storm damage and would require the reporting of a separate claim. ROA.747.

On May 5, 2022, Mason emailed H5R's counsel following up as to whether counsel had further requests in connection with the claim. ROA.484 ¶ 8, ROA.749. Mason again followed up with H5R's counsel on June 1, 2022 asking whether counsel needed anything further in connection with the claim. ROA.484 ¶ 8, ROA.750. H5R's counsel responded via email on June 1, 2022 inquiring only as to whether Scottsdale was going to "revisit the claim and live up to its contractual obligations[.]" ROA.484 ¶ 8, ROA.752. Scottsdale responded in writing on June 17, 2022 reasserting its prior coverage decision. ROA.484 ¶ 8, ROA.755-58.

II. THE UNDERLYING LAWSUIT

A. H5R's Suit

On August 8, 2022, H5R filed the lawsuit that is the subject of this appeal. ROA.23. H5R's Amended Petition and final live pleading asserted an applicable policy period beginning with a policy renewal on December 17, 2020. ROA.49. It claimed "[i]n the spring of 2021, water began penetrating the House." ROA.50. H5R's March 17, 2023 discovery responses asserted, in response to Interrogatory

no. 1, that H5R “does not know the exact date of the loss, but believes it occurred in January or February of 2021.” ROA.399. H5R’s Amended Petition asserted causes of action against Scottsdale for breach of contract, breach of the duty of good faith and fair dealing, violations of Chapter 541 and 542 of the Texas Insurance Code, and violations of the Texas Deceptive Trade Practices Act. ROA.52-54.

H5R designated Terry Moore (“Moore”) as an expert, providing a report and disclosure of publications, compensation, and testimony history, but without indicating whether he was “retained.” ROA.760. Moore provided a two-page report stating that Moore observed mold around the Property and damage to the Property’s foundation, framing, roof, electrical, and finishes. ROA.764-65. Moore recommended that the house be torn down and rebuilt based on the time and expense it would take to restore the house. ROA.764. H5R also produced a supplemental report authored by Moore, dated January 22, 2024, in which Moore set forth pricing for replacement of the home. ROA.766-67. H5R did not disclose Moore as a causation expert, nor was a causation opinion offered in any of Moore’s expert reports. ROA.760, ROA.764-67. The word “hail” did not appear in either report, nonetheless Moore testified at his deposition that hail was the sole cause of the damage at the Property. ROA.773 p. 30:3-14. Moore testified that he could not offer any opinion as to when the hail damage occurred. ROA.770-72 p.

20:7-15, 24:1-4, 29:16-22, ROA.777-78 p. 46:2-20, 59:19-22, ROA.787 p. 143:7-10. Moore further testified that he had no reason to dispute Scottsdale's retained engineer's finding that a 2011 hailstorm would likely have caused the observed hail damage to the Property. ROA.784 p. 132:17-133:2. Moore's causation opinions were then cited by H5R in response to Scottsdale's Motion for Summary Judgment asserting Moore "testified the damage was caused by hail." ROA.1058, 1735-36.

B. *Summary Judgment on H5R's Claims*

On April 5, 2024, Scottsdale filed a Motion to Strike Terry Moore and a Motion for Summary Judgment on all of H5R's claims. ROA.839, 451. On April 26, 2024, H5R filed responses to both the summary judgment motion and motion to strike. ROA.1058, 1629. H5R's response to Scottsdale's summary judgment motion contained two evidentiary objections. ROA.1058-59. Scottsdale filed a reply to both on May 10, 2024. ROA.1644, 57. On May 13, 2024, the District Court referred the case to Magistrate Judge David L. Horan for pretrial management purposes. The District Court vacated the remaining deadlines and trial settings to be reset following Magistrate Judge Horan's conclusions on Scottsdale's pending motions. (Electronic order [Doc 55], not present in Record on Appeal).

On January 10, 2025, Magistrate Judge Horan issued his memorandum & order granting Scottsdale’s motion to strike Terry Moore. ROA.1731. Magistrate Judge Horan found that H5R failed to comply with Rule 26(a)(2) and offered no explanation for their failure. ROA.1736. Magistrate Judge Horan analyzed whether H5R’s failure was harmless under the four-factor harmless analysis. ROA.1736. Because H5R had argued in response that Moore’s testimony was consistent with other evidence, Magistrate Judge Horan found the first factor—how important the evidence is—weighed in favor of exclusion. ROA.1736. Magistrate Judge Horan found the second factor—prejudice to the party opposing admission—to also weigh in favor of exclusion. ROA.1736. Magistrate Judge Horan considered that Scottsdale was not provided notice prior to the deposition as to what Moore would testify on. ROA.1737. As a hail loss was not previously claimed by H5R, Moore’s testimony also alleged a new cause of loss after discovery had closed. ROA.1737. The third factor—whether a continuance could cure prejudice—weighed against exclusion because the court had vacated the trial setting and other deadline. ROA.1737. The fourth factor—the party’s explanation for its failure to disclose—favored exclusion. ROA.1737-38. H5R’s explanation for its failure to disclose was that Moore “simply answered the questions” he was asked at deposition. ROA.1738, 1632. Magistrate Judge Horan, considering the factors holistically concluded “[H5R’s] noncompliance with Rule 26(a)(2) is not

harmless and that Moore's expert testimony should be excluded under Rule 37(c)(1). ROA.1738.

Also on January 10, 2025, Magistrate Judge Horan issued his findings, conclusions, and recommendation on Scottsdale's motion for summary judgment. ROA.1739. Magistrate Judge Horan overruled both of H5R's evidentiary objections, although the evidence did not otherwise play into the basis of his recommendation. ROA.1746-48. Magistrate Judge Horan also concluded that the District Court should grant Scottsdale's Motion for Summary Judgment and dismiss H5R's claims with prejudice. ROA.1757. On the evidentiary objection to Jonathan Moe's statement in his declaration about the claim denial, Magistrate Judge Horan found that the statement was admissible as based on an admissible business record under the Federal Rules of Evidence. ROA.1746. On the evidentiary objection Scottsdale's expert's opinion on the hail damage to the roof, Magistrate Judge Horan found the opinion was based on Dr. Moody's methodology and supported by the CoreLogic report. ROA.1747. Thus, Magistrate Judge Horan found the opinion was not "factually or legally unsupported" and overruled H5R's objection. ROA.1747-48.

Turning to the summary judgment motion, Magistrate Judge Horan found H5R failed to provide factual evidence linking its alleged property damage to a hail event. ROA.1753. H5R attempted to link the damage with Moore's stricken

deposition Testimony. ROA.1753-54. However, Magistrate Judge Horan noted that even if his testimony had been admitted Moore did not link the alleged damage to any specific hail event at the property. ROA.1754. Magistrate Judge Horan also noted that H5R's response misplaced the burden of proof and misstated the evidence. ROA.1754. Magistrate Judge Horan noted that Moody's opinion that the hail damage likely occurred in 2011 was unrebutted. ROA.1754. Additionally, had H5R produced evidence linking the hail events other than the 2011 event to the damage, both of those events also fell outside of the policy period at issue in the lawsuit. ROA.1754.

On its breach of the duty of good faith and fair dealing claim, Magistrate Judge Horan found because H5R could not establish Scottsdale's liability under the policy H5R also failed to establish a breach of the common law duty. ROA.1755. Similarly, Magistrate Judge Horan found that because Scottsdale reasonably denied H5R's claims as not caused by a covered loss under the policy that H5R failed to show Scottsdale otherwise acted in bad faith and that H5R's claims under the Deceptive Trade Practices Act and Insurance Code also failed. ROA.1756-57.

On January 23, 2023, H5R filed objections to Magistrate Judge Horan's orders and recommendations on the Motion to Strike, evidentiary objections, and Motion for Summary Judgment. ROA.1759, 1772. Scottsdale filed responses on February 6, 2025. ROA.1779, 1787. H5R filed replies on February 19, 2025.

ROA.1797, 1801. The District Court overruled H5R's objection to Magistrate Judge Horan's Recommendation on Scottsdale's Motion to Strike Terry Moore on March 25, 2025. ROA.1807. The District Court accepted the Findings and Recommendation of Magistrate Judge Horan on Scottsdale's Motion for Summary Judgment on March 25, 2025. ROA.1809. Judgment was entered on March 25, 2025 dismissing all of H5R's claims with prejudice. ROA.1810.

C. *The Appeal*

On April 17, 2025, H5R timely filed its Notice of Appeal with the District Court and with this Court. ROA.1822, Doc. 1. H5R filed its Initial Brief on July 8, 2025. Doc. 22.

SUMMARY OF THE ARGUMENT

With respect to H5R's first point of error, the District Court correctly overruled H5R's objection to claim manager Jonathan Moe's declaration statement that a denial or "declination" letter was sent by September 9, 2021, as the statement was fully supported by an admissible business record. Nonetheless, Moe, as the manager on the claim at issue, had personal knowledge sufficient to support the statement, and the statement itself—that a denial letter was sent—is non-hearsay. Nonetheless, H5R has neither argued nor shown that its substantial rights were affected, and any error was harmless as the statement served no part in the basis for the District Court granting summary judgment.

With respect to H5R's second point of error, the District Court correctly overruled H5R's objection to expert opinion and hailstorm data indicating hail in 2011 as the expert's report and cited CoreLogic report provided a sufficient basis for the opinion and the expert demonstrated a reliable methodology in reaching his conclusion. Thus, the opinion was not "unsupported factual and legal conclusions." Regardless, H5R has neither argued nor shown its substantial rights were affected and thus any error was harmless.

With respect to H5R's third point of error, the District Court correctly granted summary judgment on H5R's breach of contract claim as H5R cannot produce evidence that the hail damage it seeks recovery for occurred on any date

covered by an insurance policy with Scottsdale, nor can it produce evidence by which a jury could segregate damage having occurred from larger hail events that occurred prior to Scottsdale's coverage of the Property.

With respect to H5R's fourth point of error, the District Court correctly granted summary judgment on H5R's extracontractual claims as H5R has not demonstrated a right to recovery under the policy nor alleged a statutory violation by Scottsdale resulting in a loss of policy benefits. Regardless, a bona fide dispute existed as to liability given the reasonable basis for Scottsdale's claim decision, negating H5R's statutory and common-law bad faith claims.

With respect to H5R's fifth point of error, the District Court correctly granted summary judgment on H5R's prompt payment claims as H5R has not raised a dispute of material fact as to Scottsdale's compliance with the prompt payment statute, and as H5R cannot establish that Scottsdale is liable for the claim.

With respect to H5R's sixth point of error, the District Court correctly granted Scottsdale's Motion to Strike H5R's expert Moore as H5R's disclosure of Moore failed to disclose the causation opinions relied upon in H5R's response to Scottsdale's Motion for Summary Judgment in violation of Rule 26(a)(2), and such failure was not harmless.

ARGUMENT

III. THE DISTRICT COURT CORRECTLY OVERRULED H5R'S OBJECTION TO MOE'S STATEMENT IN HIS AFFIDAVIT ABOUT SCOTTSDALE SENDING A DENIAL LETTER

A. *Standard of Review*

This Court reviews a district court's evidentiary rulings when it determines the summary judgment record under an abuse of discretion standard. *See Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 667 (5th Cir. 1999). "A district court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Nunez v. Allstate Ins. Co.*, 604 F.3d 840, 844 (5th Cir. 2010). The harmless error doctrine applies to the review of evidentiary rulings, so even if the District Court has abused its discretion, this Court should not reverse unless the error affected "the substantial rights of the parties." *Id.*; Fed. R. Civ. P. 61. "The party asserting the error has the burden of proving that the error was prejudicial." *Ball v. LeBlanc*, 792 F.3d 584, 591 (5th Cir. 2015).

B. *The District Court Correctly Determined that Moe's Statement was Admissible as Based on an Admissible Business Record*

H5R objected to the statement of Scottsdale's claim manager Jonathan Moe that "the claim file shows that Scottsdale denied the claim following receipt of the engineer's report no later than September 9, 2021," contained the declaration supporting Scottsdale's Motion for Summary Judgment, on the basis of "hearsay

and an unsupported factual conclusion.” ROA.1059, 484. The District Court overruled H5R’s objection because the statement was based on Scottsdale’s claims handling activity log, which itself was admissible as a business record. ROA.1746. H5R concedes the activity log is a business record, but argues that “it does not contain the information described.... [t]his renders the statement in Moe’s affidavit hearsay” and for the same reasons “an unsupported factual conclusion.” Doc. 22, at p. 25.

The activity log entry on September 8, 2021 states “sent disclaimer to insd (insured)” ROA.593. This activity log shows review of the engineer’s report on August 20, 2021. ROA.594. Therefore, the activity log does contain the information described in Moe’s statement—the sending of a “disclaimer” (or denial) letter no later than September 8, 2021 after review of the engineer’s report. H5R is simply incorrect in its assertion that “it does not contain the information described.” Doc. 22, at p. 25.

Moreover, Moe had personal knowledge of the facts asserted as he was involved with the handling of the claim while he served as the claim manager for the claim. ROA.482 ¶ 1. Moe had personal involvement in the disclaimer letter, as his log note on August 22, 2021 describes necessary content in that disclaimer letter. ROA.594. Moe further stated that the facts recited in his declaration were based both on his personal involvement in the claim and his review of the activity

log *and claim file materials*. ROA.482 ¶ 2. Therefore, H5R's attempt to limit the supporting material to only the activity log is contradicted by Moe's declaration.

H5R failed to address the statements in the activity log indicating that a disclaimer was sent on September 8, 2021 after review of the engineer's report. ROA.593-94. H5R concedes the activity log is a business record and so Moe's statement was supported by admissible non-hearsay, but regardless, the information is otherwise available in an admissible form through the activity log directly. Furthermore, H5R also fails to address the fact that Moe's statement is based on "the claim file" and not just the activity log on which H5R is focused. Moe reviewed the claim materials beyond just the activity log in making his statement, and based his statements not only on the claim materials but also on his personal involvement in the claim as the claim manager at the time of the issuance of the declination letter. ROA.482 ¶¶ 1-2, ROA.593-94. Even if the statement were not directly supported by the activity log, which it is, that does not establish that it was unsupported by the claim materials as a whole nor that it was unsupported by Moe's personal knowledge from his involvement in the claim.

Finally, a statement in a declaration that a letter was sent is itself non-hearsay. *See Alexander v. State Farm Lloyds*, No. 4:12-CV-490, 2012 WL 3046119, 2012 U.S. Dist. LEXIS 104365, at *15 (S.D. Tex. July 25, 2012) ("[e]ven if Murray's testimony about his statements to plaintiff is inadmissible, his

testimony about sending and faxing the rejection letter to the number and address provided by plaintiff undoubtedly is not hearsay.”) Therefore, even if H5R were correct that Moe’s statement was not supported by the business records attached to his declaration, the statement that a denial was sent was itself non-hearsay.

C. H5R Failed to Show the District Court Abused its Discretion by Overruling H5R’s Objection, and has not Shown Resulting Prejudice

H5R has failed to show that the District Court abused its discretion in overruling the objection to Moe’s statement. Even if this Court finds an abuse of discretion, the District Court’s decision should be overturned only if the abuse affected H5R’s substantial rights. *Nunez*, 604 F.3d at 844; Fed. R. Civ. P. 61. H5R fails to argue its substantial rights were affected. Doc. 22, at pp. 23-25. H5R argues error in the overruled objection, but does not establish nor even address whether that error resulted in prejudice. H5R has not identified where the District Court relied on the subject statement of Moe in its ruling granting Scottsdale’s Motion for Summary Judgment, and H5R has not shown how sustaining that objection would have led to a different result.

Nevertheless, admission of the statement did not affect H5R’s substantial rights as the District Court did not cite the statement as a basis for granting summary judgment. ROA.1751-57, 1809. Summary judgment was granted on H5R’s breach of contract claim on the basis that H5R provided no evidence that

the alleged hail damage was caused by an event during the relevant policy period, nor had its expert linked the alleged damage to any one of the prior hail events that H5R identified in the CoreLogic report, nor could H5R refute the fact that the hail damage more likely occurred during the larger 2011 hail event which occurred prior to any policy issued by Scottsdale. ROA.1754-55. H5R's sole expert did not know when the hail damage occurred, could not say whether or not it occurred in May 2011 prior to any policy of Scottsdale insuring the Property, and could not dispute Scottsdale's expert's opinion that it was more likely than not the damage occurred prior to Scottsdale insuring the Property. ROA.882 p. 46:2-20; ROA.914-915 pp. 132:17-133:19. Summary judgment was granted as to H5R's extra-contractual claims based on the existence of a bona fide dispute. ROA.1755-56. Therefore, the date of the initial denial of the claim was immaterial to the District Court's granting of summary judgment. While H5R has not shown the District Court abused its discretion in ruling Moe's statement was admissible, even if this Court disagrees, H5R's substantial rights were not affected as the statement had no effect on the basis for the District Court's summary judgment ruling.

IV. THE DISTRICT COURT CORRECTLY OVERRULED H5R'S OBJECTIONS TO THE STATEMENTS IN THE HORNE AND MOODY REPORTS ON HAIL OCCURRING IN 2011

A. *Standard of Review*

This Court reviews a district court's evidentiary rulings when it determines the summary judgment record under an abuse of discretion standard. *See Curtis*, 174 F.3d at 667. "[A] district court has broad discretion to determine whether a body of evidence relied upon by an expert is sufficient to support that expert's opinion." *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 354 (5th Cir. 2007) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597, 113 S. Ct. 2786, 2799 (1993); Fed. R. Evid. 702). "A district court abuses its discretion when its ruling is based on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Nunez*, 604 F.3d at 844. The harmless error doctrine applies to the review of evidentiary rulings, so even if the District Court has abused its discretion, this Court should not reverse unless the error affected "the substantial rights of the parties." *Id.*; Fed. R. Civ. P. 61. "The party asserting the error has the burden of proving that the error was prejudicial." *Ball*, 792 F.3d at 591.

B. *The District Court Correctly Determined the Summary Judgment Evidence Concerning Hail Damage Occurring in 2011 was Admissible as it was Based on the Expert's Methodology*

H5R objected to two purported statements from defense experts that hail damage to the roof occurred in 2011 as "unsupported factual and legal conclusions." ROA.1059. H5R's objection cited to the Horne report's attached

Hail Verification Report from CoreLogic (indicating 1.6-inch hail in 2011 and no hail having occurred near the February 15, 2021 date of loss claimed, nor any hail exceeding .75-inch since 2011), and not to any conclusion reached by Horne.

ROA.1059, 654. H5R objected to Moody's statement that:

The CoreLogic Hail Verification Report confirmed that no hail was associated with the winter storm event of February 2021 . . . [it] did indicate ~1.6 inch diameter hail may have fallen at this location on May 24th, 2011. To the extent that any of the noticed distress in the corrugated cementitious tile roof was related to hail it is more probable than not that it occurred on May 24th, 2011.

ROA.1059, 800-801.

Notably, H5R's own expert does not dispute this conclusion. ROA.914-15 pp. 132:17-133:19. The District Court found that Moody's opinion was based on the methodology he outlined in his report, and that the opinion was supported by the CoreLogic report which indicated 1.6-inch hail at the Property on May 24, 2011 (and no subsequent events over .75 inches). ROA.1746-47. The District Court also noted that H5R failed to provide grounds for why Moody's opinion was factually or legally unsupported. ROA.1747-48.

H5R failed to cite to any conclusion in the Horne report to which an objection was raised, as it cited only to the CoreLogic report attached to Horne's report. ROA.1059, 654. The conclusion identified from Moody was itself sufficiently supported by the CoreLogic report, which indicated the hail on May 24, 2011 was in excess of *two-times* the diameter of hail on any other noted date.

ROA.654. Notably, as the volume of a sphere increases 33% for a corresponding 10% increase in its diameter ($V=(4/3)\pi r^3$), the difference in hail size alone provided a sufficient basis for Moody's conclusion that distress in the corrugated cementitious tile roof, to the extent it was hail-related, more probably than not occurred with the 1.6-inch diameter hail on May 24, 2011. Moody also reviewed the initial inspection report and photos taken on April 20, 2021, personally inspected the Property, photographed the cementitious tile roof, and noted the presence and absence of hail-related distress to other exterior elements of the Property. ROA.798-803. Moody's report provided a sufficient factual basis for his opinion, and the District Court did not err in overruling H5R's objection.

C. *H5R Failed to Show the District Court Abused its Discretion by Overruling H5R's Objection and has not Shown Resulting Prejudice*

H5R has failed to show that the District Court abused its discretion in overruling the objection to the defense expert statements. Even if this Court finds an abuse of discretion, the District Court's decision should be overturned only if the abuse affected H5R's substantial rights. Once again, H5R argues the District Court erred in overruling its objection, but H5R does not argue nor establish that error resulted in prejudice. H5R has not identified where the District Court relied on the subject opinions in its ruling granting Scottsdale's Motion for Summary Judgment, and H5R has not shown how sustaining that objection would have led to a different result.

The District Court's summary judgment ruling was based on the fact that H5R was "unable to create a fact issue because it fail[ed] to provide factual support linking the alleged damage to the hail events described above." ROA.1753. It was H5R's failure to put forth evidence, not Scottsdale's evidence, that resulted in summary judgment.

Even if Moody's conclusion that hail damage, if any, more likely occurred in May 2011 were excluded, H5R still would not have had competent evidence for a jury to tie the damage to the February 15, 2021 date of loss reported, the 2020-2021 policy period plead, or even the 2018-2021 period in which Scottsdale insured the Property. It was the lack of evidence from H5R that supported the District Court's ruling granting summary judgment, and the defense expert evidence H5R objected to was not material to the District Court's ruling. As such, any error in admitting the opinions of Scottsdale's experts was harmless and H5R's substantial rights were unaffected.

V. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF SCOTTSDALE ON H5R'S CLAIM FOR BREACH OF CONTRACT

A. *Standard of Review*

In diversity cases, this Court reviews a district court's granting of summary judgment de novo, applying Texas law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938); *Burciaga v. Deutsche Bank Nat'l Tr. Co.*, 871 F.3d

380, 388 (5th Cir. 2017). Summary judgment is proper “if the movant shows 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). Rule 56(a) “mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). If a movant alleges an absence of specific facts necessary for a nonmovant to establish an essential element of its case, then the nonmovant must respond by setting forth specific facts showing that there is a genuine dispute for trial. *DIRECTV Inc. v. Minor*, 420 F.3d 546, 549 (5th Cir. 2005). Thereafter, “if no reasonable juror could find for the nonmovant, summary judgment will be granted.” *Id.* (quotations omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2510-11 (1986) (noting summary judgment is appropriate if the non-movant's evidence is “merely colorable” or “not significantly probative”).

B. *Applicable Law*

“Under Texas law, ‘[i]nsurance policies are controlled by rules of interpretation and construction which are applicable to contracts generally.’” *Kinsale Ins. Co. v. Flyin’ Diesel Performance & Offroad, L.L.C.*, 99 F.4th 821, 826 (5th Cir. 2024) (*quoting Nat’l Union Fire Ins. Co. of Pittsburgh v. CBI Indus., Inc.*,

907 S.W.2d 517, 520 (Tex. 1995) (per curiam)). Courts begin first with the text of the contract to ascertain the parties' intent and determine whether it is possible to enforce the contract as written. *Id.* Courts give terms their plain meaning unless the contract shows the parties intended a different meaning. *Id.*

The elements of a breach of contract action under Texas law are: “(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach.” *Smith Int’l., Inc. v. Egle Grp., LLC*, 490 F.3d 380, 387 (5th Cir. 2007). “An insurer is liable only for losses covered by the policy.” *Certain Underwriters at Lloyd's of London v. Lowen Valley View, L.L.C.*, 892 F.3d 167, 170 (5th Cir. 2018). The insured bears the burden of proving they suffered a loss and that the loss is covered by the relevant insurance policy. *Seeger v. Yorkshire Ins. Co.*, 503 S.W.3d 388, 400 (Tex. 2016). Only if the insured satisfies this burden does the burden shift to the insurer to prove that an exception to coverage applies. *Id.* at 400-01.

“Under the doctrine of concurrent causes, when covered and noncovered perils combine to create a loss, the insured is entitled to recover that portion of the damage caused solely by the covered peril.” *N.Y. Inn, Inc. v. Associated Indus. Ins. Co. (In re New York Inn, Inc.)*, No. 24-10338, 2025 WL 999084, 2025 U.S. App. LEXIS 7887 *14 (5th Cir. April 3, 2025) (citing *Dall. Nat'l Ins. Co. v. Calitex*

Corp., 458 S.W.3d 210, 222 (Tex. App.—Dallas 2015, no pet.)). “The insured has the burden of separating the damage attributable to the risk covered by the insurance policy versus damage caused by non-covered risks.” *In re New York Inn*, 2025 U.S. App. LEXIS 7887 *14 (citing *Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181, 198 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)). “The insured must provide ‘evidence which will afford a reasonable basis for estimating the amount of damage or the proportionate part of damage caused by a risk covered by the insurance policy.’” *In re New York Inn*, 2025 U.S. App. LEXIS 7887 *14 (internal citation omitted). “[F]ailure to segregate covered and noncovered perils is fatal to recovery.” *Id.* (citing *Comsys*, 130 S.W.3d at 198); see also *Hamilton Props. v. Am. Ins. Co.*, 643 F. Appx. 437, 442 (5th Cir. 2016) (affirming summary judgment for insurer where insured's evidence showed that damage could be “linked” to a particular hail storm, but did “nothing to enable a jury to segregate damages for only that property damage caused by covered perils that occurred within the policy period”); *Wallis v. United Servs. Auto Ass'n*, 2 S.W.3d 300, 304 (Tex. App.—San Antonio 1999, pet. denied).

C. *The District Court Correctly Determined that H5R was Unable to Create a Fact Issue Regarding the Alleged Breach of Contract*

Magistrate Judge Horan found that H5R failed to satisfy its burden of demonstrating a covered loss during the policy period and that Scottsdale was entitled to summary judgment dismissing H5R’s breach of contract claim.

ROA.1755. H5R objected to Magistrate Judge Horan’s findings and the District Court conducted de novo review of the breach of contract claim and overruled H5R’s objections and accepted Magistrate Judge Horan’s findings and recommendation. ROA.1809. H5R’s appeal of the District Court’s ruling on the breach of contract claim boils down to one issue: whether H5R put forth any evidence demonstrating a covered loss occurred during the relevant policy period. As addressed below, H5R failed to meet its burden at the District Court and similarly fails to set forth any grounds for this Court to reverse the District Court’s ruling.

1. H5R Failed to Provide Evidence that Hail Damage Occurred at any Time During Scottsdale’s Coverage of the Property, Let Alone the Relevant Policy Period

a. The Policy Period at Issue was December 18, 2020 to December 18, 2021, and the District Court Appropriately Applied that Policy Period

H5R’s representative Hailu reported a date of loss for winter storm damage occurring February 15, 2021. ROA.483 ¶ 3. The property loss notice indicates a date of loss of February 15, 2021. ROA.598. H5R filed suit claiming “In the spring of 2021, water began penetrating the House.” ROA.50. H5R alleged that the loss arose under the policy issued following a December 17, 2020 renewal of policy #CPS32115869. ROA.49. The text messages attached to H5R’s Original Petition show H5R’s representative Hailu referencing “winter storm damage” ROA.106. H5R’s statement of its claims in the parties Joint Report stated, “Plaintiff alleges

that its property sustained freeze-related damages arising from a winter storm on or about February 15, 2021.” ROA.156. H5R’s discovery responses stated that H5R “does not know the exact date of the loss, but believes it occurred in January or February of 2021.” ROA.399. Accordingly, Magistrate Judge Horan correctly determined that the policy period at issue was December 18, 2020 to December 18, 2021. ROA.1754-55.

On appeal, H5R argues that the District Court improperly limited its analysis to the 2020-2021 policy period because “the 2018 policy and 2019 renewal are included in the summary judgment evidence and discussed in H5R’s Response in support of H5R establishing the policy/renewal period.” Doc. 22, at p. 30. However, the fact that additional policies were filed as exhibits in response to summary judgment was immaterial to the District Court’s conclusion on what policy period was at issue in H5R’s pleading. Similarly, H5R’s discussion of the prior policy periods does not identify an error by the District Court. The District Court identified the relevant policy period by quoting H5R’s live pleading “stating that the parties ‘entered into an insurance contract on or about December 17, 2020 in the form of a renewal of policy #CPS32115869.’” ROA.1754-55.

H5R argues that “a fair reading” of the language quoted above would be to conclude that the “claims are based upon the policy as renewed in 2020.” Doc. 22, at p. 30. However, the policy as renewed in 2020 would still be the 2020-2021

policy. H5R was “the master of [its] complaint.” *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir. 1995). H5R was free to draft its petition as it saw fit, and chose to draft it to identify one loss-causing event occurring during one policy period. The language of the petition clearly refers to one discrete loss occurring under one insurance contract, not three contracts and multiple loss events as H5R attempted to claim, for the first time, in its summary judgment response. Therefore, the District Court identified the correct policy period in its determination that H5R failed to show any evidence that a covered loss occurred during the policy period from 2020-2021.

b. Even if the Policy Period at Issue was a three-year term from December 18, 2018 to December 18, 2021, H5R’s claims still fail

Even if the policy period is expanded to include the entire time Scottsdale insured the Property, there still is no summary judgment evidence linking the hail damage at the Property to *any* time Scottsdale covered the Property. H5R’s own expert does not dispute that the hail damage most likely occurred in May 2011, and testified that he could not say whether the alleged hail damage did or did not occur in May of 2011. ROA.882 p. 46:17-20, ROA.914-15 pp. 132:17-133:19. The only evidence H5R directs the Court’s attention to is the CoreLogic Report. Doc. 22, at p. 30. The CoreLogic Report identifies the “estimated maximum hail size” at a certain location on various dates, noting an instance of .75-inch hail “at location” in March 2019 and an instance of .75-inch hail one mile from the property in

August 2020, but also .9-inch hail in April 2012 and 1.6-inch hail in May 2011 both “at location.” ROA.654. The report identifies many possible dates the Property or surrounding area could have experienced hail, but it does not tie the alleged hail damage discovered in 2021 to any specific date. ROA.654. H5R argues that because the report identifies *possible* hailstorms on March 24, 2019 and August 16, 2020, H5R has met its burden of identifying summary judgment evidence of a covered loss. However, the CoreLogic report fails to provide “evidence which will afford a reasonable basis for estimating the amount of damage or the proportionate part of damage caused by” the March 24, 2019 or August 16, 2020 storms. *Dall. Nat’l*, 458 S.W.3d at 223 (quoting *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971)).

H5R failed to bridge the gap between the CoreLogic report’s storm data and the damage at the Property. As Magistrate Judge Horan correctly identified when considering H5R’s arguments “[H5R] is unable to create a fact issue because it fails to provide factual support linking the alleged damage to the hail events described above.” ROA.1753. Thus, even if this Court accepts H5R’s argument that the “policy period” was a three-year term of three consecutive insurance policies beginning on December 18, 2018, H5R still failed to meet its burden to show the Property was damaged by the storms that occurred during three-policy

period and not by other prior larger storms that occurred before Scottsdale insured the property, or to segregate the damage occurring during the larger prior events.

2. H5R Incorrectly Argues that its Burden Has Been Met by Proving Only that the Property has Hail Damage

H5R's next argument is closely related to its previous one and contains the same fatal flaw. H5R argues summary judgment was improper because the Property was damaged by hail. H5R's evidence of hail damage is the Horne Report, Moody Report, CoreLogic Report, Moore's deposition testimony, and photos of the Property's roof. Doc. 22, at p. 31. However, showing the Property was damaged by hail is not enough, H5R must also show the damage is covered by the policy, and segregate any non-covered damage. *In re New York Inn Inc.*, 2025 U.S. App. LEXIS 7887, at *14 ("Under the doctrine of concurrent causes, when covered and noncovered perils combine to create a loss, the insured is entitled to recover that portion of the damage caused solely by the covered peril.")

Texas law is clear that to recover for breach of contract H5R must provide evidence sufficient for the jury to differentiate between any hail damage attributable to the larger 2011 (or other non-covered) storms from the damage attributable to the subject hailstorm occurring during the policy period, whatever that period or storm might be. Scottsdale has put forth evidence of a non-covered peril, the May 2011 hailstorm, that was the more probable cause of any hail damage to the roof. ROA.801, 654. Irrespective of whether it is analyzed under the

multiple-policy period put forth by H5R, or the policy period identified in H5R's pleading and discovery responses, the result is the same. H5R has no evidence to segregate hail damage between covered and non-covered perils.

The Horne Report does not allocate the hail damage between different dates of loss or attribute the damage to any specific date. The report concludes only that the hail damage predates the date of loss. ROA.645. The Moody Report concluded that all the hail damage most likely occurred during the May 2011 storm. ROA.801. Neither report is useful to H5R as neither attributes any of the damage to a storm occurring under any of the policies identified by H5R. ROA.645, 801. Moore testified that he does not dispute Moody's conclusion that the hail damage most likely occurred in May 2011. ROA.914-15 pp. 132:17-133:19. When asked if the damage occurred "in the last year, last five years, last ten years?" Moore testified "Oh, man. I'd be guessing. I don't know." ROA.873 p. 29:16-22. The CoreLogic report is only a compilation of weather data and puts forth no opinion on property damage or when it occurred, but does indicate the prior non-covered storm events were larger than any claimed by H5R. ROA.654. Therefore, while it identifies the 2019 and 2020 storms, it cannot serve as a basis for a jury to segregate damage between covered and non-covered storms. Similarly, the photos of the Property's roof identified by H5R, without more, cannot serve as a basis for a jury to segregate damage between covered and non-covered storms. Even if the

2019 and 2020 storms are included in the analysis, H5R has no evidence to enable a jury to segregate between those storms and the larger the 2012 and 2011 storms. *See Hamilton Props.*, 643 F. Appx. at 442; ROA.654.

H5R's argument on appeal is that the District Court's finding was improper because Scottsdale ignored evidence that the Property was damaged by hail. Consideration of each piece of evidence identified by H5R, and even Moore's stricken testimony leads to the same conclusions: (1) H5R has not put forth evidence of a covered loss during Scottsdale's coverage of the Property and (2) H5R has not put forth evidence segregating the damage between the 2011 storm and the storms it alleges damaged the Property.

3. H5R's Claim for Damage Outside the Scope of Coverage was Properly Denied

H5R's final argument against the District Court's finding on breach of contract is that H5R does not seek damages outside the scope of coverage. Doc. 22, at p. 32. Scottsdale agrees that H5R's original claim for winter storm damage occurring in February 2021 is no longer at issue and that H5R's theory of recovery, now, is limited to hail damage. However, the distinction makes no difference as H5R cannot produce evidence that the hail damage it seeks recovery for occurred on any date covered by a policy with Scottsdale, nor can it produce evidence by which a jury could segregate damage occurring in larger hail events that occurred prior to any policy with Scottsdale.

VI. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF SCOTTSDALE ON H5R'S COMMON LAW BAD FAITH CLAIMS

H5R argues that because there is summary judgment evidence on breach of contract the District Court's finding on the common-law claims was improper. Scottsdale argues that (1) H5R failed to establish breach of the insurance policy and (2) a bona fide dispute existed as to coverage of H5R's claim irrespective of the breach of contract claim. As explained below, regardless of this Court's finding on breach of contract, H5R's common-law claims fail.

A. *Standard of Review*

This Court reviews “grants of summary judgment de novo, using the same standard as that employed initially by the district court under Rule 56.” *Petzold v. Rostollan*, 946 F.3d 242, 247-48 (5th Cir. 2019). Therefore, the District Court's grant of summary judgment was proper if “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).

B. *Applicable Law - “Entitled-to-Benefits” and “Independent-Injury” Rules*

“The general rule is that an insured cannot recover policy benefits for an insurer's statutory violation if the insured does not have a right to those benefits under the policy.” *Dillon Gage Inc. v. Certain Underwriters at Lloyds*, 26 F.4th 323, 325 (5th Cir. 2022) (quoting *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d

479, 490 (Tex. 2018)). “[A]n insured cannot recover *any* damages based on an insurer’s statutory violation if the insured had no right to benefits under the policy and sustained no injury independent of a right to benefits.” *Dillon Gage*, 26 F.4th at 325 (quoting *Menchaca*, 545 S.W.3d at 489). An insured’s extra-contractual claims are “negated” when the extra contractual claims are predicated on coverage and there is no coverage. *Dillon Gage*, 26 F.4th at 325.

However, *Menchaca*, identified “five distinct but interrelated rules that govern the relationship between contractual and extra-contractual claims in the insurance context.” *Lyda Swinerton Builders, Inc. v. Okla. Sur. Co.*, 903 F.3d 435, 451-52 (5th Cir. 2018) (quoting *Menchaca*, 545 S.W.3d at 489). Two of those rules include the “entitled-to-benefits rule” and the “independent-injury rule.” *Id.* The “entitled-to-benefits” rule provides that “an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as ‘actual damages under the [Insurance Code] if the insurer’s statutory violation causes the loss of benefits.” *Lyda Swinerton*, 903 F.3d at 452; *Menchaca*, 545 S.W.3d at 495.

There are two aspects to the independent-injury rule:

The first is that, if an insurer’s statutory violation causes an injury independent of the insured’s right to recover policy benefits, the insured may recover damages for that injury even if the policy does not entitle the insured to receive benefits. . . .The second aspect of the independent-injury rule is that an insurer’s statutory violation does not permit the insured to recover *any* damages beyond policy benefits unless the violation causes an injury that is independent from the loss of benefits.

Lyda Swinerton, 903 F.3d at 452 (quoting *Menchaca*, 545 S.W.3d at 499-500).

But if an insured seeks to recover damages that “‘are predicated on,’ or ‘flow from,’ or ‘stem from’ policy benefits, the general rule applies and precludes recovery unless the policy entitles the insured to those benefits.” *Lyda Swinerton*, 903 F.3d at 452 (quoting *Menchaca*, 545 S.W.3d at 500). Notably, the Texas Supreme Court has yet to encounter a qualifying “independent injury.” *In re State Farm Mut. Auto. Ins. Co.*, 712 S.W.3d 53, 64 n. 52 (Tex. 2025) (acknowledging that the possibility of an injury independent of entitlement to insurance benefits remains open).

C. *Applicable Law - Bona Fide Dispute*

“To prevail on a breach of good faith and fair dealing claim, the insured must prove that the insurer had no reasonable basis for denial or delay in payment of claim, and that the insurer knew or should have known that fact.” *Wright v. Lloyds*, NO. 23-40719, NO. 24-40020, 2025 WL 1588832, 2025 U.S. App. LEXIS 13836 *10 (5th Cir. 2025); *Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 459 (5th Cir. 1997). “This is a high bar. ‘[T]he insured must prove that there were no facts before the insurer which, if believed, would justify denial of the claim.’” *Id.* Thus, to survive summary judgment, an insured must show “the *absence* of a reasonable basis to deny the claim” also referred to as “the absence of

a bona fide dispute as to coverage.” *Southwest Airlines Co. v. Liberty Ins. Underwriters, Inc.*, 90 F.4th 847, 856 (5th Cir. 2024).

D. *The District Court Correctly Determined that as H5R Failed to Establish Liability for the Claim, H5R’s Common Law Bad Faith Claims Also Failed*

H5R’s argument that its bad faith claims should not fail is based on its argument that its breach of contract claim prevails, “because the breach of contract claim does not fail, the bad faith claim does not fail.” Doc. 22, at p. 36. H5R then recites its breach of contract arguments claiming that the breach of contract determination was improper. Doc. 22, at p. 38-40. As Scottsdale fully addressed H5R’s breach of contract claims in Section III above, Scottsdale refers the Court to Section III of this brief. As H5R has not shown a dispute of material fact as to breach of contract, H5R’s common law bad faith claims fail.

1. *H5R Did Not Identify a Basis Upon Which the District Court’s Finding on H5R’s Common Law Claims Should Be Overturned.*

H5R does not explicitly argue that it is entitled to extra contractual damages even if its breach of contract claim fails again on appeal. However, H5R does state that H5R’s loss of rent and property value are “independent injuries” and references the “entitled-to-benefits rule” and the “independent injury rule.” Doc. 22, at p. 36-37. To the extent that H5R is claiming entitlement to extra contractual

damages on either of those theories, neither rule is applicable nor do they support a basis for reversal of the District Court's findings.

Beginning with the "entitled-to-benefits" rule, H5R has not demonstrated a right to recovery under the policy nor alleged a statutory violation by Scottsdale that resulted in H5R's loss to policy benefits. As neither requirement of the "entitled-to-benefits" rule is present, the rule does not offer a basis for reversal of the District Court's decision. Similarly, considering the "independent injury" rule, H5R has neither established nor alleged the required statutory violation. Additionally, the second requirement—that the violation caused an injury independent of the right to policy benefits—is also not present. On appeal, H5R claims its independent injuries are lost rent and property value. Doc. 22, at p. 36. However, the Texas Supreme Court has not recognized lost rent and property value as independent injuries. Additionally, H5R's alleged inability to rent the Property and alleged loss in property value would naturally flow from the claim denial. Thus, to the extent H5R claims a right to extra-contractual damages even if its breach of contract claim fails, neither the "entitled-to-benefits" nor the "independent-injury" rules would entitle H5R to recovery of its common law or Chapter 541 claims.

2. There Was a Bona Fide Dispute

The District Court correctly determined that Scottsdale did not breach the insurance policy, and therefore did not need to reach the issue of whether a bona fide dispute existed as to coverage of H5R's claim. H5R argues there was no bona fide dispute because (1) Scottsdale improperly pointed to the 2011 hail event and there was no hail damage to the roof when H5R purchased the Property in 2016; and (2) Scottsdale did not deny the claim until March 27, 2022.

First, H5R fails to properly identify the subject of its own claim or Scottsdale's coverage decision. H5R's claimed cause of loss was a water leak from the roof caused by snow and ice and burst pipe under the kitchen sink occurring on February 15, 2021. ROA.483 ¶ 3, ROA.597. As outlined in its claim decision letter, both of Scottsdale's inspections concluded that the Property had not sustained damage consistent with H5R's claimed causes of loss. ROA.483 ¶ 4-6, ROA.602-03, ROA.645. Scottsdale reasonably relied on the opinions of its independent inspector and engineer, and its claim decision was consistent with both of their opinions. ROA.745-48.

On the issue of hail, the claim decision letter states, "[a]ny hail damage would be a separate occurrence from the claim reported for Winter Storm Damage, and would require a separate claim be filed in order for coverage to be evaluated." ROA.747. Thus, H5R's argument that the coverage decision was unreasonable as it concluded the hail damage occurred in 2011 misstates Scottsdale's claim decision.

Scottsdale's actual claim decision was clearly reasonable as both of Scottsdale's inspections concluded that the Property had not sustained damage consistent with H5R's claimed causes of loss. ROA.483 ¶ 4-6, ROA.602-03, 645.

H5R proceeds to argue that its bad faith claim is supported by the declaration of H5R's representative Hailu dated April 26, 2024, where Hailu stated "[t]he roof was not damaged, by hail or otherwise, when H5R became the owner of the house." ROA.1069-71. H5R's argument that this statement could support a finding of bad faith on Scottsdale's part is contrary to well established law as the basis for the claim denial is evaluated based on the time the denial was made. Therefore, even if Hailu's declaration could have had any impact on Scottsdale's decision, the facts alleged were not provided when the decision was made. Even then, the information was not relevant to the causes of loss actually reported by H5R.

H5R's second argument that there was not a bona fide coverage dispute is that Scottsdale did not deny the claim until March 27, 2022. Doc. 22, at p. 36. For the argument on the timing of the claim decision, Scottsdale refers the Court to Section I above. However, the timing of the claim decision, regardless of when it occurred, is not relevant to the issue of whether Scottsdale had a reasonable basis to deny the claim. H5R's arguments that a bona fide dispute did not exist fail and

this Court should affirm the District Court’s ruling in favor of summary judgment on H5R’s common law and Chapter 541 claims.

VII. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF SCOTTSDALE ON H5R’S CHAPTER 542 CLAIMS

A. *Standard of Review*

This Court reviews “grants of summary judgment de novo, using the same standard as that employed initially by the district court under Rule 56.” *Petzold v. Rostollan*, 946 F.3d 242, 247-48 (5th Cir. 2019). Therefore, the District Court’s grant of summary judgment was proper if “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).

B. *Applicable Law*

H5R’s claim for Chapter 542 remedies hinges on its entitlement to policy benefits. To establish its right to Chapter 542 remedies, an insured must establish “(1) a claim under an insurance policy; (2) that the insurer is liable for the claim; and (3) that the insurer has failed to follow one or more sections of [the Prompt-Payment Statute] with respect to the claim.” *Weiser-Brown Operating Co. v. St. Paul Surplus Lines Ins. Co.*, 801 F.3d 512, 518 (5th Cir. 2015).

C. *The District Court Correctly Determined that as H5R Failed to Establish Scottsdale's Liability for the Claim, H5R's Chapter 542 Claims Also Failed*

In H5R's argument for reversal of the District Court's finding for summary judgment on H5R's Chapter 542 claims, H5R recites its breach of contract arguments and claims that the breach of contract determination was improper. Doc. 22, at p. 42-44. Scottsdale refers the Court to Section III for its response to H5R's breach of contract arguments. As Chapter 542 claims require a breach of contract and H5R's breach of contract claims were properly dismissed, dismissal of H5R's Chapter 542 claims should be affirmed.

D. *H5R Raised No Dispute of Material Fact as to Whether Scottsdale Complied with Chapter 542, and any Dispute Over Compliance is Immaterial as H5R has Not Established Scottsdale's Liability for the Claim*

Apart from restating its breach of contract argument, H5R raises two additional bases for recovery of Chapter 542 benefits: (1) that Scottsdale improperly pointed to a 2011 hail event when the house was purchased in 2016 and (2) that the coverage letter was sent of March 27, 2022.

Beginning with the claim decision, as explained in Section IV.D.2, Scottsdale's claim decision was not based on a conclusion about when the hail damage to the Property's roof occurred. Thus, even if the alleged conduct was a violation of Chapter 542, the conduct did not occur. H5R further failed to identify which provision of Chapter 542 was allegedly violated by the described conduct.

Regardless, as H5R cannot show that Scottsdale is liable for the claim, it cannot establish its right to Chapter 542 remedies. *See State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010) (“There can be no liability [for statutory interest or attorney's fees] if there is no coverage under the policy.”); *Allstate Ins. Co. v. Bonner*, 51 S.W.3d 289, 290, 292 (Tex. 2001) (holding that insurer that failed to timely acknowledge claim did not owe attorney's fees under the Act it was not liable for the claim); *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 861 (5th Cir. 2003).

For the first time on appeal, H5R clearly states one section of Chapter 542 that it accuses Scottsdale of violating: 542.056(a). Doc. 22, at p. 46. As explained in Section I.B above, the claim was timely denied by Scottsdale within 15 days of receipt of the Horne Report. Additionally, as set forth above, to the extent that the timing of denial is disputed it does not provide a basis to overturn the District Court’s findings on the Chapter 542 claims because H5R failed to show Scottsdale was liable for the claim.

VIII. THE DISTRICT COURT DID NOT ERR IN GRANTING SCOTTSDALE’S MOTION TO STRIKE H5R’S EXPERT TERRY MOORE

On January 10, 2025, Magistrate Judge Horan granted Scottsdale’s Motion to Strike Terry Moore, and on March 25, 2025, the District Court overruled H5R’s objections to Magistrate Judge Horan’s Order. ROA.1731, 1807. The basis of

Magistrate Judge Horan’s ruling on the Motion to Strike was that his designation violated the Federal Rules of Civil Procedure Rule 26 in that it failed to disclose causation opinions offered by Moore and relied upon in H5R’s response to Scottsdale’s Motion for Summary Judgment, and that such failure was not harmless under the four-factor analysis. ROA.1735-38. The District Court reviewed Magistrate Judge Horan’s decision and determined that it was not clearly erroneous or contrary to law. ROA.1807.

A. *Standard of Review*

A trial court's decision to admit expert evidence is reviewed for abuse of discretion. *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 351 (5th Cir. 2007). The trial judge has “wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge and his or her decision will not be disturbed on appeal unless manifestly erroneous.” *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 988 (5th Cir. 1997) (internal quotation marks and citation omitted). A manifest error is “plain and indisputable” and “amounts to a complete disregard of the controlling law.” *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004) (internal quotation marks and citation omitted). Additionally, the harmless error doctrine applies, meaning that even if the Court finds the District Court abused its discretion, the Court will not reverse the District Court’s decision “unless the error affected the substantial right of the parties.” *Heinsohn v. Carabin*

& *Shaw, P.C.*, 832 F.3d 224, 233 (5th Cir. 2016). Therefore, H5R must also show that if Moore’s testimony was admitted it might have “had a substantial influence on the outcome of the proceedings.” *United States v. Limones*, 8 F.3d 1004, 1008 (5th Cir. 1993).

B. *The District Court Correctly Determined that Moore’s Designation Violated Rule 26.*

Under the Federal Rules of Civil Procedure, a party designating a retained expert witness must provide a written report prepared by the witness. Fed. R. Civ. P. 26(a)(2)(B). The report must contain “a complete statement of all opinions the witness will express and the basis and reasons for them” and “the facts or data considered by the witness in forming them.” *Id.* R. 26(a)(2)(B)(i)-(ii). With respect to a non-retained expert, the disclosure must provide “a summary of the facts and opinions to which the witness is expected to testify.” *Id.* R. 26(a)(2)(C)(ii). When a party fails to provide the required information, regardless of whether the expert is retained or unretained, “the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or harmless.” *Id.* R. 37(c)(1).

As a preliminary note, H5R appears to now claim that Moore was a non-retained expert. Doc. 22, at p. 47. H5R did not take this position in its original response to Scottsdale’s “Motion to Strike the Opinions and Testimony of Plaintiff’s *Retained* Testifying Expert Terry Moore.” ROA.1629-35. A retained

expert witness is an expert who, without prior knowledge of the facts giving rise to litigation, “is recruited to provide expert opinion testimony.” *Downey v. Bob's Discount Furniture Holdings, Inc.*, 633 F.3d 1, 6 (1st Cir. 2011). In contrast, a non-retained expert witness’ testimony “arises not from his enlistment as an expert, but, rather, from his ground-level involvement in the events giving rise to the litigation.” *Id.*

Here, Moore’s first report was authored over a year after litigation was initiated. ROA.23, 332. Therefore, Moore was “retained . . . to provide expert testimony in the case.” Fed. R. Civ. P. 26(a)(2)(B). H5R’s argument that Moore was designated as a non-retained expert is belied by its own designation, which does not indicate “non-retained” and which provides a disclosure of his publications, testimony history, compensation, a resume and a report, all only required of a retained expert. ROA.923; Fed. R. Civ. P. 26(a)(2)(B)(i-vi). Nonetheless, the distinction is immaterial as a party disclosing a non-retained expert still must provide a summary of the facts and opinions to which the expert will testify. FRCP 26(a)(2)(C)(ii). Thus, the District Court still correctly found that H5R failed to comply with Rule 26’s disclosure requirements with respect to the causation opinions of Moore, on which H5R sought to affirmatively rely in opposing summary judgment, regardless of Moore’s compensation or retention status. ROA.1736.

H5R argues that because Moore's problematic testimony concerning causation was elicited by Scottsdale's counsel at a deposition it should not have been struck. Doc. 22, at pp. 49-51. However, which party elicited the testimony is not material to the question of whether Moore offered opinions outside of his designation, particularly when H5R sought to affirmatively use that causation testimony to overcome summary judgment stating "Terry Moore, an uncompensated construction expert designated by H5R, testified the damage was caused by hail." ROA.1058. As such, the District Court correctly held that Moore's testimony must be excluded unless the disclosure failure was found to be substantially justified or harmless.

H5R also argues Scottsdale should not "complain" about Moore's causation opinion because the claim-stage engineer report of Horne, and his photos of the roof, show the roof was damaged by hail. Doc. 22, at pp. 49-50. However, H5R incorrectly asserts that Moore's testimony was the same as what was offered by Horne. *Id.* Moore testified that the damage caused by hail *was so significant* that the entire house needed torn down and rebuilt from the ground up. ROA.927. That opinion is not contained in the Horne report, and it is the only causation opinion tying the purported damage to H5R's cost and scope of repair. ROA.929.

H5R further argues Moore's testimony was not properly struck because his opinion that hail caused damage to the roof was not expert testimony. Doc. 22, at

pp. 51-52. To the contrary, it was H5R who designated Moore as an expert to provide opinion testimony. ROA.927. To opine on the specific cost estimated to repair purported damage to a building, and more importantly that such damage was so extensive as to require the complete tear-down and rebuilding of that property, necessarily requires “scientific, technical, and specialized knowledge far beyond the ordinary experience of lay persons.” Fed. R. Ev. 702. Therefore, Moore’s testimony, both on cost of repair and on causation, was expert opinion and subject to the disclosure requirements of Federal Rule of Civil Procedure 26.

H5R also argues that Moore’s designation and reports on construction costs cure its failure to designate Moore on causation or disclose his causation opinions. Doc. 22, at p. 52. H5R recites Moore’s qualifications on construction costs with no mention of any experience relevant to causation. *Id.* H5R fails to differentiate between Moore’s testimony on causation and on construction costs. Even if Moore’s testimony on construction costs was admissible, the District Court was free to strike his testimony on causation. While there was evidence that Moore was unqualified to give opinions on causation or construction, he was struck due to the violation of Rule 26. Thus, his designation and qualifications on construction were immaterial. The District Court did not abuse its discretion in finding that Moore’s designation failed to comply with Rule 26, warranting exclusion.

C. *The District Court Correctly Determined that the Four Factors Weighed in Favor of Excluding Moore's Testimony.*

When evaluating whether a violation of Rule 26 is harmless the Court considers four factors: (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. *Texas A&M Rsch. Found. v. Magna Transp., Inc.*, 338 F.3d 394, 402 (5th Cir. 2003). Even where a district court abuses its discretion, the Court will not reverse an evidentiary ruling absent substantial prejudice. *Id.* at 403.

In consideration of the factors, H5R cites the opinion *Galvez v. KLLM Transp. Servs. LLC*, to argue Moore's causation opinions should not have been excluded. 575 F. Supp. 3d 748, 757 (N.D. Tex. 2021); Doc. 22, at pp. 52-53. However, unlike the disclosure in *Galvez*, Moore's designation provided no indication that he would opine on causation, and H5R has admitted that Moore's designation did not encompass causation opinions. ROA.1774; Doc. 22, at pp. 49-51. As appropriate, and within the District Court's discretion, analysis of the four factors in this case necessitated a different result.

The first factor is how important the evidence is, and the District Court held this factor weighed in favor of exclusion. ROA.1736. In its objection, H5R did not specifically address whether the evidence was important but appeared to agree that it was duplicative or of minimal importance. ROA.1776. However, without

explanation, H5R concluded that the factor weighed against exclusion. ROA.1776. H5R's argument on appeal is a verbatim recitation of its Objection. If the evidence *was* important—as Judge Fitzwater concluded it was in *Galvez*—the factor would weigh *against exclusion*. Here, the District Court properly concluded that since the evidence *was not* important that the factor weighed *in favor of exclusion*. ROA.1736. Thus, H5R failed to show that the first factor was weighed improperly.

In its objection, H5R argued that Scottsdale was not prejudiced by the substance of Moore's testimony and agreed with Magistrate Judge Horan's finding that the testimony was duplicative or of minimal importance. ROA.1776. On appeal, H5R argues again that this factor weighs against exclusion because Scottsdale was not prejudiced since Scottsdale elicited the testimony. Doc. 22, at p. 54. H5R fails to address how the facts relied on by the District Court were considered improperly. The District Court found prejudice to Scottsdale after considering whether its case-in-chief was severely impacted and whether its trial preparation was substantially prejudiced. ROA.1736-37. The District Court correctly recognized that H5R originally alleged property damage caused by snow and ice or a broken pipe before changing the alleged cause of loss to hail in its response to summary judgment. ROA.1737. The District Court considered and agreed that allowing H5R to use the undisclosed testimony would have forced Scottsdale to "face[] a newly alleged cause of loss and new opinions about the

alleged damage deep into the case” after discovery had closed. ROA.845, 1737. H5R’s brief failed to address the reasoning of the District Court and similarly failed to demonstrate how the factor was weighed improperly.

Turning to the third factor, the possibility of curing the prejudice with a continuance, the District Court found this was the only factor that weighed against excluding the evidence because the District Court had vacated the remaining deadlines. ROA.1737. Nonetheless, as Scottsdale expended time and expense conducting discovery on the properly disclosed opinions, it would have been prejudiced by a continuance of the trial that should necessarily include an opportunity to conduct discovery on the newly-disclosed opinions. Additionally, Scottsdale would have had to incur the expenses of supplemental expert reports, new depositions, and additional discovery on the new opinions, and such prejudice would not have been cured by a trial continuance.

The fourth factor—H5R’s excuse for the nondisclosure—was weighed against H5R because the only excuse offered was that Moore was not required to give opinions on causation, and Scottsdale elicited the testimony on its own accord. ROA.1737-38. The District Court was not persuaded because H5R presented Moore as a causation expert and relied on his opinions at summary judgment. ROA.1738. On appeal, H5R admits that it used Moore’s testimony in its Motion for Summary Judgment response, but says it also used other evidence. Doc.

22, at p. 55. As H5R confirmed its use of the evidence in summary judgment, the District Court's finding that the factor weighed in favor of exclusion was correct.

D. *Any Error in Excluding Moore's Testimony was Harmless as Summary Judgment was Appropriate Even with Consideration of Moore's Opinions*

H5R has failed to show that the District Court abused its discretion in striking Moore's testimony. Even if this Court finds an abuse of discretion, the District Court's decision should be overturned only if the abuse affected H5R's substantial rights. H5R fails to argue its substantial rights were affected. To the contrary, H5R repeatedly proclaims that Moore's testimony only agreed with other evidence in the record. Doc. 22, at p. 48, 51; ROA.1772-75. If this is true, then H5R was free to use the other versions of the same evidence and Moore's exclusion did not affect H5R's substantial rights.

More critically, even if Moore's opinions were admitted *in their entirety*, H5R still has no evidence that the hail damage occurred while Scottsdale insured the Property. The largest hail event—with hail stones over twice the diameter of any event identified by H5R in the prior policy periods—occurred in May 2011 and seven years before Scottsdale insured the Property. ROA.483 ¶ 8, ROA.645. Moore testified that he did not know when the hail damage occurred, that he could not say whether it occurred in May 2011, and that he had no reason to dispute Scottsdale's expert's opinion that it was more likely than not the damage occurred

in May of 2011. ROA.882 p. 46:2-20, ROA.914-15 pp. 132:17-133:19. As the District Court noted, “assuming Mr. Moore’s testimony was permitted, he too fails to link the alleged damage to one of the hail events that H5R identified from the CoreLogic report.” ROA.1756.

It was H5R’s burden to prove a covered loss *during the policy period*. Whether or not Moore’s opinions were admitted, the District Court’s ruling on Scottsdale’s Motion for Summary Judgment would stand. Like the rest of the summary judgment evidence put forth by H5R, Moore’s testimony failed to create a fact issue that a covered loss occurred during the policy period. Thus, even if admitted, Moore’s testimony would not have substantially influenced the outcome of the case. Therefore, any error was harmless as, even if admitted, Moore’s testimony was insufficient to support a jury finding of liability.

CONCLUSION

The District Court correctly overruled H5R’s objections to Scottsdale’s summary judgment evidence as set forth in Sections I and II. The District Court correctly entered summary judgment in favor of Scottsdale on H5R’s claims as set forth in Sections III-VII. The District Court also correctly granted Scottsdale’s Motion to Strike H5R’s expert Terry Moore as set forth in Section VIII. Thus, the District Court judgment in Scottsdale’s favor should be affirmed.

Respectfully submitted,

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INSURANCE COMPANY**

CERTIFICATE OF SERVICE

I, Patrick M. Kemp, hereby certify that on August 15, 2025, an electronic copy of Appellee Scottsdale's Brief was served by notice of electronic filing via this Court's CM/ECF system upon Appellant H5R.

Upon notification that the electronically-filed Brief has been accepted as sufficient, and upon the Clerk's request, seven (7) paper copies of this Brief will be submitted to the Clerk. See 5th Cir. R. 25.2.1; 5th Cir. R. 31.1; 5th Cir. CM/ECF filing standard E(1).

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1. This brief complies with the type volume limit of Fed. R. App. P. 32(a)(7)(B) because it contains 12,930 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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