THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EUGENE VERMILLION and WENDY VERMILLION, Plaintiffs, v. STATE FARM FIRE AND CASUALTY COMPANY, Defendant.	)	Case No. 24-CV-1066-D

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND BRIEF IN SUPPORT

Andrew J. Morris, OBA #31658
Peyton S. Howell, OBA #33917
McAfee & Taft, a Professional Corporation
8th Floor, Two Leadership Square
211 North Robinson
Oklahoma City, OK 73102
Telephone: (405) 235-9621
Facsimile: (405) 235-0439
andrew.morris@mcafeetaft.com
peyton.howell@mcafeetaft.com

Attorneys for Defendant State Farm Fire and Casualty Company

MOTION

Pursuant to Federal Rule of Civil Procedure 56, Defendant State Farm Fire and Casualty Company ("State Farm"), respectfully moves the Court for summary judgment as to Plaintiffs' sole claim for breach of contract. In support, State Farm states as follows:

BRIEF IN SUPPORT

INTRODUCTION AND BACKGROUND

Plaintiffs allege that State Farm owes them additional benefits under a homeowner's policy for damages to their home from a wind and hail storm in May of 2024. After Plaintiffs made their insurance claim, State Farm inspected Plaintiffs' property and observed minor hail damage to the soft-metal accessories but did not observe damage to shingles on Plaintiffs' roof. State Farm also observed still-present damages from a 2015 storm and insurance claim that had not been repaired. State Farm estimated the covered damage at $1,214.88, which fell below Plaintiffs' $2,000 deductible.

Plaintiffs then retained Coppermark Public Adjusters, which submitted photos and a repair estimate calling for a replacement of Plaintiffs' entire roof. Coppermark's estimate included no narrative or explanation connecting the additional costs to a covered event (i.e. hail damage within the policy period). Still, State Farm performed a detailed review of the estimate and photos, but State Farm reiterated after consideration of this additional submission that a roof replacement was not warranted due to the lack of covered hail damage present at the property. In light of the additional information submitted by Coppermark, State Farm did revise its total estimate to $2,115—above Plaintiffs' deductible. However, no payment to Plaintiffs was owed until they completed repairs to

their home due to the policy-allowed holdback of depreciation. All other damages identified by Coppermark were (i) regular wear and tear or (ii) still-present damage from the 2015 storm and claim—both of which were excluded from coverage under the terms of Plaintiffs' insurance policy.

Plaintiffs then filed this lawsuit. However, Plaintiffs have no competent evidence to support their contract claim. Specifically, Plaintiffs have failed to designate any expert witnesses who can opine regarding the cause of alleged damages to Plaintiffs' property—which is necessary for Plaintiffs to prove that State Farm breached the terms of the insurance policy. As such, State Farm is entitled to summary judgment on Plaintiffs' sole claim for breach of contract.

STATEMENT OF UNDIPSUTED MATERIAL FACTS[1]

A. Plaintiffs' insurance policy

1. State Farm issued a homeowners' insurance policy (the "Policy") to Plaintiffs for the period of August 16, 2023, to August 16, 2024, for 4607 Bridle Ridge Rd, Tuttle, OK 73089 (the "Subject Property). **Ex. 1**, Policy, at Vermillion-SF 0003.

2. The Policy was in effect on the claimed date of loss: May 6, 2024. *Id.* It included a $2,000 deductible. *Id.* at Vermillion-SF 0004.

3. The Policy provided coverage "for accidental direct physical loss to the

[1] Abbreviated herein as "UMF." Because Plaintiffs assert only a contract claim, with no accompanying claim for breach of the duty of good faith and fair dealing, the UMF section does not include every action taken during handling of the insurance claim—because they are not relevant to the specific argument being made by State Farm in this motion.

property . . . unless the loss is excluded or limited . . . ." *Id.* at Vermillion-SF 0030. But coverage was not provided for damage caused by "wear, tear, decay, marring, scratching, deterioration, inherent vice, latent defect, or mechanical breakdown." *Id.* at Vermillion-SF 0033.

4. The Policy is limited to "loss[es] under Section I [i.e, property coverages] . . . that occur[] during the period this policy is in effect." *Id.* at Vermillion-SF 0047.

5. The Policy stated that "[i]n case of loss under this policy, [State Farm] will pay, subject to specified policy limits, only that part of the amount of the loss that exceeds the deductible amount in the Declarations. *Id*. at Vermillion-SF 0023 (emphasis omitted).

6. The Policy also states that only "the actual cash value of the damaged part of the property" will be paid "until actual repair or replacement is completed." *Id.* at Vermillion-SF 0036 (emphasis omitted). Once the "repair[s] or replacement[s are] actually completed," the insured can be paid "the covered additional amount [the insureds] actually and necessarily spend to repair or replace the damaged part of the property," subject to any other applicable policy provisions. *Id.* (emphasis omitted).

7. The Policy defines "actual cash value" as "the value of the damaged part of the property at the time of loss, calculated as the estimated cost to repair or replace such property, less a deduction to account for pre-loss depreciation." *Id.* at Vermillion-SF 0019.

8. Plaintiffs agree that an insurance policy is governed by its terms, that it sets forth what is governed under the policy, and that insurance policies have exclusions. *See* **Ex. 2**, W. Vermillion Dep., at 130:4-20; **Ex. 3**, E. Vermillion Dep, at 84:12-85:21.

B. Plaintiffs' alleged loss and insurance claim

9. On May 8, 2024, Plaintiff Wendy Vermillion made an insurance to State Farm for storm damage to the Subject Property. *See* **Ex. 4**, Claim File History, at Vermillion-SF 0093-94; **Ex. 2**, W. Vermillion Dep., at 45:1-6. Mrs. Vermillion reported to State Farm that the storm had occurred on May 6, 2024. *See* **Ex. 4**, Claim File History, at Vermillion-SF 0088-89; **Ex. 2**, W. Vermillion Dep., at 44:20-45:6.

10. The next day, adjuster Justin Jergenson called Mrs. Vermillion to discuss the claim. *See* **Ex. 4**, Claim File History, at Vermillion-SF 0088-89. Mrs. Vermillion reported that wind and/or hail had damaged the roof and gutters of the Subject Property. *See id.*; **Ex. 2**, W. Vermillion Dep., at 61:1-6.

11. Less than one week later, Hancock Claim Consultants ("Hancock") inspected the Subject Property for State Farm—including the "entirety of the roof system . . . for wind related damages," and "[h]ail test squares . . . on each directional slope," but there was no wind- or hail-caused damages observed to the shingles. **Ex. 5**, Hancock Report, at Vermillion-SF 0549-0550. Hancock *did* observe storm-caused damage to some of the soft metal roof components, gutters, downspouts, and fence. *Id.*

12. On May 24, 2024, Mr. Jergenson reviewed the report and photographs from Hancock's inspection and noted:

> [O]nly minor damage to soft metal vents, gutters and fence. A lot of the damage found looks to have been documented in previous claim in 2015. No hail damage was found to the shingles. Shingles look to be very worn from natural wear and tear. [Jergenson] agrees with Hancock findings.

Ex. 4, Claim File History, at Vermillion-SF 0088 (cleaned up).

13. Accordingly, State Farm determined that Plaintiff's *covered* damages included replacement of rain caps, pipe jacks, and valley metal; it also estimated for debris removal and for three hours of roofing labor. *See* **Ex. 6**, State Farm Estimate (May 29, 2024), at Vermillion-SF 0598-0605. The total of State Farm's estimate ($1,214.88) did not exceed Plaintiffs' deductible of $2,000.00. *See id.* at Vermillion-SF 0600; *see also* **Ex. 4**, Claim File History, at Vermillion-SF 0087 (recounting Mr. Jergenson's outreach and explanation to Plaintiffs); **Ex. 2**, W. Vermillion Dep., at 84:1-10; **Ex. 7**, Letter from Jergenson to Vermillion (May 29, 2024), at SDT-Coppermark 0026.

14. On September 12, 2024, State Farm received an estimate for repairs from a public adjuster retained by Plaintiff—Coppermark Public Adjusters. *See* **Ex. 8**, Coppermark Estimate, at SDT-Coppermark 0083-0094; **Ex. 4**, Claim File History, at Vermillion-SF 0082. Coppermark's estimate called for replacement of the entire roof—a cost, with additional items, of $56,701.15. **Ex. 8**, Coppermark Estimate, at SDT-Coppermark 0093. It also contained an estimate of $2,779.36 for pressure spraying Plaintiffs' fence. *See id.* at SDT-Coppermark 0090.[2]

15. At the same time, Coppermark produced a "Proof of Loss" statement and a photo report. *See* **Ex. 9**, Coppermark Proof of Loss, at SDT-Coppermark 0014; **Ex 10**, Coppermark Photo Report, at SDT-Coppermark 0095-185; **Ex. 4**, Claim File History, at Vermillion-SF 0082.

16. Adjuster Melissa Jennings reviewed Coppermark's photos and estimate,

[2] The Coppermark estimate's combined total of $59,480.51 is Plaintiffs' damages model in this case. *See* Pet. ¶ 15(b), ECF No. 1-1; **Ex. 2**, W. Vermillion Dep., at p. 139:6-25.

performing a line-by-line "reconciliation" with State Farm's pre-existing estimate. **Ex. 4**, Claim File History, at Vermillion-SF 0082-0085. As to the roof, she determined that State Farm's prior decision was correct and that roof replacement was not warranted. *See id*. Based on the information and photos provided by Coppermark, Ms. Jennings added repairs of five window screens, a metal exterior door, and a door lockset/deadbolt to the pre-existing State Farm estimate. *See* **Ex. 11**, State Farm Estimate (Sept. 12, 2024), at Vermillion-SF 0324-326.

17. The updated State Farm estimate's replacement cost value was $2,115.00 *See id*. at Vermillion-SF 0322. After deducting $691.90 in depreciation and Plaintiffs' $2,000 deductible, Plaintiffs were not owed any payment at the time. *See id.* But $115.00 in replacement cost benefits were available to Plaintiffs if the estimated-for repairs and replacement were completed in-line with the terms of the Policy. *See id.*; *see also* **Ex. 1**, Policy, at Vermillion-SF 0036.

18. Plaintiffs have not made any of the repairs or replacements included on State Farm's September 2024 estimate. *See* **Ex. 2**, W. Vermillion Dep., at p. 121:1-16; **Ex. 3**, E. Vermillion Dep, at p. 79:15-80:2.

C. <u>The parties' expert and other witnesses</u>

19. State Farm retained expert witness, Derek VanDorn, who inspected the Subject Property on May 27, 2025. *See* **Ex. 12**, VanDorn Report, at VANDORN-00001.

20. Mr. VanDorn did not observe any hail or wind damage to the roof's shingles. *See id.* at VANDORN-00023 to -00024. He observed minimal hail damage to soft metal roof components, but he opined that the components can be removed and replaced. *See id.*

21. Mr. VanDorn further opined that denting of gutters and downspouts was an accumulation of small hail events which appears to predate Plaintiffs' 2015 property damage claim (and, therefore, also Plaintiffs' claim for damage from the May 2024 storm at issue in this lawsuit). *See id*. at VANDORN-00024.

22. Mr. VanDorn opined that replacement of Plaintiffs' roof was not warranted. *See id*.

23. Plaintiffs' deadline to disclose expert witnesses and submit expert reports was July 3, 2025. *See* Scheduling Order, ECF No. 15. Plaintiffs did not disclose any expert witnesses. Nor did Plaintiffs transmit any expert reports to Defendant's counsel.

24. In their general witness list filed two weeks later, Plaintiffs listed a "Corporate Representative [of] Coppermark Consulting Corps., LLC." *See* Pls.' Final Witness & Ex. List 6-8, ECF No. 20. Therein, Plaintiffs indicated that "Coppermark was not retained or employed to provide expert testimony in this case." *Id.* at 7 (cleaned up).

25. Coppermark has a contingency payment agreement with Plaintiffs whereby Coppermark is to receive 15% of any award to Plaintiffs. *See* **Ex. 13**, Coppermark Contract, at SDT-Coppermark 0010-11.

26. Plaintiffs also listed Jakes Morris of Average Joes Construction on their witness list. *See* Pls.' Final Witness & Ex. List 8-9, ECF No. 20. Plaintiffs indicated that "[Mr.] Morris was not retained or employed to provide expert testimony in this case." *Id.* at 9 (cleaned up).

E. Miscellaneous undisputed facts

27. Plaintiffs' originally believed they replaced their roof in 2015, but they actually did so in 2012—i.e., before the 2015 storm and claim occurred. *See* **Ex. 14**, 2012 Roof Replacement, at SDT-AT Roofing 0001 (showing "October 8, 2012" as date roof was replaced); *see also* **Ex. 3**, E. Vermillion Dep., at 95:7-18 (identifying when the 2012 repair information was located and produced mid-litigation).

28. Plaintiffs are not claiming their fence is damaged by the storm. *See* **Ex. 3**, E. Vermillion Dep., at 79:18-80:2

STANDARD OF DECISION

Summary judgment is proper when "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). The determination as to whether facts are "material" must be made by referencing the substantive law applicable to the case. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* "An issue is 'genuine' if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Adler v. Wal-Mart Stores, Inc*., 144 F.3d 664, 670 (10th Cir. 1998) (citing *Anderson*, 477 U.S. at 252).

The non-movant must present more than a mere "scintilla" of evidence to satisfy its burden of demonstrating that the dispute is "genuine." *Anderson*, 477 U.S. at 252. "[T]he nonmovant has a burden of doing 'more than simply showing there is some metaphysical doubt as to the material facts . . . . Rather, the relevant inquiry is whether the evidence

presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Neustrom v. Union Pac. R.R.*, 156 F.3d 1057, 1066 (10th Cir. 1998). The "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

ARGUMENTS AND AUTHORITIES

A. State Farm has not breached the Policy.

Plaintiffs allege that "State Farm breached the insurance contract by failing to pay for the full cost necessary to repair or replace damages to [Plaintiffs'] Property that were the result of a loss covered by the Policy." Pet. ¶ 15(a), ECF No. 1-1. Under, Oklahoma law, a party alleging breach of contract must establish "1) formation of a contract; 2) breach of contract; and 3) damages as a direct result of the breach." *Teel v. State Farm Fire & Cas. Co*., 645 F. Supp. 3d 1242, 1246 (W.D. Okla. 2022). When an alleged breach is based on an insurer's failure to pay benefits owed, the insured bears the burden of showing that the loss is covered by the insurance policy. *See id.* Summary judgment should therefore be granted to an insurer when the undisputed facts show that the insured has failed to establish a covered loss. *See id.*

Here, there is no evidence that State Farm breached the insurance contract. The Policy covers accidental direct physical loss, including hail and wind damage. *See* **UMF No. 3**. However, the Policy excludes damage caused by "wear, tear, decay, marring,

scratching, deterioration, inherent vice, latent defect, or mechanical breakdown." *Id.*; **Ex. 1**, Policy, at Vermillion-SF 0033. The Policy also excludes any damage which occurred outside the Policy Period. *See* **UMF No. 4**.

Further, State Farm need only pay any covered damage amounts that exceed Plaintiffs' deductible. *See* **UMF No. 5.** And, when issuing payment, State Farm is only required to pay the actual cash value—which withholds the amount of pre-loss depreciation—until the insured actually makes covered repairs and replacements (at which point, upon provision of documentation of such repairs or replacements to State Farm, replacement cost benefits are paid—bringing the total paid to the actual cash value amount less the applicable deductible). *See* **UMF Nos. 6-7.**

Here, Hancock inspected Plaintiffs' property for hail and wind damage. *See* **UMF No. 11**. A State Farm adjuster (Mr. Jergenson) reviewed Hancock's photos and report, then he issued an estimate for the covered damages observed from Hancock's inspection. *See* **UMF Nos. 12-13.** Replacement of Plaintiffs' roof was not called for because the observed damages either were wear/tear/deterioration or still-unrepaired damages from the 2015 storm—both of which are excluded by the Policy's terms. *See* **UMF Nos. 12-13.** Because the covered damage identified totaled $1,214.88—which is an amount below Plaintiffs' $2,000.00 deductible—no payment was owed or issued. *See* **UMF No. 13**.

Subsequently, State Farm received photos and a contrasting damages estimate from Coppermark Public Adjusters which called for the replacement of Plaintiffs' entire roof and various other items. *See* **UMF No. 14**. State Farm adjuster Melissa Jennings performed a detailed reconciliation of these new materials, largely agreeing that the prior-made claim

decisions were correct—i.e., that some of the claimed damages were from wear and tear; that some of the claimed damages were left over unrepaired from the 2015 storm; and that roof replacement was not warranted by damages from the at-issue May 2024 storm. *See* **UMF No. 16**. Ms. Jennings revised the State Farm estimate to add repairs of five window screens, a metal exterior door, and a door lockset/deadbolt to the pre-existing State Farm estimate. *See* **UMF No. 16**. During litigation, Plaintiffs produced documentation confirming State Farm's pre-litigation analysis: Plaintiffs never repaired the damages from 2015, which were still present at the Subject Property in 2024. *See* **UMF No. 27.**

As part of its defense of Plaintiffs' claims in litigation, State Farm hired an expert, Derek VanDorn, to inspect Plaintiffs' property. **UMF No. 19**. As to the roof, Mr. VanDorn reached the same conclusion as State Farm—no hail or wind damage observed from the at-issue storm, so a total roof replacement was not warranted. **UMF Nos. 20, 22.** Mr. VanDorn also agreed with State Farm that damage to the gutters was present during the 2015 claim—meaning it was not a result of the at-issue May 2024 storm either. **UMF No. 21**.

Accordingly, State Farm respectfully submits that summary judgment in its favor is appropriate on Plaintiffs' breach of contract claim. State Farm has not breached the Policy in any respect. State Farm appropriately applied the Policy's terms in finding covered damage to Plaintiffs' property. Additionally, State Farm's applications of the wear and tear exclusion and policy period exclusion are straightforward, and its positions are supported by Hancock and Mr. VanDorn. Further, even after revision to State Farm's estimate based on Coppermark's submission, no payment was owed to Plaintiffs based on the Policy's deductible and its provision regarding payment of only actual cash value until repairs and

replacements actually are completed by Plaintiffs. Plaintiffs have not, and they cannot, advance any competent, admissible evidence demonstrating any dispute as to any material fact and summary judgment is proper.

B. Plaintiffs' claim is not supported by viable causation evidence.

Rule 26(a)(2)(A) requires disclosure of the identities of any expert witnesses and, to avoid unfair surprise, Rule 26(a)(2)(B) further requires parties to disclose the substance of experts' opinion testimony and the bases for such opinions. While there is an exception to the report requirement in Rule 26(a)(2)(B) for non-retained experts such as treating physicians, there is no corresponding exception to Rule 26(a)(2)(A)'s disclosure requirement. Indeed, "[u]nder Rule 26 . . . , a party must disclose any individual who plans to provide expert testimony, *regardless of whether the individual is retained or specially employed*." *Khial v. Progressive Ins. Co.*, No. 2:12cv167, 2014 WL 4922600, at *3 (D. Utah Sept. 30, 2014) (emphasis added). Unlike an expert witness, "a lay witness may not proffer opinion testimony based on scientific, technical, or other specialized knowledge." *Id*. (quotations omitted). Thus, where expert testimony is necessary to prove any element of a claim, a party's failure to disclose an expert is fatal to its claim. *See id*. (granting summary judgment on a breach of contract claim because the plaintiff failed to identify any expert witness to opine regarding causation); *cf. Harris v. Remington Arms Co.*, 398 F. Supp. 3d 1126, 1129 (W.D. Okla. 2019) (explaining that when a claim required expert testimony, it could not survive summary judgment once no expert testimony was available), *aff'd* 997 F.3d 1107, 1114 (10th Cir. 2021).

Here, Plaintiffs have failed to designate any expert witnesses. Thus, they have no

expert witness who can testify that the Subject Property was damaged by hail during the at-issue policy period such that some amount of payment is owed to them under the Policy's terms. **UMF Nos. 3-7.** This failure is critical to the livelihood of Plaintiffs' claim *See Nesavich v. Auto-Owners Ins. Co.*, No. 16-cv-1493, 2018 WL 3729513, at *3-6 (D. Colo. Aug. 6, 2018) (granting summary judgment to insurer on breach of contract claim for hail damage to a roof as a result of excluding the insureds' witness testimony on the cause of roof damage). Without evidence that the claimed roof damage and other damages are caused by storm-related damage covered under the Policy or evidence that eliminates other possible causes for the alleged damages, the jury would be forced to rely on impermissible speculation. *See id*. at *6. The Tenth Circuit and district courts within the Tenth Circuit have granted and upheld summary judgment in favor of the defendant where there is a lack of competent causation evidence. *E.g.*, *Sufside Japanese Auto Parts & Serv. v. Berkshire Hathaway Homestate Ins. Co.*, No. 18-CV-487-TCK-FHM, 2019 WL 5538537, at *2-3 (N.D. Okla. Oct. 25, 2019) (entering summary judgment for insurer regarding hail roof claim where the testimony of plaintiffs' expert witness and contractor concerning the date of loss were excluded as unreliable). This Court should do the same.

Plaintiffs have confirmed that the Coppermark Estimate is their measure of claimed damages in this case. *See supra* note 2. However, no employee of Coppermark has been designated as an expert in this case. **UMF No. 23**. Additionally, the Coppermark Estimate does not include an opinion on whether Plaintiffs' loss was covered under the Policy; nor does it opine as to the cause of the alleged loss. *See* **Ex. 8**, Coppermark Estimate; *see also Underwood v. Allstate Fire and Casualty Ins. Co.*, No. 4:16-CV-00962-O-BP, 2017 U.S.

Dist. LEXIS 165380, at *3 (N.D. Tex. Sept. 19, 2017) ("An estimate is only a description of existing damage, which could have resulted from any number of events that occurred prior to the date of the estimate, including another storm on a date that was not covered by the insurance policy at issue . . . [g]enerically noting a disparity in monetary estimates does not provide the required particularity needed for allocation or causation."). Therefore, Plaintiffs have no evidence with which to establish their alleged damages were a covered loss.

Because Plaintiffs have not designated any Coppermark employee—or anybody else—as an actual expert who will testify as such in this matter—whether retained or non-retained—any testimony from a Coppermark representative will be limited to that of a lay witness. And, under Federal Rule of Evidence 701, lay witness testimony in the form of an opinion is limited to that "(a) rationally based on the witness's perception"; "(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue"; and "(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." *Revocable Tr. Agreement of Randall S. Ellis and Teri L. Ellis v. State Farm Fire & Cas. Co.*, 614 F. Supp. 3d 963, 984 (N.D. Okla. 2022). Accordingly, none of Plaintiffs' listed witnesses—i.e., either a representative of Coppermark or contractor Jack Morris (*see* Pls.' Final Witness & Ex. List 6-8,, ECF No. 20)—can testify that damages to Plaintiffs' roof were from a storm during the policy period, and not by other prior events or simply wear and tear.

As one example, in *Wilson v. State Farm Fire & Casualty Co*., Judge Claire Eagan held that the testimony of a public adjuster designated as a non-retained expert instead had

to function as a lay witness and, as such, he was precluded from testifying that certain damage was caused by a particular storm because he had "no personal knowledge as to the cause of the damage" and because "such causation testimony crosses over into expert testimony within the meaning of Rule 702." No. 21-CV-0062-CVE-SH, 2022 WL 1555816, at *13 (N.D. Okla. May 17, 2022). The witness also was precluded from testifying that certain damage was covered under the plaintiff's insurance policy. *See id*. (stating that the public adjuster could "not testify definitively that, based on the language and construction of the subject policy, plaintiffs' damage [was] covered"). This Court should follow suit.

Finally, even if a Coppermark representative was allowed to opine on causation despite Plaintiffs' non-disclosure, they should not be allowed to do so when they stand to gain financially from a verdict in Plaintiffs' favor by recovery of a percentage of such a recovery. *Cf. Midtown Invs., LP v. Auto-Owners Ins. Co.*, 641 F. Supp. 3d 1066, 1075-76 (D. Colo. Nov. 17, 2022) (excluding a non-retained expert from testifying when he stood to recover a percentage of any amount awarded to the plaintiffs).

As such, Plaintiffs have no competent expert witness evidence to support their claim that State Farm is obligated under the Policy to pay for a total replacement of Plaintiffs' roof, or that State Farm underpaid Plaintiffs in any way. State Farm is therefore entitled to summary judgment as a matter of law.

CONCLUSION

For the foregoing reasons, State Farm requests this Court enter summary judgment in its favor on Plaintiffs' sole claim for breach of contract.

Respectfully submitted,

s/ Andrew J. Morris
Andrew J. Morris, OBA #31658
Peyton S. Howell, OBA #33917
MCAFEE & TAFT A PROFESSIONAL CORP.
Eighth Floor, Two Leadership Square
211 North Robinson Ave.
Oklahoma City, OK 73102
Telephone: (405) 235-9621
Facsimile: (405) 235-0439
andrew.morris@mcafeetaft.com
peyton.howell@mcafeetaft.com

Attorneys for Defendant State Farm Fire and Casualty Company