

STATE OF NEVADA
DECLARATION OF VALUE FORM

Electronically Filed
Mar 12 2021 02:33 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

1. Assessor Parcel Number(s)
a. 164-14-414-014
b. _____
c. _____
d. _____

2. Type of Property:
a. ☐ Vacant Land b. ☒ Single Fam. Res.
c. ☐ Condo/Twnhse d. ☐ 2-4 Plex
e. ☐ Apt. Bldg f. ☐ Comm'l/Ind'l
g. ☐ Agricultural h. ☐ Mobile Home
i. Other _____

FOR RECORDERS OPTIONAL USE ONLY
Book _____ Page _____
Date of Recording: _____
Notes: _____

3. a. Total Value/Sales Price of Property: \$ 3,000,000.00
b. Deed in Lieu of Foreclosure Only (value of property) \$ _____
c. Transfer Tax Value \$ 3,000,000.00
d. Real Property Transfer Tax Due: \$ 15,300.00

4. If Exemption Claimed

- a. Transfer Tax Exemption, per NRS 375.090, Section _____
b. Explain Reason for Exemption: _____

5. Partial Interest: Percentage being transferred: 100%

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature _____ Capacity agent
Signature _____ Capacity _____

SELLER (GRANTOR) INFORMATION
(REQUIRED)

Print Name: Lyons Development, LLC
Address: 10120 W Flamingo Road Ste. 4333
City: Las Vegas
State: NV Zip: 89147

BUYER (GRANTEE) INFORMATION
(REQUIRED)

Print Name: Joseph R Folino and Nicole Folino
Address: 42 Meadowhawk Lane
City: Las Vegas
State: NV Zip: 89135

COMPANY/PERSON REQUESTING RECORDING (Required if not Seller or Buyer)

Print Name: Equity Title of Nevada Escrow No.: 17840471-084-TGR
Address: 2475 Village View Dr., Suite 250
City, State, Zip: Henderson, NV 89074

(AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED)

EXHIBIT 8



INVOICE

Rakeman Plumbing, Inc.
4075 Losee Road
N. Las Vegas, NV 89030
Phone: (702) 642-8553
Fax: (702) 399-1410

INVOICE NO
232809

CUST UPONOR
5925 148TH ST WEST
APPLE VALLEY, MN 55124

SITE SWANSON RESIDENCE
42 MEADOWHAWK LN
Las Vegas, NV 89135

ACCOUNT NO	INVOICE DATE	TERMS	DUE DATE		PAGE
UPONOR	5/23/2017	Net 30	6/22/2017		1

ORDER 13382, PO

RESOLUTION RMA # 747000

TECH FOUND 3/4 UPONOR TEE LEAKING ON THE HOT SIDE OF THE PLUMBING SYSTEM.

CUT OUT LEAKING FITTING AND REPLACE WITH NEW FITTING AND RESTORE WATER WITH NO FURTHER LEAKS.

RAKEMAN HAD TO REMOVE TOE KICKS ON BUILT IN CABINETS IN CLOSET, CUT OUT WET DRYWALL, CARPET PAD AND PLACE EQUIPMENT TO DRY OUT CLOSET.

AFTER EVERYTHING IS DRY RAKMAN REPAIRED ALL DRYWALL TO MATCH EXISTING TEXTURE & COLOR AND REPAIRED ALL DAMAGED BUILT IN CLOSETS THE RESET ALL CARPET.

ITEM NO	QUANTITY	DESCRIPTION	UNIT PRICE	EXTENDED
BID ACCEPTED	1	BID ACCEPTED	2496.00	2,496.00*

Your Business is Appreciated!

* means item is non-taxable



INVOICE

INVOICE NO
232809

Rakeman Plumbing, Inc.
4075 Losee Road
N. Las Vegas, NV 89030
Phone: (702) 642-8553
Fax: (702) 399-1410

CUST UPONOR
5925 148TH ST WEST
APPLE VALLEY, MN 55124

SITE SWANSON RESIDENCE
42 MEADOWHAWK LN
Las Vegas, NV 89135

ACCOUNT NO	INVOICE DATE	TERMS	DUE DATE			PAGE
UPONOR	5/23/2017	Net 30	6/22/2017			2

TOTAL AMOUNT 2,496.00

EXHIBIT 9



June 9, 2017

Rakeman Plumbing
ATTN: Aaron Hawley
4075 Losee Rd
NORTH LAS VEGAS, NV 89030

Re: Uponor Reference No.: RMA 746512

Dear Mr. Hawley:

I am responding to the claim you submitted under the above referenced RMA number.

Enclosed please find a check in the amount of \$2,496.00 offered by Uponor in full and complete satisfaction of all claims and damages you have or may have relating to the above referenced claim. Be assured that we take these matters seriously and are working to make sure this does not happen again.

Should you require any other information or have any additional questions, please do not hesitate to contact me at (952) 997-5383. Thank you for your assistance.

Sincerely,

Christy Wegner
Claims Coordinator
Christy.Wegner@uponor.com

Enclosure: Check

Uponor North America

Uponor, Inc.
5925 148th Street West
Apple Valley, MN 55124
Tel: (800) 321-4739
Fax: (952) 891-2008
Web: www.uponor-usa.com

Uponor Ltd
2000 Argentinia Road
Plaza 1, Suite 200
Mississauga, ON L5N 1W1
Tel: (888) 994-7726
Fax: (800) 638-9517
Web: www.uponor.ca

JA002021

014805

uponor 5925 148TH STREET WEST, APPLE VALLEY, MN 55124

109098 RAKEMAN PLUMBING Jun 7, 2017 14905

OUR REF NUMBER	INVOICE NUMBER	INVOICE DATE	INVOICE DESCRIPTION	NET AMOUNT
418340	RMA746512	Jun 7, 2017		2,496.00
TOTAL AMOUNT				\$2,496.00

THIS CHECK IS VOID IF ANY OF THE FOLLOWING CONDITIONS ARE MET: 1. THE CHECK IS NOT SIGNED BY THE ISSUING PARTY. 2. THE CHECK IS NOT SIGNED BY THE ISSUING PARTY. 3. THE CHECK IS NOT SIGNED BY THE ISSUING PARTY.

uponor
5925 148TH STREET WEST
APPLE VALLEY, MN 55124

PNC Bank
National Association
Jeannette, PA
60-162/433

014805

Check Date
07-Jun-2017

Check Amount
\$2,496.00

PAY Two Thousand Four Hundred Ninety-Six Dollars And Zero Cents*****

TO THE ORDER OF
RAKEMAN PLUMBING
4075 LOSEE ROAD
NORTH LAS VEGAS, NV 89030
United States

[Signature]

⑈014805⑈ ⑆043301627⑆ 1001149485⑈

JA002022

EXHIBIT 10

Rusty Graf

From: Beissel, Stacey <Stacey.Beissel@uponor.com>
Sent: Wednesday, December 13, 2017 12:39 PM
To: Nicole Folino
Cc: Joe Folino
Subject: Uponor Warranty Claim - RMA 746512 (42 Meadowhawk)
Attachments: 746512_As_Received__2_.JPG; Rakeman_746512_42_meadowhawk_invoice.pdf; 746512_-_payout.pdf

Hi Nicole,

I wanted to thank you for taking the time to speak with me today in regards to the Uponor products currently installed in your home. As discussed, Uponor has identified a limited manufacturing related issue with the tubing samples returned to our office for evaluation and are recommending replacement of all red and blue AQUAPEX tubing currently installed in your home with new Uponor AQUAPEX. It is my understanding that you will be discussing this recommendation with your husband and will be following up with me after the 1st of the year to begin conversations on how we can work together to accomplish this task.

Per your request, below please find the information associated with the initial claim submitted to Uponor in February 2017.

Claimant And Jobsite Information

Claimant Information

Builder/Contractor
rakeman plumbing
aaron hawley
4075 losee rd
NORTH LAS VEGAS, NV 89030
US
aaron@rakeman.com
Ph 702 642 8553
Fax 702 399 1410

Jobsite Information

Residential
aaron hawley
42 meadow hawk ln.
LAS VEGAS, NV 89131
US
aaron@rakeman.com
Ph 702 642 8553

Past Occurrences

Estimated Claim Amount

Past Occurrences

Amount	\$5000 to \$10000
Preferred Reimbursement	Cash
Repairs Complete	No

Installation Information

Application

Contractor Information

Application Plumbing
Recirculation Yes
Recirc Type Timed/On Demand
Failure Location Supply
Location Detail master bed room closet

rakeman plumbing
 aaron hawley
 4075 losee rd
 NORTH LAS VEGAS, NV
 US
 aaron@rakeman.com
 Ph 702 642 8553
 Installing? Yes

Temperature/Pressure

Other Information

Temperature Hot
System Temp Hot 120 F
System Pressure 65 PSI

Present for destructive
Phase of Construction
Builder

Water Source

Customer Comment(s)

Water Source Municipal

tubing split at fitting. Cu

Dates

Est. Installed Date 19-JUN-2013

Failure Date 16-FEB-2017

Product Information

Item Number	Description	Return
Q4751775	ProPEX EP Reducing Tee, 1" PEX x 3/4" PEX x 3/4" PEX	
Problem: tubing split at fitting		
Review Result: No Failure		
F2060750	3/4" Uponor AquaPEX Red, 300-ft. coil	
Problem: tubing split at fitting		
Review Result: Manufacturing		
F3060750	3/4" Uponor AquaPEX Blue, 300-ft. coil	
Problem: tubing split at fitting		
Review Result: Manufacturing		
F1041000	1" Uponor AquaPEX White, 100-ft. coil	
Problem: tubing split at fitting		
Review Result: No Failure		
Q4690756	ProPEX Ring with Stop, 3/4"	
Problem: tubing split at fitting		
Review Result: No Failure		
Q4691000	ProPEX Ring with Stop, 1"	
Problem: tubing split at fitting		
Review Result: No Failure		

Should you have any questions or concerns with the information supplied, please do not hesitate to reach out. My direct contact information is below.

Thank you
Stacey

Uponor

Stacey Beisse!
Warranty Manager
Uponor North America

T +19529978984
M +16512531956

www.uponor-usa.com
www.uponorpro.com

Uponor, Inc.
5925 148th St W
Apple Valley, MN, 55124

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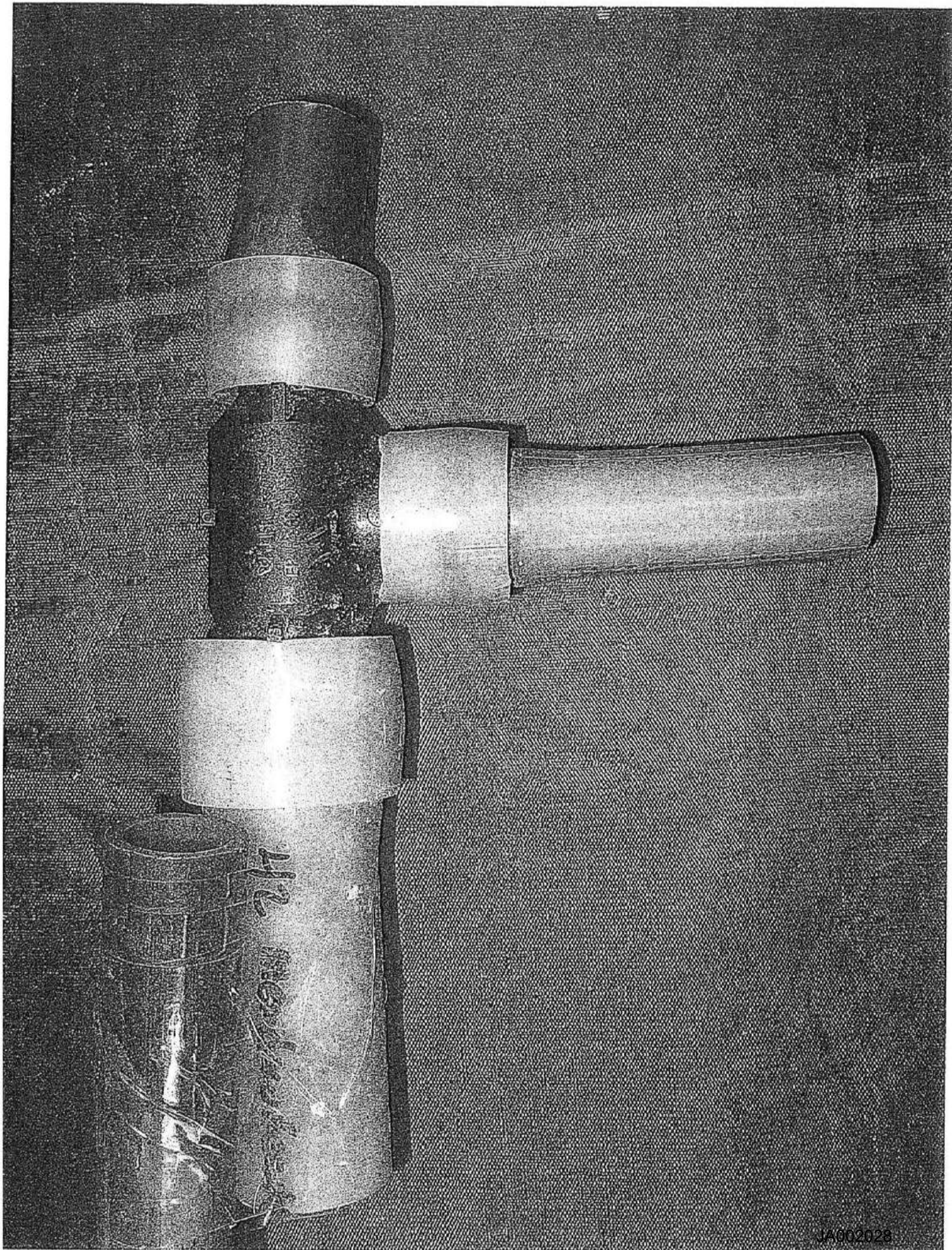


EXHIBIT 11

Rusty Graf

From: Beissel, Stacey <Stacey.Beissel@uponor.com>
Sent: Wednesday, December 13, 2017 12:47 PM
To: Nicole Folino
Cc: Joe Folino
Subject: Uponor Warranty Claim - RMA 748395 (42 Meadowhawk)
Attachments: 748395 As Received (1) (1).JPG; 748395_As_Received__2_ (1).JPG

Hi Nicole,

As requested, the claim information for the most recent claim submitted to Uponor for evaluation (in November 2017) is below:

Claimant And Jobsite Information

Claimant Information

Builder/Contractor
rakeman plumbing
alison brooks
4075 losee rd
NORTH LAS VEGAS, NV 89030
US
alison@rakeman.com
Ph 702 642 8553

Jobsite Information

Single Family
todd watson
42 meadowhawk ave.
LAS VEGAS, NV 89135
US
alison@rakeman.com
Ph 702 642 8553

Estimated Claim Amount

Amount	\$1000 to \$2500
Preferred Reimbursement	Cash

Past Occurrences

Past Occurrences

Past Occurrences Refe

Installation Information

Application

Contractor Information

Application

Plumbing

rakeman plumbing

Recirculation

No

alison brooks

Location Detail

master bath closet below water heater

4075 losee rd

NORTH LAS VEGAS, NV
US

Temperature/Pressure

alison@rakeman.com

Ph 702 642 8553

Installing? Yes

Temperature

Cold

Other Information

System Temp

70 F

System Pressure

65 PSI

Present for destructive

Water Source

Phase of Construction

Builder

Water Source

Municipal

Customer Comment(s)

Dates

Blue pipe split at fitting

Est. Installed Date

15-JUL-2013

Failure Date

07-NOV-2017

Product Information

Item Number	Description	Return
LF4517575	ProPEX LF Brass Sweat Adapter, 3/4" PEX x 3/4" Copper	
Problem: blue tubing split at fitting		
Review Result:		
F3040750	3/4" Uponor AquaPEX Blue, 100-ft. coil	
Problem: blue tubing split at fitting		
Review Result: Manufacturing		

Thank you
Stacey

Uponor

Stacey Beissel
Warranty Manager
Uponor North America

T +19529978984
M +16512531956

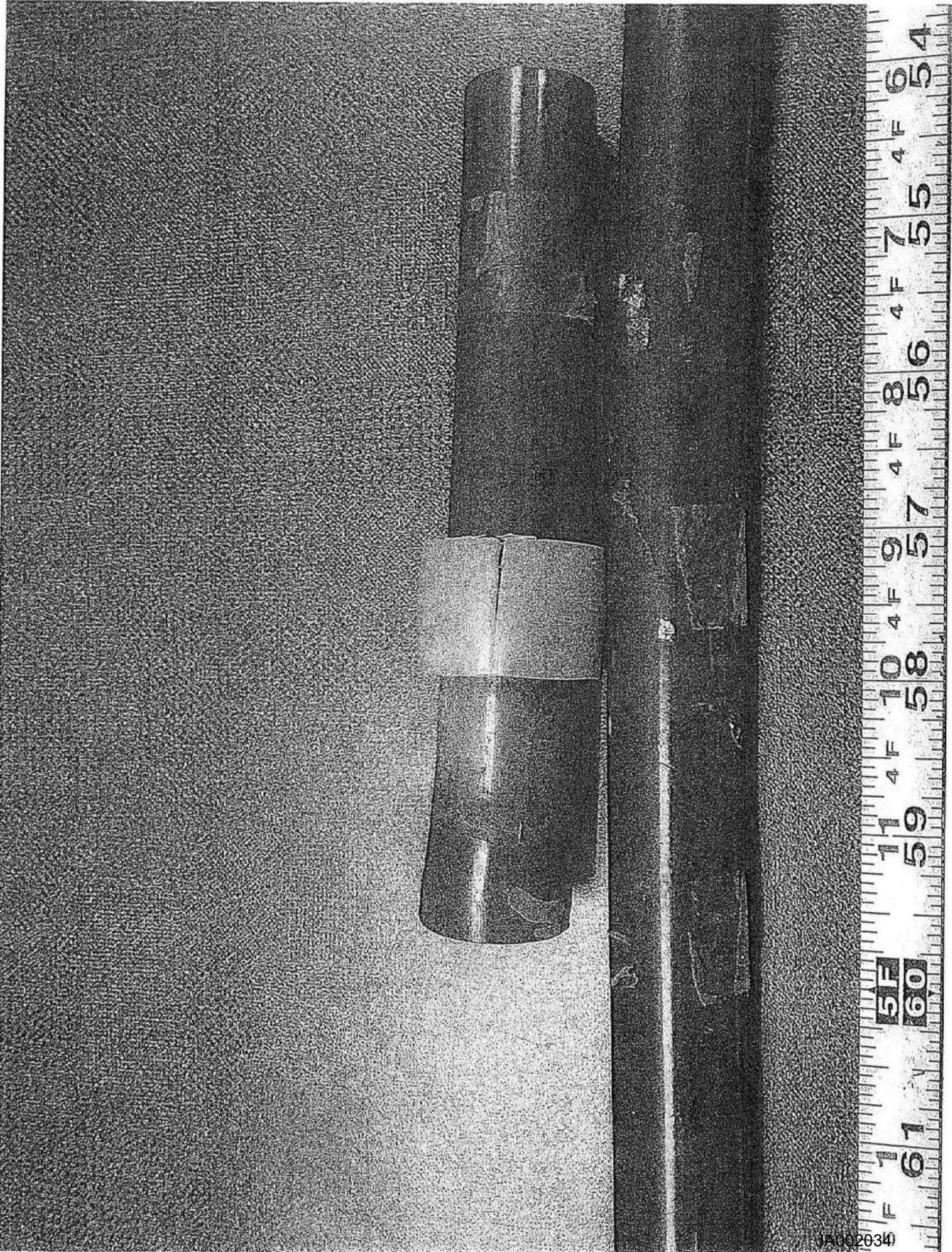
www.uponor-usa.com
www.uponorpro.com

Uponor, Inc.
5925 148th St W
Apple Valley, MN, 55124

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RMA748395





Rusty Graf

From: Beissel, Stacey <Stacey.Beissel@uponor.com>
Sent: Wednesday, December 13, 2017 1:20 PM
To: Nicole Folino
Cc: Joe Folino
Subject: RE: Uponor Warranty Claim - RMA 748395 (42 Meadowhawk)
Attachments: 2012 - Plumbing Warranty.pdf

Hi Again,
I apologize; I just realized I forgot to send the Uponor warranty applicable to your home. I have attached it for your review.

Thanks
Stacey

From: Beissel, Stacey
Sent: Wednesday, December 13, 2017 2:47 PM
To: 'Nicole Folino' <nfolino@sandlerpartners.com>
Cc: Joe Folino <jfolino@switch.com>
Subject: Uponor Warranty Claim - RMA 748395 (42 Meadowhawk)

Hi Nicole,
As requested, the claim information for the most recent claim submitted to Uponor for evaluation (in November 2017) is below:

Claimant And Jobsite Information

Claimant Information

Builder/Contractor
rakeman plumbing
alison brooks
4075 losee rd
NORTH LAS VEGAS, NV 89030
US
alison@rakeman.com
Ph 702 642 8553

Jobsite Information

Single Family
todd watson
42 meadowhawk ave.
LAS VEGAS, NV 89135
US
alison@rakeman.com
Ph 702 642 8553

Estimated Claim Amount

Amount \$1000 to \$2500

Preferred Reimbursement Cash

Past Occurrences

Past Occurrences

Past Occurrences Ref

Installation Information

Application

Application

Plumbing

Recirculation

No

Location Detail

master bath closet below water heater

Temperature/Pressure

Temperature

Cold

System Temp

70 F

System Pressure

65 PSI

Water Source

Water Source

Municipal

Dates

Est. Installed Date

15-JUL-2013

Failure Date

07-NOV-2017

Contractor Information

rakeman plumbing

alison brooks

4075 losee rd

NORTH LAS VEGAS, NV

US

alison@rakeman.com

Ph 702 642 8553

Installing? Yes

Other Information

Present for destructive

Phase of Construction

Builder

Customer Comment(s)

Blue pipe split at fitting

Product Information

Item Number	Description	Return
LF4517575	ProPEX LF Brass Sweat Adapter, 3/4" PEX x 3/4" Copper	
Problem: blue tubing split at fitting		
Review Result:		
F3040750	3/4" Uponor AquaPEX Blue, 100-ft. coil	
Problem: blue tubing split at fitting		
Review Result: Manufacturing		

Thank you
Stacey

Uponor

Stacey Beissel
Warranty Manager
Uponor North America

T +19529978984
M +16512531956

www.uponor-usa.com
www.uponorpro.com

Uponor, Inc.
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Apple Valley, MN, 55124

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PLUMBING SYSTEMS

WARRANTY

UPONOR, INC. LIMITED WARRANTY Valid for Uponor AquaPEX-a® Tubing, ProPEX® and Other Select Plumbing Products

This Warranty is Effective For Installations Made After October 15, 2012

Subject to the terms and conditions of this Limited Warranty, Uponor, Inc. ("Uponor") warrants to the owner of the applicable real property that the Uponor products listed below shall be free from defects in materials and workmanship, under normal conditions of use when installed as part of a potable water distribution system.

Unless otherwise specified, this Limited Warranty for the applicable Uponor products shall commence on the date the product was installed ("Commencement Date") and will expire after the following number of years:

- (a) Twenty-Five (25) years for Uponor AquaPEX-a® tubing, Uponor ProPEX® fittings and ProPEX® rings when all are installed in combination with each other;
- (b) Ten (10) years for Uponor AquaPEX-a® tubing when installed in combination with non-Uponor fittings;
- (c) Ten (10) years for Uponor EP valves, EP valveless manifolds and Uponor tub ells, stub ells, and straight stubs;
- (d) Two (2) years for Uponor metal manifolds, Uponor EP manifolds with valves;
- (e) Five (5) years for the Uponor D'MAND® system;
- (f) Two (2) years for all other components of the Uponor ProPEX® fitting system and all other plumbing items listed in Uponor's catalog as of the effective date of this limited warranty.

For purposes of this warranty, the use of Uponor AquaPEX-a® tubing, Uponor ProPEX® fittings and ProPEX® rings in combination with each other shall constitute an Uponor ProPEX® system.

Exclusions From Limited Warranty:

This limited warranty applies **only** if the applicable Uponor products identified above: (a) are selected, configured and installed by a certified licensed plumbing contractor recognized by Uponor as having successfully completed the Uponor AquaPEX® training course and according to the installation instructions provided by Uponor; (b) are not exposed to temperatures and/or pressures that exceed the limitations printed on the warranted Uponor product or in the applicable Uponor installation manual; (c) remain in their originally installed location; (d) are connected to potable water supplies; (e) show no evidence of misuse, tampering, mishandling, neglect, accidental damage, modification or repair without the approval of Uponor; and (f) are installed in accordance with then-applicable building, mechanical, plumbing, electrical and other code requirements; (g) are installed in combination with Uponor AquaPEX-a® tubing unless otherwise specified below.

Without limiting the foregoing, this limited warranty does not apply if the product failure or resulting damage is caused by: (a) faulty installation; (b) components not manufactured or sold by Uponor; (c) exposure to ultra violet light; (d) external physical or chemical conditions, including, but not limited to chemically corrosive or aggressive water conditions; or (e) any abnormal operating conditions.

The use of non-Uponor termination devices such as tub/shower valves, sill cocks, stops and other similar components that attach at the termination or end-point of a run or branch of Uponor AquaPEX-a® tubing does not disqualify the additional parts of the Uponor ProPEX® fitting system from the terms of this Limited Warranty. Only the non-Uponor termination devices themselves are excluded from the Uponor Limited Warranty.

The use of non-Uponor AquaPEX-a® tubing disqualifies any and all parts of the Uponor ProPEX fitting® system from the terms of this Limited Warranty. This exclusion does not include certain circumstances wherein Uponor AquaPEX-a® tubing is installed in combination with CPVC, copper, PPr, or stainless steel pipe risers as may be required in limited residential and commercial plumbing applications. The use of non-Uponor fittings in combination with Uponor ProPEX® fittings disqualifies Uponor ProPEX fittings® from the terms of this Limited Warranty.

Warranty Claim Process (for building owners and homeowners only):

Written notification of an alleged failure of, or defect in, any Uponor part or product identified herein should be sent to Uponor, Attn: Warranty Department, 5925 148th Street West, Apple Valley, Minnesota 55124 or by facsimile to (866) 351-8402, and must be received by Uponor within thirty (30) days after detection of an alleged failure or defect occurring within the applicable warranty period. All products alleged to be defective must be sent to Uponor for inspection and testing for determination of the cause of the alleged failure or defect.

Exclusive Remedies:

If Uponor determines that a product identified herein has failed or is defective within the scope of this limited warranty, Uponor's liability is limited, at the option of Uponor, to: issue a refund of the purchase price paid for, or to repair or replace the defective product.

Notwithstanding anything to the contrary in this limited warranty, if Uponor determines that any damages to the real property in which a defective product was installed were the direct result of a leak or failure caused by a manufacturing defect in an Uponor product covered by this limited warranty and occurring within the first ten (10) years after the applicable Commencement Date or during the applicable limited warranty period, whichever is shorter, and if the claimant took reasonable steps to promptly mitigate (i.e., limit or stop) any damage resulting from such failure, then Uponor may at its discretion, reimburse claimant for the reasonable costs of repairing or replacing such damaged real property, including flooring, drywall, painting, and other real property damaged by the leak or failure. Uponor shall not pay for any other additional costs or expenses, including but not limited to, transportation, relocation, labor, repairs or any other work associated with removing and/or returning failed or defective products, installing replacement products, damage to personal property or damage resulting from mold.

Warranty Claim Dispute Process:

In the event claimant and Uponor are unable to resolve a claim through informal means, the parties shall submit the dispute to the American Arbitration Association or its successor (the "Association") for arbitration, and any arbitration proceedings shall be conducted before a single arbitrator in the Minneapolis, Minnesota metropolitan area. NOTWITHSTANDING THE FOREGOING, NEITHER THE CLAIMANT NOR UPONOR, INC. SHALL BE ENTITLED TO ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS, AND NEITHER THE CLAIMANT NOR UPONOR SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS WITH ANY OTHER PARTIES IN ARBITRATION OR IN LITIGATION BY CLASS ACTION OR OTHERWISE.

Transferability:

This limited warranty may only be assigned by the original owner of the applicable real property and may not be assigned or transferred after the period ending ten (10) years following the Commencement Date.

Miscellaneous:

By the mutual agreement of the parties, it is expressly agreed that this limited warranty and any claims arising from breach of contract, breach of warranty, tort, or any other claim arising from the sale or use of Uponor's products shall be governed and construed under the laws of the State of Minnesota. It is expressly understood that authorized Uponor sales representatives, distributors, and plumbing professionals have no express or implied authority to bind Uponor to any agreement or warranty of any kind without the express written consent of Uponor.

THIS LIMITED WARRANTY IS THE FULL EXTENT OF EXPRESS WARRANTIES PROVIDED BY UPONOR, AND UPONOR HEREBY DISCLAIMS ANY WARRANTY NOT EXPRESSLY PROVIDED HEREIN, INCLUDING, WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE WITH RESPECT TO THE PRODUCTS COVERED HEREUNDER.

UPONOR FURTHER DISCLAIMS ANY STATUTORY OR IMPLIED WARRANTY OF HABITABILITY.

EXCEPT AS OTHERWISE EXPRESSLY STATED IN THIS LIMITED WARRANTY, UPONOR FURTHER DISCLAIMS ANY RESPONSIBILITY FOR LOSSES, EXPENSES, INCONVENIENCES, AND SPECIAL, INDIRECT, SECONDARY, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OR RESULTING IN ANY MANNER FROM THE PRODUCTS COVERED HEREUNDER. SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU.

THIS LIMITED WARRANTY GIVES THE CLAIMANT SPECIFIC LEGAL RIGHTS, AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE.

Revised as of 8/2012

Uponor, Inc.
5925 148th Street West
Apple Valley, MN 55124 USA
Tel: (800) 321-4739
Fax: (952) 891-2008
Web: www.uponor-usa.com

uponor

EXHIBIT 2

FLOYD A. HALE

LAW OFFICE

Practice limited to serving as:

Special Master, Mediator and Arbitrator
services administered and scheduled by JAMS
3800 Howard Hughes Parkway, 11th Floor
Las Vegas, NV 89169

email:
fhaile@floydhaile.com

JAMS
Fax (702) 437-5287
Telephone (702) 457-5287
website: www.jamsadr.com

August 20, 2018

Sent by Email

Rusty Graf, Esq.
Black & Lobello
10777 West Twain Ave., 3rd floor
Las Vegas, NV 89135
Attorneys for Plaintiffs
rgraf@blacklobellolaw.com

Christopher Young, Esq.
Cobeaga Law Firm
550 East Charleston Blvd. #D
Las Vegas, NV 89104
Attorneys for Defendant
cyoung@cottonlaw.com

Re: Joseph and Nicole Folino v. Todd Swanson; Lyons Development, LLC
Mediation: August 17, 2018

Dear Counsel:

This letter will confirm that we were not successful in reaching a settlement of this dispute during our August 17, 2018, Mediation conference. The Mediation concluded with the Folino's lowest demand to settle the case in the amount of \$225,000.00. The final settlement offer by Dr. Todd Swanson was \$125,000.00. I appreciate the clients working so hard to move the negotiations to these final figures. I will certainly welcome counsel to contact me if we can finalize this dispute since there was substantial movement toward a settlement figure.

It is my suggestion that the parties agree to settle this dispute for \$200,000.00. Since I anticipate that litigation will commence soon if there is no settlement, let me know your responses by September 4, 2018. Unless an agreement is reached, I will not advise the parties of the responses received to my proposal from the adverse party.

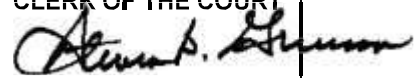
I would like to thank you for retaining me for the handling of this mediation and if I can be of any further service, please do not hesitate to give me a call.

Very truly yours,


Floyd A. Hale

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Electronically Filed
4/27/2020 8:06 AM
Steven D. Grierson
CLERK OF THE COURT



Joseph Folino, Plaintiff(s)
vs.
Todd Swanson, Defendant(s)

Case No.: A-18-782494-C
Department 24

NOTICE OF HEARING

Please be advised that the Plaintiff's Motion to Retax Costs in the above-entitled matter is set for hearing as follows:

Date: June 11, 2020
Time: 9:00 AM
Location: Phoenix Building Courtroom - 11th Floor
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Ondina Amos
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Ondina Amos
Deputy Clerk of the Court

JA002043

A-18-782494-C

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Tort

COURT MINUTES

April 29, 2020

A-18-782494-C Joseph Folino, Plaintiff(s)
vs.
Todd Swanson, Defendant(s)

April 29, 2020

Status Check

HEARD BY: Crockett, Jim

COURTROOM: Phoenix Building 11th Floor
116

COURT CLERK: Rem Lord

JOURNAL ENTRIES

COURT NOTES as of 4/28/2020 the Order Granting Summary Judgement has not been filed and ORDERED, matter CONTINUED. COURT FURTHER ORDERED, matters SET 6/9/2020 CONTINUED to 6/11/2020.

CONTINUED TO: 6/11/2020 9:00 AM... MOTION TO RETAX... MOTION FOR FEES

CLERK'S NOTE: This Minute Order was electronically served to all registered parties for Odyssey File & Serve. /rl 4/29/2020

PRINT DATE: 04/29/2020

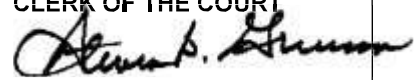
Page 1 of 1

Minutes Date: April 29, 2020

JA002044

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DISTRICT COURT
CLARK COUNTY, NEVADA

JOSEPH FOLINO, an individual and NICOLE
FOLINO, an individual,

Plaintiff(s),

v.

TODD SWANSON, an individual; TODD
SWANSON, Trustee of the SHIRAZ TRUST;
SHIRAZ TRUST, a Trust of unknown origin;
LYON DEVELOPMENT, LLC, a Nevada limited
liability company; DOES I through X; and ROES
I through X,

Defendant(s).

CASE NO.: A-18-782494-C
DEPT. NO.: XXIV

I.

PREAMBLE

On April 7, 2020, this Court held a hearing to address the Defendants' Motion to Dismiss

<input type="checkbox"/>	Voluntary Dismissal	<input type="checkbox"/>	Summary Judgment
<input type="checkbox"/>	Involuntary Dismissal	<input type="checkbox"/>	Stipulated Judgment ¹
<input type="checkbox"/>	Stipulated Dismissal	<input type="checkbox"/>	Default Judgment
<input checked="" type="checkbox"/>	Motion to Dismiss by Deft(s)	<input type="checkbox"/>	Judgment of Arbitration

JA002045

1 Plaintiffs' Second Amended Complaint, which Defendants filed on September 24, 2019.¹ Rusty J.
2 Graf, Esq. appeared on behalf of the Plaintiffs; Jeffrey L. Galliher, Esq. and Jay T. Hopkins, Esq.
3 appeared on behalf of the Defendants.²

4 This Court considered the parties' motions and supplements, together with the exhibits and
5 arguments of counsel. Viewing the evidence in the light most favorable to the Plaintiffs, this Court
6 finds that the Plaintiffs failed to establish the existence of any genuine dispute as to a material issue
7 of fact to preclude summary judgment. Accordingly, this Court makes the following Findings of Fact
8 and Conclusions of Law under the standards set forth below.

10 II.

11 PROCEDURAL HISTORY

12 This is a case involving the purchase and sale of a \$3,000,000 luxury home located at 42
13 Meadowhawk Lane in Las Vegas, Nevada. The dispute emanates from an October 27, 2017
14 Residential Purchase Agreement in which the Plaintiffs were the Buyers and Lyons Development,
15 LLC was the Seller. The gist of the Plaintiffs' lawsuit is that "the Defendants" concealed a water leak
16 in the plumbing system.

18 *Plaintiffs' Complaint*

19 On October 19, 2018, the Plaintiffs filed their initial Complaint seeking damages for
20 Defendants' alleged concealment of a February 2017 water leak which Plaintiffs alleged indicated a
21 "systemic defect" in the plumbing system. The Plaintiffs asserted six causes of action for: (1)
22 Fraud/Intentional Misrepresentation; (2) Negligent Misrepresentation; (3) Violation of NRS 598.010
23

25 ¹ While the Defendants styled their instant motion as a motion to dismiss, Defendants acknowledged in their motion that
26 because the motion and supplements referenced and attached documents outside the pleadings, this Court must invoke the
summary judgment standards in NRCP 56. *Kopicko v. Young*, 114 Nev. 1333, 1335-1336, 971 P.2d 789, 790 (1998).

27 ² The parties named the following parties: Plaintiffs, Nicole and Joseph Folino (hereinafter the "Plaintiffs" or the
28 "Folinos"); and Defendants: Dr. Todd Swanson, an individual; Todd Swanson, Trustee of the Shiraz Trust; Shiraz Trust;
and Lyons Development, LLC (hereinafter "Defendants" or "Dr. Swanson.").

et seq. (Deceptive Trade Practices); (4) Violation of NRS 113.100 et seq. (Failure to Disclose Known Defects); (5) Civil RICO; and (6) Respondeat Superior.³

Defendants' February 4, 2019 Motion to Dismiss

On February 4, 2019, the Defendants moved to dismiss the Plaintiffs' Complaint pursuant to NRCP 12(b)(5). At the April 8, 2019 hearing, the Court did not rule on the substance of the Defendants' motion but granted the Plaintiffs' request for leave to amend to cure the pleading deficiencies.

Plaintiffs' First Amended Complaint

On April 18, 2019, the Plaintiffs filed their First Amended Complaint, asserting the same claims as in the initial Complaint. The Plaintiffs also asserted a Seventh Cause of Action for Piercing the Corporate Veil/Alter Ego.

Defendants' May 20, 2019 Motion to Dismiss

On May 20, 2019, the Defendants moved to dismiss the Plaintiffs' First Amended Complaint, seeking dismissal of each of the Plaintiffs' seven claims. On July 18, 2019, this Court held a hearing on Defendants' Motion to Dismiss. At the hearing, the Court dismissed the Plaintiffs Negligent Misrepresentation, Deceptive Trade Practices, Civil RICO; Respondeat Superior and Piercing the Corporate Veil claims. The Court ruled the Plaintiffs' fraud or NRS Chapter 113 concealment claims survived and ordered the Plaintiffs to file a Second Amended Complaint.

Plaintiffs' Second Amended Complaint

On September 4, 2019, the Plaintiffs filed their Second Amended Complaint, alleging concealment in violation of NRS 113 *et seq.* and fraud/intentional misrepresentation. The Plaintiffs

³ The Plaintiffs attached several documents to their Complaint, First Amended Complaint and Second Amended Complaint which, under NRCP 12(b)(5)'s standards, are incorporated into the pleadings. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

1 also sought punitive damages.

2 ***Defendants' September 24, 2019 Motion to Dismiss***

3 Defendants moved for dismissal/summary judgment on September 24, 2019. Defendants
4 provided evidence in the form of an affidavit from the licensed plumbing company that the February
5 2017 leak had been repaired, thus negating the Defendants duty to disclose under NRS Chapter 113
6 and *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (2007).
7

8 In their Opposition, the Plaintiffs did not present any facts to rebut the Defendants' evidence
9 that the February 2017 leak had been repaired, but instead sought sanctions for Defendants filing the
10 motion.

11 At the November 7, 2019 hearing, because the Plaintiffs failed to rebut the facts in the
12 Defendants' motion, this Court stated its inclination to grant the Defendants' motion. Instead, to
13 permit the Plaintiffs to fully present their case, this Court gave Plaintiffs 90 days to conduct discovery
14 and permitted the Plaintiffs to file a supplemental brief demonstrating a genuine issue of material fact.
15 Defendants were also permitted to file a supplemental brief in response to the Plaintiffs' supplement.
16

17 ***The Plaintiffs' Discovery***

18 Between November 7, 2019 and February 13, 2020, the Plaintiffs conducted extensive
19 discovery, which included serving numerous subpoenas for documents, serving interrogatories,
20 requests for production of documents and requests for admissions. Plaintiffs took the depositions of
21 six witnesses.⁴ The Defendants produced nearly 1000 pages of documents as supplemental disclosures
22 and responses to the Plaintiffs' interrogatories and requests for production. The Plaintiffs also
23 produced over 5000 pages of documents.
24

25
26
27 ⁴ The Plaintiffs deposed Rakeman principal Aaron Hawley and employee William "Rocky" Gerber, Dr. Swanson (two
28 separate depositions), Dr. Swanson's assistant Nicky Whitfield, and Defendants'/Sellers' real estate agents, Ivan Sher and
Kelly Contenda.

On February 13, 2020, the Plaintiffs filed their Supplemental Brief. On February 27, 2020, the Defendants filed their Supplemental Reply in Support of Motion for Summary Judgment. Each party attached voluminous exhibits.

On April 7, 2020, this Court held a hearing regarding the Defendants' motion, and makes the following findings of fact and conclusions of law.

III.

LEGAL STANDARDS

The following legal standards are applicable to this case:

A. Summary Judgment Standards

Because the parties presented matters outside the pleadings, this Court treats the Defendants' motion "as one for summary judgment and disposed of as provided in Rule 56." *See* NRCP 12(c) and *Kopicko*, 114 Nev. at 1336, 971 P.2d at 790 (1998).

Since *Wood v. Safeway*,⁵ the Nevada Supreme Court has followed a gradual trend toward favoring summary judgment as a "valuable tool to weed out meritless cases [which is] no longer a 'disfavored procedural shortcut.'" *Boesiger v. Desert Appraisals, LLC*, 444 P.3d 436, 438-439, 2019 Nev. LEXIS 39, *4-5 (July 3, 2019) ("[s]ummary judgment is an important procedural tool by which factually insufficient claims or defenses [may] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources"). *See also Wood*, 121 Nev. at 730, 121 P.3d at 1030 (summary judgment "is an integral part of the [rules of civil procedure] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.")

"Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact

⁵ *Wood v. Safeway*, 121 Nev. 724, 727, 121 P.3d 1026, 1028 (2005).

remains in dispute and that the moving party is entitled to judgment as a matter of law.” *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 427 P.3d 113, 117, 134 Nev. Adv. Rep. 72 (September 13, 2018). “A genuine issue of material fact exists if, based on the evidence presented, a reasonable jury could return a verdict for the nonmoving party.” *Id.*

B. NRS Chapter 113 Standards Regarding Pre-Closing Disclosures in Real Estate Transactions

Plaintiffs’ claims are premised on the Defendants’ purported failure to disclose a February 16, 2017 water leak which, according to the Plaintiffs, was indicative of a systemic plumbing defect. The Plaintiffs’ claims are based on violation of NRS Chapter 113.

NRS §113.140 provides:

Disclosure of unknown defect not required; form does not constitute warranty; duty of buyer and prospective buyer to exercise reasonable care.

1. NRS §113.130 does not require a seller to disclose a defect in residential property of which the seller is not aware.

2. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property.

3. Neither this chapter nor chapter 645 of NRS relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself.

In *Nelson v. Heer*, the Nevada Supreme Court defined a seller’s disclosure obligations under NRS 113.130 and NRS 113.140. The Nevada Supreme Court ruled that repairing damage negates a seller’s duty to disclose damage because repaired damage “no longer constitute[s] a condition that materially lessen[s] the value of the property.” *Nelson*, 123 Nev. at 224, 163 P.3d at 425. *Id.* According to the Court, “the seller of residential real property does not have a duty to disclose a defect or condition that ‘materially affects the value or use of residential property in an adverse manner,’ if the seller does not realize, perceive, or have knowledge of that defect or condition.”⁶

⁶ Further, pursuant to statute, recovery is completely barred “on the basis of an error or omission in the disclosure form that was caused by the seller’s reliance upon information provided to the seller by:… (b) A contractor, engineer, land

1 NRS §113.150(2) provides:

2 Remedies for seller's delayed disclosure or nondisclosure of defects in property;
3 waiver.

4 2. If, before the conveyance of the property to the purchaser, a seller or the seller's agent
5 informs the purchaser or the purchaser's agent, through the disclosure form or another written
6 notice, of a defect in the property of which the cost of repair or replacement was not limited
7 by provisions in the agreement to purchase the property, the purchaser may:

8 (a) Rescind the agreement to purchase the property at any time before the conveyance
9 of the property to the purchaser; or

10 (b) Close escrow and accept the property with the defect as revealed by the seller or
11 the seller's agent without further recourse.

12 **IV.**

13 **SUMMARY OF FINDINGS OF FACT**

14 The Court finds the following facts are undisputed and supported by the evidence presented
15 by the parties:

- 16 • In 2015, Rakeman Plumbing installed the plumbing system manufactured by Uponor at
17 property located at 42 Meadowhawk Lane, Las Vegas, Nevada.
- 18 • The 42 Meadowhawk Lane property is the subject of the Plaintiffs' lawsuit.
- 19 • There was a leak in the Uponor plumbing system on February 16, 2017;
- 20 • Plaintiffs' action is premised on the Defendants' failure to disclose the February 16, 2017 leak;
- 21 • A licensed plumbing contractor, Rakeman Plumbing, completely repaired the February 16,
22 2017 leak;⁷
- 23 • Because Rakeman repaired the February 16, 2017 leak, Defendants did not disclose it on the
24

25 _____
26 surveyor, certified inspector as defined in NRS 645D.040 or pesticide applicator, who was authorized to practice that
27 profession in this State at the time the information was provided." NRS 113.150(5).

28 ⁷ The Court notes that the Rakeman invoice relating to the February 2017 leak has a May 23, 2017 date. However, the
undisputed evidence shows that the invoice was created after the fact when Rakeman submitted its warranty claim to
Uponor. The evidence is undisputed that invoice with the May 23, 2017 date is for the February 16, 2017 leak and
documents that Rakeman completely repaired that leak.

October 24, 2017 Sellers' Real Property Disclosure form;

- There was a second leak in the Uponor system on November 7, 2017 during the escrow period of the sale;
- On November 15, 2017, prior to the November 17, 2017 closing date, Defendants disclosed the leak in an addendum;
- Defendants' agent emailed the disclosure to Plaintiffs' agent on November 16, 2017;
- Plaintiffs did a walk-through before closing and knew about the November 7, 2017 leak;
- With knowledge of the November 7, 2017 leak, the Plaintiffs' agent emailed Defendants' agent with proposed options, including an acknowledgment that Plaintiffs could walk away and elect to terminate the contract and not close on the property;
- With knowledge of the November 7, 2017 leak, the Plaintiffs elected to close on the property on November 17, 2017;
- In 2015, an inspection revealed that two recirculating pumps were leaking and the recirculating pumps were replaced. The recirculating pumps failure occurred in a different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint;
- The same inspection showed a plumbing leak above the ceiling of the basement bathroom, which the report also described as a "drip." The leak/drip occurred in a different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint. Neither Rakeman nor the Defendants could identify a source of the drip, and there is no evidence that the leak/drip persisted after the date of the report, May 11, 2015;
- On November 17, 2017, the day of the closing, Infinity Environmental Services conducted

1 mold tests at the property;

- 2 • Infinity tested for possible fungal levels in the master bathroom and master closet, which is the
- 3 area where the February 2017 and November 7, 2017 leaks occurred;
- 4 • Infinity provided results of their mold testing on November 24, 2017, seven (7) days after the
- 5 Plaintiffs closed on the property;
- 6 • Plaintiffs knew Infinity was conducting the tests on November 17, 2017.
- 7 • Plaintiffs closed on the property on November 17, 2017 before the Infinity results were
- 8 reported;
- 9 • After closing, the mold was fully remediated and a subsequent mold test conducted on
- 10 December 5, 2017 showed the area to be mold-free, as documented in a December 7, 2017
- 11 Infinity Report;
- 12 • The results of the mold test were not provided by Infinity to Defendants because the
- 13 Defendants no longer owned the property and there is no evidence showing that the Defendants
- 14 knew of the results of the mold test on or before the closing date.
- 15
- 16
- 17

18 **V.**

19 **CONCLUSIONS OF LAW**

20 This case centers around the Plaintiffs' claim that the Defendants concealed a February 2017
21 water leak. Throughout these proceedings, the Defendants have asserted, together with providing
22 undisputed proof, that the February 2017 water leak was completely repaired by a licensed plumbing
23 contractor, Rakeman Plumbing. Defendants have always asserted that under *Nelson v. Heer* and NRS
24 Chapter 113, the repair negated Defendants' duty to disclose.

25 In responding to the Defendants' motion on the Plaintiffs' Second Amended Complaint, the
26 Plaintiffs did not refute the Defendants' proof that the leak had been repaired. However, rather than
27 dismiss the action at that time, this Court granted the Plaintiffs' request for discovery to establish facts
28

1 showing the February 2017 leak was not repaired and that the Defendants knew the leak had not been
2 repaired, two facts required by *Nelson*.

3 The Defendants cooperated fully with the discovery undertaken by the Plaintiffs. While the
4 discovery revealed additional facts, none of those additional facts are material to the claims made in
5 the Plaintiffs' Second Amended Complaint. Rather, the end-result of Plaintiffs' discovery efforts is
6 that, despite the testimony and the plethora of documents produced, and despite the Plaintiffs' efforts
7 to cast the evidence in their Supplement as creating genuine issues of material fact, the Plaintiffs' case
8 still fails as a matter of law.
9

10 Specifically, through the discovery undertaken and the resulting arguments in Plaintiffs'
11 Supplemental Brief, Plaintiffs attempted to create a question of fact by asserting that there were "at
12 least six (6) water losses in a little over two years (April 2015 to November 2017) that [the Defendants]
13 owned the home." However, the evidence shows that the only relevant "water losses" relate to two
14 failures in the Uponor plumbing system, one which occurred in February 2017, which the Defendants'
15 repaired, and one which occurred in November 2017, which the Defendants disclosed prior to the
16 Plaintiffs' closing on the property.
17

18 The Plaintiffs have failed to present evidence to establish the one fact that could possibly make
19 their claims viable: that the February 2017 leak was not repaired. To the contrary, the undisputed facts
20 establish that the February 2017 leak was repaired, thus abrogating any requirement that it be
21 disclosed, as fully explained in *Nelson*. The other purported "water losses" complained of by the
22 Plaintiffs are unrelated to their claims and, further, do not materially affect the value of the property.
23

24 **A. The Undisputed Evidence Shows that the Allegedly Concealed Leak Was**
25 **Repaired and that Pursuant to NRS Chapter 113 the Defendants Did Not Conceal**
26 **the Leak**

27 Plaintiffs lawsuit is predicated on their allegations that the Defendants failed to disclose a
28

February 16, 2017 water leak in the Uponor plumbing system. The Plaintiffs allege the leak indicated a “systemic” defect “known to the defendants prior to the closing of the transaction.” The Plaintiffs allege that:

Shortly after the closing occurred, the Plaintiffs were made aware of [a] water loss that had occurred at the Subject Property in approximately February of 2017 by the plumbing system manufacturer, Uponor.

The Defendants have always maintained that the February 2017 leak was repaired, and the undisputed evidence shows that indeed it was repaired. The Defendants presented an invoice from Rakeman Plumbing showing that Rakeman repaired the leak in question.

The Rakeman invoice is dated May 23, 2017, thus causing some confusion regarding the date the leak occurred. The documents and testimony, considered in conjunction with one another, clarify any potential confusion.⁸ The undisputed evidence shows the following: (1) The Uponor system had two leaks in 2017, one occurring on February 16, 2017 and one occurring on November 7, 2017; (2) the February 16, 2017 leak was completely repaired by Rakeman, and the details of the repair are outlined in the May 23, 2017 Rakeman invoice; and (3) the November 7, 2017 leak was disclosed by the Defendants on November 15, 2017, prior to closing.

The Defendants presented the following testimony showing the leak occurred on February 16, 2017, and that Rakeman repaired that leak:

Dr. Swanson’s Testimony

The undisputed evidence shows that early in the case, just prior to the August 2018 mediation, Dr. Swanson recalled a “small pinhole leak” which, to his recollection, occurred in January 2017.

⁸ The affidavit of Rakeman owner Aaron Hawley, which accompanied the Defendants’ motion for judgment on the Plaintiffs’ Second Amended Complaint, references work done on May 23, 2017. The affidavit was prepared with reference to the May 23, 2017 invoice. The May 23, 2017 document has confused everyone - because there is *no evidence* of a May 23, 2017 leak. However, as discussed herein, the May 23, 2017 date reflects Rakeman’s documentation for seeking payment under the Uponor warranty. The documents and testimony, reviewed together, establish that the leak occurred in February 16, 2017, not May 23, 2017.

1 During his deposition, Dr. Swanson testified that the leak actually occurred in February:

2 Q: So there was another leak in January, 2017?

3 A: No. I think there was a lot of trouble pinning down the date of the February leak,
4 but the date was February 17th or 18th or something like that, I think. Or 7th or 8th.

5 The Defendants' responses to Plaintiffs' interrogatories confirmed the February 16, 2017 date.
6

7 Dr. Swanson testified in his deposition and when questioned about the May 23, 2017 date on
8 the Rakeman invoice, cleared up the confusion regarding the date of the leak:

9 Q: [The May 23, 2017 date is] not accurate, is it, Doctor?

10 A: I don't believe so, unless my dates are off. Because I keep seeing this date, but I
11 think that was the date of the [Rakeman] invoice.

12 Q: Okay. And the actual leak occurred sometime in February of 2017, didn't it Doctor?

13 A: Yeah, to the best of my knowledge.

14 Dr. Swanson also testified as follows:
15

16 Q: Doctor, were there two leaks in early part of '17? Did it occur in January or February
17 of 2017 and then there was a subsequent leak in May of 2017.

18 A: No. . . . There was only one leak.

19 Plaintiffs' counsel cleared up the confusion by his own questions:

20 Q: Okay. I — and that's what we don't want to be, is confused about the dates of any
21 of these leaks occurring. So it's your understanding that the leak occurred somewhere
22 in the time period of January or February of 2017, correct?

23 A: Yes, I — I saw those dates and I found some documents that were pretty persuasive
24 that the date was in February, whatever the date was, February 8th or whatever.

25 ***

26 A: All I know is that I kept seeing [the May 23, 2017] date and it didn't make sense,
27 so I tried to find the correct date. . . . And that's what I came up with.
28

///

///

Rakeman Plumbing Testimony

The Rakeman Plumbing documents and testimony showed that the leak in question occurred in February 2017 and that Rakeman plumbing repaired the leak. The Defendants submitted the affidavit of Aaron Hawley, which establishes that the leak in question was repaired. Clearing up the date “confusion,” Mr. Hawley testified that Rakeman does not always prepare invoices for Rakeman warranty work. According to Mr. Hawley,

if there’s warranty work done behind our new construction, there may not be any papers behind it. It’s not like it’s an invoicable call to where somebody calls up. . . . If this was done under warranty, which I don’t know if it was or wasn’t, there may not be any papers involved.

Mr. Hawley testified that he was very familiar with the 42 Meadowhawk Lane property and that he and his employee, Rocky Gerber, discussed the property on many occasions. Mr. Hawley recalled that there were only two leaks in 2017. He recalled one leak during closing (November) and testified that the other leak occurred in either February or May, but not both.

Rocky Gerber testified that for warranty work covered by the manufacturer, as opposed to work covered under Rakeman’s own warranty, a summary is always prepared “after the fact.” According to Mr. Gerber, a summary to the manufacturer “has to be done after the fact.”⁹

Uponor Documents

The Uponor documents are perhaps the most revealing. Uponor records show the “initial claim [was] submitted [by Rakeman Plumbing] to Uponor in February 2017. Uponor documents reference a failure date of February 16, 2017. Uponor sent a check to Rakeman for \$2,496.00 on June 9, 2017 in satisfaction the February 16, 2017 leak. The check and letter reference the \$2,496.00 amount, which

⁹ Consistent with the testimony from Hawley and Gerber, the May 23, 2017 invoice had to be prepared after the fact. Indeed, the attached Rakeman document references April 5, 2017 as “Wanted” and “Promised” which predates the May 23, 2017 invoice date. So, it is impossible that the leak occurred in May.

1 corresponds with the May 23, 2017 Rakeman invoice which was also for \$2,496.00.

2 These documents clearly establish a nexus between the February 16, 2017 “failure date”
3 documented by Uponor and the Rakeman repair invoice dated May 23, 2017, thereby establishing the
4 fact that there was only one leak in the first half of 2017, on February 16th.

5
6 ***Nicky Whitfield’s Testimony***

7 At the time Dr. Swanson’s assistant, Nicky Whitfield, began working for Dr. Swanson in
8 March 2017, Rakeman was in the process of finalizing repairs on the February 16, 2017 leak.
9 According to Ms. Whitfield’s sworn testimony, “when I started [working for Dr. Swanson] they were
10 just finishing repairs of the carpet.” Based on this testimony, the repairs could not have been underway
11 in March if the leak did not occur until May.

12 Viewing the evidence in the light most favorable to the Plaintiffs, it cannot be reasonably
13 disputed that the first leak in 2017 was in February. Further, the Plaintiff presented no evidence that
14 more than one leak occurred in the first half of 2017. It cannot be reasonably disputed that the leak
15 occurring in the first half of 2017, regardless of whether it happened in February or May, was fully
16 repaired, thus abrogating its disclosure under *Nelson*.

17
18 This Court finds that the undisputed evidence establishes that the leak which is the subject of
19 the Plaintiffs’ action occurred on February 16, 2017, not May 23, 2017, which is the date on the
20 Rakeman invoice.

21
22 Further, this Court finds that the Rakeman invoice, testimony and Hawley affidavit provide
23 uncontroverted evidence that the February 16, 2017 leak was completely repaired, thus negating the
24 Defendants’ duty of disclosure. This Court finds that the Plaintiffs’ allegation the Defendants failed
25 to disclose a water leak in their October 24, 2017 disclosures is not supported by the evidence and
26 fails as a matter of law. Thus, summary judgment is warranted under the standards set forth in NRCP
27 56(a), NRS Chapter 113 and *Nelson v. Heer*.
28

B. The Undisputed Evidence Shows that the Plaintiffs Knew About the November 7, 2017 Leak, But Nonetheless Elected to Close

Plaintiffs Supplement asserted for the first time that Plaintiffs did not know about the November 7, 2017 leak until after the closing. Referencing “Affidavit of Joe Folino and Affidavit of Nicole Folino,” the Plaintiffs’ Supplement asserts they executed the closing documents on November 16, 2017 and “were not notified of any plumbing problems with the Subject Property prior to November 17, 2017.” Plaintiffs’ filed Supplement, however, did not actually include either affidavit.¹⁰

On February 25, 2020, 12 days after filing their Supplement and 5 days after Defendants’ counsel requested that Plaintiffs provide the affidavits, Plaintiffs’ counsel emailed two un-signed “affidavits,” purportedly made by Joseph Folino and Nicole Folino, to defense counsel. However, the un-signed and unsworn Folino “affidavits” do not support Plaintiffs’ claim that they were unaware of the November 7, 2017 leak prior to closing. Even if they did, under NRCP 56, the “affidavits” are not admissible “facts” for purposes of challenging summary judgment since neither is signed.

The admissible facts, however, refute the Plaintiffs’ claim they did not know about the November 7, 2017 leak before they closed. First, this new allegation *directly* contradicts the allegations in the Plaintiffs’ own pleadings. Plaintiffs asserted the following allegations in their Second Amended Complaint:

24. Prior to the closing of this transaction, the Plaintiffs requested and were given the opportunity to perform their own site inspection of the Subject Property;
25. This pre-closing inspection occurred on or before November 17, 2017;
26. During this inspection, the Plaintiffs uncovered a water leak that was in the process of being repaired by the Defendants;

¹⁰ The unsigned and unsworn “affidavits” further allege that Defendants requested a lease-back of the property “for the purpose of concealing repairs taking place on a leak that had occurred on or about the first week of 2017.” This contention ignores the undisputed evidence that the lease-back agreement is dated November 6, 2017, which was the day before the November 7, 2017 leak.

28. The Plaintiffs' real estate agent, Ashley Lazosky . . . had specific conversations with the Defendants and the subcontractor hired to make the repairs.

These allegations directly contradict the unsupported argument that they did not know about the November 7, 2017 leak.

Second, Plaintiffs' assertion is also contradicted by evidence showing the Defendants specifically disclosed the leak via Addendum 4-A, emailed to Plaintiffs' agent early in the day, at 8:31 a.m., on November 16, 2017.¹¹ Addendum 4-A, stated:

Seller is disclosing that there was a water leak in the master closet from a water pipe that broke. The Seller is fully remediating the issue to include new baseboards, carpet, etc. and all repair items regarding this leak will be handled prior to closing.

The same day, at 1:48 p.m., the parties' agents exchanged texts discussing a \$20,000 hold back because the buyers "don't want to rely on the plumber and their warranty." This shows that on November 16, the day prior to closing, the parties' agents were discussing potential remedies for dealing with the disclosed leak.

Again, later that same day, but prior to closing, at 9:00 p.m. on November 16, 2017, the Plaintiffs' agent, Ashley Oakes-Lazosky, sent a detailed email to Defendants' agent wherein she acknowledges that "at this point due to the change in circumstances with the last minute issue with the leak, the buyer's recourse is to walk at this point if they are not comfortable with the repairs/credits."

Finally, Plaintiffs' knowledge of the November 7, 2017 leak is further confirmed by the

¹¹ An agent's knowledge is imputed to the principal. *ARCPE I, LLC v. Paradise Harbor Place Trust*, 2019 Nev. Unpub. LEXIS 1017, *2, 448 P.3d 553 (2019); *Strohecker v. Mut. Bldg. & Loan Ass'n of Las Vegas*, 55 Nev. 350, 355, 34 P.2d 1076, 1077 (1934). Under this maxim, the Plaintiffs had at least constructive knowledge of the November 7, 2017 leak. See e.g. *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. 196, 214, 252 P.3d 681, 695 (2011).

1 testimony of Nicky Whitfield. Ms. Whitfield testified by affidavit that “[o]n November 16, Mr. &
2 Mrs. Folino conducted a walk-through of the entire house” and Ms. Whitfield “showed [Ms. Folino]
3 exactly where the leak had occurred. Ms. Whitfield’s testimony is consistent with the Plaintiffs’ own
4 allegations and the other evidence.
5

6 **C. The Plaintiffs’ Election to Close Bars Their Concealment Action**

7
8 The Plaintiffs’ election to close escrow bars their claims under general waiver principles. *See*
9 *e.g. Udevco, Inc. v. Wagner*, 100 Nev. 185, 189, 678 P.2d 679, 682 (1984) (discussing elements of
10 waiver as: (1) voluntary and intentional relinquishment of a known right; and (2) made with
11 knowledge of all material facts.) Waiver of a known right can be implied by conduct. *Id.* The
12 Plaintiffs’ conduct shows that they relinquished their rights to refuse to close.

13 NRS 113.150(2) incorporates these waiver principles. Under NRS §113.150(2), the Plaintiffs’
14 options were to either “rescind the agreement to purchase the property at any time before the
15 conveyance of the property to the purchaser; or close escrow and accept the property with the defect
16 as revealed by the seller or the seller’s agent without further recourse.”
17

18 The evidence is undisputed that prior to closing, the Defendants provided notice to the
19 Plaintiffs regarding the November 2017 Uponor system leak. The evidence is undisputed that the
20 Plaintiffs’ agent sent a detailed email to Defendants’ agent acknowledging that the Plaintiffs’ recourse
21 was to elect to not close. The evidence is undisputed that with knowledge of all the material facts,
22 Plaintiffs relinquished their right to walk by closing on the property on November 17, 2017.
23

24 This Court finds that the Plaintiffs’ election to close escrow bars “further recourse,” as a matter
25 of law.

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27 ///

D. The 2015 “Water Losses” are Unrelated to the Plaintiffs’ Allegations that the Defendants Failed to Disclose a Systemic Plumbing Defect

For the first time in their Supplement, Plaintiffs assert that Defendants wrongfully failed to disclose “water losses” that occurred in 2015. But the Plaintiffs failed to present any evidence showing that the 2015 leaks have anything to do with the Uponor plumbing system, which it the basis of their Second Amended Complaint. In contrast, the undisputed evidence shows that these issues have nothing to do with the Uponor system. Rocky Gerber of Rakeman Plumbing testified that the recirculating pumps and the Uponor piping system are two different systems.

The parties do not dispute that construction of the 42 Meadowhawk property was completed in April 2015. Shortly thereafter, on May 11, 2015, Defendants contracted for a post-construction Home Inspection Report. The evidence shows that Dr. Swanson made notes on the report as the items in the report were repaired, to document the progress of the repairs,¹² rather than to conceal a defect.

Dr. Swanson testified:

Q. What was the reason why you had this report prepared?

A. Because the house was essentially finished being built. I had moved in already, and I wanted to make sure that there were no issues or problems that Blue Heron hadn't finished or there were no problems with their construction.

This Court finds that the Plaintiffs’ failed to present any facts that the 2015 leaks are in any way related to their claims that the Defendants concealed a water leak indicative of a “systemic defect” in the plumbing system, as alleged in their Second Amended Complaint and as such, cannot defeat summary judgment.

///

¹² The notes are admissible as “present sense impressions” and thus are not hearsay under NRS 51.085. NRS 51.085 provides that a “present sense impression” is “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is not inadmissible under the hearsay rule.”

E. The Plaintiffs' Fraud Claim is Derivative of Plaintiffs' Concealment Claim and Fails by Operation of Law

This Court also finds that the Plaintiffs' fraud claim fails as a matter of law. The Plaintiffs' Second Amended Complaint alleges one wrong: Defendants' failure to disclose a February 2017 water leak, which purportedly concealed a systemic plumbing defect. The Plaintiffs fraud claim is derivative of their NRS Chapter 113 concealment claim.¹³

Because this court finds that summary judgment is warranted regarding the Plaintiffs concealment claim, the Plaintiffs' fraud claim fails as a matter of law.

VI.

ORDER

Pursuant to the findings of fact and conclusions of law detailed herein, this Court finds that summary judgment is warranted regarding the Plaintiffs' Second Amended Complaint because the Plaintiffs failed to present facts showing disputed issues of material fact which preclude summary judgment under NRCP 56.

The evidence shows that the Defendants' purported concealment relates to a February 16, 2017 water leak and that the leak was completely repaired by licensed plumbing contractor, Rakeman Plumbing. The evidence shows that under *Nelson v. Heer* and NRS §113.130 & 140, the repair and Defendants' knowledge of the repair negated the Defendants' duty to disclose the leak in the October 24, 2017 Sellers Real Property Disclosure Form. Further, the undisputed evidence shows the Plaintiffs knew about the November 2017 leak, but nonetheless elected to close on the property. The Plaintiffs' election to close bars further recourse under NRS §113.150(2).

¹³ NRS Chapter 113 provides plaintiffs with a statutory remedy to redress a seller's failure to disclose a defect or condition in a real estate transaction. The statute preempts the Plaintiffs' fraud claim. *See Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000), *citing Casa Clara v. Charley Toppino and Sons*, 620 So.2d 1244, 1247 (Fla 1993) (noting that home buyers are protected by "statutory remedies, the general warranty of habitability and the duty of sellers to disclose defects, as well as the ability of purchasers to inspect houses for defects.")

1 Accordingly, this Court hereby GRANTS the Defendants' motion regarding Plaintiffs' Second
2 Amended Complaint, and ORDERS that the Plaintiffs' Second Amended Complaint is hereby
3 DISMISSED, with prejudice.

4 DATED this 11th day of May 2020.

5
6
7 
8 Hon. Jim Crockett
District Court Judge

9
10 Respectfully submitted by:

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