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8 **IN THE UNITED STATES DISTRICT COURT**
9 **IN AND FOR THE DISTRICT COURT OF ARIZONA**

10 MARVIN SAPIRO and GLORIA
11 SAPIRO, his wife,

12 Plaintiffs,

13 v.

14 SUNSTONE HOTELS INVESTORS,
L.L.C., SUNSTONE HOTEL
15 INVESTORS, L.P.

16 Defendant.

No. CIV03-1555 PHX SRB

**DEFENDANTS' MOTION IN
LIMINE NO. 2**

**REGARDING EVIDENCE OF
SUBSEQUENT REMEDIAL
MEASURES**

(Oral Argument Requested)

17 Defendants ("Sunstone") move this Court for its Order in Limine excluding any
18 statement, argument, testimony, or evidence of any acts, events, or measures taken by, or on
19 behalf of, Sunstone in response to and after Sunstone's notification of Plaintiff Marvin Sapiro's
20 illness and threat of lawsuit. Rule 407 and Rule 403 of the Federal Rules of Evidence preclude
21 admission of such evidence. The following Memorandum of Points and Authorities and this
22 Court's entire file support this Motion.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. PERTINENT FACTS**

3 Plaintiffs Mr. and Mrs. Sapiro stayed at the Sheraton San Marcos Golf Resort and
4 Conference Center (the “San Marcos”) from February 6, 2003 to February 11, 2003. (*See*
5 Amended Complaint, ¶¶ 6, 14). Plaintiffs returned to their home state of Florida where Mr.
6 Sapiro became ill, was hospitalized, and later released. (*See* Amended Complaint, ¶¶ 15-27).
7 By a certified letter dated July 25, 2003, Plaintiffs notified Sunstone of Mr. Sapiro’s illness,
8 conveyed their allegation of Legionnaires Disease, conveyed their belief he contracted his
9 illness while staying at the San Marcos, and stated their intention of filing suit. (*See* July 25,
10 2003 Correspondence, attached as Ex. A).

11 Responding to the information from Plaintiffs, Sunstone implemented a series of
12 measures to evaluate and remediate any potentially dangerous situation caused by its domestic
13 water system. Sunstone transferred all guests to a different hotel and then closed the hotel, (*See*
14 Hammermeister Deposition, p.63:19 – p.67:14, excerpts attached as Ex. B); Sunstone hired a
15 private firm to sample and quantify the population of Legionella bacteria in the water system,
16 (*See* Studer Deposition, p.73:16, excerpts attached as Ex. C); Sunstone also super-heated and
17 hyper-chlorinated the hot water line, installed new boilers, installed new backflow prevention to
18 the city’s water source, installed new water heaters and water storage tanks, replaced all the
19 showerheads, replaced all aerators at hand sinks, replaced circulation pumps, replaced piping to
20 the boilers, and ordered a chlorine dioxide injection system. (Ex. B, pp.88-90). The local media
21 ran news stories about Sunstone’s efforts. (*See* Ex. D). Sunstone likewise provided fact sheets
22 to guests and press releases to the media regarding its efforts. (*See* fact sheets and Press
23 Releases, attached as Ex. E).

1 **II. ANY EVIDENCE OF MEASURES TAKEN IN RESPONSE TO INFORMATION**
2 **CONVEYED IN PLAINTIFFS' JULY 25, 2003 CORRESPONDENCE, REPORTS**
3 **OF THESE MEASURES, OR THE BASIS FOR UNDERTAKING SUCH**
4 **MEASURES, IS PROPERLY EXCLUDED AS EVIDENCE OF SUBSEQUENT**
5 **REMEDIAL MEASURES.**

6 Rule 407 provides that “[w]hen, after an injury or harm allegedly caused by an event,
7 measures are taken that, if taken previously would have made the injury or harm less likely to
8 occur, evidence of the subsequent measures is not admissible to prove negligence, culpable
9 conduct ... or a need for a warning or instruction.” Fed. R. Evid. 407 (2005); *see also Columbia*
10 *& P. S. R. Co. v. Hawthorne*, 144 U.S. 202, 208, 12 S.Ct. 591, 593 (U.S.1892)(stating that
11 “[p]eople do not furnish evidence against themselves simply by adopting a new plan in order to
12 prevent the recurrence of an accident[.]” to hold that admitting evidence of changes in the saw-
13 mill’s design after an accident was improper).

14 Subsequent measures include investigations taken after the incident. *See Maddox v. City*
15 *of Los Angeles*, 792 F.2d 1408, 1417 (9th Cir. 1986) (holding that “the internal affairs
16 investigation and measures taken by the defendant city were remedial measures[.]”); *Compl. of*
17 *Consolidation Coal Co.*, 123 F.3d 126, 136 (3rd Cir. 1997)(excluding as a subsequent remedial
18 measure a memo detailing an investigation and its conclusions that was prepared five days after
19 an accident); *Alimenta (U.S.A.), Inc. v. Stauffer*, 598 F.Supp. 934, 940 (N.D.Ga. 1984); *cf Rocky*
20 *Mountain Helicopters, Inc. v. Bell Helicopters Textron, A Division of Textron, Inc.*, 805 F.2d
21 907, 918 (10th Cir. 1986)(holding that District Court did not abuse its discretion by admitting
22 results from a Photoelastic Study, which was conducted after the helicopter crash and led to a
23 redesign in the trunnions). In *Alimenta*, Price Waterhouse & Co. prepared a report, at the
24 request of the trading company, “that made recommendations regarding the trading company’s
25 trading practices and procedures subsequent to the actions of the defendants which allegedly
defrauded the [trading company].” 598 F.Supp. at 938. Because the trading company requested

1 the report to improve practices, procedures and controls of its trading in response to the
2 departure of a trader involved in improper trades, the Court excluded the report as a subsequent
3 remedial measure. *Id.* at 940. Additionally, press releases and other reports describing post-
4 incident investigations and responses are also excluded as subsequent remedial measures. *See*
5 *Specht v. Jensen*, 863 F.2d 700, 701-02 (10th Cir. 1988) (affirming the District Court's
6 exclusion of a press release that summarized the City's response to the incident as a subsequent
7 remedial measure).

8 In this case, Sunstone's actions in response to the information conveyed in Plaintiffs' July
9 25, 2003 letter, if conducted before learning of Mr. Sapiro's illness would have likely reduced
10 the potential that Mr. Sapiro would have become ill from his stay at the San Marcos, regardless
11 of the fact that such measures were not required to satisfy any duty owed to Plaintiffs. Positive
12 sample results would have alerted Sunstone to a potentially dangerous condition and the
13 replacement of components, installation of new features, and disinfection of the water lines
14 would have potentially reduced or eliminated the Legionella population. Consequently, these
15 acts are subsequent remedial measures and therefore, no direct or indirect evidence of these
16 measures or reports discussing these measures should be admitted. To permit such evidence
17 would have a substantial chilling effect on efforts by similarly situated parties to reduce the
18 potential for harm related to conditions on business owners' premises.

19 Defendants presume that Plaintiffs will improperly attempt to argue that these remedial
20 measures may demonstrate conditions existing at the time of the incident, Sunstone's control of
21 the property, or the feasibility of repair. Sunstone's measures, undertaken approximately seven
22 months after Plaintiffs' stay, can not represent the conditions existing at the time of Plaintiffs'
23 stay. Additionally, Sunstone does not deny that it controlled the San Marcos during the relevant
24 time period.

1 Moreover, Sunstone has not challenged the “feasibility of repair” with respect to the
2 multitude of measures taken. Sunstone’s measures perturbed many variables associated with
3 Legionella proliferation, and therefore, it is uncertain what measures were necessary for removal
4 of the Legionella population. Sunstone’s remedial measures do not help demonstrate the
5 veracity of Plaintiffs’ assertions that routine sampling and draining of the hot water tanks would
6 have prevent Legionella proliferation. Because Sunstone did not challenge the feasibility of an
7 overhaul to the domestic water system, and such an overhaul does not advance Plaintiffs’
8 suggested measures, Sunstone’s acts do not demonstrate the “feasibility of repair”.

9 Finally, the issue in this case is not whether such acts would have worked, but rather
10 whether Sunstone was under a duty to perform them. Sunstone’s measures, taken after receipt
11 of the letter, have no bearing on its duty to act before notice of a potentially dangerous
12 condition. To the extent these measures have any relevancy, the potential prejudice created by
13 the confirmation of Legionella, the steps taken in response, and the involvement of the local
14 health departments, significantly outweighs its probative value. *See* Fed. R. Evid. 403.

15 Consequently, Sunstone requests this Court prohibit Plaintiffs, Plaintiffs’ counsel, or
16 Plaintiffs’ witnesses from referencing, testifying or introducing any evidence relating to
17 Sunstones acts, measures and response taken after receipt of Plaintiffs’ July 25, 2003 letter.

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1 DATED this 5th day of December, 2005.

2 **KUNZ PLITT HYLAND**
3 **DEMLONG & KLEIFIELD**
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12 COPY of the foregoing e-filed
13 this 5th day of December, 2005, with:

14 United States District Court
15 Clerk of the Court
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17 Phoenix, Arizona 85003

18 COPIES of the foregoing mailed
19 this 5th day of December, 2005, to:

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