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

11 MARVIN SAPIRO and GLORIA  
SAPIRO, his wife,

12 Plaintiffs,

13 v.

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

16 Defendant.

No. CIV03-1555 PHX SRB

**DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

**(Oral Argument Requested)**

18 Defendants Sunstone Hotels Investors, L.L.C. and Sunstone Hotels Investors, L.P.  
19 (“Sunstone”), by and through undersigned counsel, pursuant to Rule 56, Federal Rules of Civil  
20 Procedure, hereby request that the Court grant Summary Judgment in their favor on Marvin and  
21 Gloria Sapiro’s (the “plaintiffs”) entire Complaint. Plaintiffs cannot establish that Sunstone  
22 breached any duty owed to the plaintiffs or that any alleged breached caused the plaintiffs’  
23 harm.  
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1 This Motion is supported by the following Memorandum of Points and Authorities and  
2 Separate Statement of Facts filed contemporaneously with this motion.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. NATURE OF THE CASE.**

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6 On February 6, 2003, the plaintiffs, residents of Boca Raton, Florida, checked in as  
7 guests at the Sheraton San Marcos Golf Resort and Conference Center (the “hotel” or “Sheraton  
8 San Marcos”) in Chandler, Arizona. (SSOF ¶ 2). The plaintiffs checked out of the hotel on  
9 February 11, 2003 and returned to Florida. (SSOF ¶ 2).

10 Upon their return to Florida, Mr. Sapiro began to demonstrate flu-like symptoms. (SSOF  
11 ¶ 3). He was admitted to the Delray Medical Center in Delray Beach, Florida on February 16,  
12 2003. (SSOF ¶ 4). Mr. Sapiro was ultimately diagnosed with Legionnaire’s Disease. (SSOF ¶  
13 1). In their Complaint, the plaintiffs allege that Sunstone was negligent, thereby causing Mr.  
14 Sapiro to be exposed to the *Legionella* bacteria during his stay at the Sheraton San Marcos.  
15 (SSOF ¶ 5).

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17 **II. PLAINTIFFS CANNOT ESTABLISH THAT SUNSTONE WAS NEGLIGENT IN**  
18 **THE OPERATION AND MAINTENACE OF THE HOTEL.**

19 Summary judgment is appropriate if “the trial court concludes that the scintilla of  
20 evidence presented supporting a position is insufficient to allow a reasonable juror to conclude  
21 that the position more likely than not is true.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,  
22 509 U.S. 57 (1993); *see* Fed. R. Civ. P. 56(c). In fact, Rule 56(c), Federal Rules of Civil  
23 Procedure, mandates the entry of summary judgment against a party who fails to adequately  
24 establish the existence of an element essential to the claim after a sufficient amount of time for  
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1 discovery has passed. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986);  
2 *see* Fed. R. Civ. P. 56(c).

3 To establish a claim for negligence, the plaintiffs must show that (1) Sunstone owed them  
4 a duty with an obligation to conform to a standard of conduct; (2) that Sunstone breached that  
5 duty; (3) that there exists a causal connection between the breach and the injuries; and (4)  
6 damages. *Piccola v. Woodall*, 186 Ariz. 307, 309, 921 P.2d 710, 712 (App. 1996); *Smith v.*  
7 *Johnson*, 183 Ariz. 38, 41, 899 P.2d 199, 202 (App. 1995). In this case, the plaintiffs have  
8 failed to present sufficient evidence to demonstrate that Sunstone's acts or omissions constituted  
9 a breach of a duty of care constituting negligence or that the negligence caused Mr. Sapiro's  
10 illness.  
11

12 **A. The Duty Owed By a Landowner to Its Business Invitee.**

13 In order for Sunstone to be found negligent, the plaintiffs must first prove that they had a  
14 special relationship with Sunstone, such that a legal obligation was imposed on one for the  
15 benefit of the other. *Robertson v. Sixpence Inns of America, Inc.*, 163 Ariz. 539, 543, 789 P.2d  
16 1040, 1044 (1990). It is well-established that, "[i]n Arizona, a business owner has a duty to  
17 maintain its premises in a reasonably safe condition for invitees." *Stephens v. Bashas' Inc.*, 186  
18 Ariz. 427, 924 P.2d 117 (App. 1996). "A business visitor or invitee is a person who is invited to  
19 enter or remain on land for a purpose directly or indirectly connected with business dealings  
20 with the possessor of the land." *Stephens*, 186 Ariz. at 430, 924 P.2d at 120 (quoting *McDonald*  
21 *v. Smitty's Super Valu, Inc.*, 157 Ariz. 316, 318, 757 P.2d 120, 122 (App. 1988)). A paying  
22 guest at a motel or other place of temporary lodging is classified as an invitee. *Woody v.*  
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1 *Weston's Lamplighter Motels*, 171 Ariz. 265, 268, 830 P.2d 477, 480 (App. 1992); *Wagner v.*  
2 *Coronet Hotel*, 10 Ariz.App. 296, 301, 458 P.2d 390, 395 (1969).

3 The duty of a business owner to an invitee is to maintain its premises in a reasonably safe  
4 condition. *Stephens v. Bashas' Inc.*, 186 Ariz. at 430, 924 P.2d at 120; *Martinez v. Woodmar IV*  
5 *Condos. Homeowners Ass'n, Inc.*, 187 Ariz. 408, 410, 930 P.2d 485, 487 (App. 1996) (stating  
6 that a business owner owes an invitee a duty to warn of unreasonably dangerous conditions  
7 which it knows or should know of and which the invitee is unaware and is unlikely to discover).

8 The business owner is not the insurer of the invitee's safety, but must only exercise reasonable  
9 care. *Tom v. S.S. Kresge Co.*, 130 Ariz. 30, 31, 633 P.2d 439, 440 (App. 1981) (emphasis  
10 added). Specifically, Arizona Courts have recognized that a landowner is only subject to  
11 liability for injuries caused to his invitees if he knows that a condition on the land poses “an  
12 unreasonable risk of harm” to the invitees that they will probably not discover and he fails to  
13 make reasonable attempts to protect them. Restatement (Second) of Torts § 343 (1965).

#### 14 **B. Sunstone Did Not Breach Any Duty Owed to the Plaintiffs.**

15 In support of their argument that Sunstone breached its duty to exercise reasonable care,  
16 the plaintiffs' rely on the testimony of an “expert” witness, Mr. Matthew Freije, who made  
17 several suggestions that he claims may have prevented Mr. Sapiro's illness, including (1) that  
18 Sunstone should have regularly tested the domestic water system for the presence of *Legionella*  
19 bacteria, and (2) that Sunstone should have periodically drained the water storage tanks.<sup>1</sup> (SSOF  
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24 <sup>1</sup> Sunstone contends that Mr. Freije, a “self taught expert” on Legionnaires Disease, is not qualified to render opinions  
25 regarding the applicable standard of care or breach thereof. Thus, Sunstone contends Mr. Freije's testimony and opinions are  
properly excluded and not thus not properly before this court on this motion, but provide plaintiffs position in this respect

1 ¶ 6). He readily admits, however, that those suggestions are not required by law or any other  
2 governmental agency and have not been adopted by the hotel industry. (SSOF ¶ 7). Mr. Freije  
3 also testified in his deposition, in support of his opinion that Sunstone should have tested the  
4 water, that various Occupational Safety and Health Administration (“OSHA”) guidelines require  
5 testing water for bacteria.<sup>2</sup> (SSOF ¶ 8).

7 **-- Testing for *Legionella***

8 Mr. Frieje contends that Sunstone should have periodically tested its domestic water  
9 system for *Legionella* in order to manage the risk presented by *Legionella*, despite the fact that  
10 such testing has not been adopted as a hospitality industry standard. (See Sunstone’s motion in  
11 Liminie No. 1 regarding Matthew Frieje). He also conceded that in light of the fact that  
12 *Legionella* can “spike” rather rapidly, there is no means by which he could conclude that testing  
13 at one point in time would demonstrate the presence of *Legionella* such that the property owner  
14 could preclude development and promulgation of *Legionella* shortly thereafter. (SSOF ¶ 20).

16 **-- Draining Storage Tanks**

17 Mr. Freije also suggested that Sunstone should have been draining its water storage tanks  
18 one to four times each year, but recognized that he did not have a verifiable source to support his  
19 suggestion. (SSOF ¶ 12). He conceded that there was no law or other requirement that the hotel  
20 perform this task. (SSOF ¶ 13). The plaintiffs have not produced any evidence to show that the  
21 tanks were or were not cleaned in the twelve months prior to the Sapiros’ stay at the hotel. Even  
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23 pending the court’s ruling on Defendats’ Motion in Liminie No. 1 regarding Mr. Frieje. (See Sunstone’s separate motion in  
24 limine regarding Matthew Freije).

25 <sup>2</sup> Sunstone contends that OSHA regulations, which concern employee workplace safety, are inapplicable to the facts  
of this case. (See Sunstone’s separate motion in limine regarding OSHA).

1 if the tanks had been cleaned, Mr. Freije stated that “the tanks were so old that the cleaning  
2 would have been ineffective [and] . . . would have not guaranteed *Legionella* control.” (SSOF ¶  
3 14). Thus, considering Mr. Freije’s testimony as a whole, he concedes that had the Sheraton San  
4 Marcos drained and cleaned the storage tanks as he suggested, it would not have prevented this  
5 alleged *Legionella* exposure.  
6

7       **-- The OSHA Guidelines**

8       The OSHA guidelines when read as a whole do not require analysis of water samples  
9 unless there is a reason to suspect contamination. The OSHA Technical Manual reads, in  
10 pertinent part, “Water. Analysis of water samples from a source suspected of being  
11 contaminated with *L.pneumophila* is a valuable means of identifying potential sources of the  
12 disease.” (SSOF ¶ 9). Mr. Freije acknowledged that the OSHA guidelines do not require  
13 random water analysis, but only advocate for the analysis of water samples during an  
14 investigation after a potential bacterial disease has been identified. (SSOF ¶ 10). Notice of Mr.  
15 Sapiro’s illness was the first time that the hotel or hotel employee was aware of any allegation of  
16 *Legionella* contamination. (SSOF ¶ 11). Thus, the OSHA regulations, by their terms, did not  
17 require Sunstone to conduct analysis of water samples prior to Mr. Sapiro’s stay on the property.  
18

19       **-- The San Marcos Practices and Procedures**

20       The plaintiffs also rely on Mr. Freije’s testimony regarding the San Marcos’ Engineering  
21 Standard Operating Procedures Manual as evidence that Sunstone breached its duty owed to the  
22 plaintiffs. Jeff Hammermeister, the General Manager of the property, and Robert Marrs, the  
23 Director of Engineering of the property, stated that the Sheraton San Marcos was regularly  
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1 inspected to ensure the safety of the hotel guests: (1) the Health Department conducted property  
2 inspections several times each year; (2) Mr. Phil Dignan, a vice-president at Sunstone, traveled  
3 monthly to the hotel to ensure that its operation was satisfactory; (3) Mr. Hammermeister did a  
4 daily walk-through of the property; (4) Mr. Marris implemented a preventative maintenance  
5 program on the equipment at the hotel; and (5) Mr. Marris conducted a regular inspection of the  
6 rooms, and, specifically, checked the temperature of the domestic water approximately every  
7 two weeks. (SSOF ¶ 15).

9         The plaintiffs have provided no evidence to establish that the hotel industry sets forth a  
10 particular standard of care with regard to bacterial testing or that Sunstone failed to satisfy that  
11 standard of care. To the contrary, the evidence presented only demonstrates that the hotel and  
12 hotel employees took ample measures to ensure that the hotel was reasonably safe for its guests.  
13 In fact, Mr. Marris testified that in his long professional history in the hospitality industry he had  
14 been instructed that the domestic hot water temperature needed to be at least 121 degrees for the  
15 control of *Legionella* bacteria, and that such training was received while working for the Hilton  
16 hotel chain. (SSOF ¶ 21). During his tenure at the Sheraton San Marcos and during the time  
17 that the plaintiffs were guests of the hotel, the domestic hot water temperature remained at 130  
18 degrees. (SSOF ¶ 22). This evidence confirms that the only potential industry standard (as  
19 adopted by the Hilton chain) was followed and, therefore, the plaintiffs cannot show that  
20 Sunstone breached its duty of care to the plaintiffs.  
22

23         The plaintiffs have not presented evidence showing that Sunstone created the condition  
24 by failing to do something it was required to do, knew of the condition and did not properly  
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1 remedy the condition, or that it would have discovered the condition by exercising any other  
2 standards in satisfying its duty of care.

3 **C. The Plaintiffs Cannot Establish that Sunstone’s Alleged Negligence was the**  
4 **Proximate Cause of Mr. Sapiro’s Illness.**

5 Assuming, arguendo, that Sunstone breached its duty of care, the plaintiffs must establish  
6 that proximate cause existed. “The proximate cause of an injury is that which, in a natural and  
7 continuous sequence, unbroken by any efficient intervening cause, produces an injury, and  
8 without which the injury would not have occurred.” *McDowell v. Davis*, 104 Ariz. 69, 71, 448  
9 P.2d 869, 871 (1968).

10 The plaintiffs rely on measurable amounts of *Legionella* bacteria found in the hotel water  
11 to prove causation, however, they have not established that Sunstone’s failure to sample the  
12 water or drain the water storage tanks, as recommended by Mr. Freije, would have eliminated  
13 the bacteria and thus prevented Mr. Sapiro’s illness. Mr. Freije willingly admits that the hotel  
14 was not required to test the water for the presence of *Legionella* bacteria or drain the water  
15 storage tanks. (SSOF ¶ 17).

16 The plaintiffs also cannot establish that the bacteria was detectable at pathogenic levels at  
17 the time that the plaintiffs stayed on the property. Although Mr. Sapiro stayed at the hotel in  
18 February, the plaintiffs did not perform tests on the water until May. (SSOF ¶ 18). They did  
19 not and cannot perform regression analysis to determine what the bacteria levels were at the  
20 time that the plaintiffs were guests of the hotel. (SSOF ¶ 19). In addition, Mr. Freije said that  
21 levels of *Legionella* bacteria can spike quickly, so it may be unusually high one day even though  
22 it was not a measurable amount shortly before that analysis. (SSOF ¶ 20).



1           Based on the evidence, the plaintiffs cannot establish that Sunstone's alleged breach was  
2 the proximate cause of Mr. Sapiro's illness. Without demonstrable evidence that Sunstone's  
3 acts or omissions would have otherwise prevented the condition which allegedly caused his  
4 illness, the plaintiffs cannot meet an essential element of their negligence claim.

5  
6 **D. Mr. Freije's testimony is properly excluded.**

7           In the absence of Mr. Freije's testimony, the discussion provided above is unnecessary. In  
8 considering the information provided above with that set forth in Sunstone's Motion in Liminie  
9 No. 1 regarding Mr. Frieje, it becomes abundantly clear that plaintiffs' efforts to create a  
10 question of fact fall far short of the mark and fail to demonstrate that Sunstone failed to do  
11 something it was required to do, or did something it should not have done, and thereby caused  
12 Mr. Sapiro's illness.

13  
14           Thus, although Sunstone contends there is insufficient evidence taken as a whole to  
15 demonstrate that it breached any duty owed to plaintiffs or that any alleged breach has been  
16 proven to be the cause of plaintiffs injuries, in properly excluding Mr. Freije's testimony it  
17 becomes overwhelmingly clear that plaintiffs have failed to sustain their burden of proof as set  
18 forth above.

19 **III. CONCLUSION.**

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21           The plaintiffs have not established that Sunstone breached a duty of care and they cannot  
22 present evidence to establish that the absence of any alleged breach would have otherwise  
23 prevented Mr. Sapiro's illness. For the foregoing reasons, Sunstone respectfully requests that  
24 this Court grant summary judgment on the plaintiffs' Complaint.

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DATED this \_\_\_\_\_ day of December, 2005.

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By \_\_\_\_\_