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13
14 **IN THE UNITED STATES DISTRICT COURT**
15 **IN AND FOR THE DISTRICT COURT OF ARIZONA**

16 MARVIN SAPIRO and GLORIA
17 SAPIRO, his wife,

18 Plaintiffs,

19 v.

20 SUNSTONE HOTELS INVESTORS,
21 L.L.C., SUNSTONE HOTEL
22 INVESTORS, L.P.

23 Defendant.

24 No. CIV03-1555 PHX SRB

25 **DEFENDANTS' SEPARATE
STATEMENT OF FACTS**

26 Defendants Sunstone Hotels Investors, L.L.C. and Sunstone Hotels Investors, L.P.
27 (“Sunstone”), pursuant to Rule 56(c)(2), Arizona Rules of Civil Procedure, submits the
28 following Separate Statement of Facts in support of its Motion for Summary Judgment.

29 1. This case arises from Legionnaire’s Disease, which plaintiff contracted in
30 February 2003. (*See* Amended Complaint, ¶ 1).

31 2. From February 6, 2003 to February 11, 2003, Marvin and Gloria Sapiro
32 (collectively “Plaintiffs”) stayed at the Sheraton San Marcos Golf Resort and Conference Center

1 (the “Sheraton San Marcos”), located at One San Marcos Place, Chandler, Arizona. (*See id.* at
2 ¶¶ 6, 14).

3 3. On February 12, 2003, Marvin Sapiro (“Mr. Sapiro”) began to experience
4 flu-like symptoms. (*See id.* at ¶ 15).

5 4. On February 16, 2003, Mr. Sapiro was admitted to the Delray Medical
6 Center located in Delray Beach, Florida. (*See id.* at ¶ 18).

7 5. In their Complaint, the plaintiffs allege that Mr. Sapiro was exposed to the
8 legionella bacteria during his stay at the Sheraton San Marcos as a result of Sunstone’s
9 negligence. (*See id.* at ¶¶ 48-5).

10 6. The plaintiffs’ expert, Mr. Matthew Freije, made several suggestions, such
11 as that Sunstone should have regularly tested the water and drained the water storage tanks that
12 he claims may have prevented Mr. Sapiro’s illness. (Reports of Matthew Freije dated 4/8/05 &
13 2/11/05, Exhs. A & B).

14 7. Mr. Freije admits that those suggestions are not required by law or any
15 other governmental agency and have not been adopted by the hotel industry. (Deposition of
16 Matthew Freije dated 4/29/05 at pp. 120-24, Exh. C).

17 8. Mr. Freije testified that various Occupational Safety and Health
18 Administration (“OSHA”) guidelines require testing water for bacteria. (*Id.* at 142).

19 9. The OSHA Technical Manual reads, in pertinent part, “Water. Analysis of
20 water samples from a source suspected of being contaminated with *L.pneumophila* is a valuable
21 means of identifying potential sources of the disease.” (OSHA Technical Manual II (C) (2),
22 Exh. D).

23 10. Mr. Freije acknowledged that the OSHA guidelines do not require random
24 water analysis, but only advocate for the analysis of water samples during an investigation after
25

1 a potential bacterial disease has been identified. (Deposition of Matthew Freije dated 4/29/05 at
2 p. 142).

3 11. Notice of Mr. Sapiro's illness was the first time that the hotel or hotel
4 employee was aware that the hotel may be the source of a bacterial disease. (Deposition of Jeff
5 Hammermeister dated 6/1/05 at p. 20; Exh. E).

6 12. Mr. Freije also suggested that Sunstone should have been draining its
7 water storage tanks one to four times each year, but recognized that he did not have a verifiable
8 source to support his suggestion. (Deposition of Matthew Freije dated 9/16/05 at p. 181; Exh.
9 G).

10 13. Mr. Freije conceded that there was no law or other requirement that the
11 hotel perform this task. (*Id.* at p. 205).

12 14. Mr. Freije stated that "the tanks were so old that the cleaning would have
13 been ineffective [and] . . . would have not guaranteed legionella control." (*Id.* at pp. 178, 180-
14 81).

15 15. Mr. Hammermeister and Robert Marrs, the Director of Engineering at the
16 Sheraton San Marcos, stated that the property was regularly inspected to ensure the safety of the
17 hotel guests: (1) the Health Department conducted property inspections several times each year;
18 (2) Mr. Phil Dignan, a vice-president at Sunstone, traveled monthly to the hotel to ensure that its
19 operation was satisfactory; (3) Mr. Hammermeister did a daily walk-through of the property; (4)
20 Mr. Marrs implemented a preventative maintenance program on the equipment at the hotel; and
21 (5) Mr. Marrs conducted a regular inspection of the rooms, and, specifically, checked the
22 temperature of the water approximately every two weeks. (Deposition of Robert Marrs dated
23 9/23/04 at pp. 14-20, Exh. F; Deposition of Jeff Hammermeister dated 6/1/05 at pp. 28-29, 33,
24 87-88).

1 16. Sunstone, upon learning of Mr. Sapiro's illness, immediately transferred
2 guests to alternate hotels and closed the property, super-heated and hyper chlorinated the hot
3 lines, installed new boilers, created backflow prevention to the city's water source, installed new
4 water heaters and water storage tanks, replaced showerheads, replaced circulation pumps, and
5 replaced piping to the boilers. (Deposition of Jeff Hammermeister dated 6/1/05 at pp. 28-29, 33,
6 87-88).

7 17. Mr. Freije testified that the hotel was not required to test the water for the
8 presence of legionella bacteria or drain the water storage tanks. (Desposition of Matthew Freije
9 dated 4/29/05 at p. 123; Deposition of Matthew Freije dated 9/16/05 at p. 204).

10 18. Although Mr. Sapiro stayed at the hotel in February, the plaintiffs did not
11 perform tests on the water until May. (Desposition of Matthew Freije dated 9/16/05 at pp. 235-
12 37).

13 19. They did not and cannot perform regression analysis to determine what the
14 bacteria levels were at the time that the plaintiffs were guests of the hotel. (Deposition of
15 Matthew Freije dated 9/16/05 at pp. 236-37, 242-43).

16 20. In addition, Mr. Freije said that levels of legionella bacteria can spike
17 quickly, so it may be unusually high one day even though it was not a measurable amount
18 shortly before that analysis. (Desposition of Matthew Freije dated 9/16/05 at pp. 269-70).

19 21. Mr. Marrs testified that he had been instructed that the water temperature
20 needed to be at least 121 degrees for the prevention of Legionella during previous training he
21 received while working for the Pointe Hilton for South Mountain (Deposition of Robert Marrs
22 dated 9/23/04 at p. 47).

23 22. Mr. Marrs testified that he kept the water temperature at 130 degrees. (*Id.*
24 at p. 20).

1 DATED this _____ day of December, 2005.
2

3 **KUNZ PLITT HYLAND**
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6

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By _____