

# EXHIBIT 2



February 11, 2005

Mr. Steven W. Davis, Esq.  
Boies, Schiller & Flexner LLP  
100 Southeast 2<sup>nd</sup> Street, Suite 2800  
Miami, FL 33131-2144

Re: Sapiro v. Sunstone Hotel Investors, L.P.

Dear Mr. Davis:

Based on information received to date, my opinions in the above matter, with reasonable scientific probability, are as follows:

**1. Marvin Sapiro was exposed to high levels of *Legionella* bacteria during his stay at the San Marcos Resort in Arizona.**

*Legionella* test results for water samples collected at the San Marcos in April and August 2003 clearly indicate a significant health risk. Based on the nature of *Legionella* bacteria in plumbing systems, it is very likely that the bacteria were in the system in February 2003.

There are approximately 47 species of *Legionella*, one of which is *pneumophila*, which itself has 15 serogroups. High levels of *Legionella pneumophila* serogroup 1 were found in the San Marcos domestic water system, which is the same serogroup detected in Mr. Sapiro's urine. Although the matching serogroups does not conclusively implicate the San Marcos in Mr. Sapiro's disease, it is scientifically significant.

February 11, 2005

Mr. Steven W. Davis, Esq.

Page 2

It is possible that Mr. Sapiro was exposed to *Legionella* via water sources outside the San Marcos within two to ten days prior to onset of illness. However, the only places that the Sapiro's reported visiting during their stay in Phoenix, other than the San Marcos Resort, were restaurants, their son's house, and their son's Little Caesar's Restaurant, which had not yet opened. Although I intend to check further into the potential sources of *Legionella* contamination to which Mr. Sapiro may have been exposed during the incubation period, information I have received to date reveals no aerosolizing water sources outside the San Marcos to which Mr. Sapiro could likely have been exposed for the duration or with the intensity that he was to the water sources at the San Marcos. Moreover, in those water sources to which Mr. Sapiro may have been exposed briefly, it would be unlikely to find *Legionella* bacteria to the extent and at the levels that were detected at the San Marcos. Such high levels are uncommon, especially in homes or other small piping systems.

**2. Marvin Sapiro would not have been exposed to high levels of *Legionella* bacteria during his stay at the San Marcos if the property owner, operator, manager, or other party responsible for the hotel (presumably Sunstone Hotel Investors, L.P. or Sunstone Hotel Management, Inc.), hereinafter referred to as "Sunstone," had routinely tested the hotel water systems for *Legionella* and taken appropriate steps in response to the results.**

Had water samples been routinely collected and tested for *Legionella* prior to Mr. Sapiro's stay at the San Marcos, remedial measures could have been taken to correct the problem and protect the occupants.

**3. Sunstone failed to exercise reasonable care to prevent Legionnaires' disease at the San Marcos.**

Hotel water systems are conducive to growth and transmission of *Legionella* bacteria. Large plumbing systems can be an ideal breeding habitat for *Legionella* and other bacteria. Cooling tower water also provides an excellent habitat for *Legionella*, and a tower's

February 11, 2005

Mr. Steven W. Davis, Esq.

Page 3

powerful fan broadcasts potentially contaminated water droplets into the air. Whirlpool spas are another breeding ground for *Legionella*, and the bubbles produced by air jets are an efficient means of transmitting the bacteria from the water to the breathing zone of the bathers.

It is therefore important for hotel operators to incorporate reasonable *Legionella*-preventive measures in the design, installation, operation, and maintenance of water systems; to periodically test water systems for *Legionella* to make sure that the preventive measures are keeping the bacteria under control, and to implement remedial measures if test results are unacceptable.

Although *Legionella* environmental sampling is not regulated in the United States as it is in other countries, sampling is considered good practice by many agencies and experts:

U.S. Department of Labor, Occupational Safety and Health Administration (OSHA). *Technical Manual* (1996); Section II, Chapter 7, 1996 (Attachment B):

“Analysis of water samples from a source suspected of being contaminated with *L. pneumophila* is a valuable means of identifying potential sources of the disease.”

U.S. Environmental Protection Agency (EPA). *Guidance Manual for the Compliance with the Filtration and Disinfection Requirements for Public Water Systems Using Surface Water Sources, March 1991 Edition, Parts One and Two*, Appendix B, “Institutional Control of *Legionella*,” 1991, pages 201-206 (Attachment C):

“Although all of the criteria required for colonization are not known, large institutions, such as hospitals, hotels, and public buildings with recirculating hot water systems seem to be the most susceptible.”

February 11, 2005

Mr. Steven W. Davis, Esq.

Page 4

“It is suggested that hospitals, and other institutions with potential for the growth of *Legionella*, conduct routine monitoring of their hot water systems at least quarterly.”

“Samples should be taken at, or closely following, the hot water storage reservoir and from a number of showerheads. It is recommended that showers with the least frequent usage be included in the sampling program. Follow-up testing is suggested for all positive indications prior to the initiation of any remedial measures. If the presence of *Legionella* is confirmed, then remedial measures should be taken.”

Sunstone was aware of the health risk posed by *Legionella* bacteria. Its engineering department SOPs, under “Water Treatment for Domestic Piping/Equipment,” set forth the objective to “minimize corrosion, deposit accumulation and biological growth” to “preclude biological health hazards.” One of its standards was to “conduct annual training for Engineering personnel for water testing and treatment.” The Engineering SOPs even included a section devoted to Legionnaires’ disease, citing the objective “to define minimum standards for prevention of Legionnaires’ disease” in order to ensure buildings “are safe from Legionnaires’ pneumophila organism.” The document outlines a few specific standards, such as “Drain down all storage tanks on a regular basis” and “Prevent accumulation of mud, silt, debris, etc. from sump basins of cooling towers by cleaning on a regular basis.” I have assumed that the undated SOPs were written and disseminated prior to 2003, but have not been able to confirm it.

The SOPs also contained a reference section “to establish the reference materials to be included in the Engineering Department office,” to facilitate “efficient availability of information when needed for making decisions.” On the list of references were materials that included *Legionella* prevention information, such as facilities engineering journals and periodicals, OSHA and EPA regulations, and American Society of Heating, Refrigeration & Air-Conditioning Engineers (ASHRAE) standards.

February 11, 2005

Mr. Steven W. Davis, Esq.

Page 5

Sunstone did not follow the recommendations set forth in its referenced materials, or even the standards outlined in its own engineering department documents. The *Legionella* test results for the April and August 2003 sampling confirm that Sunstone did not “preclude biological health hazards” or ensure its buildings were “safe from Legionnaires’ pneumophila organism.” I have received no documentation indicating that Sunstone implemented proper *Legionella*-preventive maintenance, including measures recommended in its own standard operating procedures, or routinely tested water systems for *Legionella* to ensure that they were safe. In his deposition on September 23, 2004, Robert Marr said there were no written guidelines or instructions for maintenance of air conditioning or water systems in October 2002 when he started working at the San Marcos. He also confirmed that there was no *Legionella* testing prior to August 2003.

In forming my opinions, I relied on my knowledge of Legionnaires’ disease and *Legionella* bacteria, published literature on Legionnaires’ disease and *Legionella* bacteria, my experience, the *Legionella* test results of water collected from the San Marcos by me in April 2003 (VA Medical Center laboratory report dated May 21, 2003, Attachment D) and by Exponent in August 2003, and my review of the following documents provided by your office:

- Sunstone memorandums and fact sheets
- Sunstone engineering department materials and San Marcos mechanical PM program (Attachment E)
- Deposition of Robert Marrs, dated September 23, 2004 (Attachment F)
- Amended Complaint
- Defendant’s responses to interrogatories and first request for admissions (Attachment G)
- Pathogen Control Associates laboratory reports dated September 11 and 12, 2003
- Medical records related to Mr. Sapiro’s Legionnaires’ disease (Attachment H)

I have not yet inspected the San Marcos Resort facilities, other than my visit as a guest in April 2003, or examined its plumbing, air conditioning, and other water systems (I

February 11, 2005

Mr. Steven W. Davis, Esq.

Page 6

understand that a request for inspection is pending and that an inspection will occur in the near future at a mutually convenient time). I also have not had the opportunity to examine the boilers, tanks, fixtures, and any other equipment that were in use at the San Marcos in February 2003 but have since been removed. In addition, I intend to check out other facilities that Mr. Sapiro visited during his February 2003 visit to Phoenix. Any additional information could affect my opinion, so I reserve the right to supplement this report after completing such inspections or receiving additional documents.

My qualifications, publications, and a list of cases in which I have testified are listed in Attachment A. My fees in this case are \$220 per hour for document review, inspections, reports, trial preparation, etc., and \$350 per hour for depositions and court testimony.

Sincerely,

A handwritten signature in black ink, appearing to be 'M. Freije', with a horizontal line extending to the right.

Matthew R. Freije

attachments

# Attachment A

## Matthew R. Freije

PO Box 2109, 808 El Paisano Dr., Fallbrook CA 92088 • Tel 760-451-1050 • Fax 619-839-3166 • E-mail [mf@hcinfo.com](mailto:mf@hcinfo.com)

### Education and Certification

- B.S. Mechanical Engineering, Purdue University, 1983
- Special undergraduate studies in heating, ventilating, air-conditioning, and refrigeration; Purdue University, 1982-1983
- Engineer-in-Training license, State of Indiana (#83906), July 1983
- Certified Water Specialist (Water Quality Association)

### Recent Positions

- 1989 – 1995: Founder and President, Alpha-tech, Inc. (indoor air consulting)
- 1995 – present: Founder and President, HC Information Resources Inc. (consulting, publications, seminars, and training related to *Legionella* and other waterborne pathogens)

### Current Work

- Consultant, *Legionella* risk assessments, management plans, investigations, and problem solving
- Instructor, *Legionella* training courses
- Expert, litigation related to Legionnaires' disease
- Editor, *Legionella E-news*, an international electronic newsletter covering outbreaks and new technology
- Content manager, [hcinfo.com](http://hcinfo.com), a web site referenced and linked by government agencies, professional societies, and news media throughout the world.

### Expert Testimony

- Deposition in *Ortiz v Hospitality Ventures*, District Court, City and County of Denver, Colorado; September 23, 2004
- Deposition in *Liberty Mutual Insurance Co. v. American National Fire Insurance Co., et al*; Superior Court of New Jersey, Burlington County; December 9, 2004

### Industry Memberships

- American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE)
- American Society of Plumbing Engineers (ASPE)
- American Society of Safety Engineers
- International Water Association (IWA)
- Water Quality Association (WQA)

### Recent Speeches on Legionnaires' Disease (partial list)

- International Water Conference, October 2004, Pittsburgh
- ISH North America, October 2004, Boston
- Water Quality Association, March 2004, Annual Convention, Baltimore
- ISH North America, October 2003, Las Vegas
- Association of Water Technologies, September 2003, National Convention, Phoenix
- Water Quality Association, March 2003, Annual Convention, Las Vegas
- ISH North America, October 2002, Toronto
- Association of Water Technologies, September 2002, National Convention, Orlando
- American Industrial Hygiene Conference and Exposition, June 2002, San Diego
- Association of Water Technologies, October 2001, National Convention, Dallas
- EC Summit, September 2001, National Conference, Las Vegas
- American Society for Healthcare Engineering, July 2001, National Convention, Tampa
- American Industrial Hygiene Conference and Exposition, June 2001, New Orleans
- American Society of Plumbing Engineers, November 2000, National Convention, Nashville

### Publications

*Legionellae Control in Health Care Facilities: A Guide for Minimizing Risk* ([www.hcinfo.com/ldbook.htm](http://www.hcinfo.com/ldbook.htm))

- 1997 Small Press Book Awards finalist
- Fully reviewed or highlighted in journals worldwide
- Sold in more than 30 countries



Reports

- *Legionnaires' Disease: Facts, Legal Issues, Risk\**
- *How to Make Plumbing Systems Less Conducive to Legionella and Other Bacteria\**
- *Disinfecting Plumbing Systems of Legionella: Solving Problems Without Overspending\**
- *Minimizing the Risk of Legionella in Cooling Towers and Other HVAC Equipment\**
- *Sample Water for Legionella? Weighing the Benefits against the Costs\**
- *Legionella Environmental Sampling Guide\**
- *Getting Help with Legionella Problems: Guidance for Good Decisions\**
- *How to Reduce Your Risk of Legionnaires' Disease in Public Places*
- *Spas, Hot Tubs, and Whirlpool Bathtubs: A Guide for Disease Prevention*
- *Home Plumbing Systems: How to Reduce Your Risk of Legionnaires' Disease and Other Bacterial Infections*
- *Dental Water Line Contamination*
- *Home Humidifiers: Reducing Your Exposure to Harmful Bacteria*
- *Management Plan for Legionella and Other Waterborne Pathogens*

\* Composed primarily of information excerpted and adapted from *Legionellae Control in Health Care Facilities: A Guide for Minimizing Risk*

Articles (partial list)

- "The Word on Water: New CDC Guidelines Recommend a Proactive Approach to Legionella." *Health Facilities Management* (Oct. 2004), Health Forum, Inc., an American Hospital Association company
- "A Management Plan for Legionella and Other Waterborne Pathogens." *Occupational Hazards* (Aug. 2004), Penton Media, Inc.
- "Pure+Easy: Selecting a Domestic Water Disinfection System." *Health Facilities Management* (Sept. 2003), Health Forum, Inc., an American Hospital Association company
- "Testing the Waters: Facts to Consider When Deciding Whether to Sample for Legionella." *Health Facilities Management* (Oct. 2002), Health Forum, Inc., an American Hospital Association company
- "Eight Deadly Blunders: Common Mistakes in Protecting Against Legionella." *Health Facilities Management* (Mar. 2002), Health Forum, Inc., an American Hospital Association company
- "Legionella and the Plumbing Engineer: Responsibility, Liability, and Opportunities." *PM Engineer* (Feb. 2002), Business News Publishing Co.
- "Preventing Legionella in Home Plumbing Systems." *Plumbing & Mechanical* (Jan. 2002), Business News Publishing Co.
- "Developing a Management Plan for Waterborne Pathogens." *Environment of Care News* (May/June 2001), Joint Commission Resources.
- "New Standard Requires Legionella Management Plans for Hospitals." *The Analyst* (Spring 2001), Association of Water Technologies.
- "Inspecting spas and hot tubs." *The ASHI Reporter* (Mar. 2001), American Society of Home Inspectors Inc.
- "Something in the Air: Groups Turn Their Attention to Legionella Control." *Health Facilities Management* (Mar. 2001), Health Forum, Inc., an American Hospital Association company
- "Waterborne Pathogens: Reducing Risk of Legionella and Other Bacteria in Home Plumbing Systems." *Water Conditioning & Purification* (Feb. 2001), Publicom Inc.
- "Legionnaires' Disease: An Update for Plumbing Engineers." *PM Engineer* (July 2000), Business News Publishing Co.
- "Update: The latest on Legionnaires' disease." *The ASHI Reporter* (May 2000), American Society of Home Inspectors Inc.
- "Concern About Legionnaires' Disease Rising." *Building Operating Management* (Feb. 2000), Trade Press Publishing Corp.
- "Legionnaires' disease Update." *ASHRM Forum* (Jan./Feb. 2000), American Society for Healthcare Risk Management.
- "Legionnaires' disease: It has not gone away." *Air Conditioning, Heating & Refrigerating News* (Jan. 24, 2000), Business News Publishing Co. Reprinted in *Air Conditioning and Refrigerating Journal* (Apr.-June 2000), Indian Society of Heating, Refrigerating and Air Conditioning Engineers, Mumbai, India
- "Update: The latest on Legionnaires' disease." *Engineered Systems* (Jan. 2000), Business News Publishing Co.
- "Legionella in Cooling Towers: Reasonable ways to minimize risk." *Air Conditioning, Heating & Refrigerating News* (Jan. 25, 1999), Business News Publishing Co.
- "Legionella in Cooling Towers." *Engineered Systems* (July 1998), Business News Publishing Co.
- "Legionella: Preventive Measures for Domestic Water Systems." *PM Engineer* (Nov. 1997), Business News Publishing Co.
- "Legionnaires: a prescription for prevention." *Health Facilities Management* (Oct. 1996), American Hospital Publishing, Inc. Reprinted in *Health Estate Journal* (June 97), The Institute of Healthcare Engineering and Estate Management, UK
- "How to minimize the risk of legionnaires' disease." *Healthcare Risk Management* (Aug. 1996), American Health Consultants
- "To sample or not: The Legionella debate." *Hospital Infection Control* (Sep. 1996), American Health Consultants



April 8, 2005

Mr. Steven W. Davis, Esq.  
Boies, Schiller & Flexner LLP  
100 Southeast 2<sup>nd</sup> Street, Suite 2800  
Miami, FL 33131-2144

Re: Sapiro v. Sunstone Hotel Investors, L.P.

Dear Mr. Davis:

After inspecting the San Marcos on March 15, 2005, and reviewing additional documents, the opinions expressed in my report of February 11, 2005 have not changed. I wish to add, however, that I still have found no evidence of water sources outside the San Marcos to which Mr. Sapiro could likely have been exposed for the duration or with the intensity that he was to the water sources at the San Marcos.

The only places that the Sapiro's reported visiting during their stay in Phoenix, other than the San Marcos Resort, were their son's house, the Little Caesar's Restaurant that their son was preparing to open, and two restaurants in Scottsdale—Buca Di Beppo, at 3828 N. Scottsdale Road, and Don and Charlie's American Rib and Chop House, at 7501 E. Camelback Road.

When Mr. Sapiro visited Phoenix in 2003, his son lived at 3104 East Capricorn. I drove by the house on March 15, 2005, but did not inspect the interior because Mr. Sapiro's son no longer lives there. Based on studies of home water systems, it would be very unlikely to find *Legionella* bacteria in this house at the levels that were detected at the San Marcos.

April 8, 2005

Mr. Steven W. Davis, Esq.

Page 2

According to the Sapiro's, their son's Little Caesars restaurant at 911 South Lindsay Road, in Gilbert, was not open when they visited in 2003, and no water was in the plumbing system. When I drove by the restaurant on March 15, 2005, I looked for cooling towers or other potential sources of *Legionella* contamination in the vicinity but did not see any.

On March 14, 2005, I visited Buca Di Beppo restaurant and Don and Charlie's American Rib and Chop House and collected a water sample from the men's restroom in each. No *Legionella* was found in either sample (see attached sample log and laboratory report). I also drove the area and did not see a source of *Legionella* contamination (e.g., cooling towers or misters) in the vicinity of either restaurant.

I have reviewed the following documents since February 11, 2005:

- 8/28/03 letter of from Marlin Services to Sheraton San Marcos
- 9/2/03 invoice from G & G Pool Specialists to the San Marcos
- 10/3/03 Sunstone purchase order
- 10/3/03 Sunstone purchase order to ANG Pool Specialists of Glendale, Arizona
- "Draft procedures for spa and pool treatment"
- 9/3/03 Proposal from Advanced Water Systems to Sheraton San Marcos
- 9/10/03 Inspection Continuation sheet by Maricopa County Environmental Services Department
- 8/29/03 letter from the Chandler Municipal Utilities Department to Gary Stougaard of Sunstone Hotel Investors
- Cross-connection Inspection Report: notice of compliance or non-compliance, City of Chandler Water Quality Division
- Undated work order by Air Conditioned Mechanical Services with store stamp 231838
- City of Chandler permit no. CMP03-0029 dated 9/2/03
- Maricopa County inspection report dated 9/10/03, and signed by Matt Sytsma
- 9/02/03 e-mail from Robert Maars to Gary Stougaard and others, which was subsequently forwarded by Guy Lindsey to additional persons

April 8, 2005

Mr. Steven W. Davis, Esq.

Page 3

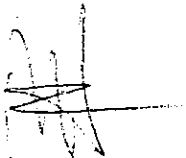
- 8/29/03 e-mail from Gordon Adams to Gary Stougaard
- 8/29/03 e-mail from Robert Maars to Gary Stougaard
- 8/28/03 e-mail from Robert Maars to Jeff Hammermeister and Gary Stougaard
- 8/30/03 e-mail from Robert Maars to Gary Stougaard, Jeff Hammermeister, and Guy Lindsey
- 8/31/03 e-mail from Robert Maars to Gary Stougaard, Guy Lindsey, and Jeff Hammermeister
- Sunstone Hotel Investors Engineering Manual, Engineering SOP's, Preventive Maintenance
- Plumbing and mechanical plans provided for the main building (plans for the other buildings were not provided)

I may wish to supplement this report if I receive additional information.

I have provided expert testimony twice since February 11, 2005:

- Trail testimony in Liberty Mutual Insurance Co. v. American National Fire Insurance Co., et al; Superior Court of the State of New Jersey, Burlington County; February 17, 2005
- Deposition in Cherry et al v. 3075 Wilshire Blvd LLC et al, Superior Court of the State of California, for the County of Los Angeles, Central District, March 11, 2005

Sincerely,



Matthew R. Freije

attachments



# Aerotech Environmental Laboratories

a division of Aerotech Laboratories, Inc.

Main Lab - 4645 E. Colton Center Blvd., Building 3, Suite 189, Phoenix, AZ 85040  
 602.437.3340 - FAX 623.445.6192  
 [ ] North Phoenix - 1501 W. Knudsen, Phoenix, AZ 85027  
 623.780.4600 - FAX 623.445.6216  
 [ ] Tucson - 4455 S. Park Ave., Suite 110, Tucson, AZ 85714  
 520.807.3801 - FAX 520.807.3803  
 www.aeroenvirolabs.com or call toll-free 866.772.5227

Lab Number  
 915-503-2137

Customer Number: \_\_\_\_\_ Page \_\_\_\_\_ of \_\_\_\_\_  
 Customer: **HC Information Resources Inc.**  
 Address: **PO Box 2109**  
 City, State, Zip: **Fallbrook CA 92088**  
 Contact: **Matt Freije** Sampler:  
 Phone: **760-451-1050** Project Name:  
 FAX: **619-839-3166** Project Number:  
 P.O. Number: \_\_\_\_\_ FAX Results:  Y  N  
 E-Mail: **mfr@hcinfo.com** E-mail Results:  Y  N

**Public Water System Information**  
 System Name:  
 PWS No.: \_\_\_\_\_ DWR No.: \_\_\_\_\_  
 POE: \_\_\_\_\_ Report To: ADEQ EPA  
 Collection Point:  
 Location (City):  
 Sample Type:

**Sample Receipt**      **Turn Around Time**  
 Temperature: **3.4 °C Fridge**      \_\_\_\_\_ 24 hours      \_\_\_\_\_ 48 Hours  
 Custody Seals: Yes \_\_\_\_\_ No **X**  
 Custody Seals Intact: Yes \_\_\_\_\_ No **WIA**  
 Total # of Containers: **(2)**  
 \_\_\_\_\_ 72 hours  
 \_\_\_\_\_ 5 Working Days  
 \_\_\_\_\_ Standard 10 Working Days  
Subject to scheduling & availability (surcharges apply).

**Analyses Requested**  
*Legionella Culture*  
*1/1/15*  
 # of Sample Containers

Sample Information				
Lab #	Sample Identification	Date	Time	Matrix
01	D+C's, 7501 E Camelback, <sup>Mesa, AZ</sup> <del>Phoenix</del>	3/14/05	6:06pm	
02	Buca, 3828 N. Sutherland Rd, M. Huque	3/14/05	6:54pm	
Sodium Thio added to both samples				

Instructions / Special Requirements

Date	Time	Samples Relinquished By	Samples Received By
3/15/05	08:30	[Signature]	[Signature]
3-15-05	1300	[Signature]	[Signature]
3-15-05	1500	[Signature]	[Signature]

Analysis performed is subject to the Terms & Conditions available at [www.aeroenvirolabs.com](http://www.aeroenvirolabs.com) or call 800-651-4802 to request a copy.

Do not use this report for any other purpose without written permission.

HC Information Resources, Inc.  
 PO Box 2109  
 Fallbrook, CA 92088  
 Attn: Matt Freije

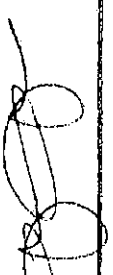

Lab Number: 915-503-2137  
 Date Received: 3/15/2005  
 Date Reported: 3/28/2005  
 AIHA EMLAP No. : 102297

**Legionella Analysis - Viable**

Aerotech Test Code W005

**Method Summary**ISO method 11731 is employed for the culture technique. It only detects viable *Legionella*.**Results**

Lab No.	Sample Identification	Conventional Culture Method			
		Legionella Genus (CFU/mL)	Legionella Species (non-pneumophila)	Serogroup	Serogroup 2-14
1	D & C's, 7501 E Camelback, Mens Pre HW/Mix	<1	---	---	---
2	Buca, 3828 N. Scottsdale Rd, M-HW Pre	<1	---	---	---

Laboratory Manager: Project Manager: 

Legionella - Water Page 1 of 1