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MANAGEMENT AND STAFF, ARLEN
8 ORCHARD, and JOHN DISTASIO

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SACRAMENTO

11
12 MARK E. GRAHAM,
13 Plaintiff,
14 vs.

15 SACRAMENTO MUNICIPAL UTILITY
DISTRICT, SMUD BOARD OF
16 DIRECTORS, SMUD MANAGEMENT and
STAFF; ARLEN ORCHARD, JOHN
17 DISTASIO, and DOES 1-100,
18 Defendants.

CASE NO. 34-2016-00188891

**REPLY TO OPPOSITION TO
DEMURRER TO PLAINTIFF MARK E.
GRAHAM'S FIRST AMENDED
COMPLAINT**

Date: August 26, 2016
Time: 2:00 p.m.
Dept.: 53

Reservation Number: 2172136

Action Filed: January 8, 2016
Trial Date: None Set

21 **I. INTRODUCTION**

22 Plaintiff Mark E. Graham ("Graham") opposes¹ the Demurrer filed by Defendants
23 Sacramento Municipal Utility District ("SMUD"), SMUD's Board of Directors, Management and
24 Staff, Arlen Orchard and John DiStasio (collectively, "Defendants"), only as to three causes of

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26
27 ¹ Graham's Opposition, excluding his table of contents and table of authorities, is 23 pages and
grossly exceeds the maximum page limit imposed by Rule 3.1113 of the California Rules of Court
by nearly 50%.

1 action: the First cause of action “for violating SMUD’s smart meter policy as described in
2 Resolution 07-08-10,” the Second Cause of Action “for exceeding the authority given it by the
3 Board of Directors,” and the Eleventh Cause of Action “for violating the MUD Act.” Graham does
4 not oppose Defendants’ demurrer to his Third through Tenth Causes of Action. Defendants’
5 demurrer to these other causes of action should be sustained without further argument.

6 Further, the only matters Graham’s opposition to Defendants’ demurrer to his First,
7 Second and Eleventh Causes of Action makes clear is that Graham does not want a so-called smart
8 meter attached to his house – a house he purchased in 2013 with a smart meter already installed
9 and after SMUD had implemented its smart meter opt-out policy – and that he believes SMUD’s
10 decision in 2007 to roll out smart meters to all of its customers was bad policy. What remains
11 unclear, however, is the basis on which Graham is not entitled to impose his policy preference on
12 SMUD through litigation. Indeed, he cannot do so.

13 Fatal to Graham’s First Amended Complaint is Attachment E to SMUD Board Resolution
14 No. 07-08-10, which is attached to and incorporated in his First Amended Complaint and contains
15 the following language: “SMUD intends to rollout an AMI network solution to all of its
16 customers.” (Board Determination on Time-Based Metering and Communication Standard,
17 attached as Exh. 2 to First Amended Complaint.) SMUD made this determination after
18 commissioning an Advanced Metering Infrastructure Business Case and held various board
19 meetings to consider time-based metering, requested public views and comments, and issued a
20 Staff Report and Findings, a process reflected in Attachment E to Resolution No. 07-08-10. (See
21 Exh. 2 to First Amended Complaint.) The decision to roll out smart meters to all of SMUD’s
22 customers was not, therefore, the haphazard, willy-nilly decision that Graham attempts to
23 characterize, but a thought-out, reasoned decision to build an infrastructure necessary and
24 convenient for SMUD to implement the policy considerations reflected in the Energy Policy Act
25 of 2005 (“EPAAct”) and to incentivize SMUD customers to avoid peak-time electricity usage and
26 thereby realize cost savings on their energy bills. In rolling out smart meters to all of its customers,
27 SMUD was carrying out its express statutory authority under section 12825 of the Public Utilities
28 Code to implement a voluntary or mandatory loan management program and to do all things

1 reasonable or necessary for the implementation of such a program.

2 That SMUD had authorized the roll out of smart meters to all of its customers is further
3 made clear from the subsequent resolutions SMUD's Board adopted implementing and modifying
4 a smart meter opt-out policy. Clearly, if the roll-out of smart meters had not been authorized in the
5 first instance, there would be no point in implementing an opt-out policy.

6 Knowing that he has no cause of action against any Defendant because Resolution No. 07-
7 08-10 clearly, unambiguously and expressly authorizes SMUD to roll out smart meters to all of its
8 customers, Graham, through strained logic and reasoning, spends the balance of his Opposition
9 attempting to excise this language from Resolution No. 07-08-10. None of his attempts are
10 persuasive because they all ignore the plain language of Resolution No. 07-08-10, authorizing
11 SMUD to roll out smart meters to all of its customers.

12 Given the clear authorization for SMUD to roll out smart meters to all of its customers, it
13 is irrelevant whether the Time Based Metering and Communication Standard, which the EAct
14 required SMUD to *consider* but not to *adopt*, reflected an opt-in policy Graham wishes to impose
15 through this Court.² SMUD was authorized to roll out smart meters to all of its customers and to
16 adopt an opt-out policy for its smart meters. It is likewise irrelevant whether Graham believes
17 SMUD adequately considered or sufficiently explained its decision to roll out smart meters to all
18 of its customers. SMUD was authorized to roll out smart meters to all of its customers, both
19 through section 12825 of the Public Utilities Code and through Resolution No. 07-08-10. Both of
20 these legal provisions have been passed and adopted by democratically elected representatives.
21 Graham has no right to use the courts to impose his contrary policy preferences.

22 For these reasons, more fully discussed below, Defendants' Demurrer should be sustained
23 in its entirety. And because the basis for Graham's requested relief is clear and he has failed to
24 show how any further amendment of his Complaint could cure the defects raised by Defendants'

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27 ² Defendants dispute that the EAct's Time-Based Metering and Communication Standard
28 reflected an opt-in policy or otherwise restricted SMUD's ability to roll out smart meters to all of
its customers, but the dispute is not material to Defendants' Demurrer.

1 Demurrer, Graham should not be allowed leave to amend.

2 **II. ARGUMENT**

3 **A. Graham’s Interpretation of SMUD Board Resolution No. 07-08-10 is**
4 **Unreasonable because It Ignores the Resolution’s Plain Language.**

5 It is a fundamental rule in interpreting any legal text that the plain language of the
6 document controls the interpretation. (Cal. Civ. Code § 1638 [“The language of a contract is to
7 govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.”];
8 *Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198 [“The plain meaning controls if there
9 is no ambiguity in the statutory language.”].)

10 Here, in plain, unmistakable words, Resolution No. 07-08-10, which adopts Attachment E
11 thereto in its entirety, authorizes SMUD to roll out smart meters to all of its customers. (See
12 Resolution No. 07-08-10, attached as Exh. 1 to First Amended Complaint; Board Determination
13 on Time-Based Metering and Communication Standard, attached as Exh. 2 to First Amended
14 Complaint.) There is no ambiguity in the Resolution’s language directing the roll-out of smart
15 meters to all of SMUD’s customers. SMUD’s authority to roll out smart meters to all of its
16 customers is confirmed in Cal. Pub. Util. Code § 12825, which authorizes SMUD to do all things
17 necessary or convenient to implementing a mandatory or voluntary loan management program,
18 such as the time-based metering standard reflected in the EPAct. Graham’s Complaint fails on the
19 plain language of Resolution No. 07-08-10 and Section 12825.

20 Knowing the plain language of Resolution No. 07-08-10 and section 12825 undermines his
21 entire Complaint, Graham goes to illogical lengths to try to excise from SMUD Board Resolution
22 No. 07-08-10 SMUD’s Board of Directors’ clear and unmistakable determination to roll out smart
23 meters to all of its customers. None of his arguments are convincing because they all overlook the
24 plain language of Resolution No. 07-08-10 and section 12825. He attempts to ignore the vast
25 majority of Resolution No. 07-08-10 and to focus only on one small portion of the entire
26 Resolution. (See Opposition at 11:4-9; 15:14-19.) But he cannot simply ignore the plain language
27 that expressly authorizes SMUD’s roll-out of smart meters to all of its customers and move
28 forward with any cause of action based on his faulty premise that SMUD did not authorize the

1 roll-out of smart meters to all of its customers.

2 Graham also cannot simply ignore the subsequent SMUD Board Resolutions discussed in
3 his Complaint and his Opposition, whereby SMUD’s Board adopted and subsequently modified a
4 smart meter opt-out policy. (*See* Complaint, at ¶¶ 85, 86; Opposition, at 21:4-17.) If SMUD’s
5 Board really did not authorize the roll-out of smart meters to all of its customers through
6 Resolution No. 07-08-10, then it is difficult to explain why SMUD’s Board adopted subsequent
7 resolutions implementing an opt-out policy. If the roll-out of smart meters truly was unauthorized,
8 as Graham alleges, one would expect a vastly different response than simply adopting an opt-out
9 program. Of course, the truth is that SMUD’s Board intended to authorize the roll out of smart
10 meters to all of its customers by adopting Resolution No. 07-08-10, just as the plain language of
11 that resolution indicates. Its adoption and subsequent modification of its smart meter opt-out
12 policy simply confirms the initial authorization.

13 Graham’s contentions regarding SMUD’s adoption of the Time Based Metering and
14 Communication Standard set forth in the EPAct do not alter the plain language of Resolution 07-
15 08-10 and Attachment E thereto. To be clear, the EPAct did not prohibit SMUD from rolling out
16 smart meters to all of its customers, as Graham contends. (*See* Opposition, at 11:23-27.) Instead, it
17 states only that customers should be offered time-based rates, and any customer electing a time-
18 based rate must be provided with a meter enabling such a rate to be charged. (*See* Opposition, at
19 6:13-21.) It does not in any way limit SMUD’s ability to roll out smart meters to all of its
20 customers. Thus, the “customer choice” Graham repeatedly references in his Complaint and
21 Opposition is not whether to have a smart meter attached to one’s house – although through
22 SMUD’s smart meter opt-out policy, its customers do have the choice – but whether to use
23 electricity during peak usage hours. It mandates only that customers who request a time-based rate
24 be provided with a meter capable of allowing such a rate to be charged. (*See* Opposition, at 6:20-
25 22.) Thus, the primary policy consideration underlying the EPAct and Resolution 07-08-10 is
26 allowing customers to reduce usage during peak hours and realize cost savings as a result, not
27 limiting SMUD’s ability to roll-out smart meters to all of its customers, as Graham contends.
28 Furthermore, section 12825 of the Public Utilities Code authorizes SMUD to do all things

1 necessary or convenient to implement this policy determination, including rolling out smart meters
2 to all customers so all customers can have a time-based rate option made available to them.
3 SMUD therefore did not contravene Resolution No. 07-08-10, the EAct, the Municipal Utility
4 District Act, or section 12825 in rolling out smart meters to all of its customers. Quite the
5 contrary, it fully complied with each of these provisions.

6 But the more fundamental issue is that, regardless of what the Time Based Metering and
7 Communication Standard said about customer choice, SMUD was not required to adopt it and
8 therefore could have rejected it and adopted an alternative standard. Thus, to the extent that
9 SMUD's determination to roll out smart meters to all of its customers was contrary to the EAct,
10 SMUD nonetheless acted well within its statutory authority in determining to do so.

11 The remaining arguments in Graham's Opposition are simply policy arguments – his
12 contentions that SMUD's roll-out of smart meters to all of its customers was not adequately
13 considered or sufficiently explained. (*See* Opposition, at 13:3-14:28.) However, he cites to no
14 legal authority that would have required SMUD to make certain considerations or explanations
15 before determining to roll out smart meters to all of its customers, or that would permit him to set
16 aside SMUD's smart meter program because of allegedly inadequate consideration or insufficient
17 explanation. In fact, there is no minimum legal standard for what SMUD's Board was required to
18 consider or explain before determining to roll out smart meters to all of its customers. If Graham
19 believes the directors comprising SMUD's Board are making bad policy decisions, his recourse is
20 to campaign and vote for directors who share his policy views. His recourse is not to the courts to
21 impose his policy views contrary to those of the democratically elected directors comprising
22 SMUD's Board.

23 Regardless of how Graham misreads the EAct or Resolution No. 07-08-10 or disagrees
24 with the policy determination SMUD's Board made, the plain language of both Cal. Pub. Util.
25 Code § 12825 and Resolution No. 07-08-10 cannot be ignored: SMUD was authorized to roll out
26 smart meters to all of its customers as a necessary or convenient way of offering time-based
27 metering to its customers. As such, there is simply no basis for Graham to assert that SMUD (or
28 any other defendant) is liable to him for any damages, or that he is entitled to any sort of

1 declaratory or equitable relief as a result of SMUD's roll-out of smart meters to all of its
2 customers.

3 **B. The Court should Sustain Defendants' Demurrer without Leave to Amend.**

4 A demurrer should be sustained without leave to amend where the facts are not in dispute,
5 and the nature of the plaintiff's claim is clear, but, under the substantive law, no liability exists.
6 (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544.) The plaintiff
7 carries the burden of showing a reasonable possibility the defect can be cured by amendment.
8 (*Ibid.*)

9 Here, the thrust of Graham's complaint is clear: he is seeking to attack SMUD's roll-out of
10 smart meters to all of its customers. As discussed above, this roll-out was clearly an act authorized
11 both by section 12825 of the Public Utilities Code and by Resolution 07-08-10. Although he
12 requests leave to amend, Graham fails to provide any explanation how any further amendment
13 would allow him to allege facts supporting any cause of action that would permit him to require
14 SMUD to undo its smart meter program. He makes only a vague contention that, if he is allowed
15 to amend, he will assert that SMUD violated his due process rights by depriving him of property
16 without due process of law. (Opposition, at 27:15-27.) He fails, however, to identify any factual
17 allegations he would assert that would support such a contention. He therefore should not be
18 allowed to continue his frivolous attempt to undo SMUD's smart meter program. Defendants'
19 demurrer should be sustained without leave to amend.

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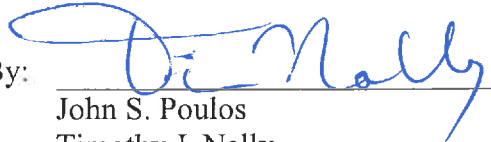
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1 **III. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully request that the Court sustain their
3 Demurrer without leave to amend.

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5 DATED: August 19, 2016

LEWIS BRISBOIS BISGAARD & SMITH LLP

6
7 By: 

8 John S. Poulos
9 Timothy J. Nally
10 Attorneys for Defendants, SACRAMENTO
11 MUNICIPAL UTILITY DISTRICT, SMUD
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13 MANAGEMENT AND STAFF, ARLEN
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CALIFORNIA STATE COURT PROOF OF SERVICE

Mark E. Graham v. Sacramento Municipal Utility District, et al. - Case No. 34-2016-00188891

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to the action. My business address is 2020 West El Camino Avenue, Suite 700, Sacramento, CA 95833.

On August 19, 2016, I served the following document(s): **REPLY TO OPPOSITION TO DEMURRER TO PLAINTIFF MARK E. GRAHAM'S FIRST AMENDED COMPLAINT**

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

Mark E. Graham	In Pro Per
P.O. Box 1823	
Elk Grove, CA 95759	Phone: 530.902.4428

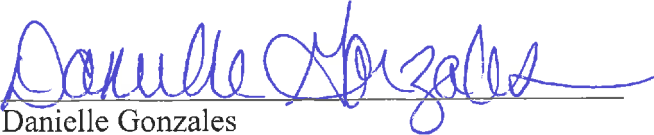
The documents were served by the following means:

(BY U.S. MAIL) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and:

Placed the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 19, 2016, at Sacramento, California.


Danielle Gonzales