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1 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
JOHN S. POULOS, SB# 154689
2 E-Mail: John.Poulos@lewisbrisbois.com
TIMOTHY J. NALLY, SB# 288728
3 E-Mail: Timothy.Nally@lewisbrisbois.com
2020 West El Camino Avenue, Suite 700
4 Sacramento, California 95833
Telephone: 916.564.5400
5 Facsimile: 916.564.5444

6 Attorneys for Defendants SACRAMENTO
MUNICIPAL UTILITY DISTRICT, SMUD
7 BOARD OF DIRECTORS, SMUD
MANAGEMENT AND STAFF, ARLEN
8 ORCHARD, and JOHN DISTASIO

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SACRAMENTO

12 Mark E. Graham,
13
14 Plaintiff,

15 vs.

16 Sacramento Municipal Utility District, SMUD
17 Board of Directors, SMUD Management and
18 Staff, Arlen Orchard, John DiStasio, and Does
1-100,
19 Defendants.

CASE NO. 34-2016-00188891

Limited Civil Case

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER TO PLAINTIFF MARK E.
GRAHAM'S FIRST AMENDED
COMPLAINT**

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4845-5133-3684.1

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO FIRST AMENDED
COMPLAINT

**LEWIS
BRISBOIS
BISGAARD
& SMITH LLP**
ATTORNEYS AT LAW

BY FAX

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1 I. INTRODUCTION

2 An individual cannot use the court system to hold public entities and their employees liable
3 for statutorily authorized policy decisions with which he or she disagrees. This is precisely what
4 Plaintiff Mark E. Graham ("Graham") is attempting to do in his First Amended Complaint for
5 Damages, Permanent Injunction and Declaratory Relief ("Complaint"). In his 500 page Complaint,
6 Graham takes issue with Defendant Sacramento Municipal Utility District's ("SMUD") smart
7 meter program, pursuant to which SMUD rolled out smart meters to all of its customers in order to
8 enable SMUD to implement time-based rates and other loan management measures. The thrust of
9 Graham's Complaint is that he is unhappy that his house had a smart meter instead of an analog
10 meter (to be clear, he bought his house with a smart meter already installed) because of alleged
11 health issues to which Graham contends smart meters have been linked, requested that SMUD
12 replace the smart meter on his house with an analog meter, which it did, in exchange for which
13 SMUD charged him rates that had been set pursuant to SMUD board resolutions that had been
14 passed and had been in place for several years at the time he requested an analog meter. Graham
15 now contends that SMUD was not authorized to roll out smart meters

16 Despite attaching to his Complaint a SMUD Board Resolution from 2007 that expressly
17 states that SMUD intends to roll out smart meters to all of its customers, Graham argues in his
18 Complaint that SMUD, in fact, inadvertently prohibited itself from doing so. On this central
19 theory, he asserts eleven "causes of action" against SMUD, SMUD's Board of Directors, SMUD's
20 Management and Staff, SMUD's former general manager John DiStasio, and SMUD's current
21 general manager and former general counsel Arlen Orchard.

22 None of Graham's causes of action can stand, as each fails to state facts constituting any
23 cause of action against any Defendant. His entire Complaint is based on the faulty theory that
24 SMUD Board Resolution No. 07-08-10, which is attached to his Complaint as Exh. 1 and Exh. 2,
25 required SMUD to implement a policy whereby SMUD could install a smart meter on a
26 customer's building only if the customer affirmatively requested a meter. However, this
27 interpretation blatantly ignores the explicit statement in Resolution No. 07-08-10 that SMUD will
28 roll out smart meters to all of its customers. SMUD has express statutory authority to do so under

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1 Cal. Pub. Util. Code § 12825.

2 Each of Graham's causes of action fails in light of his faulty interpretation of Resolution
3 07-08-10. Because SMUD acted pursuant to its express authority, confirmed by Resolution 07-08-
4 10, and subsequently enacted a series of resolutions establishing an opt-out policy from the smart
5 meter program whereby customers requesting an analog meter could request one in exchange for a
6 one time payment plus monthly service charges necessary for manual reading and servicing of
7 such analog meters, Graham is not entitled to any recovery from SMUD, its Board, Management
8 and Staff,¹ Arlen Orchard or John DiStasio, nor is Graham entitled to either a declaratory
9 judgment, because he has failed to raise any controversy regarding the interpretation of Resolution
10 No. 07-08-10 or any of the resolutions enacting the smart meter opt-out policy, or an injunction
11 because he has not shown that any Defendant engaged in or will continue to engage in any
12 wrongful conduct.

13 For these reasons, more fully discussed below, Defendants' Demurrer should be sustained
14 in its entirety.

15 **II. SUMMARY OF ALLEGATIONS**

16 The following is a recitation of the allegations made in Graham's Complaint. As, for
17 purposes of a demurrer, the Court is to accept the factual allegations in the Complaint as true, this
18 recitation assumes, without admitting, that such allegations are true.

19 Graham's 226 page Complaint (with 300 pages of exhibits) consists of some factual
20 allegations, but largely is comprised of policy arguments (see, e.g., Complaint, at 16:16-53:2), and
21 legal contentions. (See, e.g., 197:9-220:7.) According to Graham, "[t]he central question in this
22 case is whether SMUD can legally charge Plaintiff special charges for 'opting out' of the smart
23 meter program where SMUD policy per Resolution 07-08-10 and Attachment E gave each
24 individual customer the choice over the matter and where Plaintiff never 'opted in.' The SMUD
25

26
27 ¹ Neither SMUD's Board or its Management and Staff are legal entities separate and distinct from
28 SMUD itself. Thus, to the extent Graham asserts any cause of action against SMUD's Board,
Defendants understand his Complaint to be asserting such causes of action against SMUD itself.

1 Board of Directors never authorized SMUD to remove the analog meter from and install the smart
2 meter on all customers' homes and businesses, included Plaintiff's house. There is a conflict
3 between what the SMUD governing body, the SMUD Board of Directors, authorized SMUD to do
4 and what SMUD actually did." (Complaint, at ¶ 12.) Graham further states that his Complaint will
5 show that "SMUD did not notify the public back in 2007 when it was considering the 'Time-
6 Based Metering and Communication Standard' that it intended to place [smart meters] on
7 customers' bedroom walls" (*Id.* at ¶ 16.)

8 Exhibits 1 and 2 to the Complaint are SMUD Board Resolution No. 07-08-10 and
9 Attachment E thereto. Before adopting Resolution 07-08-10, SMUD held a meeting of its Policy
10 Committee on July 17, 2007 and a board meeting on August 2, 2007, to present and receive public
11 comments on the proposed smart meter policy. (Complaint, at ¶ 59.) SMUD scheduled a vote on
12 the proposed smart meter policy to occur at the August 2, 2007 board meeting, and published
13 notice of both meetings in the Sacramento Bee. (*Ibid.*) Graham included copies of both notices as
14 Exhibits 42 and 43 to his Complaint. Each notice indicated that a copy of a SMUD staff report and
15 proposed findings regarding the time-based metering and communication standard were available
16 on its website or by calling SMUD's general counsel office. (*Id.* at ¶¶ 61-64.) Graham contends
17 that the notices were "brief and cryptic." (*Id.* at ¶ 71.) The report and proposed findings were
18 presented at the July 17, 2007 meeting and, at the August 2, 2007, meeting, Resolution No. 07-08-
19 10 was adopted. (*Id.* at ¶ 74.)

20 Resolution No. 07-08-10 represents SMUD's adoption and implementation of a time based
21 metering and communication standard, pursuant to the Energy Policy Act of 2005. (Complaint, at
22 ¶¶ 53-54 and Exhs. 1 and 2.) Specifically, Resolution 07-08-10 states that "the Board
23 Determination on the Time-Based Metering and Communication Standard is hereby adopted and
24 approved, substantially in the form of Attachment E." (Exh. 1 to Complaint.) Attachment E to
25 Resolution 07-08-10 ("Attachment E"), entitled "Sacramento Municipal Utility District Board
26 Determination on Time-Based Metering and Communication Standard," states that "SMUD has
27 conducted a comprehensive Advanced Metering Infrastructure (AMI) Business Case, which
28 determined that installation of an AMI network will create opportunities for additional demand

1 response, time based rates, and effective load management.” (Exh. 2 to Complaint.) Attachment E
2 further states that “SMUD intends to rollout an AMI network solution to all of its customers.”
3 (*Ibid.*)

4 Despite SMUD’s clear expression of intent in Attachment E and Resolution No. 07-08-10
5 to roll out smart meters to all of its customers, and without referring to any language included in
6 the resolution, Graham contends that Resolution No. 07-08-10 actually prohibits SMUD from
7 installing smart meters on customers’ property without the customer affirmatively opting into the
8 smart meter program. (*Id.* at ¶ 74.)

9 SMUD rolled out its smart meters to its customers between late 2009 and early 2011.
10 (Complaint, at ¶ 79.) In response to concerns expressed by some SMUD customers, SMUD
11 adopted Resolution No. 12-03-09 on March 1, 2012, permitting SMUD customers fitting certain
12 specified criteria to have a previously installed smart meter removed from their home and replaced
13 with a “non-communicating digital meter” for an up front charge of \$127 and a monthly service
14 fee of \$14. (*Id.* at ¶ 85 and Exh. 9.) On March 21, 2013, SMUD adopted Resolution No. 13-03-08,
15 which revised the opt-out policy to permit customers to receive an analog meter. (*Id.* at ¶ 91 and
16 Exh. 7.) SMUD then adopted Resolution 13-08-11 further amending the smart meter opt-out
17 policy. (*Id.* at ¶ 35 and Exh. 6.)

18 Each of the foregoing resolutions was adopted and implemented before Graham purchased
19 his residence in March of 2013. (*Id.* at ¶ 95.) In fact, his residence already had a smart meter
20 installed on it when he purchased it. (*Ibid.*) In October of 2013, Graham opted out of the smart
21 meter program by requesting an analog meter from SMUD, which SMUD installed on October 10,
22 2013. (*Id.* at ¶¶ 96-97.) Thus, at the time Graham opted out of the smart meter program and
23 requested an analog meter, the Smart Meter Opt Out Policy and Payment Schedule had been in
24 place for a year and a half. Graham did not make a claim under the Government Claims Act until
25 May 30, 2015. (Complaint, at ¶ 18 and Exh. 3.)

26 On the foregoing allegations, Graham asserts eleven “causes of action” against Defendants.
27 Some are asserted against SMUD and others against SMUD’s “Board of Directors.” There are also
28 causes of action against “SMUD Management and Staff,” and yet others against Arlen Orchard

1 and John DiStasio. As best as they can be understood, Graham's First and Second Causes of
2 Action attack SMUD's roll-out of smart meters to all of its customers and its smart meter opt out
3 policy on the ground that Resolution No. 07-08-10 did not authorize it to do so. Similarly,
4 Graham's Eleventh Cause of Action alleges that SMUD violated the Municipal Utility Act,
5 codified as section 11883-11885 of the Public Utilities Code, and seeks to invalidate the smart
6 meter program on that ground.

7 Graham's Third and Fourth Causes of Action seek to hold Arlen Orchard liable for failure,
8 as SMUD's general counsel, to properly advise SMUD's general manager and SMUD board
9 regarding Resolution No. 07-08-10, on the ground that he should have advised them that
10 Resolution No. 07-08-10 imposed an opt-in policy for the smart meter roll-out rather than an opt-
11 out policy.

12 Graham's Fifth and Sixth Causes of Action seek to hold SMUD's Board of Directors and
13 John DiStasio liable for failure to follow internal board policies in ensuring that Resolution No.
14 07-08-10 was implemented as passed. Graham contends SMUD's Board and DiStasio were legally
15 required under this internal board policy to ensure SMUD implemented an opt-in policy for the
16 smart meter roll-out, rather than an opt-out policy.

17 Graham's Seventh, Eighth, and Ninth Causes of Action attack SMUD's adoption and
18 implementation of its smart meter opt-out policy and fees. He alleges that SMUD, its Board of
19 Directors and DiStasio failed to comply with Public Utilities Code § 451, and implemented unjust
20 and unreasonable charges, services, and rules.

21 Graham's Tenth Cause of Action seeks to hold SMUD's Board of Directors liable for
22 allegedly failing to comply with Board Policy BL-6, which requires it to evaluate the general
23 manager's performance. Graham alleges that SMUD's Board should have disciplined DiStasio for
24 failing to implement Resolution No. 07-08-10, which Graham contends called for an opt-in policy
25 for the smart meter roll-out rather than an opt-out policy.

26 Based on these "causes of action," Graham seeks a declaratory order essentially adopting
27 his interpretation of Resolution 07-08-10, that SMUD and its management and staff acted without
28 authority in installing smart meters on SMUD's customers' buildings, and that the smart meter opt



1 out fees are not “just and reasonable.” He also seeks recovery of the smart meter opt out fees he
2 has paid to SMUD after requesting that SMUD remove the smart meter from his house and
3 replace it with an analog meter, exemplary damages, and a permanent injunction prohibiting
4 SMUD from enforcing its smart meter opt out policy against him.

5 For the reasons discussed below, Graham’s complaint fails to state facts constituting a
6 cause of action against any Defendant.

7 **III. ARGUMENT**

8 **A. Graham has not Alleged Facts Sufficient to Constitute a Cause of Action**
9 **against any Defendant because SMUD was Authorized to Roll Out Smart**
10 **Meters to All of its Customers.**

11 A municipal utility district is a distinct entity governed by an elected board of directors,
12 which is vested with broad independent legislative authority. (Cal. Pub. Util. Code §§ 11801
13 [government of municipal utility district vested in board of directors]; *id.* at § 11883 [board is
14 legislative body and determines all questions of policy].) A municipal utility district has the power
15 to provide “[a]ll matters and things necessary for the proper administration of the affairs of the
16 district which are not provided for in” the Municipal Utility District Act. (*Id.* at § 11884.) More
17 specifically, a municipal utility district has the express authority to “engage in activities to reduce
18 wasteful, uneconomical or unnecessary uses of energy, including, but not limited to . . . the
19 adoption of voluntary and mandatory *load management programs* . . . and may do all things
20 necessary or convenient to the full exercise of the powers herein granted.” (*Id.* at § 12825
21 [emphasis added].)

22 Here, Graham’s Complaint shows that SMUD acted well within its legislative authority in
23 rolling out smart meters to all of its customers, as section 12825 expressly authorizes SMUD to
24 adopt mandatory load management programs. SMUD did precisely this when it determined, as
25 confirmed in Resolution 07-08-10, to roll out smart meters to all of its customers. (*See* Complaint,
26 Exh. 1 and Exh. 2.) Resolution 07-08-10 expressly adopted the Board Determination on Time-
27 Based Metering and Communication Standard, which is Attachment E to Resolution 07-08-10.
28 Attachment E specifically states that “SMUD has conducted a comprehensive Advanced Metering
Infrastructure (AMI) Business Case, which determined that installation of an AMI network will

1 create opportunities for . . . *effective load management*,” an objective expressly authorized by
2 section 12825 of the Public Utilities Code. (*Id.* at Exh. 2 [emphasis added].) As Graham alleges,
3 the time-based metering and smart meter programs are aspects of a load management program that
4 allows SMUD customers to reduce electricity “usage during the peak pricing hours, which vary by
5 utility but are typically between 3 and 7 p.m. during June through August or September.” (*Id.* at ¶
6 56, fn. 2.) SMUD thus is vested with statutory authority to adopt a time-based metering program
7 and to roll out smart meters to all of its customers as may be necessary or convenient to implement
8 such a program. On that basis, the Board determined that “SMUD intends to rollout [sic] an AMI
9 network solution to *all of its customers*.” (*Id.* at Exh. 2 [emphasis added].)

10 In his Complaint, Graham primarily contends that, by approving the Time-Based Metering
11 and Communications Standard set forth in the Energy Policy Act of 2005 (“the Standard”), SMUD
12 actually adopted an opt-in policy for the installation of smart meters. (See Complaint, at ¶¶ 74-77.)
13 However, the text of the Standard shows the flaw in his interpretation. The Standard, which
14 SMUD was required to consider but was not required to adopt, provides that “each electric utility
15 shall offer each of its customer classes, and provided individual customers upon customer request,
16 a time-based rate *schedule . . .*” (Complaint, at ¶ 73 and Exh. 2 and Exh. 11.) The Standard
17 further provides that “[e]ach electric utility [that offers its customers a time-based rate schedule]
18 shall provide each customer requesting a time-based rate with a time-based meter capable of
19 enabling the utility and customer to offer and receive such rate . . .” (*Ibid.*) Contrary to Graham’s
20 central contention, the Standard reflects customer choice only as to whether to have a time-based
21 rate schedule, not whether to have a meter that permits implementation of a time-based rate.
22 Obviously, a customer that requests a time-based rate must be provided with a meter that allows
23 such a rate to be charged, but neither the Standard nor Resolution 07-08-10 states that *only* those
24 customers who request a time based rate can be provided with a meter enabling such a rate to be
25 charged, as Graham alleges. (*Id.* at 86:18.) In fact, the Standard places no restrictions on whether
26 SMUD’ roll-out smart meters to all of its customers. It says only that SMUD must provide smart
27 meters to those who request a time-based rate. It is otherwise silent on the matter. So even if
28 Graham is correct and SMUD enacted the Standard verbatim, his interpretation of the Standard

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1 and Resolution No. 07-08-10 fails, as it would require reading words and, more importantly,
2 restrictions into Resolution 07-08-10 and the Standard that are not there. Furthermore, regardless
3 of the specific language of the Standard, SMUD was required only to consider it; it could have
4 rejected it altogether and, by extension, could choose to adopt only portions of it. Thus, when the
5 Board stated in Attachment E that the Standard was appropriate for the District and that it intends
6 to roll out smart meters to all of its customers, it was not contradicting any statutory or legal
7 mandate. To the contrary, it was acting pursuant to the express statutory authorization provided
8 under section 12825 of the Public Utilities Code.²

9 As each of Graham's causes of action depends on his faulty interpretation of the Standard
10 and Resolution No. 07-08-10, none can stand. Graham's First and Second Causes of Action
11 directly attack SMUD's smart meter roll-out on the ground that Resolution No. 07-08-10 did not
12 authorize it. Clearly, it did authorize it. Graham's Eleventh Cause of Action alleges that SMUD
13 violated the Municipal Utility Act, codified as section 11883-11885 of the Public Utilities Code,
14 but it is clear the smart meter roll-out was approved by SMUD's Board and was authorized by
15 statute. Whether Graham asserts them to obtain a declaratory order, damages, or injunctive relief,
16 each of these causes of action fails as a matter of law.

17 Nor can Graham's Third and Fourth Causes of Action against Orchard stand, inasmuch as
18 each is based on allegations that Orchard failed to properly advise SMUD's Board or SMUD's
19 general manager that Resolution No. 07-08-10 implemented an opt-in policy for the smart meter
20 roll-out. For the same reasons, Graham's Fifth and Sixth Causes of Action, which seek to hold
21 SMUD's Board of Directors and DiStasio liable for failure to ensure that Resolution No. 07-08-10
22 was implemented as passed, must fail because Resolution No. 07-08-10 clearly indicated that
23 smart meters would be rolled out to all of SMUD's customers.

24 _____
25 ² To the extent Graham is alleging that SMUD's determination in Resolution No. 07-08-10 to roll
26 out smart meters to all of its customers violated the Brown Act (see Complaint, at ¶¶ 59-73, 355),
27 his attempt to challenge Resolution 07-08-10 on this basis is untimely. (Cal. Gov. Code §
28 54960.1(c); *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1119 [failure to file
complaint alleging violation of Brown Act within timeframe set forth in section 54960.1(c) barred
plaintiff's action against city].)

1 Graham's Seventh, Eighth, and Ninth Causes of Action attacking SMUD's adoption and
2 implementation of its smart meter opt-out policy and fees are all also based on his faulty premise
3 that Resolution No. 07-08-10 required SMUD customers to request a smart meter before SMUD
4 could install one on a customer's house. But since section 12825 of the Public Utilities Code
5 expressly authorizes SMUD's adoption of a mandatory loan management program and to do all
6 things necessary or convenient to fully implementing such a program, such as rolling out smart
7 meters to all of its customers, nothing SMUD did in adopting Resolution No. 07-08-10 or the
8 resolutions establishing its smart meter opt out policy can be viewed as unreasonable or unjust.

9 Finally, Graham's Tenth Cause of Action fails because clearly, SMUD's Board authorized
10 the smart meter roll out and therefore would have no ground to discipline DiStasio for complying
11 with Resolution No. 07-08-10.

12 In exercising legislative authority, a public entity and its employees are immune from
13 liability for injuries caused by adopting or failing to adopt an enactment or by failing to enforce an
14 enactment. (Cal. Gov. Code § 818.2; *Old Town Development Corp. v. Urban Renewal Agency*
15 (1967) 249 Cal.App.2d 313, 334 [concluding that, in light of section 818.2, a public agency
16 "cannot be held liable for the consequential results of the adoption of [a] resolution"]³ "This
17 immunity is necessary to protect the essential governmental function of making laws, so that the
18 judiciary does not question the wisdom of every legislative decision through tort litigation."
19 (*Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 972.)

20 Resolution No. 07-08-10 was adopted at a duly noticed and conducted SMUD Board
21

22 ³ Addressing *Old Town* in his Complaint, Graham contends that "[n]owhere in Old Town did the
23 court write" that a resolution passed by a state agency fell within the ambit of section 818.2.
24 (Complaint, at ¶ 437.) He questions whether "defense counsel has read the case." (*Id.* at ¶ 438.) As
25 the quoted language shows, *which Graham quotes in his Complaint (see id. at ¶ 439)*, the *Old*
26 *Town* court unmistakably concluded that a resolution constituted an enactment that enjoyed
27 protection under section 818.2. More to the point, Graham contends in the claim he submitted to
28 SMUD pursuant to Cal. Gov. Code § 900 et seq., that the California "Legislature uses the terms
'motion,' 'resolution' and 'ordinance' interchangeably" (*Id.* at Exh. 3, p. 12.) Thus, if an
enactment includes an ordinance (see Cal. Gov. Code § 810.6), and a SMUD resolution is
interchangeable with a SMUD ordinance, there is no logical reason why any SMUD Board
resolution would not fall within the definition of "enactment" and therefore fall within the ambit
of section 818.2. It is disingenuous for Graham to argue otherwise.

1 meeting and clearly contemplate SMUD's policy decision to roll out smart meters to all of its
2 customers. (Complaint, at ¶ 74.) SMUD therefore is immune from liability for any injury allegedly
3 caused to Graham by adoption of the smart meter roll out. While Graham is clearly dissatisfied
4 with SMUD's policy determination, its determination rested squarely within its statutorily granted
5 authority to determine policy and legislate for the district. Graham cannot invoke the judiciary to
6 effectively strike down a legislative enactment SMUD has adopted pursuant to its statutory
7 authority simply because he does not like it. His recourse is to campaign for Board Members that
8 share his policy views. He has no cause of action or judicial recourse against SMUD or any other
9 Defendant for SMUD's adoption of Resolution No. 07-08-10.

10 **B. Graham's Attempt to Attack, Review, Set Aside, Void, or Annul the Smart**
11 **Meter Opt-Out Charges is Untimely.**

12 Although cloaked as an action under Public Utilities Code section 451, Graham's Seventh
13 Cause of Action seeks to attack, review, set aside, void and annul SMUD's smart meter opt out
14 fees. While an interested person may bring an action pursuant to Cal. Code Civ. Proc. § 860, et
15 seq., to determine the validity of district rates or charges. (Cal. Pub. Util. Code § 14402.) Such
16 proceedings are to be brought within 60 days of the adoption of the rate or charge. (Cal. Code
17 Civ. Proc. § 860.) However, "[n]otwithstanding any other provision of law, any judicial action or
18 proceeding to attack, review, set aside, void, or annul an ordinance, resolution, or motion fixing or
19 changing rates or charges for the commodities or service furnished by a district shall be
20 commenced within 120 days of the effective date of the ordinance, resolution, or motion." (Cal.
21 Pub. Util. Code § 14402 [emphasis added]; see also *Util. Cost Management v. E. Bay Mun. Util.*
22 *Dist.* (2000) 79 Cal.App.4th 1242, 1253 [action by school district to obtain refund of fees paid to
23 municipal utility district was time barred because it was filed more than 120 days after the fee was
24 assessed].)

25 Section 14402 is codified under the Municipal Utilities District Act and is expressly
26 applicable to district rates and charges. Graham's Seventh Cause of Action is time-barred because
27 it seeks to attack, review, set aside, void, and annul SMUD's Smart Meter Opt Out Policy and
28 Payment Schedule. SMUD adopted the policy and payment schedule pursuant to resolutions that

1 were all adopted more than 120 days before Graham filed his Complaint. On March 1, 2012, by
2 Resolution No. 12-03-09, the SMUD Board explicitly adopted “the Residential Customer Smart
3 Meter Opt Out Policy and Payment Schedule, substantially in the form of Attachment E.”
4 (Complaint, at ¶¶ 35, 85, and Exh. 9.) This resolution explicitly authorizes SMUD to charge
5 residential customers, such as Graham, who refuse smart meter installation and service “upfront
6 and monthly fees intended to recover the costs of the installation of alternative metering solutions,
7 meter reading, billing and related administrative costs” (*Id.* at Exh. 9.) On March 21, 2013,
8 by Resolution No. 13-03-08, the SMUD Board revised and reinstated the Residential Smart Meter
9 Opt Out Policy and Payment Schedule to reduce the ongoing monthly charge to \$14.00 per month.
10 (*Id.* at Exh. 7.) The SMUD board then adopted Resolution No. 13-08-11 on August 15, 2013,
11 further modifying the smart meter opt-out policy and payment schedule. (*Id.* at Exh. 6.)

12 Graham opted out of the smart meter program in October of 2013. In so doing, he agreed
13 to pay the fees and rates SMUD set for those wishing to opt out of the program. Graham now
14 seeks to invalidate the opt-out charges – at least as they apply to him. He previously filed a claim
15 with SMUD (Complaint, at ¶¶ 18-21 and Exh. 3) under the Government Claims Act “about fees
16 for the smart meter opt out program that SMUD has charged [him] and [he has] paid.” He further
17 states, on page 9 of his claim, that “[t]he injury, damage or loss incurred in each case is a fee that
18 SMUD charged [him] (and other SMUD customers) and that those customers and [he] paid which
19 was not authorized by the Board of Directors or for one or more other reasons was improper,
20 illegal and/or unenforceable.” (*Ibid.*) After SMUD denied his claim (*id.* at ¶¶ 18-21), Graham filed
21 this action on January 8, 2016, alleging that his “house had a smart meter on it when [he] bought
22 it,” and that, in or about early October, 2013, he requested to opt out of the smart meter program.
23 (*Id.* at ¶¶ 95-97.) He claims his injuries are the one time charge of \$127 for the new analog meter
24 and the monthly smart meter opt out charge of \$14, for every month since SMUD began charging
25 Graham such charge until this action is finally resolved. (*Id.* at ¶ 144.) Indeed, “those charges are
26 at issue here,” since, as Graham contends, “[t]he central question in this case is whether SMUD
27 can legally charge Plaintiff special charges for opting out of the smart meter program when
28 Plaintiff never opted into it.” (*Id.* at ¶¶ 11-12.) Graham seeks “[a]n order directing Defendant

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1 SMUD to approve Plaintiff's claim and pay it in full (preferably) or at least to pay it in part" (*id.* at
2 ¶ 456), as well as a declaratory order that SMUD's smart meter opt out fees are not just and
3 reasonable (*id.* at ¶ 455), and a permanent injunction barring SMUD from collecting such fees
4 from him. (*Id.* at ¶ 457.) Clearly, his Complaint represents an attempt to attack, review, set aside,
5 void, or annul resolutions fixing or changing rates or charges. Because it was filed more than 120
6 days after the resolutions he seeks to have reviewed, set aside, and annulled were passed, his
7 Seventh Cause of Action is time barred.

8 **C. Section 451 of the Public Utilities Code does not Apply to in this Case.**

9 Graham's Seventh, Eighth, and Ninth Causes of Action fail as a matter of law because
10 Public Utilities Code section 451 does not apply to SMUD. Section 451 applies only to public
11 utilities, but public utilities are regulated by the California Public Utilities Commission ("CPUC").
12 (Cal. Pub. Util. Code § 701.) SMUD, as a municipal utility district that is governed by an elected
13 board of directors, is not subject to the jurisdiction of the CPUC, which regulates privately owned
14 utilities. (*American Microsystems, Inc. v. City of Santa Clara* (1982) 137 Cal.App.3d 1037, 1042-
15 43.) Thus, SMUD does not fall within the express statutory provisions of section 451.

16 It is clear that section 451 is intended to be enforced by the CPUC and, to the extent not so
17 enforced, by private parties pursuant to Cal. Pub. Util. Code § 2106, because public utilities, as
18 privately owned entities that provide utilities to the public, are not otherwise answerable through
19 democratically supervised means. This, however, is not the case with municipal utility districts,
20 which are governed by an elected board of directors. (Cal. Pub. Util. Code §§ 11801, 11821 et
21 seq.) That section 451 is not enforceable against SMUD via Graham's Seventh, Eighth and Ninth
22 Causes of Action is also confirmed by the fact that there is not one reported case in which section
23 451 has been enforced against a municipal utility district. Furthermore, to the extent section 451 is
24 enforceable via a private right of action under section 2106 of the Public Utilities Code, section
25 2106 authorizes the imposition of exemplary damages, which are not permissible against a public
26 entity. (Cal. Gov. Code § 818.) On the contrary, the Municipal Utility District Act requires all
27 claims against a municipal utility district to be submitted via the Tort Claims Act claims process.
28 (Pub. Util. Code § 12830.) Thus, there is no legal authority, reasonably interpreted, that would

1 permit enforcement of section 451 via a private cause of action against a municipal utility district.

2 Graham's causes of action under Cal. Pub. Util. Code § 451 therefore fails as a matter of
3 law.

4 **D. Graham's Third and Fourth Causes of Action against Arlen Orchard Fail as a**
5 **Matter of Law because Graham Lacks Standing to Enforce any Duty Orchard**
6 **Owed to SMUD's Board and General Manager to Provide Proper Advice was**
7 **not Owed to Graham.**

8 A third party lacks standing to assert a claim against an entity's general legal counsel for
9 failure to provide proper legal advice. (*See Skarbrevik v. Cohen* (1991) 231 Cal.App.3d 692, 707
10 [corporate counsel owed no duty of care to shareholder and, in the absence of such duty, could not
11 be held liable for professional negligence].)

12 Here, Graham alleges that Orchard was required to advise SMUD's general manager and
13 its Board that Resolution No. 07-08-10 created an opt-in policy for the smart meter roll out and
14 that SMUD could not roll out smart meters to all of its customers based on Resolution No. 07-08-
15 10. (*See Complaint*, at ¶¶ 149-156, 162-165.) However, Graham fails to state any facts showing
16 that Orchard owed *Graham* any duty to provide this advice. Indeed, to the extent Graham alleges
17 that Orchard breached a duty arising out of an attorney-client relationship (*id.* at ¶¶ 156, 168), the
18 relationship was with SMUD, not Graham. In the absence of an attorney-client relationship,
19 Graham has no right to recover against any Defendant for any alleged failure of SMUD's general
20 counsel to provide proper advice.

21 **E. Graham's Third and Fourth Causes of Action against Orchard, Fifth and**
22 **Tenth Causes of Action against SMUD's Board, and Sixth Cause of Action**
23 **against DiStasio Fail as a Matter of Law because Each Defendant Enjoys**
24 **Immunity from Suit for the Alleged Conduct.**

25 Section 818.2 and section 820.2 provide statutory immunity to public entities and their
26 employees from liability for an injury caused by adopting or failing to adopt an enactment or by
27 failing to enforce any law. These provisions have been interpreted to provide immunity for
28 discretionary acts, or those acts that occur on the planning level of a public entity. (*Johnson v.*
State of California (1968) 69 Cal.2d 782, 794.)

29 Graham's Third and Fourth Causes of Action against Orchard fail as a matter of law

1 because, inasmuch as Graham is seeking to hold Orchard liable for the advice he rendered to the
2 SMUD Board or general manager – to be clear, Graham does not allege that Orchard failed to
3 advise the Board or general manager, only that he failed to advise them that Resolution No. 07-08-
4 10 formed an opt-in policy (*see* Complaint, at ¶¶ 161-166) – Orchard was advising on matters of
5 basic policy considerations, and such advice clearly was made on the “planning,” as opposed to
6 “operational” level of SMUD’s decision-making process. (*See Fish v. Regents of University of*
7 *Cal.* (1966) 246 Cal.App.2d 327, 331 [government-employed physician enjoyed immunity under
8 Cal. Gov. Code § 820.2 for decision to detain a person for observation of his mental condition,
9 which is a discretionary, and not a ministerial, act].)

10 Likewise each of Graham’s Fourth, Fifth, Sixth, and Eleventh causes of action are based
11 on internal SMUD Board policies that determine the relationship between SMUD Board and the
12 general manager and general counsel. (*See* Complaint, at Exh. 46 [Policy No. BL-2: “Board-Chief
13 Legal Officer and General Counsel Relationship”]; Exh. 47 [Policy No. BL-1: “Board-Chief
14 Executive Officer and General Manager Relationship”]; ¶¶ 236-239 and Exh. 48 [Policy No. BL-
15 6: “Evaluating the GM’s Performance”].) To the extent Graham otherwise has standing to enforce
16 these internal board policies, each Defendant enjoys immunity because these policies relate to
17 discretionary activities of the Board and SMUD. In particular, the Board’s evaluation of the
18 general manager is, essentially, an employment evaluation policy and the Board’s determination
19 whether or not to take disciplinary action pursuant to it cannot be the basis for liability. (*See* Cal.
20 Gov. Code §§ 815.2, 820.2; *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 982 [discretionary
21 immunity extends to “votes by members of a school district’s governing board whether to renew
22 the superintendent’s employment contract” under section 820.2].)

23 Graham’s causes of action seeking to impose liability against Orchard, DiStasio, and
24 SMUD’s Board are barred by sections 818.2 and 820.2 of the Government Code.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully request that the Court sustain their
3 demurrer to Plaintiff's First Amended Complaint.

4
5 DATED: July 11, 2016

LEWIS BRISBOIS BISGAARD & SMITH LLP

6
7
8 By: _____



9 John S. Poulos
10 Timothy J. Nally
11 Attorneys for Defendants SACRAMENTO
12 MUNICIPAL UTILITY DISTRICT, SMUD
13 BOARD OF DIRECTORS, SMUD
14 MANAGEMENT AND STAFF, ARLEN
15 ORCHARD, and JOHN DISTASIO
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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 July 11, 2016, I served the following document(s): MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF 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):

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

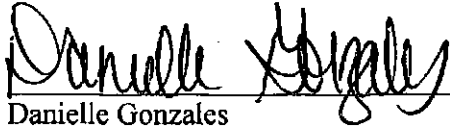
The documents were served by the following means:

(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 July 11, 2016, at Sacramento, California.


Danielle Gonzales