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FILED/ENDORSED
 OCT - 4 2016
 By A. O'DONNELL
 Deputy Clerk

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
 Plaintiff,
 14
 vs.

CASE NO. 34-2016-00188891
**[PROPOSED] ORDER SUSTAINING
 DEMURRER WITHOUT LEAVE TO
 AMEND**

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

Unlimited Civil Case
 Action Filed: January 8, 2016
 Trial Date: None Set

By Fax

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 21 This matter came before the Court on August 26, 2016, for a hearing on the Demurrer to
 22 Plaintiff Mark E. Graham's First Amended Complaint, filed by Defendants Sacramento Municipal
 23 Utility District ("SMUD"), SMUD Board of Directors, SMUD Management and Staff, Arlen
 24 Orchard, and John DiStasio (collectively, "Defendants").


25 Having considered the parties moving and opposing papers and oral arguments presented
 26 at the hearing on the matter, the Court hereby adopts its tentative ruling as the Order of the Court
 27 and SUSTAINS Defendants' Demurrer to the First Amended Complaint without leave to amend.
 28 A true and correct copy of the minute order entered by the Court adopting its tentative ruling as

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 SEP 28 2016
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**LEWIS
 BRISBOIS
 BISGAARD
 & SMITH LLP**
 ATTORNEYS AT LAW

1 the Court's order is attached hereto as Exhibit A and is incorporated by reference as though fully
2 set forth herein.

3
4 DATED: OCT - 4 2016

5
6
7 
8 David L. Brown STEVEN H. RODDA
9 JUDGE OF THE SUPERIOR COURT

SIGNATURE PURSUANT
TO 635 CCP

10 Approved as to form.

11 DATED: September 26, 2016

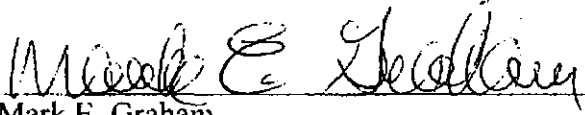
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13 By: 
14 Mark E. Graham
15 Plaintiff In Pro Per

EXHIBIT A

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 08/30/2016

TIME: 08:53:00 AM

DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown

CLERK: A O'Donnell

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **34-2016-00188891-CU-MC-GDS** CASE INIT.DATE: 01/08/2016

CASE TITLE: **Graham vs. Sacramento Municipal Utility District**

CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Hearing on Demurrer - Civil Law and Motion - Demurrer/JOP

APPEARANCES

Nature of Proceeding: Hearing on Demurrer to the 1st Amended Complaint

TENTATIVE RULING

******NOTICE: EFFECTIVE SEPTEMBER 19, 2016, THIS DEPARTMENT WILL MOVE TO 813 6TH ST SACRAMENTO, CA, 2ND FLOOR. ALL PAPERS FOR DEPARTMENTS 53 AND 54 MUST BE FILE AT THIS NEW LOCATION AND WILL NOT BE ACCEPTED AT THE GORDON D. SCHABER COURTHOUSE. ALL HEARINGS WILL TAKE PLACE AT THIS NEW LOCATION******

Defendants Sacramento Municipal Utility District ("SMUD"), et al.'s demurrer to self-represented Mr Graham's first amended complaint is ruled upon as follows.

In his 200 plus page complaint which contains 460 paragraphs and approximately 300 pages of exhibit Plaintiff alleges causes of action against Defendants arising from his displeasure that his house has "smart meter" as opposed to a analog meter, based on health issues he contends are linked to sma meters. Parenthetically, the Court understands that a smart meter is a device that records consumption of electric energy in intervals of an hour or less and communicates that information at least daily back to the utility for monitoring and billing. Smart meters enable two-way communication between the meter and the central system. Such an advanced metering infrastructure (AMI) differs from traditional automatic meter reading (AMR) in that it enables two-way communications with the meter. Plaintiff alleges that he requested that SMUD remove the smart meter and replace it with an analog meter. He alleges that SMUD improperly charged him special rates for opting out of the smart meter program when he never opted in.

Plaintiff's opposition was approximately 29 pages long, almost twice the length permitted by CRC Rule 3.1113(d). Nevertheless, the Court considered the opposition. The opposition was difficult to follow and in many respects failed to directly address the arguments set forth in Defendants' demurrer.

Here, the entire FAC is premised on Plaintiff's contention that SMUD was not authorized to roll out the smart meters and instead that SMUD adopted an opt-in policy for installation. He bases his contention on his interpretation of SMUD Resolution 07-08-10 which expressly states that SMUD intended to roll

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out smart meters to its customers. (FAC ¶ Exhs. 1, 2.) The Resolution was adopted after SMUD Policy Committee meeting on July 17, 2007 and a board meeting on August 2, 2007. (FAC ¶ 59.) The meetings were for the purpose of presenting and receiving public comments on the proposed smart meter policy. Notice of both meetings was published in the Sacramento Bee. (Id., Exhs. 42, 43.) SMUD scheduled a vote on the proposed smart meter policy. (Id.) SMUD's report and proposed findings were presented at the July 17, 2007, meeting and the Resolution was adopted at the August 2, 2007 meeting. (Id. ¶ 74.)

The Resolution states that the "Board Determination on the Time-Based Metering and Communication Standard is hereby adopted and approved substantially in the form of Attachment E." (FAC Exh. 1 Attachment E titled "Sacramento Municipal Utility District Board Determination on Time-Based Metering and Communication Standard" states that "SMUD had conducted a comprehensive Advanced Metering Infrastructure ("AMI") Business Case, which determined that installation of an AMI network will create opportunities for additional demand response, time based rates, and effective load management." (Id. Exh. 2.) "SMUD intends to rollout an AMI network solution to all of its customers." (Id.)

SMUD rolled out the smart meters between late 2009 and 2011. (FAC ¶ 79.) In response to concern from some SMUD customers, SMUD adopted resolution No. 12-03-09 on March 1, 2012, permitting SMUD customers meeting certain criteria to have the previously installed smart meters removed and replaced with a "non-communicating digital meter" for an up front charge of \$127 and a monthly service fee of \$14. (Id. ¶ 85, Exh. 9.) On March 21, 2013, SMUD adopted Resolution No. 13-03-08 which revised the opt-out policy to permit customers to receive an analog meter. (Id. ¶ 91, exh. 7.) SMUD further amended the smart meter opt-out policy when it adopted Resolution No. 13-08-11. (Id. ¶ 3; Exh. 6.)

Plaintiff purchased his home in March 2013, after the subject resolutions had been adopted and implemented. (FAC ¶ 95.) His residence had a smart meter. In October 2013, Plaintiff opted out of the smart meter program by requesting an analog meter which SMUD installed on October 2010. (Id. ¶ 96-97.) At the time he made the request, the opt out policy and payment schedule had been in place for approximately a year and a half. Plaintiff did not make a claim to SMUD under the Tort Claims Act until May 30, 2015. (Id. ¶ 18., Exh. 3.)

Plaintiff asserts 11 causes of action against SMUD, SMUD's Board of Directors, SMUD's general counsel Arlen Orchard and SMUD's general manager John DiStasio. The First and Second Causes of Action attack SMUD's smart meter roll-out to all its customers and the opt out policy on the grounds that Resolution 07-08-10 did not authorize SMUD to conduct the roll-out. The Third and Fourth Causes of Action seek to hold Mr. Orchard liable as SMUD's general counsel for failing to properly advise SMUD's general manager and the Board that the Resolution actually imposed an opt-in policy rather than an opt-out. The Fifth and Sixth Causes of Action seek to hold SMUD's Board and Mr. DiStasio liable for failing to follow internal board policies when the Resolution was passed, specifically to insure that the SMUD adopted an opt-in policy. The Seventh, Eighth and Ninth Causes of Action allege that SMUD's Board and Mr. DiStasio failed to comply with Public Utilities Code § 451 and implemented unjust and unreasonable charges, services and rules. The Tenth Cause of Action seeks to hold SMUD's Board liable for failing to comply with Board Policy BL-6 which requires it to evaluate the general manager's performance and alleges that the Board failed to discipline Mr. DiStasio for failing to implement an opt-in rather than an opt-out policy. The eleventh cause of action alleges that SMUD violated the Municipal Utility Act in implementing the opt-out rather than an opt-in policy.

As set forth above, Plaintiff's entire FAC is premised on his contention that Resolution 07-08-10 did not allow SMUD to roll out the smart meters to its customers but instead required it to implement a program whereby customers would be allowed to opt *in* to receive smart meters. Plaintiff contends that the Resolution prohibited installation without the customer affirmatively opting in to the smart meter program.

because the Resolution approved the "Time-Based Metering and Communications Standard set forth the Energy Policy Act of 2005." That Standard provides that "each electric utility shall offer each of its customer classes, and provide individual customers upon customer request, a time based rate schedule..." (Id. Exhs., 2, 11.) "Each electric utility [that offers its customers a time-based schedule] shall provide each customer requesting a time-based rate with a time-based meter capable of enabling the customer to offer and receive such rate..." (Id.)

According to Plaintiff, because the Resolution approved the Standard in the Energy Policy Act which provides that the utility shall offer a time-based meter to each customer requesting a time-based rate, then the Resolution did nothing more than establish an opt-in policy which would allow customers to receive smart meters from SMUD if they requested a time-based rate. While Plaintiff sets forth pages of argument to make this point, the fact is that the Standard does not place any restrictions on whether SMUD could roll out smart meters to all of its customers, as opposed to providing such meters to only those customers who requested time-based rates. It simply indicates that SMUD must provide smart meters to those who request a time-based rate. But, [and this is a critical point] nothing in the Resolution attached to the FAC in any way prohibited SMUD from rolling out the smart meters to all its customers and adopting a rate schedule for those who opted-out.

Plaintiff also appears to argue that the Resolution did not actually adopt any findings that it was going to establish smart meter policy for all its customers, as opposed to an opt-in policy, because the Resolution simply stated that SMUD intended to roll out smart meters to all its customers. The Court disagrees. That statement makes clear that SMUD adopted a policy that all its customers would be receiving smart meters. Simply stated, the Resolution can in no way be read to support the interpretation Plaintiff urges. Plaintiff's proffered interpretation is also inconsistent with the subsequent SMUD resolutions attached to his complaint whereby the Board adopted and then modified a smart meter opt-out policy. If SMUD never actually authorized a roll-out of smart meters to all its customers, it is difficult at best to explain how or why it would have then adopted an opt-out policy.

A municipal utility district is a distinct entity governed by an elected board of directors vested with broad legislative authority. (Pub. Util. Code §§ 11801, 11883.) It has the power to provide "[a]ll matters and things necessary for the proper administration of the affairs of the district which are not provided in" the Municipal Utility District Act. (Id. § 11884.) It has the express authority to "engage in activities to reduce wasteful, uneconomical or unnecessary uses of energy, including, but not limited to...the adoption of voluntary and mandatory load management programs...and may do all things necessary or convenient to the full exercise of the powers herein granted." (Id. § 12825.) The allegations and exhibits attached to the FAC demonstrate that SMUD was easily within its legislative authority when it rolled out smart meters to its customers and established an opt-out payment schedule. Indeed, the Resolution states that "SMUD has conducted a comprehensive Advanced meeting infrastructure (AMI) Business Case which determined that installation of an AMI network will create opportunities for...effective load management." (FAC Exh. 2.) Load management is an objective expressly set forth in Public Utilities Code § 12825. Plaintiff alleges that the time-based metering and smart meter programs are aspects of a load management program allowing SMUD customers to reduce electricity "usage during the peak pricing hours, which vary by utility but are typically between 3 and 7 p.m. during June through August and September." (Id. ¶ 56, fn. 2.) SMUD has the express statutory authority to adopt such "voluntary and mandatory load management programs" and to do all "things necessary or convenient" to carry out the powers. SMUD clearly had the power [and discretion] to adopt a policy rolling out smart meters to all of its customers and to adopt an opt-out policy. Plaintiff's opposition questioning the wisdom of the policy and/or the findings to support the policy do not in any way show that SMUD lacked the ability to adopt the policy.

In exercising legislative authority, a public entity and its employees are immune from liability for injuries caused by adopting or failing to adopt an enactment or by failing to enforce an enactment. (Gov.'t Code

§§ 818.2, 821.) Plaintiff's FAC contains substantial legal argument, including an argument that Government Code § 818.2 does not apply to a resolution passed by a public agency. He is wrong. Case law has specifically held that in light of section 818.2, a public agency "cannot be held liable for the consequential results of the adoption of [a] resolution..." (*Old Town Development Corp. v. Urban Renewal Agency* (1967) 249 Cal.App.2d 313, 334.) Contrary to the argument in the FAC, this case law makes clear that a resolution is an enactment entitled to protection under § 818.2. "This immunity is necessary to protect the essential government functions of making laws, so that the judiciary does not question the wisdom of every legislative decision through tort litigation." (*Wood v. County of Santa Joaquin* (2003) 111 Cal.App.4th 960, 972.) While Plaintiff does not like the fact that SMUD rolled out the smart meters to all its customers, and the fact that he has to pay special rates based on his decision to opt-out, his remedy is not with the Court. Plaintiff argues that there is no immunity because these sections do not bar liability when there is a breach of a mandatory duty. While this is a correct statement of law, it has no application here. Plaintiff's argument is again premised on his incorrect interpretation of Resolution 07-08-10 as imposing a mandatory duty on SMUD to implement a smart meter opt-out program. As discussed extensively above, the Resolution did not so provide and thus no mandatory duty is implicated.

As a result, the demurrer to the entire FAC is sustained for failure to state facts sufficient to constitute cause of action.

In addition, some of his other causes of action are deficient for separate and independent reasons. His seventh cause of action seeks to attack, review, set aside, void and annul SMUD's smart meter opt-out fees. While an interested person may bring an action pursuant to CCP § 860 to determine the validity of district rates or charges, the action must be brought within 60 days of the adoption of the rate or charge (Pub. Util. Code § 14402; CCP § 860.) However,

"[n]otwithstanding any other provision of law, any judicial action or proceeding to attack, review, set aside, void, or annul an ordinance, resolution, or motion fixing or changing rates or charges for commodities or service furnished by a district shall be commenced within 120 days of the effective date of the ordinance, resolution, or motion." (Pub. Util. Code § 14402.) Here the opt-out fees were adopted by resolution in March 2012, and revised and modified in March and August 2013. (FAC ¶¶ 35, 81 Exhs. 6, 7, 9.) Plaintiff opted out of the smart meter program in October 2013. (FAC ¶¶ 95-97.) The instant action was not filed until January 2016, well more than 120 days after the subject resolution were passed. The seventh cause of action is untimely as pled.

Plaintiff's seventh through ninth causes of action pursuant to Public Utilities Code § 451 are deficient in that section only applies to public utilities. Public utilities are regulated by the California Public Utilities Commission ("CPUC"). (Pub. Util. Code § 701.) SMUD, however, is a municipal utility district governed by an elected board and is not subject to the CPUC's jurisdiction. (*American Microsystems, Inc. v. City of Santa Clara* (1982) 137 Cal.App.3d 1037, 1042-4043.) Further, section 451 is enforceable by way of a private right of action set forth in section 2106 which authorizes the imposition of exemplary damages. Such damages are not available against a public entity and all claims against a municipal utility district must be submitted pursuant to the Tort Claims Act. (Gov't Code § 818; Pub. Util. Code § 12830.) There is no authority that would allow enforcement of section 451 by way of a private right of action against a municipal utility district.

Plaintiff's third and fourth causes of action against Defendant Arlen Orchard, SMUD's general counsel, fail based on Plaintiff's lack of standing, *inter alia*. Plaintiff alleges that Orchard was required to advise SMUD's general manager and its Board that the subject Resolution created an opt-in policy and that SMUD could not roll out the smart meters to all its customers. Here, however, Plaintiff has failed to allege any facts which indicate that Orchard owed Plaintiff any duty to provide advice and any duty allegedly breached was a duty owed by Orchard in the context of an attorney-client relationship with SMUD. A third party lacks standing to assert a claim against general counsel for failure to provide legal

advice. (*Skarbrevik v. Cohen* (1991) 231 Cal.App.3d 692, 707 [corporate counsel owed no duty shareholder and thus could not be liable for professional negligence].)

Plaintiffs' third, fourth, sixth, and tenth causes of action against Orchard, SMUD's Board and Joe DiStasio, SMUD's former general manager, all fail as these defendants are immune pursuant to Government Codes §§ 818.2 and 820.2. These sections provide statutory immunity to public entities and their employees from liability caused by adopting or failing to adopt an enactment or failing to enforce the law. The immunity applies to discretionary acts, or acts that occur on the planning level of a public entity. (*Johnson v. State of California* (1968) 69 Cal.2d 782, 794.) All of the allegations in these causes of action involve advice on policy matters, including internal SMUD policies governing the relationship between the SMUD Board and the general manager and the general counsel, including the failure of SMUD to discipline its general manager. These all relate to the discretionary acts which are entitled to immunity under the Government Code.

As a result, the demurrer to the FAC is sustained without leave to amend. While this is the first challenge to the complaint on which the Court has ruled, Plaintiff has not demonstrated how any further amendment will cure the defects and the Court does not see any reasonable possibility that he can do so.

Defendant shall submit a judgment and order of dismissal pursuant to CRC Rule 3.1312.

COURT RULING

The matter was argued and submitted.

The matter was taken under submission.

SUBMITTED MATTER RULING

Having taken the matter under submission on 08/26/2016, the Court now rules as follows: The Court now affirms the tentative ruling.

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 08/30/2016

TIME: 08:35:00 AM

DEPT: 53

JUDICIAL OFFICER PRESIDING: David Brown

CLERK: A O'Donnell

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: 34-2016-00188891-CU-MC-GDS CASE INIT.DATE: 01/08/2016

CASE TITLE: **Graham vs. Sacramento Municipal Utility District**

CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion to Strike - Civil Law and Motion

APPEARANCES

Nature of Proceeding: Motion to Strike the 1st Amended Complaint

TENTATIVE RULING

******NOTICE: EFFECTIVE SEPTEMBER 19, 2016, THIS DEPARTMENT WILL MOVE TO 813 6TH ST SACRAMENTO, CA, 2ND FLOOR. ALL PAPERS FOR DEPARTMENTS 53 AND 54 MUST BE FILE AT THIS NEW LOCATION AND WILL NOT BE ACCEPTED AT THE GORDON D. SCHABER COURTHOUSE. ALL HEARINGS WILL TAKE PLACE AT THIS NEW LOCATION******

Defendants Sacramento Municipal Utility District ("SMUD"), et al.'s unopposed motion to strike self-represented Mark Graham's first amended complaint is dropped as moot in light of the Court's ruling on the demurrer sustaining the demurrer without leave to amend.

COURT RULING

The matter was argued and submitted. The matter was taken under submission.

SUBMITTED MATTER RULING

Having taken the matter under submission on 08/26/2016, the Court now rules as follows: The Court now affirms the tentative ruling.

DATE: 08/30/2016

MINUTE ORDER

DEPT: 53

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