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October 4, 2016

Steve Scalmanini, Mayor and Ukiah City Council
City of Ukiah
300 Seminary Avenue,
Ukiah CA 95482

Re: *Ukiah Valley Sanitation District v. City of Ukiah*

Dear Mr. Scalmanini and Members of the Ukiah City Council,

The Ukiah Valley Sanitation District Manager Frank McMichael has been out on medical leave since September 16, 2016, so the District Board asked that I respond to Mr. Sangiacomo's email dated September 22, 2016 and sent at 10:02 AM regarding his "Request to Meet" "outside of litigation to resolve the dispute." This letter has been approved by the District Board. It is being sent with the hope it will clarify incorrect information apparently being passed off as fact and in an effort to move forward with efforts to resolve the current disputes.

The District agrees that litigation should be a last resort. In fact, that is how it was used in this case. The District sent the City Attorney an unfiled copy of the complaint a month prior to filing it with Court and asked to meet to discuss the issues raised in the lawsuit. When the City simply did not respond, the District had no other option than to file a lawsuit. In addition, the City had refused to give the District millions of dollars of *District funds* held by the City even though the City identified those funds as being held by it in a fiduciary capacity for the benefit of the District. Only after the lawsuit was filed did the City eventually hand over a portion of those fiduciary funds by paying the District over \$4,000,000.00 of the District's own money. But even then, during the last year, the City forced the District to file a motion with the trial court to recover a portion of that amount since the City was non-responsive to the District's informal efforts to resolve the matter. Even now, the City continues to hold surplus District money.

A similar pattern of behavior was followed by the City several years ago. The District had questioned whether the City had paid the District the required connection fees for the Mendocino Brewing Company ("MBC"), as had been agreed to contractually by the City and the MBC. The City claimed there was no written agreement and refused to address the matter. The District was forced to file a lawsuit against the City to recover its money. It was not until the District produced a signed copy of the agreement, which the City had inadvertently sent to the District, that the City agreed to pay the District \$300,000.00. In short, the City has shown time and again that it only takes action when its feet are held to the fire.

Regarding funding for the "Purple Water" project, during the City's September 21, 2016, Council meeting, the City Manager *incorrectly* stated that the District had provided no response to the City's request to dismiss the lawsuit subject to an agreement that it could re-file suit after the Purple Water loan funded. However, contrary to the City Managers statement, our

September 20, 2016, letter directly responded to that inquiry. After that was pointed out to the Council at the meeting and following the close of public comment, the City Manager corrected himself, only to *error* again by publicly claiming that, while the District did respond to the inquiry, it had simply refused to accept the City's request. The City went on the claim there was no downside to the offered agreement.

Mr. McMullen's response was very clear. The District cannot consider such a request unless the State, who is funding the loan, finds it acceptable. In essence, the City wants the lawsuit to momentarily disappear so it can represent to the state that there are no present claims affecting the wastewater program. That would be false, even under the agreement proposed by the City.

On Friday, September 16, 2016 at 3:08 PM, this office received an email from Sergio Rudin, Attorney, Office of Chief Counsel, State Water Resources Control Board. With his email were two (2) attachments. One was referenced as "FORM OF OPINION OF GENERAL COUNSEL" (see attached copy of document as received from the State) which appears to be a document that would require the signature of David Rapport to be put on his letterhead; and, the other was referenced as "FORM OF OPINION OF BOND COUNSEL." We do not know who would sign the second letter.

It should be noted that the form opinion of general counsel letter prepared by the State, which the District presumes is to be signed by David Rapport, requires the following acknowledgement:

"f. To the best of my knowledge and based upon a reasonable investigation, there is no action, suit, proceeding, inquiry or investigation before or by any court of federal, state, municipal or other governmental authority pending or threatened against or affecting the City's water and wastewater system or the assets, properties or operations of the City relating to its water and wastewater system which, if determined adversely to the City or its interests would result in any material change in the assets or financial condition of the City, the City's water and wastewater system or the financial condition thereof." (Emphasis added.)

While the lawsuit could be momentarily dropped, the claim would persist by virtue of your own agreement to allow it to be re-filed. In other words, notwithstanding the City's proposed agreement to allow re-filing, there would most certainly still be a threatened action and your general counsel could not, in good conscience, sign the required acknowledgement. In short, absolutely nothing is accomplished by the proposed dismissal of the lawsuit.

Our point, made quite clear in Mr. McMullen's correspondence, was that the District will not participate in a fraud upon the State. That may not be your intent or design but absent the state's acknowledgment of the process and approval that the case may be dismissed and simply

re-filed, that is exactly what you are asking the District to do. The District considers that a "downside."

Therefore, the question remains: will the State approve funding of the loan with the City's proposed re-filing agreement in place? The City Attorney has acknowledged that this does indeed need to be addressed. As previously pointed out, without being asked to do so, we reached out to the State's attorney and offered to make good faith efforts to work through the issue. The District understands that as the agency seeking the loan, the City must approve the District's participation in such discussions. Therefore, whether those efforts are undertaken is contingent on your approval and action. In this regard, we have yet to receive any word on the matter from the City or the State. The District remains willing to work through all of these issues in a prompt and timely manner.

Moving on, included in the backup for item 3(b) to the City Council's October 5, 2016, agenda, are several pages that pose and supposedly answer specific questions. The District wishes to address a few of those questions.

The second slide/page 12 asks: "Why are there two government agencies for one sewer system?" The simple answer is that, by law, the City cannot provide services outside of the City limits. While the District provides service to some City residents because the City did not annex sewer services when they annexed the underlying land, for the services to be provided by one governmental entity there are two (2) options:

1. The City would have to annex the *entire* District, which includes area outside of the City limits; or,
2. The District would have to annex that portion of the City that is not already included within the District boundaries which is commonly known as the "overlap area".

The third slide/page 13 asks: "Isn't there is a duplication of services?" Again, the simple answer is "No." The District contracts with the City (pays the city) for services listed on the slide/page. The City contracts with a private companies to provide billing and collection services. But, as is all too often the case, the City did not tell the District they were contracting out those services. It was not until two (2) District Board members received a letter from a company located in Southern California in the past thirty (30) days that the District became aware of the fact the City contracted out billing and collection services.

The District could just as easily contract with a private company here in Ukiah to provide the same services. It is unclear why the City chose to contract with an outside supplier without first addressing the issue with the District. This is especially the case since the District was charged for its portion of the billing and collection services for fiscal year 2015/2016, the sum of more than \$88,000, which represents 47.45% of total budget of \$185,434.00. It should be noted that in fiscal year 2014/2015, the total City actual expenditure for billing and collection services was only \$130,345.00; whereas, in the proposed 2016/2017 it has increased to \$320,669.00.

Applying the same 47.45% to that figure means the District share of billing and collection has increased to \$152,312.00 without any requested input from the District. It is things such as this which cause the District Board great frustration when dealing with the City, who is suppose to be their transparent partner in the sewer system.

The fourth slide/page 14 asks: "Do all the customers pay the same price?" The answer to that question is "No." District customers pay \$11.00 per month *less* for base services although the District's connection fees are slightly higher.

The fifth slide/page 15 asks, " Why is the UVSD suing the City?" The City's bullet points includes "Result in duplicity." The eighth slide/page 18 asks, "What are the ratepayer benefits?" The City's bullet points includes "Eliminate opportunity for creating duplicity."

No truer a statement has been made. According to the Merriam-Webster online dictionary "duplicity" is defined as " dishonest behavior that is meant to trick someone". (<http://www.merriam-webster.com/dictionary/duplicity>). Therefore, on both points the City is correct. As to the fifth slide/page 15 the District is suing the City because of the City's dishonest behavior. As to the eighth slide/page 18, the benefit to the rate payer is to "Eliminate opportunity for [City dishonesty]."

Finally, the District wants to emphasize as clearly as possible, it is willing to spend whatever time may be necessary to resolve all issues affecting the parties. From the very beginning the District did not desire to bring this lawsuit, but the City chose to simply ignore the District's overtures to meet and confer prior to taking that action. The District Board owes a duty to its rate payers to represent their interests. This duty includes insuring: the District is not paying more than its fair share of sewer system operating and maintenance costs; and, the District is properly credited and receives its customer's revenues. To just ignore the over-charging and lost revenue would be a dereliction of duty on the part of the District Board and would lead to even larger problems in the future.

The City has largely ignored the District's overtures to resolve the parties' disputes to date. Now, when the disputes present an apparent impediment to funding that the City desires, the City attempts to publicly disparage the District, as if the District is the problem. The reality, however, is that the City has a problem of its own creation; a problem it has chosen to ignore until now. Instead of pointing fingers, the City should be willing to sit down with the District and work through the disputes. In truth, that is the only effective solution. The District remains willing to work toward that end.

In conclusion, the District continues to be willing to meet and confer with the City regarding the pending litigation but not on the terms suggested in the email from Mr. Sangiacomo's dated September 22, 2016 at 10:02 AM. The District believes that only through a committee committed to undertaking such efforts that includes two (2) members of the City Council can the City become fully informed on the facts of the case, not just the facts which have been subject to a selective filter. At any such conference, the District proposes that he parties

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appear represented by their respective Managers, two (2) board (Council) members and legal counsel. In the meantime, the District believes that it is in both parties' best interest to meet with the Department of Water Resources, as soon as possible, in a joint effort to quickly resolve the State's concerns so that the City can move forward on their application for recycled (purple) water funds.

Respectfully yours,


DUNCAN M. JAMES

cc: UVSD

DRAFT 4/18/16

[FORM OF OPINION OF GENERAL COUNSEL – insert your letterhead]

State Water Resources Control Board
Division of Financial Assistance
Attn: Eva Kawada
1001 I Street, 17th Floor
Sacramento, CA 95814

Re: City of Ukiah (“City”) – Recycled Water Pipeline Project –CWSRF Project No. 8076-110
 (“Project”)

Ladies and Gentlemen:

I am General Counsel to the City in connection with the Project. This opinion is delivered to the State Water Resources Control Board (“State Water Board”) at the request of the City. In connection therewith, I have examined the laws pertaining to the City, originals of the Installment Sale Agreement, between the City and the State Water Board (“Installment Sale Agreement”), the City’s reimbursement resolution [number] adopted on [DATE], the City’s rate-setting resolution [number] adopted on [DATE], the City’s authorized representative resolution [number] adopted on [DATE], the City’s resolution [number] pledging revenues and funds adopted on [DATE], [insert if authorizing reso – the City’s authorizing resolution [number] adopted on [DATE]] (collectively, “the City Resolutions”), documents related to each of the obligations listed in Exhibit F of the Installment Sale Agreement, (collectively, the “Material Obligations”), and such other documents, legal opinions, instruments and records, and have made such investigation of law, as I have considered necessary or appropriate for the purpose of this opinion.

General Authority

- a. The City, a general law city of the State of California duly organized, validly existing under the laws of the State of California pursuant to [INSERT SPECIFIC LEGAL AUTHORITY], has the requisite legal right, power, and authority to execute and deliver the Installment Sale Agreement and carry out and consummate all transactions contemplated therein.
- b. The City Resolutions have been duly adopted at meetings of the City which were called and held pursuant to law with all public notice required by law and at which a quorum was present and acting when the City Resolutions were adopted. The City Resolutions are in full force and effect and have not been amended, modified, supplemented, or rescinded, nor has the rate-setting resolution been challenged or the rates become subject of a referendum or initiative or other similar process.
- c. To the best of my knowledge and based upon a reasonable investigation, all proceedings required by law or under the ordinances or bylaws of the City to be taken by the City in connection with the authorization of the Installment Sale Agreement and the transactions contemplated by and related thereto, and all such approvals, authorizations, consents or other orders of or filings or registrations with such public boards or bodies, if any, as may be legally required to be obtained by the City prior to the date hereof with respect to all or any of such matters have been taken or obtained and are in full force and effect, except that no opinion is expressed as to any approvals, obligations or proceedings which may be required under any federal securities laws or state blue sky or securities laws.

- d. To the best of my knowledge and based upon a reasonable investigation, the execution and delivery of the Installment Sale Agreement and the consummation of the transactions therein will not conflict with or constitute a breach of or default (with due notice or the passage of time or both) under (i) the statutes creating the City or any amendments thereto, (ii) the ordinances or by laws of the City, (iii) any bond, debenture, note or other evidence of indebtedness, or any material contract, agreement or lease to which the City is a party or by which it or its properties are otherwise subject or bound or (iv) any applicable law or administrative regulation or any applicable court or administrative decree or order.
- e. To the best of my knowledge and based upon a reasonable investigation, the City has sufficient property rights in the Project property for the purposes contemplated in the Installment Sale Agreement. These property rights extend in perpetuity/until [date].
- f. To the best of my knowledge and based upon a reasonable investigation, there is no action, suit, proceeding, inquiry or investigation before or by any court of federal, state, municipal or other governmental authority pending or threatened against or affecting the City's water and wastewater system or the assets, properties or operations of the City relating to its water and wastewater system which, if determined adversely to the City or its interests would result in any material change in the assets or financial condition of the City, the City's water and wastewater system or the financial condition thereof, and the City is not in default with respect to any order or decree of any court or any order, regulation, or demand of any federal, state, municipal, or other governmental agency which default might have consequences that would materially and adversely affect the financial condition of the City or its water and wastewater system.
- g. No facts have come to my attention which lead me to believe that the City's authorized representative has made any untrue statement of a material fact or omitted or omits to state a material fact or has made misleading statements in the Installment Sale Agreement.
- h. The Installment Sale Agreement has been duly authorized, executed, and delivered, and assuming due authorization, execution and delivery of the Installment Sale Agreement by the State Water Board, constitutes legal, valid, and binding obligation of the City enforceable against the City in accordance with its terms, subject to the laws relating to bankruptcy, insolvency, reorganization, or creditors' rights generally and to the application of equitable principles, if equitable remedies are sought.

Sincerely,

Name
General Counsel
City