



## SAN LORENZO VALLEY WATER DISTRICT

### BOARD OF DIRECTORS SPECIAL AGENDA January 30, 2018

**MISSION STATEMENT:** Our Mission is to provide our customers and future generations with reliable, safe and high quality water at an equitable price; to create and maintain outstanding service and community relations; to manage and protect the environmental health of the aquifers and watersheds; and to ensure the fiscal vitality of the San Lorenzo Valley Water District.

Notice is hereby given that a special meeting of the Board of Directors of the San Lorenzo Valley Water District will be held on Tuesday, January 30, 2018 at 6:00 p.m., 13057 Highway 9, Boulder Creek, California.

*In compliance with the requirements of Title II of the American Disabilities Act of 1990, the San Lorenzo Valley Water District requests that any person in need of any type of special equipment, assistance or accommodation(s) in order to communicate at the District's Public Meeting can contact the District Secretary's Office at (831) 430-4636 a minimum of 72 hours prior to the scheduled meeting.*

*Agenda documents, including materials related to an item on this agenda submitted to the Board of Directors after distribution of the agenda packet, are available for public inspection and may be reviewed at the office of the District Secretary, 13060 Highway 9, Boulder Creek, CA 95006 during normal business hours. Such documents are also available on the District website at [www.slvwd.com](http://www.slvwd.com) subject to staff's ability to post the documents before the meeting.*

1. Convene Meeting/Roll Call

2. Additions and Deletions:

*Additions to the Agenda, if any, may only be made in accordance with California Government Code Section 54954.2 (Ralph M. Brown Act) which includes, but is not limited to, additions for which the need to take action is declared to have arisen after the agenda was posted, as determined by a two-thirds vote of the Board of Directors (or if less than two-thirds of the members are present, a unanimous vote of those members present).*

3. Oral Communications:

*This portion of the agenda is reserved for Oral Communications by the public for items which are on the Agenda. Any person may address the Board of Directors at this time, on items on the agenda. Normally, presentations must not exceed three (3) minutes in length, and individuals may only speak once during Oral Communications. No actions may be taken by the Board of Directors on any Oral Communications presented; however, the Board of Directors may request that the matter be placed on a future agenda. Please state your name and town/city of residence at the beginning of your statement for the record.*

4. New Business:

a. POTENTIAL LAWSUIT FOR INJUNCTION TO PREVENT FUTURE UNAUTHORIZED DISCLOSURES OF THE DISTRICT'S CONFIDENTIAL AND LEGALLY PROTECTED INFORMATION

Receive and consider, by the Board, public comment before deciding whether to proceed with filing a lawsuit for an injunction, or other court order, to prevent future unauthorized disclosures of the District's confidential and legally protected information.

5. Adjournment

**Certification of Posting**

I hereby certify that on January 24, 2018 I posted a copy of the foregoing agenda in the outside display case at the District Office, 13060 Highway 9, Boulder Creek, California said time being at least 24 hours in advance of the special Meeting of the Board of Directors of the San Lorenzo Valley Water District (Government Code Section 54954.2).

Executed at Boulder Creek, California on January 24, 2018.

\_\_\_\_\_  
Holly B. Hossack  
District Secretary



**TO:** Board of Directors, San Lorenzo Valley Water District  
Brian Lee, District Manager

**FROM:** Gina Nicholls, District Counsel

**DATE:** January 24, 2018

**RE:** Potential Lawsuit for Injunction to Prevent Future Unauthorized Disclosures of the District's Confidential and Legally Protected Information 502665-0001

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**RECOMMENDATION**

Receive and consider public comment before deciding whether to proceed with filing a lawsuit for an injunction, or other court order, to prevent future unauthorized disclosures of the District's confidential and legally protected information.

**BACKGROUND**

In prior closed session meetings of the District's Board of Directors ("Board"), the Board has debated how to address a concerning pattern of unauthorized disclosures of the District's confidential and legally protected Information. Among other alternatives considered by the Board, the Board directed District Counsel to prepare a draft complaint for injunctive relief to prevent further unauthorized disclosures. A copy of the draft complaint is attached hereto as **Exhibit A**. The draft complaint sets forth several specific examples of what appear on their face to represent unauthorized disclosures of confidential information. These examples provide legal grounds for such a lawsuit, as discussed in more detail below.

**LEGAL ANALYSIS**

The Brown Act prohibits disclosure of confidential information that has been acquired by being present at a closed session meeting to any person not entitled to receive such information, without Board authorization. (Gov. Code § 54963, subd. (a).) The Brown Act defines confidential information as any "communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet in closed session" under the Brown Act. (*Id.*, at subd. (b).) Section 54963 provides agencies with certain remedies against unauthorized disclosures, including injunctive relief to prevent any disclosure of confidential information prohibited by the statute. (*Id.*, at subd. (c).)

### **Can the District Obtain Injunctive Relief?**

Short Answer: Yes.

In order to obtain a permanent injunction, a plaintiff must demonstrate (1) that a violation of the Brown Act's duty of confidentiality has occurred; (2) that monetary compensation would not afford adequate relief; and (3) restraint is necessary to prevent multiplicity of judicial proceedings. (Code Civ. Proc. § 526, subd. (a).) It is likely that the District can establish all of these elements by reference to past examples of unauthorized disclosures reflected in the draft complaint attached hereto as **Exhibit A**.

Under these circumstances, monetary compensation would not afford adequate relief to the District. It would be extremely difficult, if not impossible, to value the harm done by multiple unauthorized disclosures of confidential and legally protected information. Immeasurable harms to the District include the Board's inability to conduct closed session discussions in trust and good faith among its members, with inevitable damage to the District's ability to diligently protect its legal rights and interests, as well as other sensitive information that the District has a legal duty to protect.

The "multiplicity of judicial proceedings" requirement can be satisfied by showing that the District will likely be exposed to future actions involving the same subject matter or same set of facts or principles. Because there has been not just one, but a pattern, of unlawful disclosures, the District should be entitled to an injunction. An injunction would give the District the means to enforce, under penalty of contempt, the duties that the District and every Director is obligated to fulfill.

### **Can the District Obtain Preliminary Injunctive Relief Before a Trial on the Merits?**

Short Answer: Probably.

For a preliminary injunction, a plaintiff additionally must show that irreparable harm will result before the matter can be resolved. (Code Civ. Proc. § 527.) Because many of the unlawful disclosures alleged in the draft complaint pertain to on-going litigation, they threaten the District's ability to conduct closed session meetings on an ongoing basis. Thus, a court could find interim irreparable harm to the District to support a preliminary injunction.

### **Do Any of the Exceptions That Allow Disclosure of Certain Information Discussed in Closed Session Apply to the Disclosures Alleged in the Draft Complaint?**

Short Answer: No.

Information obtained from a closed session meeting can only be disclosed as authorized by law. The Brown Act permits disclosure only in those limited circumstances where an individual's duty of confidentiality gives way to his or her responsibility to disclose improper matters dealt with in closed sessions. Government Code section

54963, subdivisions (e) and (f), establishes the parameters for when disclosures may be permitted, as follows:

“(e) (1) Making a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law, including disclosing facts to a district attorney or grand jury that are necessary to establish the illegality of an action taken by a legislative body of a local agency or the potential illegality of an action that has been the subject of deliberation at a closed session if that action were to be taken by a legislative body of a local agency.

(2) Expressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action.

(3) Disclosing information acquired by being present in a closed session under this chapter that is not confidential information.

(f) Nothing in this section shall be construed to prohibit disclosures under the whistleblower statutes contained in Section 1102.5 of the Labor Code or Article 4.5 (commencing with Section 53296) of Chapter 2 of this code.”

The disclosures which are the subject of the draft complaint are not permissible under any of these provisions of the Brown Act, nor under the “whistleblower statutes” referenced in subdivision (f).

**STRATEGIC PLAN:**

N/A

**FISCAL IMPACT:**

Approximately \$1000 to file the case; TBD to litigate it to completion.

**Exhibit A**

**Draft Complaint**

[SEE FOLLOWING PAGES]

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**Public Agency, No Filing Fee Required  
Government Code § 6103**

6 Attorneys for Plaintiff  
SAN LORENZO VALLEY WATER DISTRICT  
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9  
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **FOR THE COUNTY OF SANTA CRUZ**  
12

13 SAN LORENZO VALLEY WATER  
DISTRICT, a California public agency,

Case No: \_\_\_\_\_

14 Plaintiff,

15 vs.

16 WILLIAM H. SMALLMAN, an individual in  
17 his capacity as an elected member of the  
Board of Directors of San Lorenzo Valley  
18 Water District,

**VERIFIED COMPLAINT FOR  
INJUNCTIVE RELIEF TO PREVENT  
FURTHER VIOLATIONS OF BROWN  
ACT SECTION 54963, WHICH  
PROHIBITS DISCLOSURE OF CLOSED  
SESSION CONFIDENTIAL  
INFORMATION**

19 Defendant.  
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1 Plaintiff, the San Lorenzo Valley Water District (“the District”) alleges as follows:

2 **INTRODUCTION**

3 1. This complaint arises from unlawful actions by Defendant, a member of  
4 the District’s Board of Directors (“Board”). Defendant has made multiple unauthorized  
5 disclosures of the District’s confidential and attorney-client privileged communications to  
6 the press and the public, in violation of his fiduciary duties and statutory obligations  
7 under the Brown Act, and thereby seriously jeopardizing the ability of the District to  
8 protect its lawful interests in defending against ongoing litigation.

9 2. Notwithstanding the strong policy of government transparency embodied  
10 in the Brown Act, the Act also expressly protects the confidentiality of local agencies’  
11 communications with counsel in the context of properly noticed closed session meeting.  
12 To that end, the Act creates statutory remedies to punish and prevent unauthorized  
13 disclosures of confidential and privileged information.

14 **PARTIES**

15 3. The District is, and at all times mentioned herein was, a California public  
16 agency formed in 1941 pursuant to the County Water District Law, section 30000 et  
17 seq. of the California Water Code. The District serves the public by supplying potable  
18 water to the communities of Boulder Creek, Brookdale, Ben Lomond, Lompico, Zayante,  
19 Scotts Valley, Manana Woods and Felton. The District is governed by a five person  
20 Board elected at large to four-year terms. As a local public agency, the conduct of the  
21 District’s Board meetings is governed by the Brown Act, Government Code section  
22 54950 et seq.

23 4. Defendant William H. Smallman (“Director Smallman”), is a local resident  
24 and an elected member of the District’s Board. Director Smallman’s term of office began  
25 in December 2016 and will expire in December 2020. As a member of the Board,  
26 Director Smallman owes fiduciary duties to the public and the District to maintain the

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1 confidentiality of the District's protected information, including confidential closed  
2 session communications and other legally protected information.

3 **JURISDICTION AND VENUE**

4 5. Jurisdiction and venue are proper in this court as Director Smallman is a  
5 resident of the County of Santa Cruz, California, and the acts and events giving rise to  
6 the claims set forth herein occurred in the County of Santa Cruz, California.

7 **GENERAL ALLEGATIONS**

8 6. As a public agency that is subject to the Brown Act, the District holds  
9 public meetings of its Board. The District also holds closed sessions to discuss certain  
10 confidential matters, as permitted under the Brown Act, including discussions with  
11 counsel regarding anticipated or pending litigation, pursuant to Government Code  
12 section 54956.9, subsection (d).

13 7. The Brown Act requires the legislative bodies of local agencies such as  
14 the District to hold their meetings open to the public except as provided in the Act.  
15 Section 54956.9 of the Brown Act establishes one of these important exceptions to the  
16 public meeting requirement. It authorizes local agencies to conference with their  
17 attorneys in private regarding pending or anticipated litigation, after notice to the public,  
18 when discussion in open session would prejudice the position of the local agency in the  
19 litigation.

20 8. Section 54963 of the Brown Act strictly prohibits local agency board  
21 members from publicly disclosing any information that has been received and discussed  
22 in closed session concerning litigation unless the information is expressly authorized by  
23 law to be disclosed.

24 9. The District is involved in multiple pending lawsuits and related claims.  
25 One such lawsuit was filed in In November 2014 by an individual plaintiff against the  
26 District, Terry Vierra (one of the District's former Board members), and others for  
27 alleged violations of the Political Reform Act and conflict of interest laws. The lawsuit is  
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1 proceeding as Santa Cruz County Superior Court, Case No. CV180394, and Sixth  
2 District Court of Appeal, Case Nos. H044505, H044800, H043492, and H043704.

3 10. The District provided Mr. Vierra's legal representation in the lawsuit until  
4 shortly after the trial court issued a judgment against him in January 2017. On April 3,  
5 2017 the Board voted unanimously to stop all financial commitment to the Political  
6 Reform Act case (the claims against Mr. Vierra are based on the Political Reform Act).  
7 The District continues to defend itself in connection with the plaintiff's appeal of court  
8 orders dismissing the case against the District.

9 11. On December 15, 2014, Mr. Vierra corresponded with former District  
10 Counsel regarding a request for legal representation. This communication, the contents  
11 of which are confidential and privileged, has become known as the "Vierra letter."

12 12. The District's Board has conducted a number of closed session meetings  
13 with counsel to discuss the pending lawsuit against Mr. Vierra and the District. The  
14 Board depends on the confidentiality of these meetings in order to discuss the strengths  
15 and weaknesses of the District's position and to make strategy decisions without  
16 compromising its ability to defend against the lawsuit.

17 13. The Board also depends on the confidentiality of its closed session  
18 meetings in order to deliberate about other pending or anticipated litigation matters,  
19 sensitive personnel issues, and other confidential matters as permitted under the Brown  
20 Act.

21 14. As a member of the District's Board, Director Smallman regularly attends  
22 its public and closed session meetings.

### 23 **UNLAWFUL DISCLOSURES**

24 15. On multiple occasions, Director Smallman has publicly disclosed  
25 confidential, attorney-client privileged information that he learned by virtue of his  
26 attendance at closed session meetings, in clear violation of his statutory duties under  
27 the Brown Act and his fiduciary duty to protect and not to disclose such information.

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1           16.    The District became aware that Director Smallman improperly has  
2 disclosed the District’s confidential and protected information because some of that  
3 information was published in articles by the Press Banner, a local news publication.

4           17.    For example, on August 4, 2017 an article published by the Press Banner  
5 reported several clear violations of closed session confidentiality by Director Smallman,  
6 as follows:

7                   (a)    “[D]irector Bill Smallman revealed this week” that “Directors of the  
8 San Lorenzo Valley Water District this year were worried by the threat of a  
9 lawsuit from former director Terry Vierra, as they continued to pay his legal bills  
10 in a conflict-of-interest case . . . .”

11                   (b)    “ **‘The threat of Vierra suing the district has been brought up  
12 numerous times in closed meetings ever since I got on the board,’ said  
13 Smallman.**” (Emphasis added.)

14                   (c)    “**Smallman said the issue of the [Vierra] letter came up briefly  
15 at the April 3 closed-door session** in which he and his fellow directors – facing  
16 growing public concern about paying Vierra’s legal bills and the prospect of  
17 escalating payments for an appeal – reversed themselves and withdrew financial  
18 support for Vierra.” (Emphasis added.)

19                   (d)    “After the unanimous [closed-session] vote to end payment of  
20 Vierra’s legal bills, Smallman said there was no vote to withhold the letter.”

21                   (e)    “**He said that in the closed-door meeting on April 3, he made  
22 his first request to release the letter,** which prompted” a subsequent public  
23 statement by then-Board President Ratcliffe. (Emphasis added.)

24           18.    A true and correct copy of the August 4, 2017 Press Banner article with  
25 relevant sections highlighted is attached hereto as Exhibit “A.”

26           19.    The District did not authorize Director Smallman, or any other person, to  
27 disclose any of these confidential and attorney-client privileged communications to the  
28 public.

1           20.    In addition to the clear Brown Act violations cited above, Director  
2 Smallman has made other unauthorized and unlawful disclosures of the District's  
3 confidential and privileged information.

4           21.    For instance, an article published by the Press Banner on September 1,  
5 2017 reported that

6                   **"Smallman also revealed that board members this week were**  
7                   **cautioned by district counsel Gina Nicholls that grand jury**  
8                   **investigations are strictly confidential**, and that board members should  
9                   refrain from discussing any aspects of a grand jury investigation,  
                  especially if they become aware that any investigation exists or is  
                  pending."

10          22.    A true and correct copy of the September 1, 2017 Press Banner article is  
11 attached hereto as Exhibit "B."

12          23.    Upon information and belief, Director Smallman has made other  
13 unauthorized and unlawful disclosures of the District's confidential and privileged  
14 information on social media such as Facebook.

15          24.    Director Smallman's multiple unauthorized disclosures of the District's  
16 confidential and privileged information to the news media, made on or about August 4,  
17 2017 and September 1, 2017, and at other dates and times using social media such as  
18 Facebook, establish a pattern of Director Smallman violating his fiduciary duties to  
19 protect and not to disclose such information.

20          25.    Section 54963, subdivision (c) of the Brown Act expressly authorizes  
21 injunctive relief, among other remedies, to prevent violations of the rule against  
22 unauthorized disclosure of closed-session confidential information.

23          26.    The full extent of Director Smallman's unauthorized disclosures of the  
24 District's confidential and/or privileged information is unknown to the District and may be  
25 extensive. Such uncertainty interferes with the ability of the District's Board to conduct  
26 its official business, including deliberations regarding strategy that are necessary to  
27 protect the District in pending litigation. Accordingly, on \_\_\_\_\_, 2018 a majority of  
28 the Board voted to authorize this lawsuit against Director Smallman.

**FIRST CAUSE OF ACTION**

(Injunctive Relief)

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3       27. The District incorporates by reference, as fully set forth herein, paragraphs  
4 1 through 26 above.

5       28. This Court is authorized to issue a preliminary injunction and/or a  
6 permanent injunction against Director Smallman under the present circumstances,  
7 pursuant to Code of Civil Procedure sections 525, 526, and 527, as well as Government  
8 Code section 54963.

9       29. By disclosing confidential information obtained in closed-session meetings  
10 to the press and the public, Director Smallman has violated the Brown Act.

11       30. The District has no other adequate remedy at law to prevent Director  
12 Smallman from making further unauthorized disclosures of the District's confidential  
13 and/or privileged information in the future.

14       31. Absent judicial restraint, Director Smallman will continue to cause the  
15 District to suffer immediate and irreparable harm, including obstructing the District's  
16 ability to continue to conduct closed-session discussions in good faith with Board  
17 members. Further disclosures also will significantly impair the District's ability to  
18 diligently protect its legal rights and interests in pending and anticipated litigation.

19       32. Director Smallman's repeated disclosures of not only closed-session  
20 discussions, but also other confidential attorney-client privileged communications,  
21 establish a pattern of unlawful behavior, and indicate that Director Smallman is likely to  
22 continue making unauthorized disclosures that interfere with the District's ability to  
23 conduct confidential closed session meetings.

24       32. The District is entitled to an injunction requiring Director Smallman to:

25               (a) Immediately cease all of his unauthorized communications with the  
26 press regarding confidential information acquired through closed session Board  
27 meetings;

1 (b) Immediately cease all efforts to share such confidential information  
2 with any other member of the public by any other means, including social media;

3 (c) Such further and other injunctive relief as the Court deems  
4 appropriate.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, the District prays for judgment as against Defendant, Director  
7 Smallman, as follows:

- 8 1. For a preliminary and permanent injunction prohibiting Director  
9 Smallman from making unlawful disclosures of confidential  
10 information obtained from closed-session meetings;  
11 2. For the District's costs of suit incurred herein, including attorneys'  
12 fees and litigation expenses as applicable;  
13 3. For such other and further relief as the Court deems just and  
14 proper.

15  
16 Dated: \_\_\_\_\_, 2018

NOSSAMAN LLP  
GINA R. NICHOLLS  
TARA E. PAUL

17  
18  
19 By: \_\_\_\_\_  
20 Gina R. Nicholls

21 Attorneys for Plaintiff  
22 SAN LORENZO VALLEY WATER DISTRICT  
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**VERIFICATION**

I, Brian C. Lee, am General Manager of Plaintiff San Lorenzo Valley Water District, and I am authorized to make this verification on its behalf. I have reviewed the foregoing VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF TO PREVENT FURTHER VIOLATIONS OF BROWN ACT SECTION 54963, WHICH PROHIBITS DISCLOSURE OF CLOSED SESSION CONFIDENTIAL INFORMATION, and I am informed and believe the matters stated therein are true, and on that ground allege that they are true.

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

Executed this \_\_\_ day of \_\_\_\_\_ 2018 at Boulder Creek, Santa Cruz County, California.

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Brian C. Lee