Robert S. Lynch (Bar No. 001638)
Todd A. Dillard (Bar No. 028708)
Robert S. Lynch & Associates
340 E. Palm Lane, Suite 140
Phoenix, Arizona 85004-4603
Telephone: (602) 254-5908
Facsimile: (602) 257-9542
Email: rslynch@rslynchaty.com

Hans Clugston (Bar No. 019033)
Hans Clugston, PLLC
1580 Plaza West Drive
Prescott, Arizona 86303
Telephone: (928) 445-6566
E-mail: courts@clugston.us.
Writer's E-mail: hclugston@clugston.us

Attorneys for Defendants

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

TALKING ROCK LAND, LLC, an Arizona limited liability company, Plaintiff, v. INSCRIPTION CANYON RANCH SANITARY DISTRICT, an Arizona sanitary district; DAVID BARREIRA, District Board Member; BILL DICKRELL, District Board Member; and AL POSKANZER, District Board Member, Defendants.	Case No. P1300CV201800380 **VERIFIED RESPONSE TO APPLICATION FOR ORDER TO SHOW CAUSE** **(Hearing May 9, 2018, at 3:30 p.m.)** **(The Honorable John D. Napper)**

Defendants INSCRIPTION CANYON RANCH SANITARY DISTRICT, an Arizona sanitary district; DAVID BARREIRA, District Board Member; BILL DICKRELL, District Board Member; and AL POSKANZER, District Board Member (hereinafter collectively "the

District"), by and through undersigned counsel, hereby respond to *Plaintiff's Application for Order to Show Cause* as follows:

I. ISSUE TO BE HEARD

Pursuant to the Court's Order entered April 25, 2018, the sole issue for determination at the May 9, 2018 Hearing is to "show cause, if any exists, why the District should not be required to lift the moratorium and provide all approvals necessary for a provision of sewer service to the 45 Sterling Ranch Lots".

II. THE PLAINTIFF'S CLAIM THAT THE DISTRICT HAS ENACTED A DE FACTO MORATORIUM IS TOTALLY DISINGENUOUS

A. The Plaintiff conveniently omits the relevant part of A.R.S. § 48-2033 because it totally defeats their arguments.

1. The missing part of A.R.S. § 48-2033(G) identifying what constitutes a moratorium is the provision defining what <u>does</u> <u>not</u> constitute a moratorium:

> 2. "Moratorium on construction or land development":
> ... (b) Does not include denial or delay of permits or authorizations because they are inconsistent with applicable statutes, rules or ordinances.

2. The applicable statutes and rules prevent the District from executing the forms presented to it by the Plaintiff.

A.R.S. § 49-106 provides the general authority to the Arizona Department of Environmental Quality ("ADEQ") to issue rules. Specific to this proceeding, the ADEQ Rules require a Notice of Intent to Discharge ("Notice of Intent"), A.A.C.R. 18-9-301A, certifying that the discharge will comply with the applicable general permit, A.A.C.R. 19-9-301B.

Additionally, the ADEQ Rules require execution of two forms, commonly called Capacity Assurance Forms ("CA's"). The first form is used to certify that the additional flow resulting from the new development's collection system will not exceed the input flow limits of the general permit. A.A.C.R. 18-9-E301(C)(2). The second form is used to certify that the sewage treatment facility can accept and treat the increased flows anticipated from the new development. A.A.C.R. 18-9-E301(C)(1). It is the latter CA that is the focus of Plaintiff's wrath and the Achilles' heel of its complaint.

All three of these forms require the intended signatory, here District Board Chair David Barreira, to affirm the correctness of the information contained therein. All three of the forms contain the following inclusion in that affirmation:

> "I am aware that there are significant penalties for submitting false information including permit revocation as well as the possibility of fine and imprisonment for knowing violations."

3. The sewage treatment CA submitted to the District by the Plaintiff contained material errors.

Attached as Exhibit A are the three forms submitted by the Plaintiff to the District. The sewage treatment CA states in Box #4:

> APP Approved Capacity 0.455 (MGD)
>
> - that is a number used in the general permit for possible expansion, not existing capacity, as recognized in the Complaint, ¶ 38.
>
> Constructed Capacity 0.070 (MGD)

- Plaintiff admits that the current plant capacity is 62,500 GPD or 0.0625 MGD. Complaint, ¶ 39.

Operational Flow 0.040 (MGD)

- Plaintiff intentionally misrepresents this statistic which is not even supported by its selective selection of February 2018 in the Complaint, ¶ 40.

Thus, the Plaintiff's submitted version of this CA contains material misrepresentations, making it fatally flawed and impossible for the District to authorize the Chair's signature.

4. The Notice of Intent proferred by the Plaintiff cannot be executed because the District has not received, let alone reviewed and approved, significant documents that the form requires be reviewed and approved.

The District has not received the documents required to be revised and approved by the District in the Notice of Intent, p. 2 (Supplemental Information), to-wit:

Section 13 – site plan
Section 14 – all information
Section 15 – design flow calculations
Section 17 – design documents

Until those documents are submitted to the District and reviewed, the District cannot authorize the Chair to execute and deliver this form.

Since all three (3) forms must be correct and complete, under penalty of civil (A.R.S. § 49-783) or criminal (A.R.S. §§ 49-263, 283(G)) sanctions, before affirmation, the District could not and cannot authorize the Chair to sign them as presented.

III. THE PLAINTIFF'S COMPLAINT IS TOTALLY MISLEADING BECAUSE IT MISREPRESENTS THE SERIOUS PROBLEM IT KNOWS THE DISTRICT HAS CONCERNING ACCOMMODATING ADDITIONAL SEWAGE FLOWS INTO THE EXISTING TREATMENT PLANT

A. The Plaintiff's Complaint totally ignores the known fact that the existing treatment plant's current capacity is in danger of being exceeded.

1. Plaintiff's otherwise defective Sewage Treatment Facility CA shows the problem.

The sewage plant CA form shows a Basic Design Flow for the Sterling Ranch 45 lots of 0.0038 MGD. That number is derived from the Treatment Plant design for average flow from each lot to be 84 GPD (84 x 45 = 3.780 or 38). Plaintiff admits that the District has 603 current connections. Complaint, ¶ 48. Using the same math, the District must be able to serve these existing connections, which must be assumed to produce collectively the same average, being 50,652 GPD (84 x 603 = 50,652). If you add Sterling Ranch's contribution, the total (54,432 GPD)exceeds even Plaintiff's unsupported representation of the industry standard for expansion (85% of capacity or here 53,125 GPD). Complaint, ¶ 41.

2. Other growth already underway exacerbates the problem.

In December, Plaintiff bragged that 29 new homes were under construction and 10 more were being subjected to architectural review. Exhibit B. Those new homes represent an additional average flow of 3,276 GPD (39 x 84). Now the near term number looks more like 57,708 GPD (50,652 + 3,780 + 3,276). And Plaintiff is only one of three developers in the District. Exhibit C. Under these circumstances, the plant's current capacity of 62,500 GPD is reaching 92% use on <u>average</u> days.

3. The District must accommodate peak flows, not just average flows.

In December, the District experienced three days of inflows exceeding 60,000 GPD, including one day of inflow of 68,200 gallons. Exhibit D. The plant was able to accommodate this inflow only because prior days had been lower. On a very short timeframe, it can

accommodate 70,000 GPD but not for very long. (The problem was replicated in April, with three days over 60,000 gallons and a peak of 67,600 gallons. Exhibit E.) The December peak day represents a per connection inflow in excess of 113 gallons. Again, do the math. 648 connections (603 + Sterling Ranch's 45) could produce a peak flow of 73,224 GPD (648 x 113), overtopping the existing plant. Add the other 39, and the peak rises to 77.631 GPD, an untenable result even if the other two developers sit on their hands.

The Plaintiff acknowledges that the District must expand the Treatment Plant, and soon. Complaint, ¶ 42. The Plaintiff has also acknowledged the District's need to plan for peak flows. Id., ¶ 43. The Plaintiff is also well aware of the engineering efforts the District has undertaken, including receiving a proposal from Granite Basin Engineering on April 20, 2018 (Exhibit F), since the engineering firm also works for the Plaintiff.

4. The District is proceeding in a reasonable manner to acquire the necessary engineering to submit a plan to ADEQ for approval and likely amendment of the existing Aquifer Protection Permit ("APP").

The existing permit contemplates replacing rather than expanding the existing Treatment Plant. See: Complaint, ¶ 43. ADEQ will likely insist on an amendment. ADEQ processes could take up to six (6) months. The two engineering proposals just received will likely require up to six (6) months before submission to ADEQ. See: Exhibit F, for instance. Additionally, the District must arrange for financing for the work. It has approached the Plaintiff with a proposal to amend the Development Agreement among the District and the three developers toward that end and separately suggested a separate agreement to move forward in a cooperative manner. While the District was doing this, Plaintiff, unbeknownst to the District, was filing this action.

IV. THE ALLEGED OPEN MEETING LAW VIOLATION IS GROUNDLESS AND YET ANOTHER ATTEMPT TO PRESSURE THE DISTRICT IMPROPERLY

The alleged open meeting law violation is not a subject of the Court's Order to Show Cause. It is, however, further evidence that the Complaint is completely frivolous and without legal merit. The alleged open meeting law violation is that the District board passed a motion that "legal counsel proceed as directed in executive session." *Complaint* at ¶ 125. It is based on a comment by Bob Hilb, who is not a party to this action, not an attorney, and not pursuant to this cause of action. Ibid.

The Arizona Attorney General Agency Handbook provides,

> This provision [A.R.S. § 38-31.03(A)(4)] is unique in that it permits public bodies to "instruct" their attorneys. In these limited situations, the public body must be able to discuss and arrive at some consensus on its position before it instructs its legal counsel. Executive session minutes must contain an accurate description of all instructions given. A.R.S. § 38-431.01(C). **The best practice is for a public body, upon return to the open session, to vote to authorize its attorney to act "as instructed in the executive session."** After the attorney takes the action authorized and the need for confidentiality has passed, the public body must formally approve of the action in open session. *Arizona Attorney General Agency Handbook*, Ch. 7.9.7 (emphasis added).

The District board's motion was verbatim best practice according to the Arizona Attorney General Agency Handbook. The Plaintiff's true complaint is that the forms weren't signed, not the meeting process. The parties are in contract negotiations and this Complaint is about really trying to stampede those negotiations – it has nothing to do with moratorium or open meeting law.

Although no open meeting law violation occurred, in an overabundance of caution, the District board has scheduled a meeting on May 8, 2018 to ratify the complained-of legal action

in open session. The ratification will serve to cure any possible open meeting defect, and render this count moot and subject to dismissal. *Valencia v. Cota*, 126 Ariz. 555, 617 P.2d 63 (App.Div.1 1980); see also: *McLeod v. Chilton*, 132 Ariz. 9, 643 P.2d 712 (App.Div.1, 1981), cert. den. 459 U.S. 877.

V. CONCLUSION

Clearly, the Plaintiff has been less than forthcoming in its presentation to the Court. It has alleged an emergency with no supporting evidence that its critical date (June 2) has actual legal consequences and is not just its desired schedule. It has failed to disclose material facts, engaged in speculation and misrepresented the situation the District is confronting. Indeed, one could easily conclude that this Complaint and the Order to Show Cause were filed just to pressure the District into signing forms it could not sign. Under these circumstances, the Plaintiff should take nothing from its questionable tactics. Rather the Court should deny the Plaintiff its request for emergency relief and dismiss this action as having been improvidently brought, awarding attorneys' fees (A.R.S. § 48-2033(F)) and costs (A.R.S. § 12-341) to the Defendants.

VI. REQUEST FOR RELIEF

The Defendants, by their undersigned counsel, hereby request that the Court:

1. Deny the Plaintiff relief in this emergency proceeding;
2. Award Defendants their attorneys' fees and costs; and
3. Grant such further relief as the Court deems just.

RESPECTFULLY SUBMITTED this 4th day of May, 2018.

ROBERT S. LYNCH & ASSOCIATES

Robert S. Lynch
Todd A. Dillard
Hans Clugston
Attorneys for Defendants

Certificate of Service. On 5/ 4 /18, the above document and its attachments, if any, were served as follows

ORIGINAL sent to: Electronically

Clerk of the Superior Court — ☐Mail ☐ Delivery ☐ Facsimile ☐Not Served

Copy sent to:

FENNEMORE CRAIG, P.C.
Sean Hood, Esq.; Dawn Meidinger, Esq.;
Taylor Burgoon, Esq.
2394 E. Camelback Road, Suite 600
Phoenix, AZ 85016-3429

☒Mail ☐ Delivery ☐ Not Served

Copy sent to:

PRESCOTT LAW GROUP, PLC
Andy Jolley, Esq.
116 N. Summit Avenue
Prescott, AZ 86301

☒Mail ☐Delivery ☐ Facsimile ☐Not Served

Copy sent to:

☐ Mail ☐ Delivery ☐ Not Served

Under penalty of perjury, I certify the above Certificate of Service is true and correct.

Signature — Hans Clugston (Print Name) — 5/ 4 /18 (Date)

VERIFICATION

STATE OF ARIZONA)
) ss.
County of Yavapai)

David Barreira, being first duly sworn, deposes and says:

I, David Barreira, am the Board Chairman for Inscription Canyon Ranch Sanitary District, an Arizona sanitary district ("ICRSD"), and I am an authorized agent of ICRSD. I am over 18 years of age and have firsthand knowledge of the facts stated in the foregoing RESPONSE TO APPLICATION FOR ORDER TO SHOW CAUSE, I have read the foregoing pleading and know the contents thereof, and state upon information and belief that the things stated therein are true in substance and in fact to the best of my knowledge, information, and belief.

David Barreira

SUBSCRIBED AND SWORN to before me this 4TH day of May, 2018, by David Barreira.

My Commission Expires: October 25, 2021

Notary Public

SHANNON L PREHN
NOTARY PUBLIC, ARIZONA
YAVAPAI COUNTY
My Commission Expires
October 25, 2021