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9 **BEFORE THE HEARING BOARD OF THE**
10 **SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT**

11 **In The Matter Of**

12 SOUTH COAST AIR QUALITY
13 MANAGEMENT DISTRICT,

14 Petitioner,

15 vs.

16 BAKER COMMODITIES INC.,

17 [Facility ID No. 800016]

18 Respondent.
19
20

Case No. 6223-1

**PETITIONER'S REPLY IN SUPPORT
OF ITS MOTION TO QUASH
SUBPOENA (DUCES TECUM) FOR
PRODUCTION OF DOCUMENTS**

Date: August 4, 2022
Time: 9:00 am
Place: Hearing Board
South Coast Air Quality
Management District
21865 Copley Drive
Diamond Bar, CA 91765

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22 To the South Coast Air Quality Management District Hearing Board, the South Coast Air
23 Quality Management District ("District" or "Petitioner") submits this reply to Respondent Baker
24 Commodities Inc.'s ("Respondent" or "Baker") Opposition to the District's Motion to Quash
25 requests subpoena duces tecum ("subpoena") served by Respondent on the District.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This is not a criminal or a civil proceeding, and the specific discovery rules applicable there
4 are not applicable in this administrative proceeding. Criminal prosecutors, in criminal court, have a
5 duty to disclose evidence favorable to the accused. We are not in criminal court and Baker’s
6 constitutional arguments are inapplicable here. (Respondent’s Opposition to Motion to Quash,
7 p.1:7-11, citing *J.E. v. Superior Court* (2014) 223 Cal.App.4th 1329, 1334-1335.) An individual’s
8 liberty is not at issue in this case. Nor are we in civil court where broad discovery is routine.

9 “There is no basic constitutional right to pretrial discovery in administrative proceedings.”
10 (*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 302.) “The extent of discovery that a party
11 engaged in an administrative hearing is entitled to is primarily determined by the particular
12 agency... .” (*Id.*) Hearing Board Rule 9(a)(1) provides that the Chair of the Hearing Board may
13 issue subpoenas requiring “witnesses to produce all books, papers and documents in the possession,
14 or under the control, of such witnesses which are *material* to the hearing.” (Emphasis added.)
15 Further, Hearing Board Rule 9(a)(4)(A) requires that the party must establish “the information
16 sought is relevant and material to the subject matter involved.” In this forum, scope of discovery is
17 limited to what is relevant and material to the hearing.

18 The District offers to produce its inspection reports and the related photographs. All other
19 requests should be quashed. Most of the requested documents are a distraction and go beyond what
20 this air pollution control district Hearing Board was designed to decide and are not material. To the
21 extent Baker argues there are relevant documents concerning “specific exemptions” applicable to it,
22 and the District should be required to search through years-worth of emails to find them, then the
23 District notes: if Baker and its representatives were a part of those alleged communications then
24 those documents are equally accessible to them. It is unlikely those alleged communications made
25 it into the District’s rulemaking files or were considered by the Governing Board when passing the
26 rule.

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1 **II. ARGUMENT**

2 **A. Requests No. 3, 4, 5, and 6, as Phrased, Seek District Counsel’s Mental**
3 **Processes, Which are Protected Under the Attorney Work Product Doctrine.**

4 The work product doctrine is a qualified protection against the discovery of material prepared
5 for litigation by or for the opposing party. The purpose is to prevent a party from unduly benefiting
6 from the legwork of the other side. “A writing that reflects an attorney’s impressions, conclusions,
7 opinions, or legal research or theories is not discoverable under any circumstances.” (Code Civ.
8 Proc., § 2018.030(A).) Even in the criminal court context attorney work product is protected.

9 Respondent can ask for specific documents, such as non-privileged reports and photographs.
10 Individual non-privileged documents themselves would not be considered work product. But,
11 Respondent in asking for documents the District “relied” upon for specific allegations is asking for
12 South Coast AQMD attorney’s work product.¹ It is tantamount to asking the South Coast AQMD
13 attorneys which documents they consider are important to each allegation.

14 Respondent is prohibited from obtaining South Coast AQMD attorneys’ mental impressions.
15 As one appellate court stated, “[b]ecause identification of the document as a group will reveal []
16 counsel’s selection process, and thus his mental impressions, petitioner argues that the identification
17 of documents as a group must be prevented to protect defense counsel’s work product. We agree.”
18 *Sporck v. Peil*, 759 F.2d 312, 315 (3d Cir. 1985). “[S]election and compilation of documents by
19 counsel . . . falls within the highly-protected category of opinion work product.” *Id.* at 316.

20 **B. Requests No. 7, 8, 9, 10, and 11 are Overly Broad, Irrelevant and Burdensome.**

21 Baker is not the first and will not be the last entity to disagree with alleged violations. Imagine
22 if every time an entity disagreed with an alleged violation, they sought broad discovery going into
23 the rulemaking process. Such discovery would delay the proceedings and go far beyond the scope of
24 this administrative hearing. For a Petition for Order for Abatement, the Hearing Board’s purpose is
25 to hear evidence, review the rule as written, review applicable permits as written, and decide whether
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27 ¹ Request 1 (reports or photographs) also uses the objectionable phrase “relies on.” The District interprets request 1 to
28 mean signed District Inspection Reports from the time period between March 11, 2022, to May 19, 2022, and all
photographs taken by District Inspector during the inspections conducted during that time period.

1 a violation has occurred. What is material to this hearing is the evidence of alleged violations of
2 Baker’s permits and Rule 415.

3 Despite Baker’s assertion that its requests are narrowly tailored, the requests ask for “any and
4 all emails, meeting notes, or memorandum” for a rulemaking that began in 2014 and completed in
5 2017. Requests 7, 8, 9, and 11 are broad and responses will be burdensome to compile.

6 Baker argues “all the rulemaking documents are located in a single location,” and “[s]ince
7 this is a public file all reviews for privilege would have been performed when the file was assembled
8 in 2017.” (Opposition, p. 8:1-3.) However, Baker’s requests were not that narrowly defined; Baker
9 did not ask specifically and only for the “public file,” and its overly broad and burdensome requests
10 encompass documents that may be outside the rulemaking documents.

11 The District has not conducted a thorough search of the potentially responsive documents to
12 Baker’s subpoena as drafted, as it will wait for a further determination by the Hearing Board on what
13 responsive documents need to be produced, but District notes the requests are broad and would go
14 beyond what would be found in the rulemaking file. Some such documents may fall within the
15 “deliberative process privilege.” Thus, the District asserts this privilege now.

16 In response to the District’s statutory construction argument for why the requested documents
17 would be irrelevant, Baker argues statutory construction rules outlined by our California Supreme
18 Court are not relevant before the Hearing Board. (Opposition, p. 8:4-14.) Instead, Baker points out
19 the Hearing Board “may consider ‘any relevant evidence’ so long as ‘it is the sort of evidence on
20 which responsible persons are accustomed to rely on in their conduct of serious affairs, regardless of
21 the existence of any common law or statutory rule which might make improper the admission of such
22 evidence over objection in civil actions.’” (Opposition, p. 8:16-20, quoting portions of Hearing Board
23 Rules, Rule 9(b)(3).)

24 It bears repeating that Baker does not meet the “relevant evidence” prong. What is relevant
25 here is only what the Governing Board members considered as a whole. (*See Calvillo-Silva v. Home*
26 *Grocery* (1998) 19 Cal.4th 714, 727, *disapproved on other grounds by Aguilar v. Atlantic Richfield*
27 *Co.* (2001) 25 Cal.4th 826.) The Governing Board members were provided the Board agenda
28 package, which included the rule language and the staff report. It would be nonsensical to consider

1 documents that were not before the entire Governing Board, the rulemaking body. If a body—such
2 as the Governing Board or the Hearing Board—was not given a document to review prior to making
3 a decision, how would that document possibly be relevant to its decision-making? Further, inquiry
4 here into the rulemaking is not relevant because the Hearing Board has no authority to issue
5 declaratory relief or render any decision that remands Rule 415 back to the Governing Board for
6 amendment. The Hearing Board is limited to interpretation of Rule 415 as written and has the staff
7 report available to assess Baker’s interpretation arguments.

8 Rulemaking requires notice and hearing pursuant to Health and Safety Code Section 40440.5
9 Baker had an opportunity at the rulemaking stage to make its position known to the Governing Board.
10 In fact, Baker did apprise itself of the rulemaking process and Baker’s counsel, Ms. Taber, submitted
11 five letters with attachments, totaling nearly 400 pages, to staff, which were included as part of the
12 Governing Board agenda package. (South Coast AQMD Governing Board Agenda Packet for
13 November 30, 2017, Item 30, Attachment H –Final Environmental Assessment for Proposed Rule
14 415—Odors from Rendering Facilities, Appendix D - Letters Received on Draft EA and Responses
15 to Comments, D1-123- 510.) Baker appears to be asking the District to search for documents that
16 were never made public as part of the rulemaking process to support unnamed exceptions that did
17 not make it in the rule language.

18 Moreover, responsible persons would rely on exactly the same materials as the Governing
19 Board: Rule language and other materials in the board package. Responsible persons would rely on
20 the plain meaning of the rule language first and foremost. While irresponsible persons may rely on
21 something that was not specifically written in the rule nor considered by the Governing Board as a
22 whole, the Hearing Board does not need to consider it. Allowing discovery of documents which
23 responsible persons would not rely upon when conducting serious affairs is a waste of time.

24 Baker also argued, “Baker has reason to believe that there were communications between
25 Baker and some District executive/employees concerning how the Rule 415 would be applied to
26 Baker’s facility prior to its passage.” (Opposition, p. 9:17-19.) If alleged communications occurred
27 between Baker and its representatives and District executives or employees, then Baker should have
28 equal access to those alleged communications. Further, assuming for purposes of argument that the

1 alleged communications were so important that a responsible person conducting serious affairs
2 would rely upon them, then Baker should have and would have kept such documents. Considering
3 these circumstances—in particular, the fact that Baker should have these alleged communications
4 itself and the District resources needed to search many years of documents and review documents
5 that Baker would already have—the subpoena would impose an undue burden on the District. Thus,
6 requests 7, 8, 9, 10, and 11 should be denied.

7 Baker has not articulated why potentially extensive discovery is warranted here. Instead,
8 Baker speculates “whether aspects of Baker’s wastewater operations were meant to be subject to the
9 ‘specific exemptions’ developed pursuant to staff on-site observations of facilities, or are otherwise
10 not covered by Rule 415.” (Opposition, p. 9:22-24.) Baker has not identified what exemptions it
11 believes are applicable and what statements were allegedly made concerning their application, even
12 though Baker remains represented by the same counsel representing Baker during the rulemaking.
13 Goose chases and fishing expeditions can be appropriate in some civil litigation, but this is an
14 administrative hearing, and expeditions in order to come up with an unarticulated defense is not
15 appropriate.

16 An administrative hearing is unlike general civil litigation that allows for broad discovery.
17 Discovery here is more akin to an administrative writ proceeding, where a moving party must identify
18 what evidence he or she seeks to discover so a determination can be made whether it is relevant. In
19 the administrative writ context, discovery “cannot be used to go on a fishing expedition looking for
20 unknown facts to support speculative theories.” (*Pomona Valley Hospital Medical Center v. Superior*
21 *Court* (1997) 55 Cal.App.4th 93, 102.)

22 Baker states its requests 7, 8, 9, and 11 seek two categories of information. (Opposition, p.
23 10:9-10.) Its first category is “documents that demonstrate whether the District made a decision in
24 2017 to include exemptions and provisions in Rule 415 specifically tailored to address Baker’s
25 operations.” (Opposition, p. 10:10-12.) All 1,118 pages of the District Board Packet related to Rule
26 415 is easily accessible to the public at [http://www.aqmd.gov/docs/default-](http://www.aqmd.gov/docs/default-source/Agendas/Governing-Board/2017/2017-nov3-030.pdf?sfvrsn=7)
27 [source/Agendas/Governing-Board/2017/2017-nov3-030.pdf?sfvrsn=7](http://www.aqmd.gov/docs/default-source/Agendas/Governing-Board/2017/2017-nov3-030.pdf?sfvrsn=7). Those documents
28 demonstrate what the Governing Board considered in 2017 when passing the rule. The documents

1 show that during the rulemaking process staff visited the rendering facilities “to understand each
2 facility’s operation and to appropriately tailor provisions to address issues that were unique to various
3 operations and to ensure the proposed rule will control off-site odors from the rendering operation.”
4 (Staff Report, p. 2.) And based on staff’s observations exemptions were developed. (Staff Report, p.
5 87-88.) In other words, exemptions are written in the rule itself.

6 Baker’s second category is “documents that articulate the basis for the District’s position that
7 Baker’s current operations are in violation of Rule 415(f) and 415(g).” (Opposition, p. 10:12-13.)
8 Baker is required to follow its permits and the rule. It already has the petition, which has been served
9 on its counsel, and was also served notices of violation. In addition, the District has already said time
10 and time again, that it is willing to provide inspection reports and photographs taken during
11 inspections. These documents are sufficient to “articulate the basis for the District’s position.”
12 Moreover, it is District counsel’s understanding, the District Inspector already had discussions with
13 Baker staff on site at its facility about what the violations were and what needed to be done to comply.

14 **C. Request No. 2 for Odor Complaints is Not Material to the Alleged Violations of**
15 **Rule 415.**

16 As the District stated earlier in its initial brief, this is not a public nuisance action. Proving a
17 public nuisance is not required for Rule 415. Fear that members of the public will be raising odor
18 issues during public comments is not a reason to expand discovery beyond what is material for the
19 hearing. The scope of the petition is not expanded by public comment.

20 **D. Request No. 10 for Guidelines**

21 Baker’s request no. 10 for “[a]ny and all non-privileged documents containing guidelines for
22 facility inspections pursuant to District Rule 415” is overbroad. If it is granted, it should be narrowed
23 to only currently used guidelines as only those would allow Baker to “assess whether the inspections
24 underlying Petitioner’s allegations adhered to those guidelines.” (Alene M. Taber and Niran
25 Somasundaram, Letter to Clerk of the Boards dated July 1, 2022, at p. 1.) To the extent there are any
26 currently used guidelines specific to enforcement of Rule 415, the District can provide such
27 guidelines, but it is District counsel’s understanding there are no applicable guidelines used by the
28 District’s enforcement staff at this time.

1 **III. CONCLUSION**

2 Based on this reply and the motion to quash, the District respectfully requests an order
3 quashing the following requests in Respondent’s subpoena served on the SCAQMD: requests 2, 7,
4 8, 9, 10, and 11. In addition, the District asks that requests 3, 4, 5, and 6 be denied because
5 responses would be protected by attorney work product privilege.

6 Baker has not, and cannot, demonstrate that it is entitled to the requested discovery. For this
7 administrative hearing, a subpoena can be used to obtain documents that are relevant and material
8 to the hearing. Nothing more.

9 If the Hearing Board were to grant Baker’s request no. 2 for complaint data, then the
10 District requests the Hearing Board allow the redaction of identifying complainant information (as
11 contemplated by the document request) or issue a protective order limiting the use of the complaint
12 data to the instant Order for Abatement hearing before the Hearing Board and any judicial review
13 proceeding relating thereto. If redactions are not allowed, the District requests a further requirement
14 that Respondent return the complaint records to the District or declare under the penalty of perjury
15 their destruction after proceedings relating to the petition are concluded.

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Dated: July 29, 2022

SOUTH COAST AIR QUALITY
MANAGEMENT DISTRICT



DAPHNE P. HSU
Principal Deputy District Counsel
NICHOLAS P. DWYER
Senior Deputy District Counsel
Attorneys for Petitioner

1 **PROOF OF SERVICE**

2 I am employed in the County of Los Angeles, State of California. I am over the age of 18
3 and and not a party to the within action. My business address is 21865 Copley Drive, Diamond Bar,
4 CA 91765.

5 On July 29, 2022, I served the within document(s) described as
6 **PETITIONER’S REPLY IN SUPPORT OF ITS MOTION TO QUASH SUBPOENA**
7 **(DUCES TECUM) FOR PRODUCTION OF DOCUMENTS**

8 as follows:

9 (BY PERSONAL SERVICE) I caused to be delivered a true copy of the foregoing
10 document(s) in a sealed envelope by hand to the offices of the above addressee(s).

11 (BY E-MAIL) Pursuant to the stipulation for email service reached with counsel for
12 Respondent in this suit, I served the above document to the email listed in the service caption below.
13 By transmitting a true .pdf copy of the foregoing document(s) by e-mail transmission from
14 pchoi@aqmd.gov to each interested party at the e-mail address(es) set forth below [on the attached
15 service list]. Said transmission(s) were completed on the aforesaid date at the time stated on
16 declarant’s e-mail transmission record.
17 on the interested parties as follows:


18 Alene Marie Taber
19 Niran Somasundaram
20 Hanson Bridgett LLP
21 777 S Figueroa St
22 Ste 4200
23 Los Angeles, CA 90017-5837
24 ataber@hansonbridgett.com
25 nsomasundaram@hansonbridgett.com

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

28 Executed on July 29, 2022, at Diamond Bar, California.

Patrick Choi

(Type or print name)



(Signature)