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**BEFORE THE HEARING BOARD OF THE**

**SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT**

**In The Matter Of**

BAKER COMMODITIES, INC.,

[Facility ID No. 800016]

Petitioner,

vs.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,

Respondent.

Case No. 6223-2

**SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT'S NOTICE OF MOTION TO STRIKE PORTIONS OF BAKER'S PERMIT APPEAL; MOTION TO STRIKE; MEMORANDUM IN SUPPORT THEREOF; REQUEST FOR OFFICIAL NOTICE; DECLARATION OF NICHOLAS DWYER; AND [PROPOSED] ORDER**

Date: February 26, 2025
Time: 9:30 am
Place: Hearing Board
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

**TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on February 26, 2025, at 9:30 a.m. or as soon thereafter as the matter may be heard by the South Coast Air Quality Management District Hearing Board ("Hearing Board"), located at Hearing Board Room, 21865 Copley Drive, Diamond Bar, CA 91765, Appellee/Respondent, South Coast Air Quality Management District ("South Coast AQMD" or District"), will and hereby does move the Hearing Board for an order striking portions of Appellant/Petitioner Baker Commodities, Inc.'s Appeal of Revised Vernon Facility Permit Incorporation of Rule 415[1] ("Permit Appeal[2]"), pursuant to Hearing Board Rules and Procedures Rule 6(a) and (d), with guidance from California Code of Civil Procedure section 436.

For the Hearing Board's convenience, a copy of the challenged pleading, with the portions proposed to be stricken marked with strikethrough, is attached to the Proposed Order, as Attachment A. Further, attached to the motion as Attachment B is Quoted Portions of the Permit Appeal Requested to be Struck. The grounds for striking such matter are included in the below memorandum.

This motion is based upon this notice, upon the attached Memorandum of Points and Authorities, filed herewith; upon the records and files in this action; upon the District's Request for Official Notice, related to the Hearing Board's June 21, 2023, Findings and Decision; and upon such further evidence and argument as may be presented prior to or at the time of hearing on the motion. Filed with this motion is Attachment C, which contains copies of the authorities cited in the Memorandum of Points and Authorities, as required by Hearing Board Rule 6 (e)(4).

Dated: February 12, 2025,

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

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

[1] Filed on January 9, 2025.
[2] Permit Appeal includes the Supplement filed on January 28, 2025.

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

What is before the Hearing Board is a petition for a permit appeal brought by Baker Commodities, Inc. ("Baker").

After this Hearing Board issued an Order for Abatement finding Baker violated District rules, Baker is attempting to cherry pick a few lines from 10 days[3] of abatement order proceedings to support their permit appeal. Baker attempts to muddy the issues by citing comments made when the operations at that time consisted of trap grease processing only (without cooking or collections); fast forward to the District's review of Baker's current permit applications, the District's evaluation involves different operations consisting of trap grease processing and collections operations. Most importantly, abatement order proceedings are immaterial and irrelevant because in this instance, in a permit appeal, the question is whether the Executive Officer properly issued the permit. The Hearing Board's role in determining that question is to "simply determin[e] whether the [Executive Officer]'s interpretation and application of the applicable regulations was correct as a matter of law." (*Valero Refining Company - California v. Bay Area Air Quality Management District Hearing Board* (2020) 49 Cal.App.5th 618, 640 disapproved of on other grounds by *Meinhardt v. City of Sunnyvale* (2024) 16 Cal.5th 643.) References to the abatement order transcripts in Baker's petition should be stricken, including Exhibits 3 and 4 that are attached to Baker's petition.

Further, Baker attempts to distract from the legal issue before the Hearing Board (whether the Executive Officer properly cited to Rule 415 in the issued permits) by alleging the importance of its operations. The District does not pass judgment on the importance of Baker's operations in determining that Rule 415 applies to the facility. Similar to other rendering facilities, Baker must abide by District rules. Baker's teeing up of this issue serves no purpose other than to preemptively seek more relaxed application requirements for being a member of the rendering

[3] Hearing dates related to the Order for Abatement are as follows: August 4, 2022; September 27, 28, and 29, 2022; April 18 and 19, 2023; May 29, 2024; June 11, 2024; July 2, 2024; and December 18, 2024

industry, while arguing they are not subject to the rendering rule, however this attempt must fall flat as no such consideration played a role in the permit evaluation conducted by the District.

Respondent/Appellee South Coast Air Quality Management District ("District") moves to strike irrelevant, false, or improper matters from Petitioner/Appellant Baker Commodities, Inc.'s ("Baker") pleading titled "RESPONDENT BAKER COMMODITIES, INC.'S APPEAL OF REVISED VERNON FACILITY PERMIT INCORPORATION OF RULE 415."[4] This is a Petition for Appeal of Permit Conditions ("Permit Appeal").

The issue to be evaluated by this Hearing Board in deciding the Permit Appeal[5] is straightforward: whether the decision-making that went into evaluating the permit application and determining the permit conditions was proper. In other words, determine whether the Executive Officer's conclusion regarding 415 applicability is proper. The Order for Abatement has no bearing on the District's permitting decision, thus those portions of the petition that selectively cite that history should be stricken.

## II. THE HEARING BOARD IS AUTHORIZED TO STRIKE ALL OR PART OF A PETITION

Hearing Board Rule 6, section (a) provides that "[p]arties may make appropriate motions in any matter," and section (d) states: "A motion to dismiss or strike may be made with regard to the whole or any part of a petition." The Hearing Board Rules and Procedures do not provide standards for determining motions to strike; however, the California Code of Civil Procedure sections on motions to strike are instructive.

Under California Code of Civil Procedure, section 436, a court, or in our case Hearing Board, may:

[U]pon terms it deems proper:

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[4] During the January 21, 2025 prehearing conference, the parties, Chair, and Member Pearman discussed the scheduling and briefing for the District's motion to strike and motion in limine. In addition, the District reached out to Baker's counsel separately and discussed the motions with them, seeking possible agreement. The District continues to be open to stipulations on these matters.

[5] Permit Appeal includes Baker's original pleading filed on January 9, 2025 and its Supplement filed on January 28, 2025.

(a) Strike out any irrelevant, false, or improper matter inserted in any pleading.
(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.

## III. GROUNDS FOR AN ORDER STRIKING PORTIONS OF BAKER'S PETITION FOR APPEAL OF PERMIT CONDITIONS

### A. *Baker is the Appellant and Petitioner, Thus Has the Burden of Proof.*

Baker naming itself the respondent here is false, misleading, improper, and not drawn in conformity with Hearing Board Rules and Procedures. Hearing Board Rule 1, sections (a), (b), (l), and (n) have the following relevant definitions:

> "Appeal" means an action requested to review a decision of the Executive Officer.
> "Appellant" means the party who appeals a decision of the Executive Officer and brings the matter before the Hearing Board.
> "Petitioner" means the party who petitioned the Hearing Board to initiate an action.
> "Respondent" means the party who answers, or the party against whom an appeal is brought.

Baker petitioned the Hearing Board to revise the permits, appealing the Executive Officer's permitting decision; therefore, Baker is properly considered the Petitioner/Appellant for this Appeal, and the District is the Respondent/Appellee. Baker as the Petitioner/Appellant has the burden of proof.

Based on the above stated grounds, Respondent/Appellee, the District, seeks an order striking the matters from the Permit Appeal that incorrectly refer to Baker as Respondent and the District as Petitioner. (*See* Attachment B - Quoted Portions of Baker's Permit Appeal Requested to be Struck: Items 1-5.)

### B. *Whether Baker Provides Services is Immaterial to the Permit Conditions.*

Baker's compliance with the Order for Abatement and the alleged importance of rendering within the state of California are irrelevant. Those matters carry no weight in determining whether a rule is applicable or not. These facts may be relevant for a petition for a variance or an order for abatement, but not for a permit appeal. During the permitting review process, the engineer is not making a determination of the importance of a service being provided. He or she is determining appropriate conditions to impose "[t]o assure compliance with all applicable regulations." (District Rule 204.)

Material and relevant allegations are those that are essential to the claim. (Code Civ. Proc., § 431.10.) For a permit appeal before the Hearing Board, the material allegations concern the identity of the facility, the equipment or operation that is the subject of the petition, the permitting action being appealed, the action of the Executive Officer that was not proper, and the specific relief.[6] Baker's allegations regarding its own importance and compliance with the Order for Abatement are irrelevant and should be struck from the petition.

Based on the above, the District requests the portion of the pleading describing Baker's services and its compliance with the Order for Abatement be struck. (*See* Attachment B: Item 6.)

**C.** ***The Order for Abatement Proceeding is Irrelevant to the District's Permitting Decision Whether Rule 415 Applies to Baker's Current Operations.***

The Order for Abatement matter is irrelevant for whether the District's permitting decision was proper or not. Including it here only serves to confuse the issues by taking the focus off the specific permitting decisions that are the subject of the Permit Appeal.

Aside from the 10 days of hearing before the Hearing Board, the full Order for Abatement history includes a cease-and-desist order, Baker's petition for writ of mandate in Superior Court, the District's cross-complaint and anti-SLAPP motion—plus a number of modifications to the order of abatement, negotiation of a settlement resolving all the litigation and dismissal of the Superior Court action against the Hearing Board and the District.

The District and Baker resolved the underlying litigation and stipulated for Baker to start collection operations, abandoning their cooking rendering operations.

Here, Baker cherry picks portions of the abatement proceedings and disguises them as relevant factors that influenced the District's evaluation of their permit application review. In a permitting evaluation, the District is not considering Hearing Board statements made during deliberations. Baker is foreclosed from quoting hearing board statements that were not part of the permitting decision, thus these portions in the petition must be stricken. The decisionmaker

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[6] See Hearing Board Rule 2 and the Hearing Board's 6-page form titled "PETITION FOR APPEAL BEFORE THE HEARING BOARD OF THE SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT."

considered Baker's trap grease process, conducted a walkthrough with Baker staff, and determined it fit the definition of rendering, because the process converts raw rendering materials into fat commodities by heat and mechanical separation. (*See* Baker's Permit Appeal, Exhibit 6.) Further, the District further determined, as operated, Baker's facility did not fit any of the exemptions in Rule 415.

All the references to the Order for Abatement and the hearings identified at Items 6-18 in Attachment B should be struck. This includes Exhibits 3 and 4 (two hearing transcripts attached to Baker's Permit Appeal), because they are irrelevant and confuse the issues.

1. <u>The Stipulated Conditions for Purposes of an Order for Abatement Have No Bearing on the District's Permitting Decision Whether a Regulation is Applicable.</u>

In the context of an order for abatement, Health and Safety Code section 42451(b) allows the Hearing Board to issue an order for abatement "pursuant to the stipulation of the air pollution control officer and the person or persons accused of . . . violating . . . any rule, or regulation prohibiting or limiting the discharge of air contaminants into the air, upon the terms and conditions set forth in the stipulation." The District can agree to conditions in an order for abatement it may find incompatible in another context.

In the context of permitting, for example, the Executive Officer cannot issue a permit unless he or she is "satisfied, on the basis of criteria adopted by the [Governing Board], that the article, machine, equipment, or contrivance will comply with all of the following: (1) All applicable orders, rules, and regulations of the district and of the state board. (2) All applicable provisions of this division." (Health & Saf. Code, § 42301.) A permitting engineer's duty is to evaluate the permit application and where appropriate add permit conditions "[t]o assure compliance with all applicable regulations." (District Rule 204.)

The fact the District stipulated to conditions for purposes of an Order for Abatement, where the Health and Safety Code allows for such stipulations, does not mean the District agreed to those conditions for permits that had not yet been issued. The District was still in the process of determining whether Rule 415 applied and provided Baker with the opportunity to provide its

reasoning for why it believed that rule did not apply. (*See* Baker's Permit Appeal, Exhibit 5). The District further analyzed the issue and requested additional information from Baker. The District conducted a site visit on September 4, 2024, to confirm how the trap grease rendering process operated. Only after completing that process did the District conclude Baker's facility that conducts trap grease rendering along with collections is subject to Rule 415. (*See* Baker's Permit Appeal, Exhibit 6.) The focus of these proceedings should examine the basis for the decision making in determining Rule 415 applicability to Baker's operations identified in their permit, not Baker's attempts to transplant portions of prior proceedings that had no bearing on the permit evaluation process.

Stipulated conditions for an Order for Abatement are meant to be ***temporary*** until the facility achieves compliance. These temporary stipulated conditions do not bind an Executive Officer's ability to evaluate a related permit application or limit his or her decision-making on whether a regulation is applicable or not. Baker is attempting to lead this Hearing Board down a path where stipulated conditions in an abatement order must be inserted into a related permit application and the absence of such conditions is inherently problematic. Such a process would impinge upon the current thorough examination of the details provided in a permit application. That analysis is not bound by conditions imposed by the Hearing Board as part of an order for abatement, stipulated or not; rather, it involves an independent review based on the details in the permit application. Baker's idea that the prior abatement proceedings could somehow bind the District to include permit conditions issued by the Hearing Board during that process, bears no semblance to the independent analysis that was performed in permitting.

The legislature could not have been more clear when describing the limits of an order for abatement in Health and Safety Code section 42452, that it must be framed as an injunction against the facility and may be conditional until compliance is achieved. No requirements exist to limit an air district to issue permits based on prior abatement proceedings. Instead for permits, the District must follow the requirements in Health and Safety Code section 42301, *et seq*. and its own rules. Based on the above, the District moves to strike portions of Baker's pleading that refer to the Order for Abatement stipulation as an agreement that would affect and predetermine the permitting

decision. (*See* Attachment B: Items 7-12.)

2. Statements About a Separate Matter Only Serve to Confuse the Issues and Waste Hearing Board Resources, Especially When They are Taken Out of Context.

Background on the Order for Abatement and quotes from Hearing Board members during the hearings are irrelevant and should be struck. The District moves to strike Items: 13-19 in Attachment B, because the selected portions are irrelevant, improper, and do not conform with Hearing Board Rules and Procedures.

The following portion of Baker's pleading is especially misleading:

> At the April 2023 hearing, the Hearing Board noted that trap grease operations are not subject to Rule 415 and that retaining reference to Rule 415 could lead to confusion.[4] The Hearing Board issued written findings on the Modified Order on June 21, 2023, allowing Baker to resume trap grease operations and related wastewater processing.
>
> [4] *See, e.g.*, April 19, 2023 Hearing Transcript (attached as Exhibit 3) at 297:2–6 (Mr. Pearman: "The whole point is that if they somehow aren't doing rendering and have that portion modified … then the mere grease operations are not subject to Rule 415. I think that's pretty clear from the rules."); 298:4–8 (Mr. Pearman: "but I think we have to get 415 out. Because it just muddies the water for intentions here.")

Board Member Pearman's statement during an Order for Abatement Modification Hearing on April 19, 2023, concerned a factual situation different than what District permitting staff considered for their permitting decision. At that juncture of the hearing, Baker had not even submitted permit applications. Baker submitted its permit applications that led to the permit at issue here seven months later, on or about November 16, 2023. The April 19, 2023, hearing concerned granting Baker a modification under the Order for Abatement that would allow Baker to reopen its trap grease operations while still under the Order for Abatement. Baker argued that the Order for Abatement prevented them from operating their rendering, so they should be allowed to restart their trap grease operations, and be exempt from 415, section (l)(1)(C), which states: "The following facilities are not subject to Rule 415: ... (C) Facilities that process trap grease but do not conduct inedible animal rendering operations."

At the time, Baker did not seek to conduct collections activity. Any statements regarding

those trap grease operations are not relevant, particularly, because Baker has added collection activity to its facility. Thus, the relevant, though still inapplicable, exemption is under Rule 415(l)(1)(B), which states: "The following facilities are not subject to Rule 415: ... Collection centers that do not conduct inedible rendering or handle or process trap grease." Using quotes out of context from the abatement order proceeding is improper, and such statements should be struck from Baker's pleading.

Further, Baker attributes the statement from Board Member Pearman (page 4, lines 2-4 and footnote 4, lines 24 to 26) to the Hearing Board, when they are in fact statements from a single Hearing Board Member. Thus, they are not attributable to the entire Hearing Board nor are they part of the final Hearing Board Order. "Oral comments or statements made during deliberations cannot be used to impeach the board's final decision. (See, e.g., *Key v. Tyler* (2019) 34 Cal.App.5th 505, 539, fn.16, 246 Cal.Rptr.3d 224 [court's comments from the bench "were not final findings and cannot impeach the court's subsequent written ruling".]) (*Valero Refining Company - California v. Bay Area Air Quality Management District Hearing Board* (2020) 49 Cal.App.5th 618, 644, fn. 24.) The Hearing Board's findings and decision (Request for Official Notice, Ex A: June 21, 2023, Findings and Decision Granting Request to Amend and Modify Conditions in Order for Abatement) does not reflect this statement, and it is improper to suggest otherwise. The Hearing Board should strike this sentence from Baker's pleading.

Similarly, Baker quotes Board Member Balagopalan several times in its Permit Appeal. Just as the quotes of Board Member Pearman were improper, so are these. The District moves to strike Items 13-19 identified in Attachment B, because they are improper and irrelevant to the Executive Officer's permitting decision.

**D.** ***An Applicant's Business Decisions are Not Evaluated as Part of the Permit Review Process.***

Again, the main focus of the Permit Appeal is to examine whether the District properly issued a permit to Baker. Baker's business decision to stop one type of rendering at its facility (cooking) is irrelevant to the current appeal, which concerns Baker's current operations as a collection center that also performs trap grease rendering. If Baker has buyer's remorse or

dissatisfaction with the terms of their negotiated settlement or any stipulation in the abatement order proceeding, sharing that insight here has no bearing on the Executive Officer's decision-making process in evaluating the permit. Nor does it have any bearing on the Hearing Board's review of that decision and should be struck. The District moves to strike Item 20 in Attachment B, because it is irrelevant.

## IV. CONCLUSION

The District respectfully requests the Hearing Board keep the focus of this Permit Appeal matter on the Executive Officer's permitting decision by striking from Baker's petition the irrelevant, improper, and at times misleading portions related to its own importance, the value of rendering in California, and the history of the Order for Abatement. The Order for Abatement matter stretches over multiple years, a handful of orders, and several days of hearings and transcripts: including hearings on August 4, 2022; September 27, 28, and 29, 2022; April 18 and 19, 2023; May 29, 2024; June 11, 2024; July 2, 2024; and December 18, 2024.

If the Hearing Board is inclined to rule in favor of allowing the history of the Order for Abatement matter to be included here in the Permit Appeal, then pursuant to the scheduling order all the transcripts from those other ten days of hearings are to be lodged by Baker with the Hearing Board. If some of the Order for Abatement matter is to be considered, then all should be considered and before the Hearing Board. The Hearing Board should use caution here in expanding the record beyond what is necessary for review of the Executive Officer's permitting decision. It is inefficient, prejudicial to the District, and gives Baker a second bite at the apple to relitigate issues already decided.

For the Hearing Board's convenience, a copy of the challenged pleading, with the portions proposed to be stricken marked with strikethrough, is attached to the Proposed Order as Attachment A. Further, attached to this motion as Attachment B is Quoted Portions of the Permit Appeal Requested to be Struck. The District's Request for Official Notice, related to the Hearing Board's June 21, 2023, Findings and Decision, and Declaration of Nicholas Dwyer are filed concurrently. Additionally, for the Hearing Board's convenience, the District attaches Attachment C, with copies of the authorities cited by the District, as required by Hearing Board Rule 6 (e)(4).

Dated: February 12, 2025

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

DAPHNE P. HSU
Principal Deputy District Counsel
NICHOLAS P. DWYER
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# ATTACHMENT A

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BAKER COMMODITIES, INC.

**BEFORE THE HEARING BOARD OF THE**

**SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT**

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| **In The Matter Of:**<br><br>SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,<br><br>~~Petitioner,~~<br><br>v.<br><br>BAKER COMMODITIES, INC.,<br><br>~~Respondent.~~ | Case No. 6223-1<br><br>**~~RESPONDENT~~ BAKER COMMODITIES, INC.'S APPEAL OF REVISED VERNON FACILITY PERMIT INCORPORATION OF RULE 415**<br><br>Facility ID: #800016<br>4020 Bandini Boulevard, Vernon, CA 90058<br>Phone # (323) 268-2801<br>Facility Contact: Jason Andreoli (Assistant Vice President – Los Angeles General Manger and Corporate Production Manager)<br>Email: JJAndreoli@bakercommodities.com |

Baker Commodities, Inc., appeals the South Coast Air Quality Management District's December 12, 2024, issuance of a Title V/RECLAIM Facility Permit Revision for the Facility.[1] The Permit improperly requires compliance with District Rule 415, which applies exclusively to rendering operations. But the Facility no longer performs rendering of any kind. The District's inclusion in the Permit of blanket references to Rule 415 is an unlawful attempt to expand the Rule's ambit to non-rendering activities. It is also unnecessary. Baker now operates the Facility as a collection center under strict and carefully constructed odor control measures developed jointly by Baker, the District, and the Hearing Board, as the July 22, 2024, Second Modified Order ("Order") reflects.[2] Baker has done so without incident or substantiated odor complaint since collection center operations commenced in October 2024 alongside extant cooking oil and trap grease recycling and associated wastewater operations. In short, the Order's measures (many of which track Rule 415 *verbatim*) are lawful and effective and were acceptable to the District when it was forced to work cooperatively. The District's subsequent about-face to incorporate Rule 415 in the Permit should not be accepted.

The District's deviation from the Order's provisions mischaracterizes the nature of the Facility's operations, improperly extends Rule 415 to activities it was never intended to regulate, and threatens to revive disputes already put to rest through painstaking negotiations and costly proceedings. Many of the Rule 415 conditions demanded are entirely unworkable for the Facility and risks significant uncertainty for future compliance, effectively making Baker's compliance impossible. This increasingly seems to be the point: the District is going to great lengths to punish Baker—and the workers and communities that depend on Baker—for past disputes that should be put to rest. Whatever its perceived justification, however, the District's conduct can only be described as arbitrary and capricious. Baker now requests that the Hearing Board amend the Revised Permit to remove references to Rule 415 and rendering and to replace them with the Order's substantive operational requirements to fit the Facility's *actual* operations, the proper scope of Rule 415, ~~and the terms to which the District previously agreed.~~

[1] Baker timely submitted its Title V Permit renewal application, which is still pending with the District.
[2] Relevant portions of the Revised Permit are attached as Exhibit 1. The Order is attached as Exhibit 2.

## BACKGROUND

### I. Baker Provides Essential Services While Complying with the Order.

Baker remains committed to complying with District Rules and is dedicated to providing its essential service to the community. The importance of Baker's collection operations at the Facility—even without rendering—was again underscored by Governor Newsom's December 18, 2024 Proclamation of a State of Emergency regarding bird flu, which infects and kills cattle. Per the Proclamation, despite efforts to contain the flu's spread, "dairy cows at four Southern California dairies tested positive," and the State is "working with environmental protection agencies to safely manage mass mortality material," i.e., cattle carcasses.[3] Without transport to lawful rendering facilities, carcasses are left to rot in the sun, increasing the spread of disease. Baker is among the last providers ensuring these remains are properly collected, managed, and converted to useful products, helping mitigate health and safety impacts in our communities. The District's unlawful inclusion of Rule 415 in a permit for a non-rendering facility threatens those efforts.

Baker's operations are also key to California's climate response infrastructure, which requires low-carbon fuels and diversion of organic waste from landfills. Baker, a carbon-negative operation, is an essential supplier of advanced biofuel feedstocks from used cooking oil and trap grease. The Facility also reduces carbon emissions by diverting organic waste from landfills, another key for California, which requires a 75% reduction of organic waste by 2025. *See* Health & Safety Code § 39730.6.

### II. The Parties and This Hearing Board Carefully Built an Operational and Capital Improvement Package for the Future of the Facility.

In September 2022, the Hearing Board issued the Facility's first Order for Abatement ("Original Order"), requiring Baker to cease rendering, trap grease processing, and related wastewater processing operations. In April 2023, the Hearing Board modified the Original Order

[3] *See* Exec. Dep't State of Cal. Proc. of State of Emergency related to the Bird Flu (Dec. 18, 2025), available at https://bit.ly/GovBirdFluProcSOE; *see also* Heath, Crystal & Baur, Gene, *It's Time to End the Denial About Bird Flu*, Time (Dec. 6, 2024) available at https://time.com/7200002/bird-flu-outbreak-denial-essay/; Douglas, Leah, *Cows dead from bird flu rot in California as heat bakes dairy farms*, Reuters (Oct. 17, 2024) available at https://www.reuters.com/world/us/cows-dead-bird-flu-rotcalifornia-heat-bakes-dairy-farms-2024-10-17/.

to allow trap grease and related wastewater operations to resume while the parties addressed their ongoing dispute over rendering. At the April 2023 hearing, the Hearing Board noted that trap grease operations are not subject to Rule 415 and that retaining reference to Rule 415 could lead to confusion.[4] The Hearing Board issued written findings on the Modified Order on June 21, 2023, allowing Baker to resume trap grease operations and related wastewater processing.

Following extensive discussions about how best to serve the community and retain its employees, Baker later determined not to resume rendering at the Facility. To avoid shuttering its business and terminating all employees, and because California's need for rendering services is essential, substantial, and remains unmet, Baker proposed instead to begin collection operations after significant capital and operational improvements to the Facility. To implement the proposal, on November 16, 2023, Baker first submitted to the District its permit applications as follows:

(1) **Main Plant PTE Extension** (Device ID C402): Baker originally designed the Main Plant to comply with the Rule 415 PTE standards and seeks the ability to expand the PTE structure. The District issued this permit.[5]

(2) **J&M Catch Basin Enclosure** (D269): Baker plans to enclose the catch basin, which includes a screening bin with a screw conveyor to remove solids collected in the catch basin. The proposed PTE would also enclose the catch basin and screening bin, but the top portion of the sealed and closed screw conveyor will be located outside to address operational requirements, and that portion will operate as a closed system. No raw rendering materials are received in this area. The District issued this permit.[6]

(3) **Grease Pit Trash Enclosure** (D328): Also referred to as the wastewater treatment plant enclosure, comprises an inclined trough leading to screens and screw conveyors that remove debris from incoming trap water so that waste solids can drop into a waste bin located directly

[4] *See, e.g.*, April 19, 2023 Hearing Transcript (attached as Exhibit 3) at 297:2–6 (Mr. Pearman: "The whole point is that if they somehow aren't doing rendering and have that portion modified … then the mere grease operations are not subject to Rule 415. I think that's pretty clear from the rules."); 298:4–8 (Mr. Pearman: "but I think we have to get 415 out. Because it just muddies the water for intentions here.")

[5] Where the District's demands for additional Device or Control ID Numbers on the Permit are derived from the District's misapplication of Rule 415 to these operations, Baker contests those changes.

[6] In addition to the improper Rule 415 and "rendering" statements in the Permit, Baker appeals the District's use of the term "sludge." The grease trap collection bin collects "trash", including utensils, rocks, etc., not sludge.

next to receiving pit. No raw rendering materials are received in this area. Baker plans to enclose the area around the receiving pit waste bin. This permit is still pending.

(4) **Centrisys Trash Bin** (D368, D369): The Centrisys system is an elevated structure to allow waste solids to drop into a waste bin below the Centrisys units. Baker plans to construct a PTE enclosing the waste bin that collects centrifuge solids from the Centrisys horizontal drum centrifuges. No raw rendering materials are received in this area. This permit is still pending.

~~On April 17, 2024, after reviewing the details in the permit applications and ironing out most, but not all, operational and capital improvement details with the District, Baker petitioned the Hearing Board to modify the Modified Order to allow collection operations consistent with the submitted permit applications and other conditions.[7] Despite Baker's agreeing not to resume rendering and the Hearing Board finding trap grease processing not subject to Rule 415 under the Modified Order,~~ the District sent Baker draft permit conditions on May 9 and May 16 with inappropriate and unworkable blanket citations to Rule 415 throughout.

~~On May 29, June 11, and July 2, the Hearing Board heard evidence and argument to support issuance of the Second Modified Order, ultimately issued on July 22. As the Hearing Board knows, Baker was ready and able to commit to the essential housekeeping requirements the District wished to impose from Rule 415 but not to import wholesale application of a Rule having little to do with Baker's new proposed operations. Thus, after careful discussion, the parties agreed to list the specific rule provisions the District demanded instead of blanket references to Rule 415 in the Facility's operational requirements.[8] Attachment A to the Order reflects the numerous carefully crafted operational conditions, including that "Baker shall not resume grinding, cooking and downstream operations related to rendering of animal products at the Facility," and extensive odor and housekeeping best management practices tailored to Baker's *actual* planned operations, which do not include rendering.~~ Consistent with the Hearing Board

~~[7] *See* Baker's Request to Modify the Modified Order, Case No, 6223-1 (April 17, 2024).~~

~~[8] *See e.g.*, May 29, 2024 Hearing Transcript (attached as Exhibit 4) at 191:21–192:2. (Ms. Hsu: "parties are aligned on not needing to take the issue of Rule 415 applicability at this time, and we have been in discussion regarding instead of a reference to say Rule 415(e), to take out specific provisions, and given that this is an abatement order context, the hearing board does have flexibility in terms of what it is ordering."); 22:6–8 (Mr. Dwyer: "the district does not see a good reason why we need to continue to dig into continued applicability of Rule 415.").~~

proceeding, Baker returned the draft permits to the District on July 16 (before the final Order issued), with corrections to the District's unlawful inclusion of Rule 415.

~~Notably, before the final Order issued, the District was already backtracking on its agreement.~~ The District's engineering department reached out to Baker to explain its inclusion of Rule 415 in the draft permits, ignoring the Order's then-anticipated conditions. Given the significance and timing of this backtracking, Baker's counsel emailed District counsel to explain the problems with the District's proposed conditions and request a call so the permits could be corrected consistent with the Board's anticipated Order. On July 25, three days after the Board issued its Order, District counsel declined even to meet, stating it would not be "fruitful" and that the District engineer would finalize permit conditions, which Baker could appeal if it wished. On August 1 and September 26, Baker and the District exchanged additional correspondence concerning Rule 415 applicability, reiterating their positions.[9]

The District later gave Baker notice of the draft permit language—with the improper Rule 415 conditions—before sending it to U.S. EPA for 45-day review, on the following dates:

- October 12 (Saturday): Application Nos. 648440 and 648441 Main Plaint Extension, screw conveyor, and the J&M skimmer trash bin enclosure.
- November 10: Application No. 648442 trap grease area enclosure.
- November 19: Application No. 648443, Centrisys enclosure.

As to each, Baker commented that the inappropriate reference to Rule 415 should be removed, to no avail. On December 12, 2024, the District notified Baker of its final approval of the permits to construct the Main Plant Extension, screw conveyor, and the J&M skimmer trash bin enclosure, all of which continued to reflect the Rule 415 conditions and rendering, as well as other problems.[10] The District improperly and unnecessarily insists on citing Rule 415 and rendering in Baker's long-term operational permits.

## III. The Hearing Board is Authorized to Direct the District to Remove the Improper Reference to Rule 415 in the Facility Permits.

Baker appeals the first two of four permits to construct, and will appeal the second two permits when issued, under Health & Safety Code § 42302.1 and District Rule 216, and is entitled

[9] Baker's August 1, 2024 Letter is attached as Exhibit 5. The District's Response Letter is attached as Exhibit 6.
[10] *See* Exhibit 1, Revised Facility Permit.

to a hearing within 30 days. Baker requests that the Hearing Board remove references to Rule 415 and rendering, and to "sludge" when referencing the trash related to the grease trap, in all Facility permits, and replace them with conditions consistent with the Order, under Rule 216, Health & Safety Code §§ 42308, 42302.1.

## ARGUMENT

### I. Reference to Rule 415 in the Facility Permit is Unlawful, Improper, Unnecessary, and Contrary to the Second Modified Order.

The District demands that the Facility Permits specifically reference Rule 415, ~~departing from the carefully crafted language by which the Hearing Board resolved Baker's earlier dispute with the District under the Order—language to which both Baker and the District agreed on the record before the Hearing Board.~~ The District's position is wrong on the law and misreads Rule 415's plain text and history. And it wastes Baker's and the Board's time and resources without conferring any additional benefit to the District or the community. Baker has expended significant resources to work in good faith with the District and resolve its dispute. It has made *significant* capital and operational improvements; ceased rendering; will build new enclosures on non-rendering features; identified and implements a deodorizer; implemented expanded employee training, housekeeping, and other protocols; and retained a compliance specialist, all while continuing to keep as much of its staff employed as possible, even when revenue was drastically reduced, to ensure the Facility's long-term viability. Yet the District clings to its error of applying Rule 415 to non-rendering operations for what seem like purely tactical and retaliatory reasons. This undermines years of progress and risks reigniting and expanding a dispute that had been put to rest, without legal or practical merit.

#### A. Rule 415 Does Not Apply to Collection Centers That Do Not Also Conduct Inedible Rendering.

The only operations to which Rule 415 applies are "rendering facilities that process raw rendering materials; and wastewater associated with rendering." Rule 415(b). "Rendering" under Rule 415 is limited to "operations and processes that *convert raw rendering materials into fat commodities and protein commodities by heat and mechanical separation.*" Rule 415(c)(19).[11]

[11] *See also* Rule 415(c)(17) ("Raw Rendering Materials means materials introduced into the receiving area at a

The Final Staff Report for Rule 415 further confirms that the Rule is intended to govern only *facilities that conduct inedible rendering*.[12] Rule 415 goes further still and exempts "[f]acilities that process trap grease *but do not* conduct inedible animal rendering operations." Rule 415(l)(1)(C) (emphasis added). Rule 415 also expressly exempts "[c]ollection centers that do not conduct inedible rendering or handle or process trap grease." Rule 415(l)(1)(B).[13]

Baker ceased all rendering operations at the Facility when the Original Order issued and has since agreed not to resume such operations. The Order reflects this, prohibiting Baker from resuming "grinding, cooking and downstream operations related to rendering" and ordering Baker to "disconnect ... and keep disconnected any gas, fuel, and/or steam lines to cookers used for rendering...." Order, Attachment A, Condition 1.[14] This necessarily includes all equipment that could be used to "convert raw rendering materials into fat commodities and protein commodities by heat and mechanical separation." Rule 415(c)(19). Nothing in Rule 415 justifies applying the Rule to a collection center that conducts no operations related to rendering.

**B. The District's Reading of Rule 415 Is Unsupported.**

The District advances three conflicting and confused arguments to unlawfully extend Rule 415 to facilities that perform collections and process trap grease without any inedible animal rendering operations. First, it argues that the Facility is ineligible for applicable exemptions because Baker operates as a collection center *and* processes trap grease. Second, the District argues that trap grease "is considered a Raw Rendering Material"—a misreading of the Rule ~~the~~

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rendering facility, and may include animal carcasses and parts, packing house or grocery store cuttings, out-of-date products from grocery stores, blood, viscera, offal, feces and other organic matter generated by food processors. Raw rendering materials does not include used cooking oil."); Rule 415(c)(20) ("Rendering Facility means a facility engaged in rendering operations.").

[12] *See* Final Staff Report at 3-6 ("The purpose of Proposed Rule (PR) 415 is to reduce odors from facilities rendering animals and animal parts."), 3-7 ("Applicability of the proposed rule is to rendering facilities that conduct inedible rendering operations."), A-78 ("PR 415 is applicable to new and existing rendering facilities that process raw rendering materials; and trap grease wastewater associated with rendering or trap grease processing.").

[13] *See also id.* at 3-7 ("Collection centers for animal carcasses and parts that do not also conduct inedible rendering operations" are exempt from Rule 415); A-70 (Rule 415's definition of "collection center" was intended to "provide for an exemption ... for collection centers that do not conduct inedible rendering or handle or process trap grease."), A-81 ("collection centers that do not conduct inedible rendering are exempt from the requirements of PR 415 under subparagraph (l)(1)(B)").

[14] *See also* Exhibit 2, Findings of Fact, p. 2 (Baker has decided to cease cooking and downstream operations *related to rendering of animal products (colloquially known as 'rendering') at the Facility*[.]" (emphasis added).

Hearing Board already rejected with the Modified Order.[15] Third, the District argues Baker's trap grease processing *is* rendering subject to Rule 415 because it uses steam—again ignoring the Rule's plain language and common sense.[16] None of these positions holds water. Indeed, the latter two arguments contradict the first. The District's inability to advance internally consistent arguments thus negates any notion that its position is proper regulation or anything other than a tactical attempt to target Baker and expand the ambit of Rule 415.

***First,*** Rule 415(b) applies only to "rendering facilities that process raw rendering materials; and wastewater associated with rendering." The Facility does not, and expressly cannot under the Order, render, which requires that "raw rendering materials" be converted "by heat and mechanical separation." Rule 415(c)(19). Baker therefore need not qualify for an exemption to the Rule, because the Rule itself does not govern the Facility. Even so, the plain language of two exemptions confirms that Rule 415 unequivocally does not extend to the Facility. "Facilities that process trap grease but do not conduct inedible animal rendering operations" are exempt. Rule 415(l)(1)(C). That alone disposes of the question.

The District's arbitrary reading of the Rule to negate the exemptions for collection centers that also recycle trap grease fails. First, the Final Staff Report confirms that the reference to handling or processing trap grease is a vestige of the February 18, 2015 draft of Rule 415. That earlier draft expressly included trap grease operations within the Rule's ambit. And it set forth exemptions for non-rendering facilities that were phrased identically to those in the final Rule, which (as the Final Staff Report repeatedly notes) does not apply to trap grease.[17] Second, the District's reading cannot explain why the exemption at (C) uses the broader term "facilities,"

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[15] *See, e.g.*, Exhibit 3 at 309:13–16. (Member Balagopan: "The plain meaning of the rule is very clear, it's plain. In the rule in the staff report, it is plain as can be: Remove trap grease from PR 415, applicability");

[16] *See, e.g.*, *id.* at 317:18–19. (Member Balagopan: "So the trap grease operation is being – does not have to comply with 415"); 309:20–310:6. (Member Balagopan: "What the District chose to do in the opening statement is . . . referred to the . . . 415 staff report and as Exhibit 21 that Baker understood the trap grease was subject to 415. That was based on early on discussion in the rule in the proposed rule making. But as you can see in table P-1, the summary of changes, that was discarded. But the District has been disingenuous in saying hey, look. This is what they had submitted and they knew this. I think it's misleading. This in my mind is really straightforward").

[17] *See*, e.g., Final Staff Report at A-17 ("All requirements for trap grease have been removed from the staff proposal."); A-55 ("The requirements for trap grease have been removed from the proposal for PR 415."); P-ii ("Removed trap grease from PR 415 applicability").

which would clearly cover *the* Facility, while the exemption at (B) uses the narrower "collection center" term. But understanding "trap grease" here as a vestige of a prior proposal that applied broadly to trap grease resolves that question. Each exemption concerns *only* the combination of some activity (trap grease handling or operating a "collection center") *and* inedible rendering. This reading also provides a consistent outcome between the two exemptions: the Facility is exempt under both. The District's view either strains to disqualify the Facility under both exemptions (the broad language at (C) notwithstanding) or renders a nonsensical result: the Facility is exempt and not exempt at the same time. That cannot be. *See Michaels v. State Pers. Bd.* (2022) 76 Cal. App. 5th 560, 569–570 (interpreting a legal rule to comport with commonsense and avoid absurdity and mischief).

Additionally, the Final Staff Report confirms that Rule 415 was expressly intended to address the five rendering facilities in the South Coast Air Basin.[18] Notably, no wastewater treatment operations, including those handling trap grease, that were not also rendering were involved in the report or the rulemaking process.[19] This also comports with the District's disclaiming the Rule's applicability to, and signaled a separate rulemaking to address, trap grease.

***Second,*** in a confusing attempt to apply Rule 415 to collection centers that process trap grease but do not render, the District argues that Trap Grease is a Raw Rendering Material, as the Rule defines these terms. It claims that because Raw Rendering Material is defined to expressly exclude used cooking oil but not trap grease, "[i]t is included as Raw Rendering Material because Trap Grease is introduced in the receiving area."[20] That conclusion makes no sense. Raw Rendering Materials means "materials introduced into the receiving area at a rendering facility." Further, the Receiving Area is "the area, tank, or pit within a rendering facility where raw rendering materials are unloaded from a vehicle or container, or transferred from another portion of the facility *for the purpose of rendering these materials.*" Rule 415(c)(18) (emphasis added). Each term has its own definition based on the act of rendering—i.e., the conversion of "raw

[18] *See* Final Staff Report at 1-1 and 1-22.
[19] *See* Final Staff Report at A-107 (referring to facilities "that will be included during rule development of PR 416, which addresses odors from kitchen trap grease")
[20] *See* Exhibit 6 at 1.

rendering materials into fat commodities and protein commodities by heat and mechanical separation." Rule 415(c)(19). By contrast, Trap Grease means "cooking grease, food waste, and wastewater from a restaurant grease trap or interceptor." Rule 415(c)(23). It lacks any reference to rendering. The District's attempt to read Trap Grease into the definitions of Raw Rendering Material and Rendering is unsupported by the Rule's plain language and would obviate many of Rule 415's definitions and terms.[21] If Trap Grease were Raw Rendering Materials, Rule 415 would not need separate definitions, requirements, and exemptions for trap grease processing. As just one example, the very exemption for "[f]acilities that process trap grease but do not conduct inedible animal rendering operations" would make no sense.

***Third,*** the District's disingenuous assertion that trap grease processing is somehow rendering because it believes the Facility is converting trap grease into a fat commodity using heat (in the form of steam) and mechanical separation should be rejected.[22] Baker's trap grease operations do not constitute rendering as Rule 415 defines it, and any argument to the contrary cannot pass the straight-face test. Most obvious is that this argument contradicts the District's other stated position that the Facility should be regulated under Rule 415 only because it is processing trap grease *and* operating as a collection center. If the District believed that Baker's trap grease operations actually constitute rendering, then the Hearing Board's approval of the Modified Order would make no sense.

The basic canon of construction against redundancy and surplusage forecloses a reading of "processing trap grease" that falls within the definition of "inedible rendering." *Thiara v. Pac. Coast Khalsa Diwan Soc'y* (2010) 182 Cal. App. 4th 51, 57 (reversing judgment below construing a statute such that some words were rendered surplusage). It is absurd to suggest that every instance in the Rule where "rendering" is mentioned separately from and alongside the processing or handling of trap grease is redundant or surplus. California Courts avoid such odd and strained

[21] *See e.g.*, Exhibit 3 at p. 316:20–317:5 (Member Balagopan: "I'm not sure why the District in there brought up the definition of 'rendering' and food and agriculture code . . . they looked at the definition, they health and food grease and the rendering. But that would have affected all the other non-rendering facilities. So the District chose to change the definition and exclude that in its definition of 'rendering'").

[22] *See* Exhibit 6 at 5.

constructions of administrative rules. *Jones v. Cal. Interscholastic Fed'n* (1988) 197 Cal. App. 3d 751, 758 (interpreting administrative rules using the same rules applicable to statutory interpretation). Here, the only reasonable construction is that these are distinct activities, one of which is the regulatory object of Rule 415 while the other is not.

It appears the District finds Rule 415 applicable also because the District inspector finds trap grease "odorous."[23] But this proves far too much. If the smell of trap grease processing were sufficient to place it under Rule 415, then its combination with some activities would be beside the point. *Id.* Under that view, simply processing trap grease without these other activities would be sufficient to bring trap grease processes within the ambit of Rule 415. But that was precisely the approach rejected in adopting the final rule.

That the Facility conducts trap grease operations and collections does not subject it to Rule 415. The District has no legal basis for demanding that the Permit cite Rule 415, which does not apply to the Facility. Indeed, the District's claim that it can enforce Rule 415 beyond its plain meaning and intent amounts to an impermissible underground regulation. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 572 (finding agency policy constitutes unlawful underground regulation because it applies generally, interprets or implements a law, and was not adopted following formal rulemaking). Because the District's interpretation of Rule 415 is contrary to law and standard canons of construction, and because upholding that position would amount to underground regulation, the Board should revise the Facility's Permit conditions and hold the District to its prior representations.

### C. Applying Rule 415 to the Permit Is Unnecessary and Problematic and Provides No Tangible Benefit, as Relevant Housekeeping and Operational Conditions Already Apply Under the Order.

While the Order promoted efficiency, fairness, and consistency with the substance of the Rule, the blanket application of Rule 415 suggested in the Permit Conditions is unworkable. As only one example, in the Permit's Section H (Permit to Construct and Temporary Permit to Operate), the District included a condition that the "Facility shall comply with Rule 415(e),

[23] *Id.* at 2.

including the washdown provisions."[24] These include, among others, that the Receiving Area "be thoroughly washed to remove animal matter at least once each working day." Rule 415(e)(10).

But as Baker has repeatedly reminded the District, multiple requirements of Rule 415(e), including this washdown provision, are applicable *only* to rendering facilities and not to the Facility. Including them in the Permit is not only inappropriate but problematic. Daily washdown and full removal of animal matter from this area, particularly the pit, in its currently approved configuration is impracticable and, in light of the successful deodorizer, unnecessary, as the Hearing Board recognized in formulating the Order's conditions to require washdowns twice per week and expressly not to require the removal of all residue. *See* Order at 11f.

Similarly, the District's citation to Rule 415(c)(4) when referring to odors from the Facility is flawed.[25] Rule 415(c)(4) defines a "Confirmed Odor Event" as "the occurrence of a rendering-related odor," yet the Facility does not conduct rendering. Any verified odor complaints can and must be appropriately addressed under Rule 402.

As with the Order, Baker seeks to revise the Permit to spell out relevant requirements tailored to its actual planned operations so Baker can comply without waiving its rightful opposition to Rule 415's applicability.[26] Baker's Permit would allow it to construct the three new enclosures without delay, as requested by the District, and lawfully expand and improve the Main Plant PTE. Baker would implement the many housekeeping measures and odor controls it has committed to under the Order without conceding Rule 415 applies (because it does not), ensuring an efficient permitting process so it can make Facility improvements benefiting the community without further delay. Removing Rule 415 from the Permit while agreeing to applicable conditions is a commonsense solution and was precisely how the Hearing Board previously addressed the parties' disagreement.~~[27]~~

[24] *See, e.g.*, Exhibit 1, Section H, page 16.
[25] *Id*.
[26] *See* Exhibit 7, which provides limited, non-exhaustive examples of proposed revisions to the Permit that conform with the Order. Baker can provide a full redline of the Permit upon the Hearing Board's request.
~~[27] *See* Exhibit 3 at 312:5–9 (Member Balagopan: "The order abatement is binding. It overrides the permits in a lot of cases when you issue an order of abatement for the condition may say some things but the order abatement may override for the duration of the order.")~~

Again, *Baker does not seek to dodge conditions.* Baker has demonstrated a commitment to abiding by applicable, reasonable, and feasible conditions needed to restore the Facility to productive operations and minimize potential odors, reassuring the District and the public. ~~Unfortunately, the moment it was out of the Hearing Board's sight, the District jettisoned the solution it accepted when appearing at the modification hearings.~~ The District's refusal to take "yes" for an answer is now impeding progress and squandering resources. Incorporating the necessary terms of Rule 415 without explicit rule references would, in substance, give the District everything it has demanded.[28] It would also avoid unnecessary delays and bypass disagreements that only hamper the resumption of useful services in the community. The District's gamesmanship is diverting time, effort, and other resources that the District, the Hearing Board, and Baker could better spend elsewhere. Baker is unwilling to subordinate function to form and concede a principle of law that the District continues to get wrong.

These considerations reflect the practicality of the approach Baker now asks the Hearing Board to carry forward to its logical conclusion in the Permit—the issuance of permit conditions that give the District what it wants in substance while avoiding a dispute on technical legal distinctions that are—at least for the District—devoid of practical difference.

Thus, in addition to the correctness of Baker's legal position, the Hearing Board should grant Baker's petition because the District will suffer no prejudice, the District's substantive demands will be met, and all involved could return to the useful courses of their work.

### D. The District Should Be Estopped from Contravening the Compromise by Which the Hearing Board Resolved the Proceedings on the Order.

The Board should also exercise its sound judgment in granting the petition on the basis that the District is equitably estopped from taking a position with respect to the Permit conditions that is contrary to the position it took in the context of modifying the Order—a position on which Baker has already relied. *Times-Mirror Co. v. Superior Court of Los Angeles County* (1935) 3 Cal. 2d 309 (equitable estoppel applied where the petitioner, acting in good faith and relying on the city's assurances and actions, undertook significant construction based

on the understanding that its property would be acquired for public use). This would also serve to deter gamesmanship that diminishes public trust in regulators like the District.

Here, Baker reasonably relied on the District's conduct during the order modification proceedings to resolve the parties' dispute over the applicability of Rule 415. This reliance included undertaking significant capital expenditures to bring the Facility into compliance. Baker followed through on the operational requirements agreed upon in good faith, only to have the District perform an about-face and demand unlawful conditions that Baker has already explained it cannot accept. The District's bait-and-switch tactics not only harm Baker but undermine the integrity of the regulatory process. The Hearing Board should not let that stand.

## CONCLUSION

The District's attempt to make Rule 415 part of Permit is wrong on the law, contravenes the District's prior agreements and representations, and undermines the integrity of the regulatory process and the significant progress the parties had previously made. Baker has complied in good faith with all operational requirements the Board and the District selected for and tailored to the Facility. The District now seeks to rewrite the terms. Its reversal is improper, unnecessary, counterproductive, and inherently arbitrary and capricious. The Board should thus end the District's crusade, grant Baker's appeal, and revise the Facility Permit to replace improper references to Rule 415 and rendering with the agreed-upon conditions of the Order.

I, George Gigounas, am a partner at the law firm DLA Piper LLP (US) and an authorized agent of Petition Baker Commodities, Inc. I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct to the best of my knowledge. Executed this 9th day of January 2025, in San Francisco, California.

By:_____

GEORGE GIGOUNAS, DLA PIPER LLP (US)
Attorney for BAKER COMMODITIES, INC.

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 555 Mission Street, Suite 2400, San Francisco, California 94105-2933.

On January 9, 2025, I served the foregoing document(s) described as:

**RESPONDENT BAKER COMMODITIES, INC.'S APPEAL OF REVISED VERNON FACILITY PERMIT INCORPORATION OF RULE 415**

on interested parties in this action by the method of service indicated below.

☒ (**BY E-MAIL)** I transmitted the document(s) listed above via e-mail to the person(s) at the email address(es) set forth below.

Clerk of the Board
South Coast Air Quality Management District
clerkofboard@aqmd.gov

Daphne Hsu
dhsu@aqmd.gov

Nicholas Dwyer
ndwyer@aqmd.gov

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

Executed on January 9, 2025, at San Francisco, California.

DENISE ELDER

# EXHIBIT 3

# BEFORE THE HEARING BOARD OF THE

# SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

IN THE MATTER OF

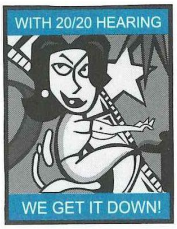
| | | |
|---|---|---|
| SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, | ) | |
| Petitioner, | ) | |
| vs. | ) | **CASE NO.** 6223-1 |
| BAKER COMMODITIES INC., | ) | |
| Respondent. | ) | |

## TRANSCRIPT OF PROCEEDINGS

**DATE:** Wednesday, April 19, 2023

**REPORTER:** Jennifer A. Hines, CSR No. 6029/RPR/CRR/CLR

**LOCATION:** 21865 Copley Drive
Diamond Bar, California 91765

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BEFORE THE HEARING BOARD OF THE

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

IN THE MATTER OF

| | |
|---|---|
| SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, PETITIONER, | |
| vs. | Case No. 6223-1 |
| BAKER COMMODITIES INC., RESPONDENT. | |

TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, APRIL 19, 2023

9:03 A.M.

21865 COPLEY AVENUE
DIAMOND BAR, CALIFORNIA 91765

H E A R I N G  B O A R D  P A N E L

APPEARANCES OF THE HEARING BOARD FOR THE AIR QUALITY MANAGEMENT DISTRICT:

THE CHAIRWOMAN: CYNTHIA VERDUGO-PERALTA

VICE CHAIRMAN: ROBERT PEARMAN

MICAH ALI

MOHAN BALAGOPAN

ALLEN BERNSTEIN, DPM/MBA



TRANSCRIPT OF PROCEEDINGS before the Hearing Board, reported by JENNIFER A. HINES, Certified Shorthand Reporter Number 6029/RPR/CRR for the State of California, with principal office in the County of Los Angeles, commencing at 9:03 A.M., on WEDNESDAY, APRIL 19, 2023, at 21865 COPLEY AVENUE, DIAMOND BAR, CALIFORNIA 91765.

* * *

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I N D E X





I N D E X

E X H I B I T S

implicating Rule 415.

The whole point is that if they somehow aren't doing rendering and have that portion modified and activated whatever term you use, then the meer trap grease operations are not subject to Rule 415. I think that's pretty clear in the rules.

If your witness felt the other way, I don't see the basis for that.

So I think that's a bit overbroad and harsh. It's kind of like you're really still nailing them on the rendering requirements which is not the propose of the proposed request.

So I think the better terminology is to simply say they would have to fully enclose or put in an enclosed system any and all wastewater treatment systems necessary for the trap grease operations to satisfy all applicable rules and laws.

And, again, applicable, whatever that may be. We don't have to pass that. But I don't think you should put that 415 reference in there because it's too harsh and takes away the whole purpose which is to get this out of 415 if they don't do rendering and activate.

Any comment?

MS. HSU: In terms of activation, that's why we have 9(c). I think that's what we're trying to



address what you are saying, that if they were to inactivate rendering, that they may not -- that's what where we are trying to address it.

MEMBER PEARMAN: I agree. That was probably while you were trying to give and take away. I think that's the wrong way, but I would say keep (c) in there, but I think we have to get 415 out. Because it just muddies the water for intentions here.

And then it looks like in item 9, we never discussed the cooking oil issue. And then when we go down, you -- 13, you talk about commencement operations as to condition 9 which is just trap grease. And then item 14 talks about commencement operations again. So I'm trying to find out first the used cooking oil process, the only reference is in 8. I don't see it discussed elsewhere. So am I missing something about your intentions as far as that's concerned?

MS HSU: No. That's correct. This way if they haven't done any of the enclosures per item 9, they could still operate their wastewater operations for rain water, wash down water and the cooking oil because there was a carve out in cooking oil in Rule 415. So we wanted to honor that and make that explicit in item 8

MR. PEARMAN: And do they need to notify you if they simply start the used cooking operations?



MS HSU: No. That was just -- no, they would not.

MEMBER PEARMAN: Okay. All right.

So then I'm going to try and figure out.

13 talks about relating to condition 9, trap grease prior to commencement of operations they shall notify you.

So if you don't have to be notified about the cooking oil, then what does 14 relate to unless it relates to the rendering? That's the only thing left.

MS HSU: That would be related to item number 9, so because 13 is just more -- we want to know that construction is complete and then when they commence operations.

MEMBER PEARMAN: Okay. So the distinction there is -- see, it says prior to commencement of operations in 13 then you talk about compliance with permits to construct and then you talk about operations again in 14. So it's kind of odd.

You're talking about construction notice, you wouldn't say prior to commencement of operations in 13. You'd say prior to commencing construction. So I'm kind of confused here why we have these two operation prior notices.

MS. HSU: I think -- it could -- it was



inartfully stated.

Basically we wanted to know when construction was complete and when they wanted to start operations because there could be a gap in time.

MEMBER PEARMAN: Okay. So prior to commencing operations, tell us when you finish construction. But then tell us before you start commencement again?

MS HSU: Correct.

MEMBER PEARMAN: Okay. And should this be stricken from both 13 and 14?

MS HSU: No. He should remain on. It's just a typo on 14. There's just an H that's not part of his e-mail address.

MEMBER PEARMAN: Okay. Okay. All right.

And what else did I have here.

And if I may, Madam Chair, I forgot to ask -- if I can ask Baker now just as we're discussing conditions -- maybe I'll ask Ms. Hsu first.

The May 18th timeframe, in 9(a) and 9(b), could you elaborate on that and why that's there, how you limited it, et cetera, et cetera.

MS HSU: We just believe approximately 30 days would be sufficient to -- to submit permit applications. They're welcome to submit it earlier. If

Ms. Taber?

MEMBER BERNSTEIN: So May 18th --

MS. TABER: Yes, thank you.

MEMBER BERNSTEIN: 4th of July?

MR. DWYER: Yes.

THE CHAIRWOMAN: All right. Mr. Balagopan, did you want to start deliberations?

MEMBER BALAGOPAN: Yes. After hearing all the testimonies and so forth, I am now -- I'm inclined to propose modification based on what Baker proposed and disregard the District's change for the modification.

I will go through the reasons why. I think the District said the plain meaning of the rule. The plain meaning of the rule is very clear, it's plain. In the rule in the staff report, it is plain as can be: Remove trap grease from PR 415, applicability; remove 2BEM 415 odor best management practice. That is in the 2017 staff report that was adopted by the governing board.

What the District chose to do in the opening statement is then -- I don't know why they did this, but they referred to the comment on page -- comment 18, page 833 of 415 staff report and as Exhibit 21 that Baker understood the trap grease was subject to 415.

That was based on early on discussion in the



rule in the proposed rule making. But as you can see in table P-1, the summary of changes, that was discarded. But the District has been disingenuous in saying hey, look. This is what they had submitted and they knew this. I think it's misleading.

This in my mind is really straightforward.

So we would ask and I think I'm jumping all over the place. We would ask to -- and I'll -- because I wrote it down, the order.

We would ask about the credibility of the manager was the manager, and I would defer to the permitting manager on permitting issues. I would defer to the process of the general manager on process issues. You know, and I think he testified there is vapors coming from the tank. I would -- the engineer wasn't sure. If you heard the testimony initially then she had to correct it that she -- yellow grease was being incinerated and then after that, it was corrected I think that it was as fuel.

So, again, I think it's very difficult sometimes for the permitting engineer to know all the nuances of the permitting at the facility. The people who do day-to-day operation are familiar with it.

But on the permitting side, yes. I think the facilities don't understand all the nuances of



permitting. You know, those issues of permitting and so forth. Yes, I would defer to that.

Now, the other -- the thing that I found is to -- the condition that the District proposes to submit applications all over again. You have to recall that this application was submitted, they were reviewed and approved and were sub- -- and the facility permit was issued in 2021 for the wastewater treatment operation.

Now, I want to clarify that. They are two different things: Trap grease and wastewater treatment. I think that's the proper way, not processing as per the rule.

Trap grease requirement is that -- the requirement in Rule 415 that was adopted was that you put it into -- into -- directly into the wastewater system and then everything else -- then you -- basically exempt of 415. However, 415 require -- the wastewater operation has to comply with 415, which is what the facility did. They submitted applications and they got the permit to operate to construct for the wastewater operation with the enclosure.

So the District would not have issued the permit to construct/permit to operate unless they had evaluated all the information in the application that was submitted and made the determination, yes, I think



if they do this and this as outlined in the permit, they would comply with rule -- the applicable rule.

So I think that to say now hey, you are then ordered abatement, I take offense at the fact that, you know, the order abatement is not a good tool. The order abatement is binding. It overrides the permits in a lot of cases when you issue an order of abatement for the condition may say some things but the order abatement may override for the duration of the order.

So the order is very clear, do not conduct any operation. What they're asking for is to conduct trap grease operation, wastewater operation and cooking grease.

So the rendering and they are -- and they have conditions which I thought -- which will reinforce the fact that they will not conduct rendering because the lines -- the gas lines to the cookers will be turned off and so that they -- they will be -- essentially without that, you cannot do any rendering.

So but regardless of that, the order is already there saying you cannot do rendering until you modify -- if you choose to modify. To submit application again -- I don't think -- realize what -- I said part of the reason why I ask the engineer, you know, what the permit, some of these permits, that

particular permit and I didn't check fine. I looked at Exhibit X. There was an equipment list. That -- the ren- -- where they say trap grease, that was issued in 1978. It's almost -- almost --

MEMBER ALI: 45 years.

MEMBER BALAGOPAN: -- 50 years ago. And some of these are like gold. I mean, but -- and you don't surrender the permits or inactivate a permit unless, you know, you're not operating it, per se. But here the intent is for them to go back.

They are working towards a path of coming back and operating the rendering facility.

So for them to say you inactivate a permit, re-apply does not make total sense at all.

Plus in the application you submit, you have emission reduction permits and all that stuff associated with it. You don't just inactivate a permit, you know. You -- those -- some of these permits have a lot of credits available.

So the fact -- oh, just inactivate, re-apply again does not make any sense to -- to any business. I think businesses who come before us have been say oh, you're under abatement. Submit -- inactivate your permit because you are under an order abatement. And reply again. When you re-apply, you're subject to new



source review all over again, you know, new source for toxic, new source for criteria which are -- can be very onerous.

So I can -- you know, to say hey, surrender, re-apply and do it again, why do it again when you already did it? Just in 20 -- it was just issued with the engineer reviewing and approving it.

Now --

THE CHAIRWOMAN: That's why I was asking those questions because I wanted it to come out that okay, there's a cost here.

MEMBER BALAGOPAN: Right.

And then you know, I object because -- and we heard actually testimony from the engineer clearly that the open pit was not in the permit. You know, there was not.

And we also heard testimony they're not operating the open pit and they're willing to take conditions and nothing goes into the open pit, any waste, trash, et cetera will go into closed bins.

I do propose that where they are putting into the operating bins, that they have free board, that it should be covered. Even if a simple thing as a plastic covering around the shoot so when it free-falls, and I -- I was getting at I went to a brewery with some



engineers and with a Jerome monitor when they were dumping the yeast waste from the brewery into these trucks for hauling out to a landfill, you stand upwind from the -- the activity, you don't smell anything and the reading is zero. You go downwind, the meter went crazy. So there's a wind sheering effect with the free-fall.

So that has to be -- it's a simple, you know, solution until they come up with some elaborate thing that goes directly underneath. But if you don't have free -- if you have free-fall, put some plastic sheets. Make sure that the wind shearing does not take the smell. So that is one thing I would make, you know.

And we looked at -- we talked about D-269. Clearly they're willing, however, to wait until the permit is issued to operate that clarifier as a closed system. So that is a condition that I think we can put because there's -- there's an issue about the permitting.

And so the debate on whether that should be covered, you know, by a different permit or the existing permit, you know.

They applied for the -- I think we heard testimony they applied for the PTE enclosure because they initially planned to have -- for the receiving



area. So the receiving area that's a J&M plant, so -- and I don't think I need to go into that. They applied because -- because they changed the -- initially I think they proposed a larger PTE. Now they narrowed its scope so then the inspector told them you need to apply, they applied, and so this was tied up with that.

So that -- the other thing I thought which was somewhat -- the plain -- I think the District talks about the plain meaning of the rule. The plain meaning of the rule, as I said before, it's not ambiguous. Let's not complicate the issue with what is already the rule. The rule is clear, the staff report is very clear.

The permit that was issued is also very clear. There was no reference to trap grease processing in -- except in the permit that was issued 50 years ago actually there was. But the recent one and the -- there isn't. But the -- the wastewater treatment is subject to 415. And so that's what they have to comply with.

So let's see. There was a few other -- I'm not sure why the District in there brought up the definition of "rendering" and food and agriculture code. Saying almost -- but clearly as they indicated, when the -- they looked at the definition, they health and food and agriculture, it did include processing kitchen

grease and the rendering.

But that would have affected all the other non-rendering facilities. So the District chose to change the definition and exclude that in its definition of "rendering."

So we go by what is in the current rule, you know, the current rule is what we have to go by.

So the rule applies -- it says wastewater from rendering. Correct? And for -- and trap grease processing. The only requirement in the rule is that you -- and I'll read that -- is -- and if you do that, I'm sorry, is under L 8: "Trap grease unloading." Again, they're talking about just the unloading "shall not be subject to the requirement for PTE provided the trap grease is unloaded only through a hose in a wastewater tank or separator" which we heard testimony and which is -- that is what they're doing.

So the trap grease operation is being -- does not have to comply with 415. Enclosure all the odor management, or what do you call it, not the odor management, the odor BMP, the best management practice for orders under that because that's what -- F, it refers to F which -- and I think we have to follow the rule. I'm sorry. I keep emphasizing the rule. Permanent total enclosure and odor control standards.



So it says if you do that, you're not -- you don't have to comply with the permanent enclosure and odor control standards.

Now, the conditions that the District's proposing is draconian in a sense, I believe. You know that is predicated on -- again, I think it was pointed out not knowing what rules -- the rule have already -- it's clear what applied. That's why te permit was issued. To say resubmit it again and re-evaluate it on a rule that has not been adopted -- one of the staff -- the staff report in chapter 3, page 7 had clearly had indicated that trap grease processing will -- facilities that only process trap grease, will be -- there's a separate rule for cooking oil and trap grease, but it's not been adopted yet. So there's no regulation in place. The regulation in place is 415 which --

THE CHAIRWOMAN: Okay. May I ask you, though, if you can kind of cut to the chase.

MEMBER BALAGOPAN: Sure. Cut to the chase.

THE CHAIRWOMAN: What so --

MEMBER BALAGOPAN: I My -- I would propose, you know, a modification to order to allow them to process -- you know, to remove certain conditions that they asked for and I'll go through those conditions when the time comes and to put the -- to allow them to use



cooking oil, do trap grease processing and any wastewater that is generated at the facility through the system that is -- has been already permitted. And they complied with the permit conditions.

If -- we heard about the boiler, you know, the boiler is subject to -- then they have to comply with the boiler standard if it changes. So that's what I'm proposing, that they -- we adopt with the additional conditions that they propose, the five conditions. That's what I was getting to, that we --

THE CHAIRWOMAN: There are actually 8 that I counted.

MEMBER BALAGOPAN: What's that?

THE CHAIRWOMAN: I have 8.

MEMBER PEARMAN: That Baker proposed?

MEMBER BALAGOPAN: Baker proposes 5 I think.

THE CHAIRWOMAN: Okay.

MEMBER BALAGOPAN: I am actually completely disregarding the District's proposal. I did glance at it, but I'm disregarding it.

THE CHAIRWOMAN: In its entirety of all the conditions; is that correct?

MEMBER BALAGOPAN: Yes, that they propose in the modification.

THE CHAIRWOMAN: Okay. Thank you,



Mr. Balagopan.

Mr. Pearman.

MEMBER PEARMAN: I think both sides gave us kind of a -- too much on the past that was decided.

MEMBER ALI: Exactly.

MEMBER PEARMAN: And a lack of clarity about the specific challenge here was how to handle a non-rendering operation situation, which is what Baker came to us before for.

It's a unique case. There's no history of anything like this that we've heard of inactivate a rendering process to then go and just trap grease. It's a governing board rule so we're kind of limited in trying to add our own interpretation to it.

But I do think in general, you know, with Baker's -- in their original proposal is trying to pass go and by taking advantage of their found violations of permits and rules just start up trap grease processing without any real restrictions. That certainly is improper.

So I do think, though, that we should try and impose some conditions that can be flexible. They can use open air pit or not, things of that nature. And that the District should not be too draconian in how they deal with that to allow them to institute just

But we really do have very strict constraints on that. And I would definitely suggest that you have some good conversations with the engineers and the staff of the AQMD.

So I want to thank all of you, Ms. Hsu, Mr. Dwyer, Ms. Taber, and I know I'll mess up your name so I'm not even going to try.

But thank you to all of your staff and your witnesses.

So -- and my colleagues, thank you so much. We all worked real hard and thought long and hard on this. And like I said, it wasn't easy, but I think we got it done to the best of our ability. And I think that both sides should be happy with us.

Thank you and the matter is closed and we are adjourned.

MS HSU: Chair --

THE CHAIRWOMAN: Yes.

MS HSU: Sorry. I know you had wanted to ask one of the parties to draft the Proposed Findings and Decision.

THE CHAIRWOMAN: Yes. Yes, I do. And who's going to volunteer?

MR. SOMASUNDARAM: As the moving party, we would volunteer.



THE CHAIRWOMAN: Okay. Thank you.

MEMBER ALI: And just a reminder, Madam Chair, both of them are paying for the court reporter.

THE CHAIRWOMAN: Yes. I got agreement on that.

MEMBER ALI: And her happy hour. All right.

THE CHAIRWOMAN: Thanks again, everybody. Have a safe trip home .

(Whereupon, the proceedings concluded at the hour of 3:38 p.m.)



STATE OF CALIFORNIA. )
) SS
COUNTY OF LOS ANGELES )

I, JENNIFER A. HINES, Certified Shorthand Reporter qualified in and for the State of California, do hereby certify:

That the foregoing transcript is a true and correct transcription of my original stenographic notes.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this proceeding was taken; and furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of April, 2023.

JENNIFER A. HINES,
CSR No. 6029/RPR/CRR/CLR

# EXHIBIT 4

Transcript of Proceedings

May 29, 2024

South Coast Air Quality Management District

vs.

Baker Commodities

BEFORE THE HEARING BOARD OF THE
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

In the Matter of,
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,
Petitioner,
VS.
BAKER COMMODITIES, INC.
[Facility ID No. 800016]
Respondent.

CASE NO. 6223-1

TRANSCRIPT OF PROCEEDINGS in the above-entitled matter held at the South Coast Air Quality Management District, 21865 Copley Drive, Diamon Bar, California, beginning at 9:33 a.m. and ending at 3:50 p.m. on Wednesday, May 29, 2024.

JOB NO. 10142931
REPORTED BY LAUREN SPEARS, CA CSR NO. 14185



APPEARANCES:

HEARING BOARD:
CHAIR CYNTHIA VERDUGO-PERALTA, PUBLIC MEMBER
VICE-CHAIR ROBERT PEARMAN, ATTORNEY MEMBER
MICAH ALI, PUBLIC MEMBER
MOHAN BALAGOPALAN, ENGINEER MEMBER
JERRY P. ABRAHAM, MD, MPH, CMQ, MEDICAL MEMBER

FOR PETITIONER SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT:
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FOR RESPONDENT BAKER COMMODITIES, INC.:
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ALSO PRESENT:

DALE LARSON - COUNSEL FOR THE HEARING BOARD
ROSALINDA DIAZ - DEPUTY BOARD CLERK II
JOHANNA GONZALEZ - INTERPRETER CERT. #301778
JUAN CARLOS JUAREZ - INTERPRETER CERT. #369990



EXAMINATION





DISTRICT'S EXHIBITS



BAKER'S EXHIBITS

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place to limit potential odor as Baker takes on this new venture. On Friday, May 24th, 2024, Baker's counsel filed stipulated facts. The 15 facts in that document are agreed upon by the parties.

My counsel has recognized that Micah is no longer in the --

CHAIR VERDUDO-PERALTA: They can hear back there.

MR. DWYER: Okay. Further evidencing the amount of agreement between the parties are the two proposed findings and decisions submitted by the parties. On May 24th, this past Friday, district's counsel submitted the district's proposed findings and decision, and included in that submittal was a comparison document showing the differences between what Baker has proposed and what the district is proposing. There is a lot of similarities between the two parties' proposals.

One of the first differences you will see when reviewing that comparison document is that the district disagrees that Baker has given up all rendering at its facility. Baker has not ceased rendering used cooking oil or trapped grease at its facility. As a business decision, Baker has decided to cease traditional type rendering, where it would cook and further process the animal -- raw animal parts at the facility. And as a

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part of that business decision, Baker has decided to start collection services at the facility, which it refers to as transloading.

Now, I think it's really important here to understand that Baker has not completely given up rendering at its facility. At this point, the district does not see a good reason why we need to continue to dig into continued applicability of Rule 415. That could be an inefficient use of our time today, but if the topic does need to be further explored here, I suggest that we have further briefing on that issue. It would be a better use of everyone's time, if that was necessary.

Back to the proposed findings and decision. The second biggest difference concerns the district's desire to have enforceful order for abatement conditions for Baker's collection services. Now, as my colleague, Baker's counsel, has pointed out, there are differences of opinion, as you have gathered from reviewing Baker's witness' declaration and the district witnesses' declarations. There was apparent confusion and misunderstanding as to whether the parties wanted Baker's standard operating procedures to be part of the abatement order.

It's now clear that both parties are asking the hearing board to put in the order enforceable operational

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conditions. The district still favors specific enforceable conditions, rather than several standard operating procedures that provide too much flexibility, and some of which are too uncertain to enforce. The conditions being proposed by the district are for the interim period where Baker will be operating in its collection center before the extension is permitted to operate. These limits consider the fact during this interim period, Baker will not have a permitted conveyor to take material from raw rendering material pits and load it into trucks.

Given the time it takes to load trucks without using a screw conveyer, it stretches the imagination to see how they can manage 200,000 pounds. The district views that fact as very important for why the 200,000 maximum limit proposed by Baker is unrealistic, and poses an unacceptable risk of potential odor. The district has received far less odor complaints in the Vernon area since the September 2020 order for abasement. We must tread carefully here to not unreasonably increase potential odor. The district remains open to hearing from Baker's witness on how he envisions the collections operation will operate during this interim period, where permits related to the conveyor and the extension of the permanent total enclosure are pending.

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Representing the public, we have an obligation to understand how Baker is proposing to operate, and to set limits on those operations to ensure we minimize the potential for odors. The district put forth its reasons why, and considered Baker's requests for flexibility. The declarations of Paolo Longoni and Atul Kandhari set forth the district's reasons for limiting the amount of materials stored in the permanent total enclosure to 60,000 pounds, and requiring a cutoff time where all material must be out of the permanent total enclosure, to ensure the equipment and services that come into contact with the raw material are cleaned daily.

The district is seeking for this board to keep the proposed conditions intact that set forth fair limitations on Baker's operations, while they transition their operations to something entirely new at this location. Again, most of these are already agreed upon by the parties, but the district sees a specific limitation or specific limitations related to the collection center activities as necessary here.

That's all I have for my opening statement. Thank you.

CHAIR VERDUDO-PERALTA: Thank you.

Okay. Call your first witness.

MR. GIGOUNAS: Yes, Madam Chair. We would like

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And so I am going to request that both sides give us a two-pager or a three-pager that we can look at and see what the differences are, because that is going to have some relevance, because the district believes that some parts still belong under 415, and I know that Baker does not. So --

Were you going to say something, Mr. Pearman?

MR. PEARMAN: Yeah. I don't know, but if the thought was the cleaning condition of 415(e), I would just say there's a possibility that it's just a question of what the conditions are. You could come up with conditions, taking some from 415(e), but not relying on that, and let the parties fight another day if they think 415 applies. So that possibly might exist, and that's one solution perhaps, but we'll see how it goes.

MR. GIGOUNAS: I don't mean to interject, but I might propose something, if the board is willing to hear it.

So first of all, Mr. Pearman, I think we all agree, one thing we've tried to do is avoid the entire fight about the applicability of 415 by specifying the specific subject matter that would go in. So in other words, instead of Baker shall comply with 415(e), it would be Baker shall do X, Y, and Z, or A, B, and C. And within Rule 415(e), nearly all of those provisions, Baker

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is able to do with this proposed -- with this proposed business.

The district -- or excuse me, the board, in questioning our witness, had raised some questions and some issues. And so if it appears that we will need to continue to a further date, we might consider -- and I'm just raising this for some discussion at some point, whether Baker can make a proposal to the board, because we have been discussing in good faith collaboration with the district for a long time, if we were able to make a proposal to the board that perhaps gave voice to some of the concerns that the board members have raised, and the questions that the board members have raised, it might give the board something concrete to consider in between the two proposals that were made.

And of course, the district can do the same thing, if they wish. But that might be some way to sort of, you know, avoid the necessity of coming back and sort of completing -- not an adversarial process, but a formal hearing process.

MR. BALAGOPALAN: I'm just going to add that in the district's proposed finding and decision, they did propose the 415(g), you know, in one condition. So there is some reference to 415. They could have teased out -- and I thank you for the suggestion, the elements of it

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without referencing the rule, you know.

MR. GIGOUNAS: Yes, sir. And indeed, we have discussed that and we're trying to continue to discuss that. I don't know that Baker and the district will come to complete agreement. For instance, 415(e) is where the washout provision is contained, and that, as the board members have seen, is one of the points of contention here. We certainly -- as I've said, most of those provisions are things that regardless of the applicability of Rule 415, Baker is able to do and willing and wants to do in this process. But there are a few things that are different.

This is not a rendering facility, or at least our position is that. So yes, the parties have been discussing, look, let's not -- let's avoid this fight. The issue is, I don't know that we will ultimately get to where we agree on all of the provisions that are within 415 that could be done, which could lead to the board needing to make that determination. We would like to avoid it, though.

MS. HSU: We are -- both parties are aligned on not needing to take the issue of Rule 415 applicability at this time, and we have been in discussion regarding instead of a reference to say Rule 415(e), to take out specific provisions, and given that this is an abatement

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order context, the hearing board does have more flexibility in terms of what it is ordering.

CHAIR VERDUDO PERALTA: Okay. All right. So therefore, we can go ahead and you can -- if you want to go ahead and go down -- I don't want to see you go down the path of going over history again. I want to see -- let's go forward. And I understand you want to layout a foundation, but if we can do that as briefly as possible, with still giving us the picture of how we are going to see this company still try to operate, without rendering, of course, and then where the -- where we're going to find a solution for both sides.

MR. ALI: Madam Chair, just one quick comment, perhaps in colloquy with you. If they seem to be in much agreement on many things, then why could they not caucus -- we recess, they caucus, they come back with a proposal. Perhaps they can work amicably. I mean, everybody seems to be getting along here today, and so perhaps they would even want to waive their closing, and we move right to their proposal, and we can then deliberate based upon that.

Now, again, that's just my suggestion, the board has to make a determination. And perhaps both parties would have to agree, but it just stands to reason, let's try to find a path to a solution so we can

CERTIFICATE OF CERTIFIED SHORTHAND REPORTER

I, the undersigned Certified Shorthand Reporter in and for the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witnesses were put under oath; that the testimony of the witnesses and all objections made at the time of the proceedings were recorded stenographically by me and were thereafter transcribed under my direction; that the foregoing is a true record of the testimony and of all objections made at the time of the proceedings.

I further certify that I am a disinterested person and am in no way interested in the outcome of said action or connected with or related to any of the parties in said action or to their respective counsel.

The dismantling, unsealing, or unbinding of the original transcript will render the reporter's certificate null and void.

In witness whereof, I have subscribed my name on 05/29/2024.

Lauren B. Spears, CSR No. 14185

# PETITION FOR APPEAL
# BEFORE THE HEARING BOARD OF THE
# SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

CASE NO: 6223-2

FACILITY ID: 800016

**IN THE MATTER OF**

1. FACILITY NAME: Baker Commodities, Inc.

ADDRESS: 4020 Bandini Blvd.
***[location of equipment/operation; specify business/corporate address, if different, under Item 4, below]***

CITY, STATE & ZIP CODE: Vernon, CA, 90058

☎ ( 323 ) 268-2801 *Ext.* *Fax* ( )

2. PETITIONER **if different from above**:

ADDRESS:

CITY, STATE & ZIP CODE:

☎ ( ) *Ext.* *Fax* ( )

**NOTE**: If the Petitioner is not the owner, operator and/or permittee of the facility you **must** answer No. 11, on Page 5.

**IMPORTANT FILING INFORMATION**

Your petition must be filed within 30 days of the action specified in Health & Safety Code Sections 42302.1, 42501, 42302, or 40713, or District Rules 215 or 216, as applicable. You are responsible for reviewing these code sections to determine the details governing the deadline for filing your petition.

In order to be accepted by the Clerk of the Board for filing, your Petition for Appeal must:

(i) Include an original and eight copies. The original petition must be printed on one side; the copies may be double-sided; and

(ii) Be accompanied by the required filing fee, pursuant to SCAQMD Rule 303, Table III. A copy of Rule 303 may be obtained from the Clerk of the Board or via the SCAQMD website at www.aqmd.gov/rules/rulesreg.html .

***Persons with disabilities may request this document in an alternative format by contacting the Clerk of the Board at 909-396-2500 or by e-mail at clerkofboard@aqmd.gov.***

***If you require disability-related accommodations to facilitate participating in the hearing, contact the Clerk of the Board at least five (5) calendar days prior to the hearing.***

[ALL DOCUMENTS FILED WITH CLERK'S OFFICE BECOME PUBLIC RECORD]

3. Petitioner respectfully submits to the Hearing Board this petition appealing the:

**ISSUANCE of** ☒ **OR** **DENIAL of** ☐

☒ Permits(s) to Construct
☐ Permits(s) to Operate
☒ Permit Condition(s)
☐ Emission Reduction Credits (ERC)
☐ _____ Plan
☐ OTHER _____

4. **CONTACT(S)**: Name, title, company, address, and phone number of persons to contact and authorized to receive notices regarding this Petition (no more than two authorized persons).

Jeff Wilson, Vice President and General Counsel
Baker Commodities, Inc.
4020 Bandini Blvd.
Vernon, CA *Zip* 90058
☎ ( 323 ) 268-2801 *Ext.*
*Fax* ( )
*E-mail* jwilson@bakercommodities.com

George Gigounas
DLA Piper LLP
555 Mission Street, Suite 2400
San Francisco *Zip* 94105-2933
☎ ( 415 ) 615-6005 *Ext.*
*Fax* ( )
*E-mail* george.gigounas@us.dlapiper.com

5. Is this a Title V facility? Yes ☒ No ☐

6. Is this petition a supplement to an appeal pending before the Hearing Board? Yes ☒ No ☐
If yes, indicate Case No. 6223-2

7. Briefly describe the equipment or operation which is the subject of this petition.

The Hearing Board's July 22, 2024 Second Modified Order for the Facility, Condition 8, requires Baker to apply for and construct three new enclosures over the (i) grease pit trash area; (ii) J&M skimmer trash bin, and (iii) Centrysis trash bin, and imposes certain conditions on Collection Operations within the Main Plant Enclosure and Odor Best Management Practices at the Facility.

This appeal supplements Baker's January 9, 2025 Permit Appeal by incorporating the three permits to construct required under the Second Modified Order and the fourth permit to construct concerning the Main Plant Enclosure extension, and associated conditions, addressed under the Second Modified Order. All permits improperly require compliance with District Rule 415.

While the January 8, 2025 Permit Appeal identifies all four permits, the District had not yet issued two of the four permits to construct by the time of that filing. Accordingly, Baker supplements its Permit Appeal by incorporating the two newly issued permits as follows:

*Initial Permits Issued:*
(1) Main Plant Extension Extension and Screw Conveyor (Application No. 648440) Issued on December 10, 2024.
(2) J&M Catch Basin Enclosure (Application No. 648441) Issued on December 10, 2024.

*New Permits Issued:*
(3) Wastewater Treatment Area and Trap Grease Area Enclosure (Application No. 648442). Issued January 15, 2025.
(4) Centrisys Trash Bin Enclosure and Afterburner (Application No. 648443). Issued January 15, 2025.

[**YOU MAY ATTACH ADDITIONAL PAGES IF NECESSARY**]

Attached as Exhibit 8 is a copy of the relevant pages from the Facility Permit issued on January 15, 2025. Exhibits 1 through 7 are attached to the January 9, 2025 Permit Appeal.

8. Date Permit/Plan/ERC was issued/approved: Issued 1/15/2025 denied/disapproved: _____

**Attach a copy of the permit, approval/denial letter, or any other relevant documentation. For RECLAIM or Title V facilities, attach *only* the relevant sections of the Facility permit showing the equipment or process and conditions that are the subject of this appeal.**

9. Provide a detailed statement discussing how and why the action of the Executive Officer was not proper.

All permits improperly require compliance with District Rule 415, which applies exclusively to rendering operations. The Facility no longer performs rendering of any kind. Baker requests that the Hearing Board amend the Facility Permit to remove all references to Rule 415 and rendering, and replace them with the Second Modified Order's substantive operational requirements to fit the Facility's actual operations and the terms to which the District previously agreed.

The Hearing Board's April 19, 2023 decision, followed by the June 21, 2023 written First Modified Order, allowed Baker to resume trap grease and associated wastewater operations, in addition to its used cooking oil operations. The Hearing Board's July 22, 2024 Second Modified Order allowed Baker to begin collection operations subject to specified conditions, including to apply for and construct three new enclosures.

Please refer to Baker's January 9, 2024 Permit Appeal for the detailed statement discussing how and why the District's action in issuing the permits to construct and conditions is improper. The following provides a brief summary:

(1) Rule 415 does not apply to the Facility's Current Operations:
Rule 415 regulates rendering operations, which Baker no longer conducts at its Facility. The Facility now operates as a collection center with stringent odor control measures, as outlined in the Second Modified Order issued on July 22, 2024.

~~(2) Contradiction of Prior Agreements:~~
~~The District's inclusion of Rule 415 contradicts prior agreements and the Second Modified Order, which clearly delineated the operational requirements tailored to the Facility's current activities. These agreements were reached after extensive negotiations and should be honored to maintain regulatory consistency and fairness.~~

(3) Arbitrary and Capricious Action:
The District's decision to include Rule 415 appears to be arbitrary and capricious, lacking a sound legal or practical basis. ~~The action threatens to revive disputes that had been resolved through painstaking negotiations and costly proceedings, undermining the progress made.~~

(4) Unnecessary and Unworkable Conditions:
Many of the conditions imposed by Rule 415 are unworkable for the facility's current operations and create significant uncertainty for future compliance. This not only imposes undue burdens on Baker but also risks making compliance impossible.

Baker requests that the Hearing Board amend the permits to remove references to Rule 415 and rendering, ensuring that the permit conditions align with the Facility's actual operations and the terms previously agreed upon.

10. State in detail the specific relief you seek.

Baker requests that the Hearing Board amend the Revised Permit to remove references to Rule 415 and rendering and to replace them with the Order's substantive operational requirements to fit the Facility's actual operations and the terms to which the District previously agreed.

Please refer to Baker's January 9, 2025 Permit Appeal for further explanation.

11. If you are the facility owner, operator, and/or permittee, skip to No. 12. If you are not,

(a) Explain what your relationship is to the facility or to the action being appealed:

(b) Explain what actions you or your representative has taken to appear, submit written testimony, or otherwise participate in the action pertaining to the issuance of the permit that is the subject of this petition. (See California Health & Safety Code Section 42302.1):

[**YOU MAY ATTACH ADDITIONAL PAGES IF NECESSARY**]

12. The undersigned, under penalty of perjury, states that the above petition, including attachments, and the items therein set forth, are true and correct.

Date: 1/27/25

Signature: 

Print Name: George Gigounas

Title: Attorney for Baker Commodities, Inc.

# ATTACHMENT B

**Attachment B**

**Portions of Baker's Petition for Permit Appeal Requested to be Struck**

***Baker is the Appellant and Petitioner, Thus Has the Burden of Proof.***

1. The following language at page 1, line 11 on the left side of the cover page of the Permit Appeal:

   Respondent

2. The following language at page 1, line 19 on the left side of the cover page of the Permit Appeal:

   Petitioner,

3. The following language at page 1, line 23 on the left side of the cover page of the Permit Appeal:

   Respondent.

4. The following language at page 1, lines 17 on the right side of the cover page of the Permit Appeal:

   RESPONDENT

5. The following language at the footer of each page starting on page 1 through 15 of the Permit Appeal:
   RESPONDENT'S

***Whether Baker Provides Services is Immaterial to the Permit Conditions.***

6. The following language at page 3, paragraphs 1 and 2, lines 2 through 20, and footnote 3 at lines 26 through 28 of the Permit Appeal:

   **"I. Baker Provides Essential Services While Complying with the Order.**

   Baker remains committed to complying with District Rules and is dedicated to providing its essential service to the community. The importance of Baker's collection operations at the Facility—even without rendering—was again underscored by Governor Newsom's December 18, 2024 Proclamation of a State of Emergency regarding bird flu, which infects and kills cattle. Per the Proclamation, despite efforts to contain the flu's spread, "dairy cows at four Southern California dairies tested positive," and the State is "working with

environmental protection agencies to safely manage mass mortality material," i.e., cattle carcasses.3 Without transport to lawful rendering facilities, carcasses are left to rot in the sun, increasing the spread of disease.

Baker is among the last providers ensuring these remains are properly collected, managed, and converted to useful products, helping mitigate health and safety impacts in our communities. The District's unlawful inclusion of Rule 415 in a permit for a non-rendering facility threatens those efforts.

Baker's operations are also key to California's climate response infrastructure, which requires low-carbon fuels and diversion of organic waste from landfills. Baker, a carbon-negative operation, is an essential supplier of advanced biofuel feedstocks from used cooking oil and trap grease. The Facility also reduces carbon emissions by diverting organic waste from landfills, another key for California, which requires a 75% reduction of organic waste by 2025. *See* Health & Safety Code § 39730.6.

3 *See* Exec. Dep't State of Cal. Proc. of State of Emergency related to the Bird Flu (Dec. 18, 2025), available at https://bit.ly/GovBirdFluProcSOE; *see also* Heath, Crystal & Baur, Gene, *It's Time to End the Denial About Bird*

*Flu*, Time (Dec. 6, 2024) available at https://time.com/7200002/bird-flu-outbreak-denial-essay/; Douglas, Leah, *Cows dead from bird flu rot in California as heat bakes dairy farms*, Reuters (Oct. 17, 2024) available at https://www.reuters.com/world/us/cows-dead-bird-flu-rotcalifornia-heat-bakes-dairy-farms-2024-10-17/."

***The Order for Abatement Proceeding is Irrelevant to the District's Permitting Decision Whether Rule 415 Applies to Baker's Current Operations.***

Items: 6-18, which includes Exhibits 3 and 4.

Stipulated Conditions for Purposes of an Order for Abatement Have No Bearing on a District's Permitting Decision Whether a Regulation is Applicable.

7. The following language at page 2, paragraph 2, line 26 of the Permit Appeal:

"the terms of which the District previously agreed."

8. The following language at page 5, paragraph 3, lines 14 through 24 of the Permit Appeal:

On May 29, June 11, and July 2, the Hearing Board heard evidence and argument to support issuance of the Second Modified Order, ultimately issued on July 22. As the Hearing Board knows, Baker was ready and able to commit to the essential housekeeping requirements the District wished to impose from Rule 415 but not to

import wholesale application of a Rule having little to do with Baker's new proposed operations. Thus, after careful discussion, the parties agreed to list the specific rule provisions the District demanded instead of blanket references to Rule 415 in the Facility's operational requirements.8 Attachment A to the Order reflects the numerous carefully crafted operational conditions, including that "Baker shall not resume grinding, cooking and downstream operations related to rendering of animal products at the Facility," and extensive odor and housekeeping best management practices tailored to Baker's *actual* planned operations, which do not include rendering.

9. The following language at page 6, paragraph 2, lines 3 through 4 of the Permit Appeal:

"Notably, before the final Order issued, the District was already backtracking on its agreement."

10. The following language at page 7, paragraph 2, lines 7 through 11 of the Permit Appeal:

departing from the carefully crafted language by which the Hearing Board resolved Baker's earlier dispute with the District under the Order –language to which both Baker and District agreed on record before the Hearing Board.

11. The following language at page 14, paragraph 1, lines 4 through 5 of the Permit Appeal:

Unfortunately, the moment it was out of the Hearing Board's sight, the District jettisoned the solution it accepted when appearing at the modification hearings.

12. From the Supplement to the Permit Appeal. The following language at page 3, under prompt 9, from paragraphs 5 and 6:

(2) Contradiction of Prior Agreements:

The District's inclusion of Rule 415 contradicts prior agreements and the Second Modified Order, which clearly delineated the operational requirements tailored to the Facility's current activities. These agreements were reached after extensive negotiations and should be honored to maintain regulatory consistency and fairness.

. . .

The action threatens to revive disputes that had been resolved through painstaking negotiations and costly proceedings, undermining the progress made.

Statements About a Separate Matter Only Serve to Confuse the Issues and Waste Hearing Board Resources. Especially When They are Taken Out of Context.

13. The following language at page 3, paragraph 3, lines 21 through 25, and page 4, lines 1-2 of the Permit Appeal:

> **II. The Parties and This Hearing Board Carefully Built an Operational and Capital Improvement Package for the Future of the Facility.**
>
> In September 2022, the Hearing Board issued the Facility's first Order for Abatement ("Original Order"), requiring Baker to cease rendering, trap grease processing, and related wastewater processing operations. In April 2023, the Hearing Board modified the Original Order to allow trap grease and related wastewater operations to resume while the parties addressed their ongoing dispute over rendering.

14. The following language at page 4, lines 2 through 5, and footnote 4, lines 24 through 26 of the Permit Appeal:

> At the April 2023 hearing, the Hearing Board noted that trap grease operations are not subject to Rule 415 and that retaining reference to Rule 415 could lead to confusion.4 The Hearing Board issued written findings on the Modified Order on June 21, 2023, allowing Baker to resume trap grease operations and related wastewater processing.
>
> 4 *See, e.g.*, April 19, 2023 Hearing Transcript (attached as Exhibit 3) at 297:2–6 (Mr. Pearman: "The whole point is that if they somehow aren't doing rendering and have that portion modified … then the mere grease operations are not subject to Rule 415. I think that's pretty clear from the rules."); 298:4–8 (Mr. Pearman: "but I think we have to get 415 out. Because it just muddies the water for intentions here.")

15. The following language at page 5, paragraph 2, lines 7 through 12 of the Permit Appeal:

On April 17, 2024, after reviewing the details in the permit applications and ironing out most, but not all, operational and capital improvement details with the District, Baker petitioned the Hearing Board to modify the Modified Order to allow collection operations consistent with the submitted permit applications and other conditions.7 Despite Baker's agreeing not to resume rendering and the Hearing Board finding trap grease processing not subject to Rule 415 under the Modified Order,

7 *See* Baker's Request to Modify the Modified Order, Case No, 6223-1 (April 17, 2024).

16. The following language at page 8, lines 1 to page 9 line 1, and footnotes15 and 16 lines 23 through 28 of the Permit Appeal:

the Hearing Board already rejected with the Modified Order.

15 *See, e.g*., Exhibit 3 at 309:13–16. (Member Balagopan: "The plain meaning of the rule is very clear, it's plain. In the rule in the staff report, it is plain as can be: Remove trap grease from PR 415, applicability");

16 *See, e.g., id*. at 317:18–19. (Member Balagopan: "So the trap grease operation is being – does not have to comply with 415"); 309:20–310:6. (Member Balagopan: "What the District chose to do in the opening statement is . . .referred to the . . . 415 staff report and as Exhibit 21 that Baker understood the trap grease was subject to 415. That was based on early on discussion in the rule in the proposed rule making. But as you can see in table P-1, the summary of changes, that was discarded. But the District has been disingenuous in saying hey, look. This is what they had submitted and they knew this. I think it's misleading. This in my mind is really straightforward").

17. The following language at page 11, footnote 21 lines 26 through 27 of the Permit Appeal:

21 *See e.g.*, Exhibit 3 at p. 316:20–317:5 (Member Balagopan: "I'm not sure why the District in there brought up the definition of 'rendering' and food and agriculture code . . . they looked at the definition, they health and food grease and the rendering. But that would have affected all the other non-rendering facilities. So the District chose to change the definition and exclude that in its definition of 'rendering'").

18. Exhibit 3 April 19, 2023 Hearing Transcript of the Permit Appeal.

19. Exhibit 4 May 29, 2024 Hearing Transcript of the Permit Appeal.

***An Applicant's Business Decisions are Not Evaluated as Part of the Permit Review Process.***

20. The following language at page 4, lines 6 through 10 of the Permit Appeal:

Following extensive discussions about how best to serve the community and retain its employees, Baker later determined not to resume rendering at the Facility. To avoid shuttering its business and terminating all employees, and because California's need for rendering services is essential, substantial, and remains unmet, Baker proposed instead to begin collection operations after significant capital and operational improvements to the Facility. To implement the proposal,…

# ATTACHMENT C

49 Cal.App.5th 618
Court of Appeal, First District, Division 2, California.

VALERO REFINING COMPANY – CALIFORNIA, Plaintiff and Respondent,
v.
BAY AREA AIR QUALITY MANAGEMENT DISTRICT HEARING BOARD et al., Defendants and Appellants.

A151004
|
Filed 5/27/2020

**Synopsis**

**Background:** Oil refinery filed petition for writ of administrative mandamus challenging denial by regional air quality management district of its request to bank emissions reductions resulting from facility upgrades as environmental credits. The Superior Court, San Francisco County, No. CPF-15514407, Harold Kahn, J., granted writ to set aside air district hearing board's decision. Air district appealed.

**Holdings:** The Court of Appeal, Stewart, J., held that:

as a matter of first impression, trial court's mailing of notice of judgment to counsel's former address did not trigger deadline for bringing appeal;

hearing board was not authorized to review whether applying regulations to oil refinery would be fundamentally fair; and

hearing board properly applied procedural rule governing scope of review of air pollution control officer (APCO) decision.

Reversed.

**Procedural Posture(s):** On Appeal; Review of Administrative Decision; Petition for Writ of Mandate.

****888** San Francisco County Superior Court, Hon. Harold E. Kahn, Judge (San Francisco County Super. Ct. No. CPF-15514407)

**Attorneys and Law Firms**

Brian C. Bunger, San Francisco, Alexander G. Crockett for Defendants and Appellants.

Xavier Becerra, Attorney General, Robert W. Byrne, Assistant Attorney General, Annadel A. Almendras, Connie P. Sung, Ryan R. Hoffman, Deputy Attorneys General for California Air Resources Board, as Amicus Curiae on behalf of Defendants and Appellants.

Bayron Gilchrist, Barbara Baird, Mary J. Reichert, San Francisco, for South Coast Air Quality Management District, as Amicus Curiae on behalf of Defendants and Appellants.

Pillsbury Winthrop Shaw Pittman, Ronald E. Van Buskirk, San Francisco, John T. Hansen, Michael S. McDonough, Los Angeles, Stacey C. Wright, San Francisco, for Plaintiff and Respondent.

**Opinion**

STEWART, J.

***624** An oil refinery, respondent Valero Refining Company California (Valero), undertook a costly, three-year construction project both to comply with a consent decree it entered into with the federal government and to upgrade portions of its facility. The project resulted in a significant reduction in air pollution, and after constructing it Valero sought approval from the regional air quality management district to bank the resulting emissions reductions as valuable environmental credits. It was denied a significant portion of the requested credits—first by the agency official charged with deciding the issue, and then by the hearing board to which it appealed. In this administrative mandamus action, it asked the superior court to set aside the hearing board's decision. The superior court did so, remanded the case back to the hearing board for reconsideration, and the air district has appealed.

The sole issue raised in this appeal concerns the standard of review that the air district's hearing board must apply when reviewing the agency official's decision denying approval of such emission reduction credits. Here, the agency official charged with considering the refinery's banking application in the first instance denied the credits in question because, applying a local air district regulation that prescribes the methodology for measuring emissions reductions, the official calculated a significantly lower reduction in air pollution than the refinery calculated. The refinery then appealed the official's decision to the hearing board, which upheld the official's interpretation of the regulation and on that basis declined to disturb the official's decision. The superior court ruled the hearing board did not apply the correct standard of review in deciding the refinery's appeal, because the hearing board erroneously declined to consider evidence that denial of the refinery's banking application was "unfair" under the circumstances.

We hold the air district hearing board's standard of review neither requires nor empowers it to consider whether applying the regulation to the particular case before it is in some broad sense fair, but instead is limited to a quasi-judicial inquiry entailing the exercise of its independent judgment to decide if the agency official's interpretation of that regulation was correct. ****889** The hearing board could, and did, appropriately consider Valero's evidence regarding the fairness of applying the regulation to Valero, but in another context: in addressing Valero's claim that the air district was equitably estopped from applying it here. The superior court erred in construing the ***625** hearing board's standard of review to permit, and indeed require, the hearing board to consider some other, more amorphous concept of "fairness." Accordingly, we reverse and remand the case to the trial court to address the issues it did not reach, which we will not decide in the first instance on appeal.

## BACKGROUND

### A. The Regulatory Framework

In California, regulatory oversight over sources of air pollution is divided between the State Air Resources Board which has exclusive control over emissions from motor vehicles, and 35 local and regional air quality management districts (air districts) which have primary responsibility for the control of air pollution from all other sources. (See Health & Saf. Code, [1] §§ 39002, 39003, 39500, 40000; *Friends of Outlet Creek v. Mendocino County Air Quality Management Dist* (2017) 11 Cal. App. 5th 1235, 1239, fn. 4, 218 Cal.Rptr.3d 212.) This case, involving emissions from an oil refinery, concerns the scope of regulatory powers and duties at the air district level.

"Subject to the powers and duties of the state board," air districts are empowered to "adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction, and shall enforce all applicable provisions of state and federal law." (§ 40001, subd. (a).)

  

The regulatory powers and duties of air districts are carried out at three levels. Each air district has a governing board, composed of locally elected officials, which adopts substantive rules and regulations through a public hearing process. (See §§ 40704.5, 40725, subd. (a), 40726.) The governing board also appoints an air pollution control officer for the district, commonly referred to in regulatory parlance as the "APCO." (§ 40750.) The APCO possesses broad enforcement authority, with responsibility for enforcing "[a]ll orders, regulations, and rules prescribed by the district board." (§ 40752.) The governing board also appoints a five-member hearing board, comprised of two members of the public and three professionals (one lawyer, one engineer and one medical expert with specialty in environmental medicine or related fields). [2] (§§ 40800, 40801.) The hearing board serves a hybrid function; it sits in a reviewing capacity in some types of cases (permit disputes (see §§ 42302.1 [issuance], 42302 [denial], 42306 [suspension], 42307 [revocation]) and appeals of emissions reduction credit banking decisions (§ 40713)) and it presides over other types of matters directly in the first ***626** instance, in a nonreviewing capacity (see §§ 42350, subd. (a) [variance applications], 42451, subd. (a) [abatement proceedings]). It is empowered to hold public hearings (§ 40808), subpoena witnesses (§ 40840) and "adopt rules for the conduct of its hearings" (§ 40807). Its decisions may be judicially reviewed by petition for a writ of mandate under Code of Civil Procedure section 1094.5. (§ 40864.)

Section 40709 requires each air district to adopt regulations establishing an air ****890** pollution emission offset system. (See § 40709.) Broadly described, an offset system enables owners of pollution sources who voluntarily reduce their air pollution emissions below the levels required by law to receive emission reduction credits (ERC), certified by the air district, that can be banked for future use or sold to other emission sources for profit. (*Elk Hills Power, LLC v. Board of Equalization* (2013) 57 Cal.4th 593, 603, 160 Cal.Rptr.3d 387, 304 P.3d 1052.) [3] Approval of emissions reductions through an offset system results in the issuance of a certificate evidencing the ownership of all approved reductions. (§ 40710.) Each air district offset system is subject to disapproval by the state board within 60 days of adoption. (§ 40709, subd. (a).)

The Legislature has prescribed two levels of agency action for regulatory approval of ERCs. Under section 40709, the initial decision rests with the APCO. (See § 40709, subd. (a) [emission reductions "shall be registered, certified, or otherwise approved by the district air pollution control officer before they may be banked"].) Pursuant to section 40713, if the APCO refuses to register, certify or otherwise approve an application for emission reductions under section 40709, the applicant may seek review of that decision by the district hearing board, which must hold a hearing to decide "whether the application was properly refused." (§ 40713.)

The underlying dispute here arose under regulations promulgated by the Bay Area Air Quality Management District (the air district) concerning the banking of ERCs, which we summarize briefly for context. The air district's regulations state that emissions reductions calculated in accordance with its ***627** specified methodology qualify as "emission reduction credit" if they exceed the reductions required by law, rule, regulation or the district's clean air plan. The regulations also specify that the reductions must be "real, permanent, quantifiable, and enforceable." Subject to exceptions not pertinent here, ERCs are then "bankable," meaning they can be deposited into the air district's "emissions bank."

The air district's regulations require an application to deposit an emission reduction in the district's emissions bank, on forms specified by the APCO. However, the regulations prohibit the submission of a banking application for pollutant sources that are subject to an abatement order or other similar formal order "until compliance with the emissions limitations which are the subject of the ... order is achieved."

The dispute in this case turned on the meaning of regulation 2-2-605.1, which specifies one aspect of the methodology for calculating ECMs. That regulation mandates the use of a "baseline period" to calculate emissions reductions that "consists of the 3 year period immediately preceding *the date that the* ****891** *application is complete*." [4] (Italics added.) The baseline period reflects the "before" input in what is essentially a "before and after" calculation mandated by the air district's regulations. In dispute here was the meaning of the phrase "the application." We will elaborate further below.

**B. These Proceedings**

**1. The Construction Project**

In 2005, Valero entered into a consent decree with the United States Environmental Protection Agency to settle litigation charging it with violations of the Clean Air Act. The consent decree required Valero to take certain steps to reduce air pollution emissions at its refinery in Benicia, California, including installing some new equipment (a "scrubber," to scrub one type of pollutant from its fluid coker).

At issue here are reductions in air pollution that resulted from a project that included both the equipment necessary to enable compliance with the consent decree and additional upgrades Valero decided to undertake voluntarily at the same time. As described by Valero, the project "was an integrated project" that included decommissioning two furnaces and their associated equipment and replacing them with two more efficient furnaces, a set of modern catalytic ***628** reduction beds and two flue gas scrubbers. According to Valero, about $500 million of its $750 million total outlay for the project was spent to achieve emissions reductions beyond those required by the consent decree. Valero opted to undertake greater than required improvements in order to modernize its refinery, expand its processing capability and make significant emissions reductions that it could use in the future.

In April 2008, Valero filed a permit application with the air district requesting authority to construct these improvements. [5] Under the air district's "New Source Review" regulations (Regulation 2, Rule 2), the purpose of that permit review process was to ensure that certain new or modified sources of air pollution would achieve no net increase in emissions. (See § 40919, subd. (a)(2).)

Valero's permit application expressly anticipated seeking approval of credit for the resulting emissions reductions. Its permit application (in section 7.0, entitled "Banking Credits") stated that the project would result in a reduction in emissions and that "Valero will submit an application to bank ERCs from these reductions under separate cover." The air district deemed the permit application to be complete on May 16, 2008. Subsequently, on December 15, 2008, the authority-to-construct permit issued.

On December 31, 2010, after two years of construction, Valero permanently shut down the two older furnaces, and about two months later, on February 23, 2011, the two new furnaces began operating. Over the next several months, Valero underwent mandatory emissions testing of the new equipment so the district could verify it complied with all permit limitations. ****892** The testing was completed and certified in September 2011.

**2. The APCO's Decision on Valero's Banking Application**

In order to satisfy the air district's requirement that emissions reductions be "real, permanent, verifiable and enforceable" to qualify as an ERC, Valero believed it could not submit a banking application until the old furnaces had been permanently shut down, the new ones had been built and tested and Valero had modified its federal operating permit. [6]

After the improvement project was operational, Valero submitted an application (in Mar 2012) to bank the resulting emissions reductions. In its ***629** banking application, Valero calculated its emissions reductions using the same baseline period it had used in its permit application: a three-year period ending in March 2008 (*before* it had performed the refinery upgrades), the date corresponding with its permit application. [7]

The air district had instructed Valero to use this baseline period in its permit application, [8] and it also was the same baseline period the air district used in engineering evaluations of the project it prepared in connection with Valero's permit application.

  

The engineering evaluations had stated, "The baseline emissions shall be calculated in accordance with Regulation 2-2-605 [Basis: Banking]," which Valero had taken to mean that the same baseline period would be used to bank its emission reductions. The engineering evaluations also contained statements that led Valero to believe it could not submit a banking application until the project had been completed, [9] which was consistent with the district's regulation (2-4-401) that prohibits the submission of a banking application for pollutants that are the subject of a formal order such as the consent decree until after the emission limitations required by the order are achieved.

In November 2014, after lengthy wrangling with Valero, the APCO issued a final decision authorizing the banking of a significantly lower number of ERCs than Valero sought. Interpreting regulation 2-2-605.1 to require the use of a three-year baseline period ending on the date Valero's *banking application* was deemed complete (May 15, 2012), the APCO measured the reductions against a more recent baseline period (May 2009 to May 2012) than the period in Valero's banking application (Apr 2005 to Mar 2008). The more recent baseline period included the period after Valero had shut down its existing furnaces but not yet brought the new ones online (i.e., when no emissions were generated), and extended into the postproject period when its emissions were lower than ****893** they had been prior to construction of the project. In all, Valero argued that the more recent baseline period captured about 18 months of postchange emissions rather than reflecting three full years of pre-change emissions. As a result, Valero argued, this baseline period was not representative of Valero's prechange emissions, it understated the true level ***630** of emissions reductions Valero had achieved and using it to calculate Valero's emissions reductions for purposes of the banking application reduced the amount of ERCs Valero could receive.

### 3. Valero's Appeal to the Hearing Board

Valero appealed to the hearing board, and the matter proceeded to a five-day hearing at which both parties submitted prehearing briefs, presented evidence and argued.

Rule 3.6 of the hearing board rules (Rule 3.6) sets forth the board's standard of review, and the scope of this rule is the central issue in this appeal. It states: "The traditional legal presumption is one of the correctness of a regulatory agency's action. California Evidence Code Section 664 ('It is presumed that official duty has been regularly performed'). The Board may not readily substitute its judgment for that of the District's expertise. The Board's role is to determine whether the APCO's interpretation of the applicable legal requirements in its action is fair and reasonable and consistent with other actions of the APCO and whether the APCO followed proper and appropriate procedures and guidelines. The burden of proof in an appeal is on the party challenging the APCO's action or finding. California Evidence Code Section 660. [¶] The scope of the Hearing Board's review is deference to the District's determination with the burden on the Appellant(s) to show the District's action was erroneous. Specifically, it is the Board's task to determine whether the agency's interpretation of its duty was reasonable and if its performance of that duty was regularly performed." (Rule 3.6.)

Valero argued the APCO's use of a baseline period ending on the completeness date of the banking application, rather than a preproject baseline ending in March 2008, was legally erroneous. It argued that the "application" date as used in regulation 2-2-605.1 meant the completion date for the application that made the emissions reductions *enforceable*: either the application seeking an authority-to-construct permit in cases (like this one) that required such a permit, and in all other cases (such as emissions reductions resulting only from a shutdown of equipment), the banking application itself.

Valero also asserted in its reply brief before the hearing board that, under the circumstances, the air district should be equitably estopped from using the banking application completeness date to set the baseline period. Specifically, it argued that the district "should not be permitted to assert a different position on the baseline [period] than the one it [applied to Valero's permit application] in part because Valero detrimentally relied on the District's statements and actions ...."

The APCO argued that the "application" date used in regulation 2-2-605.1 meant only the banking application and not some other one. It argued that the ***631** "declining baseline" that results when an applicant delays submitting its banking application

was adopted by design " 'to encourage applicants to complete their applications in a timely manner,' " and that the history of the current version of the rule reflected that intention. It also argued the plain language of the regulation supported its interpretation and the district's treatment of prior applications interpreted the regulation ****894** consistently to have the same meaning it was applying to Valero.

The APCO also addressed Valero's estoppel argument, both contending that it was not timely made and therefore was waived and opposing it on the merits. Valero responded to that procedural objection by invoking Rule 3.6 and contending the estoppel arguments in its reply brief were the same arguments it had previously advanced in its prehearing briefing about the hearing board's standard of review, just reframed.

After the five-day evidentiary hearing concluded, the hearing board by a divided 3-2 vote upheld the APCO's interpretation of the banking regulation and dismissed Valero's appeal. Applying Rule 3.6 in a 10-page written ruling, the hearing board concluded that "the APCO's interpretation of Regulation 2-2-605.1, and its application of that provision in this particular case, was fair and reasonable and consistent with other actions of the ACPO" and that the APCO "applied this interpretation fairly and consistently to Valero in the same manner as it has applied to other similarly-situated applicants seeking to bank emission reduction credits under similar circumstances." It reached this conclusion principally by examining the regulation's language, its regulatory context, evidence from various sources of the air district's intent and two prior instances in which the district had applied the regulation similarly.

The hearing board also rejected Valero's equitable estoppel theory. It did so principally on factual grounds, finding there was nothing in Valero's permit application, the engineering evaluations, the permit, its banking application or the banking decision itself that was "inconsistent with the APCO's position that the baseline period for the banking application is based on the date of the banking application itself." It rejected Valero's theory that Valero had relied on assurances by air district staff that the same baseline period would be used for both the permit application and the later banking application, observing that there was no evidence that Valero ever confirmed such an understanding in writing. "Furthermore," it stated, "the position of an individual Air District staff member does not bind the agency as a whole, especially in cases where such a position was not reflected in the actual permitting documents that District staff prepared, and where it was not the position that the APCO took in approving the ... permit application or banking application." It concluded that Valero had "not demonstrated that the APCO ever took an inconsistent position that would justify a conclusion that the APCO's position in this matter was unreasonable or otherwise improper."

***632** The hearing board was not entirely unsympathetic to Valero, however. It concluded its ruling with advisory suggestions "encourag[ing]" the air district both to "reconsider the fairness of denying banking credits under these circumstances" and to "make its interpretation of the baseline rules clear to the public and to regulated entities that may be affected by it." Quite presciently anticipating these proceedings, it also encouraged the parties to engage in settlement discussions.

#### 4. The Superior Court's Ruling

Valero then filed a petition for writ of mandate pursuant to Code of Civil Procedure section 1094.5 against the hearing board, the air district and the air district's APCO, Jack Broadbent (collectively, the "air district parties"). The first cause of action alleged the hearing board did not proceed in the manner required by law with respect to the proper standard of review. The second cause of action alleged ****895** the hearing board's ruling was not supported by the findings. And the third cause of action alleged the hearing board's findings were not supported by substantial evidence.

The superior court (the Hon. Harold E. Kahn) issued a writ of mandate, vacating the board's decision and remanding the matter for a new hearing. It ruled that the hearing board had prejudicially abused its discretion by not applying the correct standard of review under Rule 3.6. Specifically, it concluded that the hearing board had "improperly limited its consideration of Valero's appeal to the sole question of whether the APCO's interpretation of [regulation] 2-2-605.1 was reasonable." The court ruled that, "[r]ead as a whole and within the context of administrative law, Rule 3.6 quite clearly has its origins in and therefore should take

its meaning from the case law on the independent judgment standard of review," observing that the rule "incorporates all aspects of the independent judgment standard," including "the presumption of correctness of the APCO's decision, the exercise of the Board's own judgment not in a way that is in derogation of the presumption of correctness, and the Board's obligation to set aside the APCO's decision when the Board's own judgment shows that the APCO's decision was erroneous." It concluded that the hearing board "erred in determining that Rule 3.6 required it to dismiss Valero's appeal once it determined that the APCO's interpretation of [regulation] 2-2-605.1 was reasonable .... The Board's decision not to consider any of the facts adduced from the evidence received by the Board that persuaded all five members of the Board that the denial of Valero's application was *unfair* to Valero shows that, had the majority properly construed Rule 3.6, there is a significant possibility that one or more of the three persons who voted to dismiss Valero's appeal may have decided the appeal differently." (Italics added.) The superior court appears to have been addressing Valero's first cause of action and not to have reached Valero's second and third causes of action.

***633** This appeal by the air district parties then followed.

## DISCUSSION

### I.

### *Appellate Jurisdiction*

Before turning to the merits of this appeal, we first address whether this appeal was timely filed and conclude that it was.

Under California Rules of Court rule 8.104 (rule 8.104), a 60-day deadline to appeal commences when "the superior court clerk serves on the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, showing the date either was served," assuming (as is true here) that nothing has triggered an even earlier deadline. (Cal. Rules of Court, rule 8.104(a)(1)(A).) In this case, the air district parties filed their notice of appeal more than 60 days after the superior court clerk mailed the parties a file-stamped copy of the appealable judgment accompanied by a proof of service, and so we requested supplemental briefing concerning the appeal's timeliness. [10] (See *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 667, 125 Cal.Rptr. 757, 542 P.2d 1349 [if appeal is untimely " 'the court has no discretion but must dismiss the appeal of its own motion even if no objection ****896** is made' "]; Cal. Rules of Court, rule 8.104(b).)

The supplemental briefing disclosed that the superior court clerk's mailing was sent to an incorrect address. At the air district parties' request, we have taken judicial notice of the notice of change of address their counsel had filed in the superior court several months earlier. As now enlarged by that document, the record thus reveals that the superior clerk mailed the judgment to appellants' counsel's former address of record, not to counsel's current address of record.

Our research has revealed no authority addressing whether a clerk's mailing of notice of entry of judgment to counsel's former rather than current address of record commences the deadline to appeal under rule 8.104, but we have no hesitation concluding it does not.

Under rule 8.104, service "may be by any method permitted by the Code of ***634** Civil Procedure." (Cal. Rules of Court, rule 8.104(a)(2).). Code of Civil Procedure section 1013, which prescribes the requirements for valid mail service, requires papers to be addressed to "the office address *as last given by that person on any document filed in the cause.*" (Italics added.) That was not done here. After a notice of change of address has been filed with the court, as it was here, mail sent to a former address of record does not constitute proper service under section 1013. (See *Lee v. Placer Title Co.* (1994) 28 Cal.App.4th 503, 510, 33 Cal.Rptr.2d 572 [notice of dismissal sent to prior address of record held ineffective]; see also *Gamet v. Blanchard* (2001)

91 Cal.App.4th 1276, 1286, 111 Cal.Rptr.2d 439 [trial court notices sent to address not specified in party's notice of change of address were "faulty" and "inadequate," rendering resulting judgment void].)

Because the clerk's notice of entry of judgment was not properly served, it did not satisfy rule 8.104. "[S]trict compliance" with Code of Civil Procedure section 1013 is required (*Valley Vista Land Co. v. Nipomo Water & Sewer Co.* (1967) 255 Cal.App.2d 172, 174, 63 Cal.Rptr. 78), and therefore "[n]otice of an appealable judgment or order mailed to an incorrect address is not sufficient to constitute legal notice" for purposes of calculating the deadline to appeal. (*Moghaddam v. Bone* (2006) 142 Cal.App.4th 283, 288, 47 Cal.Rptr.3d 602 [notice of entry of judgment addressed with wrong zip code held ineffective]; see also *Triumph Precision Products, Inc. v. Insurance Co. v. Insurance Co. of North America* (1979) 91 Cal.App.3d 362, 365, 154 Cal.Rptr. 120 [notice of entry of judgment listing correct street address for appellant's counsel but omitting law firm name]; *Valley Vista Land Co.*, at pp. 173–174, 63 Cal.Rptr. 78 [notice of entry of judgment with incorrect street address].)

Citing dicta that notice of entry of judgment mailed to an incorrect address would trigger the 60-day deadline to appeal upon "proof notice was actually received" (*Moghaddam v. Bone*, *supra*, 142 Cal.App.4th at p. 288, 47 Cal.Rptr.3d 602 [construing Cal. Rules of Court, former rule 2]), Valero urges us to deem this appeal untimely because appellants *did* receive the clerk's mailing, a fact ultimately established by a declaration the air district parties filed with their reply supplemental briefing in order to clarify matters.[11] That ****897** is irrelevant, however. The fact remains that Rules of Court, rule 8.104 was not strictly complied with.

Although in other contexts, technical defects in giving notice are of no consequence where it can be inferred that notice was in fact received (see, ***635** e.g., *In re T.W.* (2011) 197 Cal.App.4th 723, 729-731, 128 Cal.Rptr.3d 373 [ZIP code omitted from notice of writ advisement under Welf. & Inst. Code, § 366.26(*l*)(3)]), actual notice that an appealable judgment has been entered, including by receiving a notice of entry of judgment or a file-stamped copy of the judgment, does not trigger the deadline to appeal when notice of entry of judgment has not been given in accordance with rule 8.104. Even trivial errors in giving notice of entry of judgment, which this was not, cannot be excused.[12] (See *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 903, 55 Cal.Rptr.3d 534, 152 P.3d 1109 ["the older rule that technical defects in a notice of entry of judgment are excusable unless they are so egregious as to preclude actual notice of entry [citation] has not been applied to ... rule 8.104(a)(1) ..."].) Our Supreme Court has made clear that rule 8.104 does not require litigants to "guess, at their peril" whether documents mailed by the court clerk trigger the deadline to appeal. (*Alan*, at p. 905, 55 Cal.Rptr.3d 534, 152 P.3d 1109.) " 'Neither parties nor appellate courts should be required to speculate about jurisdictional time limits.' " (*Ibid.*)

The issue here is one of first impression, but courts have held that other attempts to give notice of the entry of judgment that failed strictly to comply with rule 8.104 were ineffective to trigger the appeal deadline even in situations when the service clearly did result in actual notice to the appealing party of the entry of judgment. We are aware of no case reaching a contrary result. (See *InSyst, Ltd. v. Applied Materials, Inc.* (2009) 170 Cal.App.4th 1129, 88 Cal.Rptr.3d 808 [electronic service of notice that judgment was entered, with instructions and hyperlink to electronic file-stamped copy of judgment held insufficient]; *Citizens for Civic Accountability v. Town of Danville* (2008) 167 Cal.App.4th 1158, 1164, 84 Cal.Rptr.3d 684 [similar]; see also *Thiara v. Pacific Coast Khalsa Diwan Society* (2010) 182 Cal.App.4th 51, 105 Cal.Rptr.3d 333 [judgment mailed with cover letter but no proof of service]; *Keisha W. v. Marvin M.* (2014) 229 Cal.App.4th 581, 585, 177 Cal.Rptr.3d 161 [personal service of restraining order but no evidence it was file-stamped]; *In re Marriage of Lin* (2014) 225 Cal.App.4th 471, 170 Cal.Rptr.3d 34 [appellant personally present in court when restraining order issued, making order legally enforceable, followed by court clerk handing written copy to appellant's counsel].) "Because appellate time limits are jurisdictional and cut off litigants' access to the courts, we strictly construe statutes and rules concerning the time in which to file a notice of appeal.

[Citation.] 'On numerous occasions, California courts have resolved ambiguities concerning appellate jurisdictional time limits to extend, rather than limit, the right to appeal, even where such interpretations may be considered ****898** hypertechnical in other contexts.' " (*Lin*, at p. 474, 170 Cal.Rptr.3d 34.) Simply put, "mere ***636** knowledge" an appealable judgment has been entered is not sufficient to start the 60-day appeal period. (*Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1102, fn. 5, 139 Cal.Rptr.3d 396; see also *Lee v. Placer Title Co.*, *supra*, 28 Cal.App.4th at p. 511, 33 Cal.Rptr.2d 572 [actual notice "does not substitute for compliance with [Code Civ. Proc., §] 1013"].)

Valero also cites authority that "mail sent to a former address is deemed properly served for up to one year after the change of address because postal regulations require the postal service to forward first class mail at no charge during that period" (*Whitehead v. Habig* (2008) 163 Cal.App.4th 896, 903, 77 Cal.Rptr.3d 679), and contends that because the clerk's notice in this case was sent within the one-year mail-forwarding window it should be deemed properly served absent proof it was not received. We do not agree. *Whitehead* is not on point, involved a different issue and opposite facts. It held that defendants who changed addresses but did *not* file a notice of change of address with the court were not denied due process when a notice of the trial date was mailed to their address of record, even though it was no longer their current address. (See *ibid.*) Unlike here, there was no issue in *Whitehead* about the validity of mail service under Code of Civil Procedure section 1013 much less the timeliness of a notice of appeal; quite sensibly, *Whitehead* simply held the defendants had no due process right to receive notice of the trial date at their new address when they never bothered to change their address of record on file with the court.

Nothing in either *Whitehead* or in postal mail forwarding regulations persuades us to interpret rule 8.104 in a manner that "would create a trap for the unwary." (*Citizens for Civic Accountability v. Town of Danville*, *supra*, 167 Cal.App.4th at p. 1164, 84 Cal.Rptr.3d 684.) The rule "must be strictly construed to preserve the right to appeal when possible without doing violence to the language of the rule." (*Id.* at pp. 1163-1164, 84 Cal.Rptr.3d 684.) Strict construction allows no room to depart from the requirement, incorporated by rule 8.104(a)(2) (service by any method "permitted by the Code of Civil Procedure"), that mail service be accomplished by addressing a notice of entry of judgment to "the office address as last given by that person on any document filed in the cause" (Code Civ. Proc., § 1013, subd. (a)). That was not done here.

The air district parties filed their notice of appeal within 60 days of the date that Valero's counsel served them with a (properly addressed) notice of entry of judgment. Accordingly, their appeal is timely. (See Cal. Rules of Court, rule 8.104(a)(1)(B).)

## ***637 II.**

### *The Hearing Board Applied the Correct Standard of Review.*

The legal issue we are asked to decide in connection with the air district's banking decision is very narrow, and so we begin by clarifying what is not at issue. We are not asked to decide whether the air district should be *estopped* from using an emissions baseline period ending on the date of Valero's banking application, a theory Valero advanced before the hearing board but did not raise in the first cause of action of its petition for writ of mandate in the superior court and does not raise here. We also are not asked to decide whether the APCO and the hearing board *correctly interpreted* the air district's banking regulation to require the use of that emissions baseline period rather than the (more favorable) ****899** baseline period Valero used in its permit application. The merits of that issue were not before the superior court in Valero's first cause of action and are not before us now. [13] The sole legal question we are asked to decide is whether the hearing board applied the proper standard of review in deciding Valero's appeal. That is all.

  

We review this legal question de novo. In reviewing an agency's decision on a question of law " ' "the trial and appellate courts perform essentially the same function, and the conclusions of the trial court are not conclusive on appeal." ' " (*Duncan v. Department of Personnel Administration* (2000) 77 Cal.App.4th 1166, 1174, 92 Cal.Rptr.2d 257.)

The air district parties argue that the hearing board correctly interpreted and applied its standard of review, and therefore the superior court erred in vacating the hearing board's decision and directing it to reconsider Valero's appeal. They, along with several amici who have submitted briefs in support of their position, [14] assert that Rule 3.6 requires the board to determine *only* whether the APCO's decision was correct as a matter of law and does not empower the board to depart from the law based on board members' individual views as to whether applying the regulation in the circumstances before it is substantively fair. The air district parties also assert, secondly, that the board engaged in exactly the inquiry required by Rule 3.6 and the superior court erred in concluding otherwise.

***638** Valero, on the other hand, contends Rule 3.6 "goes beyond requiring simply a check on the 'legal correctness' of APCO regulatory interpretations" and, instead, broadly empowers the hearing board to "go[ ] beyond the bare interpretation of the regulations at issue" and consider " 'basic principles of fundamental fairness' " in deciding an appeal. It says that "Rule 3.6 specifies a multi-faceted standard of review under which both facts and law—and not just mere interpretation of regulations—may be important in determining whether a banking application was 'properly refused' by the APCO." Indeed, although Valero's appellate briefing is somewhat opaque about the contours of what Rule 3.6 supposedly entails, and it backpedals in its response to amicus curiae briefing (inconsistently), [15] it was quite clear in its briefing before the hearing board. There, Valero expressly conflated the standard of review required by Rule 3.6 with the principles of equitable estoppel, telling the hearing board there was in fact no difference ("they are the same arguments—indeed, the same issues"). Here, since the board members expressed concerns about the substantive fairness of the outcome—and indeed, in advisory comments, ****900** even encouraged the APCO to "reconsider the fairness of denying banking credits under these circumstances"—Valero says that the board prejudicially misconstrued its standard of review and it urges us to affirm the superior court's ruling. Second, and relatedly, Valero also faults the hearing board for considering only whether the APCO's interpretation was "reasonable" and nothing more.

We agree with the air district parties.

**A. The Hearing Board Is Not Empowered To Review the APCO's Decision for "Fundamental Fairness."**

We start with the general principle that the hearing board was required to exercise its independent judgment in deciding Valero's appeal. It could not blindly ratify the APCO's decision but, rather, was required to decide the merits of the issues for itself. On appeal, this basic proposition does not appear to be in contention. The superior court concluded that the hearing board's standard of review encompassed the obligation to exercise independent judgment; Valero argues the trial court "properly recognized that Rule 3.6 effectively restates the independent standard of review"; and the air district parties embrace this understanding of the hearing board's standard of review as well. They argue the hearing board properly "applied its own ***639** independent judgment," and equate the board's standard of review with the principles of judicial review prescribed in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 78 Cal.Rptr.2d 1, 960 P.2d 1031 (*Yamaha*). Under *Yamaha*, our Supreme Court's seminal decision establishing the framework for assessing the amount of judicial deference an administrative interpretation is entitled to by the courts, " 'The standard for judicial review of agency interpretation of law is *the independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action.' " (*Id.* at p. 8, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) Moreover, our independent research has revealed cases in which an independent review standard has been held applicable to administrative entities acting in a reviewing capacity that, like the hearing board, have the power to take evidence, hear from witnesses, entertain argument and render a decision. (See *Quintanar v. County of Riverside* (2014) 230 Cal.App.4th 1226, 1233-1235, 179 Cal.Rptr.3d 82 (*Quintanar*) [hearing officer presiding over appeal of employee disciplinary proceeding pursuant to county collective bargaining agreement required

to exercise independent judgment regarding appropriate discipline]; *Kolender v. San Diego County Civil Service Com.* (2005) 132 Cal.App.4th 1150, 1157, 34 Cal.Rptr.3d 209 [county civil service commission must "independently review the facts and law" in appeal from disciplinary order]; accord, *Lopez v. Imperial County Sheriff's Office* (2008) 165 Cal.App.4th 1, 5, 80 Cal.Rptr.3d 557 [county appeals board presiding over appeal of employee termination].) "In any review process, a provision that the reviewer must hold a full evidentiary hearing tends to show that the reviewer is supposed to exercise independent judgment; this is true regardless of whether the review process is contractual or statutory. Likewise, a provision, whether contractual or statutory, that a reviewer can 'modify' a decision tends to show that the reviewer is supposed to exercise independent judgment." [16] (*Quintanar*, at p. 1235, 179 Cal.Rptr.3d 82.) There is no reason to conclude the district's enactment of Rule 3.6 ****901** was intended to circumscribe the board's review powers more narrowly. And, as said, no party contends otherwise. [17]

***640** Contrary to the trial court's ruling, however, the hearing board's exercise of independent judgment under Rule 3.6 does not encompass a broader inquiry than simply determining whether the APCO's interpretation and application of the applicable regulations was correct as a matter of law. It does not allow (much less require) the hearing board to decline to apply the regulations if, in the hearing board's view, applying them in the case before it would be "unfair." [18] The trial court erred in holding otherwise.

First, no statute authorizes the district to promulgate a regulation empowering its hearing board to engage in such an expansive and amorphous "fairness" inquiry. (See *PaintCare v. Mortensen* (2015) 233 Cal.App.4th 1292, 1305, 183 Cal.Rptr.3d 451 ["An administrative agency 'has only as much rulemaking power as is invested in it by statute' "]; *Friends of the Kings River v. County of Fresno* (2014) 232 Cal.App.4th 105, 117, 181 Cal.Rptr.3d 250 [similar].) The Legislature has specified that *the APCO* is legally required to follow the law, i.e., to enforce "[a]ll orders, regulations, and rules prescribed by the district boards" (§ 40752), and in the banking context in particular, section 40713 requires the hearing board to determine only whether the APCO "properly refused" a banking application. [19] It follows that the hearing board is charged with deciding only whether the APCO "properly" enforced the district's orders, regulations and rules on the subject. Nothing more. (See *Industrial Indemnity Co. v. City and County of San Francisco* (1990) 218 Cal.App.3d 999, 1009, 267 Cal.Rptr. 445 ["A court must construe an administrative regulation in light of the enabling statute's intent"].) Valero asserts that "[i]t makes no sense to equate 'properly refused' with 'legally correct.' " But that rather astonishing position makes no sense. Indeed, elsewhere in its briefing Valero says the opposite, acknowledging that the statutory "properly refused" standard entails reviewing for legal *error*. [20]

****902** We also recognize, of course, the hearing board is authorized to "adopt rules for the conduct of its hearings" (§ 40807), but the fact " '[t]hat an agency has been granted *some* authority to act within a given area does not mean that it enjoys *plenary* authority to act in that area.' " ( ***641** *Friends of the Kings River v. County of Fresno*, *supra*, 232 Cal.App.4th at p. 117, 181 Cal.Rptr.3d 250.) That limited grant of *procedural* power (governing the "conduct" of hearings), cannot reasonably be construed as a grant of *substantive* authority to disregard duly enacted administrative regulations. Not even Valero seriously points to section 40807 as a source of legislative authority for the expansive interpretation of Rule 3.6 it advocates. [21]

Second, nothing in the plain language of Rule 3.6 itself suggests the hearing board is to engage in anything other than a traditional quasi-judicial administrative review exercise. The rule states that the hearing board's "role" is "to determine whether the APCO's interpretation of the applicable legal requirements in its action is fair and reasonable and consistent with other actions of the APCO" and "to determine whether the agency's interpretation of its duty was reasonable," while also incorporating the presumption of correctness, commanding "deference" to the District's decision, and providing that the hearing board "may not readily substitute its judgment for that of the District's expertise."

Valero places great reliance on the rule's mention of "fair and reasonable," but that language does not support its expansive interpretation of Rule 3.6. The rule expressly says the relevant question is whether the APCO's "*interpretation* of the applicable *legal requirements* of the law is "fair and reasonable," not whether *applying* that law is fair in the particular case. This language

does nothing more than reflect fundamental principles of constitutional, statutory and regulatory construction, using terminology regularly employed by both the United States Supreme Court and our Supreme Court. (See, e.g., *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, fn. 4, 108 S.Ct. 2687, 101 L.Ed.2d 702 [constitutional provision should not be given " 'a crabbed interpretation that robs [it] of its full, fair and reasonable meaning' "]; *People v. Freeman* (1988) 46 Cal.3d 419, 425, 250 Cal.Rptr. 598, 758 P.2d 1128 [statute will be construed in a manner that is constitutional where it is capable of such meaning " 'by fair and reasonable interpretation' "]; *Bank of America etc. Assn.* (1937) 9 Cal.2d 46, 52, 69 P.2d 839 [statutes must be "reasonably and fairly interpreted ... so as to give effect, if possible, to the expressed intent of the legislature"]; *State Farm Mutual Automobile Ins. Co. v. Quackenbush* (1999) 77 Cal.App.4th 65, 79, 91 Cal.Rptr.2d 381 [interpreting insurance regulations based on "a fair reading of the regulations as a whole"].) Likewise, Rule 3.6's directive to consider whether the APCO's interpretation of the law is "consistent with other actions ***642** of the APCO" simply reflects one factor under the *Yamaha* framework for assessing the amount of deference to give an agency's interpretation of law. The reviewing tribunal considers ****903** whether "the agency 'has consistently maintained the interpretation in question, especially if [it] is long-standing,' " because " '[a] vacillating position ... is entitled to no deference.' " (*Yamaha*, *supra*, 19 Cal.4th at p. 13, 78 Cal.Rptr.2d 1, 960 P.2d 1031.)

We also find support for the air district parties' construction of Rule 3.6 in the academic commentary. Both parties cite a law review article authored by Santa Clara University Law Professor Kenneth Manaster, who served as chairman of this very hearing board for more than 10 years (1978-1989) and represented Valero in this case. (Manaster, *Fairness In The Air: California's Air Pollution Hearing Boards* (2006) 24 UCLA J. Envtl. L. & Pol'y 1, 1, fn. *.) Professor Manaster describes the standard of review governing air district hearing boards in language that virtually mirrors the text of Rule 3.6, with no mention of a duty to consider whether applying the law in any given case would be "fair" but, on the contrary, making clear that a hearing board's duty is solely to ascertain whether district staff properly followed the law. According to Professor Manaster: "[T]he inquiry ... should be *whether the district staff has made a fair, reasonable interpretation of the applicable legal requirements* in its action .... The hearing board's usual function should be to determine *whether the staff view in the permit dispute* [22] *falls within a sensible application of the language and purpose of the pertinent regulations or other requirements*. [¶] This perspective is consistent with the traditional legal presumption of the regularity and correctness of administrative action. This presumption means that the burden of proof in a permit dispute should be on the party challenging the district staff's action or finding. It also means that the hearing board should not lightly disagree with the staff's determinations. *A hearing board in permit cases is operating analogously to the role of an appellate court reviewing administrative agency action*. This is in contrast to the board's function in variance or abatement cases, where the better analogy is the work of trial courts determining matters in the first instance. In short, the hearing board should not substitute its judgment in permit cases for that of the expert, full-time staff of the [Air Pollution Control District]. [¶] This does not mean, of course, that this oversight and review function of the hearing board should be forfeited through automatic, uninformed deference to the staff." (Manaster, 24 UCLA J. Envtl. L. & Pol'y at pp. 80–81, italics added, fns. omitted.) Professor Manaster's views are at odds with Valero's assertion that the hearing board is *not* "like any reviewing tribunal" subject to " 'familiar judicial principles' " that "apply to reviewing *courts* evaluating agency interpretations," and Valero's view that Rule 3.6 does *not* "limit[ ] the Board ***643** to a regulatory interpretation exercise to determine whether the APCO properly effectuated the intent of the Board of Directors in adopting the regulations."

Finally, both the air district parties and the amici curiae caution that upholding the expansive construction of Rule 3.6 that Valero urges would cause great regulatory uncertainty. As the state Air Resources Board puts it, "If hearing boards, exercising independent judgment, could reverse an APCO's action, even after determining that the APCO applied a reasonable legal construction in conformance with procedural requirements, they could functionally repeal or amend air districts' technical permit regulations on a case-by-case basis. That is not the role of hearing boards, ****904** which do not enact substantive regulations and are not charged to enforce them. [23] A broad expansion of the hearing board's scope of review, sought by Valero and sanctioned by the Superior Court, would destabilize public health controls by frustrating the public rulemaking process and engendering regulatory uncertainty." Such an approach would threaten to decrease transparency in decisionmaking, it tells us,

decrease the ability of third parties to rely on APCO decisions, and ultimately impede the stateAir Resources Board itself from fulfilling its statutory mandate to coordinate statewide pollution control activities.

Administrative review depends no less on proper adherence to the law than does judicial review. *Courts* cannot refuse to follow the law " 'simply because we disagree with the wisdom of the law or because we believe that there is a fairer method for dealing with the problem.' " (*San Diego County Water Authority v. Metropolitan Water Dist.* (2004) 117 Cal.App.4th 13, 28, 11 Cal.Rptr.3d 446.) As this court has recognized, proper interpretation of the law might produce results that are "uneven, perhaps even unfair," but that does not empower courts to declare the result unlawful. (*Service Employees Internat. Union, Local 1000 v. Brown* (2011) 197 Cal.App.4th 252, 275, 128 Cal.Rptr.3d 711.) "The wisdom and expediency of the choices made by the political branches are not subject to judicial recalibration." (*Ibid.*) The same is true of the hearing board carrying out its statutory mandate to review whether the APCO's decision was "properly refused" under regulations duly promulgated by the air district.

That said, the hearing board did consider Valero's "fairness" evidence, and addressed it in a context that was appropriate, namely, in evaluating Valero's equitable estoppel claim. (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 402-404, 261 Cal.Rptr. 310, 777 P.2d 83 [largely factual claims of estoppel should be heard first in administrative hearing despite absence of ***644** specific statutory authorization for such defense].) As the parties recognized in their prehearing briefs, equitable estoppel is an established doctrine with well-defined elements, including intentional or negligent inducement of reliance and actual reliance. The APCO disputed both of these elements, and as we have already discussed, the hearing board rejected Valero's estoppel argument on several grounds, in effect finding no acts or statements by the APCO that were intended to or negligently caused Valero's reliance. In the first cause of action in its writ petition, Valero did not challenge the hearing board's factual determinations, and the issue of whether those findings have the requisite support therefore is not before us. In any event, we reject the trial court's suggestion that the hearing board chose not to consider Valero's evidence at all and its conclusion that the hearing board should have determined whether that evidence violated some nebulous concept of fairness untethered from equitable estoppel.

**B. The Hearing Board Properly Applied Rule 3.6.**

Although the principal focus of the parties' briefing, as well as the amicus curiae briefing, is on the foregoing fairness issue, the superior court also misconstrued the hearing board's decision as more deferential than it in fact was, and on appeal Valero does too. As the air district parties argue, the hearing board did not solely ****905** consider whether the APCO's interpretation of the banking regulation was reasonable. Rather, it acknowledged and applied the very standard that Rule 3.6 required: namely, "whether the APCO's interpretation of the applicable legal requirements in its action is fair and reasonable and consistent with other actions of the APCO." There is simply no other way to read the board's decision. [24]

First, the hearing board quoted Rule 3.6 and said that it had "applied this standard in reaching its decision in this matter." Next, it found that "[t]he APCO's interpretation of Regulation 2-2-605.1, and its application of that provision in this particular case, was fair and reasonable and consistent with other actions of the APCO. The APCO's interpretation of Regulation 2-2-605.1 was reasonable, and the APCO applied this interpretation fairly and consistently to Valero in the same manner as it has applied it to other similarly-situated applicants seeking to bank emission reduction credits under ***645** similar circumstances." It then spent three pages explaining its reasons, which were based upon: (1) the language of the regulation, (2) its regulatory context, (3) evidence of the district's regulatory intent contained in a staff report issued when the regulation was adopted, (4) a prior version of the regulation, and (5) the board's factual finding that the district had applied the regulation the same way to two similarly situated applicants in the past. The board then concluded: "The Hearing Board therefore finds that the APCO's interpretation of Regulation 2-2-605.1, and its application of Regulation 2-2-605.1 to Valero's banking application in this case, *was fair, reasonable, and consistent with other actions of the APCO*, for all of the reasons outlined above." (Italics added.)

**C. Conclusion**

Because the hearing board applied the correct standard of review, the superior court erred in granting a writ of mandate on Valero's first cause of action. The air district parties also ask us to exercise our discretion to dismiss the other two claims

Valero asserted in its writ petition that the superior court did not reach. But the air district parties have briefed these issues in a conclusory manner that does not facilitate meaningful appellate review, the superior court did not address these other claims which were clearly mooted by its ruling on the first cause of action, and we believe it should decide those causes of action in the first instance.

## DISPOSITION

The judgment is reversed. Appellants shall recover their costs.

Kline, P. J., and Richman, J., concurred.

**All Citations**

49 Cal.App.5th 618, 262 Cal.Rptr.3d 885, 20 Cal. Daily Op. Serv. 4971, 2020 Daily Journal D.A.R. 5152

## Footnotes

1 Unless otherwise noted, all further statutory references are to the Health and Safety Code.

2 No officer or employee of the district may sit on the hearing board. (§ 40803.)

3 Specifically, section 40709 provides that every air district board "shall establish by regulation a system by which all reductions in the emission of air contaminants that are to be used to offset certain future increases in the emission of air contaminants shall be banked prior to use to offset future increases in emissions." (§ 40709, subd. (a).) The intent of the system is to "provide a mechanism for districts to recognize the existence of reductions of air contaminants that can be used as offsets, and to provide greater certainty that the offsets shall be available for emitting industries." (*Id*., subd. (b).) Substantively, it specifies that "[t]he system shall provide that only those reductions in the emission of air contaminants that are not otherwise required by any federal, state, or district law, rule, order, permit, or regulation" are eligible for being banked and used to offset future increases in air pollution emissions. (*Id*., subd. (a).)

4 In full, regulation 2-2-605.1 states: "The baseline period consists of the 3 year period immediately preceding the date that the application is complete (or shorter period if the source is less than 3 years old). The applicant must have sufficient verifiable records of the source's operation to substantiate the emission rate and throughput during the entire baseline period."

5 Technically, the furnace upgrades were addressed in a separate written amendment to the April 2008 permit application filed several months later, in December 2008. No party ascribes any significance to that fact, however, and in their briefing both parties treat the permit application as having been filed in April 2008. We will do the same.

6 Valero obtained an amended federal operating permit in December 2010.

7 Although Valero submitted its permit application in April 2008, and the application was deemed complete in May, March was the last month for which it had a complete set of emissions data to calculate its projected emissions reductions for the application.

8 Valero's permit application had originally proposed an even earlier baseline period.

  

9 For example, the evaluation stated that "Valero may bank any allowable excess of emissions reductions, in accordance with Regulation 2, Rule 4, after the project is built and the actual equipment has shut down." A district employee testified this statement meant only that a banking *certificate* could not issue until after the equipment had been shut down but did not mean Valero could not have submitted a banking *application* with its [New Source Review] permit application. The engineering evaluation also said that reductions "shall be eligible for banking after being demonstrated by source-testing or other means acceptable to the APCO."

10 Contrary to the suggestion by the air district parties, the appealable judgment was the court's order granting a writ of mandate, not a "judgment" that it subsequently entered. (See *Molloy v. Vu* (2019) 42 Cal.App.5th 746, 753, fn. 6, 255 Cal.Rptr.3d 679.)

11 Before they did so, Valero filed a request asking us to take judicial notice of email correspondence between counsel corroborating the fact that appellants' counsel possessed a file-stamped copy of the judgment. We now deny that request, both because such materials are not a proper subject of judicial notice and they are irrelevant in light of the air district parties' acknowledgement they did receive the clerk's notice. We also deny the air district parties' request to take judicial notice of the materials that their counsel did, in fact, receive because the fact of receipt is established by their counsel's declaration.

12 Notice mailed to an address that is not an attorney's address of record is not a trivial, technical misstep. We are dealing here not with a misspelling, a wrong name or a missing ZIP Code but, rather, a totally incorrect address as reflected in the trial court's records.

13 We express no opinion whether these merits issues are encompassed by either of the two remaining causes of action that were mooted by the superior court's ruling. The parties are free to address the scope of those two other claims on remand.

14 There are two amicus curiae briefs, one submitted by the state Air Resources Board and the other by four regional air quality and air pollution control districts (South Coast, Sacramento, San Joaquin and Monterey Bay).

15 In that filing, Valero asserts repeatedly that "fairness" pertains only to the proper *interpretation* of the applicable regulations, arguing for example that "the Hearing Board was entitled under Rule 3.6 to address the competing interpretations and to adopt the one that avoided (rather than caused) manifest injustice." On the other hand, it also asserts repeatedly in that filing that "Rule 3.6 plainly goes beyond requiring simply a check on the 'legal correctness' of APCO regulatory interpretations," and gives the hearing board "wide latitude to fashion an appropriate remedy."

16 The hearing board's rules specify it may do this.

17 Although the cases we located in our independent research held that little or no deference was owed in the circumstances presented there (see *Quintanar*, *supra*, 230 Cal.App.4th at p. 1235, 179 Cal.Rptr.3d 82 ["Based on the wording chosen by the parties to the [memorandum of understanding], we conclude that the Department gave up any requirement that the hearing officer defer to its discretion"]; *Kolender v. San Diego County Civil Service Com.*, *supra*, 132 Cal.App.4th at p. 1157, 34 Cal.Rptr.3d 209 [sheriff's decision was "not due substantial deference"]), none involved an agency's interpretation of its own regulation, nor a rule specifying a particular standard of review such as Rule 3.6 expressly requiring "deference to the agency's determination." Here, although Valero appears to blow hot and cold on the subject, ultimately we understand all parties to agree that Rule 3.6 incorporates the principles of judicial review expressed in *Yamaha* and its progeny. The parties have not specified how those factors would apply here, however, and we are not asked to decide that issue.

18 The parties disagree as to how much deference *we* must give the *hearing board's* interpretation of its own standard of review embodied in Rule 3.6, but it is unnecessary to decide that issue because we readily agree with the board's interpretation even if we give it no deference.

19 The Legislature has utilized similar language to describe the scope of other types of appeals before the hearing board. (See §§ 42302 [whether permit "was properly denied"], 42302.1 [whether permit "was properly issued"], 42306 [whether permit "was properly suspended"].)

20 Valero points out in its respondent's brief that Rule 3.6 expressly requires the hearing board to "determine whether 'the District's action was erroneous' " which Valero says "echoe[s] the statutory requirement" under section 40713 "that the Board determine 'whether the application was properly refused.' "

21 Apart from a generalized string citation, Valero cites section 40807 in one sentence of its response to amicus curiae briefing where it asserts, without discussion or analysis: "The Code allows all air district hearing boards discretion to carry out their statutory review authorities by adopting their own rules for hearing administrative appeals of banking decisions and other determinations by air district staff. *See* [Health & Saf. Code,] § 40807."

22 The author characterizes ERC banking applications as a type of "permit dispute." (See Manaster, 24 UCLA J. Envtl. L. & Pol'y, at p. 79.)

23 As we have discussed, it is the air district's *governing* board, acting in a quasi-legislative capacity, that adopts substantive rules and regulations. (See p. 625, *ante*.)

24 Although both parties quote liberally from comments by individual board members at the hearing, we review only the hearing board's written ruling. Oral comments or statements made during deliberations cannot be used to impeach the board's final decision. (See, e.g., *Key v. Tyler* (2019) 34 Cal.App.5th 505, 539, fn.16, 246 Cal.Rptr.3d 224 [court's comments from the bench "were not final findings and cannot impeach the court's subsequent written ruling"]; *Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 300-301, 128 Cal.Rptr.3d 772 ["we disregard the trial court's tentative ruling and the comments the court made [at the hearing], and consider only the trial court's final order on the motion"].)

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 2. Of Civil Actions (Refs & Annos)
Title 6. Of the Pleadings in Civil Actions
Chapter 4. Motion to Strike (Refs & Annos)

West's Ann.Cal.C.C.P. § 436

# § 436. Discretion of court to strike pleadings or portions of pleadings

Currentness

The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper:

(a) Strike out any irrelevant, false, or improper matter inserted in any pleading.

(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.

**Credits**
(Added by Stats.1982, c. 704, p. 2857, § 3.5. Amended by Stats.1983, c. 1167, p. 2857, § 4.)

Notes of Decisions (210)

West's Ann. Cal. C.C.P. § 436, CA CIV PRO § 436
Current with Ch. 1 of 2023-24 2nd Ex.Sess, and all laws through Ch. 1017 of 2024 Reg.Sess.

**End of Document**

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 2. Of Civil Actions (Refs & Annos)
Title 6. Of the Pleadings in Civil Actions
Chapter 3. Objections to Pleadings; Denials and Defenses (Refs & Annos)
Article 2. Denials and Defenses (Refs & Annos)

West's Ann.Cal.C.C.P. § 431.10

# § 431.10. Material and immaterial allegations defined

Currentness

(a) A material allegation in a pleading is one essential to the claim or defense and which could not be stricken from the pleading without leaving it insufficient as to that claim or defense.

(b) An immaterial allegation in a pleading is any of the following:

(1) An allegation that is not essential to the statement of a claim or defense.

(2) An allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense.

(3) A demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint.

(c) An "immaterial allegation" means "irrelevant matter" as that term is used in Section 436.

**Credits**

(Added by Stats.1971, c. 244, p. 384, § 29, operative July 1, 1972. Amended by Stats.1982, c. 704, p. 2857, § 2; Stats.1983, c. 1167, § 3; Stats.1986, c. 540, § 2.)

**Editors' Notes**

**LAW REVISION COMMISSION COMMENTS**

1971 Addition

Section 431.10 continues without substantive change the provisions of former Code of Civil Procedure Section 463.

Notes of Decisions (13)

West's Ann. Cal. C.C.P. § 431.10, CA CIV PRO § 431.10
Current with Ch. 1 of 2023-24 2nd Ex.Sess, and all laws through Ch. 1017 of 2024 Reg.Sess.

  

End of Document

West's Ann.Cal.Health & Safety Code § 42451

# § 42451. Hearing board; authority; notice and hearing; stipulations

Currentness

(a) On its own motion, or upon the motion of the district board or the air pollution control officer, the hearing board may, after notice and a hearing, issue an order for abatement whenever it finds that any person is constructing or operating any article, machine, equipment, or other contrivance without a permit required by this part, or is in violation of Section 41700 or 41701 or of any order, rule, or regulation prohibiting or limiting the discharge of air contaminants into the air.

(b) As an alternative to subdivision (a), the hearing board may issue an order for abatement pursuant to the stipulation of the air pollution control officer and the person or persons accused of constructing or operating any article, machine, equipment, or other contrivance without a permit required by this part, or of violating Section 41700 or 41701, or any order, rule, or regulation prohibiting or limiting the discharge of air contaminants into the air, upon the terms and conditions set forth in the stipulation, without making the finding required under subdivision (a). The hearing board shall, however, include a written explanation of its action in the order for abatement.

**Credits**

(Added by Stats.1975, c. 957, p. 2188, § 12. Amended by Stats.1986, c. 147, § 1; Stats.1988, c. 183, § 2.)

West's Ann. Cal. Health & Safety Code § 42451, CA HLTH & S § 42451
Current with Ch. 1 of 2023-24 2nd Ex.Sess, and all laws through Ch. 1017 of 2024 Reg.Sess.

**End of Document**

West's Annotated California Codes
Health and Safety Code (Refs & Annos)
Division 26. Air Resources (Refs & Annos)
Part 4. Nonvehicular Air Pollution Control (Refs & Annos)
Chapter 4. Enforcement (Refs & Annos)
Article 1. Permits (Refs & Annos)

West's Ann.Cal.Health & Safety Code § 42301

# § 42301. Requirements of permit system

Currentness

A permit system established pursuant to Section 42300 shall do all of the following:

(a) Ensure that the article, machine, equipment, or contrivance for which the permit was issued does not prevent or interfere with the attainment or maintenance of any applicable air quality standard.

(b) Prohibit the issuance of a permit unless the air pollution control officer is satisfied, on the basis of criteria adopted by the district board, that the article, machine, equipment, or contrivance will comply with all of the following:

(1) All applicable orders, rules, and regulations of the district and of the state board.

(2) All applicable provisions of this division.

(c) Prohibit the issuance of a permit to a Title V source if the Administrator of the Environmental Protection Agency objects to its issuance in a timely manner as provided in Title V. This subdivision is not intended to provide any authority to the Environmental Protection Agency to object to the issuance of a permit other than that authority expressly granted by Title V.

(d) Provide that the air pollution control officer may issue to a Title V source a permit to operate or use if the owner or operator of the Title V source presents a variance exempting the owner or operator from Section 41701, any rule or regulation of the district, or any permit condition imposed pursuant to this section, or presents an abatement order that has the effect of a variance and that meets all of the requirements of this part pertaining to variances, and the requirements for the issuance of permits to operate are otherwise satisfied. The issuance of any variance or abatement order is a matter of state law and procedure only and does not amend a Title V permit in any way. Those terms and conditions of any variance or abatement order that prescribe a compliance schedule may be incorporated into the permit consistent with Title V and this division.

(e) Require, upon annual renewal, that each permit be reviewed to determine that the permit conditions are adequate to ensure compliance with, and the enforceability of, district rules and regulations applicable to the article, machine, equipment, or contrivance for which the permit was issued which were in effect at the time the permit was issued or modified, or which have subsequently been adopted and made retroactively applicable to an existing article, machine, equipment, or contrivance, by the

  

district board and, if the permit conditions are not consistent, require that the permit be revised to specify the permit conditions in accordance with all applicable rules and regulations.

(f) Provide for the reissuance or transfer of a permit to a new owner or operator of an article, machine, equipment, or contrivance. An application for transfer of ownership only, or change in operator only, of any article, machine, equipment, or contrivance which had a valid permit to operate within the two-year period immediately preceding the application is a temporary permit to operate. Issuance of the final permit to operate shall be conditional upon a determination by the district that the criteria specified in subdivisions (b) and (e) are met, if the permit was not surrendered as a condition to receiving emission reduction credits pursuant to banking or permitting rules of the district. However, under no circumstances shall the criteria specify that a change of ownership or operator alone is a basis for requiring more stringent emission controls or operating conditions than would otherwise apply to the article, machine, equipment, or contrivance.

**Credits**

(Added by Stats.1975, c. 957, p. 2183, § 12. Amended by Stats.1983, c. 506, § 1; Stats.1988, c. 1568, § 27; Stats.1993, c. 1166 (A.B.2288), § 7; Stats.1994, c. 727 (A.B.3119), § 5.)

West's Ann. Cal. Health & Safety Code § 42301, CA HLTH & S § 42301
Current with Ch. 1 of 2023-24 2nd Ex.Sess, and all laws through Ch. 1017 of 2024 Reg.Sess.

**End of Document**

West's Ann.Cal.Health & Safety Code § 42452

§ 42452. Nature of order; conditions

Currentness

The order for abatement shall be framed in the manner of a writ of injunction requiring the respondent to refrain from a particular act. The order may be conditional and require a respondent to refrain from a particular act unless certain conditions are met. The order shall not have the effect of permitting a variance unless all the conditions for a variance, including limitation of time, are met.

**Credits**
(Added by Stats.1975, c. 957, p. 2189, § 12.)

West's Ann. Cal. Health & Safety Code § 42452, CA HLTH & S § 42452
Current with Ch. 1 of 2023-24 2nd Ex.Sess, and all laws through Ch. 1017 of 2024 Reg.Sess.

**End of Document**

34 Cal.App.5th 505
Court of Appeal, Second District, Division 2, California.

Sarah Plott KEY, Plaintiff and Appellant,
v.
Elizabeth Plott TYLER et al., Defendants and Respondents.

B283979
|
Filed 4/19/2019
|
As Modified on Denial of Rehearing 5/7/2019

**Synopsis**

**Background:** Trust beneficiary brought petition alleging amendment to trust was the product of undue influence by co-beneficiary and thus invalid. After petition was granted, beneficiary filed petition to enforce trust's no-contest clause against co-beneficiary, alleging co-beneficiary's defense of the invalid trust amendment implicated that clause. The Superior Court, Los Angeles County, No. BP131447, David J. Cowan, J., struck petition based on co-beneficiary's anti-SLAPP motion and denied beneficiary's motion for attorney fees. Beneficiary appealed.

**Holdings:** On denial of rehearing, the Court of Appeal, Lui, P.J., held that:

an action to enforce a no-contest provision of a trust is necessarily based upon writing made before a judicial proceeding and therefore falls within the express statutory definition of conduct that arises from protected petitioning conduct, under step one of analysis of an anti-SLAPP motion;

pleadings amounting to a direct contest to the validity of a trust, to which a no-contest clause may apply, are not limited to an action that a beneficiary initiates;

litigation privilege does not apply to actions to enforce no-contest clauses;

in an action to enforce a trust's no-contest clause, plaintiff has the burden of proof to show that defendant brought her contest of the trust without probable cause;

issues that were actually litigated and that supported probate court's decision invalidating trust amendment could have preclusive effect on co-beneficiary's ability to deny her exercise of undue influence;

prior probate court order finding amendment invalid was sufficient to support prima facie showing on beneficiary's claim for purposes of anti-SLAPP analysis; and

no-contest clause's provision for expenses encompassed litigation expenses, including attorney fees.

Reversed and remanded with directions.

**Procedural Posture(s):** On Appeal; Motion to Strike All or Part of a Pleading; Motion for Attorney's Fees.

****228** APPEAL from orders of the Superior Court of Los Angeles County. David J. Cowan, Judge. Reversed and remanded with directions. (Los Angeles County Super. Ct. No. BP131447)

**Attorneys and Law Firms**

Grignon Law Firm, Margaret M. Grignon, Long Beach, Anne M. Grignon; Wershow & Cole and Jonathan A. Wershow, Encino, for Plaintiff and Appellant.

Magee & Adler, Eric R. Adler, Long Beach; Murphy Rosen and Paul D. Murphy for Defendant and Respondent Elizabeth Plott Tyler.

Silas Isadore Harrington, Escondido; Williams Iagmin and Jon R. Williams, San Diego, for Defendant and Respondent Jennifer Plott Potz.

**Opinion**

LUI, P. J.

***509** Sarah Plott Key (Key) appeals from orders of the probate court (1) striking her petition to enforce a no contest clause in a trust under the "anti-SLAPP" statute ****229** (Code Civ. Proc., § 425.16) [1] and (2) denying her motion to recover her attorney fees incurred in defending an earlier unsuccessful appeal filed by respondent Elizabeth Plott Tyler (Tyler). Key and Tyler are sisters and, along with the third sister, respondent Jennifer Plott Potz (Potz), are beneficiaries of a family trust (Trust) that their parents first created in 1999. Tyler was the trustee.

The Trust was purportedly amended in 2007 (2007 Amendment), substantially changing the beneficiaries' rights and effectively disinheriting Key. Key filed a petition in 2011 (Invalidity Petition) seeking a ruling that the 2007 Amendment was a product of undue influence by Tyler. The probate court granted that petition, and this court affirmed that ruling in a nonpublished opinion. (*Key v. Tyler* (June 27, 2016, mod. June 29, 2016, B258055) (*Key v. Tyler I*).)

Following remand, Key filed a petition to enforce the Trust's no contest clause against Tyler (No Contest Petition), claiming that Tyler's judicial defense of the invalid 2007 Amendment implicated that clause. Citing the same section of the Trust that contains the no contest clause, Key also sought an award of her attorney fees on appeal, which she claimed she incurred while resisting Tyler's attack on the original Trust provisions.

Tyler responded with an anti-SLAPP motion. Tyler argued that Key's No Contest Petition arose from Tyler's protected litigation conduct under Code of Civil Procedure section 425.16, subdivision (e)(3), and that Key could not ***510** show a likelihood of success on her No Contest Petition for a variety of reasons, including that Key, not Tyler, had initiated the proceedings challenging the validity of the 2007 Amendment. Tyler also opposed Key's request for attorney fees.

The probate court granted Tyler's anti-SLAPP motion and denied Key's motion for attorney fees. The court rejected Key's argument that the anti-SLAPP statute does not apply to petitions to enforce no contest provisions in probate court. The court also found that Key failed to show a probability of success on her No Contest Petition because Tyler's defense against the Invalidity Petition that *Key* filed was not an enforceable "direct contest" of the Trust. (Prob. Code, § 21311.) [2] With respect to the request for attorney fees, the court ruled that Key had failed to identify any statutory or equitable basis for the request.

We reverse both orders. We agree with the probate court (and with a recent decision by Div. Five of this district) that the anti-SLAPP statute applies to a petition such as Key's seeking to enforce a no contest clause. However, we conclude that Key

adequately demonstrated a likelihood of success under the second step of the anti-SLAPP procedure. Tyler's judicial defense of the 2007 Amendment that she procured through undue influence meets the Trust's definition of a contest that triggered the no contest clause. And, under sections 21310 and 21311, that clause is enforceable against Tyler because the pleadings that Tyler filed defending the 2007 Amendment constituted a "direct contest" of the Trust provisions that the amendment purported to alter. (§ 21310, subd. (b)(5).) Key also provided sufficient evidence that Tyler lacked probable cause ****230** to defend the 2007 Amendment. (§ 21311, subd. (a)(1).) The findings of the probate court concerning Tyler's undue influence, which this court affirmed, provide a sufficient basis to conclude that Key has shown a probability of success on her No Contest Petition.

The same section of the Trust that contains the no contest clause also provides that expenses to resist any "contest" or "attack" on a Trust provision shall be paid from the Trust estate. We conclude that this section provides Key with the contractual right to seek reimbursement of her attorney fees incurred in resisting Tyler's appeal of the probate court's ruling invalidating the 2007 Amendment. We therefore reverse the probate court's rulings and remand for the court to determine Key's reasonable attorney fees and for further proceedings on Key's No Contest Petition.

## ***511 BACKGROUND**

### 1. Facts Concerning Tyler's Undue Influence [3]

Tyler, Key, and Potz are the daughters of Thomas and Elizabeth Plott, who owned a successful family nursing home business. Thomas and Elizabeth created the Trust in 1999 and amended it in 2002 and 2003. Thomas died in 2003. (*Key v. Tyler I, supra*, B258055.)

The Trust provided that, upon the death of the first spouse, the estate would be divided into three separate subtrusts: the survivor's trust; the marital trust; and the exemption trust. The marital trust and the exemption trust became irrevocable upon the first spouse's death, but the survivor's trust was revocable. The assets allocated to the three trusts were required to be equivalent. As of January 2006, the Trust's assets were worth over $ 72 million. [4] (*Key v. Tyler I, supra*, B258055.)

Article Fourteen (Article 14) of the Trust contains a "Disinheritance and No Contest Clause" (No Contest Clause). That clause provides in pertinent part that, "if any devisee, legatee or beneficiary under this Trust ... directly or indirectly (a) contests either Trustor's Will, this Trust, any other trust created by a Trustor, or in any manner attacks or seeks to impair or invalidate any of their provisions, ... then in that event Trustors specifically disinherit each such person, and all such legacies, bequests, devises, and interest given under this Trust to that person shall be forfeited as though he or she had predeceased the Trustors without issue, and shall augment proportionately the shares of the Trust Estate passing under this Trust to, or in trust for, such of Trustors' devisees, legatees, and beneficiaries who have not participated in such acts or proceedings."

Following Thomas's death, Tyler, a lawyer, "actively sought to have Mrs. Plott amend the survivor's trust to effectively exclude Key." (*Key v. Tyler I, supra,* B258055.) Tyler was vice-president of operations for the nursing home business and was a principal and founding member of Tyler & Wilson, the law firm that provided legal services to the business. Mrs. Plott depended on Tyler for information related to the business and for legal advice. Mrs. ****231** Plott also was dependent on Tyler to carry on the family business, which Mrs. Plott ***512** considered her legacy. Tyler "exploited her knowledge of the family nursing home business to manipulate Mrs. Plott." (*Ibid.*)

Beginning in late 2006, Tyler actively participated in efforts to procure an amendment to the Trust that made significant changes to the distribution of the survivor's trust. Tyler controlled the communications concerning the amendment between Mrs. Plott and Allan Cutrow, her estate planning lawyer, and with his firm, Mitchell, Silberberg & Knupp (MSK). Tyler was the "gatekeeper between MSK and Mrs. Plott." Cutrow "was told to route all inquiries through Tyler & Wilson and not to contact Mrs. Plott directly." (*Key v. Tyler I, supra,* B258055.) Every meeting that Mrs. Plott attended with MSK concerning the 2007

Amendment was also attended by Tyler or by Tyler's associate. Tyler also "often created time pressure on Mrs. Plott by limiting Ms. Tyler's availability or intentionally shortening the time in which to have meetings, thus putting pressure on decisions to be made by Mrs. Plott."

During the drafting process, Tyler "actively revised" the 2007 Amendment, "directly instructing Mr. Cutrow to include specific language and percentages in the final document." The probate court found that there was "NO evidence that the [2007 Amendment] represents the desires or choices of Mrs. Plott." The court based that conclusion on the totality of the court's findings concerning Tyler's active procurement of the 2007 Amendment, "most importantly the lack of any evidence originating directly from Mrs. Plott without the participation or interference of Ms. Tyler."

The final 2007 Amendment unduly benefited Tyler. As amended in 2003, the Trust provided for an equal division of property between the three daughters. However, the 2007 Amendment replaced the relevant provision of the Trust with a new distribution scheme that gave Tyler 65 percent of the business assets and Potz 35 percent. Key received a lump sum gift of $ 1 million. (*Key v. Tyler I, supra,* B258055.)

The 2007 Amendment also gave Tyler all the contents of Mrs. Plott's residence, replacing a provision that personal property was to be split equally, or in " 'such manner as [the children] shall agree.' " And the 2007 Amendment purportedly forgave a $ 2.5 million debt that Tyler owed to the marital trust, effectively giving Tyler a benefit of $ 1,666,666 and imposing a loss on Key of $ 833,333. (*Key v. Tyler I, supra,* B258055.) The 2007 Amendment included this loan forgiveness provision although Cutrow had told Mrs. Plott that the note was owned one-third by each daughter through the marital trust (which was irrevocable), and therefore could not be forgiven. The probate court found that there was "no competent evidence that Mrs. Plott wanted this term in the 2007 ... Amendment."

***513** Mrs. Plott signed the 2007 Amendment on May 25, 2007. In 2010 she was diagnosed with dementia. She died on June 27, 2011. (*Key v. Tyler I, supra,* B258055.)

**2. Key's Invalidity Petition**

Key filed her Invalidity Petition on November 1, 2011. Tyler opposed the petition. In her capacity as trustee, Tyler filed a response and objections to the Invalidity Petition in which she argued that Mrs. Plott "was not susceptible to any undue influence of others" and that Mrs. Plott's "testamentary wishes were embodied in the 2007 Amendment."

Tyler appeared at the trial on the Invalidity Petition through counsel both individually and in her capacity as trustee. She ****232** filed some pleadings in both capacities. Following a 17-day trial, the probate court issued its 67-page Statement of Decision stating its findings and granting the Invalidity Petition. This court issued its opinion affirming that decision on June 27, 2016. (*Key v. Tyler I, supra,* B258055.)

**3. Tyler's Anti-SLAPP Motion**

Following remand, Key filed her No Contest Petition. Tyler responded with a motion to strike the entire petition under Code of Civil Procedure section 425.16, which the probate court heard on May 16, 2017.

The court ruled that the anti-SLAPP statute applies to actions to enforce a no contest clause. The court recognized that the anti-SLAPP procedure and a no contest enforcement action are in some ways "antithetical to one another." However, the court concluded that Probate Code section 1000 makes the Code of Civil Procedure applicable to probate proceedings unless the Probate Code indicates otherwise, and there is "nothing in the no contest law, which says that it shouldn't be subject to the anti-SLAPP law."

With respect to the second step of the anti-SLAPP procedure, the court found that Key failed to meet her burden to show a probability of success on her No Contest Petition. The court concluded that Key could not enforce the Trust's No Contest Clause under section 21311 because Tyler "did not file a direct contest. Rather, she defended against a petition that Ms. Key filed." The court also found that Key had not shown that Tyler lacked probable cause to defend the 2007 Amendment, as section 21311 requires. The court noted that the prior judge who decided the Invalidity Petition had "indicated that it was a difficult case to decide, which, itself, gives this court, which did ***514** not try the case, some pause as to whether—how much of a slam dunk it was or ... how much the defense was without probable cause." [5]

**4. Key's Motion for Attorney Fees**

Following remand, Key also filed a motion for the attorney fees she incurred in defending Tyler's appeal of the probate court's decision granting her Invalidity Petition. The probate court heard that motion along with the anti-SLAPP motion.

The court denied the motion. The court concluded that Key failed to show a legal basis for a fee award under any of the grounds that she raised, including Probate Code section 17211, subdivision (b); Civil Code section 1717; the "common benefit" theory; the court's inherent power; or Code of Civil Procedure section 128.5. With respect to Civil Code section 1717, which addresses attorney fees authorized by contract, the court acknowledged that "a trust is a kind of contract." However, the court concluded that the pleading on which Key prevailed was "not a breach of contract case. It was a trust case. It was that she exercised—or she could not prove that it was not without undue influence."

## DISCUSSION

**1. The Anti-SLAPP Procedure**

Code of Civil Procedure section 425.16 provides for a "special motion to strike" when a plaintiff asserts claims against a person "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." ****233** (Code Civ. Proc., § 425.16, subd. (b)(1).) Such claims must be stricken "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Ibid.*)

Thus, ruling on an anti-SLAPP motion involves a two-step procedure. First, the "moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396, 205 Cal.Rptr.3d 475, 376 P.3d 604 (*Baral*).) At this stage, the defendant must make a "threshold showing" that the challenged claims arise from protected activity. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056, 39 Cal.Rptr.3d 516, 128 P.3d 713.)

***515** Second, if the defendant makes such a showing, the "burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral*, *supra*, 1 Cal.5th at p. 396, 205 Cal.Rptr.3d 475, 376 P.3d 604.) Without resolving evidentiary conflicts, the court determines "whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment." (*Ibid.*) The plaintiff's showing must be based upon admissible evidence. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212, 12 Cal.Rptr.3d 786.) Thus, the second step of the anti-SLAPP analysis is a "summary-judgment-like procedure at an early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192, 25 Cal.Rptr.3d 298, 106 P.3d 958.) In this step, a plaintiff "need only establish that his or her claim has 'minimal merit' [citation] to avoid being stricken as a

  

SLAPP." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291, 46 Cal.Rptr.3d 638, 139 P.3d 30, quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, 124 Cal.Rptr.2d 530, 52 P.3d 703.)

Code of Civil Procedure section 425.16, subdivision (e) defines the categories of acts that are in " 'furtherance of a person's right of petition or free speech.' " Those categories include "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," and "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (Code Civ. Proc., § 425.16, subd. (e)(1)–(2).) An appellate court reviews the grant or denial of an anti-SLAPP motion under the de novo standard. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067, 217 Cal.Rptr.3d 130, 393 P.3d 905 (*Park*).)

**2. The Enforceability of No Contest Clauses**

Both parties cite to the history of legislation governing no contest clauses for its relationship to the anti-SLAPP statute and for its relevance to determining whether the No Contest Clause is enforceable against Tyler. We therefore briefly describe pertinent portions of that history.

A no contest clause operates as a disinheritance device: " '[I]f a beneficiary contests or seeks to impair or invalidate the trust instrument or its provisions, the beneficiary will be disinherited and thus may not take the gift or devise provided under the instrument.' " (*Donkin v. Donkin* (2013) 58 Cal.4th 412, 422, 165 Cal.Rptr.3d 476, 314 P.3d 780 (*Donkin*), quoting *Burch v. George* (1994) 7 Cal.4th 246, 265, 27 Cal.Rptr.2d 165, 866 P.2d 92.) "Such clauses promote the public policies ****234** of honoring the intent of the donor and discouraging litigation by persons whose expectations are frustrated by the donative scheme of the instrument." (*Donkin,* at p. 422, 165 Cal.Rptr.3d 476, 314 P.3d 780.)

***516** These policies are in tension with the policy interests of "avoiding forfeitures and promoting full access of the courts to all relevant information concerning the validity and effect of a will, trust, or other instrument." (*Donkin, supra,* 58 Cal.4th at p. 422, 165 Cal.Rptr.3d 476, 314 P.3d 780.) The common law of California balanced these interests by permitting the enforcement of no contest clauses so long as they were " 'not prohibited by some law or opposed to public policy.' " (*Ibid.,* quoting *In re Estate of Kitchen* (1923) 192 Cal. 384, 389, 220 P. 301.) Because they cause a forfeiture, such clauses were strictly construed. (*Kitchen,* at pp. 389–390, 220 P. 301.)

The Legislature partially codified the law concerning no contest clauses in 1989. (*Donkin, supra,* 58 Cal.4th at p. 422, 165 Cal.Rptr.3d 476, 314 P.3d 780.) Part of the codification included the establishment of a "safe harbor" declaratory relief procedure. (*Id.* at p. 423, fn. 6, 165 Cal.Rptr.3d 476, 314 P.3d 780.) Using that procedure, a beneficiary could "apply to the court for a determination whether a particular motion, petition, or other act by the beneficiary would be a contest within the terms of a no contest clause." (Former § 21305, subd. (a); Stats. 1989, ch. 544, § 19, p. 1825.) A no contest clause was not enforceable against such an application so long as it "did not require a determination of the merits of the motion, petition, or other act by the beneficiary." (Former § 21305, subd. (b); Stats. 1989, ch. 544, § 19, p. 1825.)

The statutory scheme governing no contest clauses became increasingly complex over the next several decades. (*Donkin, supra,* 58 Cal.4th at pp. 423–424, 165 Cal.Rptr.3d 476, 314 P.3d 780.) The Legislature enacted amendments "specifically identifying various types of claims for which a safe harbor proceeding was expressly available and further identifying specific

types of actions against which a no contest clause was not enforceable." (*Id.* at p. 423, 165 Cal.Rptr.3d 476, 314 P.3d 780.) The complexity led to uncertainty, which also contributed to the number of safe harbor declaratory relief applications. The frequency of such applications "added an additional layer of litigation to probate matters, which undermined the goal of a no contest clause in reducing litigation by beneficiaries." (*Id.* at p. 424, 165 Cal.Rptr.3d 476, 314 P.3d 780.)

In 2008 the Legislature adopted recommendations of the California Law Revision Commission (Commission) by repealing the law on no contest provisions and enacting a new set of statutes. (*Donkin, supra,* 58 Cal.4th at p. 426, 165 Cal.Rptr.3d 476, 314 P.3d 780; Stats. 2008, ch. 174, §§ 1, 2, p. 567.) The new legislation simplified the regulatory regime by more narrowly defining the types of challenges that *could* be subject to a no contest clause, replacing "the existing 'open-ended definition of "contest," combined with a complex and lengthy set of exceptions.' " (*Donkin*, at pp. 425–426, 165 Cal.Rptr.3d 476, 314 P.3d 780, quoting Recommendation: Revision of No Contest Clause Statute (Jan. 2008) 37 Cal. Law Revision Com. Rep. (2007) p. 392 (Commission 2007 Recommendation).) The new statutes precluded the enforcement of no contest clauses against an "indirect" contest (i.e., a contest ***517** that indirectly " 'attacks the validity of an instrument by seeking relief inconsistent with its terms' "). (*Donkin*, at p. 424, 165 Cal.Rptr.3d 476, 314 P.3d 780, quoting *Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 605, 100 Cal.Rptr.3d 622, 217 P.3d 1194; ****235** *Donkin*, at p. 426, 165 Cal.Rptr.3d 476, 314 P.3d 780.) The new legislation also discontinued the safe harbor procedure. (*Donkin,* at p. 427, 165 Cal.Rptr.3d 476, 314 P.3d 780.)

Under current law, a no contest clause is enforceable against a "direct contest that is brought without probable cause." (§ 21311, subd. (a)(1).) Section 21310, subdivision (b) defines a "direct contest." The definition includes a "contest that alleges the invalidity of a protected instrument or one or more of its terms" based upon the "revocation of a trust pursuant to Section 15401." (§ 21310, subd. (b)(5).) "Contest" is defined as "a pleading filed with the court by a beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced." (§ 21310, subd. (a).) A "pleading" is further defined as a "petition, complaint, cross-complaint, objection, answer, response, or claim." (§ 21310, subd. (d).)

**3. The Anti-SLAPP Statute Applies to Key's No Contest Petition**

There is no dispute that Key's No Contest Petition arises from statements made "before a ... judicial proceeding" and "in connection with an issue under consideration or review by a ... judicial body." (Code Civ. Proc., § 425.16, subd. (e)(1)–(2).) Key's No Contest Petition challenges Tyler's judicial defense of the 2007 Amendment against Key's successful effort to obtain a declaration that the amendment was invalid. The No Contest Petition is based on the theory that Tyler's judicial defense of the 2007 Amendment contested the validity of the Trust provisions that the amendment purported to alter, therefore authorizing Tyler's disinheritance under the Trust's No Contest Clause and Probate Code sections 21310 and 21311.

Thus, Key's No Contest Petition challenges Tyler's litigation conduct. That is necessarily so because section 21310 specifically defines a "contest" as a "pleading filed with the court." Unless proceedings to enforce no contest provisions are excluded from the scope of the anti-SLAPP statute, Tyler has met her burden under step one of the anti-SLAPP procedure to show that Key's petition arises from protected conduct.

Key claims that the anti-SLAPP statute does not apply to petitions to enforce no contest clauses because the anti-SLAPP procedure is inconsistent with the probate statutes governing such clauses. Key points out that the purpose of the anti-SLAPP procedure is to weed out meritless claims arising from protected conduct by permitting a challenge to such claims at the beginning of a lawsuit. Such a challenge necessarily involves "an additional layer of litigation, with associated costs and delays." She argues that this ***518** additional litigation is inconsistent with the Legislature's intent to streamline the resolution of no contest petitions by eliminating the safe harbor procedure in the prior law.

Division Five of this district recently rejected a similar argument. In *Urick v. Urick* (2017) 15 Cal.App.5th 1182, 224 Cal.Rptr.3d 125 (*Urick*), the court held that "the plain language of the anti-SLAPP statute applies" to petitions to enforce no contest clauses. (*Id.* at p. 1186, 224 Cal.Rptr.3d 125.) The court concluded that, although "[t]here may be valid reasons to exempt enforcement of no contest clauses from the anti-SLAPP statute," it is for the Legislature to make that decision. (*Id.* at p. 1195, 224 Cal.Rptr.3d 125.)

We agree with the court in *Urick.* Unlike certain other kinds of actions, the anti-SLAPP statutory scheme does not create any exception to the anti-SLAPP procedure for actions to enforce no contest clauses. (See Code Civ. Proc., § 425.17, subds. (b)–(c) [establishing exceptions for ****236** actions brought in the public interest and for certain actions based upon commercial speech].) A judicial challenge to a trust or other protected instrument involves a "writing made before a ... judicial proceeding." (Code Civ. Proc., § 425.16, subd. (e)(1).) An action to enforce a no contest provision is necessarily based upon such conduct, and therefore falls within the express statutory definition of conduct that arises from protected petitioning conduct under step one of the anti-SLAPP procedure.

While Key presents reasonable arguments for why the anti-SLAPP statute should not apply to actions to enforce no contest provisions, those arguments are for the Legislature to consider. Key points out that, based upon the statutory definition of a "contest" as a "pleading," all actions to enforce no contest clauses will necessarily be subject to the anti-SLAPP procedure. While that is so, it is simply another way of saying that all actions to enforce no contest provisions arise from protected petitioning conduct. The protection of such conduct is of course one of the goals of the anti-SLAPP statute, which our Legislature has directed "shall be construed broadly." (Code Civ. Proc., § 425.16, subd. (a).) In light of that legislative directive and the stated purpose of the anti-SLAPP statute, we cannot say that this result is so "absurd" as to be "clearly contrary to the Legislature's intent." (*Urick, supra,* 15 Cal.App.5th at p. 1195, 224 Cal.Rptr.3d 125, quoting *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 136, 119 Cal.Rptr.3d 437, 244 P.3d 1080.)

Our Supreme Court rejected similar arguments in *Jarrow Formulas, Inc. v. La Marche* (2003) 31 Cal.4th 728, 3 Cal.Rptr.3d 636, 74 P.3d 737 (*Jarrow*) in holding that the anti-SLAPP statute applies to malicious prosecution actions. The court recognized that "section 425.16 potentially may apply to every malicious prosecution action, because every such action arises from an ***519** underlying lawsuit, or petition to the judicial branch." (*Id.* at pp. 734–735, 3 Cal.Rptr.3d 636, 74 P.3d 737.) Nevertheless, the court concluded that the " 'plain language of the statute establishes what was intended by the Legislature.' " (*Id.* at p. 735, 3 Cal.Rptr.3d 636, 74 P.3d 737, quoting *People v. Statum* (2002) 28 Cal.4th 682, 690, 122 Cal.Rptr.2d 572, 50 P.3d 355.) The court also noted that giving effect to the plain statutory language "accords with the Legislature's specific decision not to include malicious prosecution claims in the statutory list of actions to which '[t]his section shall not apply.' " (*Jarrow*, at p. 735, 3 Cal.Rptr.3d 636, 74 P.3d 737, quoting Code Civ. Proc., § 425.16, subd. (d).)

Key also argues that the "availability of the anti-SLAPP procedure may result in the filing of non-meritorious contest litigation" because an unsuccessful contestant can use an anti-SLAPP motion to "evade the consequences of a meritless contest." The conclusion is questionable because a meritless contest will still be actionable if there is evidence in the second step of the anti-SLAPP procedure showing that the contestant lacked probable cause to bring the contest. In any event, if the Legislature concludes that the anti-SLAPP procedure tilts the balance involved in the regulation of no contest clauses too far away from "discouraging litigation" and too far toward promoting "full access of the courts to all relevant information," it can change the law. (*Donkin, supra,* 58 Cal.4th at p. 422, 165 Cal.Rptr.3d 476, 314 P.3d 780.)

Key also makes various statutory interpretation arguments that she claims the court in *Urick* did not consider. First, she points out that the court in *Urick* correctly noted that the " 'general rules of the Code of Civil Procedure do not apply when the Probate Code provides special rules.' " ****237** (*Urick, supra,* 15 Cal.App.5th at pp. 1194–1195, 224 Cal.Rptr.3d 125, quoting

*Swaithes v. Superior Court* (1989) 212 Cal.App.3d 1082, 1088–1089, 261 Cal.Rptr. 41; see Prob. Code, § 1000.)[6] She argues that the court in *Urick* incorrectly applied that rule because it mistakenly concluded that "no provision of the Probate Code has been shown to be inconsistent with the anti-SLAPP provisions." (*Urick*, at p. 1195, 224 Cal.Rptr.3d 125.)

Key argues that section 1022 creates such inconsistency. That section provides that "[a]n affidavit or verified petition shall be received as evidence when offered in an uncontested proceeding under this code." Key claims that this provision is inconsistent with the anti-SLAPP statute because, by implication, it precludes the use of affidavits in *contested* proceedings, and ***520** a contested anti-SLAPP motion involves the use of affidavits.[7] We do not find an inconsistency that would preclude the use of the anti-SLAPP procedure in probate matters.

Key cites *Estate of Bennett* (2008) 163 Cal.App.4th 1303, 78 Cal.Rptr.3d 435 (*Bennett*) for the proposition that section 1022 prohibits the use of affidavits for *any* contested motion under the Probate Code. We do not believe the holding in that case stretches that far.

In *Bennett*, the probate court granted a motion to set aside a settlement agreement on the ground that it was the result of fraud and duress and provided inadequate consideration. The court ruled on the parties' declarations, rejecting the respondent's argument that the motion involved " 'factual issues which require determination after [a] full evidentiary hearing during which documentary evidence and testimony will have to be presented.' " (*Bennett, supra,* 163 Cal.App.4th at p. 1307, 78 Cal.Rptr.3d 435.) The appellate court reversed. The court first noted that "[i]t has long been the rule" in probate matters that " 'affidavits may not be used in evidence unless permitted by statute.' " (*Bennett,* at pp. 1308–1309, 78 Cal.Rptr.3d 435, quoting *Estate of Fraysher* (1956) 47 Cal.2d 131, 135.) The court rejected the petitioners' argument that Code of Civil Procedure section 2009 provided authority to decide the motion based upon the declarations, interpreting Probate Code section 1022 to authorize the use of declarations "only in an 'uncontested proceeding.' "[8] (*Bennett*, at p. 1309, 78 Cal.Rptr.3d 435.)

The "contested proceeding" at issue in *Bennett* was a motion in which the *facts asserted in the declarations* were contested. It is logical to conclude that, by authorizing the use of affidavits in "uncontested proceeding[s]," section 1022 is at least impliedly inconsistent with the use of affidavits to decide contested facts. However, the anti-SLAPP procedure does not require—or even permit—a court to decide contested facts based upon affidavits. Rather, like a motion for summary judgment, a motion to strike under the anti-SLAPP statute requires a court simply to determine whether the plaintiff's showing, "if accepted ****238** by the trier of fact," would be sufficient to sustain a favorable judgment. (*Baral, supra,* 1 Cal.5th at p. 396.) Such a decision must be made *without* resolving evidentiary conflicts. (*Ibid.*) Section 1022 does not conflict with the use of affidavits in such a procedure, where the truth of the facts themselves are not contested.

***521** At a minimum, section 1022 is not so clearly inconsistent with the anti-SLAPP procedure that one may infer from that section that the Legislature intended to exclude probate proceedings from the scope of the anti-SLAPP statute. Section 1000 subdivision (a) explains that the rules applicable to civil actions apply to probate proceedings "[e]xcept to the extent that this code provides applicable rules." The Probate Code does not itself provide rules for anything akin to an anti-SLAPP procedure, or indeed any other procedure for a preliminary determination of the strength of a petitioner's case prior to deciding disputed facts. Under section 1000, the absence of such rules in the Probate Code suggests that the anti-SLAPP statute should apply.

This conclusion is consistent with the widespread use of the summary judgment procedure in probate matters. Like the anti-SLAPP statute, the statute governing summary judgment motions specifically provides for the use of affidavits. (See Code Civ. Proc., §§ 425.16, subd. (b)(2), 437c, subd. (b)(1).) And, like the anti-SLAPP statute, the summary judgment statute does not permit the determination of contested facts based upon the affidavits, but allows a motion to be granted only if

  

there is "no triable issue as to any material fact." (Code Civ. Proc., § 437c, subd. (c).) Despite Probate Code section 1022, summary judgment proceedings in probate court are commonplace. (See, e.g., *Estate of Duke* (2015) 61 Cal.4th 871, 877, 190 Cal.Rptr.3d 295, 352 P.3d 863 [appeal from summary judgment in probate court]; *Katzenstein v. Chabad of Poway* (2015) 237 Cal.App.4th 759, 764, 188 Cal.Rptr.3d 461 [probate court denied a motion for summary judgment and granted a motion for summary adjudication]; *Estate of Molino* (2008) 165 Cal.App.4th 913, 921, 81 Cal.Rptr.3d 512 [appeal from a summary judgment entered by the probate court]; *Estate of Myers* (2006) 139 Cal.App.4th 434, 436, 42 Cal.Rptr.3d 753 [same]; *Estate of Coleman* (2005) 129 Cal.App.4th 380, 385, 28 Cal.Rptr.3d 282 [same]; *Estate of Cleveland* (1993) 17 Cal.App.4th 1700, 1703–1704, 22 Cal.Rptr.2d 590 [same]; *Estate of Lane* (1970) 7 Cal.App.3d 402, 404, 86 Cal.Rptr. 620 [same]; see also Ross & Cohen, Cal. Practice Guide: Probate (The Rutter Group 2018) ¶ 15:228, p. 15-102 ["A motion for summary judgment may, in an appropriate case, be particularly attractive to will proponents facing a will contest"].)

Key presents another statutory interpretation argument based upon the wording of the anti-SLAPP statute itself. That statute states that a "cause of action against a *person*" arising from protected conduct is subject to a special motion to strike. (Code Civ. Proc., § 425.16, subd. (b)(1), italics added.) Key argues that this language limits the anti-SLAPP procedure to actions that are in personam in nature, making it inapplicable to actions under the Probate Code, which have the character of in rem proceedings. (See *Estate of Wise* (1949) 34 Cal.2d 376, 385, 210 P.2d 497 [an heirship decree is " 'not against persons as such, but against or upon the thing or subject matter itself' "], quoting 11A Cal.Jur. § 73, p. 135.)

***522** This argument, while intriguing, reads too much into the use of the term "person" in the statute and ultimately is inconsistent with the purpose of the anti-SLAPP procedure. The anti-SLAPP statute itself does not distinguish between in rem and in personam actions. It requires only that a ****239** cause of action against a "person" arise from a protected "act of the person." An action can arise from the personal exercise of a protected constitutional right whether the action is intended to impose damages for an alleged tort or to adjudicate the person's right to property.

Actions to enforce no contest clauses illustrate the point. While such actions determine the right to inherit particular property, by definition they also challenge the exercise of a specific protected constitutional right—the right to petition the government through the courts. Protecting that right from lawsuits that threaten to chill its exercise is of course an expressed purpose of the anti-SLAPP statute. (Code Civ. Proc., § 425.16, subd. (a).) The threat of facing a petition seeking forfeiture of an inheritance is certainly capable of chilling resort to the judicial process; indeed, that is the point of a no contest clause.

Key's argument that the anti-SLAPP statute should not apply to probate proceedings because they are in rem in nature also ignores that actions under the Probate Code can include the prospect of significant personal damages based upon individual conduct. In particular, section 859 permits damages of "twice the value of the property recovered by an action under this part" as well as attorney fees following a finding that a "person" has disposed of a decedent's property "by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse." Such an action seeking individual damages cannot fairly be characterized as anything other than an action "against a person," regardless of whether the underlying probate proceedings are conceptually in rem. (See *Greco v. Greco* (2016) 2 Cal.App.5th 810, 825–826, 206 Cal.Rptr.3d 501 [applying the anti-SLAPP statute to a probate petition that asserted a claim for misrepresentations by a trustee].)

Like the court in *Urick*, we "appreciate the strength of the argument" in favor of exempting actions to enforce no contest provisions from the scope of the anti-SLAPP statute. (*Urick, supra,* 15 Cal.App.5th at p. 1186, 224 Cal.Rptr.3d 125.) However, the decision to create such an exemption involves policy judgments that are the province of the Legislature to make. None of Key's arguments provides a ground to ignore the plain language of the anti-SLAPP statute, which applies by its terms to an action such as this. We therefore conclude that Tyler met her burden under step one of the anti-SLAPP procedure to show that Key's No Contest Petition arises from protected conduct.

  

***523 4. Key Has Sufficiently Shown a Probability of Success Under the Second Step of the Anti-SLAPP Procedure**

Having decided that Tyler has met her burden to show that Key's claim arises from protected conduct, we must determine whether Key has met her burden under step two of the anti-SLAPP procedure to show a probability that she will prevail on her No Contest Petition. We conclude that she has.

Tyler presents a number of legal challenges to the viability of Key's petition. First, Tyler argues that a "direct contest" under section 21310 must involve conduct that *initiates* a judicial action to obtain "affirmative relief." Thus, she claims that her *defense* of the 2007 Amendment against Key's effort to invalidate it was not a direct contest challenging the validity of any Trust provisions. Second, she claims that she filed her pleadings defending the 2007 Amendment in her capacity as a trustee, and her conduct therefore does not meet the statutory definition of a contest as a "pleading filed with the court by a *beneficiary.*" (§ 21310, subd. (a), italics added.) Finally, she claims that her conduct ****240** in defending the 2007 Amendment was protected by the litigation privilege. We reject each of these legal arguments.

We also conclude that Key has provided adequate evidentiary support for the merits of her No Contest Petition. Tyler claims that Key did not support her anti-SLAPP opposition with admissible evidence. However, such evidence exists in the form of the probate court's Statement of Decision and this court's opinion affirming it. The facts established by those decisions are sufficient to show a probability of success on Key's petition.

**A. *Tyler's judicial defense of the 2007 Amendment was a "direct contest" of the Trust provisions that the 2007 Amendment purported to replace.***

Tyler's defense of the 2007 Amendment clearly falls within the scope of the Trust's No Contest Clause. As discussed above, Article 14 of the Trust operates to "specifically disinherit" any "devisee, legatee or beneficiary" who "contests either Trustor's Will, this Trust, any other trust created by a Trustor, or in any manner attacks or seeks to impair or invalidate any of their provisions." By obtaining the 2007 Amendment through undue influence and then defending that amendment in court, Tyler sought to "impair" and "invalidate" the provisions of the original Trust that the 2007 Amendment purported to replace. The No Contest Clause therefore disinherits Tyler if it is enforceable against her.

Under section 21311, the No Contest Clause was enforceable only if Tyler's conduct amounted to a " '[d]irect contest" of the Trust brought ***524** without probable cause. Section 21310 defines a "direct contest" as a contest that "alleges the invalidity of a protected instrument or one or more of its terms" based on certain enumerated grounds, including the "revocation of a trust pursuant to Section 15401."[9] (§ 21310, subd. (b)(5).)

Tyler's defense of the 2007 Amendment, had it been successful, would have had the effect of revoking paragraph C of article four of the Trust, which the 2007 Amendment purported to replace. Although the 2007 Amendment was labeled an amendment, by making that change its effect was to revoke Key's right to inherit 33 1/3 percent of the estate through the residual Trust and to replace it with the right to inherit "the lesser of $ 1,000,000, or 5% of the then Survivor's Trust Estate less any amount owed on any outstanding promissory note in favor of the Surviving Trustor." (See *Key v. Tyler I, supra,* B258055.) The effect of this change is what matters, not the label attached to it. (See *Urick, supra,* 15 Cal.App.5th at pp. 1187, 1197, 224 Cal.Rptr.3d 125 [rejecting the argument that the trustee's petition to "reform the trust" did not seek to invalidate it, and concluding that the effect of her action "controls over the label that she gave to the remedy that she sought"].)

Tyler's pleadings defending the 2007 Amendment by "alleg[ing] the invalidity of a protected instrument" (i.e., the original Trust) therefore met the statutory definition of a direct contest. (§ 21310, subds. (a)–(b).) Nothing in the language of sections 21310 or 21311 suggests that a direct contest is limited to an action that a ****241** beneficiary *initiates.* To the contrary: Pleadings amounting to a "contest" under section 21310 can include responsive pleadings such as a "cross-complaint, objection, answer [or] response." (§ 21310, subd. (d).)

Nor is there any reason to assume that the Legislature intended such a limitation. As Key points out, a trustee does not need judicial assistance to alter the provisions of a trust through deceptive or manipulative conduct, such as a fraudulent revocation or, as here, an amendment obtained through undue influence. Because a trust is designed to be administered by a trustee outside of probate, any judicial contest concerning a trustee's improper attempt to alter the trust will ordinarily be initiated by a beneficiary who is adversely affected by the trustee's conduct. In that case, the trustee's defense of a bogus change presents no less a threat to the settlor's intent for the distribution of his or her property than a judicial contest initiated by a beneficiary who is unhappy with the original trust terms.

***525** This conclusion is also supported by the case law. In *Estate of Gonzalez* (2002) 102 Cal.App.4th 1296, 126 Cal.Rptr.2d 332 (*Gonzalez*), a beneficiary presented a 1998 will for probate that he had obtained from his father through undue influence. The will purported to replace a 1992 will that contained a no contest clause. The appellate court concluded that, by offering the 1998 will to probate, the beneficiary brought a "contest" seeking revocation because "the 1998 will revoked all prior wills, including the 1992 will with the no contest clause." (*Id.* at p. 1303, 126 Cal.Rptr.2d 332.) Similarly, here, Tyler's attempt to enforce the 2007 Amendment that she obtained through undue influence amounted to a direct contest seeking revocation of the pertinent terms in the original Trust. [10]

The court in *Gonzalez* cited *Estate of Bergland* (1919) 180 Cal. 629, 182 P. 277 (*Bergland*). In that case, a beneficiary unwittingly offered a forged will for probate that purported to supersede prior wills, one of which included a no contest clause. The court held that the daughter's attempt in good faith to probate the later will did not fall within the forfeiture clause. (*Id.* at p. 634, 182 P. 277.) However, the court also noted that, "[i]f an attempt were made *knowingly* to probate a spurious will of a later date which purported to distribute the testator's estate in a manner different from that of the genuine will, such an attempt would quite certainly come within the language of the forfeiture clause as an attempt to defeat the provisions of the will." (*Ibid.*, italics added.) [11]

****242** That principle applies here. Tyler defended a spurious Trust amendment in court in an attempt to defeat the provisions of the original Trust. For purposes of enforcing the No Contest Clause, it does not matter that Tyler's attempt to enforce the spurious amendment through judicial proceedings began with a petition filed by Key.

***526 B.** ***Tyler defended the validity of the 2007 Amendment in her capacity as a beneficiary.***

Tyler's argument that she defended the 2007 Amendment only in her capacity as a trustee is contradicted by the record. Tyler submitted various trial pleadings, including her trial brief, "individually" and as the trustee. In addition, following the trial, Tyler submitted a 33-page "Request for Statement of Decision or, Alternatively, Objections to Proposed Statement of Decision." The document was signed by "Attorneys for Respondent Elizabeth Plott Tyler, *as an individual*," as well as by Tyler herself as "successor trustee In Pro Per." (Italics added.) The objections disputed the evidentiary basis for the probate court's undue influence findings by defending the fairness of the 2007 Amendment, attacking the bases for the court's conclusion that Plott was susceptible to undue influence, and defending the propriety of Tyler's conduct.

More fundamentally, under the facts established by the prior trial Tyler's conduct benefited her personally to the detriment of her duties as a trustee. A trustee is obligated to deal impartially with beneficiaries. (§ 16003.) Tyler obtained a trust amendment through undue influence that revoked the bulk of the bequest to one of the beneficiaries—her sister Key. As this court found, the evidence at the trial "supports the trial court's finding that the [2007] Amendment is nothing but [Tyler's] desire to benefit herself." (*Key v. Tyler I, supra,* B258055.) And, as discussed below, the facts established by the prior proceeding are sufficient to support a prima facie case that Tyler defended the 2007 Amendment without probable cause to do so.

It is the effect of Tyler's conduct that establishes whether she defended the 2007 Amendment solely in her capacity as a disinterested trustee, not the titles on the pleadings that she filed. In *Urick,* the court concluded there was prima facie evidence

that the trustee/beneficiary in that case (Dana) filed a reformation petition in her capacity as a beneficiary. The court noted that the "petition was consistent with the interests of Dana as a beneficiary, not with her fiduciary duties as a trustee to the beneficiaries." (*Urick, supra,* 15 Cal.App.5th at p. 1196, 224 Cal.Rptr.3d 125.) Similarly, here, Tyler's defense of the 2007 Amendment was consistent with her own interests as a beneficiary, not with her duty as a trustee to deal impartially with Key. Her pleadings defending the 2007 Amendment therefore were sufficient to trigger enforcement of the No Contest Clause.

**C.** ***The litigation privilege does not apply to actions to enforce no contest provisions.***

Civil Code section 47, subdivision (b) codifies a privilege that applies to a "publication or broadcast" made as part of a "judicial proceeding." (***527** Civ. Code, § 47, subd. (b).) The principle purpose of this litigation privilege is to "afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 213, 266 Cal.Rptr. 638, 786 P.2d 365 (*Silberg*).)

****243** The privilege applies to all tort actions except malicious prosecution. (*Silberg, supra,* 50 Cal.3d at p. 216, 266 Cal.Rptr. 638, 786 P.2d 365.) Malicious prosecution actions are excluded because the " 'policy of encouraging free access to the courts ... is outweighed by the policy of affording redress for individual wrongs when the requirements of favorable termination, lack of probable cause, and malice are satisfied.' " (*Ibid.*, quoting *Albertson v. Raboff* (1956) 46 Cal.2d 375, 382, 295 P.2d 405.)

Key argues that the litigation privilege does not apply to actions to enforce no contest clauses because its application would nullify the statutory scheme permitting such actions. We agree.

Our Supreme Court has held that the litigation privilege does not apply to various proceedings in which its application would make more specific statutes "significantly or wholly inoperable." (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1246, 63 Cal.Rptr.3d 398, 163 P.3d 89.) For example, the privilege does not apply to prosecutions for perjury, subornation of perjury, false report of a criminal offense, and " 'attorney solicitation through the use of "runners" or "cappers." ' " (*Ibid.*) The court has recognized these exceptions because of the " 'rule of statutory construction that particular provisions will prevail over general provisions.' " (*Ibid.,* quoting *In re James M.* (1973) 9 Cal.3d 517, 522, 108 Cal.Rptr. 89, 510 P.2d 33.)

Courts of Appeal have applied the same principle in other contexts where the privilege would abrogate statutes that specifically permit particular claims. In *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 95 Cal.Rptr.3d 880, the court held that the privilege did not apply to actions for violations of the Rosenthal Fair Debt Collection Practices Act (Civ. Code, § 1788 et seq.). (*Komarova*, at p. 330, 95 Cal.Rptr.3d 880.) The court concluded that, by prohibiting particular litigation activity in connection with debt collections, that act was more specific than the litigation privilege, and that applying the privilege would make the act "significantly inoperable." (*Id.* at pp. 339–340, 95 Cal.Rptr.3d 880.)

In *Begier v. Strom* (1996) 46 Cal.App.4th 877, 54 Cal.Rptr.2d 158 (*Begier*), the court applied a similar rationale in holding that the litigation privilege did not apply to making knowingly false police reports of child ***528** abuse. Such reports are covered by a specific statute (Pen. Code, § 11172), which imposes liability for damages caused by submitting knowingly false reports. (*Id.* at p. 884, 54 Cal.Rptr.2d 158.) The court concluded that applying the litigation privilege to that conduct would "essentially nullify the Legislature's determination that liability should attach." (*Begier*, at p. 885, 54 Cal.Rptr.2d 158.)

  

Similarly, here, applying the litigation privilege to actions to enforce no contest provisions would nullify the specific Probate Code statutes governing the enforcement of such provisions. Because section 21310 defines a "contest" as a "pleading," if the litigation privilege applied to actions to enforce no contest clauses the privilege would *always* provide a defense to conduct for which section 21311 would otherwise permit a forfeiture. In this case, the specific statutes in the Probate Code prevail over the litigation privilege to "avoid rendering a statute meaningless and ineffective." (*Begier, supra,* 46 Cal.App.4th at p. 885, 54 Cal.Rptr.2d 158.)

**D.** ***Key provided sufficient evidence showing a probability that her petition will succeed.***

As discussed above, Tyler's pleadings defending the 2007 Amendment constituted ****244** a "direct contest" of the Trust under section 21310, subdivision (b). Under section 21311, subdivision (a), Key will prevail on her petition if Tyler brought the direct contest "without probable cause."

The parties have raised a threshold issue concerning who bears the burden of proof on the issue of probable cause under section 21311. The issue is apparently one of first impression. While the issue is not dispositive on this appeal, it will arise on remand and we therefore consider it.

**i.** ***Key has the burden of proof to show that Tyler lacked probable cause to defend the 2007 Amendment.***

The general rule in a civil action is that a party has the burden of proof "as to each fact essential to his claim for relief." (*Estate of Della Sala* (1999) 73 Cal.App.4th 463, 470, 86 Cal.Rptr.2d 569 (*Della Sala*).) This principle is embodied in Evidence Code section 500, which provides that, "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." The Probate Code does not establish any contrary rule, and Evidence Code section 500 therefore applies to probate actions under Probate Code section 1000. (*Della Sala,* at pp. 469–470, 86 Cal.Rptr.2d 569.)

The language of section 21311 suggests that the absence of probable cause is an essential element of Key's claim. Under ***529** section 21311, subdivision (a), a no contest clause may "*only* be enforced" against three specific categories of contests, including a "direct contest that is brought without probable cause." (§ 21311, subd. (a)(1), italics added.) Thus, the statute requires proof that a particular contest falls within the limited class of contests that the law makes subject to no contest clauses.

This language is inconsistent with Key's argument that probable cause is an affirmative defense because it "is an exception to enforcement of a no contest clause." The Legislature could have used different language establishing a presumption that a direct contest is subject to a no contest clause "except for" a direct contest brought with probable cause. It did not do so. Instead, section 21311, subdivision (a)(1) makes the absence of probable cause a requirement for enforcement.

Placing the burden on the one seeking enforcement of a no contest clause is also consistent with the nature of the relief the moving party is requesting. The party attempting to enforce a no contest clause seeks forfeiture of a bequest that the decedent otherwise intended for the person who allegedly violated the clause. The "public policy to avoid a forfeiture" underlies the requirement that a no contest clause be strictly construed. (See § 21312; Commission 2007 Recommendation, *supra*, 37 Cal. Law Revision Com. Rep. at p. 379.) A similar policy to keep the threat of forfeiture from inhibiting access to the courts underlies the probable cause requirement. (See Recommendation Relating to No Contest Clauses (Jan. 1989) Revision Report, supra, 20 Cal. Law Revision Com. Rep. at p. 11 ["In favor of a probable cause exception are the policy of the law to facilitate full access of the courts to all relevant information concerning the validity and effect of a will, trust, or other instrument, and to avoid forfeiture"].) That policy counsels in favor of placing the burden of proof on the party who is seeking the "harsh penalty" of forfeiture. (See Commission 2007 Recommendation, *supra*, at pp. 369–370.)

  

Evidence Code section 520 also supports assigning the burden of proof to the party who claims that a beneficiary brought a contest without probable cause to do so. Section 520 of the Evidence Code states that a "party claiming that a person is ****245** guilty of crime or wrongdoing has the burden of proof on that issue." The allegation that a person has pursued baseless litigation is an accusation of wrongdoing. (See *Western Land Office, Inc. v. Cervantes* (1985) 175 Cal.App.3d 724, 740, 220 Cal.Rptr. 784 ["A tenant who claims his landlord acted with a retaliatory motive accuses the landlord of wrongdoing" and therefore has the burden of proof on that issue under Evid. Code, § 520].)

In the similar context of malicious prosecution claims, the plaintiff has the burden to prove the defendant lacked probable cause to bring the underlying ***530** action. (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 771, 221 Cal.Rptr.3d 432, 400 P.3d 1 ["To establish liability for the tort of malicious prosecution, a plaintiff must demonstrate, among other things, that the defendant previously caused the commencement or continuation of an action against the plaintiff that was not supported by probable cause"]; *Kassan v. Bledsoe* (1967) 252 Cal.App.2d 810, 812, 60 Cal.Rptr. 799 ["The plaintiff in an action for malicious prosecution bears the burden of proving not only termination of the earlier proceedings in his favor, but also lack of probable cause on the part of defendants"].) Like a proceeding to enforce a no contest clause, a malicious prosecution action involves allegations of baseless litigation. And, like the probable cause element in section 21311, the requirement to prove the lack of probable cause in malicious prosecution actions exists to "avoid improperly deterring individuals from resorting to the courts for the resolution of disputes." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 875, 254 Cal.Rptr. 336, 765 P.2d 498.)

Key cites *Estate of Peterson* (1999) 72 Cal.App.4th 431, 85 Cal.Rptr.2d 110, which contains language suggesting that, to escape a no contest provision, the "contestant" of a will must prove that he or she had probable cause to bring the contest. However, the case does not explicitly concern the allocation of the burden of proof. More important, the case was decided under the prior regulatory regime, which, as discussed above, created categories of exceptions to the general rule that no contest clauses are enforceable. The statute in place at the time provided that a "no contest clause is *not enforceable* against a beneficiary to the extent the beneficiary, with probable cause, contests a provision that benefits" persons in certain defined categories, including a person who drafted or transcribed the instrument. (*Id.* at p. 434, fn. 3, 85 Cal.Rptr.2d 110, italics added.) The former statute identifying persons against whom a no contest provision is *not* enforceable might be consistent with an exception to enforceability that constitutes an affirmative defense; the current statute identifying the *only* contests that are subject to a no contest provision is more consistent with an element of a claim seeking to enforce such a provision. [12]

Key also argues that the burden of proof on the probable cause element should be placed on the person who brought a contest because that person will be better able to assess the "facts known to the contestant" at the time he or she filed the contest. (§ 21311, subd. (b).) However, as Witkin ****246** notes, the ***531** "greater knowledge" factor in assigning the burden of proof "does not ... apply with any consistency." (See 1 Witkin, Cal. Evidence (5th ed. 2018) Introduction, § 12, p. 22.) For example, that factor does not justify placing the burden on the defendant to prove probable cause in the analogous context of malicious prosecution actions. Nor does it apply in a probate action brought by a child omitted from a decedent's will. (See *Della Sala, supra,* 73 Cal.App.4th at p. 467, 86 Cal.Rptr.2d 569 [rejecting the argument that "the burden of proof regarding 'what "the decedent had in mind" ' when executing a will that omits a living child should be borne by the estate or the beneficiary of the will, rather than by the omitted child 'who would not have been on the scene' "].)

We therefore conclude that Key has the burden of proof to show that Tyler brought her contest of the Trust without probable cause. Nevertheless, as discussed below, we also conclude that Key sufficiently met her burden to show sufficient evidence supporting her petition in opposing Tyler's anti-SLAPP motion.

  

**ii.** ***The probate court's findings concerning Tyler's undue influence are sufficient evidence of a probability of success.***

Tyler had probable cause to contest the Trust by defending the 2007 Amendment if, at the time she brought the contest, she knew facts that "would cause a reasonable person to believe that there [was] a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery." (§ 21311, subd. (b).) In this case, the "requested relief" was a finding that the 2007 Amendment was valid.

Key argues that the probate court's Statement of Decision granting Key's Invalidity Petition and this court's opinion affirming the probate court's decision are sufficient to support a prima facie showing that Tyler lacked probable cause to defend the 2007 Amendment. We agree.

Tyler argues that these decisions do not satisfy Key's burden to provide admissible evidence supporting a probability of success because the factual findings in those decisions establish only that the findings were made, not the facts themselves. Citing *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564–1566, 8 Cal.Rptr.2d 552 (*Sosinsky*), Tyler asserts that a court "may take judicial notice only of the fact that the prior court made the findings in question, not of the truth of those facts."

We agree with the general legal proposition. As the court explained in *Sosinsky,* the effect of taking judicial notice of the *truth* of facts in a prior court decision would remove an issue of fact from the current dispute ***532** "without resort to concepts of collateral estoppel or res judicata that would litigate whether the issue was fully addressed and resolved." (*Sosinsky*, *supra*, 6 Cal.App.4th at p. 1564, 8 Cal.Rptr.2d 552; see *Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 590, 63 Cal.Rptr.2d 467, 936 P.2d 473 [citing *Sosinsky* in explaining that "judicial notice of findings of fact does not mean that those findings of fact are true, but, rather, only means that those findings of fact were made"].)

However, this rule does not preclude Key from relying on the probate court's prior findings as support for the merits of her No Contest Petition because collateral estoppel *does* apply here. The probate court (and this court) may properly consider the probate court's prior findings on Key's Invalidity Petition for purposes of determining the collateral estoppel effect of those findings. (Evid. Code, § 452, subd. (d); ****247** *Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1299, 243 Cal.Rptr. 390 [court may take judicial notice of court records in ruling on an issue of res judicata].) [13]

***a. Key has properly raised collateral estoppel on appeal***

Tyler claims that Key did not argue the collateral estoppel effect of the Statement of Decision below, pointing out that "the phrase 'collateral estoppel' is never used in her underlying brief." However, Key did claim generally that "Tyler is *estopped* from denying her exercise of undue influence or claiming that she had any good faith belief or probable cause to believe that her objections to Ms. Key's petition to invalidate the 2007 amendment had a ***533** chance of success." (Italics added.) Citing the Statement of Decision and this court's prior opinion, she also argued that "Tyler is barred by the law of the case to deny that she exercised undue influence or to claim that she had probable cause to believe that she could prevail against Ms. Key. These matters have already been established and Tyler is bound by the adverse rulings made against her."

While these references did not identify the doctrine of collateral estoppel (or issue preclusion) by name, they were certainly sufficient to apprise Tyler and the trial court of the substance of Key's argument that Tyler is bound by the results of the prior trial. Thus, there is no unfairness in considering the argument on appeal. (See *Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997, 209 Cal.Rptr.3d 658 [rule that theories not raised in the trial court cannot be asserted for the first time

on appeal is based on fairness to the trial court and opposing litigants]; see also *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 387, 184 Cal.Rptr. 576 [evidence of prior administrative findings that a police officer's injuries were " 'work-related' " and counsel's arguments that the pension board should therefore consider the injuries as " 'service-connected' " were sufficient to raise the issue of collateral estoppel].)

****248** Moreover, the issue that Key has raised on appeal is whether the findings in the Statement of Decision and in this court's prior opinion are sufficient to support a prima facie claim that Tyler lacked probable cause to defend the 2007 Amendment. The *contents* of those decisions are not subject to dispute. No findings of fact were necessary in the trial court for this court to determine the issues that were litigated and decided in the prior trial based on the decisions themselves. (See *Duran v. Obesity Research Institute, LLC* (2016) 1 Cal.App.5th 635, 646, 204 Cal.Rptr.3d 896 ["the appellate court has discretion to consider issues raised for the first time on appeal where the relevant facts are undisputed and could not have been altered by the presentation of additional evidence"].) [14]

***534** ***b. The collateral estoppel effect of the Statement of Decision***

Collateral estoppel (also known as issue preclusion) prevents relitigation of previously decided issues. (*Samara v. Matar* (2018) 5 Cal.5th 322, 326–327, 234 Cal.Rptr.3d 446, 419 P.3d 924 (*Samara*).) Issue preclusion applies " '(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.' " (*Id.* at p. 327, 234 Cal.Rptr.3d 446, 419 P.3d 924, quoting *DKN Holdings, LLC v. Faerber* (2015) 61 Cal.4th 813, 824, 189 Cal.Rptr.3d 809, 352 P.3d 378.) The doctrine of issue preclusion applies to final orders in proceedings under the Probate Code. (Code Civ. Proc., § 1908, subd. (a)(1); *Conservatorship of Harvey* (1970) 3 Cal.3d 646, 652, 91 Cal.Rptr. 510, 477 P.2d 742; *Noggle v. Bank of America* (1999) 70 Cal.App.4th 853, 862, 82 Cal.Rptr.2d 829.)

The identical issue requirement for issue preclusion addresses whether identical factual allegations are at stake, "not whether the ultimate issues or dispositions are the same." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342, 272 Cal.Rptr. 767, 795 P.2d 1223 (*Lucido*).) And the "necessarily decided" prong means only that " 'the issue not have been "entirely unnecessary" to the judgment in the initial proceeding.' " (*Ibid.*)

Faced with a 67-page Statement of Decision containing a detailed collection of findings and an exhaustive discussion of the evidence underlying those findings, the definition of an "issue" for purposes of issue preclusion becomes important. Because the Statement of Decision and this court's prior opinion affirming that decision were the principle items of evidence that Key proffered to show a likelihood of success on her No Contest Petition, the nature of the facts that those decisions established is important to the outcome of Key's appeal. The collateral estoppel effect of those decisions is also likely to be an issue on remand. We therefore begin by ****249** explaining the methodology that we conclude is appropriate to analyze what binding "issues" those decisions determined.

Not every interpretation of every item of evidence discussed in Judge Goetz's description of her findings is necessarily binding under the doctrine of issue preclusion. Only findings on issues that are "not '... unnecessary' " to the court's decision are binding. (*Lucido, supra,* 51 Cal.3d at p. 342, 272 Cal.Rptr. 767, 795 P.2d 1223 [fact that the prosecution failed to prove indecent exposure as a basis for a probation violation was " 'necessarily decided' " even though a probation violation was established through other, admitted conduct].)

On the other hand, findings that were important to the court's decision may be binding even if they were not themselves dispositive of an ultimate legal ***535** issue. Some courts have suggested that findings are binding under the doctrine of issue preclusion only if they determine issues of "ultimate fact." (See, e.g., *California Logistics, Inc. v. State of California* (2008) 161 Cal.App.4th 242, 249, 73 Cal.Rptr.3d 825 ["Under the doctrine of collateral estoppel or issue preclusion, when an issue of *ultimate fact* has been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in a future lawsuit," italics added]; *Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881–882, 168 Cal.Rptr. 361; *King v. Timber Structures, Inc.* (1966) 240 Cal.App.2d 178, 183, 49 Cal.Rptr. 414.) In some civil cases, courts have used the term "ultimate fact" while reciting the formulation of collateral estoppel as it is applied in criminal prosecutions. (See, e.g., *California Logistics*, at p. 249, 73 Cal.Rptr.3d 825, citing *Ashe v. Swenson* (1970) 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469; *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 286, 54 Cal.Rptr.2d 655, quoting *People v. Santamaria* (1994) 8 Cal.4th 903, 912, 35 Cal.Rptr.2d 624, 884 P.2d 81 (*Santamaria*).) [15] Other cases have used the term to distinguish between factual findings on collateral evidentiary issues and findings that are relevant to the merits of the action. (See *Ion Equipment,* at pp. 881–882, 168 Cal.Rptr. 361 [prior finding concerning the admissibility of a tape recording].)

When used to characterize the importance of factual issues decided in a prior proceeding, the distinction between "ultimate" and "evidentiary" facts is unhelpful and potentially misleading. As the Restatement ****250** Second of Judgments explains: "The line between ultimate and evidentiary facts is often impossible to draw. Moreover, even if a fact is categorized as evidentiary, great effort may have been expended by both parties in seeking to persuade the adjudicator of its existence or nonexistence and it may well have been regarded as the key issue in the dispute. In these circumstances the determination of the issue should be conclusive whether or not other links in the ***536** chain had to be forged before the question of liability could be determined in the first or second action." (Rest.2d Judgments, § 27, com. j, p. 261.)

Under our Supreme Court's description of the elements of issue preclusion, the relevant distinction is not between "ultimate" and "evidentiary" facts, but between findings that are unnecessary to a decision on the merits and those that *support* that decision (i.e., are "not ... unnecessary" to the court's decision). (*Lucido, supra,* 51 Cal.3d at p. 342, 272 Cal.Rptr. 767, 795 P.2d 1223; *Samara, supra,* 5 Cal.5th at p. 326, 234 Cal.Rptr.3d 446, 419 P.3d 924.) Factual findings can support a decision on the merits of a claim even if they do not themselves resolve an element of the claim. (See *Ayala v. Dawson* (2017) 13 Cal.App.5th 1319, 1331, 220 Cal.Rptr.3d 917 [prior unlawful detainer proceeding necessarily decided the issue of title even though that issue is not ordinarily germane in such a proceeding]; *Greene v. Bank of America* (2015) 236 Cal.App.4th 922, 934–935, 186 Cal.Rptr.3d 887 [magistrate's credibility finding at a preliminary hearing in a prior criminal case was binding, as the magistrate's probable cause determination was based on that finding].)

With this discussion in mind, we consider the collateral estoppel effect of the probate court's order deciding Key's Invalidity Petition by identifying express findings in the Statement of Decision concerning issues that were actually litigated and that support the decision. In doing so, we do not attempt to distinguish between evidentiary and "ultimate" facts.

The definition of probable cause in section 21311, subdivision (b) requires a court to consider what a "reasonable person" would believe based upon the "facts known to the contestant" at the time of filing a contest. The Statement of Decision contains a number of findings relating to the facts known to Tyler. These findings show that, at a minimum, the probate court's prior order on Key's Invalidity Petition established that:

*Tyler knew that Mrs. Plott was dependent on her for important information related to the family nursing home business.*
The probate court explained that Tyler "knew that Mrs. Plott was *dependent* on her, among others, and relied on her for information related to: [¶] 1) The business side of the business, [¶] 2) Regulatory implementation and assessment of risk management, and [¶] 3) For legal advice related to litigation as these issues pertained to the businesses."

  

*Tyler knew that Mrs. Plott was vulnerable to Tyler's threat to quit if Tyler did not obtain control over the family businesses after Mrs. Plott's death.*
The probate court found that Mrs. Plott was "*depending* on [Tyler] to carry on the family businesses which Mrs. Plott considered to be her legacy."

***537** *Tyler controlled the communications between Mrs. Plott and her estate counsel.*
The probate court found that "Tyler acted as a gatekeeper between MSK and Mrs. Plott, controlling Mrs. Plott's communications with MSK and their access to her." The court also found that "[a]ll affirmative ****251** communications addressing dispositive terms" of the 2007 Amendment came from Tyler, Tyler's associate under her direction, or "Tyler testifying [as] to what Mrs. Plott said."

*Tyler actively participated in procuring the 2007 Amendment.*
The probate court found that Mrs. Plott did not attend *any* meetings with MSK related to the 2007 Amendment that were not also attended by Tyler or Tyler's associate.

*Although Mrs. Plott presented a strong personality, Tyler was able to overcome her will.*
The probate court based this finding in part on Tyler's conduct in "[b]ossing her mother around and losing her temper," including using her " 'scary, yelling tone.' " The court concluded that Mrs. Plott was "*vulnerable in the area of her business needs and dependence on ... Tyler's assistance with them.*" (Italics added.)

*Tyler obtained undue benefits under the 2007 Amendment.*
The probate court found that the 2007 Amendment made Tyler the beneficiary of all the contents of the Plotts' residence, which was "contrary to all dispositive terms previously expressed by Mrs. Plott." The court also found that Tyler obtained an undue benefit from the 2007 Amendment "in that she was gifted business assets from the remainder of the Survivor's Trust in the amount of 65%," whereas the "prior testamentary plan called for the assets to be divided equally between the three daughters." And the court found that Tyler, "by manipulating how the business assets were allocated into the Survivor's Trust, ensured that the Survivor's Trust was valued in an amount that was out of proportion to the other trusts, thus increasing Ms. Tyler's interest in the overall Trust estate."

*Mrs. Plott made testamentary gifts benefiting Tyler in the 2007 Amendment that Mrs. Plott knew were not hers to give.*
The probate court found that a provision in the 2007 Amendment distributing promissory notes to Tyler and Potz had the effect of canceling those ***538** notes. As mentioned, at the time of trial, Tyler owed almost $ 2.5 million in principal and interest on one of those notes. The court found that Mrs. Plott "was aware that the notes were in the Marital Trust," which was irrevocable, "yet she included these in the [2007] Amendment anyway." As this court concluded, through this device Tyler "received a benefit of $ 1,666,666, and Key suffered a loss of $ 833,333." (*Key v. Tyler I*, *supra*, B258055.)

*Tyler's personal financial difficulties gave her the motive to unduly influence Mrs. Plott.*
The financial difficulties included her default on her $ 2.5 million loan, on which she had made no payments since her father's death.

*Tyler intentionally withheld relevant evidence.*

  

Based upon evidence of Tyler & Wilson's document retention, the documents produced by Tyler & Wilson, and the documents produced by MSK, the probate court found that Tyler "intentionally did not produce relevant evidence in an effort to prevent relevant evidence from being discovered related to determining the validity of the [2007] Amendment." (See *Key v. Tyler I, supra,* B258055 [Tyler "failed to produce e-mails to hide her involvement"].)

The probate court on remand may identify additional relevant facts established by ****252** the court's prior ruling under the issue preclusion principles discussed above. However, the findings summarized above alone are sufficient to support reversal.

A court could reasonably infer from these findings that Tyler acted *intentionally* in manipulating Mrs. Plott and in using "excessive persuasion" on her to obtain terms in the 2007 Amendment that were not the result of Mrs. Plott's free will. (Welf. & Inst. Code, § 15610.70, subd. (a); Prob. Code, § 86.) Indeed, this court previously drew such an inference from the evidence in affirming the probate court's invalidity ruling. In our prior opinion, we explained that "[i]t is reasonable to infer that Mrs. Plott allowed [Tyler] to have her way because [Tyler] threatened to quit and cause the family business to fail. Or [Tyler] made Mrs. Plott's life miserable, causing Mrs. Plott to sign the [2007] Amendment 'to keep peace' .... This is evidence of an overborne will that makes the transfer to [Tyler] unfair. [Tyler's] controlling and even threatening demeanor with her elderly parent, ***539** coupled with [Tyler's] personal involvement in drafting the [2007] Amendment, is evidence that the unequal division of assets contemplated by the [2007] Amendment was *solely [Tyler's] plan, not Mrs. Plott's*." (*Key v. Tyler I, supra,* B258055, italics added.)

Based on these inferences, a court could find that a reasonable person in Tyler's position would *not* have believed there was a "reasonable likelihood" that the 2007 Amendment was valid. These findings are sufficient to meet Key's burden under step two of the anti-SLAPP procedure.

We emphasize that the probate court's prior order is not sufficient in itself to establish that Tyler lacked probable cause as a matter of law. The legal standard for invalidating an instrument based upon undue influence and the standard for finding a lack of probable cause to *believe* the instrument was valid are different. (See *Jarrow, supra,* 31 Cal.4th at p. 742, 3 Cal.Rptr.3d 636, 74 P.3d 737 [summary judgment in favor of the defense on an underlying claim does not establish lack of probable cause as a matter of law for purposes of a subsequent malicious prosecution action].)

The findings that the probate court made in issuing its prior order also do not establish the lack of probable cause as a matter of law. [16] Although the factual findings themselves are binding, the probate court in the prior trial was not asked to decide the issue of probable cause and therefore did not draw any inferences specifically related to that issue. However, the established facts are sufficient to establish at least a prima facie case that Tyler ****253** lacked probable cause. [17]

***540 5. Key Is Entitled to Her Legal Fees for the Prior Appeal**

Key raises various theories supporting her claim for attorney fees for the prior appeal and for her argument that the probate court erred in denying her motion for those fees. We need consider only one. The plain language of Article 14 of the Trust, as interpreted above, provides for payment of her litigation expenses in resisting Tyler's contest of the Trust provisions.

We reject Tyler's claim that Key did not argue below that the Trust "is contractually obligated to pay her fees." She made precisely that argument. In her motion for attorney fees, Key pointed out that a "trust agreement is a contract," and she identified the same language in Article 14 that she cites on appeal as the basis for a fee award. She then argued that she was entitled to her attorney fees under Civil Code section 1717 because she had "prevailed in this action on the contract." Although in the probate court she cited the reciprocal attorney fee portion of Civil Code section 1717 as authorization for a fee award, that section also provides general authority for the enforcement of an attorney fee provision in a contract. Her argument below was sufficient to raise the issue for the probate court's consideration. [18]

In any event, as discussed below, Key's argument raises a legal issue concerning the interpretation of a trust instrument that does not depend upon any disputed facts. We may consider that argument for the first time on appeal. (*Blech v. Blech* (2018) 25 Cal.App.5th 989, 1000, fn. 31, 236 Cal.Rptr.3d 430 (*Blech*).)

"A declaration of trust constitutes a contract between the trustor and the trustee for the benefit of a third party. ... The mutual consent of the parties to the express declaration of trust constitutes a contract between them, each having rights and obligations which may be enforced by the other and by the beneficiary designated in the contract." (*Estate of Bodger* (1955) 130 Cal.App.2d 416, 424–425, 279 P.2d 61.) Absent disputed extrinsic evidence, the interpretation of a trust instrument is an issue of law that we consider independently. (*Blech, supra,* 25 Cal.App.5th at pp. 1001–1002, 236 Cal.Rptr.3d 430.) The parties do not identify any relevant extrinsic evidence here, and we therefore consider the interpretation of the Trust de novo.

As mentioned, Article 14 contains the Trust's no contest provision. After setting forth the terms of that provision, the article states that "[e]xpenses to resist any contest or attack [of] any nature upon any provision of this Trust ***541** shall be paid from the Trust Estate as expenses of administration." As discussed above, Tyler's defense of the 2007 Amendment amounted to a contest of the Trust provisions in her capacity as a beneficiary. Given the placement of this language at the conclusion of the Trust's No Contest Clause, it is clear that "expenses" in that context encompass ****254** litigation expenses, including attorney fees. Key incurred litigation expenses, including attorney fees on appeal, in "resist[ing]" Tyler's attack on the Trust.

The language in Article 14 authorizing the payment of expenses in resisting a contest is not limited to expenses of the trustee. As Key points out, reimbursement of a trustee's litigation expenses are addressed in a different provision of the Trust. We interpret the Trust's provisions as a whole and seek to avoid an interpretation that would make any provision surplusage. (See § 21121; *Blech, supra,* 25 Cal.App.5th at p. 1001, 236 Cal.Rptr.3d 430; *Estate of Lindner* (1978) 85 Cal.App.3d 219, 225, 149 Cal.Rptr. 331.) Article 14 therefore authorizes reimbursement of Key's attorney fees in defending Tyler's contest, and the trial court erred in denying Key's motion.

On remand, the probate court shall consider the reasonable amount of fees to award to Key under Article 14 for her defense of the prior appeal. Pursuant to that article, the fees are to be awarded "from the Trust Estate as expenses of administration." However, the trial court has discretion under principles of equity to direct that the beneficiary responsible for the expenses of the litigation be solely responsible for their reimbursement. (*Estate of Ivey* (1994) 22 Cal.App.4th 873, 883, 28 Cal.Rptr.2d 16 [" 'Where the expense of litigation is caused by the unsuccessful attempt of one of the beneficiaries to obtain a greater share of the trust property, the expense may properly be chargeable to that beneficiary's share' "], quoting Fratcher, Scott on Trusts (4th ed. 1988) § 188.4, p. 69.) On remand the trial court should therefore consider whether Key's attorney fees should be paid only from Tyler's portion of the Trust estate (if any). [19]

## DISPOSITION

The probate court's orders (1) striking Key's No Contest Petition under Code of Civil Procedure section 425.16; (2) awarding attorney fees to prevailing parties on their motion to strike under Code of Civil Procedure section 425.16; and (3) denying Key's motion for attorney fees on appeal are reversed. The case is remanded for further proceedings on Key's petition and for determination of Key's reasonable attorney fees in defending Tyler's appeal in case No. B258055. On remand, the trial court shall determine whether those fees are to be paid ***542** solely from Tyler's share of the Trust estate (if any). Key is entitled to her costs on this appeal.

Ashmann-Gerst, J., and Hoffstadt, J., concurred.

A petition for a rehearing was denied May 7, 2019, and the opinion was modified to read as printed above. Respondents' petition for review by the Supreme Court was denied August 21, 2019, S256393.

**All Citations**

34 Cal.App.5th 505, 246 Cal.Rptr.3d 224, 19 Cal. Daily Op. Serv. 3561, 2019 Daily Journal D.A.R. 3308

## Footnotes

1 "SLAPP" is an acronym for "[s]trategic lawsuit against public participation." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1109, fn. 1, 81 Cal.Rptr.2d 471, 969 P.2d 564.)

2 Subsequent undesignated statutory references are to the Probate Code.

3 This factual summary is based primarily on the probate court's statement of decision dated April 25, 2014 (Statement of Decision), following the trial on Key's Invalidity Petition and on this court's prior opinion in *Key v. Tyler I, supra*, B258055. We cite that opinion pursuant to California Rules of Court, rule 8.1115(b)(1), which permits citation of nonpublished opinions when relevant under the doctrines of res judicata or collateral estoppel.

4 As mentioned in *Key v. Tyler I, supra*, B258055, the family's nursing home business ultimately sold at a probate court auction for $ 55 million.

5 By the time of the anti-SLAPP motion, the judge who had decided the Invalidity Petition, Judge Reva Goetz, had retired. The anti-SLAPP motion was heard by Judge David J. Cowan.

6 Section 1000, subdivision (a) provides that, except to the extent that the Probate Code provides applicable rules, "the rules of practice applicable to civil actions ... apply to, and constitute the rules of practice" in proceedings under the Probate Code. That subdivision also directs that "[a]ll issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions."

7 Our discussion of affidavits applies equally to declarations, which are the statutory equivalent of affidavits. (Code Civ. Proc., § 2015.5.)

8 Code of Civil Procedure section 2009 permits the use of affidavits for a number of purposes, including "upon a motion."

9 Section 15401 provides that a trust may be revoked by complying with any method provided in the trust instrument, or, unless the trust explicitly provides the only method of revocation, by delivering a writing signed by the settlor to the trustee. (§ 15401, subd. (a)(1)–(2).) The power of revocation includes the power to modify. (§ 15402; *Heifetz v. Bank of America Nat. Trust & Sav. Assn.* (1957) 147 Cal.App.2d 776, 781–782, 305 P.2d 979.)

10 The trial court distinguished *Gonzalez* on the ground that it was decided before the change in the governing law in 2010. Tyler makes the same argument on appeal. However, the court's reasoning in *Gonzalez*—that judicial action to enforce a new instrument obtained through undue influence amounts to a "contest" challenging the validity of the original

instrument—applies equally to the definition of a direct contest under current law. (*Gonzalez*, *supra*, 102 Cal.App.4th at p. 1303, 126 Cal.Rptr.2d 332.)

11 The holding in *Bergland* was incorporated into the initial 1989 legislation codifying the enforcement of no contest clauses. (See Recommendation Relating to No Contest Clauses (Jan. 1989) 20 Cal. Law Revision Com. Rep. (1990) (Revision Report) pp. 12–13; former § 21306, Stats. 1989, ch. 544, § 19.) The Commission characterized *Bergland* as holding that "a no contest clause is not enforceable against a person who, in good faith, contests a will on the ground of ... revocation by execution of a subsequent will." (Revision Report, at pp. 12–13 & fn. 9.) That description of the good faith exception presumes that revocation through an attempt to enforce a subsequent bogus instrument would otherwise trigger a no contest provision. In place of a good faith exception, the new legislative scheme provided that a no contest clause was not enforceable against contests based on forgery or revocation that were brought with *probable cause*. (See former § 21306; Stats. 1989, ch. 544, § 19.)

12 Key also cites a comment by the Commission concerning the proposed legislative changes in 2008 stating that "[p]robable cause is not a *defense* to the enforcement of a no contest clause" under subdivision (a)(2) and (3) of section 21311. (Commission 2007 Recommendation, *supra*, at p. 403, italics added.) That subdivision is not at issue here. We do not interpret the Commission's use of the word "defense" in describing the absence of an element in other provisions to be a description of the burden of proof applicable to the probable cause element in section 21311, subdivision (a)(1).

13 Contrary to Tyler's argument, the Statement of Decision and this court's prior opinion are also both properly part of the record on this appeal. Tyler herself submitted those decisions in support of her anti-SLAPP motion. Key also filed a request for judicial notice of both decisions in support of her opposition to the anti-SLAPP motion. Tyler objected to Key's request for judicial notice, but only on the ground that "the court may take judicial notice only of the fact that the prior court *made* the findings in question, not of the truth or falsehood of those facts." The Statement of Decision and this court's prior opinion were before the trial court, and we therefore consider them as well.

Key also filed with this court a request for judicial notice of the entire record from the prior appeal. Tyler opposes the request and argues that Key submitted only the Statement of Decision and this court's prior opinion in support of her opposition to the anti-SLAPP motion. However, Tyler's own notice of motion stated that her anti-SLAPP motion was based on the "files, records and pleadings of this action." (See *Larsen v. Johannes* (1970) 7 Cal.App.3d 491, 496, 86 Cal.Rptr. 744 ["The notice of motion indicated reliance upon all the files in this action, and the pleadings incorporating the documentation. This was sufficient to bring them before the court"]; *Roth v. Plikaytis* (2017) 15 Cal.App.5th 283, 291–292, 222 Cal.Rptr.3d 850 [abuse of discretion for trial court to refuse to consider previously filed documents that were incorporated by reference in support of a motion for attorney fees].) We therefore grant Key's request for judicial notice of the record from the prior appeal. However, as discussed below, the Statement of Decision and this court's prior opinion are themselves sufficient to identify binding findings that support a prima facie case under the second step of the anti-SLAPP procedure.

14 Tyler also argues that Key failed to show that collateral estoppel applied because she did not inform the trial court of the specific factual findings on which she relied and failed to offer the entire trial record to establish that the findings concerned issues that were actually litigated and necessarily decided. But Key did submit the Statement of Decision itself, which is relevant extrinsic evidence of the scope of the court's prior decision. (*McClain v. Rush* (1989) 216 Cal.App.3d 18, 28, 264 Cal.Rptr. 563, citing 7 Witkin, Cal. Procedure (3d ed. 1985) Judgments, § 256, p. 694.) In some cases—such as *Santa Clara Valley Transportation Authority v. Rea* (2006) 140 Cal.App.4th 1303, 1311–1312, 45 Cal.Rptr.3d 511 (which Tyler cites)—it is necessary to review the record to determine whether an issue has been litigated and decided. But that is not so here, where the probate court issued a lengthy and detailed Statement of Decision identifying its findings and explaining their basis in the evidence.

15 In the particular context of criminal prosecutions, the requirement that an issue concern an "ultimate fact" refers to the elements that must be proved in a second prosecution beyond a reasonable doubt. A finding in a prior prosecution showing that the state did not meet its burden to prove an issue beyond a reasonable doubt is not binding in a subsequent prosecution if that same issue need not be proved beyond a reasonable doubt in the subsequent prosecution. (See *Santamaria, supra,* 8 Cal.4th at pp. 921–922, 35 Cal.Rptr.2d 624, 884 P.2d 81.) Thus, for example, evidence that a criminal defendant committed a prior crime may be admissible even if the defendant was acquitted of that crime because the prosecution would not have to prove that the defendant committed the prior crime beyond a reasonable doubt for evidence of the prior act to be admissible in a later prosecution for a different crime. (*Id.* at p. 921, 35 Cal.Rptr.2d 624, 884 P.2d 81, citing *Dowling v. United States* (1990) 493 U.S. 342, 349, 110 S.Ct. 668, 107 L.Ed.2d 708.) And a jury's verdict rejecting a sentencing enhancement based upon personal use of a knife does not preclude a subsequent murder prosecution based upon a theory of knife use where such knife use need not be proved for a murder conviction. (*Santamaria,* at pp. 921–922, 35 Cal.Rptr.2d 624, 884 P.2d 81.) As these decisions demonstrate, the concept of "ultimate fact" in this context is actually based on differences in the burden of proof rather than on some abstract measure of the degree of importance of prior factual findings.

16 On the other hand, we reject Tyler's argument that the probate court's findings establish the *presence* of probable cause as a matter of law. Tyler relies on comments that the trial court made during oral arguments on the Invalidity Petition to the effect that it was a " 'very hard case' " and was " 'not a clear-cut decision.' " The probate court's oral comments were not final findings and cannot impeach the court's subsequent written ruling. (*Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 300, 128 Cal.Rptr.3d 772; *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 633, 7 Cal.Rptr.3d 715.) In its final Statement of Decision, the court found that the "evidence is substantial and overwhelmingly establishes that the 2007 ... Amendment is the product of undue influence." The court also stated its conclusion that the evidence of undue influence would be sufficient under a "clear and convincing evidence" standard. In ruling on Tyler's anti-SLAPP motion, the probate court erred in taking judicial notice of the prior judge's oral comments without considering whether they contradicted the court's final, written decision.

17 Because the preclusive effect of the probate court's order on Key's Invalidity Petition is sufficient to meet her burden under step two of the anti-SLAPP procedure, we need not consider the admissibility or probative value of the Statement of Decision apart from its relevance to the issues that were previously litigated and decided.

18 We also reject Tyler's argument that Key's attorney fees motion was untimely. She made that argument below and the trial court implicitly rejected it by considering the motion on the merits. Tyler does not identify any abuse of discretion in that decision and we therefore will not reconsider it on appeal.

19 Tyler claims that any enforcement of the No Contest Clause should be against her portion of the survivor's trust only. We decline to decide that issue, which relates to the scope of permissible relief under Key's No Contest Petition rather than the probate court's decision granting Tyler's anti-SLAPP motion that is the subject of this appeal.

**End of Document**

West's Annotated California Codes
Evidence Code (Refs & Annos)
Division 4. Judicial Notice (Refs & Annos)

West's Ann.Cal.Evid.Code § 450

# § 450. Judicial notice may be taken only as authorized by law

Currentness

Judicial notice may not be taken of any matter unless authorized or required by law.

**Credits**
(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

**Editors' Notes**

**LAW REVISION COMMISSION COMMENTS**

Section 450 provides that judicial notice may not be taken of any matter unless authorized or required by law. See Evidence Code § 160, defining "law." Sections 451 and 452 state a number of matters which must or may be judicially noticed. Judicial notice of other matters is authorized or required by other statutes or by decisional law. *E.g.,* Civil Code § 53; Corp.Code § 6602. In this respect, the Evidence Code is consistent with existing law, for the principal judicial notice provision found in existing law--Code of Civil Procedure Section 1875 (superseded by this division of the Evidence Code)--does not limit judicial notice to those matters specified by statute. Judicial notice has been taken of various matters not so specified, principally of those matters of common knowledge which are certain and indisputable. Witkin, California Evidence §§ 50-52 (1958).

Under the Evidence Code, as under existing law, courts may consider whatever materials are appropriate in construing statutes, determining constitutional issues, and formulating rules of law. That a court may consider legislative history, discussions by learned writers in treatises and law reviews, materials that contain controversial economic and social facts or findings or that indicate contemporary opinion, and similar materials is inherent in the requirement that it take judicial notice of the law. In many cases, the meaning and validity of statutes, the precise nature of a common law rule, or the correct interpretation of a constitutional provision can be determined only with the help of such extrinsic aids. *Cf.* People v. Sterling Refining Co., 86 Cal.App. 558, 564, 261 Pac. 1080, 1083 (1927) (statutory authority to notice "public and private acts" of legislature held to authorize examination of legislative history of certain acts). See also Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17 (1948) (texts and authorities used by court in opinions determining constitutionality of statute prohibiting interracial marriages). Section 450 will neither broaden nor limit the extent to which a court may resort to extrinsic aids in determining the rules of law that it is required to notice. Nor will Section 450 broaden or limit the extent to which a court may take judicial notice of any other matter not specified in Section 451 or 452. [7 Cal.L.Rev.Comm. Reports 1 (1965)].

Notes of Decisions (66)

**O'CONNOR'S ANNOTATIONS**
***StorMedia Inc. v. Superior Ct.*** (1999) 20 Cal.4th 449, 456 n.9. "[A] court may consider facts of which it has taken judicial notice. This includes the existence of a document. When judicial notice is taken of a document, however, the truthfulness and

  

proper interpretation of the document are disputable." *See also* ***Herrera v. Deutsche Bank Nat'l Trust Co.*** (3d Dist.2011) 196 Cal.App.4th 1366, 1375; ***Fremont Indem. Co. v. Fremont Gen. Corp.*** (2d Dist.2007) 148 Cal.App.4th 97, 113.

***Aerojet-Gen. Corp. v. Transport Indem. Co.*** (1997) 17 Cal.4th 38, 56 n.8. "[A]mici curiae supporting [D's] position … have submitted a request for judicial notice of [certain] commentaries…. We deny the request. We may take judicial notice only of matter that is 'authorized or required by law.' The indicated commentaries are not such. They may nevertheless be consulted for whatever assistance they may furnish."

***Mangini v. R.J. Reynolds Tobacco Co.*** (1994) 7 Cal.4th 1057, 1063, *overruled on other grounds*, ***In re Tobacco Cases II*** (2007) 41 Cal.4th 1257. See annotation under Evidence Code §451.

***Ross v. Seyfarth Shaw LLP*** (2d Dist.2023) 96 Cal.App.5th 722, 745. "Our authority to take judicial notice … is subject to the limitation that the proffered evidence be relevant. It is not sufficient that the evidence be relevant to an argument made by its proponent. The evidence must be relevant to the disposition of the matter."

***Aquila, Inc. v. Superior Ct.*** (4th Dist.2007) 148 Cal.App.4th 556, 569. "When a trial court's judicial notice rulings are challenged, harmless error standards should apply: 'The Evidence Code declares the party's right and the trial judge's duty, but does not deal with the problems of appellate review and reversible error. Hence, even though the matter called for compulsory notice, or was appropriate for optional notice, and the appellant fully complied with the procedural requirements, refusal to take notice is merely error. Whether it is reversible error depends on the state of the record, and also involves considerations of estoppel and waiver. Likewise, the improper taking of notice is subject to harmless error analysis.'"

***Post v. Prati*** (2d Dist.1979) 90 Cal.App.3d 626, 633-34. "'The doctrine of judicial notice is an evidentiary doctrine that permits the court to consider *as established* in a case a matter of *law* or *fact* that is relevant to an issue, without the necessity of formal proof of the matter by any party. Judicial notice is a substitute for formal proof. Judicial notice may be taken of either a proposition of *law* or a proposition of *fact*. The fundamental theory of judicial notice is that the matter that is judicially noticed is one of law or fact that *cannot reasonably be disputed*.' Judicial notice may be taken by the trial court in connection with a demurrer … and may also be considered by an appellate court in conducting review."

West's Ann. Cal. Evid. Code § 450, CA EVID § 450
Current with Ch. 1 of 2023-24 2nd Ex.Sess, and all laws through Ch. 1017 of 2024 Reg.Sess.

**End of Document**

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Annotated California Codes
Evidence Code (Refs & Annos)
Division 4. Judicial Notice (Refs & Annos)

West's Ann.Cal.Evid.Code § 452

§ 452. Matters which may be judicially noticed

Currentness

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

**Credits**
(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

  

**Editors' Notes**

**COMMENT--ASSEMBLY COMMITTEE ON JUDICIARY**

Section 452 includes matters both of law and of fact. The court *may* take judicial notice of these matters, even when not requested to do so; it is *required* to notice them if a party requests it and satisfies the requirements of Section 453.

The matters of law included under Section 452 may be neither known to the court nor easily discoverable by it because the sources of information are not readily available. However, if a party requests it and furnishes the court with "sufficient information" for it to take judicial notice, the court must do so if proper notice has been given to each adverse party. See Evidence Code § 453. Thus, judicial notice of these matters of law is mandatory only if counsel adequately discharges his responsibility for informing the court as to the law applicable to the case. The simplified process of judicial notice can then be applied to all of the law applicable to the case, including such law as ordinances and the law of foreign nations.

Although Section 452 extends the process of judicial notice to some matters of law which the courts do not judicially notice under existing law, the wider scope of such notice is balanced by the assurance that the matter need not be judicially noticed unless adequate information to support its truth is furnished to the court. Under Section 453, this burden falls upon the party requesting that judicial notice be taken. In addition, the parties are entitled under Section 455 to a reasonable opportunity to present information to the court as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed.

Listed below are the matters that may be judicially noticed under Section 452 (and must be noticed if the conditions specified in Section 453 are met).

*Law of sister states*. Subdivision (a) provides for judicial notice of the decisional, constitutional, and statutory law in force in sister states. California courts now take judicial notice of the law of sister states under subdivision 3 of Section 1875 of the Code of Civil Procedure. However, Section 1875 seems to preclude notice of sister-state law as interpreted by the intermediate-appellate courts of sister states, whereas Section 452 permits notice of relevant decisions of *all* sister-state courts. If this be an extension of existing law, it is a desirable one, for the courts of sister states generally can be considered as responsive to the need for properly determining the law as are equivalent courts in California. The existing law also is not clear as to whether a request for judicial notice of sister-state law is required and whether judicial notice is mandatory. On the necessity for a request for judicial notice, see Comment, 24 Cal.L.Rev. 311, 316 (1936). On whether judicial notice is mandatory, see In re Bartges, 44 Cal.2d 241, 282 P.2d 47 (1955), and the opinion of the Supreme Court in denying a hearing in Estate of Moore, 7 Cal.App.2d 722, 726, 48 P.2d 28, 29 (1935).

*Law of territories and possessions of the United States.* Subdivision (a) also provides for judicial notice of the decisional, constitutional, and statutory law in force in the territories and possessions of the United States. See the broad definition of "state" in Evidence Code § 220. It is not clear under existing California law whether this law is treated as sister-state law or foreign law. See Witkin, California Evidence § 45 (1958).

*Resolutions and private acts.* Subdivision (a) provides for judicial notice of resolutions and private acts of the Congress of the United States and of the legislature of any state, territory, or possession of the United States. See the broad definition of "state" in Evidence Code § 220.

The California law on this matter is not clear. Our courts are authorized by subdivision 3 of Code of Civil Procedure Section 1875 to take judicial notice of private statutes of this State and the United States, and they probably would take judicial notice of resolutions of this State and the United States under the same subdivision. It is not clear whether such notice is compulsory. It may be that judicial notice of a private act pleaded in a criminal action pursuant to Penal Code Section 963 is mandatory, whereas judicial notice of the same private act may be discretionary when pleaded in a civil action pursuant to Section 459 of the Code of Civil Procedure.

  

Although no case in point has been found, California courts probably would not take judicial notice of a resolution or private act of a sister state or territory or possession of the United States. Although Section 1875 is not the exclusive list of the matters that will be judicially noticed, the courts did not take judicial notice of a private statute prior to the enactment of Section 1875. Ellis v. Eastman, 32 Cal. 447 (1867).

*Regulations, ordinances, and similar legislative enactments.* Subdivision (b) provides for judicial notice of regulations and legislative enactments, adopted by or under the authority of the United States or of any state, territory, or possession of the United States, including public entities therein. See the broad definition of "public entity" in Evidence Code § 200. The words "regulations and legislative enactments" include such matters as "ordinances" and other similar legislative enactments. Not all public entities legislate by ordinance.

This subdivision changes existing law. Under existing law, municipal courts take judicial notice of ordinances in force within their jurisdiction. People v. Cowles, 142 Cal.App.2d Supp. 865, 867, 298 P.2d 732, 733-734 (1956); People v. Crittenden, 93 Cal.App.2d Supp. 871, 877, 209 P.2d 161, 165 (1949). In addition, an ordinance pleaded in a criminal action pursuant to Penal Code Section 963 must be judicially noticed. On the other hand, neither the superior court nor a district court of appeal will take judicial notice in a civil action of municipal or county ordinances. Thompson v. Guyer-Hays, 207 Cal.App.2d 366, 24 Cal.Rptr. 461 (1962); County of Los Angeles v. Bartlett, 203 Cal.App.2d 523, 21 Cal.Rptr. 776 (1962); Becerra v. Hochberg, 193 Cal.App.2d 431, 14 Cal.Rptr. 101 (1961). It seems safe to assume that ordinances of sister states and of territories and possessions of the United States would not be judicially noticed under existing law.

Judicial notice of certain regulations of California and federal agencies is mandatory under subdivision (b) of Section 451. Subdivision (b) of Section 452 provides for judicial notice of California and federal regulations that are not included under subdivision (b) of Section 451 and, also, for judicial notice of regulations of other states and territories and possessions of the United States.

Both California and federal regulations have been judicially noticed under subdivision 3 of Code of Civil Procedure Section 1875. 18 Cal.Jur.2d Evidence § 24. Although no case in point has been found, it is unlikely that regulations of other states or of territories or possessions of the United States would be judicially noticed under existing law.

*Official acts of the legislative, executive, and judicial departments*. Subdivision (c) provides for judicial notice of the official acts of the legislative, executive, and judicial departments of the United States and any state, territory, or possession of the United States. See the broad definition of "state" in Evidence Code § 220. Subdivision (c) states existing law as found in subdivision 3 of Code of Civil Procedure Section 1875. Under this provision, the California courts have taken judicial notice of a wide variety of administrative and executive acts, such as proceedings and reports of the House Committee on Un-American Activities, records of the State Board of Education, and records of a county planning commission. See Witkin, California Evidence § 49 (1958), and 1963 Supplement thereto.

*Court records and rules of court.* Subdivisions (d) and (e) provide for judicial notice of the court records and rules of court of (1) any court of this State or (2) any court of record of the United States or of any state, territory, or possession of the United States. See the broad definition of "state" in Evidence Code § 220. So far as court records are concerned, subdivision (d) states existing law. Flores v. Arroyo, 56 Cal.2d 492, 15 Cal.Rptr. 87, 364 P.2d 263 (1961). While the provisions of subdivision (c) of Section 452 are broad enough to include court records, specific mention of these records in subdivision (d) is desirable in order to eliminate any uncertainty in the law on this point. See the Flores case, *supra*.

Subdivision (e) may change existing law so far as judicial notice of rules of court is concerned, but the provision is consistent with the modern philosophy of judicial notice as indicated by the holding in Flores v. Arroyo, *supra*. To the extent that subdivision (e) overlaps with subdivisions (c) and (d) of Section 451, notice is, of course, mandatory under Section 451.

  

*Foreign law.* Subdivision (f) provides for judicial notice of the law of organizations of nations, foreign nations, and public entities in foreign nations. See the broad definition of "public entity" in Evidence Code § 200. Subdivision (f) should be read in connection with Sections 310, 311, 453, and 454. These provisions retain the substance of the existing law which was enacted in 1957 upon recommendation of the California Law Revision Commission. Code Civ.Proc. § 1875. See 1 Cal.Law Revision Comm'n. Rep., Rec. & Studies, Recommendation and Study Relating to Judicial Notice of the Law of Foreign Countries at I-1 (1957).

Subdivision (f) refers to "the law" of organizations of nations, foreign nations, and public entities in foreign nations. This makes all law, in whatever form, subject to judicial notice.

*Matters of "common knowledge" and verifiable facts.* Subdivision (g) provides for judicial notice of matters of common knowledge within the court's territorial jurisdiction that are not subject to dispute. "Territorial jurisdiction," in this context, refers to the county in which a superior court is located or the judicial district in which a municipal or justice court is located. The fact of which notice is taken need not be something physically located within the court's territorial jurisdiction, but common knowledge of the fact must exist within the court's territorial jurisdiction. Subdivision (g) reflects existing case law. Varcoe v. Lee, 180 Cal. 338, 181 Pac. 223 (1919); 18 Cal.Jur.2d Evidence § 19 at 439-440. The California courts have taken judicial notice of a wide variety of matters of common knowledge. Witkin, California Evidence §§ 50-52 (1958).

Subdivision (h) provides for judicial notice of indisputable facts immediately ascertainable by reference to sources of reasonably indisputable accuracy. In other words, the facts need not be actually known if they are readily ascertainable and indisputable. Sources of "reasonably indisputable accuracy" include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject matter. This would not mean that reference works would be received in evidence or sent to the jury room. Their use would be limited to consultation by the judge and the parties for the purposes of determining whether or not to take judicial notice and determining the tenor of the matter to be noticed.

Subdivisions (g) and (h) include, for example, facts which are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings. These subdivisions include such matters listed in Code of Civil Procedure Section 1875 as the "geographical divisions and political history of the world." To the extent that subdivisions (g) and (h) overlap subdivision (f) of Section 451, notice is, of course, mandatory under Section 451.

The matters covered by subdivisions (g) and (h) are included in Section 452, rather than Section 451, because it seems reasonable to put the burden on the parties to bring adequate information before the court if judicial notice of these matters is to be mandatory. See Evidence Code § 453 and the Comment thereto.

Under existing law, courts take judicial notice of the matters that are included under subdivisions (g) and (h), either pursuant to Section 1875 of the Code of Civil Procedure or because such matters are matters of common knowledge which are certain and indisputable. Witkin, California Evidence §§ 50-52 (1958). Notice of these matters probably is not compulsory under existing law.

Notes of Decisions (2084)

**O'CONNOR'S ANNOTATIONS**

***Subdivision (a)***

***Quintano v. Mercury Cas. Co.*** (1995) 11 Cal.4th 1049, 1062. "[D] asks that we take judicial notice [of statements made by] the author of the bill [enacting the legislation at issue]. [S]tatements of an individual legislator, including the author of a bill,

  

are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation."

***County of L.A. Dept. of Publ. Health v. Superior Ct.*** (2d Dist.2021) 61 Cal.App.5th 478, 486 n.3. "We … deny [P's] request to judicially notice … minute orders [from an unrelated suit]. We do not consider unpublished trial court orders in other cases as authority…."

***Duarte v. Pacific Specialty Ins.*** (1st Dist.2017) 13 Cal.App.5th 45, 51 n.6. "[P] asks us to take notice of testimony [in another case] from [witness], who testified for [D there] as well as here. [P] argues [it] is relevant to the interpretation of … question 4 in this case, as well as to [D's] 'credibility,' because [witness] discussed the significance of [a] question that is identical to question 4 and interpreted it differently. We deny the request for judicial notice because 'we cannot take judicial notice of the truth of hearsay statements in other decisions, or court files …, or of the truth of factual findings made in another action.' Moreover, [the other case] concerned a different portion of the question than this case, and in any event [witness's] testimony [was] not inconsistent with her testimony here."

***Subdivision (b)***

***Ross v. Creel Printing & Publ'g Co.*** (1st Dist.2002) 100 Cal.App.4th 736, 743-44. "[Ds] argue … that because the … District Attorney's Office is empowered to prosecute consumer fraud claims, its Bad Check Diversion Unit Handbook for Businesses … comes under the rubric of a '[regulation or] legislative enactment issued by or under the authority of the United States or any public entity in the United States' and thus may be subject to judicial notice. [Ds have] not provided any information about the source, purpose, or official ratification of the handbook. We see no evidence that it is a regulation or legislative enactment so as to come under §452, subdivision (b). We decline to take judicial notice." ***See also Lucas v. City of Pomona*** (2d Dist.2023) 92 Cal.App.5th 508, 532 n.6 (court took judicial notice of city resolutions and city council's report regarding election results); ***City of Ontario v. Superior Ct.*** (4th Dist.1993) 12 Cal.App.4th 894, 899 n.5 (court took judicial notice of county ordinances).

***Trinity Park, L.P. v. City of Sunnyvale*** (6th Dist.2011) 193 Cal.App.4th 1014, 1027, *disapproved on other grounds*, ***Sterling Park, L.P. v. City of Palo Alto*** (2013) 57 Cal.4th 1193. "[W]e may take notice [under §452, subdivision (b)] of local ordinances … and the official resolutions, reports, and other official acts of a city…." *See also* ***City of Ontario v. Superior Ct.*** (4th Dist.1993) 12 Cal.App.4th 894, 899 n.5 (court can take judicial notice of county ordinances).

***Subdivision (c)***

***Mangini v. R.J. Reynolds Tobacco Co.*** (1994) 7 Cal.4th 1057, 1063-65, *overruled on other grounds*, ***In re Tobacco Cases II*** (2007) 41 Cal.4th 1257. "While courts may notice official acts and public records, 'we do not take judicial notice of the truth of all matters stated therein.' '[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom.' [¶] Requests for judicial notice should not be used to 'circumvent[ ]' appellate rules and procedures, including the normal briefing process. Asking that authority be judicially noticed instead of citing and discussing it in a brief gives the parties no orderly opportunity to argue the relevance of that authority or to distinguish it." *See also* ***Licudine v. Cedars-Sinai Med. Ctr.*** (2d Dist.2016) 3 Cal.App.5th 881, 902 (court could take judicial notice of fact that Bureau of Labor Statistics published report but not truth of facts stated in report); ***Taxpayers for Improving Pub. Safety v. Schwarzenegger*** (3d Dist.2009) 172 Cal.App.4th 749, 771 (court could take judicial notice of issuance of Attorney General opinions but not substance of opinions).

***Santa Paula Animal Rescue Ctr. v. County of L.A.*** (2d Dist.2023) 95 Cal.App.5th 630, 639 n.4. "[T]he only official act associated with the Attorney General's opinion [that can be judicially noticed] is the issuance of the opinion, not its substance. Our denial of the request to take judicial notice does not prevent us from considering the Attorney General's opinion for its persuasive value."

  

***Physicians Cmte. for Responsible Med. v. Los Angeles Unified Sch. Dist.*** (4th Dist.2019) 43 Cal.App.5th 175, 183. "The Constitution and the Legislature have ceded substantial discretionary control over education to local school districts. Thus, school board actions can be official acts, and school board policies and regulations may be recognized by judicial notice."

***Scott v. JPMorgan Chase Bank*** (1st Dist.2013) 214 Cal.App.4th 743, 752-53. "[P] contends that the court should not have taken judicial notice of the [agreement between FDIC and D] or the facts therein. [¶] [S]ection 452, subdivision (c) … enables courts in California to take notice of a wide variety of official acts. An expansive reading must be provided to certain of its phrases; included in 'executive' acts are those performed by administrative agencies. [T]he FDIC's official acts of seizing [bank's] assets and publishing the [a]greement are judicially noticeable. Moreover, … the FDIC's official act of transferring certain [bank] assets … to [D]--as *evinced* by the [a]greement--is an official act subject to judicial notice under §452, subdivision (c) under the circumstances of this case." (Internal quotes omitted.)

***LaChance v. Valverde*** (4th Dist.2012) 207 Cal.App.4th 779, 783. "We reject the Attorney General's contention that e-mails exchanged between a deputy attorney general and counsel for a party to an appeal are '[o]fficial acts of the legislative, executive, and judicial departments of the U.S. and of any state of the U.S.,' of which judicial notice may be taken. We therefore deny the Attorney General's initial request to take judicial notice." *See also* ***In re Marriage of Brewster & Clevenger*** (6th Dist.2020) 45 Cal.App.5th 481, 498 (police reports are not records of official acts subject to judicial notice under §452(c)); ***Stevens v. Superior Ct.*** (2d Dist.1999) 75 Cal.App.4th 594, 607-08 (papers filed with state and federal agencies do not fall within ambit of §452(c)); ***Hughes v. Blue Cross*** (1st Dist.1989) 215 Cal.App.3d 832, 856 n.2 (materials prepared by private parties that are merely on file with state agencies may not be judicially noticed).

***Fowler v. Howell*** (2d Dist.1996) 42 Cal.App.4th 1746, 1750. "[S]ection 452, subdivision (c) permits the trial court to take judicial notice of the records and files of a state administrative board." *See also* ***Associated Builders & Contractors, Inc. v. San Francisco Airports Comm'n*** (1999) 21 Cal.4th 352, 374 n.4 (judicial notice of transcripts of commission hearings); ***California State Empls. Ass'n v. Flournoy*** (2d Dist.1973) 32 Cal.App.3d 219, 233 n.10 (judicial notice may be taken of statistical records and other reports and records of a state agency).

***Washington v. County of Contra Costa*** (1st Dist.1995) 38 Cal.App.4th 890, 901. "[Ps'] complaint is not with the nature of the documents judicially noticed, but with the quality of them. As the quality of documents has no bearing on the question of whether the documents may be judicially noticed, [Ps'] arguments are irrelevant. To the extent the arguments are that the documents do not demonstrate that the County properly performed its statutory duties, they are again irrelevant."

***Subdivision (d)***

***People v. Franklin*** (2016) 63 Cal.4th 261, 280. "[D] has requested that we take judicial notice of four amicus curiae briefs filed in [other California cases]. A court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments. Because [D] does not argue that the existence (as opposed to the content) of these briefs is relevant here, we deny his request for judicial notice." (Internal quotes omitted.)

***Hart v. Darwish*** (2d Dist.2017) 12 Cal.App.5th 218, 225. "[Ps] urge that judicial notice [of motion ruling in underlying case] is inappropriate because [it] is set forth in a court document with the caption 'Trial Minutes' rather than the caption 'Minute Order.' However, the document correctly reports what happened, as verified by the transcripts. Because the document is 'a trustworthy chronicle of events' that 'accurately and officially reflects the work of the court,' it is a 'record' of 'a court of this state' and is properly subject to judicial notice. In these circumstances, the document's title is irrelevant. [¶] [Ps also] point out that the hearsay rule generally precludes a court from taking judicial notice of the truth of statements contained in a court file, including the truth of a prior court's factual findings. This is true, but irrelevant here. The trial court only took judicial notice of the [prior court's motion] ruling and the basis for that ruling; it did not take judicial notice of the truth of any factual findings underlying that ruling. [T]his was appropriate."

  

***Hawkins v. SunTrust Bank*** (2d Dist.2016) 246 Cal.App.4th 1387, 1390. "[P] appeals from a judgment on the pleadings entered in favor of [D] on her complaint for wrongful foreclosure. The trial court ruled that the action was barred by a South Carolina judicial foreclosure judgment. *At 1391:* The trial court took judicial notice of the South Carolina judgment…. *At 1392:* The South Carolina trial court judgment includes the finding that [P was] served with the summons and complaint. *At 1393:* [P] asserts that the trial court erred in taking judicial notice of the factual findings in the South Carolina judgment. Although a court cannot take judicial notice of hearsay allegations in a court record, it can take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments. To determine whether to preclude relitigation on collateral estoppel grounds, judicial notice may be taken of a prior judgment and other court records. [¶] As a general rule factual findings in a judgment are not the proper subject of judicial notice. That does not end our inquiry. Whether a factual finding is true is a different question than whether the truth of that factual finding may or may not be subsequently litigated a second time. The doctrines of res judicata and collateral estoppel will, when they apply, serve to bar relitigation of a factual dispute even in those instances where the factual dispute was erroneously decided in favor of a party who did not testify truthfully. In other words, even though a factual finding in a prior judicial decision may not establish the truth of that fact for purposes of judicial notice, the finding itself may be a proper subject of judicial notice if it has a res judicata or collateral estoppel effect in a subsequent action. [¶] The trial court did not err in taking judicial notice of the South Carolina judgment and the service of process finding." (Internal quotes omitted.) *See also* ***Kilroy v. State*** (3d Dist.2004) 119 Cal.App.4th 140, 148.

***Linda Vista Vill. San Diego Homeowners Ass'n v. Tecolote Investors, LLC*** (4th Dist.2015) 234 Cal.App.4th 166, 185. "It is well accepted that when courts take judicial notice of the existence of court documents, the legal effect of the results reached in orders and judgments may be established."

***O'Neill v. Novartis Consumer Health, Inc.*** (2d Dist.2007) 147 Cal.App.4th 1388, 1405. "A court may take judicial notice of a court's action, but may not use it to prove the truth of the facts found and recited." *See also* ***Sosinsky v. Grant*** (5th Dist.1992) 6 Cal.App.4th 1548, 1551 (court cannot take judicial notice of truth of factual findings made by judge who sat as trier of fact in previous case).

***Big Valley Band of Pomo Indians v. Superior Ct.*** (1st Dist.2005) 133 Cal.App.4th 1185, 1191-92. "In ***Del E. Webb Corp. v. Structural Materials Co.*** [(2d Dist.1981) 123 Cal.App.3d 593], the court held it may be appropriate for a court to take judicial notice of … affidavits and verified discovery responses to the extent they contradict allegations of the complaint. The court cautioned, however, against turning the hearing on demurrer 'into a contested evidentiary hearing through the guise of having the court take judicial notice of affidavits, declarations, depositions, and other such material which was filed on behalf of the adverse party and which purports to contradict the allegations and contentions of the plaintiff….' ***Del E. Webb Corp.*** has itself been criticized … in ***Garcia v. Sterling*** [(2d Dist.1985) 176 Cal.App.3d 17]: 'Although the *existence* of statements contained in a deposition transcript [or declaration] filed as part of the court record can be judicially noticed, their *truth* is not subject to judicial notice.'"

***Ross v. Creel Printing & Publ'g Co.*** (1st Dist.2002) 100 Cal.App.4th 736, 743. "Section 452, subdivision (d)(2) permits judicial notice of the records of 'any court of record of the U.S. or of any state of the U.S.' [¶] We decline to take judicial notice of the complaint because the document offered is neither certified nor provided under subpoena from the Nevada court, and we have no assurance of its authenticity. '[W]hen a party desires the appellate court to take judicial notice of a document or record on file in the court below the parties should furnish the appellate court with a copy of such document or record certified by its custodian.' It is the burden of the party seeking judicial notice to demonstrate a reason for the failure to furnish certified copies. [¶] However, even if the document were properly certified, we would take judicial notice only as to the existence of the complaint, not as to the truth of any of the allegations contained in it. *At 744:* The burden is on the party seeking judicial notice to provide sufficient information to allow the court to take judicial notice." *See also* ***Shapell Socal Rental Props., LLC v. Chico's FAS, Inc.*** (4th Dist.2022) 85 Cal.App.5th 198, 208.

  

***Joslin v. H.A.S. Ins. Brokerage*** (4th Dist.1986) 184 Cal.App.3d 369, 374-75. "Various tests or rules have been suggested to determine whether a court which has taken judicial notice of a document may take the further step of accepting its truth or adopting a proposed interpretation of its meaning. [¶] When the court takes judicial notice of a document in its own files, or in those of another court, it has been said the court will not consider the truth of the document's contents unless it is an order, statement of decision, or judgment. Other cases have suggested the court may accept the truth of statements made by the party whose pleadings are being challenged but not statements of an opponent or third party. [¶] A third approach, which provides maximum flexibility while still insisting disputed factual issues cannot be resolved on demurrer, proposes 'judicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed.' [¶] Correct results will be reached in most cases by application of either of the first two rules, but there may be occasional cases which can only be resolved properly by using the third approach. [T]he third approach is in our opinion the most reliable in all cases."

***In re Estate of Russell*** (1st Dist.1971) 17 Cal.App.3d 758, 765-66. "Court records are matters which *may* be judicially noticed. Such records may be judicially noticed if a party requests that such notice be taken, furnishes the court with sufficient information to enable it to take judicial notice, and gives each adverse party sufficient notice of the request to prepare to meet it. … The court may, however, take judicial notice of such court records, even when not requested to do so, because it has the discretionary power to take such notice under §452…. However, where the matter to be noticed is one that is of *substantial consequence to the action*, the party adversely affected must be given a reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to present information relevant to the propriety of taking judicial notice and as to tenor of the matter to be noticed. 'If the judge does not discover that a matter should be judicially noticed until after the cause is submitted for decision, he may, of course, order the cause to be reopened for the purpose of permitting the parties to provide him with information concerning the matter.'" *See also* ***Carroll v. State*** (4th Dist.1990) 217 Cal.App.3d 134, 144.

***Subdivision (f)***

***In re Marriage of Nurie*** (1st Dist.2009) 176 Cal.App.4th 478, 509. "[D] submitted the declaration of her attorney in Pakistan for the evident purpose of proving that [an enforcement procedure similar to the UCCJEA, Fam. C. §§3441-3457] is available [in Pakistan]. The attorney did not, however, explain substantive Pakistani legal standards for enforcing foreign custody decrees; nor did [D] provide copies of Pakistani statutes or cases on this issue. While we are authorized to take judicial notice of '[t]he law of … foreign nations and public entities in foreign nations' …, we decline to do so here because [D] has submitted insufficient evidence to enable us to determine with confidence either the procedure or the substantive rules Pakistan would employ."

***Subdivision (g)***

***Malek Media Grp. v. AXQG Corp.*** (2d Dist.2020) 58 Cal.App.5th 817, 825. "[P] requested judicial notice of the *#MeToo* movement and the phrase *a woman alleging sexual harassment must be believed* [but] failed to provide sufficient evidence or explanation that [these] are facts of such generalized knowledge that they cannot reasonably be the subject of dispute. [P] asserts that 'one would be hard pressed to find an adolescent or adult who has not heard of the *#MeToo* movement and understands what it stands for in the U.S.' This, however, does not make the existence of a contemporary social movement the proper subject of judicial notice. By their very nature, social movements do not have defined boundaries and their scope, meaning, and influence are subjects of debate … for years after they emerge."

***Brown v. Smith*** (2d Dist.2018) 24 Cal.App.5th 1135, 1142. "[Ds] filed a motion requesting judicial notice of … documents published by the World Health Organization, the [Centers for Disease Control and Prevention], the American Academy of Pediatrics, and the U.S. Department of Health and Human Services … addressing the safety and effectiveness of vaccinations…. In addition, [Ds] requested we take judicial notice 'of the safety and effectiveness of vaccinations in preventing the spread of dangerous communicable diseases, a fact that is commonly known and accepted in the scientific community and the general public.' [¶] [Ps] object to the materials on vaccination as hearsay, inadmissible opinion evidence, and 'government propaganda.' [Ps] further argue that we cannot take judicial notice of the safety and effectiveness of vaccines [because it] is not

  

common knowledge, and is the subject of reasonable dispute. But … authorities are to the contrary. *At 1143:* [W]e conclude judicial notice of the safety and effectiveness of vaccinations is proper."

***Evans v. California Trailer Ct., Inc.*** (5th Dist.1994) 28 Cal.App.4th 540, 549, *disapproved on other grounds,* ***Black Sky Capital, LLC v. Cobb*** (2019) 7 Cal.5th 156. "On a motion for judgment on the pleadings, a court may take judicial notice of something that cannot reasonably be controverted, even if it negates an express allegation of the pleading. [¶] The court may take judicial notice of recorded deeds. [Ds] asked the court to judicially notice the recorded trustee's deed pursuant to … §452, subdivision (g). [Ps] stated they did not object to the request and the court took judicial notice of the deed. [¶] The court did not err or abuse its discretion in granting the request." *See also* ***Lockhart v. MVM, Inc.*** (2d Dist.2009) 175 Cal.App.4th 1452, 1460-61.

***Jordan v. Worthen*** (1st Dist.1977) 68 Cal.App.3d 310, 319. "The subject of the nature of the past use of the road to [P's ranch] is not a fact or proposition of generalized knowledge that is so universally known that it cannot reasonably be the subject of dispute. It possibly could be a fact or proposition of such common knowledge within the territorial jurisdiction of the court that it could not reasonably be the subject of dispute. … Nevertheless, in this case there was nothing to establish that the historical use of the road to [P's ranch] was a matter of common knowledge, and the declarations of others which were testified to by the witnesses were the declarants' individual observations, not common knowledge."

***Subdivision (h)***

***Boghos v. Certain Underwriters at Lloyd's of London*** (2005) 36 Cal.4th 495, 505 n.6. "[T]he arbitration clause expressly invokes the [American Arbitration Association's] commercial arbitration rules. The full, up-to-date text of those rules is available on the [Association's] Internet site…. Having given the parties appropriate notice before oral argument that we proposed to take judicial notice of the rules on our own motion …, we now do take judicial notice of them."

***Planned Parenthood Shasta-Diablo, Inc. v. Williams*** (1995) 10 Cal.4th 1009, 1021 n.2. "We find the law to be well settled that trial or reviewing courts may properly notice government maps and surveys."

***Travelers Indem. Co. v. Navigators Specialty Ins.*** (4th Dist.2021) 70 Cal.App.5th 341, 354-55. "'[T]he existence of a contract between private parties cannot be established by judicial notice under … §452, subdivision (h).' The existence and terms of a private agreement are not facts that are not reasonably subject to dispute and that can be determined by indisputable accuracy."

***Yumori-Kaku v. City of Santa Clara*** (6th Dist.2020) 59 Cal.App.5th 385, 408 n.7. "The result of a public election is a fact not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

***Linda Vista Vill. San Diego Homeowners Ass'n v. Tecolote Investors, LLC*** (4th Dist.2015) 234 Cal.App.4th 166, 186. "With respect to [Ds'] request for judicial notice … of [certain] lodged exhibits … (i.e., newspaper articles and historical articles and brochures that are not recorded documents), it is arguable whether they clearly fall within the provisions of … §452, subdivision (h)…. Under … subdivision (h), it is discretionary with this court whether to take judicial notice of such historical articles, and in any case, we would not take judicial notice of the truth of those views." Held: Motion denied.

***Ragland v. U.S. Bank*** (4th Dist.2012) 209 Cal.App.4th 182, 193. "While we may take judicial notice of the existence of the audit report, Web sites, and blogs, we may not accept their contents as true." *See also* ***L.B. Research & Educ. Found. v. UCLA Found.*** (2d Dist.2005) 130 Cal.App.4th 171, 180 n.2.

***Fontenot v. Wells Fargo Bank*** (1st Dist.2011) 198 Cal.App.4th 256, 265, *disapproved on other grounds*, ***Yvanova v. New Century Mortg. Corp.*** (2016) 62 Cal.4th 919. "[C]ourts have taken judicial notice not only of the existence and recordation of recorded documents but also of a variety of matters that can be deduced from the documents. [¶] Strictly speaking, a court takes judicial notice of facts, not documents. When a court is asked to take judicial notice of a document, the propriety of the court's action depends upon the nature of the facts of which the court takes notice from the document. [A] court may take judicial notice

  

of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face." *See also* ***Scott v. JPMorgan Chase Bank*** (1st Dist.2013) 214 Cal.App.4th 743, 753-55.

***Gould v. Maryland Sound Indus.*** (2d Dist.1995) 31 Cal.App.4th 1137, 1145. "Judicial notice under … §452, subdivision (h) is intended to cover facts which are not reasonably subject to dispute and are easily verified. These include, for example, facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter. The statute has also been used on demurrer to take judicial notice of facts commonly known in a community, such as ownership, easements and control over land …, and the history and operation of a local museum…." *See also* ***Hughes v. Blue Cross*** (1st Dist.1989) 215 Cal.App.3d 832, 856 n.2.

West's Ann. Cal. Evid. Code § 452, CA EVID § 452
Current with Ch. 1 of 2023-24 2nd Ex.Sess, and all laws through Ch. 1017 of 2024 Reg.Sess.

**End of Document**

West's Ann.Cal.Evid.Code § 453

# § 453. Compulsory judicial notice upon request

Currentness

The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:

(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and

(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

**Credits**
(Stats.1965, c. 299, § 2, operative Jan. 1, 1967.)

**Editors' Notes**

**LAW REVISION COMMISSION COMMENTS**

Section 453 provides that the court must take judicial notice of any matter specified in Section 452 if a party requests that such notice be taken, furnishes the court with sufficient information to enable it to take judicial notice of the matter, and gives each adverse party sufficient notice of the request to prepare to meet it.

Section 453 is intended as a safeguard and not as a rigid limitation on the court's power to take judicial notice. The section does not affect the discretionary power of the court to take judicial notice under Section 452 where the party requesting that judicial notice be taken fails to give the requisite notice to each adverse party or fails to furnish sufficient information as to the propriety of taking judicial notice or as to the tenor of the matter to be noticed. Hence, when he considers it appropriate, the judge may take judicial notice under Section 452 and may consult and use any source of pertinent information, whether or not furnished by the parties. However, where the matter noticed under Section 452 is one that is of substantial consequence to the action--even though the court may take judicial notice under Section 452 when the requirements of Section 453 have not been satisfied--the party adversely affected must be given a reasonable opportunity to present information as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed. See Evidence Code § 455 and the Comment thereto.

*The "notice" requirement.* The party requesting the court to judicially notice a matter under Section 453 must give each adverse party sufficient notice, through the pleadings or otherwise, to enable him to prepare to meet the request. In cases where the notice given does not satisfy this requirement, the court may decline to take judicial notice. A somewhat similar notice to the adverse parties is required under subdivision 4 of Section 1875 of the Code of Civil Procedure when a request for judicial notice of the law of a foreign country is made. Section 453 broadens this existing requirement to cover all matters specified in Section 452.

  

The notice requirement is an important one since judicial notice is binding on the jury under Section 457. Accordingly, the adverse parties should be given ample notice so that they will have an opportunity to prepare to oppose the taking of judicial notice and to obtain information relevant to the tenor of the matter to be noticed.

Since Section 452 relates to a wide variety of facts and law, the notice requirement should be administered with flexibility in order to insure that the policy behind the judicial notice rules is properly implemented. In many cases, it will be reasonable to expect the notice to be given at or before the time of the pretrial conference. In other cases, matters of fact or law of which the court should take judicial notice may come up at the trial. Section 453 merely requires reasonable notice, and the reasonableness of the notice given will depend upon the circumstances of the particular case.

*The "sufficient information" requirement.* Under Section 453, the court is not required to resort to any sources of information not provided by the parties. If the party requesting that judicial notice be taken under Section 453 fails to provide the court with "sufficient information," the judge may decline to take judicial notice. For example, if the party requests the court to take judicial notice of the specific gravity of gold, the party requesting that notice be taken must furnish the judge with definitive information as to the specific gravity of gold. The judge is not required to undertake the necessary research to determine the fact, though, of course, he is not precluded from doing such research if he so desires.

Section 453 does not define "sufficient information"; this will necessarily vary from case to case. While the parties will understandably use the best evidence they can produce under the circumstances, mechanical requirements that are ill-suited to the individual case should be avoided. The court justifiably might require that the party requesting that judicial notice be taken provide expert testimony to clarify especially difficult problems.

*Burden on party requesting that judicial notice be taken.* Where a request is made to take judicial notice under Section 453, the court may decline to take judicial notice unless the party requesting that notice be taken persuades the judge that the matter is one that properly may be noticed under Section 452 and also persuades the judge as to tenor of the matter to be noticed. The degree of the judge's persuasion regarding a particular matter is determined by the subdivision of Section 452 which authorizes judicial notice of the matter. For example, if the matter is claimed to be a fact of common knowledge under paragraph (g) of Section 452, the party must persuade the judge that the fact is of such common knowledge within the territorial jurisdiction of the court that it cannot reasonably be subject to dispute, *i.e.,* that no reasonable person having the same information as is available to the judge could rationally disbelieve the fact. On the other hand, if the matter to be noticed is a city ordinance under paragraph (b) of Section 452, the party must persuade the judge that a valid ordinance exists and also as to its tenor; but the judge need not believe that no reasonable person could conclude otherwise.

Without regard to the evidence supplied by the party requesting that judicial notice be taken, the judge's determination to take judicial notice of a matter specified in Section 452 will be upheld on appeal if the matter was properly noticed. The reviewing court may resort to any information, whether or not available at the trial, in order to sustain the proper taking of judicial notice. See Evidence Code § 459. On the other hand, even though a party requested that judicial notice be taken under Section 453 and gave notice to each adverse party in compliance with subdivision (a) of Section 453, the decision of the judge not to take judicial notice will be upheld on appeal unless the reviewing court determines that the party furnished information to the judge that was so persuasive that no reasonable judge would have refused to take judicial notice of the matter. [7 Cal.L.Rev.Comm. Reports 1 (1965)].

Notes of Decisions (51)

**O'CONNOR'S ANNOTATIONS**

***CREED-21 v. City of San Diego*** (4th Dist.2015) 234 Cal.App.4th 488, 519. "[D] attempted to file a request for judicial notice of a document purporting to be an ordinance adopted by the City Council authorizing certain fees…. *At 520-21:* Based on our review of the record, we conclude the trial court did not abuse its discretion by denying [D's] request for judicial notice of the

  

copy of the purported ordinance. First, the court properly found [D] had not given [P] sufficient notice of its request for judicial notice to enable [P] to have a reasonable opportunity to prepare its opposition to the request and obtain information relevant to the matter to be noticed. Although the parties do not cite, and we are unaware of, any published case interpreting the term 'sufficient notice' required under … §453, subdivision (a), we conclude the trial court did not abuse its discretion by finding [D] did not meet that requirement in the circumstances of this case. [D] apparently did not submit its request for judicial notice until the morning of the … hearing [on the disputed fee]. [¶] We further conclude the trial court properly found [D] did not satisfy the second requirement for mandatory judicial notice under … §453, namely, that [D] did not furnish the court with 'sufficient information' to enable it to take judicial notice. The court found the copy of the purported ordinance was incomplete [b]ecause the copy of the document [D] included in its request for judicial notice did not include a copy of the attachment referred to therein that apparently contained the list of specific fees approved by the City Council…."

***Mitroff v. United Servs. Auto. Ass'n*** (1st Dist.1999) 72 Cal.App.4th 1230, 1243. "[W]e reject the contention that the trial court was compelled to take judicial notice of court records in two unrelated matters in which [P] argued that [D] took a different position as to coverage of similar matters. [S]ection 453, which states that the court shall take judicial notice of matters properly presented does not compel the court to admit irrelevant matters that would result in the undue consumption of time. … The likelihood that the court would have to make a detailed inquiry into the facts and contentions of the parties in each of the other cases supports the court's denial of the request for judicial notice."

***Whispering Pines Mobile Home Park, Ltd. v. City of Scotts Valley*** (6th Dist.1986) 180 Cal.App.3d 152, 162. "We decline to take judicial notice … because we have not been provided with sufficient information to ensure the books cited are sources of reasonably indisputable accuracy. If there is any doubt whatever either as to a fact itself or as to its being a matter of common knowledge, evidence should be required. … If the party requesting that judicial notice be taken under §453 fails to provide the court with sufficient information, the judge may decline to take judicial notice. The court justifiably might require that the party requesting that judicial notice be taken provide expert testimony to clarify especially difficult problems." (Internal quotes omitted.) *See also* ***Willis v. State*** (3d Dist.1994) 22 Cal.App.4th 287, 291; ***Conservatorship of Bones*** (1st Dist.1987) 189 Cal.App.3d 1010, 1014 n.2.

***Stepan v. Garcia*** (1st Dist.1974) 43 Cal.App.3d 497, 500. "The court may take judicial notice of its own file …: referring to the contents of the court's file by way of affidavit was a proper means of requesting the court to take such judicial notice under … §453…."

West's Ann. Cal. Evid. Code § 453, CA EVID § 453
Current with Ch. 1 of 2023-24 2nd Ex.Sess, and all laws through Ch. 1017 of 2024 Reg.Sess.

**End of Document**

64 Cal.App.5th 494
Court of Appeal, Fourth District, Division 1, California.

IN RE N.A., a Person Coming Under the Juvenile Court Law.
San Diego County Health and Human Services Agency, Plaintiff and Respondent,
v.
N.A., Defendant and Appellant.

D077956
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Filed 04/27/2021
|
As Modified 05/21/2021

**Synopsis**

**Background:** Nonminor former dependent (NFD), whose legal guardian had continued to receive Aid to Families with Dependent Children-Foster Care (AFDC-FC) on nonminor's behalf after nonminor had moved out of home, petitioned for reentry to juvenile court jurisdiction and extended foster care. The Superior Court, San Diego County, No. EJ36443A, Tilisha T. Martin, J., denied petition. Nonminor appealed.

**Holdings:** The Court of Appeal, Aaron, J., held that:

ALJ's decision regarding nonminor's request for administrative hearing was relevant;

statute that permitted nonminor to petition court for hearing to determine whether to assume dependency jurisdiction did not apply to allow nonminor to petition court;

requiring nonminor to exhaust administrative remedies before seeking judicial review of determination that she was ineligible for AFDC-FC payments would not have been futile;

nonminor failed to demonstrate irreparable injury; and

juvenile court properly declined to make own determination as to whether nonminor was eligible for AFDC-FC payments.

Affirmed.

**Procedural Posture(s):** On Appeal; Other.

****104** APPEAL from an order of the Superior Court of San Diego County, Tilisha Martin, Judge. Affirmed. (Super. Ct. No. EJ3643A)

**Attorneys and Law Firms**

Christy C. Peterson, Santa Barbara, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of County Counsel, Caitlin E. Rae, Chief Deputy County Counsel, and Jesica N. Fellman, Deputy County Counsel, for Plaintiff and Respondent.

  

**Opinion**

AARON, J.

***496** Appellant N.A. is a nonminor former dependent (NFD). While she was a minor, she lived in the home of a legal guardian, who received financial aid (aid to families with dependent children-foster care, or AFDC-FC) on N.A.'s behalf. When N.A. was 17 years old, she moved out of the guardian's home. The San Diego County Health and Human Services Agency (Agency) was not informed of this circumstance, and AFDC-FC payments to the guardian continued past N.A.'s 18th birthday. The guardian provided ***497** some financial support to N.A. after she moved out, but at some point, the guardian stopped providing support altogether.

Thereafter, N.A. petitioned to return to juvenile court jurisdiction and foster care, which would provide her with certain services and financial aid, under section 388.1 of the Welfare and Institutions Code.[1] At that time, the Agency became aware of N.A.'s prior living circumstance and determined that she and the guardian became ineligible for AFDC-FC payments when N.A. moved out of the guardian's home before N.A. turned 18. The Agency sent notice of its decision to the guardian. Based on its determination that N.A. was not actually eligible to receive AFDC-FC payments after she turned 18 because she had moved out of the guardian's home by that time, the Agency recommended denying her petition for reentry. (§ 388.1, subd. (a)(2) [qualified petitioners include "nonminor former dependent ... who received ... aid after attaining 18 years of age"].)

The juvenile court denied N.A.'s petition for reentry under section 388.1 but ordered the Agency to notify N.A. directly of its eligibility determination so that she could pursue administrative remedies.

On appeal, N.A. contends that the juvenile court's order is based on an erroneous interpretation of section 388.1 and related statutes. Alternatively, N.A. argues that the court should have decided the AFDC-FC ****105** eligibility issue because exhausting the administrative hearing process would be futile under the circumstances. We affirm the order.

## FACTUAL AND PROCEDURAL BACKGROUND

The material facts are undisputed. N.A. became a juvenile dependent when she was 11 years old. When she was 15, N.A. began living in the home of Julie L. (guardian). The juvenile court subsequently selected a permanent plan of legal guardianship, appointed Julie L. as the guardian, and terminated its jurisdiction.

In January 2019, 17-year-old N.A. indicated in a meeting with her case worker (Salcido) that she was not getting along with her guardian. Salcido encouraged N.A. to try to work things out. The guardian and N.A. reported to the Agency in February 2019, August 2019, and January 2020 that N.A. was continuing to reside in the guardian's home.[2] Throughout that time, and ***498** past N.A.'s 18th birthday in January 2020, AFDC-FC funds were provided to the guardian based on the Agency's understanding that N.A. was living in the guardian's home.[3]

In May 2020, N.A. filed a request to return to juvenile court jurisdiction and foster care (form JV-466, petition for reentry) under section 388.1, indicating that (1) she planned to attend college, (2) her guardian received AFDC-FC payments on her behalf after she turned 18 years old, and (3) her guardian was no longer supporting her. Social worker Salcido interviewed N.A. about her petition for reentry, and N.A. disclosed for the first time that she had moved out of the guardian's home in late January 2019. N.A. told Salcido that she and the guardian had been constantly arguing, and the guardian began telling her, " '[y]ou can't live here anymore.' " N.A. went to live with a family friend, and the guardian paid for N.A.'s rent at the family friend's home.[4] Salcido spoke to the family friend, who confirmed that N.A. lived with her until August 2019, at which point N.A. moved out

  

of the family friend's home and into an apartment with her boyfriend. N.A. lived with her boyfriend until the lease ended in May 2020. She then began living in the home of her boyfriend's parents. [5] When Salcido asked N.A. why she had not informed the Agency earlier about moving out of the guardian's home, she replied, " '[B]ecause I was a minor and was worried about where the State would choose to place me. As an adult I feel like I have more of a say so of where I can be.' "

As part of the assessment of N.A.'s petition for reentry, Salcido made an unannounced visit to the guardian's home. Before the visit, the guardian continued to report that N.A. was living with her. After Salcido observed during his visit that N.A.'s belongings were not in "N.A.'s bedroom," the guardian told Salcido that N.A. "comes and goes" from the boyfriend's parent's home, "does what she wants," "lies," and "does not listen." The guardian further declared that she no longer wanted responsibility over N.A., that she was "done" with the guardianship, and that the case should be closed "today." The guardian ****106** maintained that N.A. had continuously lived with her and not with the family friend or in her own apartment.

The Agency determined that N.A. became ineligible for AFDC-FC funding in 2019, when she moved out of the guardian's home before turning 18 and that she was thus ineligible for reentry in extended foster care (EFC). The Agency recommended that the juvenile court deny N.A.'s petition for reentry. ***499** Salcido otherwise noted in his written report that N.A. was a "bright student and hard worker," was enrolled in college, had several jobs, and was a highly motivated young person.

The juvenile court appointed counsel for N.A. (counsel for nonminor former dependent, or NFD counsel), ordered the parties to brief the issue of whether N.A. was qualified to petition for reentry, and set a contested special hearing. The parties filed initial hearing briefs, and the contested proceeding ultimately occurred over three days in July and August 2020.

On the first hearing date in July, the court received the Agency's written reports in evidence, heard testimony from social worker Salcido, and considered counsel's arguments.

On the second hearing date in July, the court announced that it was inclined to grant N.A.'s petition for reentry under section 388.1 and related statutes, based on its findings that: (1) N.A. was not living in the guardian's home by February 2019; (2) the guardian received foster care payments for N.A. after N.A.'s 18th birthday; (3) the guardian had been supporting N.A. in some capacity both before and after her 18th birthday, including providing funds for rent and to help N.A. obtain a car loan, but was no longer supporting N.A. at the time she filed her petition for reentry; and (4) N.A. was enrolled in college, satisfying EFC participation criteria (§§ 388.1, subd. (c)(5)(E), 11403, subd. (b)(2) ["The nonminor is enrolled in an institution that provides postsecondary or vocational education"]).

The court acknowledged that it had no authority to make AFDC-FC funding decisions but ordered the Agency to assist N.A. with "exploring the AFDC-FC eligibility." In response, the Agency's counsel expressed concern that there was nothing that the Agency could do at that point to "make [N.A.] eligible" for funding because she had been determined to be ineligible for AFDC-FC funds as of January 2019, when she moved out of the guardian's home. There was discussion among the court and counsel concerning the fact that the eligibility determination was subject to an administrative hearing process, which had not yet been initiated. NFD counsel countered that the administrative hearing process would be futile because the Agency had taken the position that N.A. was not eligible for AFDC-FC funds. At the conclusion of this discussion, the court ordered supplemental briefing on these issues and set the matter for further hearing.

In response to the court's order for supplemental briefing, the Agency submitted written exhibits to show that, after N.A. filed her petition for reentry and disclosed that she had moved out of the guardian's home, the following events occurred: In late May 2020, the Agency updated its placement documentation to reflect that N.A.'s placement at the guardian's home ***500** closed on January 27, 2019, because N.A. moved out of the home. Further, in June 2020, the Agency sent a "NOTICE OF ACTION Foster Care Termination" (NOA) to "[Julie] for [N.A.]" at the guardian's home address, indicating that foster care aid was discontinued as of January 27, 2019, based on the fact that the guardian was no longer providing foster care or a ****107** foster home for N.A. The NOA contained a disclosure of administrative hearing rights.

At the continued special hearing in August 2020, the court admitted the supplemental briefs in evidence by reference and modified its previous ruling. The court decided that it would not grant N.A.'s petition for reentry under section 388.1 and instead, ordered the Agency to properly notify N.A. directly, rather than at the guardian's home address, of its decision to terminate AFDC-FC funding so that N.A. could pursue administrative remedies. The court stated that it was not authorized to make any funding eligibility determinations and that the court could not conclude that an administrative hearing process would be futile. At the same time, the court indicated that it would allow NFD counsel to file a motion to request the appointment of a successor guardian for N.A. [6]

N.A.'s appeal followed.

## DISCUSSION

### I. *Request for Judicial Notice*

While this appeal was pending, N.A. filed a request for judicial notice of the "Decision of the Administrative Law Judge, *In the matter of claimant* [N.A.] (Feb. 12, 2021), Case No. SHN-10469549," attached to the request as an exhibit (ALJ decision). N.A. argues that the ALJ decision is relevant for several reasons, including to show that she "request[ed] an administrative hearing on the [A]gency's decision to deny continued AFDC-FC benefits" and that the ALJ rendered a decision on February 12, 2021.

The Agency opposes the request for judicial notice to the extent that N.A. is using the ALJ decision to establish that she has exhausted her administrative remedies. The Agency maintains that N.A. has not exhausted her administrative remedies. It is undisputed that the ALJ decision is a judicially noticeable matter under Evidence Code section 452.

***501** We agree with the Agency that the ALJ decision does not establish that N.A. has exhausted her administrative remedies. Within the decision itself, there is a disclosure of an administrative right to rehearing as well as the right to petition the superior court for review under Code of Civil Procedure section 1094.5. We nonetheless grant N.A.'s request for judicial notice on the ground that the ALJ decision is relevant to our determination of the issues on appeal. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, 31 Cal.Rptr.2d 358, 875 P.2d 73, overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276, 63 Cal.Rptr.3d 418, 163 P.3d 106.)

### II. *The Juvenile Court Did Not Err in Denying N.A.'s Petition for Reentry*

N.A. contends that the juvenile court's order denying her petition to reenter dependency jurisdiction is based on an erroneous interpretation of section 388.1 and related EFC statutes.

" 'The interpretation of a statute is a question of law we review independently.' " (*Adoption of A.B.* (2016) 2 Cal.App.5th 912, 919, 206 Cal.Rptr.3d 531.) "[T]he fundamental goal of statutory interpretation is to ascertain and carry out the intent of the Legislature." (****108** *People v. Cruz* (1996) 13 Cal.4th 764, 782, 55 Cal.Rptr.2d 117, 919 P.2d 731.) " ' "To determine legislative intent, a court begins with the words of the statute, because they generally provide the most reliable indicator of legislative intent." ' " (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 905, 119 Cal.Rptr.2d 1, 44 P.3d 949.)

"Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction. [Citation.] Nonetheless, a court may determine whether the literal meaning of a statute comports with its purpose. [Citation.] We need not follow the plain meaning of a statute when to do so would 'frustrate[ ] the manifest purposes of the legislation as a whole or

  

[lead] to absurd results.' " (*California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 340, 33 Cal.Rptr.2d 109, 878 P.2d 1321.) "Even unambiguous statutes must be construed to avoid absurd results which do not advance the legislative purpose[.]" (*Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1304, 1306, 4 Cal.Rptr.3d 629 (*Upland Police*); see id., [construing statute that allows officer to select representative of choice during interrogation to include reasonableness limitation; officer may not pick a representative who is not available and thereby prevent interrogation from happening].)

"The overriding principle is that '[i]nterpretation must be reasonable.' (Civ. Code, § 3542.)" (*Upland Police, supra*, 111 Cal.App.4th at p. 1304, 4 Cal.Rptr.3d 629.)

***502** Further, "[g]iven the complexity of the statutory scheme governing dependency, a single provision 'cannot properly be understood except in the context of the entire dependency process of which it is part.' " (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1235, 91 Cal.Rptr.3d 140, 203 P.3d 454.)

N.A. claims that she should have been allowed to reenter the juvenile court's jurisdiction under section 388.1. Section 388.1, subdivision (a), provides: "A nonminor who has not attained 21 years of age may petition the court in which he or she was previously found to be a dependent or delinquent child of the juvenile court for a hearing to determine whether to assume dependency jurisdiction over the nonminor, if he or she meets any of the following descriptions." There are four categories of qualified petitioners (§ 388.1, subd. (a)(1)-(4)), and N.A. asserts that she fits the second category, which provides in pertinent part:

> "(2) He or she is a nonminor former dependent, as defined in subdivision (aa) of Section 11400, who *received ... aid after attaining 18 years of age* under Kin-GAP pursuant to Article 4.5 (commencing with Section 11360) or Article 4.7 (commencing with Section 11385) of Chapter 2 of Part 3 of Division 9, or AFDC-FC pursuant to subdivision (e) of Section 11405, and whose former guardian or guardians no longer provide ongoing support to, and no longer receive aid on behalf of, the nonminor after the nonminor attained 18 years of age, but before he or she attains 21 years of age." (§ 388.1, subd. (a)(2), italics added.)

As enacted, subdivision (a) of section 388.1 sets out categories of nonminors who continued to receive a form of financial aid after attaining the age of 18, but for some reason, such as the death of a guardian or adoptive parent, stopped receiving aid prior to attaining the age of 21. (§ 388.1, subd. (a); see generally *In re Jesse S.* (2017) 12 Cal.App.5th 611, 618, 219 Cal.Rptr.3d 149 (*Jesse S.*) [discussing purpose of section 388.1].) Only these specified nonminors may petition the juvenile court for reentry into the dependency system under § 388.1. (Legis. Counsel's Dig., Assem. Bill ****109** No. 2454 Stats. 2014, ch. 769 (2013-2014 Reg. Sess.) ["This bill would ... authorize a nonminor who has not attained 21 years of age to petition the court ... if the nonminor received public assistance after attaining 18 years of age, as specified, and his or her former guardian or guardians or adoptive parent or parents no longer provide ongoing support to, and no longer receive payment on behalf of, the nonminor"].)

Other subdivisions of section 388.1 address procedural aspects of filing the petition for reentry, hearing requirements, factual findings the juvenile court must make in order to assume jurisdiction over the nonminor, and the Agency's responsibilities. (§ 388.1, subds. (b)-(e).)

  

The issue in this case is whether N.A. "received ... aid after attaining 18 years of age under ... AFDC-FC pursuant to ***503** subdivision (e) of Section 11405," thus allowing her to petition to reenter the dependency system. (§ 388.1, subd. (a)(2); see also §§ 11403, subd. (c) [referring to "nonminor former dependent receiving aid"], 11405, subd. (e)(1) [allowing a youth to "remain eligible" for AFDC-FC benefits].) N.A.'s position is that section 388.1, subdivision (a)(2) requires only that her guardian actually received AFDC-FC payments on N.A.'s behalf after she turned 18, i.e., after January 2020, and that it is of no legal consequence whether N.A. or the guardian was *eligible* to receive those payments. In contrast, the Agency's position is that in order for N.A. to be allowed to petition to reenter the juvenile court's jurisdiction, the relevant inquiry is whether the guardian was eligible, or legally entitled, to receive AFDC-FC payments after N.A. turned 18, not merely whether the guardian in fact received such payments. The Agency posits that a section 388.1 petitioner must have *validly* received AFDC-FC payments, and in this case, the Agency has classified the AFDC-FC payments made on N.A.'s behalf after January 27, 2019, as "overpayments" that are subject to collection or recoupment.

Unfortunately for N.A., the Agency has the better position. When the Legislature required a nonminor to have "received" the specified financial aid, we are confident that it did not intend to include situations in which the financial aid was inadvertently or mistakenly paid, or unlawfully received. (See *Upland Police, supra*, 111 Cal.App.4th at p. 1305, 4 Cal.Rptr.3d 629 [literal application of statute would defy common sense and lead to absurd result].) The Legislature intended to assist certain youth transitioning to adulthood—those between the ages of 18 and 21—by continuing their financial aid and services. (*Jesse S., supra*, 12 Cal.App.5th at pp. 617-618 [legislative goal was to "ensure services to young people between ages 18 and 21 who had been in foster care"]; *A.F., supra*, 219 Cal.App.4th at p. 55, 161 Cal.Rptr.3d 512 [legislative intent was to allow "certain youth in foster care to continue receiving assistance payments after turning 18"].) To achieve the legislative goal, the aid that was "received" by the nonminor former dependent after turning 18 must have been aid to which the recipient was eligible or legally entitled to receive.

Our construction of subdivision (a) of section 388.1 is bolstered by a consideration of the internally referenced AFDC-FC benefits statute—subdivision (e) of section 11405—which provides that a nonminor former dependent, like N.A., who was in a nonrelated guardianship, shall "*remain eligible* for AFDC-FC benefits ... until the youth attains 21 years of age, provided that the youth enters into a mutual agreement with the agency ...." (***504** § 11405, subd. (e)(1), italics added; see also § 11403, subd. (c).) The statute thus ****110** contemplates continuous eligibility for AFDC-FC benefits. [7] (§ 11405, subd. (e)(1).)

N.A. argues that our construction of section 388.1 will require courts to adjudicate eligibility for AFDC-FC payments, which they generally may not do. However, we are not persuaded that juvenile courts deciding petitions for reentry will be required to adjudicate the issue of eligibility for AFDC-FC payments. Legal guardians are required to timely report to the Agency any changes in placement. (E.g., §§ 11403, subd. (c) ["the payee and nonminor shall report any change in placement or other relevant changes in circumstances that may affect payment"], 11405, subd. (a); *Timmons v. McMahon* (1991) 235 Cal.App.3d 512, 515, 286 Cal.Rptr. 620 [AFDC-FC aid will be paid to an eligible child living with a nonrelated legal guardian "provided that the guardian cooperates with the local welfare department"].) The Agency's funding eligibility determinations do not necessarily or even typically coincide with juvenile courts' consideration of petitions for reentry. For example, if the guardian and/or N.A. had reported N.A.'s move in January 2019 or shortly thereafter, the Agency could have intervened at that time and the resulting outcome for N.A. would have been different.

Based on our review of the record, the Agency demonstrated that it retroactively terminated AFDC-FC payments to the guardian, effective as of January 2019. As a result, N.A. did not meet the requirements for reentering the dependency system under

  

section 388.1 because she was not validly receiving financial aid at the time she turned 18 in January 2020, or thereafter. Her case is regrettable insofar as it appears that the Agency may not have fully advised N.A. of her options or the ramifications of her moving out of the guardian's home before her 18th birthday. While the Agency's decision is subject to an administrative hearing process through which N.A. might obtain relief, the juvenile court did not err in denying her petition for reentry under section 388.1.

III. *The Juvenile Court Did Not Err in Declining To Determine N.A.'s Eligibility for AFDC-FC Payments*

As an alternative basis for reversal, N.A. contends that the juvenile court should have decided whether she was eligible for AFDC-FC without requiring her to exhaust administrative remedies. N.A. argues that the futility exception applies.

***505** Determining eligibility for AFDC-FC is "a function that rests with [the] Agency as part of the executive branch of government." (*A.F., supra*, 219 Cal.App.4th at p. 59 see , 161 Cal.Rptr.3d 512; *In re Darlene T.* (2008) 163 Cal.App.4th 929, 938-939, 78 Cal.Rptr.3d 119 (*Darlene T.*).) "The courts do not have the authority to order a social services agency to make AFDC-FC payments without an administrative determination of eligibility for those payments, and judicial review of eligibility determinations is ordinarily limited to the consideration of a petition for writ of administrative mandate of the eligibility decision." (*A.F.*, at p. 60, 161 Cal.Rptr.3d 512; see also *In re Joshua S.* (2007) 41 Cal.4th 261, 273-274, 59 Cal.Rptr.3d 460, 159 P.3d 49 (*Joshua S.*).)

****111** Exceptions to the rule requiring exhaustion of administrative remedies may lie " 'when the agency is incapable of granting an adequate remedy [citation] or when resort to the administrative process would be futile because it is clear what the agency's decision would be [citations].' " (*Darlene T., supra*, 163 Cal.App.4th at p. 940, 78 Cal.Rptr.3d 119; *Joshua S., supra*, 41 Cal.4th at p. 274, 59 Cal.Rptr.3d 460, 159 P.3d 49.)

The futility exception applies only when the petitioner is able to " 'state with assurance' " that the Agency would rule adversely in the petitioner's case, which usually cannot be done when the issue has never been presented for hearing. (*Joshua S., supra*, 41 Cal.4th at p. 274, 59 Cal.Rptr.3d 460, 159 P.3d 49.)

We cannot conclude that requiring N.A. to exhaust administrative remedies would necessarily be a futile exercise. Both parties acknowledge that her case involves an unusual set of factual circumstances. The probable administrative decision " '[can]not be forecast' " before her case is even presented to an administrative tribunal. (*Joshua S., supra*, 41 Cal.4th at p. 274, 59 Cal.Rptr.3d 460, 159 P.3d 49; see *Darlene T., supra*, 163 Cal.App.4th at pp. 940-941, 78 Cal.Rptr.3d 119.) Despite the Agency's current position, it is possible that the administrative hearing process may cause the Agency to review its regulations and its determination of N.A.'s eligibility for AFDC-FC payments. The process will also yield a comprehensive record and final administrative determination for the superior court to review. (*Darlene T.*, at p. 941, 78 Cal.Rptr.3d 119.)

Further, N.A. has not made an adequate showing of irreparable injury to circumvent the exhaustion requirement. We are sensitive to the timing issue—i.e., that time marches on while the administrative process unfolds. (See *Jesse S., supra*, 12 Cal.App.5th at p. 620 [administrative action takes "a large chunk out of the life of a young person 18 to 21"].) However, if the Agency's eligibility determination is found to be erroneous, N.A. has not shown that the Agency would be unable to make corrective payments.

Finally, we agree with the Agency that the juvenile court properly declined to make its own determination as to whether N.A. was eligible for AFDC-FC ***506** funding, respecting the separation of powers doctrine. (*Joshua S., supra*, 41 Cal.4th at p. 274, 59 Cal.Rptr.3d 460, 159 P.3d 49 ["a juvenile court may not order the [Agency] actually to make AFDC-FC payments ... unless the administrative process is invoked *and* it is determined through that process that the children are eligible for AFDC-

FC payments"].) The court's initial inclination to grant N.A.'s petition for reentry raised a host of internal Agency issues relating to funding mechanisms, which the court was ill-equipped, and without authority, to address. The court did what it could, which was to ensure that N.A. was notified of the potential availability of an administrative hearing to address her eligibility for AFDC-FC payments. The judicially noticed ALJ decision issued in February 2021 demonstrates that the administrative review process is underway and that further administrative remedies may still be available to N.A.

DISPOSITION

The order is affirmed.

Haller, Acting P. J., and O'Rourke, J., concurred.

On May 21, 2021, the opinion was modified to read as printed above.

**All Citations**

64 Cal.App.5th 494, 279 Cal.Rptr.3d 101, 21 Cal. Daily Op. Serv. 4939, 2021 Daily Journal D.A.R. 5009

**Footnotes**

1 Further unspecified statutory references are to the Welfare and Institutions Code.

2 In a statement of facts supporting eligibility for AFDC-extended foster care, signed January 2020, 18-year-old N.A. declared that her current address was the guardian's address.

3 It appears that the guardian received approximately $960 per month for N.A.'s care.

4 N.A. said that the guardian gave her $500 a month for rent, while the family friend said the guardian paid $200 a month for rent.

5 In late April 2020, N.A. gave birth to a baby girl, who also lived at the boyfriend's parents' home.

6 In her supplemental brief, NFD counsel asserted that a potential avenue of relief for N.A. would be for the juvenile court to appoint a successor guardian, which was within the court's power as noted in *In re A.F.* (2013) 219 Cal.App.4th 51, 161 Cal.Rptr.3d 512 (*A.F.*). There is no claim of error raised as to this aspect of the court's ruling, and accordingly, we do not address it.

7 The issue of whether a nonminor former dependent must be continuously eligible for AFDC-FC benefits in order to reenter the dependency system is not before us, and accordingly, we do not decide that matter. We merely note that the AFDC-FC benefits statute supports our conclusion that, to reenter the dependency system, aid that was "received" by the nonminor former dependent after turning 18 must have been aid for which the recipient was eligible or legally entitled.

62 Cal.2d 589, 400 P.2d 745, 43 Cal.Rptr. 633
Supreme Court of California

MALCOLM E. HARRIS, as Director of the Department of Alcoholic Beverage Control, Plaintiff and Appellant,
v.
ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD et al., Defendants and Respondents.

S. F. No. 21919.
Apr. 15, 1965.

**HEADNOTES**

(1)
Intoxicating Liquors § 9.9(11)--Licenses--Revocation--Exercise of Discretion.

Under Const., art. XX, § 22, and Bus. & Prof. Code, §§ 24200, 23084, 23085, the propriety of a penalty for misuse of a liquor license is a matter vested in the discretion of the Department of Alcoholic Beverage Control; its determination may not be disturbed unless there is a clear abuse of discretion.

See **Cal.Jur.2d,** Alcoholic Beverages, § 34.

(2)
Intoxicating Liquors § 9.9(11)--Licenses--Revocation--Exercise of Discretion.
That reasonable minds might differ as to the propriety of the penalty imposed by the Department of Alcoholic Beverage Control for misuse of a liquor license serves to fortify the conclusion that the department acted within the area of its discretion in imposing the penalty.

(3)
Intoxicating Liquors § 9.9(11)--Licenses--Revocation--Exercise of Discretion.
Though the discretion of the Department of Alcoholic Beverage Control as to the penalty for misuse of a liquor license is broad, the department does not have absolute and unlimited power, but is bound to exercise legal discretion, which is judicial discretion.

(4)
Intoxicating Liquors § 9.9(11)--Licenses--Revocation--Exercise of Discretion.
Revocation of an on-sale beer and wine license constituted an abuse of discretion where it appeared that the licensee operated for almost five years without a record of disciplinary action, and that the improper acts, which occurred within an eight-day period, included the volunteer services of the licensee's minor son not regularly employed as a bartender, the son's service of beer to minors, the service of beer by a waitress to an intoxicated person, the presence at the bar of a liqueur for the licensee's personal use only, and the service of wine from behind the bar by an unlicensed waitress who was not the licensee's wife.

(5a, 5b)
Appeal and Error § 950--Judicial Notice by Appellate CourtIntoxicating Liquors § 9.9(12), 9.10(2)(c)Administrative Law § 155-- Licenses--Revocation--EvidenceJudicial Review.

  

The failure to make a part of the administrative record ***590** the bulletin of the Director of the Department of the Alcoholic Beverage Control to area administrators containing a schedule of penalties for misuse of a beer and wine license does not preclude the Supreme Court from taking judicial notice of it. (Disapproving *DeMartini v. Department of Alcoholic Beverage Control,* 215 Cal.App.2d 787, 809-811 [30 Cal.Rptr. 668] insofar as it is inconsistent with the view that judicial notice may be taken of the bulletin.)

(6)
Evidence § 12Administrative Law § 155--Judicial Notice.
Nothing in Gov. Code, § 11515, indicates that an administrative agency's failure to take official notice of a matter precludes a court from taking judicial notice of it, and the reasons for procedural requirements in that section do not necessitate that such requirements always be complied with before a court may take judicial notice of a matter.

See **Cal.Jur.2d,** Evidence, § 18; **Am.Jur.,** Evidence (1st ed § 16).

(7)
Administrative Law § 101--Evidence--Official Notice.
The requirement in Gov. Code, § 11515, that the parties be informed of, and given an opportunity to refute, matters to be officially noticed was designed to protect the parties from unwarranted action by an agency, and the requirement that matters noticed be referred to in the record was to insure that the facts noticed would be brought to the reviewing court's attention.

(8)
Intoxicating Liquors § 9.9(12)--Licenses--Revocation--Evidence.
A bulletin from the Director of the Department of Alcoholic Beverage Control to area administrators, containing a schedule of penalties for misuse of a liquor license, absent mitigating or aggravating circumstances, merely constitutes evidence of the department's policy regarding penalties and thus of the manner in which the department's discretion was probably exercised in other cases, which is an appropriate matter for a court to consider in determining whether the department acted within the limits of its discretion in revoking a license.

**SUMMARY**

APPEAL from a decision of the Superior Court of the City and County of San Francisco. Byron Arnold, Judge. Affirmed.

Proceeding in mandamus to compel the Alcoholic Beverage Control Appeals Board to vacate a portion of a decision reversing a revocation of an on-sale beer and wine license. Judgment denying writ affirmed.

COUNSEL
Stanley Mosk and Thomas C. Lynch, Attorneys General, and Wiley W. Manuel, Deputy Attorney General, for Plaintiff and Appellant. ***591**
Charles P. Just, Joseph L. Alioto, Saveri & Saveri and Richard Saveri for Defendants and Respondents.

BURKE, J.

This is an appeal by the Director of the Department of Alcoholic Beverage Control (the Department) from a judgment denying mandamus to compel the Alcoholic Beverage Control Appeals Board (the Appeals Board) to vacate a portion of its decision reversing the Department's revocation of the on-sale beer and wine license of Giovanni Belfiore. The principal question presented is whether the Appeals Board exceeded its powers in reversing the Department's revocation of the license.

  

Belfiore operated a small pizzeria in San Francisco for which he held an on-sale beer and wine license. He was first licensed in 1956, and no disciplinary action was taken against him by the Department before that involved here. In this proceeding the Department ordered his license revoked on each count from XIII through XVII. With respect to these counts, the Department determined that he used the services of his minor son Horace on a portion of the premises primarily designed and used for the sale of alcoholic beverages for consumption on the premises in violation of section 25663 of the Alcoholic Beverage Control Act (count XIII); [1] that he permitted a female who was not a licensee or the wife of a licensee to dispense wine from behind a permanently affixed fixture used for the preparation and concoction of alcoholic beverages in violation of section 25656 (counts XIV and XVII); that he sold alcoholic beverages to an obviously intoxicated person in violation of section 25602 (count XV); that he had distilled spirits on premises licensed only for the sale of beer and wine in violation of section 25607 (count XVI); and that the continuance of his license would be contrary to public welfare and morals. The Appeals Board concluded that the evidence was sufficient to support counts XIII through XVII but that the penalty of revocation was too severe, and it remanded the matter to the Department for reconsideration of the penalty as to these counts. The Department then brought the instant mandamus proceeding to compel the Appeals Board to vacate its decision reversing the Department's revocation of Belfiore's license with respect to counts XIII through XVII. [2] ***592**

The facts relating to these counts may be summarized as follows:

Count XIII (use of services of a minor). On June 2, 1961, Ronald Lockyer, Rudolph Hoffman, and Chester Jew, investigators for the Department, went to Belfiore's restaurant about 11:35 p.m. Belfiore, his 16-year-old son Horace, and another son, James, were at the restaurant that night. The sons had gone there earlier in the evening for a "snack" and after eating had noticed dishes accumulating on the tables and decided to help their father by cleaning up. Horace cleared the tables and served food to customers. He also worked behind the bar and filled several pitchers with beer, which he served to two groups of minors without asking for identification. The investigators stayed at the restaurant about two hours. Belfiore spent most of this time in the food preparation area at the front of the restaurant, but he walked to the rear of the restaurant several times and talked to Horace behind the bar. Belfiore was standing about 20 feet from Horace and was "looking around the premises" on one of the occasions when Horace went behind the bar, filled a pitcher with beer, and served it. Horace testified that his father had not instructed him to serve beer; that he had been released from the Log Cabin Ranch School for Boys about a week before the night in question and had been told by his probation officer to help his father at the restaurant. He had worked for his father "off and on" during the week after his release and was not paid any salary. [3]

Count XIV (permitting female to dispense wine). On June 3, 1961, Jew again went to the restaurant. Belfiore and a waitress, Angeline Newsome, were there that night. Jew ordered some pizza, and the waitress asked him what he wanted to drink. He inquired as to the kind of wine she had, and she ***593** said she would give him some "house wine." She poured some wine into a glass and served it to him at the counter. Lockyer then arrived, and while he was writing a citation the waitress grabbed the glass and tried to pour the wine into a sink, but the investigators succeeded in retrieving some of it.

Count XV (serving obviously intoxicated person). On June 3, 1961, a man named Walter Olcott staggered into Belfiore's restaurant. Olcott was singing incoherently, and his breath smelled of alcohol. He requested beer and the waitress served it to him. He fell asleep but thereafter appeared to recover somewhat and was allowed to go home. The waitress told Jew that Olcott was "loaded" and that after he "makes all the other places he usually comes here before he goes home." Olcott testified that he had suffered a stroke in 1960 and was under a doctor's care, that he did not drink except sometimes some beer or wine, that when he drank "a couple of beers" he became silly, and that he had gone to Belfiore's restaurant a number of times for coffee and occasionally for one or two "beers."

Count XVI (possession of distilled spirits on premises licensed only for sale of beer and wine). On June 3, 1961, Lockyer saw a bottle of creme de menthe on the bar at Belfiore's restaurant. Belfiore testified that he bought the creme de menthe to put into his coffee to remove the taste of medicine he took and that no one else had ever had any of the liqueur. A letter from a doctor stated that Belfiore was under his care for an ulcer and that Belfiore regularly took certain medications that might leave a bad taste which would be counteracted by a little creme de menthe.

  

Count XVII (permitting female to dispense wine). On June 9, 1961, Ulysses Beasley, an investigator for the Department, went to Belfiore's restaurant and sat down at the counter. He asked a waitress, Wendy Wales, for a specific type wine, and she informed Belfiore of his request. Belfiore obtained a bottle of the wine and handed it and a glass to the waitress, who in turn placed them in front of Beasley.

Section 22 of article XX of the California Constitution provides, "The Department of Alcoholic Beverage Control ... shall have the power, in its discretion, to ... suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the ... continuance of such license would be contrary to public welfare or morals, ... Review by the board [the Alcoholic Beverage Control Appeals Board] of a decision of the department shall be limited to the questions ***594** whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. ... When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department. ..." (See also Bus. & Prof. Code, §§ 24200, 23084, 23085.)

(1) Under the cited constitutional and statutory provisions the propriety of the penalty is a matter vested in the discretion of the Department, and its determination may not be disturbed unless there is a clear abuse of discretion. (*Martin v. Alcoholic Beverage etc. Appeals Board,* 52 Cal.2d 287, 291, 293 [341 P.2d 296]; cf. *Magit v. Board of Medical Examiners,* 57 Cal.2d 74, 87 [17 Cal.Rptr. 488, 366 P.2d 816].) ( 2) If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion. (*Martin v. Alcoholic Beverage etc. Appeals Board, supra,* 52 Cal.2d 287, 294.) It has been held, for example, that the Department did not abuse its discretion in revoking a license where the licensee violated Penal Code section 337a by taking an unlawful bet on the licensed premises (*MacFarlane v. Department of Alcoholic Beverage Control,* 51 Cal.2d 84, 91 [330 P.2d 769]) and where the licensee over a number of years repeatedly misrepresented a material fact by failing on license renewal applications to disclose that the business was in fact operated by a partnership (*Martin v. Alcoholic Beverage etc. Appeals Board, supra,* 52 Cal.2d 287, 289 et seq.).

(3) Although the Department's discretion with respect to the penalty is broad, it does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion. (*Martin v. Alcoholic Beverage etc. Appeals Board,* 55 Cal.2d 867, 875 [13 Cal.Rptr. 513, 362 P.2d 337].) In *Martin* this court stated, " 'The term "judicial discretion" was defined in *Bailey v. Taaffe* (1866) 29 Cal. 422, 424, as follows: "The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia,* but a legal discretion, to be exercised in ***595** conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." ' "

(4) Here the Appeals Board concluded that the revocation of Belfiore's license constituted a clear abuse of discretion by the Department, and the trial court apparently also so concluded since it denied mandamus. We are satisfied that their conclusion is correct. Belfiore had no prior disciplinary record with the Department. For almost five years, from 1956 when he obtained a license until the instant proceeding in 1961, he had not been in any difficulties with the Department. Although within an eight-day period several acts were committed that were improper, they were not of such a nature as to warrant revocation of his license. It does not appear that Belfiore regularly employed a minor to act as a bartender but rather that his son volunteered his services on the night in question and filled a few pitchers with beer which he served. The son served the beer to minors, but the Department considered suspension for a limited period of time an adequate penalty for Belfiore's allowing the minors to be served. The fact that a waitress on one occasion served a glass of beer to an intoxicated person and that her acts and knowledge are imputable to the licensee (*Garcia v. Martin,* 192 Cal.App.2d 786, 790 [14 Cal.Rptr. 59]) does not warrant the imposition of

  

the most severe administrative penalty possible, nor do the circumstances surrounding the service of wine to the investigators show that the offenses were of such a character that revocation was justified. With respect to the creme de menthe, there was no evidence that it was used for any purpose except Belfiore's own personal use.

The Appeals Board requests that judicial notice be taken of a bulletin from the director of the Department to area administrators containing a schedule of penalties under which the standard penalty, in the absence of mitigating or aggravating circumstances, is suspension for a total of not more than 75 days for the same or similar offenses as the ones for which the Department ordered revocation of Belfiore's license. Judicial notice may be taken of public and private official acts of the executive department of the state. (Code Civ. Proc., § 1875, subd. 3; *Pearson v. State Social Welfare Board,* 54 Cal.2d 184, 210 [5 Cal.Rptr. 553, 353 P.2d 33].)

(5a) We do not agree with the Department's contention that the failure to make the bulletin a part of the administrative record precludes this court from taking judicial notice of ***596** it. The Department relies upon *DeMartini v. Department of Alcoholic Beverage Control,* 215 Cal.App.2d 787, 809-811 [30 Cal.Rptr. 668], which contains dictum that the court could not under the guise of judicial notice incorporate into the administrative record a matter of common knowledge not officially noticed by the Department. The court in *DeMartini* said that under Government Code section 11515 the Department was permitted to take official notice of any fact that may be judicially noticed, provided it followed the procedural provisions of that section;[4] that the court reviewed the administrative record; and that in the court's opinion the procedural restrictions persisted upon judicial review. ( 6) There is nothing in the language of section 11515 indicating that failure to take official notice of a matter precludes a court from taking judicial notice of it, and the reasons for the procedural requirements in that section do not necessitate that such requirements always be complied with before a court may take judicial notice of a matter. ( 7) The requirement in section 11515 that the parties be informed of, and given an opportunity to refute, the matters to be noticed was designed to protect the parties from unwarranted action by an agency, and the requirement that matters noticed be referred to in the record was to insure that the facts noticed would be brought to the attention of the reviewing court. (See Tenth Biennial Report of Judicial Council of Cal. (1944) p. 23.) ( 5b) In the present case no reason is apparent why the failure to make the bulletin a part of the administrative record should preclude our taking judicial notice of it. Insofar as *DeMartini* is inconsistent with our view that judicial notice may be taken of the bulletin it is disapproved.

(8) The Department further contends that even if judicial notice is taken of the bulletin it does not aid Belfiore because the Department cannot by its own rules limit the exercise of its constitutional discretion in determining the penalty (cf. *Bank of Italy v. Johnson,* 200 Cal. 1, 15 et seq. [251 P. 784]). The bulletin, however, does not circumscribe the exercise of ***597** the Department's discretion. The face of the bulletin shows that it was contemplated that the schedule of penalties might not be followed where aggravating or mitigating circumstances were present, and even in the absence of such circumstances a departure from the schedule would not necessarily show an abuse of discretion by the Department. The Department also, of course, was not precluded from changing the schedule. The bulletin merely constitutes evidence of the Department's policy regarding penalties and thus of the manner in which the Department's discretion has probably been exercised in other cases, and in our opinion this is an appropriate matter for us to consider in determining whether the Department acted here within the limits of its discretion.

The judgment is affirmed.

Traynor, C. J., McComb, J., Peters, J., Tobriner, J., Peek, J., and Schauer, J.,* concurred.
Appellant's petition for a rehearing was denied May 12, 1965. ***598**

  

## Footnotes

1 Unless otherwise noted, section references are to the Alcoholic Beverage Control Act (Bus. & Prof. Code, § 23000 et seq.).

2 Review was not sought in the superior court of the portion of the Appeals Board's decision relating to counts I through XII and count XVIII. With respect to those counts, the Department determined that Belfiore sold beer to six minors in violation of section 25658 (counts I through VI); that he permitted the same minors to consume beer in violation of section 25658 (counts VII through XII); and that he employed the services of a minor, Wendy Wales, in violation of section 25663 (count XVIII). The Department ordered his license suspended for 15 days on each of the first twelve counts, the penalties on the first six counts to run consecutively and on the next six counts to run concurrently with those on the first six counts. The Department ordered his license revoked on count XVIII. The Appeals Board concluded that all counts except IV, X, and XVIII were supported by substantial evidence and affirmed the term of suspension ordered by the Department, except that the total period of suspension was reduced from 90 to 75 days because the evidence did not support counts IV and X.

3 The acts involved in count XIII also constituted the basis for the charges in counts I through XII.

4 Section 11515 reads: "In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency."

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

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**BEFORE THE HEARING BOARD OF THE**

**SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT**

| | |
|---|---|
| **In The Matter Of**<br><br>BAKER COMMODITIES INC.,<br><br>[Facility ID No. 800016]<br><br>Petitioner,<br><br>vs.<br><br>SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,<br><br>Respondent. | Case No. 6223-2<br><br>**[PROPOSED] ORDER GRANTING SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT'S MOTION TO STRIKE**<br><br>Date: February 26, 2025<br>Time: 9:30am<br>Place: Hearing Board<br>South Coast Air Quality Management District<br>21865 Copley Drive<br>Diamond Bar, CA 91765 |

This matter came on before the South Coast Air Quality Management District Hearing Board ("Hearing Board") for hearing on February 26, 2025. George Gigounas and Caroline Lee of DLA Piper LLP appeared for Appellant/Petitioner Baker Commodities Inc. ("Baker"). Daphne P. Hsu and Nicholas P. Dwyer appeared for Appellee/Respondent South Coast Air Quality Management District ("South Coast AQMD" or "District").

The Hearing Board, having reviewed the moving and opposing papers on the District's

Motion to Strike portions of the Baker's Appeal of Revised Vernon Facility Permit Incorporation of Rule 415 ("Permit Appeal[1]"), herein pursuant to Hearing Board Rules and Procedures Rule 6(a) and (d), with guidance from California Code of Civil Procedure sections 435 and 436; and oral argument of counsel having been received by the Hearing Board:

The Hearing Board finds, adjudges and orders as follows:

That the Hearing Board GRANTS the District's Motion to Strike as follows:

1. The stricken portions of the pleadings, attached hereto as Attachment A, shall be stricken.

IT IS SO ORDERED.

Dated: _____

_____
BOARD MEMBER

[1] Permit Appeal includes the Supplement filed January 28, 2025.

# ATTACHMENT A

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**BEFORE THE HEARING BOARD OF THE**

**SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT**

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| **In The Matter Of:**<br><br>SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,<br><br>~~Petitioner,~~<br><br>v.<br><br>BAKER COMMODITIES, INC.,<br><br>~~Respondent.~~ | Case No. 6223-1<br><br>**~~RESPONDENT~~ BAKER COMMODITIES, INC.'S APPEAL OF REVISED VERNON FACILITY PERMIT INCORPORATION OF RULE 415**<br><br>Facility ID: #800016<br>4020 Bandini Boulevard, Vernon, CA 90058<br>Phone # (323) 268-2801<br>Facility Contact: Jason Andreoli (Assistant Vice President – Los Angeles General Manger and Corporate Production Manager)<br>Email: JJAndreoli@bakercommodities.com |

Baker Commodities, Inc., appeals the South Coast Air Quality Management District's December 12, 2024, issuance of a Title V/RECLAIM Facility Permit Revision for the Facility.[1] The Permit improperly requires compliance with District Rule 415, which applies exclusively to rendering operations. But the Facility no longer performs rendering of any kind. The District's inclusion in the Permit of blanket references to Rule 415 is an unlawful attempt to expand the Rule's ambit to non-rendering activities. It is also unnecessary. Baker now operates the Facility as a collection center under strict and carefully constructed odor control measures developed jointly by Baker, the District, and the Hearing Board, as the July 22, 2024, Second Modified Order ("Order") reflects.[2] Baker has done so without incident or substantiated odor complaint since collection center operations commenced in October 2024 alongside extant cooking oil and trap grease recycling and associated wastewater operations. In short, the Order's measures (many of which track Rule 415 *verbatim*) are lawful and effective and were acceptable to the District when it was forced to work cooperatively. The District's subsequent about-face to incorporate Rule 415 in the Permit should not be accepted.

The District's deviation from the Order's provisions mischaracterizes the nature of the Facility's operations, improperly extends Rule 415 to activities it was never intended to regulate, and threatens to revive disputes already put to rest through painstaking negotiations and costly proceedings. Many of the Rule 415 conditions demanded are entirely unworkable for the Facility and risks significant uncertainty for future compliance, effectively making Baker's compliance impossible. This increasingly seems to be the point: the District is going to great lengths to punish Baker—and the workers and communities that depend on Baker—for past disputes that should be put to rest. Whatever its perceived justification, however, the District's conduct can only be described as arbitrary and capricious. Baker now requests that the Hearing Board amend the Revised Permit to remove references to Rule 415 and rendering and to replace them with the Order's substantive operational requirements to fit the Facility's *actual* operations, the proper scope of Rule 415, ~~and the terms to which the District previously agreed.~~

[1] Baker timely submitted its Title V Permit renewal application, which is still pending with the District.
[2] Relevant portions of the Revised Permit are attached as Exhibit 1. The Order is attached as Exhibit 2.

## BACKGROUND

### I. Baker Provides Essential Services While Complying with the Order.

Baker remains committed to complying with District Rules and is dedicated to providing its essential service to the community. The importance of Baker's collection operations at the Facility—even without rendering—was again underscored by Governor Newsom's December 18, 2024 Proclamation of a State of Emergency regarding bird flu, which infects and kills cattle. Per the Proclamation, despite efforts to contain the flu's spread, "dairy cows at four Southern California dairies tested positive," and the State is "working with environmental protection agencies to safely manage mass mortality material," i.e., cattle carcasses.[3] Without transport to lawful rendering facilities, carcasses are left to rot in the sun, increasing the spread of disease. Baker is among the last providers ensuring these remains are properly collected, managed, and converted to useful products, helping mitigate health and safety impacts in our communities. The District's unlawful inclusion of Rule 415 in a permit for a non-rendering facility threatens those efforts.

Baker's operations are also key to California's climate response infrastructure, which requires low-carbon fuels and diversion of organic waste from landfills. Baker, a carbon-negative operation, is an essential supplier of advanced biofuel feedstocks from used cooking oil and trap grease. The Facility also reduces carbon emissions by diverting organic waste from landfills, another key for California, which requires a 75% reduction of organic waste by 2025. *See* Health & Safety Code § 39730.6.

### II. The Parties and This Hearing Board Carefully Built an Operational and Capital Improvement Package for the Future of the Facility.

In September 2022, the Hearing Board issued the Facility's first Order for Abatement ("Original Order"), requiring Baker to cease rendering, trap grease processing, and related wastewater processing operations. In April 2023, the Hearing Board modified the Original Order

[3] *See* Exec. Dep't State of Cal. Proc. of State of Emergency related to the Bird Flu (Dec. 18, 2025), available at https://bit.ly/GovBirdFluProcSOE; *see also* Heath, Crystal & Baur, Gene, *It's Time to End the Denial About Bird Flu*, Time (Dec. 6, 2024) available at https://time.com/7200002/bird-flu-outbreak-denial-essay/; Douglas, Leah, *Cows dead from bird flu rot in California as heat bakes dairy farms*, Reuters (Oct. 17, 2024) available at https://www.reuters.com/world/us/cows-dead-bird-flu-rotcalifornia-heat-bakes-dairy-farms-2024-10-17/.

to allow trap grease and related wastewater operations to resume while the parties addressed their ongoing dispute over rendering. At the April 2023 hearing, the Hearing Board noted that trap grease operations are not subject to Rule 415 and that retaining reference to Rule 415 could lead to confusion.[4] The Hearing Board issued written findings on the Modified Order on June 21, 2023, allowing Baker to resume trap grease operations and related wastewater processing.

Following extensive discussions about how best to serve the community and retain its employees, Baker later determined not to resume rendering at the Facility. To avoid shuttering its business and terminating all employees, and because California's need for rendering services is essential, substantial, and remains unmet, Baker proposed instead to begin collection operations after significant capital and operational improvements to the Facility. To implement the proposal, on November 16, 2023, Baker first submitted to the District its permit applications as follows:

(1) **Main Plant PTE Extension** (Device ID C402): Baker originally designed the Main Plant to comply with the Rule 415 PTE standards and seeks the ability to expand the PTE structure. The District issued this permit.[5]

(2) **J&M Catch Basin Enclosure** (D269): Baker plans to enclose the catch basin, which includes a screening bin with a screw conveyor to remove solids collected in the catch basin. The proposed PTE would also enclose the catch basin and screening bin, but the top portion of the sealed and closed screw conveyor will be located outside to address operational requirements, and that portion will operate as a closed system. No raw rendering materials are received in this area. The District issued this permit.[6]

(3) **Grease Pit Trash Enclosure** (D328): Also referred to as the wastewater treatment plant enclosure, comprises an inclined trough leading to screens and screw conveyors that remove debris from incoming trap water so that waste solids can drop into a waste bin located directly

[4] *See, e.g.*, April 19, 2023 Hearing Transcript (attached as Exhibit 3) at 297:2–6 (Mr. Pearman: "The whole point is that if they somehow aren't doing rendering and have that portion modified … then the mere grease operations are not subject to Rule 415. I think that's pretty clear from the rules."); 298:4–8 (Mr. Pearman: "but I think we have to get 415 out. Because it just muddies the water for intentions here.")

[5] Where the District's demands for additional Device or Control ID Numbers on the Permit are derived from the District's misapplication of Rule 415 to these operations, Baker contests those changes.

[6] In addition to the improper Rule 415 and "rendering" statements in the Permit, Baker appeals the District's use of the term "sludge." The grease trap collection bin collects "trash", including utensils, rocks, etc., not sludge.

next to receiving pit. No raw rendering materials are received in this area. Baker plans to enclose the area around the receiving pit waste bin. This permit is still pending.

(4) **Centrisys Trash Bin** (D368, D369): The Centrisys system is an elevated structure to allow waste solids to drop into a waste bin below the Centrisys units. Baker plans to construct a PTE enclosing the waste bin that collects centrifuge solids from the Centrisys horizontal drum centrifuges. No raw rendering materials are received in this area. This permit is still pending.

~~On April 17, 2024, after reviewing the details in the permit applications and ironing out most, but not all, operational and capital improvement details with the District, Baker petitioned the Hearing Board to modify the Modified Order to allow collection operations consistent with the submitted permit applications and other conditions.[7] Despite Baker's agreeing not to resume rendering and the Hearing Board finding trap grease processing not subject to Rule 415 under the Modified Order,~~ the District sent Baker draft permit conditions on May 9 and May 16 with inappropriate and unworkable blanket citations to Rule 415 throughout.

~~On May 29, June 11, and July 2, the Hearing Board heard evidence and argument to support issuance of the Second Modified Order, ultimately issued on July 22. As the Hearing Board knows, Baker was ready and able to commit to the essential housekeeping requirements the District wished to impose from Rule 415 but not to import wholesale application of a Rule having little to do with Baker's new proposed operations. Thus, after careful discussion, the parties agreed to list the specific rule provisions the District demanded instead of blanket references to Rule 415 in the Facility's operational requirements.[8] Attachment A to the Order reflects the numerous carefully crafted operational conditions, including that "Baker shall not resume grinding, cooking and downstream operations related to rendering of animal products at the Facility," and extensive odor and housekeeping best management practices tailored to Baker's *actual* planned operations, which do not include rendering.~~ Consistent with the Hearing Board

~~[7] *See* Baker's Request to Modify the Modified Order, Case No, 6223-1 (April 17, 2024).~~

~~[8] *See e.g.*, May 29, 2024 Hearing Transcript (attached as Exhibit 4) at 191:21–192:2. (Ms. Hsu: "parties are aligned on not needing to take the issue of Rule 415 applicability at this time, and we have been in discussion regarding instead of a reference to say Rule 415(e), to take out specific provisions, and given that this is an abatement order context, the hearing board does have flexibility in terms of what it is ordering."); 22:6–8 (Mr. Dwyer: "the district does not see a good reason why we need to continue to dig into continued applicability of Rule 415.").~~

proceeding, Baker returned the draft permits to the District on July 16 (before the final Order issued), with corrections to the District's unlawful inclusion of Rule 415.

~~Notably, before the final Order issued, the District was already backtracking on its agreement.~~ The District's engineering department reached out to Baker to explain its inclusion of Rule 415 in the draft permits, ignoring the Order's then-anticipated conditions. Given the significance and timing of this backtracking, Baker's counsel emailed District counsel to explain the problems with the District's proposed conditions and request a call so the permits could be corrected consistent with the Board's anticipated Order. On July 25, three days after the Board issued its Order, District counsel declined even to meet, stating it would not be "fruitful" and that the District engineer would finalize permit conditions, which Baker could appeal if it wished. On August 1 and September 26, Baker and the District exchanged additional correspondence concerning Rule 415 applicability, reiterating their positions.[9]

The District later gave Baker notice of the draft permit language—with the improper Rule 415 conditions—before sending it to U.S. EPA for 45-day review, on the following dates:

- October 12 (Saturday): Application Nos. 648440 and 648441 Main Plaint Extension, screw conveyor, and the J&M skimmer trash bin enclosure.
- November 10: Application No. 648442 trap grease area enclosure.
- November 19: Application No. 648443, Centrisys enclosure.

As to each, Baker commented that the inappropriate reference to Rule 415 should be removed, to no avail. On December 12, 2024, the District notified Baker of its final approval of the permits to construct the Main Plant Extension, screw conveyor, and the J&M skimmer trash bin enclosure, all of which continued to reflect the Rule 415 conditions and rendering, as well as other problems.[10] The District improperly and unnecessarily insists on citing Rule 415 and rendering in Baker's long-term operational permits.

## III. The Hearing Board is Authorized to Direct the District to Remove the Improper Reference to Rule 415 in the Facility Permits.

Baker appeals the first two of four permits to construct, and will appeal the second two permits when issued, under Health & Safety Code § 42302.1 and District Rule 216, and is entitled

[9] Baker's August 1, 2024 Letter is attached as Exhibit 5. The District's Response Letter is attached as Exhibit 6.
[10] *See* Exhibit 1, Revised Facility Permit.

to a hearing within 30 days. Baker requests that the Hearing Board remove references to Rule 415 and rendering, and to "sludge" when referencing the trash related to the grease trap, in all Facility permits, and replace them with conditions consistent with the Order, under Rule 216, Health & Safety Code §§ 42308, 42302.1.

## ARGUMENT

### I. Reference to Rule 415 in the Facility Permit is Unlawful, Improper, Unnecessary, and Contrary to the Second Modified Order.

The District demands that the Facility Permits specifically reference Rule 415, ~~departing from the carefully crafted language by which the Hearing Board resolved Baker's earlier dispute with the District under the Order—language to which both Baker and the District agreed on the record before the Hearing Board.~~ The District's position is wrong on the law and misreads Rule 415's plain text and history. And it wastes Baker's and the Board's time and resources without conferring any additional benefit to the District or the community. Baker has expended significant resources to work in good faith with the District and resolve its dispute. It has made *significant* capital and operational improvements; ceased rendering; will build new enclosures on non-rendering features; identified and implements a deodorizer; implemented expanded employee training, housekeeping, and other protocols; and retained a compliance specialist, all while continuing to keep as much of its staff employed as possible, even when revenue was drastically reduced, to ensure the Facility's long-term viability. Yet the District clings to its error of applying Rule 415 to non-rendering operations for what seem like purely tactical and retaliatory reasons. This undermines years of progress and risks reigniting and expanding a dispute that had been put to rest, without legal or practical merit.

#### A. Rule 415 Does Not Apply to Collection Centers That Do Not Also Conduct Inedible Rendering.

The only operations to which Rule 415 applies are "rendering facilities that process raw rendering materials; and wastewater associated with rendering." Rule 415(b). "Rendering" under Rule 415 is limited to "operations and processes that *convert raw rendering materials into fat commodities and protein commodities by heat and mechanical separation.*" Rule 415(c)(19).[11]

[11] *See also* Rule 415(c)(17) ("Raw Rendering Materials means materials introduced into the receiving area at a

The Final Staff Report for Rule 415 further confirms that the Rule is intended to govern only *facilities that conduct inedible rendering*.[12] Rule 415 goes further still and exempts "[f]acilities that process trap grease *but do not* conduct inedible animal rendering operations." Rule 415(l)(1)(C) (emphasis added). Rule 415 also expressly exempts "[c]ollection centers that do not conduct inedible rendering or handle or process trap grease." Rule 415(l)(1)(B).[13]

Baker ceased all rendering operations at the Facility when the Original Order issued and has since agreed not to resume such operations. The Order reflects this, prohibiting Baker from resuming "grinding, cooking and downstream operations related to rendering" and ordering Baker to "disconnect ... and keep disconnected any gas, fuel, and/or steam lines to cookers used for rendering...." Order, Attachment A, Condition 1.[14] This necessarily includes all equipment that could be used to "convert raw rendering materials into fat commodities and protein commodities by heat and mechanical separation." Rule 415(c)(19). Nothing in Rule 415 justifies applying the Rule to a collection center that conducts no operations related to rendering.

**B. The District's Reading of Rule 415 Is Unsupported.**

The District advances three conflicting and confused arguments to unlawfully extend Rule 415 to facilities that perform collections and process trap grease without any inedible animal rendering operations. First, it argues that the Facility is ineligible for applicable exemptions because Baker operates as a collection center *and* processes trap grease. Second, the District argues that trap grease "is considered a Raw Rendering Material"—a misreading of the Rule ~~the~~

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rendering facility, and may include animal carcasses and parts, packing house or grocery store cuttings, out-of-date products from grocery stores, blood, viscera, offal, feces and other organic matter generated by food processors. Raw rendering materials does not include used cooking oil."); Rule 415(c)(20) ("Rendering Facility means a facility engaged in rendering operations.").

[12] *See* Final Staff Report at 3-6 ("The purpose of Proposed Rule (PR) 415 is to reduce odors from facilities rendering animals and animal parts."), 3-7 ("Applicability of the proposed rule is to rendering facilities that conduct inedible rendering operations."), A-78 ("PR 415 is applicable to new and existing rendering facilities that process raw rendering materials; and trap grease wastewater associated with rendering or trap grease processing.").

[13] *See also id.* at 3-7 ("Collection centers for animal carcasses and parts that do not also conduct inedible rendering operations" are exempt from Rule 415); A-70 (Rule 415's definition of "collection center" was intended to "provide for an exemption ... for collection centers that do not conduct inedible rendering or handle or process trap grease."), A-81 ("collection centers that do not conduct inedible rendering are exempt from the requirements of PR 415 under subparagraph (l)(1)(B)").

[14] *See also* Exhibit 2, Findings of Fact, p. 2 (Baker has decided to cease cooking and downstream operations *related to rendering of animal products (colloquially known as 'rendering') at the Facility*[.]" (emphasis added).

Hearing Board already rejected with the Modified Order.[15] Third, the District argues Baker's trap grease processing *is* rendering subject to Rule 415 because it uses steam—again ignoring the Rule's plain language and common sense.[16] None of these positions holds water. Indeed, the latter two arguments contradict the first. The District's inability to advance internally consistent arguments thus negates any notion that its position is proper regulation or anything other than a tactical attempt to target Baker and expand the ambit of Rule 415.

***First,*** Rule 415(b) applies only to "rendering facilities that process raw rendering materials; and wastewater associated with rendering." The Facility does not, and expressly cannot under the Order, render, which requires that "raw rendering materials" be converted "by heat and mechanical separation." Rule 415(c)(19). Baker therefore need not qualify for an exemption to the Rule, because the Rule itself does not govern the Facility. Even so, the plain language of two exemptions confirms that Rule 415 unequivocally does not extend to the Facility. "Facilities that process trap grease but do not conduct inedible animal rendering operations" are exempt. Rule 415(l)(1)(C). That alone disposes of the question.

The District's arbitrary reading of the Rule to negate the exemptions for collection centers that also recycle trap grease fails. First, the Final Staff Report confirms that the reference to handling or processing trap grease is a vestige of the February 18, 2015 draft of Rule 415. That earlier draft expressly included trap grease operations within the Rule's ambit. And it set forth exemptions for non-rendering facilities that were phrased identically to those in the final Rule, which (as the Final Staff Report repeatedly notes) does not apply to trap grease.[17] Second, the District's reading cannot explain why the exemption at (C) uses the broader term "facilities,"

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[15] *See, e.g.*, Exhibit 3 at 309:13–16. (Member Balagopan: "The plain meaning of the rule is very clear, it's plain. In the rule in the staff report, it is plain as can be: Remove trap grease from PR 415, applicability");

[16] *See, e.g.*, *id.* at 317:18–19. (Member Balagopan: "So the trap grease operation is being – does not have to comply with 415"); 309:20–310:6. (Member Balagopan: "What the District chose to do in the opening statement is . . . referred to the . . . 415 staff report and as Exhibit 21 that Baker understood the trap grease was subject to 415. That was based on early on discussion in the rule in the proposed rule making. But as you can see in table P-1, the summary of changes, that was discarded. But the District has been disingenuous in saying hey, look. This is what they had submitted and they knew this. I think it's misleading. This in my mind is really straightforward").

[17] *See*, e.g., Final Staff Report at A-17 ("All requirements for trap grease have been removed from the staff proposal."); A-55 ("The requirements for trap grease have been removed from the proposal for PR 415."); P-ii ("Removed trap grease from PR 415 applicability").

which would clearly cover *the* Facility, while the exemption at (B) uses the narrower "collection center" term. But understanding "trap grease" here as a vestige of a prior proposal that applied broadly to trap grease resolves that question. Each exemption concerns *only* the combination of some activity (trap grease handling or operating a "collection center") *and* inedible rendering. This reading also provides a consistent outcome between the two exemptions: the Facility is exempt under both. The District's view either strains to disqualify the Facility under both exemptions (the broad language at (C) notwithstanding) or renders a nonsensical result: the Facility is exempt and not exempt at the same time. That cannot be. *See Michaels v. State Pers. Bd.* (2022) 76 Cal. App. 5th 560, 569–570 (interpreting a legal rule to comport with commonsense and avoid absurdity and mischief).

Additionally, the Final Staff Report confirms that Rule 415 was expressly intended to address the five rendering facilities in the South Coast Air Basin.[18] Notably, no wastewater treatment operations, including those handling trap grease, that were not also rendering were involved in the report or the rulemaking process.[19] This also comports with the District's disclaiming the Rule's applicability to, and signaled a separate rulemaking to address, trap grease.

***Second,*** in a confusing attempt to apply Rule 415 to collection centers that process trap grease but do not render, the District argues that Trap Grease is a Raw Rendering Material, as the Rule defines these terms. It claims that because Raw Rendering Material is defined to expressly exclude used cooking oil but not trap grease, "[i]t is included as Raw Rendering Material because Trap Grease is introduced in the receiving area."[20] That conclusion makes no sense. Raw Rendering Materials means "materials introduced into the receiving area at a rendering facility." Further, the Receiving Area is "the area, tank, or pit within a rendering facility where raw rendering materials are unloaded from a vehicle or container, or transferred from another portion of the facility *for the purpose of rendering these materials.*" Rule 415(c)(18) (emphasis added). Each term has its own definition based on the act of rendering—i.e., the conversion of "raw

[18] *See* Final Staff Report at 1-1 and 1-22.
[19] *See* Final Staff Report at A-107 (referring to facilities "that will be included during rule development of PR 416, which addresses odors from kitchen trap grease")
[20] *See* Exhibit 6 at 1.

rendering materials into fat commodities and protein commodities by heat and mechanical separation." Rule 415(c)(19). By contrast, Trap Grease means "cooking grease, food waste, and wastewater from a restaurant grease trap or interceptor." Rule 415(c)(23). It lacks any reference to rendering. The District's attempt to read Trap Grease into the definitions of Raw Rendering Material and Rendering is unsupported by the Rule's plain language and would obviate many of Rule 415's definitions and terms.[21] If Trap Grease were Raw Rendering Materials, Rule 415 would not need separate definitions, requirements, and exemptions for trap grease processing. As just one example, the very exemption for "[f]acilities that process trap grease but do not conduct inedible animal rendering operations" would make no sense.

***Third,*** the District's disingenuous assertion that trap grease processing is somehow rendering because it believes the Facility is converting trap grease into a fat commodity using heat (in the form of steam) and mechanical separation should be rejected.[22] Baker's trap grease operations do not constitute rendering as Rule 415 defines it, and any argument to the contrary cannot pass the straight-face test. Most obvious is that this argument contradicts the District's other stated position that the Facility should be regulated under Rule 415 only because it is processing trap grease *and* operating as a collection center. If the District believed that Baker's trap grease operations actually constitute rendering, then the Hearing Board's approval of the Modified Order would make no sense.

The basic canon of construction against redundancy and surplusage forecloses a reading of "processing trap grease" that falls within the definition of "inedible rendering." *Thiara v. Pac. Coast Khalsa Diwan Soc'y* (2010) 182 Cal. App. 4th 51, 57 (reversing judgment below construing a statute such that some words were rendered surplusage). It is absurd to suggest that every instance in the Rule where "rendering" is mentioned separately from and alongside the processing or handling of trap grease is redundant or surplus. California Courts avoid such odd and strained

[21] *See e.g.*, Exhibit 3 at p. 316:20–317:5 (Member Balagopan: "I'm not sure why the District in there brought up the definition of 'rendering' and food and agriculture code . . . they looked at the definition, they health and food grease and the rendering. But that would have affected all the other non-rendering facilities. So the District chose to change the definition and exclude that in its definition of 'rendering'").

[22] *See* Exhibit 6 at 5.

constructions of administrative rules. *Jones v. Cal. Interscholastic Fed'n* (1988) 197 Cal. App. 3d 751, 758 (interpreting administrative rules using the same rules applicable to statutory interpretation). Here, the only reasonable construction is that these are distinct activities, one of which is the regulatory object of Rule 415 while the other is not.

It appears the District finds Rule 415 applicable also because the District inspector finds trap grease "odorous."[23] But this proves far too much. If the smell of trap grease processing were sufficient to place it under Rule 415, then its combination with some activities would be beside the point. *Id.* Under that view, simply processing trap grease without these other activities would be sufficient to bring trap grease processes within the ambit of Rule 415. But that was precisely the approach rejected in adopting the final rule.

That the Facility conducts trap grease operations and collections does not subject it to Rule 415. The District has no legal basis for demanding that the Permit cite Rule 415, which does not apply to the Facility. Indeed, the District's claim that it can enforce Rule 415 beyond its plain meaning and intent amounts to an impermissible underground regulation. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 572 (finding agency policy constitutes unlawful underground regulation because it applies generally, interprets or implements a law, and was not adopted following formal rulemaking). Because the District's interpretation of Rule 415 is contrary to law and standard canons of construction, and because upholding that position would amount to underground regulation, the Board should revise the Facility's Permit conditions and hold the District to its prior representations.

### C. Applying Rule 415 to the Permit Is Unnecessary and Problematic and Provides No Tangible Benefit, as Relevant Housekeeping and Operational Conditions Already Apply Under the Order.

While the Order promoted efficiency, fairness, and consistency with the substance of the Rule, the blanket application of Rule 415 suggested in the Permit Conditions is unworkable. As only one example, in the Permit's Section H (Permit to Construct and Temporary Permit to Operate), the District included a condition that the "Facility shall comply with Rule 415(e),

[23] *Id.* at 2.

including the washdown provisions."[24] These include, among others, that the Receiving Area "be thoroughly washed to remove animal matter at least once each working day." Rule 415(e)(10).

But as Baker has repeatedly reminded the District, multiple requirements of Rule 415(e), including this washdown provision, are applicable *only* to rendering facilities and not to the Facility. Including them in the Permit is not only inappropriate but problematic. Daily washdown and full removal of animal matter from this area, particularly the pit, in its currently approved configuration is impracticable and, in light of the successful deodorizer, unnecessary, as the Hearing Board recognized in formulating the Order's conditions to require washdowns twice per week and expressly not to require the removal of all residue. *See* Order at 11f.

Similarly, the District's citation to Rule 415(c)(4) when referring to odors from the Facility is flawed.[25] Rule 415(c)(4) defines a "Confirmed Odor Event" as "the occurrence of a rendering-related odor," yet the Facility does not conduct rendering. Any verified odor complaints can and must be appropriately addressed under Rule 402.

As with the Order, Baker seeks to revise the Permit to spell out relevant requirements tailored to its actual planned operations so Baker can comply without waiving its rightful opposition to Rule 415's applicability.[26] Baker's Permit would allow it to construct the three new enclosures without delay, as requested by the District, and lawfully expand and improve the Main Plant PTE. Baker would implement the many housekeeping measures and odor controls it has committed to under the Order without conceding Rule 415 applies (because it does not), ensuring an efficient permitting process so it can make Facility improvements benefiting the community without further delay. Removing Rule 415 from the Permit while agreeing to applicable conditions is a commonsense solution and was precisely how the Hearing Board previously addressed the parties' disagreement.~~[27]~~

[24] *See, e.g.*, Exhibit 1, Section H, page 16.
[25] *Id*.
[26] *See* Exhibit 7, which provides limited, non-exhaustive examples of proposed revisions to the Permit that conform with the Order. Baker can provide a full redline of the Permit upon the Hearing Board's request.
~~[27] *See* Exhibit 3 at 312:5–9 (Member Balagopan: "The order abatement is binding. It overrides the permits in a lot of cases when you issue an order of abatement for the condition may say some things but the order abatement may override for the duration of the order.")~~

Again, *Baker does not seek to dodge conditions.* Baker has demonstrated a commitment to abiding by applicable, reasonable, and feasible conditions needed to restore the Facility to productive operations and minimize potential odors, reassuring the District and the public. ~~Unfortunately, the moment it was out of the Hearing Board's sight, the District jettisoned the solution it accepted when appearing at the modification hearings.~~ The District's refusal to take "yes" for an answer is now impeding progress and squandering resources. Incorporating the necessary terms of Rule 415 without explicit rule references would, in substance, give the District everything it has demanded.[28] It would also avoid unnecessary delays and bypass disagreements that only hamper the resumption of useful services in the community. The District's gamesmanship is diverting time, effort, and other resources that the District, the Hearing Board, and Baker could better spend elsewhere. Baker is unwilling to subordinate function to form and concede a principle of law that the District continues to get wrong.

These considerations reflect the practicality of the approach Baker now asks the Hearing Board to carry forward to its logical conclusion in the Permit—the issuance of permit conditions that give the District what it wants in substance while avoiding a dispute on technical legal distinctions that are—at least for the District—devoid of practical difference.

Thus, in addition to the correctness of Baker's legal position, the Hearing Board should grant Baker's petition because the District will suffer no prejudice, the District's substantive demands will be met, and all involved could return to the useful courses of their work.

### D. The District Should Be Estopped from Contravening the Compromise by Which the Hearing Board Resolved the Proceedings on the Order.

The Board should also exercise its sound judgment in granting the petition on the basis that the District is equitably estopped from taking a position with respect to the Permit conditions that is contrary to the position it took in the context of modifying the Order—a position on which Baker has already relied. *Times-Mirror Co. v. Superior Court of Los Angeles County* (1935) 3 Cal. 2d 309 (equitable estoppel applied where the petitioner, acting in good faith and relying on the city's assurances and actions, undertook significant construction based

on the understanding that its property would be acquired for public use). This would also serve to deter gamesmanship that diminishes public trust in regulators like the District.

Here, Baker reasonably relied on the District's conduct during the order modification proceedings to resolve the parties' dispute over the applicability of Rule 415. This reliance included undertaking significant capital expenditures to bring the Facility into compliance. Baker followed through on the operational requirements agreed upon in good faith, only to have the District perform an about-face and demand unlawful conditions that Baker has already explained it cannot accept. The District's bait-and-switch tactics not only harm Baker but undermine the integrity of the regulatory process. The Hearing Board should not let that stand.

## CONCLUSION

The District's attempt to make Rule 415 part of Permit is wrong on the law, contravenes the District's prior agreements and representations, and undermines the integrity of the regulatory process and the significant progress the parties had previously made. Baker has complied in good faith with all operational requirements the Board and the District selected for and tailored to the Facility. The District now seeks to rewrite the terms. Its reversal is improper, unnecessary, counterproductive, and inherently arbitrary and capricious. The Board should thus end the District's crusade, grant Baker's appeal, and revise the Facility Permit to replace improper references to Rule 415 and rendering with the agreed-upon conditions of the Order.

I, George Gigounas, am a partner at the law firm DLA Piper LLP (US) and an authorized agent of Petition Baker Commodities, Inc. I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct to the best of my knowledge. Executed this 9th day of January 2025, in San Francisco, California.

By:_____

GEORGE GIGOUNAS, DLA PIPER LLP (US)
Attorney for BAKER COMMODITIES, INC.

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 555 Mission Street, Suite 2400, San Francisco, California 94105-2933.

On January 9, 2025, I served the foregoing document(s) described as:

**RESPONDENT BAKER COMMODITIES, INC.'S APPEAL OF REVISED VERNON FACILITY PERMIT INCORPORATION OF RULE 415**

on interested parties in this action by the method of service indicated below.

☒ (**BY E-MAIL)** I transmitted the document(s) listed above via e-mail to the person(s) at the email address(es) set forth below.

Clerk of the Board
South Coast Air Quality Management District
clerkofboard@aqmd.gov

Daphne Hsu
dhsu@aqmd.gov

Nicholas Dwyer
ndwyer@aqmd.gov

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

Executed on January 9, 2025, at San Francisco, California.

DENISE ELDER

# EXHIBIT 3

# BEFORE THE HEARING BOARD OF THE

# SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

IN THE MATTER OF

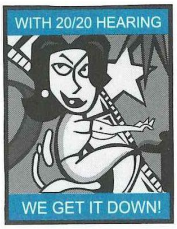
| | | |
|---|---|---|
| SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, | ) | |
| Petitioner, | ) | |
| vs. | ) | **CASE NO.** 6223-1 |
| BAKER COMMODITIES INC., | ) | |
| Respondent. | ) | |

## TRANSCRIPT OF PROCEEDINGS

**DATE:** Wednesday, April 19, 2023

**REPORTER:** Jennifer A. Hines, CSR No. 6029/RPR/CRR/CLR

**LOCATION:** 21865 Copley Drive
Diamond Bar, California 91765

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BEFORE THE HEARING BOARD OF THE

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

IN THE MATTER OF

| | |
|---|---|
| SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, PETITIONER, | |
| vs. | Case No. 6223-1 |
| BAKER COMMODITIES INC., RESPONDENT. | |

TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, APRIL 19, 2023

9:03 A.M.

21865 COPLEY AVENUE
DIAMOND BAR, CALIFORNIA 91765

H E A R I N G  B O A R D  P A N E L

APPEARANCES OF THE HEARING BOARD FOR THE AIR QUALITY MANAGEMENT DISTRICT:

THE CHAIRWOMAN: CYNTHIA VERDUGO-PERALTA

VICE CHAIRMAN: ROBERT PEARMAN

MICAH ALI

MOHAN BALAGOPAN

ALLEN BERNSTEIN, DPM/MBA



TRANSCRIPT OF PROCEEDINGS before the Hearing Board, reported by JENNIFER A. HINES, Certified Shorthand Reporter Number 6029/RPR/CRR for the State of California, with principal office in the County of Los Angeles, commencing at 9:03 A.M., on WEDNESDAY, APRIL 19, 2023, at 21865 COPLEY AVENUE, DIAMOND BAR, CALIFORNIA 91765.

* * *

APPEARANCES OF COUNSEL:

For the Petitioner
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT:

OFFICE OF THE GENERAL COUNSEL
BY: DAPHNE P. HSU,
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E X H I B I T S

implicating Rule 415.

The whole point is that if they somehow aren't doing rendering and have that portion modified and activated whatever term you use, then the meer trap grease operations are not subject to Rule 415. I think that's pretty clear in the rules.

If your witness felt the other way, I don't see the basis for that.

So I think that's a bit overbroad and harsh. It's kind of like you're really still nailing them on the rendering requirements which is not the propose of the proposed request.

So I think the better terminology is to simply say they would have to fully enclose or put in an enclosed system any and all wastewater treatment systems necessary for the trap grease operations to satisfy all applicable rules and laws.

And, again, applicable, whatever that may be. We don't have to pass that. But I don't think you should put that 415 reference in there because it's too harsh and takes away the whole purpose which is to get this out of 415 if they don't do rendering and activate.

Any comment?

MS. HSU: In terms of activation, that's why we have 9(c). I think that's what we're trying to



address what you are saying, that if they were to inactivate rendering, that they may not -- that's what where we are trying to address it.

MEMBER PEARMAN: I agree. That was probably while you were trying to give and take away. I think that's the wrong way, but I would say keep (c) in there, but I think we have to get 415 out. Because it just muddies the water for intentions here.

And then it looks like in item 9, we never discussed the cooking oil issue. And then when we go down, you -- 13, you talk about commencement operations as to condition 9 which is just trap grease. And then item 14 talks about commencement operations again. So I'm trying to find out first the used cooking oil process, the only reference is in 8. I don't see it discussed elsewhere. So am I missing something about your intentions as far as that's concerned?

MS HSU: No. That's correct. This way if they haven't done any of the enclosures per item 9, they could still operate their wastewater operations for rain water, wash down water and the cooking oil because there was a carve out in cooking oil in Rule 415. So we wanted to honor that and make that explicit in item 8

MR. PEARMAN: And do they need to notify you if they simply start the used cooking operations?



MS HSU: No. That was just -- no, they would not.

MEMBER PEARMAN: Okay. All right.

So then I'm going to try and figure out.

13 talks about relating to condition 9, trap grease prior to commencement of operations they shall notify you.

So if you don't have to be notified about the cooking oil, then what does 14 relate to unless it relates to the rendering? That's the only thing left.

MS HSU: That would be related to item number 9, so because 13 is just more -- we want to know that construction is complete and then when they commence operations.

MEMBER PEARMAN: Okay. So the distinction there is -- see, it says prior to commencement of operations in 13 then you talk about compliance with permits to construct and then you talk about operations again in 14. So it's kind of odd.

You're talking about construction notice, you wouldn't say prior to commencement of operations in 13. You'd say prior to commencing construction. So I'm kind of confused here why we have these two operation prior notices.

MS. HSU: I think -- it could -- it was



inartfully stated.

Basically we wanted to know when construction was complete and when they wanted to start operations because there could be a gap in time.

MEMBER PEARMAN: Okay. So prior to commencing operations, tell us when you finish construction. But then tell us before you start commencement again?

MS HSU: Correct.

MEMBER PEARMAN: Okay. And should this be stricken from both 13 and 14?

MS HSU: No. He should remain on. It's just a typo on 14. There's just an H that's not part of his e-mail address.

MEMBER PEARMAN: Okay. Okay. All right.

And what else did I have here.

And if I may, Madam Chair, I forgot to ask -- if I can ask Baker now just as we're discussing conditions -- maybe I'll ask Ms. Hsu first.

The May 18th timeframe, in 9(a) and 9(b), could you elaborate on that and why that's there, how you limited it, et cetera, et cetera.

MS HSU: We just believe approximately 30 days would be sufficient to -- to submit permit applications. They're welcome to submit it earlier. If

Ms. Taber?

MEMBER BERNSTEIN: So May 18th --

MS. TABER: Yes, thank you.

MEMBER BERNSTEIN: 4th of July?

MR. DWYER: Yes.

THE CHAIRWOMAN: All right. Mr. Balagopan, did you want to start deliberations?

MEMBER BALAGOPAN: Yes. After hearing all the testimonies and so forth, I am now -- I'm inclined to propose modification based on what Baker proposed and disregard the District's change for the modification.

I will go through the reasons why. I think the District said the plain meaning of the rule. The plain meaning of the rule is very clear, it's plain. In the rule in the staff report, it is plain as can be: Remove trap grease from PR 415, applicability; remove 2BEM 415 odor best management practice. That is in the 2017 staff report that was adopted by the governing board.

What the District chose to do in the opening statement is then -- I don't know why they did this, but they referred to the comment on page -- comment 18, page 833 of 415 staff report and as Exhibit 21 that Baker understood the trap grease was subject to 415.

That was based on early on discussion in the



rule in the proposed rule making. But as you can see in table P-1, the summary of changes, that was discarded. But the District has been disingenuous in saying hey, look. This is what they had submitted and they knew this. I think it's misleading.

This in my mind is really straightforward.

So we would ask and I think I'm jumping all over the place. We would ask to -- and I'll -- because I wrote it down, the order.

We would ask about the credibility of the manager was the manager, and I would defer to the permitting manager on permitting issues. I would defer to the process of the general manager on process issues. You know, and I think he testified there is vapors coming from the tank. I would -- the engineer wasn't sure. If you heard the testimony initially then she had to correct it that she -- yellow grease was being incinerated and then after that, it was corrected I think that it was as fuel.

So, again, I think it's very difficult sometimes for the permitting engineer to know all the nuances of the permitting at the facility. The people who do day-to-day operation are familiar with it.

But on the permitting side, yes. I think the facilities don't understand all the nuances of



permitting. You know, those issues of permitting and so forth. Yes, I would defer to that.

Now, the other -- the thing that I found is to -- the condition that the District proposes to submit applications all over again. You have to recall that this application was submitted, they were reviewed and approved and were sub- -- and the facility permit was issued in 2021 for the wastewater treatment operation.

Now, I want to clarify that. They are two different things: Trap grease and wastewater treatment. I think that's the proper way, not processing as per the rule.

Trap grease requirement is that -- the requirement in Rule 415 that was adopted was that you put it into -- into -- directly into the wastewater system and then everything else -- then you -- basically exempt of 415. However, 415 require -- the wastewater operation has to comply with 415, which is what the facility did. They submitted applications and they got the permit to operate to construct for the wastewater operation with the enclosure.

So the District would not have issued the permit to construct/permit to operate unless they had evaluated all the information in the application that was submitted and made the determination, yes, I think



if they do this and this as outlined in the permit, they would comply with rule -- the applicable rule.

So I think that to say now hey, you are then ordered abatement, I take offense at the fact that, you know, the order abatement is not a good tool. The order abatement is binding. It overrides the permits in a lot of cases when you issue an order of abatement for the condition may say some things but the order abatement may override for the duration of the order.

So the order is very clear, do not conduct any operation. What they're asking for is to conduct trap grease operation, wastewater operation and cooking grease.

So the rendering and they are -- and they have conditions which I thought -- which will reinforce the fact that they will not conduct rendering because the lines -- the gas lines to the cookers will be turned off and so that they -- they will be -- essentially without that, you cannot do any rendering.

So but regardless of that, the order is already there saying you cannot do rendering until you modify -- if you choose to modify. To submit application again -- I don't think -- realize what -- I said part of the reason why I ask the engineer, you know, what the permit, some of these permits, that

particular permit and I didn't check fine. I looked at Exhibit X. There was an equipment list. That -- the ren- -- where they say trap grease, that was issued in 1978. It's almost -- almost --

MEMBER ALI: 45 years.

MEMBER BALAGOPAN: -- 50 years ago. And some of these are like gold. I mean, but -- and you don't surrender the permits or inactivate a permit unless, you know, you're not operating it, per se. But here the intent is for them to go back.

They are working towards a path of coming back and operating the rendering facility.

So for them to say you inactivate a permit, re-apply does not make total sense at all.

Plus in the application you submit, you have emission reduction permits and all that stuff associated with it. You don't just inactivate a permit, you know. You -- those -- some of these permits have a lot of credits available.

So the fact -- oh, just inactivate, re-apply again does not make any sense to -- to any business. I think businesses who come before us have been say oh, you're under abatement. Submit -- inactivate your permit because you are under an order abatement. And reply again. When you re-apply, you're subject to new



source review all over again, you know, new source for toxic, new source for criteria which are -- can be very onerous.

So I can -- you know, to say hey, surrender, re-apply and do it again, why do it again when you already did it? Just in 20 -- it was just issued with the engineer reviewing and approving it.

Now --

THE CHAIRWOMAN: That's why I was asking those questions because I wanted it to come out that okay, there's a cost here.

MEMBER BALAGOPAN: Right.

And then you know, I object because -- and we heard actually testimony from the engineer clearly that the open pit was not in the permit. You know, there was not.

And we also heard testimony they're not operating the open pit and they're willing to take conditions and nothing goes into the open pit, any waste, trash, et cetera will go into closed bins.

I do propose that where they are putting into the operating bins, that they have free board, that it should be covered. Even if a simple thing as a plastic covering around the shoot so when it free-falls, and I -- I was getting at I went to a brewery with some



engineers and with a Jerome monitor when they were dumping the yeast waste from the brewery into these trucks for hauling out to a landfill, you stand upwind from the -- the activity, you don't smell anything and the reading is zero. You go downwind, the meter went crazy. So there's a wind sheering effect with the free-fall.

So that has to be -- it's a simple, you know, solution until they come up with some elaborate thing that goes directly underneath. But if you don't have free -- if you have free-fall, put some plastic sheets. Make sure that the wind shearing does not take the smell. So that is one thing I would make, you know.

And we looked at -- we talked about D-269. Clearly they're willing, however, to wait until the permit is issued to operate that clarifier as a closed system. So that is a condition that I think we can put because there's -- there's an issue about the permitting.

And so the debate on whether that should be covered, you know, by a different permit or the existing permit, you know.

They applied for the -- I think we heard testimony they applied for the PTE enclosure because they initially planned to have -- for the receiving



area. So the receiving area that's a J&M plant, so -- and I don't think I need to go into that. They applied because -- because they changed the -- initially I think they proposed a larger PTE. Now they narrowed its scope so then the inspector told them you need to apply, they applied, and so this was tied up with that.

So that -- the other thing I thought which was somewhat -- the plain -- I think the District talks about the plain meaning of the rule. The plain meaning of the rule, as I said before, it's not ambiguous. Let's not complicate the issue with what is already the rule. The rule is clear, the staff report is very clear.

The permit that was issued is also very clear. There was no reference to trap grease processing in -- except in the permit that was issued 50 years ago actually there was. But the recent one and the -- there isn't. But the -- the wastewater treatment is subject to 415. And so that's what they have to comply with.

So let's see. There was a few other -- I'm not sure why the District in there brought up the definition of "rendering" and food and agriculture code. Saying almost -- but clearly as they indicated, when the -- they looked at the definition, they health and food and agriculture, it did include processing kitchen

grease and the rendering.

But that would have affected all the other non-rendering facilities. So the District chose to change the definition and exclude that in its definition of "rendering."

So we go by what is in the current rule, you know, the current rule is what we have to go by.

So the rule applies -- it says wastewater from rendering. Correct? And for -- and trap grease processing. The only requirement in the rule is that you -- and I'll read that -- is -- and if you do that, I'm sorry, is under L 8: "Trap grease unloading." Again, they're talking about just the unloading "shall not be subject to the requirement for PTE provided the trap grease is unloaded only through a hose in a wastewater tank or separator" which we heard testimony and which is -- that is what they're doing.

So the trap grease operation is being -- does not have to comply with 415. Enclosure all the odor management, or what do you call it, not the odor management, the odor BMP, the best management practice for orders under that because that's what -- F, it refers to F which -- and I think we have to follow the rule. I'm sorry. I keep emphasizing the rule. Permanent total enclosure and odor control standards.



So it says if you do that, you're not -- you don't have to comply with the permanent enclosure and odor control standards.

Now, the conditions that the District's proposing is draconian in a sense, I believe. You know that is predicated on -- again, I think it was pointed out not knowing what rules -- the rule have already -- it's clear what applied. That's why te permit was issued. To say resubmit it again and re-evaluate it on a rule that has not been adopted -- one of the staff -- the staff report in chapter 3, page 7 had clearly had indicated that trap grease processing will -- facilities that only process trap grease, will be -- there's a separate rule for cooking oil and trap grease, but it's not been adopted yet. So there's no regulation in place. The regulation in place is 415 which --

THE CHAIRWOMAN: Okay. May I ask you, though, if you can kind of cut to the chase.

MEMBER BALAGOPAN: Sure. Cut to the chase.

THE CHAIRWOMAN: What so --

MEMBER BALAGOPAN: I My -- I would propose, you know, a modification to order to allow them to process -- you know, to remove certain conditions that they asked for and I'll go through those conditions when the time comes and to put the -- to allow them to use



cooking oil, do trap grease processing and any wastewater that is generated at the facility through the system that is -- has been already permitted. And they complied with the permit conditions.

If -- we heard about the boiler, you know, the boiler is subject to -- then they have to comply with the boiler standard if it changes. So that's what I'm proposing, that they -- we adopt with the additional conditions that they propose, the five conditions. That's what I was getting to, that we --

THE CHAIRWOMAN: There are actually 8 that I counted.

MEMBER BALAGOPAN: What's that?

THE CHAIRWOMAN: I have 8.

MEMBER PEARMAN: That Baker proposed?

MEMBER BALAGOPAN: Baker proposes 5 I think.

THE CHAIRWOMAN: Okay.

MEMBER BALAGOPAN: I am actually completely disregarding the District's proposal. I did glance at it, but I'm disregarding it.

THE CHAIRWOMAN: In its entirety of all the conditions; is that correct?

MEMBER BALAGOPAN: Yes, that they propose in the modification.

THE CHAIRWOMAN: Okay. Thank you,



Mr. Balagopan.

Mr. Pearman.

MEMBER PEARMAN: I think both sides gave us kind of a -- too much on the past that was decided.

MEMBER ALI: Exactly.

MEMBER PEARMAN: And a lack of clarity about the specific challenge here was how to handle a non-rendering operation situation, which is what Baker came to us before for.

It's a unique case. There's no history of anything like this that we've heard of inactivate a rendering process to then go and just trap grease. It's a governing board rule so we're kind of limited in trying to add our own interpretation to it.

But I do think in general, you know, with Baker's -- in their original proposal is trying to pass go and by taking advantage of their found violations of permits and rules just start up trap grease processing without any real restrictions. That certainly is improper.

So I do think, though, that we should try and impose some conditions that can be flexible. They can use open air pit or not, things of that nature. And that the District should not be too draconian in how they deal with that to allow them to institute just

But we really do have very strict constraints on that. And I would definitely suggest that you have some good conversations with the engineers and the staff of the AQMD.

So I want to thank all of you, Ms. Hsu, Mr. Dwyer, Ms. Taber, and I know I'll mess up your name so I'm not even going to try.

But thank you to all of your staff and your witnesses.

So -- and my colleagues, thank you so much. We all worked real hard and thought long and hard on this. And like I said, it wasn't easy, but I think we got it done to the best of our ability. And I think that both sides should be happy with us.

Thank you and the matter is closed and we are adjourned.

MS HSU: Chair --

THE CHAIRWOMAN: Yes.

MS HSU: Sorry. I know you had wanted to ask one of the parties to draft the Proposed Findings and Decision.

THE CHAIRWOMAN: Yes. Yes, I do. And who's going to volunteer?

MR. SOMASUNDARAM: As the moving party, we would volunteer.



THE CHAIRWOMAN: Okay. Thank you.

MEMBER ALI: And just a reminder, Madam Chair, both of them are paying for the court reporter.

THE CHAIRWOMAN: Yes. I got agreement on that.

MEMBER ALI: And her happy hour. All right.

THE CHAIRWOMAN: Thanks again, everybody. Have a safe trip home .

(Whereupon, the proceedings concluded at the hour of 3:38 p.m.)



STATE OF CALIFORNIA. )
) SS
COUNTY OF LOS ANGELES )

I, JENNIFER A. HINES, Certified Shorthand Reporter qualified in and for the State of California, do hereby certify:

That the foregoing transcript is a true and correct transcription of my original stenographic notes.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this proceeding was taken; and furthermore, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of April, 2023.

JENNIFER A. HINES,
CSR No. 6029/RPR/CRR/CLR

# EXHIBIT 4

Transcript of Proceedings

May 29, 2024

South Coast Air Quality Management District

vs.

Baker Commodities

BEFORE THE HEARING BOARD OF THE
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

In the Matter of,
SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT,
Petitioner,
VS.
BAKER COMMODITIES, INC.
[Facility ID No. 800016]
Respondent.

CASE NO. 6223-1

TRANSCRIPT OF PROCEEDINGS in the above-entitled matter held at the South Coast Air Quality Management District, 21865 Copley Drive, Diamon Bar, California, beginning at 9:33 a.m. and ending at 3:50 p.m. on Wednesday, May 29, 2024.

JOB NO. 10142931
REPORTED BY LAUREN SPEARS, CA CSR NO. 14185



APPEARANCES:

HEARING BOARD:
CHAIR CYNTHIA VERDUGO-PERALTA, PUBLIC MEMBER
VICE-CHAIR ROBERT PEARMAN, ATTORNEY MEMBER
MICAH ALI, PUBLIC MEMBER
MOHAN BALAGOPALAN, ENGINEER MEMBER
JERRY P. ABRAHAM, MD, MPH, CMQ, MEDICAL MEMBER

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JUAN CARLOS JUAREZ - INTERPRETER CERT. #369990



EXAMINATION





DISTRICT'S EXHIBITS



BAKER'S EXHIBITS

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place to limit potential odor as Baker takes on this new venture. On Friday, May 24th, 2024, Baker's counsel filed stipulated facts. The 15 facts in that document are agreed upon by the parties.

My counsel has recognized that Micah is no longer in the --

CHAIR VERDUDO-PERALTA: They can hear back there.

MR. DWYER: Okay. Further evidencing the amount of agreement between the parties are the two proposed findings and decisions submitted by the parties. On May 24th, this past Friday, district's counsel submitted the district's proposed findings and decision, and included in that submittal was a comparison document showing the differences between what Baker has proposed and what the district is proposing. There is a lot of similarities between the two parties' proposals.

One of the first differences you will see when reviewing that comparison document is that the district disagrees that Baker has given up all rendering at its facility. Baker has not ceased rendering used cooking oil or trapped grease at its facility. As a business decision, Baker has decided to cease traditional type rendering, where it would cook and further process the animal -- raw animal parts at the facility. And as a

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part of that business decision, Baker has decided to start collection services at the facility, which it refers to as transloading.

Now, I think it's really important here to understand that Baker has not completely given up rendering at its facility. At this point, the district does not see a good reason why we need to continue to dig into continued applicability of Rule 415. That could be an inefficient use of our time today, but if the topic does need to be further explored here, I suggest that we have further briefing on that issue. It would be a better use of everyone's time, if that was necessary.

Back to the proposed findings and decision. The second biggest difference concerns the district's desire to have enforceful order for abatement conditions for Baker's collection services. Now, as my colleague, Baker's counsel, has pointed out, there are differences of opinion, as you have gathered from reviewing Baker's witness' declaration and the district witnesses' declarations. There was apparent confusion and misunderstanding as to whether the parties wanted Baker's standard operating procedures to be part of the abatement order.

It's now clear that both parties are asking the hearing board to put in the order enforceable operational

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conditions. The district still favors specific enforceable conditions, rather than several standard operating procedures that provide too much flexibility, and some of which are too uncertain to enforce. The conditions being proposed by the district are for the interim period where Baker will be operating in its collection center before the extension is permitted to operate. These limits consider the fact during this interim period, Baker will not have a permitted conveyor to take material from raw rendering material pits and load it into trucks.

Given the time it takes to load trucks without using a screw conveyer, it stretches the imagination to see how they can manage 200,000 pounds. The district views that fact as very important for why the 200,000 maximum limit proposed by Baker is unrealistic, and poses an unacceptable risk of potential odor. The district has received far less odor complaints in the Vernon area since the September 2020 order for abasement. We must tread carefully here to not unreasonably increase potential odor. The district remains open to hearing from Baker's witness on how he envisions the collections operation will operate during this interim period, where permits related to the conveyor and the extension of the permanent total enclosure are pending.

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Representing the public, we have an obligation to understand how Baker is proposing to operate, and to set limits on those operations to ensure we minimize the potential for odors. The district put forth its reasons why, and considered Baker's requests for flexibility. The declarations of Paolo Longoni and Atul Kandhari set forth the district's reasons for limiting the amount of materials stored in the permanent total enclosure to 60,000 pounds, and requiring a cutoff time where all material must be out of the permanent total enclosure, to ensure the equipment and services that come into contact with the raw material are cleaned daily.

The district is seeking for this board to keep the proposed conditions intact that set forth fair limitations on Baker's operations, while they transition their operations to something entirely new at this location. Again, most of these are already agreed upon by the parties, but the district sees a specific limitation or specific limitations related to the collection center activities as necessary here.

That's all I have for my opening statement. Thank you.

CHAIR VERDUDO-PERALTA: Thank you.

Okay. Call your first witness.

MR. GIGOUNAS: Yes, Madam Chair. We would like

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And so I am going to request that both sides give us a two-pager or a three-pager that we can look at and see what the differences are, because that is going to have some relevance, because the district believes that some parts still belong under 415, and I know that Baker does not. So --

Were you going to say something, Mr. Pearman?

MR. PEARMAN: Yeah. I don't know, but if the thought was the cleaning condition of 415(e), I would just say there's a possibility that it's just a question of what the conditions are. You could come up with conditions, taking some from 415(e), but not relying on that, and let the parties fight another day if they think 415 applies. So that possibly might exist, and that's one solution perhaps, but we'll see how it goes.

MR. GIGOUNAS: I don't mean to interject, but I might propose something, if the board is willing to hear it.

So first of all, Mr. Pearman, I think we all agree, one thing we've tried to do is avoid the entire fight about the applicability of 415 by specifying the specific subject matter that would go in. So in other words, instead of Baker shall comply with 415(e), it would be Baker shall do X, Y, and Z, or A, B, and C. And within Rule 415(e), nearly all of those provisions, Baker

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is able to do with this proposed -- with this proposed business.

The district -- or excuse me, the board, in questioning our witness, had raised some questions and some issues. And so if it appears that we will need to continue to a further date, we might consider -- and I'm just raising this for some discussion at some point, whether Baker can make a proposal to the board, because we have been discussing in good faith collaboration with the district for a long time, if we were able to make a proposal to the board that perhaps gave voice to some of the concerns that the board members have raised, and the questions that the board members have raised, it might give the board something concrete to consider in between the two proposals that were made.

And of course, the district can do the same thing, if they wish. But that might be some way to sort of, you know, avoid the necessity of coming back and sort of completing -- not an adversarial process, but a formal hearing process.

MR. BALAGOPALAN: I'm just going to add that in the district's proposed finding and decision, they did propose the 415(g), you know, in one condition. So there is some reference to 415. They could have teased out -- and I thank you for the suggestion, the elements of it

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without referencing the rule, you know.

MR. GIGOUNAS: Yes, sir. And indeed, we have discussed that and we're trying to continue to discuss that. I don't know that Baker and the district will come to complete agreement. For instance, 415(e) is where the washout provision is contained, and that, as the board members have seen, is one of the points of contention here. We certainly -- as I've said, most of those provisions are things that regardless of the applicability of Rule 415, Baker is able to do and willing and wants to do in this process. But there are a few things that are different.

This is not a rendering facility, or at least our position is that. So yes, the parties have been discussing, look, let's not -- let's avoid this fight. The issue is, I don't know that we will ultimately get to where we agree on all of the provisions that are within 415 that could be done, which could lead to the board needing to make that determination. We would like to avoid it, though.

MS. HSU: We are -- both parties are aligned on not needing to take the issue of Rule 415 applicability at this time, and we have been in discussion regarding instead of a reference to say Rule 415(e), to take out specific provisions, and given that this is an abatement

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order context, the hearing board does have more flexibility in terms of what it is ordering.

CHAIR VERDUDO PERALTA: Okay. All right. So therefore, we can go ahead and you can -- if you want to go ahead and go down -- I don't want to see you go down the path of going over history again. I want to see -- let's go forward. And I understand you want to layout a foundation, but if we can do that as briefly as possible, with still giving us the picture of how we are going to see this company still try to operate, without rendering, of course, and then where the -- where we're going to find a solution for both sides.

MR. ALI: Madam Chair, just one quick comment, perhaps in colloquy with you. If they seem to be in much agreement on many things, then why could they not caucus -- we recess, they caucus, they come back with a proposal. Perhaps they can work amicably. I mean, everybody seems to be getting along here today, and so perhaps they would even want to waive their closing, and we move right to their proposal, and we can then deliberate based upon that.

Now, again, that's just my suggestion, the board has to make a determination. And perhaps both parties would have to agree, but it just stands to reason, let's try to find a path to a solution so we can

CERTIFICATE OF CERTIFIED SHORTHAND REPORTER

I, the undersigned Certified Shorthand Reporter in and for the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witnesses were put under oath; that the testimony of the witnesses and all objections made at the time of the proceedings were recorded stenographically by me and were thereafter transcribed under my direction; that the foregoing is a true record of the testimony and of all objections made at the time of the proceedings.

I further certify that I am a disinterested person and am in no way interested in the outcome of said action or connected with or related to any of the parties in said action or to their respective counsel.

The dismantling, unsealing, or unbinding of the original transcript will render the reporter's certificate null and void.

In witness whereof, I have subscribed my name on 05/29/2024.

Lauren B. Spears, CSR No. 14185

# PETITION FOR APPEAL
# BEFORE THE HEARING BOARD OF THE
# SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT

CASE NO: 6223-2

FACILITY ID: 800016

**IN THE MATTER OF**

1. FACILITY NAME: Baker Commodities, Inc.

ADDRESS: 4020 Bandini Blvd.
***[location of equipment/operation; specify business/corporate address, if different, under Item 4, below]***

CITY, STATE & ZIP CODE: Vernon, CA, 90058

☎ ( 323 ) 268-2801 *Ext.* *Fax* ( )

2. PETITIONER **if different from above**:

ADDRESS:

CITY, STATE & ZIP CODE:

☎ ( ) *Ext.* *Fax* ( )

**NOTE**: If the Petitioner is not the owner, operator and/or permittee of the facility you **must** answer No. 11, on Page 5.

**IMPORTANT FILING INFORMATION**

Your petition must be filed within 30 days of the action specified in Health & Safety Code Sections 42302.1, 42501, 42302, or 40713, or District Rules 215 or 216, as applicable. You are responsible for reviewing these code sections to determine the details governing the deadline for filing your petition.

In order to be accepted by the Clerk of the Board for filing, your Petition for Appeal must:

(i) Include an original and eight copies. The original petition must be printed on one side; the copies may be double-sided; and

(ii) Be accompanied by the required filing fee, pursuant to SCAQMD Rule 303, Table III. A copy of Rule 303 may be obtained from the Clerk of the Board or via the SCAQMD website at www.aqmd.gov/rules/rulesreg.html .

***Persons with disabilities may request this document in an alternative format by contacting the Clerk of the Board at 909-396-2500 or by e-mail at clerkofboard@aqmd.gov.***

***If you require disability-related accommodations to facilitate participating in the hearing, contact the Clerk of the Board at least five (5) calendar days prior to the hearing.***

[ALL DOCUMENTS FILED WITH CLERK'S OFFICE BECOME PUBLIC RECORD]

3. Petitioner respectfully submits to the Hearing Board this petition appealing the:

**ISSUANCE of** ☒ **OR** **DENIAL of** ☐

☒ Permits(s) to Construct
☐ Permits(s) to Operate
☒ Permit Condition(s)
☐ Emission Reduction Credits (ERC)
☐ _____ Plan
☐ OTHER _____

4. **CONTACT(S)**: Name, title, company, address, and phone number of persons to contact and authorized to receive notices regarding this Petition (no more than two authorized persons).

Jeff Wilson, Vice President and General Counsel
Baker Commodities, Inc.
4020 Bandini Blvd.
Vernon, CA *Zip* 90058
☎ ( 323 ) 268-2801 *Ext.*
*Fax* ( )
*E-mail* jwilson@bakercommodities.com

George Gigounas
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San Francisco *Zip* 94105-2933
☎ ( 415 ) 615-6005 *Ext.*
*Fax* ( )
*E-mail* george.gigounas@us.dlapiper.com

5. Is this a Title V facility? Yes ☒ No ☐

6. Is this petition a supplement to an appeal pending before the Hearing Board? Yes ☒ No ☐
If yes, indicate Case No. 6223-2

7. Briefly describe the equipment or operation which is the subject of this petition.

The Hearing Board's July 22, 2024 Second Modified Order for the Facility, Condition 8, requires Baker to apply for and construct three new enclosures over the (i) grease pit trash area; (ii) J&M skimmer trash bin, and (iii) Centrysis trash bin, and imposes certain conditions on Collection Operations within the Main Plant Enclosure and Odor Best Management Practices at the Facility.

This appeal supplements Baker's January 9, 2025 Permit Appeal by incorporating the three permits to construct required under the Second Modified Order and the fourth permit to construct concerning the Main Plant Enclosure extension, and associated conditions, addressed under the Second Modified Order. All permits improperly require compliance with District Rule 415.

While the January 8, 2025 Permit Appeal identifies all four permits, the District had not yet issued two of the four permits to construct by the time of that filing. Accordingly, Baker supplements its Permit Appeal by incorporating the two newly issued permits as follows:

*Initial Permits Issued:*
(1) Main Plant Extension Extension and Screw Conveyor (Application No. 648440) Issued on December 10, 2024.
(2) J&M Catch Basin Enclosure (Application No. 648441) Issued on December 10, 2024.

*New Permits Issued:*
(3) Wastewater Treatment Area and Trap Grease Area Enclosure (Application No. 648442). Issued January 15, 2025.
(4) Centrisys Trash Bin Enclosure and Afterburner (Application No. 648443). Issued January 15, 2025.

[**YOU MAY ATTACH ADDITIONAL PAGES IF NECESSARY**]

Attached as Exhibit 8 is a copy of the relevant pages from the Facility Permit issued on January 15, 2025. Exhibits 1 through 7 are attached to the January 9, 2025 Permit Appeal.

8. Date Permit/Plan/ERC was issued/approved: Issued 1/15/2025 denied/disapproved: _____

**Attach a copy of the permit, approval/denial letter, or any other relevant documentation. For RECLAIM or Title V facilities, attach *only* the relevant sections of the Facility permit showing the equipment or process and conditions that are the subject of this appeal.**

9. Provide a detailed statement discussing how and why the action of the Executive Officer was not proper.

All permits improperly require compliance with District Rule 415, which applies exclusively to rendering operations. The Facility no longer performs rendering of any kind. Baker requests that the Hearing Board amend the Facility Permit to remove all references to Rule 415 and rendering, and replace them with the Second Modified Order's substantive operational requirements to fit the Facility's actual operations and the terms to which the District previously agreed.

The Hearing Board's April 19, 2023 decision, followed by the June 21, 2023 written First Modified Order, allowed Baker to resume trap grease and associated wastewater operations, in addition to its used cooking oil operations. The Hearing Board's July 22, 2024 Second Modified Order allowed Baker to begin collection operations subject to specified conditions, including to apply for and construct three new enclosures.

Please refer to Baker's January 9, 2024 Permit Appeal for the detailed statement discussing how and why the District's action in issuing the permits to construct and conditions is improper. The following provides a brief summary:

(1) Rule 415 does not apply to the Facility's Current Operations:
Rule 415 regulates rendering operations, which Baker no longer conducts at its Facility. The Facility now operates as a collection center with stringent odor control measures, as outlined in the Second Modified Order issued on July 22, 2024.

~~(2) Contradiction of Prior Agreements:~~
~~The District's inclusion of Rule 415 contradicts prior agreements and the Second Modified Order, which clearly delineated the operational requirements tailored to the Facility's current activities. These agreements were reached after extensive negotiations and should be honored to maintain regulatory consistency and fairness.~~

(3) Arbitrary and Capricious Action:
The District's decision to include Rule 415 appears to be arbitrary and capricious, lacking a sound legal or practical basis. ~~The action threatens to revive disputes that had been resolved through painstaking negotiations and costly proceedings, undermining the progress made.~~

(4) Unnecessary and Unworkable Conditions:
Many of the conditions imposed by Rule 415 are unworkable for the facility's current operations and create significant uncertainty for future compliance. This not only imposes undue burdens on Baker but also risks making compliance impossible.

Baker requests that the Hearing Board amend the permits to remove references to Rule 415 and rendering, ensuring that the permit conditions align with the Facility's actual operations and the terms previously agreed upon.

10. State in detail the specific relief you seek.

Baker requests that the Hearing Board amend the Revised Permit to remove references to Rule 415 and rendering and to replace them with the Order's substantive operational requirements to fit the Facility's actual operations and the terms to which the District previously agreed.

Please refer to Baker's January 9, 2025 Permit Appeal for further explanation.

11. If you are the facility owner, operator, and/or permittee, skip to No. 12. If you are not,

(a) Explain what your relationship is to the facility or to the action being appealed:

(b) Explain what actions you or your representative has taken to appear, submit written testimony, or otherwise participate in the action pertaining to the issuance of the permit that is the subject of this petition. (See California Health & Safety Code Section 42302.1):

[**YOU MAY ATTACH ADDITIONAL PAGES IF NECESSARY**]

12. The undersigned, under penalty of perjury, states that the above petition, including attachments, and the items therein set forth, are true and correct.

Date: 1/27/25

Signature: 

Print Name: George Gigounas

Title: Attorney for Baker Commodities, Inc.