PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON D.C.

In the Matter of UNION OIL COMPANY OF CALIFORNIA, a corporation.	Docket No. 9305

<u>RESPONDENT'S PROPOSED CONCLUSIONS OF LAW</u>

I. RESPONDENT UNION OIL COMPANY OF CALIFORNIA

1. The Commission has jurisdiction over Respondent, Union Oil Company of California. For purposes of this proceeding, Union Oil Company of California is referred to as "Unocal."

2. Unocal is organized, existing and doing business under and by virtue of the laws of California. Its office and principal place of business is located at 2141 Rosecrans Avenue, Suite 4000, El Segundo, California 90245. Unocal is a wholly-owned, operating subsidiary of Unocal Corporation, a holding company incorporated in Delaware.

3. Unocal is, and at all relevant times has been, a corporation, as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. (JX 3).

4. At all times relevant herein, Unocal has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. (JX 3).

II. THE ALLEGATIONS OF THE COMPLAINT

5. The Complaint in this matter alleges that respondent Unocal "subverted state regulatory standard-setting proceedings relating to low emissions gasoline standards" and further "engaged in a pattern of bad-faith, deceptive conduct, exclusionary in nature, that enabled it to undermine competition and harm consumers. Through a pattern of anticompetitive acts and practices that continue even today, Unocal has illegally monopolized, attempted to monopolize, and otherwise engaged in unfair methods of competition in both the technology market for the production and supply of CARB-compliant 'summer-time' RFG and the downstream CARB 'summer-time' RFG product market." (Complaint ¶ 1).

6. The "deceptive conduct" alleged by the Complaint can be categorized within three types of conduct or representations that Complaint Counsel allege are false and misleading:
   a. Representing to CARB and other participants that its emissions research results showing, inter alia, the directional relationships between certain

gasoline properties (most notably the midpoint distillation temperature of gasoline or "T50") on automobile emissions were "nonproprietary," were in "the public domain," or otherwise were available to CARB, industry members, and the general public, without disclosing that Unocal intended to assert its proprietary interests (as manifested in pending patent claims) in these research results;

b. Representing to CARB that a "predictive model"— i.e., a mathematical model that predicts whether the resulting emissions from varying certain gasoline properties (including T50) in a fuel are equivalent to the emissions resulting from a specified and fixed fuel formulation—would be "cost-effective" and "flexible," without disclosing that Unocal's assertion of its proprietary interests would undermine the cost-effectiveness and flexibility of such a model;

c. Making statements and comments to CARB and other industry participants relating to the cost-effectiveness and flexibility of the regulations that further reinforced the materially false and misleading impression that Unocal had relinquished or would not enforce any proprietary interests in its emissions research results.

(Complaint ¶ 2).

7. According to the Complaint, "[b]ut for Unocal's fraud, CARB would not have adopted RFG regulations that substantially overlapped with Unocal's concealed patent claims; the terms on which Unocal was later able to enforce its proprietary interests would have been substantially different; or both." (Complaint ¶ 5).

8. Based on these allegations, the Complaint alleges five violations of Section 5 of the FTC Act. 15 U.S.C. § 45(a)(1). (*See* Complaint ¶¶ 99-103). The First Count alleges that Unocal has violated Section 5 of the FTC Act by wrongfully obtaining monopoly power in the technology market for the production and supply of CARB-compliant "summertime" gasoline to be sold in California (¶ 99). The Second and Third Counts allege that Unocal has attempted to monopolize two markets: the technology market for the production and supply of CARB-compliant "summertime" gasoline to be sold in California (¶ 100), and the downstream goods market for CARB-compliant "summertime" gasoline to be sold in California (¶ 101). The final two counts of the Complaint— ¶¶ 102 and 103—are based upon the same factual allegations as the monopolization and attempted monopolization claims and purport to state a generic "unfair competition" claim under Section 5 of the FTC Act.

9. Complaint Counsel may not proceed on claims such as breach of contract, which they have not pled. *See, e.g., In re Beatrice Foods Co.*, 101 F.T.C. 733, 825 (1983); *In re Standard Camera Corp.*, 63 F.T.C. 1238, 1267 (1963). Breach of contract, moreover, presents "a

claim that rarely, if ever, would implicate antitrust laws." *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1352 (6th Cir. 1989).

III. ELEMENTS OF THE ALLEGED VIOLATIONS

10. The exercise of a patent holder's rights can serve as the basis for antitrust liability in only very limited circumstances. "In the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using or selling the claimed invention free from liability under the antitrust laws." *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327 (Fed. Cir. 2000); *Townshend v. Rockwell Int'l Corp.*, No. C 99-0400, 2000 U.S. Dist. LEXIS 5070, at *22-23 (N.D. Cal. Mar. 28, 2000). There is no allegation in this case that Unocal has engaged in illegal tying, fraud on the Patent and Trademark Office (PTO), or sham litigation. These facts serve as an absolute bar to Complaint Counsel's challenge of Unocal's exercise of its lawful rights under its patents.

11. To prevail on the Complaint, Complaint Counsel must establish all the elements of a claim for monopolization or attempted monopolization.

12. The offense of monopolization consists of "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

13. The essential elements of an attempt to monopolize are: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). (JX 3).

14. Section 5 of the FTC Act may not be expanded to cover offenses that are broader than, or create liability apart from, the monopolization and attempted monopolization claims pled in the Complaint. *In re General Foods Corp.*, 103 F.T.C. 204, 364-66 (1984).

15. To the extent that Counts 4 and 5 of the Complaint are based on a theory that would not constitute an antitrust violation under the Sherman Act, they fail to state a claim. To the extent that they are duplicative of the monopolization and attempted monopolization claims as set forth in Counts 1 through 3, they are duplicative of those claims and do not state an additional basis for a violation. Accordingly, Counts 4 and 5 are dismissed.

IV. UNOCAL DID NOT ENGAGE IN EXCLUSIONARY CONDUCT.

16. The exclusionary conduct alleged by Complaint Counsel is fraud. Under the Order of the Commission dated July 7, 2004, in order to fit within any exception to the immunity provided by the *Noerr* doctrine *(see Eastern R.R. Presidents Confs. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)), Complaint Counsel must show that the fraud was knowing, deliberate, factually verifiable and central to the outcome of the CARB Phase 2 regulatory process.

17. In its July 7 opinion, the Commission noted that, according to the Complaint, the proximate cause of the alleged competitive harm was Unocal's *enforcement* of its patent rights. *In re Union Oil Co. of Cal.*, No. 9305, slip op. at 44 (FTC July 7, 2004) (emphasis supplied). The Federal Circuit has held that the question whether conduct in "enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law." *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068 (Fed. Cir. 1998); *Unitherm Food Sys., v. Swift-Ecklich, Inc.*, 375 F.3d 1341, 1355 (Fed. Cir. 2004).

18. The elements of fraud are "(1) a representation of a material fact, (2) the falsity of that representation, (3) the intent to deceive or, at least, a state of mind so reckless as to the consequences that it is held to be the equivalent of intent (scienter), (4) a justifiable reliance upon the misrepresentation by the party deceived which induces him to act thereon, and (5) injury to the party deceived as a result of his reliance on the misrepresentation." *Nobelpharma*, 141 F.3d at 1069-70.

19. Complaint Counsel have failed to demonstrate that Unocal made a misrepresentation of a material fact to CARB, Auto/Oil or WSPA.

20. Complaint Counsel have failed to prove that Unocal made a misrepresentation of a material fact to CARB by stating in CX 29 that Unocal's data was "public[ly] available" and "non-proprietary" and failing to disclose its pending patent application. They also have failed to prove that Unocal made a misrepresentation of material fact to Auto/Oil or WSPA by stating that its data was in the "public domain" (if in fact those words were said). Unocal did make its data publicly available and lifted the confidentiality on the data. Unocal did not patent the data; it patented compositions of gasoline and methods and processes of making and using gasoline. Unocal has never sought to prevent others from using its data; it only sought to exercise its statutory rights with respect to its patented compositions, methods and processes.

21. Complaint Counsel have failed to prove that Unocal made a misrepresentation of a material fact in advocating a predictive model as "cost-effective." Unocal used the term "cost-effective" as a statement of opinion, not fact. The evidence shows that Unocal believed its statements to be true and, in fact, CARB as well as many other refiners believed and still believe that the CARB Phase 2 predictive model was more cost effective than the original CARB Phase 2 regulations.

22. To find a violation of the antitrust laws premised on a failure to disclose requires a clear duty to disclose. *Rambus, Inc. v. Infineon Technologies AG*, 318 F.3d 1081, 1102 (Fed. Cir. 2003), *cert. denied*, 124 S.Ct. 227 (2003); *A.C. Aukerman Co. v. R.L. Chaides Cons. Co.*, 960 F.2d 1020, 1043-44 (Fed. Cir. 1992).

23. A failure to disclose material facts is not actionable fraud unless there is a fiduciary or confidential relationship imposing a duty to disclose. *Kruse v. Bank of Am.*, 248 Cal. Rptr. 217, 225 (Cal. App. 1988). There can be no Section 5 antitrust violation based upon a failure to disclose absent proof of a "clear and unambiguous" duty to disclose. *In re Rambus Inc.*, No. 9302, slip op. at 259 (FTC Initial Decision Feb. 23, 2004).

24. There was no clear and unambiguous duty for Unocal to disclose its patent application to CARB, Auto/Oil or WSPA.

25. Unocal had no relationship with CARB, Auto/Oil or WSPA that would create a duty for Unocal to disclose that it had filed a patent application. There are no fiduciary duties that would have obligated Unocal to disclose its confidential information to its competitors. *See Rambus v. Infineon*, 318 F.3d at 1096 n.7.

26. Unocal's truthful statements to CARB, Auto/Oil and WSPA did not give rise to a duty to disclose its pending patent applications.

27. By law, "[n]o state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule . . . unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the secretary of state pursuant to this chapter." California Code of Regulations, Title 2, §11347.5. CARB has no relevant guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has been adopted as a regulation and filed with the secretary of state. In the absence of any such formally adopted policy, practice, standard, guideline, or other rule, Unocal had no obligation to disclose any pending patent application to CARB.

28. The Auto/Oil members were parties to the Auto/Oil Agreement which contained an integration clause (CX 4001 at 024).

29. Because no ambiguity exists in the Auto/Oil Agreement, the construction of the agreement is a matter of law for the court. *See Cowal v. Hopkins*, 229 A.2d 452, 454 (D.C. App. 1967).

30. The Auto/Oil agreement is the entire understanding of the parties and governs the rights and liabilities of the parties. *See Scrimgeour v. Magazine*, 429 A.2d 187 (D.C. App. 1981). Extrinsic evidence of the purported meaning of the contract is not admissible, as such evidence is irrelevant, immaterial and unreliable. *See In re Orkin Exterminating Co., Inc.*, Docket No. 9176, 1986 FTC LEXIS 3, at *24 (Dec. 15, 1986).

31. Unocal's independent research was the property of Unocal under the provisions of the Auto/Oil agreement. (CX 4001). Unocal's work did not become "work of the Program" simply because Unocal presented the results of its research at a meeting. This type of publication of information is common practice among researchers and within the oil industry.

32. Likewise, Unocal's competitors in WSPA did not obtain rights in Unocal's patented inventions simply because Unocal presented the results of its research and provided its data to WSPA members.

33. Unocal's statements regarding its data and regarding the cost-effectiveness of a predictive model were not false or misleading.

34. Conduct is "exclusionary" if the conduct would not make economic sense but for its elimination or softening of competition. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-589 (1986). To be deemed exclusionary, conduct must have "'no rational business purpose other than its adverse effects on competitors.'" *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000). Exclusionary conduct normally involves the sacrifice of short-term profits or goodwill in order to maintain or obtain long-term monopoly power. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608, 610-11 (1985).

35. When the allegations of exclusionary conduct are based upon an allegation that the Respondent intentionally sought to mislead, Complaint Counsel must prove an intent to mislead or deceive in order to establish a Section 5 violation. *In re Rambus Inc.*, No. 9302, slip op. at 297 (FTC Initial Decision, Feb. 23, 2004) (citing *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1129 (7th Cir. 1983) (holding that a representation about

products must be "knowingly false or misleading before it can amount to an exclusionary practice")). The intent to deceive is a necessary component of both common law fraud and *Walker Process* fraud. *Kangaroos U.S.A. v. Caldor, Inc.*, 778 F.2d 1571, 1573 (Fed. Cir. 1985). In addition, the Commission's July 7 opinion emphasized that cases recognizing a misrepresentation exception to *Noerr* all require that any such misrepresentation be made with deliberate intent. *Union Oil*, slip op. at 36.

36. Complaint Counsel have failed to prove that Unocal intended to mislead or deceive the California Air Resources Board ("CARB") or Auto/Oil or WSPA members. To the contrary, the evidence shows that Unocal acted in good faith.

37. Fraud requires that the alleged misstatements of fact be material. *Roberts v. Lomanto*, 5 Cal. Rptr. 3d 866, 876 (Cal. Ct. App. 2003).

38. Complaint Counsel have failed to demonstrate that Unocal's alleged misrepresentation were material to CARB or to Auto/Oil or WSPA members.

39. Fraud requires proof that CARB, Auto/Oil members or WSPA members relied, to their detriment, on the alleged failure to disclose. *Whiteley v. Philip Morris, Inc.*, 11 Cal. Rptr. 3d 807, 842-43 (Cal. Ct. App. 2004); 2 Herbert Hovenkamp, Mark D. Janis & Mark A. Lemley, IP AND ANTITRUST § 35.5, at 35-40 (2002); 3 Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW ¶ 782(b) (2002).

40. Complaint Counsel have not established that CARB, Auto/Oil or WSPA members detrimentally relied on Unocal's alleged misrepresentations or nondisclosures.

V. UNOCAL HAD LEGITIMATE BUSINESS REASONS FOR ITS CONDUCT.

41. When there is a legitimate business reason for the challenged conduct, the conduct is not exclusionary and cannot be the basis for a monopolization or attempted monopolization claim. *See Technical Resource Servs. v. Dornier Med. Sys., Inc.*, 134 F.3d 1458, 1466 (11th Cir. 1998); *Oahu Gas Service, Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 369 (9th Cir. 1988).

42. Protecting the secrecy of innovations and trade secrets is a legitimate business justification. *Technical Res. Servs., Inc. v. Dornier Med. Sys., Inc.*, 134 F.3d 1458, 1467 (11th Cir. 1998); *see also Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281-82 (2d Cir. 1979).

43. Not disclosing information about pending or future patent applications is not only "rational and profit maximizing behavior," but also is procompetitive because the ability to control the disclosure of intellectual property preserves incentives to innovate. *In re Rambus Inc.*, No. 9302, slip op. at 287 (FTC Initial Decision, Feb. 23, 2004).

44. Unocal's efforts to lobby CARB for a predictive model constitute a legitimate business justification, as that conduct is protected under the *Noerr* doctrine.

45. Maintaining the confidentiality of patent applications is clearly related to a legitimate and normal business purpose and thus precludes a finding of exclusionary conduct in this case.

46. At the time of CARB's Phase 2 rulemaking, the PTO was required by law to keep confidential both the contents of pending patent application and the fact that an application had been made. 35 U.S.C. § 122 (1991); 37 C.F.R. § 1.14 (1991).

47. Patent applications are preserved in secrecy by both law, 35 U.S.C. § 122, and regulation, 37 C.F.R. § 1.14, for a reason. The integrity of the patent system is maintained in part by inventors' understanding that their patent applications will remain secret until either the patents issue or the applications are otherwise published by the PTO. "Breaches of this secrecy undermine the integrity of the patent system." *Eagle Comtronics, Inc. v. Arrow Communication Labs., Inc.*, 64 U.S.P.Q.2d (BNA) 1481 (Fed. Cir. Sept. 17, 2002), *reh'g granted in part on other grounds,* Nos. 01-1544 & 1591, 2002 U.S. App. LEXIS 22717 (Fed. Cir. Nov. 1, 2002).

48. Unocal has demonstrated that there were legitimate business justifications for the conduct challenged by Complaint Counsel.

VI. COMPLAINT COUNSEL DID NOT ESTABLISH THAT UNOCAL POSSESSES, OR IS DANGEROUSLY LIKELY TO ATTAIN MONOPOLY POWER.

49. Complaint Counsel have not shown that Unocal possesses, or is dangerously likely to attain, monopoly power in a relevant market.

50. To establish monopoly power, all technologies and goods that compete with Unocal's patented technology must be examined. Once these technologies and goods are identified, Unocal's share of the relevant market must be determined. As a matter of law, a share below two-thirds of the market is insufficient to establish monopolization of a market. *See Colo. Interstate Gas Co. v. Natural Gas Pipeline Co.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989)

("courts generally require a minimum market share of between 70% to 80%"); *Holleb & Co. v. Produce Terminal Cold Storage Co.*, 532 F.2d 29, 33 (7th Cir. 1976) (60% insufficient); *Fineman v. Armstrong World Indus., Inc*., 980 F.2d 171, 201-02 (3d Cir. 1992) (55% insufficient); *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 65 F.3d 1406, 1411 (7th Cir. 1995) (50% insufficient); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1274 (9th Cir. 1975) (50% insufficient).

51. The gasoline market claims alleged in the Complaint fails as a matter of law because Unocal is not a participant in the alleged market. *Spanish Broad. Sys. of Fla. v. Clear Channel Communications*, 376 F.3d 1065, 1075 (11th Cir. 2004); *Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 145 F.3d 1258, 1261 (11th Cir. 1998).

52. Complaint Counsel provided no analysis of market structure with respect to the technology market alleged by the Complaint. Accordingly, they failed to show that Unocal "actually monopolizes or dangerously threatens to do so." *Spectrum Sports*, 506 U.S. at 459.

53. Complaint Counsel's effort to establish that Unocal monopolized the technology market based on the fact that it is seeking a price greater than zero for a patent license also fails. Complaint Counsel failed to establish that the competitive price for Unocal's RFG technology is zero. This claim cannot be sustained given that Unocal has licensed its technology to several licensees in arms-length transactions that are not alleged to have been tainted by the conduct challenged in this case. Complaint Counsel have also failed to show monopoly power in that the vast majority of the market has refused to pay Unocal for its technology. They have merely shown that Unocal is seeking to collect royalties.

54. There is no competent evidentiary support for Professor Shapiro's principal assumption, which is that Unocal made a "royalty-free" offer of its patents to CARB; his opinions therefore cannot be relied on to support judgment for Complaint Counsel. Moreover, because his principal assumption contradicted the principal allegations in the Complaint, his opinions are and must be rejected.

55. A showing that gasolines that are made and sold in the California market match the numerical property limitations of Unocal's RFG patents does not show that Unocal has market power.

   a. Unocal's right to exclude others extends only so far as the scope of the patent claims. *See Markman v. Westview Instruments*, 52 F.3d 967, 970-71 (Fed. Cir. 1995); *see also Jones v. Hardy*, 727 F.2d 1524, 1528 (Fed. Cir. 1984) ("Analysis properly begins with the claims, for they measure and define the invention").

b. Determining infringement is a two-step process: first, the claims must be construed in light of the claim language, the specification and the prosecution history of the patent to determine its scope and meaning; second, they must be compared, as construed, to the accused device or process. *See Tate Access Floors, Inc. v. Interface Architectural Res., Inc.*, 279 F.3d 1357, 1365 (Fed. Cir. 2002); *Eaton Corp. v. Rockwell International Corp.*, 323 F.3d 1332, 1337 (Fed. Cir. 2003). To prove infringement, each and every limitation of the claim must be present in the accused device, method, or process. *See Tate Access Floors*, 279 F.3d at 1365; *see also Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed. Cir. 1995). No claim limitation may be ignored as insignificant or immaterial. *Techsearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360 (Fed. Cir. 2002); *Lockheed Martin Corp. v. Space Sys., Loral, Inc.*, 324 F.3d 1308, 1319 (Fed. Cir. 2003).

c. Only the '393 patent has been construed by a court; even there, there is a remaining dispute about construction of the claims that has not yet been resolved by the district court and could have a dramatic impact for determining claim scope. The scope of the claims of the other four patents has not been determined.

d. Complaint Counsel have not even attempted to offer evidence of infringement. Representatives for the major California refiners were questioned in depositions about infringement and avoiding infringement. The refiners refused to answer the questions on the grounds that the questions called for a legal conclusion.

e. Even a "likely to infringe" standard requires a full infringement analysis including construction of the claims. *See Oakley, Inc. v. Sunglass Hut Int'l*, 316 F.3d 1331, 1339 (Fed. Cir. 2003). Accordingly, it is not appropriate to assume likelihood of infringement. This is particularly true where, as here, the party with the burden to show monopoly power has entirely ignored significant claim limitations in most of the claims at issue. *See Techsearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360 (Fed. Cir. 2002).

f. Because a decision from the federal courts that gasolines made with ethanol do not infringe the patent would dramatically reduce any potential for infringement, the matching analysis is not an indicator of monopoly power.

g. It is inappropriate to use Unocal's licenses to determine Unocal's market power in this case. The royalties paid under the licenses represent a very small portion of the market; the terms of the licenses— which are confidential and structured for the convenience of the parties— cannot be applied outside the licensing context as a substitute for claim construction. *See Cardiac Pacemakers, Inc. v. St. Jude Pacemakers, Inc.*, No. IP 96-1718-C H/G, 2000 U.S. Dist. LEXIS 17352, *23, n.5 (S.D.Ind. Nov. 29, 2000), *aff'd in part, reversed in part and remanded – all on other grounds*, 381 F.3d 1371 (Fed. Cir. 2004).

h. Matching is a meaningless indicator where the vast majority of the market is not paying for Unocal's technology.

i. The matching rate does not indicate market power because no claim-by-claim analysis was done to identify available alternatives to Unocal's technology. The evidence shows that all refiners can blend around the ‘393 patent at minimal cost; the evidence also shows that refiners generally are not making efforts to avoid the other four Unocal patents or to undertake partial avoidance strategies.

VII. COMPLAINT COUNSEL HAVE FAILED TO SHOW THAT UNOCAL’S CONDUCT CAUSED ANY ANTICOMPETITIVE EFFECT.

56. Complaint Counsel must establish that Unocal’s alleged conduct has an “anticompetitive effect.” That is, it must harm the competitive process and thereby harm consumers." *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985).

57. In a standard-setting type case, the antitrust claimant must establish “a causal link between the standard-setting conduct and the adoption of a standard that infringed the wrongdoer’s patent.” *Rambus, slip op.* at 301; *see also Heary Bros. Lightning Prot.*, 287 F.Supp. 2d 1038, 1050 (D. Ariz. 2003); *Townshend v. Rockwell Int’l Corp., No.* C 99-0400, 2000 U.S. Dist. LEXIS 5070, at * 33 (N.D. Cal. Mar. 28, 2000); *Dell Computer Corp*., 121 F.T.C. 616, 624 n.2 (1996).

58. Complaint Counsel have failed to demonstrate that Unocal’s challenged conduct caused an anticompetitive effect.

59. Complaint Counsel have failed to demonstrate harm to competition.

60. Complaint Counsel have failed to show that any of the adverse effects that they allege likely would have been avoided had Unocal not engaged in the challenged conduct.

61. Complaint Counsel have failed to demonstrate that Unocal’s challenged conduct resulted in higher prices to consumers.

62. To establish that Unocal’s conduct harmed competition, assuming that exclusionary conduct is also shown, Complaint Counsel must prove that absent Unocal’s alleged misconduct, CARB would have adopted regulations that likely would have been more cost-effective than the current regulation. To that end, Complaint Counsel were required to show – among other things – that CARB had acceptable, non-infringing alternatives to its Phase 2 RFG regulations that it could have enacted absent deception by Unocal. Unless CARB could have chosen a competitively preferable regulatory solution that did not implicate Unocal’s patents

or, alternatively, negotiated a license agreement with Unocal to provide for lower royalties than Unocal has actually obtained, there can be no consumer harm. *See In re Rambus Inc*., No. 9302, slip op. at 312 (FTC Initial Decision, Feb. 23, 2004).

63. Complaint Counsel failed to show that CARB would (or even could) have adopted any regulatory scheme that is more cost-effective than the current one, taking Unocal's patents into account, that it is not able to adopt today. The sole alternative regulation proffered by Complaint Counsel was the EPA regulations. The uncontroverted evidence shows that the EPA regulations were not a plausible alternative for California at the time. Accordingly, Complaint Counsel have failed to meet their burden of proving harm to competition. *See In re Rambus Inc*., No. 9302, slip op. at 323 (FTC Initial Decision, Feb. 23, 2004).

64. With respect to the Complaint's allegation of monopolization through fraud of the refiners, the Complaint alleges that, but for the alleged fraud, California refiners would have "incorporat[ed] knowledge of Unocal's pending patent rights in their capital investment and refinery reconfiguration decisions to avoid and/or minimize potential infringement" and that as "[a]s a result . . . the harm to competition and consumers, as described in this Complaint, would have been avoided." (Complaint ¶ 89(c)).

65. Complaint Counsel failed to show that refiners might have invested in patent-avoiding refinery configurations that they can no longer pursue today. Indeed, Complaint Counsel made no attempt to rebut the persuasive evidence that foreknowledge of Unocal's patents would not have enabled refiners to avoid the patents to a greater extent than they can today. (Shapiro, Tr. 7381; Griffin, Tr. 8427).

66. Complaint Counsel have failed to establish that CARB is "locked in" to the current CARB regulations. That is, they have failed to show that there is are alternatives to the CARB Phase 2 regulations that CARB could have and would have adopted but for the alleged misconduct that it cannot adopt today.

67. To establish regulatory lock-in, Complaint Counsel were required to show that CARB cannot today adopt regulations as cost-effective as those that it would have adopted ex ante had Unocal's alleged misconduct not occurred because switching costs prevent it from doing so. To establish refiner lock-in, Complaint Counsel were required to show that California refiners cannot today invest in refinery configurations that would reduce overlap with Unocal's patents that would have been economically rational to make ex ante had Unocal's alleged misconduct not occurred. Lock-in exists where "the cost of switching is high." *Eastman Kodak Co v. Image Technical Serv., Inc.*, 504 U.S. 451, 476 (1992); *see also Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 515 (3d Cir. 1998); *In re Rambus Inc*., slip op. at 326; *see also* Carl Shapiro & Hal R. Varian, INFORMATION

RULES 111 (1999) ("[s]witching costs measure the extent of a customer's lock-in to a given supplier").

68. Complaint Counsel have failed to establish lock-in with respect to CARB. There is no evidence that CARB cannot today adopt a more cost-effective regulatory option that it would have adopted had Unocal not engaged in the alleged misconduct.

69. Complaint Counsel have failed to establish lock-in with respect to California refiners as well. They have failed to show that switching costs preclude California refiners from investing in refinery configurations that would reduce overlap with Unocal's patents that would have been economically rational to make ex ante.

VIII. COMPLAINT COUNSEL MUST ESTABLISH THEIR CLAIMS THROUGH CLEAR AND CONVINCING EVIDENCE.

70. As the proponents of the Complaint, Complaint Counsel bear the burden of establishing each element of the violations alleged in the Complaint. 16 C.F.R. § 3.43.

71. The heightened standard of clear and convincing proof applies to this case, where fraud is alleged as the exclusionary conduct and the predominant issues involved challenge the balance between patent and antitrust law. *Handgards, Inc. v. Ethicon, Inc*., 601 F.2d 986, 992 n.10, 996 (9th Cir. 1979); *Nobelpharma v. Implant Innovations,* 141 F.3d at 1070-71 (a patentee is not liable under antitrust laws unless fraud can be shown by clear and convincing evidence); *see also SSIH Equip. S.A. v. ITC,* 718 F.2d 365, 380-81 (Fed. Cir. 1983) (additional comments of Nies, J.).

72. The clear and convincing standard is also warranted here because of the *Noerr* immunity and First Amendment issues involved. *See, e.g., MCI Communication Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1155-56 (7th Cir. 1983) (approving jury instructions, in the context of communication tariffs, that required the jury to find sham exception to *Noerr* by clear and convincing evidence); *see also Christianson v. Colt Indus. Operating Corp.*, 766 F. Supp 670, 683 (C.D. Ill. 1991) (applying the clear and convincing standard to sham litigation exception); *Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co.*, 730 F. Supp. 826, 937-939 (C.D. Ill. 1990) (same holding for intervention before the FERC); *cf. Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1059 (9th Cir. 1998) (holding that the heightened pleading standard applies when alleging an exception to *Noerr* based on fraud: "when a plaintiff seeks damages . . . for conduct which is *prima facie* protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required") (quoting *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers,* 542

F.2d 1076, 1083 (9th Cir. 1976)). *Contra Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785, 813-814 (2d Cir. 1983). In deciding that the clear and convincing standard applies, this Court also considers the potential chilling effect on participation in standard-setting or regulatory proceedings. *Rambus v. Infineon*, 318 F.3d at 1102 n.10 ("[A]fter-the-fact morphing of a vague, loosely defined policy to capture actions not within the actual scope of that policy likewise would chill participation in open standard-setting bodies").

73. Complaint Counsel have not met their burden of establishing each element of the violations alleged under either a preponderance of the evidence standard or a clear and convincing evidence standard.

IX. THE STATUTE OF LIMITATIONS BARS THIS PROCEEDING.

74. 28 U.S.C. § 2462 applies to this proceeding and provides that "any action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ." 28 U.S.C. § 2462.

75. 28 U.S.C. § 2462 bars this proceeding as the challenged conduct by Unocal occurred outside of the limitations period and Unocal has not engaged in any conduct that would have the effect of restarting the limitations period.

X. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO ORDER THE REMEDY SOUGHT.

76. The remedy proposed by Complaint Counsel in this case exceeds the Commission's authority, as the Commission has no authority to force the forfeiture of patent rights.

77. The proposed remedy with respect to the '393 patent would be an impermissible attack on the judgment of an Article III court. *Deerfield v. F.C.C.*, 992 F.2d 420 (2d Cir. 1993).

78. The proposed remedies do not bear a reasonable relation to the alleged unlawful conduct. *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *La Peyre v. F.T.C.*, 366 F.2d 117, 122 (5th Cir. 1966).

79. The proposed remedies are inappropriate in light of the objective appearance of the immunity of Unocal's actions both in 1991 and at the time of the Complaint in 2003. *In re Union Oil Co. of Cal.*, No. 9305, slip. op. at 1-2 (FTC Nov. 23, 2003) (Initial Decision); *In*

re Abbott Labs., No. C-3945 (F.T.C. May 26, 2000) (consent order); *Geneva Pharms, Inc.*, No. C-3946 (May 26, 2000) (consent order).

XI. THIS PROCEEDING IS BARRED BY THE *NOERR* DOCTRINE.

80. Complaint Counsel have failed to demonstrate that Unocal's conduct fits within any exception to *Noerr-Pennington* immunity as recognized by the Commission's Opinion and Order dated July 7, 2004.

81. The CARB Phase 2 RFG rulemaking was a substantially "political" proceeding under the test set forth by the Commission.

82. CARB did not establish any norms of conduct for the Phase 2 regulatory process that communicated governmental expectations of truthful representation.

83. CARB was delegated extensive discretion by the California legislature to accomplish its mandate of achieving clean air in California.

84. CARB was not necessarily reliant on Unocal for factual information in connection with the Phase 2 RFG rulemaking.

85. The Court finds that is not possible to establish, in the quasi-legislative context of the CARB Phase 2 rulemaking, the precise mixture of facts, arguments, politics or other factors that caused CARB to adopt the Phase 2 RFG regulations.

86. Complaint Counsel have failed to show that Unocal engaged in knowing, deliberate, factually verifiable fraud that was central to the legitimacy of CARB's phase 2 regulatory process.

87. Because Unocal engaged in protected petitioning activity in connection with a quasi-legislative rulemaking proceeding, its actions are immune under *E. R.R. Presidents Conferences v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

88. CARB's awareness of the competitive consequences of their actions is irrelevant to *Noerr-Pennington* immunity. *Noerr*, 365 U.S. at 145; *Boone v. Redevelopment Agency of City of San Jose*, 841 F.2d 886 (9th Cir. 1988).

89. Unocal's enforcement of its patents is independently protected under *Noerr* because Unocal has the right to seek redress in the courts so long as its petitioning is not "objectively baseless." *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993). Further, the enforcement of the patents through litigation and activities ancillary to litigation and the petitioning at the rulemaking stage constitute "a single petitioning activity protected by the First Amendment and *Noerr-Pennington*." *Knology, Inc. v. Insight Communications. Co.*, 393 F.3d 656, 659 (6^{th} Cir. 2004).

90. The challenged conduct by Unocal is immune from liability under the antitrust laws under *E. R.R. Presidents Conferences v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

91. The Commission does not have authority to order the remedy sought in this matter.

XII. THE COMMISSION DOES NOT HAVE JURISDICTION TO HEAR THIS MATTER.

92. The Complaint raises substantial questions of patent law and as such the Commission is without jurisdiction to hear this matter. 28 U.S.C. § 1338(a); *Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 808-09 (1988); *Decker v. FTC*, 176 F.2d 461, 463 (D.C. Cir. 1949).

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Respectfully submitted,

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By: *Signature on File with Commission*

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