INITIAL DECISION: 11/25/03

(PUBLIC)

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

DOCKET NO. 9305

In the Matter of

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

INITIAL DECISION

D. Michael Chappell
Administrative Law Judge

Date: November 25, 2003

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I. INTRODUCTION

A. Procedural Background

This Initial Decision is filed pursuant to Rule 3.22(e) of the Commission's Rules of Practice which requires that "[w]hen a motion to dismiss a complaint . . . is granted with the result that the proceeding before the Administrative Law Judge is terminated, the Administrative Law Judge shall file an initial decision in accordance with the provisions of § 3.51. 16 C.F.R. § 3.22(e). As set forth below, the motions to dismiss filed by Respondent Union Oil Company of California ("Respondent" or "Unocal") are granted in part with the result that the proceeding before the Administrative Law Judge is terminated. Accordingly, this Initial Decision is filed in accordance with the provisions of Rule 3.51 of the Commission's Rules of Practice. 16 C.F.R. § 3.51(c).

Respondent filed two motions to dismiss pursuant to Rule 3.22(e) of the Commission's Rules of Practice, on April 2, 2003. The first motion seeks dismissal of the Complaint based upon immunity under *Noerr-Pennington* ("Motion"). Complaint Counsel filed its opposition on April 21, 2003 ("Opposition"). By Order dated August 25, 2003, the parties were ordered to file reply briefs. Respondent filed its reply brief on September 9, 2003 ("Reply"). Complaint Counsel filed its response to Respondent's reply brief on September 26, 2003 ("Sur-reply").

Respondent's second motion seeks dismissal of the Complaint for failure to make sufficient allegations that Respondent possesses or dangerously threatens to possess monopoly power ("Market Power Motion"). Complaint Counsel filed its opposition on April 21, 2003 ("Market Power Opposition").

B. Summary of Decision

As set forth below, there is no set of facts that Complaint Counsel could introduce in support of the violations of law that are alleged in the Complaint that would overcome *Noerr-Pennington* immunity with respect to Respondent's efforts to solicit government action. Accordingly, Respondent's motion to dismiss the Complaint based upon immunity under *Noerr-Pennington* is GRANTED IN PART as to all violations alleged and all allegations of the Complaint, except the allegations of Respondent's conduct directed toward the Auto/Oil Air Quality Improvement Research Program ("Auto/Oil Group") and the Western States Petroleum

Association ("WSPA"), independent of the conduct directed toward the California Air Resources Board ("CARB").

As set forth below, with respect to the allegations of Respondent's conduct directed toward Auto/Oil Group and WSPA, independent of the conduct directed toward CARB, there is no set of facts that Complaint Counsel could introduce in support of the violations of law that are alleged in the Complaint that would establish that the Commission has jurisdiction to resolve the substantial patent issues which are entangled in and raised by the allegations and violations of the Complaint. The motion is GRANTED IN PART to the extent that the Commission lacks jurisdiction to decide the fundamental and substantial patent issues raised by the allegations of the Complaint. Because of this determination, the remaining issues raised by Respondent's motion to dismiss for failure to make sufficient allegations that Respondent possesses or dangerously threatens to possess monopoly power are not reached. Accordingly, the remainder of Respondent's Market Power Motion is DENIED WITHOUT PREJUDICE.

Therefore, as discussed in detail below, no allegations or violations of the Complaint remain and the Complaint in Docket 9305 is dismissed in its entirety.

II. POSITIONS OF THE PARTIES

A. Summary of the Allegations of the Complaint and Answer

1. Complaint

According to the Complaint, in the 1980s, the California Air Resources Board ("CARB") initiated rulemaking proceedings to determine "cost-effective" regulations and standards governing the composition of low emissions, reformulated gasoline ("RFG"). Complaint at ¶ 1. The Complaint alleges that, through misrepresentations and omissions, Respondent influenced the outcome of CARB's Phase 2 reformulated gasoline rulemaking. Complaint at ¶¶ 35, 37, 39, 41, 42, 46, 48. On November 22, 1991, CARB adopted Phase 2 RFG regulations that set particular standards for the composition of low emissions, reformulated gasoline. Complaint at ¶ 44. CARB's Phase 2 RFG regulations substantially overlap with patents held by Respondent relating to low emissions, reformulated gasoline. Complaint at ¶¶ 15, 32, 45.

In addition, the Complaint alleges that during the CARB RFG rulemaking, Respondent

participated in the Auto/Oil Group, a cooperative, joint research program between automobile and oil industries, and in the WSPA, an oil industry trade association. Complaint at ¶¶ 50, 56. The Complaint alleges that Respondent made misrepresentations and material omissions to the Auto/Oil Group and WSPA and that, but for Respondent's fraud, these participants in the rulemaking process would have taken actions including, but not limited to, (a) advocating that CARB adopt regulations that minimized or avoided infringement on Respondent's patent claims; (b) advocating that CARB negotiate license terms substantially different from those that Respondent was later able to obtain; and/or (c) incorporating knowledge of Respondent's pending patent rights in their capital investment and refinery reconfiguration decisions to avoid and/or minimize potential infringement. Complaint at ¶ 90.

The Complaint further alleges that Respondent did not announce the existence of its proprietary interests and patent rights relating to RFG until shortly before CARB's Phase 2 regulations were to go into effect. Complaint at ¶ 6. By that time, the refining industry had spent billions of dollars in capital expenditures to modify their refineries to comply with the CARB Phase 2 regulations. *Id.* After CARB and the refiners had become locked into the Phase 2 regulations, Respondent commenced patent enforcement efforts by publicly announcing its RFG patent rights and its intention to collect royalty payments and fees. *Id.* Since Respondent's public announcement of the issuance of its first RFG patent on January 31, 1995, Respondent has obtained four additional patents and enforced its RFG patent rights through litigation and licensing activities. *Id.*

The Complaint charges Respondent with the legal violations of engaging in anticompetitive and exclusionary practices, whereby, in the markets defined in the Complaint, Respondent has wrongfully obtained monopoly power, has attempted monopolization, and has unreasonably restrained trade, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

2. Answer

Respondent's Answer denied the substantive allegations of the Complaint. In addition, Respondent, in its Answer, asserted that there are two basic underpinnings of the Complaint

which are unsupportable and eviscerate any viability to the Complaint. First, Respondent avers that the Complaint implicitly and incorrectly suggests that when the word "non-proprietary" or "proprietary" is used, a representation is made as to the status of patent rights, and that Respondent's opinion on the flexibility and cost effectiveness of a predictive model is not a representation on the status of patent rights. Second, Respondent asserts in the introduction to the Answer, that its conduct is petitioning conduct, immune from antitrust scrutiny.

B. Summary of Arguments Made Regarding Respondent's Motion to Dismiss Based On *Noerr-Pennington* Immunity

1. Respondent's arguments in support

Respondent moves to dismiss the Complaint on the ground that the conduct alleged in the Complaint is immunized from antitrust liability under the *Noerr-Pennington* doctrine. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Respondent asserts that CARB, an administrative agency, exercised quasi-legislative authority in enacting the Phase 2 RFG regulations. Respondent argues that its involvement in CARB's Phase 2 RFG rulemaking was political petitioning conduct, protected under *Noerr-Pennington*. Thus, Respondent argues, Respondent should be shielded from antitrust liability regardless of its motives or the effects of the governmental action. Respondent further asserts that the Complaint does not allege facts sufficient to support the "sham" exception to the *Noerr-Pennington* doctrine. *See Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, 504 U.S. 49 (1993). In addition, Respondent argues that the exception to *Noerr* immunity recognized in contexts involving the enforcement of patent rights obtained through knowing fraud on the Patent and Trademark Office is inapplicable to this proceeding. *See Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

Respondent also asserts that immunity under the *Noerr-Pennington* doctrine extends to causes of action brought under Section 5 of the FTC Act. Finally, Respondent asserts that the Complaint's allegations that Respondent made misrepresentations to two private bodies, the

Auto/Oil Group and WSPA, do not take Respondent's activities outside of the realm of *Noerr* protected political activities.

2. Complaint Counsel's arguments in opposition

Complaint Counsel argues first that the motion to dismiss is inappropriate because there are factual disputes and because the Complaint "specifically alleges" that *Noerr-Pennington* immunity does not apply here as a "matter of fact." Opposition at 2; Complaint at ¶ 96. Complaint Counsel next argues that Respondent's fraudulent statements were made to an agency acting in a quasi-adjudicative manner and that misrepresentations are not immunized when made in an adjudicatory setting or where the agency is dependent upon the petitioner for information. Complaint Counsel further asserts that *Noerr-Pennington* immunity does not extend to situations where the government agency is unaware that it is being asked to adopt or participate in a restraint of trade.

In addition, Complaint Counsel argues that Respondent's conduct is outside the reach of *Noerr-Pennington* because the harm was caused not by CARB's adoption of the regulations, but by Respondent's enforcement of its patents. Complaint Counsel also asserts that Respondent's conduct falls under the sham exception to the *Noerr-Pennington* doctrine. Next, Complaint Counsel argues that *Noerr* does not immunize Respondent's conduct because this action is brought under the FTC Act, and not the Sherman Act. Finally, Complaint Counsel argues that Respondent's conduct towards Auto/Oil Group and WSPA, is not shielded by *Noerr-Pennington* and states an independent cause of action.

C. Summary of Arguments Made Regarding Respondent's Motion to Dismiss Based On Failure to Make Sufficient Allegations That Respondent Possesses or Dangerously Threatens to Possess Monopoly Power

1. Respondent's arguments in support

Respondent's motion to dismiss based on failure to make sufficient allegations that Respondent possesses or dangerously threatens to possess monopoly power raises several issues. However, the only issues raised by Respondent in that motion that are decided herein are as

follows: whether the allegations of the Complaint arise under patent law; and whether the FTC has jurisdiction to decide the substantial questions of patent law alleged in the Complaint. The remaining issues are not reached because the determination on the *Noerr-Pennington* motion and the determination of the jurisdictional argument make any analysis of the remaining issues raised in the Market Power Motion unnecessary.

Respondent argues that the allegations of this Complaint arise under patent law because they require an inquiry into claim construction and infringement. Respondent further argues that jurisdiction to decide issues arising under patent law lies solely with federal courts and that the Commission does not have jurisdiction to decide the patent issues raised by the Complaint.

2. Complaint Counsel's arguments in opposition

Complaint Counsel asserts that the allegations of this Complaint do not arise under patent law. Complaint Counsel further asserts that the Commission has jurisdiction to decide issues that touch on patent law.

III. EVIDENTIARY STANDARDS

A. Motion to Dismiss Standard

Rule 3.22(e) of the Commission's Rules of Practice authorizes the filing of a motion to dismiss a complaint. 16 C.F.R. § 3.22(e). Although the Commission's Rules of Practice do not have a rule identical to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Commission has acknowledged a party's right to file, and the Administrative Law Judge's authority to rule on, a motion to dismiss for failure to state a claim upon which relief could be granted. *E.g.*, *In re Times Mirror Co.*, 92 F.T.C. 230 (1978); *In re Florida Citrus Mutual*, 50 F.T.C. 959, 961 (1954) (ALJ may "dismiss a complaint if in his opinion the facts alleged do not state a cause of action.").

Rule 3.11(b)(2) of the Commission's Rules of Practice sets forth that the Commission's complaint shall contain a "clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law." 16 C.F.R. § 3.11(b)(2). This rule requires that the complaint contain "a factual statement sufficiently clear and concise to inform respondent with reasonable definiteness of the types of

acts or practices alleged to be in violation of law, and to enable respondent to frame a responsive answer." *In re New England Motor Rate Bureau, Inc.*, 1986 FTC LEXIS 5, *114 (1986). A motion to dismiss for failure to state a claim upon which relief can be granted is judged by whether "a review of the complaint clearly shows that the allegations, if proved, are sufficient to make out a violation of Section 5." *In re TK-7 Corp.*, 1989 FTC LEXIS 32, *3 (1989).

For purposes of a motion to dismiss, "the factual allegations of the complaint are presumed to be true and all reasonable inferences are to be made in favor of complaint counsel." *TK-7 Corp.*, 1989 FTC LEXIS 32, *3 (citing *Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977); *Jenkins v. McKeitchen*, 395 U.S. 411, 421-22 (1969)). If the motion to dismiss raises material issues of fact which are in dispute, dismissal is not appropriate. *In re Herbert R. Gibson, Sr.*, 1976 FTC LEXIS 378, *1 (1976); *In re Jewell Companies, Inc.*, 81 F.T.C. 1034, 1035-36 (1972) (denying motion to dismiss where there was a substantial dispute on questions of fact). *See also In re College Football Assoc.*, 1990 FTC LEXIS 485, *4 (1990) (Where facts are needed to make determination on a "close question," the motion to dismiss will be denied.).

B. Factual Allegations Accepted as True; Conclusions of Law Not Accepted as True

The standard used in Commission proceedings mirrors the standard used for evaluating motions to dismiss raised in federal district courts under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Supreme Court has held that it "is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Moreover, it is well established that, in ruling on a motion to dismiss, allegations in the complaint must be accepted as true and construed favorably to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "[I]n antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976) (quoting *Poller v. Columbia Broad.*, 368 U.S. 464, 473 (1962)).

While well-pleaded allegations are taken as admitted, "conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted." *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968); *Violanti v. Emery Worldwide A-CF*, 847 F. Supp. 1251, 1255 (M.D. Pa. 1994) (conclusory allegations of law need not be accepted as true). On motions to dismiss, courts routinely reject allegations that are, or contain, legal conclusions. *E.g., United Mine Workers of America, Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1085 (4th Cir. 1979) (allegation that plaintiff acted under color of state law was a legal conclusion and insufficient to survive a motion to dismiss); *Donald v. Orfila*, 618 F. Supp. 645, 647 (D.D.C. 1985) (allegations that official acted in bad faith beyond the scope of his authority so as not to be entitled to immunity were legal conclusions and thus were not admitted for purposes of a motion to dismiss). "Were it otherwise, Rule 12(b)(6) would serve no function, for its purpose is to provide a defendant with a mechanism for testing the legal sufficiency of the complaint." *United Mine Workers*, 609 F.2d at 1086.

The Complaint specifically alleges that "Unocal is not shielded from antitrust liability pursuant to the *Noerr-Pennington* doctrine for numerous reasons *as a matter of law and as a matter of fact* . . . ." (Complaint at ¶ 96) (emphasis added). Whether or not *Noerr-Pennington* immunity applies to the facts alleged requires a legal conclusion and clearly is a matter of law. *See Razorback Ready Mix Concrete Co, Inc. v. Weaver*, 761 F.2d 484, 488 (8th Cir. 1985). Whether or not an issue is a matter of fact or is a matter of law is also a legal determination. In *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288 (8th Cir. 1978), although the complaint alleged that the agency was an adjudicatory body, the Court of Appeals dismissed the complaint after finding that defendant's actions, including misrepresentations to the agency and city council, were genuine political activity. *Id.* at 293, 297. In the instant case, paragraph 96 of the Complaint is not a properly plead factual allegation in so far as it alleges a conclusion of law; it need not be, and is not, taken as true for purposes of Respondent's motion to dismiss.

C. Matters Which May Be Considered on a Motion to Dismiss and For Which Official Notice May Be Taken

In ruling on a motion to dismiss, it is appropriate to consider the allegations of the

complaint, as well as documents attached to or specifically referenced in the complaint, and matters of public record. *Hoffman-LaRouche Inc. v. GenPharm, Inc.*, 50 F. Supp. 2d 367, 377 (D.N.J. 1999) (citing *Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 259 (3d Cir. 1998); 5A Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1357 at 299 (2d ed. 1990)). The Complaint specifically references California Health and Safety Code § 43018 and California's Administrative Procedure Act. Complaint at ¶¶ 17, 18, 21, and 26. As set forth below, it is also appropriate to take official notice of the statutes governing CARB, the Notice of Public Hearing through which CARB initiated the rulemaking, and the Final Statement of Reasons for Rulemaking, all of which are beyond dispute.

The Commission's Rules of Practice authorize the use of official notice. 16 C.F.R. § 3.43(d) ("when any decision of an Administrative Law Judge or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor"). Because the Commission Rule does not define official notice, it is appropriate to look to Federal Rule of Evidence ("F. R. Evid.") 201(b). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." F. R. Evid. 201(b).

Under Commission precedent, official notice may be taken of references "generally accepted as reliable." *In re Thompson Medical Co.*, 104 F.T.C. 648, 790 (1984). The Commission and Administrative Law Judges have frequently taken official notice of statutes and regulations. *E.g.*, *In re New England Motor Rate Bureau, Inc.*, 1989 FTC LEXIS 62, *16 n.6 (1989) (amendment to New Hampshire statute); *In re Great Atlantic & Pacific Tea Co.*, 85 F.T.C. 601, 608 (1975) (Trade Regulation Rule); *In re Blanton Co.*, 53 F.T.C. 580, 588 (1954) (regulations of the Secretary of Agriculture in the Federal Register).

Federal Rule of Evidence 201 authorizes federal courts to take judicial notice of adjudicative facts on a motion to dismiss. *Zimora v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503 (10th Cir. 1997). This includes taking notice of regulations and statutes. *See id.* at 1504 (to the extent that plaintiff's allegations conflicted with the provisions of the ordinance, plaintiff's

allegations were appropriately rejected or ignored). In *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1988), where the district court relied upon the public records of the administrative agency in ruling on a motion to dismiss on *Noerr-Pennington* grounds, the Court of Appeals held that these records were properly the subject of judicial notice. *Id.* at 1064 n.7. Moreover, the Commission has taken official notice of changes in an agency's amendments to regulations in determining to dismiss a complaint. *In re Marcor Inc.*, 90 F.T.C. 183, 185 (1977).

Respondent, in its motion, specifically cited to the California Clean Air Act (Cal. Health & Safety Code § 39601) and Chapter 3.5 (commencing with Section 11340) of the Government Code, and cited to and attached the Notice of Public Hearing through which CARB initiated the rulemaking and the Final Statement of Reasons for Rulemaking. Motion at 11-12, 23 n.7, and Appendices B and D. Complaint Counsel had an opportunity to disprove these statutes and agency materials of which official notice is taken not only through the filing of its Opposition, but was also provided an additional opportunity when directed to submit additional briefing by Order dated August 25, 2003. These statutes and public documents were relied upon by Respondent and their veracity and accuracy were not disputed by Complaint Counsel.

D. Motions To Dismiss Involving *Noerr-Pennington*

Courts routinely resolve, on a motion to dismiss, the legal issue of whether *Noerr-Pennington* immunity shields a defendant. *E.g.*, *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 250 (3rd Cir. 2001); *Baltimore Scrap Corp. v. The David J. Joseph Co.*, 237 F.3d 394, 396 (4th Cir. 2001); *Manistee Town Ctr. v. Glendale*, 227 F.3d 1090, 1091 (9th Cir. 2000). In *Kottle*, the court examined, on a motion to dismiss, whether an administrative agency bore many of the indicia of a true adjudicatory proceeding, such as conducting public hearings, accepting written and oral arguments, issuing written findings after hearing, and whether its decision was appealable to determine whether the sham exception to *Noerr-Pennington* applied. 146 F.3d at 1059. *See also Armstrong Surgical Center v. Armstrong City Mem'l Hosp.*, 185 F.3d 154, 163 (3d Cir. 1999) ("On the facts alleged in the complaint, it is also clear that the state decision makers were disinterested, conducted their own investigation, and afforded all interested parties an opportunity to set the record straight."). Thus, although other courts have deferred

ruling on whether the *Noerr-Pennington* doctrine applies until after discovery, *e.g., Fox News Network v. Time Warner, Inc.*, 962 F. Supp. 339, 345 (E.D.N.Y. 1997); *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972), where, as here, the dispositive issues are legal, there are no facts within reasonable dispute, and the issues can be resolved on a motion to dismiss, it is appropriate to do so.

Furthermore, courts, in ruling on motions to dismiss based on *Noerr-Pennington*, review the statutory authority under which an agency is acting to determine whether the conduct challenged in the complaint occurred in a political setting. For example, in *Mark Aero*, despite allegations in the complaint that the Aviation Department and the city council were "adjudicatory bodies," the court, upon reviewing state statutes, concluded that city council's passage of ordinances was an exercise of legislative power. 580 F.2d at 290. In *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 228 (7th Cir. 1975), on a motion to dismiss, the court determined that the city council was a body to which the state had delegated legislative powers, that the council did not need to compile an evidentiary record through formal proceedings, and that its members were subject to lobbying and other forms of *ex parte* influence, to conclude that the conduct challenged in the complaint occurred in a political setting. In *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 955 (11th Cir. 1986), the Court of Appeals for the Eleventh Circuit reviewed the statute applicable to the State Health Planning Agency's (SHPA) action in issuing a certificate of need and found that each application was reviewed individually according to a process which required consideration of a number of health planning issues, any interested party could have submitted information to SHPA in connection with the application, the initial review was conducted without an evidentiary hearing, the Act provided for a separate review board to handle any appeals from SHPA decisions, and the review board, at its discretion, could grant discovery rights prior to conducting a mandatory evidentiary hearing. This analysis led the court to determine, on a motion to dismiss, that the agency was acting in an adjudicatory manner. *Id.* Thus, a determination of whether CARB was acting in a legislative or adjudicative manner may properly be made on a motion to dismiss by review of the applicable statutes, as well as the factual allegations of the Complaint. As discussed below, other issues raised by Respondent's

motions and Complaint Counsel's responses do not require the resolution of genuine factual disputes and are properly decided on the motions to dismiss.

E. Burden of Proof

Noerr-Pennington immunity is not merely an affirmative defense. *McGuire Oil Co. v. MAPCO, Inc.*, 958 F.2d 1552, 1558 n.9 (11th Cir. 1992). "Rather, 'the antitrust plaintiff has the burden of establishing that the defendant restrained trade unreasonably, which cannot be done when the restraining action is that of the government.'" *Id.* (quoting P. Areeda and H. Hovenkamp, Antitrust Law § 203.4c). The antitrust plaintiff also bears the burden of proving that the action of the defendant comes within the sham exception to *Noerr-Pennington. Westmac, Inc. v. Smith*, 797 F.2d 313, 318 (6th Cir. 1986). Thus, the burden falls on Complaint Counsel to allege facts sufficient to show that *Noerr-Pennington* immunity does not attach to Respondent's actions.

In addition, where jurisdiction is limited to only that power authorized by statute, the burden of establishing jurisdiction rests upon the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). If a complaint before the Federal Trade Commission does not allege sufficient facts to confer jurisdiction, it must be dismissed. *In re R.J. Reynolds Tobacco Co., Inc.*, 111 F.T.C. 539, 541 (1988). Thus, the burden is on Complaint Counsel to demonstrate that jurisdiction exists over all violations alleged in the Complaint.

IV. STATEMENT OF FINDINGS

Rule 3.22(e) of the Commission's Rules of Practice requires that when a motion to dismiss a complaint is granted with the result that the proceeding before the Administrative Law Judge is terminated, the Administrative Law Judge shall file an initial decision in accordance with the provisions of § 3.51. 16 C.F.R. § 3.22(e). Rule 3.51(c) requires an initial decision to include a statement of findings and conclusions and an appropriate rule or order. 16 C.F.R. § 3.51(c). Accordingly, this section sets forth as findings those facts alleged in the Complaint that are taken as true only for the limited purpose of ruling on both motions to dismiss. Citations to specific

numbered findings of fact in this Initial Decision are designated by "F."

Allegations that are not relevant to the issues decided are not included. As discussed above (section III.B. *supra*) argumentative language and allegations that constitute legal conclusions need not be taken as true and are not included as findings of fact.

As is permitted when ruling on a motion to dismiss, official notice may appropriately be taken of legislative and public agency materials. (Section III.C. *supra*). Therefore, this section also includes excerpts from the Notice of Public Hearing through which CARB initiated the rulemaking at issue, the Final Statement of Reasons for Rulemaking, and the statutes governing CARB, upon which this order granting the motion to dismiss on *Noerr-Pennington* grounds and the Initial Decision are based. The Notice of Public Hearing and the Final Statement of Reasons for Rulemaking are Appendices B and D to Respondent's motion for dismissal based on *Noerr-Pennington*, available at www.ftc.gov/os/adjpro/d9305/index.htm.

A. Facts As Alleged in the Complaint

1. Respondent

1. Union Oil Company of California is a public corporation 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. Since 1985, Union Oil Company of California has done business under the name "Unocal." Unocal is a wholly-owned, operating subsidiary of Unocal Corporation, a holding company incorporated in Delaware. Complaint at ¶ 11.

2. Unocal is, and at all relevant times has been, a corporation as "corporation" is defined by Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44; and at all times relevant herein, Unocal has been, and is now, engaged in commerce as "commerce" is defined in the same provision. Complaint at ¶ 12.

3. Prior to 1997, Unocal owned and operated refineries in California as a vertically integrated producer, refiner, and marketer of petroleum products. In March 1997, Unocal completed the sale of its west coast refining, marketing, and transportation assets to Tosco Corporation. Currently, Unocal's primary business activities involve oil and gas exploration and production, as well as production of geothermal energy, ownership in proprietary and common carrier pipelines, natural gas storage facilities, and the marketing and trading of hydrocarbon commodities. Complaint at ¶ 13.

4. In its annual report for the year 2001 filed with the United States Securities and Exchange Commission, Form 10-K, Unocal lists as another of its key business activities: "[p]ursuing and negotiating licensing agreements for reformulated gasoline patents with refiners, blenders and importers." Unocal has publicly announced that it expects to earn up to $150 million in revenues a year from licensing its RFG patents. Complaint at ¶ 14.

2. Respondent's patents

5. Unocal is the owner, by assignment, of the following patents relating to low emissions, reformulated gasoline: United States Patent No. 5,288,393 (issued February 22, 1994); United States Patent No. 5,593,567 (issued January 14, 1997); United States Patent No. 5,653,866 (issued August 5, 1997); United States Patent No. 5,837,126 (issued November 17, 1998); and United States Patent No. 6,030,521 (issued February 29, 2000). Complaint at ¶ 15.

6. On May 13, 1990, Unocal scientists presented the preliminary research results of their emissions research program to the highest levels of Unocal's management to obtain approval and funding for additional, confirmatory research. Unocal's management approved funding for additional emissions testing, and this project became known as the "5/14 Project." Complaint at ¶ 29.

7. Unocal's management approved the filing of a patent application covering the invention and discovery that sprang from the 5/14 Project. Specifically, the Unocal scientists' novel discovery of the directional relationships between eight fuel properties – RVP, T10, T50, T90, olefin content, aromatic content, paraffin content, and octane – and three types of tailpipe emissions – *i.e.*, incompletely burned or unburned hydrocarbons, carbon monoxide, and nitrogen oxides. Complaint at ¶ 30.

8. On December 13, 1990, Unocal filed with the United States Patent and Trademark Office a patent application, No. 07/628,488. This application presented Unocal's emissions research results, including the regression equations and underlying data; detailed the directional relationships between the fuel properties and emissions studied in Unocal's 5/14 Project; and set forth composition and method claims relating to low emissions, reformulated gasoline. Complaint at ¶ 32.

3. California Air Resources Board ("CARB")

9. The California Air Resources Board ("CARB") is a department of the California Environmental Protection Agency. Established in 1967, CARB's mission is to protect the health, welfare, and ecological resources of California through the effective and efficient reduction of air pollutants, while recognizing and considering the effects of its actions on the California economy. CARB fulfills the mandate by, among other things, setting and enforcing standards for low emissions, reformulated gasoline. Complaint at ¶ 16.

4. Reformulated gasoline in California

10. CARB initiated rulemaking proceedings in the late 1980s to determine "cost-effective" regulations and standards governing the composition of low emissions, reformulated gasoline. Unocal actively participated in the CARB RFG rulemaking proceedings. Complaint at ¶ 1.

11. CARB's RFG regulations had their genesis in an effort by California to study the viability of alternative fuels for motor vehicles, such as methanol. In 1987, the California legislature passed AB 234, which resulted in the formation of a panel to study the environmental impact of alternative fuels and to develop a proposal to reduce emissions. This panel included representatives from the refining industry, including Roger Beach, a high level Unocal executive who later became the Chief Executive Officer and Chairman of the Board of Unocal. Complaint at ¶ 19.

12. Based in substantial part on the representations of oil industry executives that the oil industry could, and would develop gasoline that would be cleaner-burning and cheaper than methanol, the AB 234 study panel recommended exploring reformulated gasoline as an alternative to methanol. Complaint at ¶ 20.

13. In late 1988, the California legislature amended the California Clean Air Act to require CARB to take actions to reduce harmful car emissions, and directed CARB to achieve this goal through the adoption of new standards for automobile fuels and low emission vehicles. CARB's legislative mandate, set forth in California Health and Safety Code Section 43018, provided, *inter alia,* that CARB undertake the following actions:

a. Take "necessary, cost-effective, and technologically feasible" actions to achieve "reduction in the actual emissions of reactive, organic gases of at least 55 percent, a reduction in emissions of oxides of nitrogen of at least 15 percent from motor vehicles" no later than December 31, 2000;

b. Take actions "to achieve the maximum feasible reduction in particulates, carbon monoxide, and toxic air contaminants from vehicular sources";

c. Adopt standards and regulations that would result in "the most cost-effective combination of control measures on all classes of motor vehicles and motor vehicle fuels" including the "specification of vehicular fuel composition."

Complaint at ¶ 21.

14. Following the 1998 California Clean Air Act amendments, CARB embarked on two rulemaking proceedings relating to low emissions, reformulated gasoline. In these rulemaking proceedings – Phase 1 and Phase 2 – CARB prescribed limits on specific gasoline properties. Complaint at ¶ 22.

15. CARB's Phase 2 RFG proceedings represented an effort by CARB to develop stringent standards for low emissions, reformulated gasoline. Participants to the Phase 2 RFG proceedings understood that the CARB Phase 2 RFG regulations would require refiners to make substantial capital investments to reconfigure their refineries to produce compliant gasoline. Complaint at ¶ 24.

16. In its Phase 2 RFG proceedings, CARB did not conduct any independent studies of its own, but relied on the industry to provide research and information. Complaint at ¶ 25.

17. In the course of CARB's Phase 2 RFG proceedings, CARB adhered to the procedures set forth in the California Administrative Procedure Act. CARB provided notice of proposed regulations; provided the language of these proposed regulations and a statement of reasons; solicited and accepted written comments from the public; and conducted lengthy hearings at which oral testimony was received. CARB also issued written findings on the results of its rulemaking proceedings. Following adoption of the regulations, several parties sought judicial review of the CARB Phase 2 RFG regulations that provided small refiners with a two-year exemption for compliance with the regulations. Complaint at ¶ 26.

5. Unocal's conduct before CARB

18. Prior to and after the filing of the patent application on December 13, 1990, Unocal employees and management discussed and considered the potential competitive advantage and corporate profit that could be gained through effectuating an overlap between the CARB regulations and Unocal's patent claims. Complaint at ¶ 33.

19. During the same time that Unocal participated in the CARB RFG rulemaking proceedings, specific discussions took place within the company concerning how to induce the regulators to use information supplied by Unocal so that Unocal could realize the licensing income potential of its pending patent claims. Complaint at ¶ 34.

20. Beginning in 1990, and continuing throughout the CARB Phase 2 RFG rulemaking process, Unocal provided information to CARB for the purpose of obtaining competitive advantage. Unocal gave CARB this information in private meetings with CARB, through participation in CARB's public workshops and hearings, as well as by participating in industry groups that also were providing input into the CARB regulations. Unocal suppressed facts relating to its proprietary interests in its emissions research results. Complaint at ¶ 35.

21. On June 11, 1991, CARB held a public workshop regarding the Phase 2 RFG regulations. This workshop included discussions of CARB staff's proposed gasoline specifications – *i.e.*, the levels at which certain gasoline properties should be set – to reduce the emissions from gasoline-fueled vehicles. The set of specifications proposed by CARB for discussion at this workshop did not include a T50 specification. Complaint at ¶ 36.

22. On June 20, 1991, Unocal presented to CARB staff the results of its 5/14 Project to show CARB that "cost-effective" regulations could be achieved through adoption of a "predictive model" and to convince CARB of the importance of T50. Unocal's pending patent application contained numerous claims that included T50 as a critical limitation, in addition to other fuel properties that CARB proposed to regulate. Complaint at ¶ 37.

23. Prior to the presentation to CARB, Unocal's management decided not to disclose Unocal's pending '393 patent application to CARB staff. Complaint at ¶ 38.

24. On July 1, 1991, Unocal provided CARB with the actual emissions prediction equations developed in the 5/14 Project. Unocal requested that CARB "hold these equations confidential, as we feel that they may present a competitive advantage in the production of gasoline." But Unocal went on to state: "If CARB pursues a meaningful dialogue on a predictive model approach to Phase 2 gasoline, Unocal will consider making the equations and underlying data public as required to assist in the development of a predictive model." Complaint at ¶ 39.

25. Following CARB's agreement to develop a predictive model, Unocal made its emissions results, including the test data and equations underlying its 5/14 Project, publicly available. Complaint at ¶ 40.

26. On August 27, 1991, Unocal stated in a letter to CARB that its emissions research data were "nonproprietary." Specifically, Unocal stated: "Please be advised that Unocal now considers this data to be nonproprietary and available to CARB, environmental interests, groups, other members of the petroleum industry, and the general public upon request." Complaint at ¶ 41.

27. At the time Unocal submitted its August 27, 1991 letter to CARB, it did not disclose to CARB its proprietary interests in the 5/14 Project data and equations, its prosecution of a patent application, or its intent to enforce its proprietary interests to obtain licensing income. Complaint at ¶ 42.

28. CARB used Unocal's equations in setting a T50 specification. Subsequently, in October 1991, CARB published Unocal's equations in public documents supporting the proposed Phase 2 RFG regulations. Complaint at ¶ 43.

29. On November 22, 1991, the CARB Board adopted Phase 2 RFG regulations that set particular standards for the composition of low emissions, reformulated gasoline. These

regulations specified limits for eight gasoline properties: RVP, benzene, sulfur, aromatics, olefins, oxygen, T50, and T90. Unocal's pending patent claims recited limits for five of the eight properties specified by the regulations: T50, T90, olefins, aromatics, and RVP. Complaint at ¶ 44.

30. The Phase 2 RFG regulations substantially overlapped with Unocal's patent claims. For example, CARB included a specification for T50 in its Phase 2 RFG regulations and eventually adopted a "predictive model" that included T50 as one of the parameters. Complaint at ¶ 45.

31. Although Unocal knew by July 1992 that most of the pending patent claims based on its emissions research had been allowed by the United States Patent and Trademark Office, Unocal did not disclose this material information to CARB and other participants in the CARB RFG proceedings. Complaint at ¶ 4.

32. Prior to the final approval of the CARB Phase 2 RFG regulations in November 1992, Unocal submitted comments and presented testimony to CARB opposing CARB's proposal to grant small refiners a two-year exemption for complying with the regulations. Unocal opposed this proposed exemption on the grounds that it would increase the costs of compliance and undermine the cost-effectiveness of the CARB Phase 2 RFG regulations. In making these statements, Unocal did not disclose that it had proprietary rights that would materially increase the cost and reduce the cost-effectiveness and flexibility of the regulations that CARB had adopted. Complaint at ¶ 46.

33. CARB amended the Phase 2 regulations in June 1994 to include a predictive model as an alternative method of complying with the regulations that was intended to provide refiners with additional flexibility. At the urging of numerous companies, including Unocal, this "predictive model" permits a refiner to comply with the RFG regulations by producing fuel that is predicted – based on its composition and the levels of the eight properties – to have equivalent emissions to a fuel that meets the strict gasoline property limits set forth in the regulations. Complaint at ¶ 47.

34. During the development of the predictive model, Unocal continued to meet with CARB, providing testimony and information. Unocal submitted comments to CARB touting the predictive model as offering "flexibility" and furthering CARB's mandate of "cost-effective" regulations. Complaint at ¶ 48.

35. Unocal made statements and comments to CARB relating to the "cost effectiveness" of CARB Phase 2 regulations, and the "flexibility" offered by the implementation of a predictive model to reduce refiner compliance costs. These statements and comments include, but are not limited to, both written and/or oral statements made to CARB on the following dates: October 29, 1991, November 21, 1991, November 22, 1991, March 16, 1992, June 19, 1992, August 14, 1992, September 4, 1992, June 3, 1994 and June 9, 1994. Complaint at ¶ 78.

36. Throughout its communications and interactions with CARB prior to January 31, 1995, Unocal did not disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties. Complaint at ¶ 79.

37. On February 22, 1994, the United States Patent Office issued the '393 patent. CARB first became aware of Unocal's '393 patent shortly after Unocal's issuance of a press release on January 31, 1995. Complaint at ¶ 49.

6. Unocal's participation in industry groups

38. During the CARB RFG rulemaking, Unocal actively participated in the Auto/Oil Air Quality Improvement Research Program ("Auto/Oil Group"), a cooperative, joint research program between the automobile and oil industries. By agreement dated October 14, 1989, the big three domestic automobile manufacturers – General Motors, Ford, and Chrysler – and representatives from fourteen oil companies, including Unocal, entered into a joint research agreement in accordance with the National Cooperative Research Act of 1984 ("Auto/Oil Agreement"). Complaint at ¶ 50.

39. The stated objective of the Auto/Oil joint research venture was to plan and carry out research and tests designed to measure and evaluate automobile emissions and the potential improvements in air quality achievable through the use of reformulated gasolines, methanol, and other alternative fuels, and to evaluate the relative cost-effectiveness of these various improvements. Complaint at ¶ 51.

40. The Auto/Oil Agreement provided that "[t]he results of research and testing of the Program will be disclosed to government agencies, the Congress and the public, and otherwise placed in the public domain." This agreement specifically provided for the following dedication of any and all intellectual property rights to the public: "No proprietary rights will be sought nor patent applications prosecuted on the basis of the work of the Program unless required for the purpose of ensuring that the results of the research by the Program will be freely available, without royalty, in the public domain." Complaint at ¶ 52.

41. While the Auto/Oil Agreement permitted participating companies to conduct independent research, and further permitted them to withhold the fruits of such independent research from the Auto/Oil Group, once data and information were in fact presented to the Auto/Oil Group, they became the "work of the Program." Complaint at ¶ 53.

42. On September 26, 1991, Unocal presented to the Auto/Oil Group the results of Unocal's emissions research, including the test data, equations, and corresponding directional relationships between fuel properties and emissions derived from the 5/14 Project. Unocal's management authorized this presentation, which was substantially similar to that made to CARB on June 20, 1991. Unocal informed Auto/Oil participants that the data had been made available

to CARB and were in the public domain. Unocal also represented that the data would be made available to Auto/Oil participants. Complaint at ¶ 55. Unocal failed to disclose Unocal's proprietary interests in its emissions research results and Unocal's intention and efforts to enforce its intellectual property rights. Complaint at ¶ 82.

43. Throughout all of its communications and interactions with the Auto/Oil Group prior to January 31, 1995, Unocal failed to disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties. Complaint at ¶ 83.

44. During the CARB Phase 2 RFG rulemaking proceedings, Unocal also actively participated in the Western States Petroleum Association ("WSPA"), an oil industry trade association that represents companies accounting for the bulk of petroleum exploration, production, refining, transportation and marketing in the western United States. WSPA, as a group, actively participated in the CARB RFG rulemaking process. WSPA commissioned, and submitted to CARB, three cost studies in connection with the CARB Phase 2 RFG rulemaking. Complaint at ¶ 56.

45. One cost study commissioned by WSPA incorporated information relating to process royalty rates associated with non-Unocal patents and was used by CARB to determine the cost-effectiveness of the proposed CARB Phase 2 RFG standards. This WSPA cost study estimated the costs of the proposed regulations on a cents-per-gallon basis and estimated the incremental costs associated with regulating specific gasoline properties. This WSPA study could have incorporated costs associated with potential royalties flowing from Unocal's pending patent rights. Complaint at ¶ 57.

46. On September 10, 1991, Unocal presented its 5/14 Project emissions research results to WSPA. Unocal's management authorized the presentation of the research results to WSPA. This Unocal presentation created the impression that Unocal's emissions research results, including the data and equations, were nonproprietary and could be used by WSPA or its individual members without concern for the existence or enforcement of any intellectual property rights. Complaint at ¶ 58.

47. Throughout all of its communications and interactions with WSPA prior to January 31, 1995, Unocal failed to disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties. Complaint at ¶ 88.

48. None of the participants in the WSPA or Auto/Oil Group knew of the existence of Unocal's proprietary interests and/or pending patent rights at any time prior to the issuance of the '393 patent in February 1994, by which time most, if not all, of the oil company participants to these groups had made substantial progress in their capital investment and refinery modifications plans for compliance with the CARB Phase 2 RFG regulations. Complaint at ¶ 59.

7. Unocal's patent prosecution and enforcement

49. Following the November 1991 adoption of CARB Phase 2 RFG specifications, Unocal amended its patent claims in March 1992 so that the patent claims more closely matched the regulations. In some cases, Unocal's patent claims were narrowed to resemble the regulations. Complaint at ¶ 60.

50. On or about July 1, 1992, Unocal received an office action from the U.S. Patent and Trademark Office indicating that most of Unocal's pending patent claims had been allowed. Unocal did not disclose this information to CARB or other participants to the CARB Phase 2 RFG rulemaking. Complaint at ¶ 61.

51. Subsequently, after the submission of additional amendments, Unocal received a notice of allowance from the U.S. Patent and Trademark Office for all of its pending claims in February 1993. Unocal did not disclose this information to CARB or other participants to the CARB Phase 2 RFG rulemaking. Complaint at ¶ 62.

52. In June 1993, Unocal filed a divisional application (No. 08/77,243) of its original patent application that allowed Unocal to pursue additional patents based on the discoveries of the 5/14 Project. Complaint at ¶ 63.

53. The U.S. Patent and Trademark Office issued the '393 patent to Unocal on February 22, 1994. On January 31, 1995, Unocal issued a press release announcing issuance of the '393 patent. The Unocal press release stated that the '393 patent "covers many of the possible fuel compositions that refiners would find practical to manufacture and still comply with the strict California Air Resources Board (CARB) Phase 2 requirements." Complaint at ¶ 64.

54. In March 1995, Unocal met separately with California Governor Pete Wilson and CARB and made assurances that Unocal would not enjoin or otherwise impair the ability of refiners to produce and supply to the California market gasoline that complied with the CARB Phase 2 RFG regulations. In or about the same time period, CARB expressed its own concern to Unocal about the coverage of the patent and even sought and received from Unocal a license to use the '393 patent in making and using test fuels. Complaint at ¶ 65.

55. On March 22, 1995, five days after meeting with CARB staff, Unocal filed a continuation patent application (No. 08/409/074) claiming priority to the original December 1990 application. Unocal did not inform CARB or Governor Wilson that it intended to obtain additional RFG patents. Complaint at ¶ 66.

56. Unocal subsequently filed additional continuation patent applications on June 5, 1995 (No. 08/464,544), August 1, 1997 (No. 08/904,594), and November 13, 1998 (No. 08/191,924),

all claiming priority based on Unocal's original December 13, 1990 patent application. Complaint at ¶ 67.

57. On April 13, 1995, ARCO, Exxon, Mobil, Chevron, Texaco, and Shell filed suit in the United States District Court for the Central District of California seeking to invalidate Unocal's '393 patent. Unocal filed a counterclaim for patent infringement of the '393 patent. The jury in this private litigation determined that Unocal's '393 patent was valid and infringed, and found that the refiners must pay a royalty rate of 5.75 cents per gallon for the period from March through July 1996 for sales of infringing gasoline in California. Complaint at ¶ 68.

58. The United States Court of Appeals for the Federal Circuit subsequently affirmed the trial court's judgment. The United States Supreme Court denied the refiner-defendants' petition for a writ of certiorari. The refiner-defendants have made payments totaling $91 million to Unocal for damages, costs, and attorneys' fees. Complaint at ¶ 69.

59. An accounting action is still ongoing in the United States District Court for the Central District of California to determine damages for infringement of the '393 patent by the refiners for the period from August 1, 1996, through December 31, 2000. The court ruled in August 2002 that the 5.75 cents per gallon royalty fee awarded by the jury would apply to all infringing gasoline produced and/or supplied in California. Complaint at ¶ 70.

60. On January 23, 2002, Unocal sued Valero Energy Company in the Central District of California for willful infringement of both the '393 patent and the '126 patent. In its complaint, Unocal seeks damages at the rate of 5.75 cents per gallon for all infringing gallons, and treble damages for willful infringement. Complaint at ¶ 71.

61. Unocal also has enforced its patent claims through licensing activities. To date, Unocal has entered into license agreements with eight refiners, blenders and/or importers covering the use of all five RFG patents. The terms of these license agreements are confidential. Unocal has announced that these license agreements feature a "uniform" licensing schedule that specifies a range from 1.2 to 3.4 cents per gallon depending on the volume of gasoline falling within the scope of the patents. As a licensee practices under the license more frequently, the licensing fee per gallon is reduced. Complaint at ¶ 72.

62. Refiners in California invested billions of dollars in sunk capital investments without knowledge of Unocal's patent claims to reconfigure their refineries in order to comply with the CARB Phase 2 RFG regulations. These refiners cannot produce significant volumes on non-infringing CARB-compliant gasoline without incurring substantial costs. Complaint at ¶ 93.

63. Were Unocal to receive a 5.75 cents per gallon royalty on all gallons of "summer-time" CARB RFG produced annually for the California market, this would result in an estimated annual cost of more than $500 million (assuming approximately 14.8 billion gallons per year

California consumption, with up to 8 months of CARB summer-time gasoline requirements). Complaint at ¶ 10.

B. Legislative and Agency Materials of Which Official Notice is Taken

1. Notice of Public Hearing

64. CARB issued its Notice of Public Hearing to Consider Adoption of and Amendments to Regulations Regarding Reformulated Gasoline (Phase 2 Gasoline Specifications), and the Wintertime Oxygen Content of Gasoline on September 24, 1991, ["Notice of Public Hearing"] in connection with the Phase 2 regulations. Notice of Public Hearing, p.1.

65. The Notice of Public Hearing states that the Air Resources Board ("the Board") will conduct a public hearing to consider the adoption of and amendments to regulations to establish more stringent gasoline specifications for Reid vapor pressure ("RVP"), distillation temperatures, and sulfur, benzene, olefin, oxygen and aromatic hydrocarbon content starting in 1996. Notice of Public Hearing, p. 1.

66. The Notice of Public Hearing states that the Board staff has prepared a Staff Report for the proposed Phase 2 reformulated gasoline proposal that is available to the public. Notice of Public Hearing, p. 6.

67. The Notice of Public Hearing states that based on cost data submitted to the Board, the staff has determined that the regulations will cost between 14 cents per gallon to 20 cents per gallon, if the entire cost is passed on to the consumer. The total capital investment costs to the refiners are estimated to be in the range of four to seven billion dollars. Notice of Public Hearing, p. 7.

68. The Notice of Public Hearing states that the staff estimates that implementation of Phase 2 specifications will result in ozone precursor emission reductions of about 190 tons per day in 1996. Emissions of CO will be reduced by about 1300 tons per day and sulfur oxides by 40 tons per day. Other Phase 2 specifications will also result in reduced toxic emissions. Notice of Public Hearing, p. 7.

69. The Notice of Public Hearing states that the staff is conducting an independent cost analysis using the Process Industry Modeling System refinery model. Notice of Public Hearing, p. 7.

70. The Notice of Public Hearing states that before taking final action on the proposed regulatory action, the Board must determine that no alternative considered by the agency would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action. Notice of Public Hearing, pp. 7-8.

71. The Notice of Public Hearing states that the public may present comments relating to this matter orally or in writing. The Board encourages members of the public to bring to the attention of staff in advance of the hearing any suggestions for modification of the proposed regulatory action. Notice of Public Hearing, p. 8.

2. Final Statement of Reasons For Rulemaking

72. The California Air Resources Board issued its Final Statement of Reasons for Rulemaking, Including Summary of Comments and Agency Response relating to the public hearing to consider the adoption and amendments to Phase 2 gasoline specifications held on November 21-22, 1991. ["Final Statement of Reasons for Rulemaking"].

73. Final Statement of Reasons for Rulemaking states: "[t]he statutes do not mandate what specific fuel characteristics must be controlled, how stringent those controls should be, what the compliance dates should be, to whom the controls should apply, whether the limits should be statewide or limited to areas with substantial air pollution problems, whether the limits should apply year-round or only during seasons with bad air quality, whether all batches of fuel should be subject to the same limit or an 'averaging' program of some sort should be instituted, how the controls should be enforced, and whether there should be provisions granting temporary 'variances' based on unforeseen unique events." Final Statement of Reasons for Rulemaking, p. 190.

74. The Final Statement of Reasons for Rulemaking states that the Board conducted a hearing at which it received oral and written comments on the regulatory proposals. Final Statement of Reasons for Rulemaking, p. 1.

75. The Final Statement of Reasons for Rulemaking states that the staff conducted an informal public workshop on October 14, 1991 to discuss the Phase 2 RFG regulatory proposal. Final Statement of Reasons for Rulemaking, p. 17, n.5.

76. The Final Statement of Reasons for Rulemaking contains a summary of the comments the Board received on the Phase 2 RFG regulations during the formal rulemaking process and the Board's responses to the comments. Final Statement of Reasons for Rulemaking, p. 3.

77. An attachment to the Final Statement of Reasons for Rulemaking shows that 51 entities, including automobile companies, assemblymen, business associations, chemical companies, environmental associations, forestry associations, labor unions, oil companies, petroleum associations, refiners' associations, and trucking associations, all provided comments to the Board during the formal rulemaking process. Final Statement of Reasons for Rulemaking, pp. A-1 - A-6.

3. Statutory authority under which CARB's regulations were adopted

78. The Notice of Public Hearing states that CARB's regulatory action is proposed under that authority granted in sections 39600, 39601, 43013, 43018, and 43101 of the Health and Safety Code and *Western Oil and Gas Ass'n v. Orange County Air Pollution Control District*, 14 Cal. 3d 411, 121 Cal. Rprt. 249 (1975). Notice of Public Hearing, p. 8.

79. CARB also has the authority to conduct adjudicatory hearings. The procedures for hearings can be found at Cal. Code Regs. tit. 17 §§ 60040-60053. The provisions of this article do not apply to review of decisions related to programs or actions of air pollution control or air quality management districts. Cal. Health & Safety Code § 60040.

80. The Notice of Public Hearing does not state that CARB's regulatory action is proposed under the authority granted in sections 60040-60053 of the Health and Safety Code. Notice of Public Hearing, p. 8.

81. Section 39600 of the Health and Safety Code states: The state board shall do such acts as may be necessary for the proper execution of the powers and duties granted to, and imposed upon, the state board by this division and by any other provision of law. Cal. Health & Safety Code § 39600.

82. Section 39601 of the Health and Safety Code states, in part:

(a) The state board shall adopt standards, rules, and regulations in accordance with the provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, necessary for the proper execution of the powers and duties granted to, and imposed upon, the state board by this division and by any other provision of law . . . ;

(c) The standards, rules, and regulations adopted pursuant to this section shall, to the extent consistent with the responsibilities imposed under this division, be consistent with the state goal of providing a decent home and suitable living environment for every Californian. Cal. Health & Safety Code § 39601.

83. Section 43013 of the Health and Safety Code states, in part:

(a) The state board may adopt and implement motor vehicle emission standards, in-use performance standards, and motor vehicle fuel specifications for the control of air contaminants and sources of air pollution which the state board has found to be necessary, cost-effective, and technologically feasible, to carry out the purposes of this division, unless preempted by federal law . . . .

(e) Prior to adopting or amending any standard or regulation relating to motor vehicle fuel specifications pursuant to this section, the state board shall, after consultation with public or private entities that would be significantly impacted . . . do both of the following:

(1) Determine the cost-effectiveness of the adoption or amendment of the standard or regulation. The cost-effectiveness shall be compared on an incremental basis with other mobile source control methods and options.

(2) Based on a preponderance of scientific and engineering data in the record, determine the technological feasibility of the adoption or amendment of the standard or regulation. . . .

(f) Prior to adopting or amending any motor vehicle fuel specification pursuant to this section, the state board shall do both of the following:

(1) To the extent feasible, quantitatively document the significant impacts of the proposed standard or specification on affected segments of the state's economy. The economic analysis shall include, but is not limited to, the significant impacts of any change on motor vehicle fuel efficiency, the existing motor vehicle fuel distribution system, the competitive position of the affected segment relative to border states, and the cost to consumers.

(2) Consult with public or private entities that would be significantly impacted to identify those investigative or preventive actions that may be necessary to ensure consumer acceptance, product availability, acceptable performance, and equipment reliability. The significantly impacted parties shall include, but are not limited to, fuel manufacturers, fuel distributors, independent marketers, vehicle manufacturers, and fuel users. Cal. Health & Safety Code § 43013.

84. Section 43018 of the Health and Safety Code states, in part:

(a) The state board shall endeavor to achieve the maximum degree of emission reduction possible from vehicular and other mobile sources in order to accomplish the attainment of the state standards at the earliest practicable date.

(b) Not later than January 1, 1992, the state board shall take whatever actions are necessary, cost-effective, and technologically feasible in order to achieve, not later than December 31, 2000, a reduction in the actual emissions of reactive organic gases of at least 55 percent, a reduction in emissions of oxides of nitrogen of at least 15 percent from motor vehicles. These reductions in emissions shall be calculated with respect to the 1987 baseline year. The state board also shall take action to achieve the maximum feasible reductions in particulates, carbon monoxide, and toxic air contaminants from vehicular sources.

(c) In carrying out this section, the state board shall adopt standards and regulations which will result in the most cost-effective combination of control measures on all classes of motor vehicles and motor vehicle fuel, including, but not limited to, all of the following:

(1) Reductions in motor vehicle exhaust and evaporative emissions.

(2) Reductions in emissions from in-use emissions from motor vehicles through improvements in emission system durability and performance.

(3) Requiring the purchase of low emission vehicles by state fleet operators.

(4) Specification of vehicular fuel composition.

(d) In order to accomplish the purposes of this division, and to ensure timely approval of the district's plans for attainment of the state air quality standards by the state board, the state board shall adopt the following schedule for workshops and hearings to consider the adoption of the standards and regulations required pursuant to this section:

(1) Workshops on the adoption of vehicular fuel specifications for aromatic content, diesel fuel quality, light-duty vehicle exhaust emission standards, and revisions to the standards for new vehicle certification and durability to reflect current driving conditions and

useful vehicle life shall be held not later than March 31, 1989. . . .

(2) Notwithstanding Section 43830, workshops on the adoption of regulations governing gasoline Reid vapor pressure, and standards for heavy-duty and medium-duty vehicle emissions, shall be held not later than January 31, 1990. . . .

(3) Workshops on the adoption of regulations governing detergent content, emissions from off-highway vehicles, vehicle fuel composition, emissions from construction equipment and farm equipment, motorcycles, locomotives, utility engines, and to the extent permitted by federal law, marine vessels, shall be held not later than January 31, 1991. . . .

(e) Prior to adopting standards and regulations pursuant to this section, the state board shall consider the effect of the standards and regulations on the economy of the state, including, but not limited to, motor vehicle fuel efficiency . . . . Cal. Health & Safety Code § 43018.

85. Section 43101 of the Health and Safety Code states: The state board shall adopt and implement emission standards for new motor vehicles for the control of emissions therefrom, which standards the state board has found to be necessary and technologically feasible to carry out the purposes of this division. Prior to adopting such standards, the state board shall consider the impact of such standards on the economy of the state, including, but not limited to, their effect on motor vehicle fuel efficiency. The state board shall submit a report of its findings on which the standards are based to the Legislature within 30 days of adoption of the standards. Such standards may be applicable to motor vehicle engines, rather than to motor vehicles. Cal. Health & Safety Code § 43101.

4. California Administrative Procedure Act

86. The Notice of Public Hearing and Cal. Health & Safety Code § 39601 state that CARB's public hearing and adoption of regulations shall be conducted in accordance with the California Administrative Procedure Act, Title 2, Division 3, Part 1, Chapter 3.5 (commencing with section 11340) of the Government Code ["California APA"]. Notice of Public Hearing, p. 8; Cal. Health & Safety Code § 39601.

87. Part 1 of Division 3 of Title 2 of the Government Code governs state departments and agencies within the executive department. Cal. Gov't. Code, Part 1, Division 3. Chapter 3.5 is entitled "Administrative Regulations and Rulemaking." Cal. Gov't. Code, Part 1, Division 3, Chapter 3.5. Chapter 3.5 encompasses Sections 11340 through 11351. *Id.*

88. Section 11340.1 of the California APA declares the intent to establish an Office of Administrative Law which is charged with reviewing adopted regulations for the purpose of reducing the number of regulations and to improve the quality of those regulations adopted. It is the intent of the Legislature that neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency. Cal. Gov't Code § 11340.1

89. Section 11342 of the California APA defines "regulation" as every rule, regulation, order, or standard of general application. Cal. Gov't Code § 11342.

90. Section 11346 of the California APA states:

(a) It is the purpose of this chapter to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted . . .

(b) An agency that is considering adopting, amending, or repealing a regulation may consult with interested persons before initiating regulatory action pursuant to this article. Cal. Gov't Code § 11346.

91. Section 11346.3 of the California APA states:

(a) State agencies proposing to adopt . . . any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals. Cal. Gov't Code § 11346.3

92. Section 11346.4 of the California APA requires notice of the proposed action prior to hearing and close of the public comment period. Cal. Gov't Code § 11346.4.

93. Section 11346.45 of the California APA requires agencies proposing to adopt regulations to involve parties who would be subject to the proposed regulations in public discussions regarding those proposed regulations. This requirement is not imposed where the state agency is required to implement federal law and regulations for which there is little or no discretion on the part of the state to vary. Cal. Gov't Code § 11346.45.

94. Section 11346.8 of the California APA states that if a public hearing is held, both oral and written statements, arguments, or contentions, shall be permitted. If a public hearing is not scheduled, the state agency shall afford any interested person the opportunity to present statements, arguments or contentions in writing. The state agency shall consider all relevant matter presented to it before adopting, amending, or repealing any regulation. In any hearing under this section, the state agency shall have authority to administer oaths or affirmations. Cal. Gov't Code § 11346.45.

95. The Notice of Public Hearing indicates that CARB's adoption of regulations was required to be in accordance with Chapter 3.5 ("Administrative Regulations and Rulemaking"). Cal. Health & Safety Code § 39601. It was not required to be in accordance with Chapter 4 ("Administrative Hearings"), Chapter 4.5 ("Administrative Adjudication: General Provisions"), or Chapter 5 ("Administrative Adjudication: Formal Hearing"). *See* Cal. Gov't. Code, Part 1, Division 3.

V. ANALYSIS AND CONCLUSIONS OF LAW

A. Overview of the *Noerr-Pennington* Doctrine

The evolution of the judicially created immunity from antitrust liability under the *Noerr-Pennington* doctrine begins in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In *Noerr*, truck operators and their trade association alleged that railroads and their trade association conspired to restrain trade in violation of Sections 1 and 2 of the Sherman Act by engaging in a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business. *Id.* at 129. The defendants argued that their activities could not create liability under the Sherman Act when they were only trying to inform the public and the legislature of certain facts. The Supreme Court agreed, noting "that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Id.* at 136 (citing *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939); *Parker v. Brown*, 317 U.S. 341 (1943)).

The Supreme Court based its finding of immunity from antitrust liability on two premises. First, to hold an entity liable under antitrust laws for actions taken to influence the passage or enforcement of laws "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." *Noerr*, 365 U.S. at 137. The Supreme Court explained:

> In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

Id. at 137.

The second premise for immunity from antitrust liability stems from the Constitutional right to "petition the Government for redress of grievances," U.S. Const. amend I, cl. 6. "The

right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Noerr*, 356 U.S. at 138. Thus, the Supreme Court held that the Sherman Act does not apply to the activities that "comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." *Id.* at 138.

The antitrust immunity established in *Noerr* for attempts to influence governmental action was reaffirmed in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In *Pennington*, the union and large coal companies agreed upon steps to exclude the marketing, production, and sale of non-union coal. Together they successfully approached the Secretary of Labor to obtain a minimum wage requirement for employees of contractors selling coal to the Tennessee Valley Authority ("TVA"), making it difficult for small companies to compete for TVA term contracts. Other executive action was also sought and obtained. The Supreme Court held that the actions seeking changes in policy or law by the government were immune from antitrust liability, "regardless of intent or purpose." *Id.* at 670. "[The] legality of the conduct 'was not at all affected by any anti-competitive purpose it may have had,' . . . even though the 'sole purpose in seeking to influence the passage and enforcement of laws was to destroy . . . competitors . . . .'" *Id.* at 669 (citation omitted). *Accord Mark Aero*, 580 F.2d at 294 (*Noerr* shields from antitrust liability a concerted effort to influence public officials regardless of intent or purpose.); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1254 (9th Cir. 1982) ("Genuine efforts to induce governmental action are shielded by *Noerr* even if their express and sole purpose is to stifle or eliminate competition.").

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Supreme Court extended the *Noerr-Pennington* doctrine to attempts to influence administrative and adjudicatory bodies. *Id.* at 510. Lower courts have made clear that lobbying efforts designed to influence a state administrative agency's decision are within the ambit of the *Noerr-Pennington* doctrine. *Kottle*, 146 F.3d at 1059; *Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558, 1570 n.17 (10th Cir. 1991); *St. Joseph's Hosp.*, 795 F.2d at 955. "*Noerr-Pennington* immunity extends to efforts to influence all branches of government, including state administrative

agencies." *Livingston Downs Racing Assoc. v. Jefferson Downs Corp.*, 192 F. Supp. 2d 519, 532 (M.D. La. 2001).

B. *Noerr-Pennington* Provides Immunity to Conduct Alleged in the Complaint

The Supreme Court has a broad view of *Noerr-Pennington* immunity. "Those who petition the government for redress are generally immune from antitrust liability." *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993). *Accord Kottle*, 146 F.3d at 1059 (The *Noerr-Pennington* doctrine "sweeps broadly and is implicated by both state and federal antitrust claims that allege anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government.").

Complaint Counsel argues that the conduct alleged in the Complaint is not immunized by *Noerr-Pennington* because: (1) CARB was acting in a quasi-adjudicatory setting; (2) CARB was dependent on Respondent for information; and (3) regardless of whether the agency's actions are determined to be adjudicatory or legislative, there is no immunity where an agency is unaware that it is being asked to adopt or participate in a restraint of trade. The Complaint specifically alleges:

> Unocal is not shielded from antitrust liability pursuant to the *Noerr-Pennington* doctrine for numerous reasons . . . including, but not limited to, the following: (i) Unocal's misrepresentations were made in the course of quasi-adjudicative rulemaking proceedings; (ii) Unocal's conduct did not constitute petitioning behavior . . . .[1]

Complaint at ¶ 96.

Notwithstanding this legal conclusion contained within the factual allegations of the Complaint, the facts alleged in the Complaint, the legislative and agency materials relating to CARB's rulemaking, and applicable case law demonstrate that CARB's Phase 2 RFG rulemaking process was a quasi-legislative proceeding and that Respondent's conduct did constitute political petitioning behavior.

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[1] Paragraph 96 of the Complaint alleges that Respondent is not shielded from antitrust liability for a third reason, that "Unocal's misrepresentations and materially false and misleading statements to Auto/Oil and WSPA, two non-governmental industry groups, were not covered by any petitioning privilege." Complaint at ¶ 96. This issue is discussed at Section V.E. *infra*.

1. CARB's Phase 2 reformulated gasoline rulemaking process was quasi-legislative

a. Distinction made between legislative versus adjudicatory arena

Noerr and its progeny hold that misrepresentations are condoned if made in the political process, but may result in antitrust liability if made in the adjudicative process. This distinction between the context (legislative versus adjudicatory) in which misrepresentations are made is set forth most clearly in *Professional Real Estate Investors*:

> In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."

508 U.S. at 61 n.6 (quoting *California Motor Transport*, 404 U.S. at 512-13). Misrepresentations condoned in the legislative arena extend to deliberate deception. "A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988). In *Noerr* itself, where the private party engaged in conduct that could be "termed unethical" and "deliberately deceived the public and public officials" in its successful lobbying campaign, the Supreme Court said, "'deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned.'" *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 383-84 (1991); *Noerr*, 365 U.S. at 141, 145.

Circuit courts applying the *Noerr-Pennington* doctrine hold that misrepresentations made in the context of legislative activities are immune from antitrust liability. *E.g.*, *Armstrong Surgical Center*, 185 F.3d at 162 (liability for injuries caused by states acting as regulators is precluded even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision making process); *Kottle*, 146 F.3d at 1060 ("the political arena has a higher tolerance for outright lies than the judicial arena does"); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988)

(misrepresentations of facts made by defendant real estate developer to the city council relating to the city council's decision to not construct a parking garage is conduct that "certainly falls within the ambit of the *Noerr-Pennington* doctrine"); *First Am. Title Co. v. South Dakota Land Title Assn.*, 714 F.2d 1439, 1447 (8th Cir. 1983) (lobbying campaign alleged to involve "'a misuse of the lobbying process' through the use of false statements and inaccuracies made by defendants to the state legislature" protected by *Noerr-Pennington* doctrine); *Metro Cable*, 516 F.2d at 228 (when a legislative body granted an exclusive franchise to defendant, allegedly due to defendant's illicit conduct, the complaint was dismissed, because while the legislature could have had an adjudicatory body issue the license, it chose not to do so); *Woods Exploration & Producing Co., v. Aluminum Company of America, Inc.*, 438 F.2d 1286, 1297 (5th Cir. 1971) ("The germination of the allowable formula was political in the *Noerr* sense, and thus participation in those rule-making proceedings would have been protected.").

By contrast, where the agency is using an adjudicatory process, misrepresentations are not immunized. *California Motor Transport*, 404 U.S. at 512-13; *Allied Tube*, 486 U.S. at 499-500 ("in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations"). *E.g.*, *St. Joseph's Hosp.*, 795 F.2d at 955 (a governmental agency passing on specific certificate applications is acting judicially; misrepresentations under these circumstances do not enjoy *Noerr* immunity); *Clipper Exxpress*, 690 F.2d at 1261 ("fraudulent furnishing of false information to an agency in connection with an adjudicatory proceeding can be the basis for antitrust liability").

Thus, apparently seeking to circumvent *Noerr-Pennington* immunity, the Complaint alleges that "CARB's Phase 2 RFG proceedings were quasi-adjudicative in nature." Complaint at ¶ 26. Complaint Counsel argues that "where, as here, a party makes material misrepresentations in the course of 'adjudicatory' proceedings, such misconduct brings the case within the independent misrepresentation exception to *Noerr*." Opposition at 20. Despite this conclusory allegation, if the conduct complained about is genuine petitioning in the legislative context, the violations alleged in the complaint must be dismissed. *See Mark Aero*, 580 F.2d at 292-93, 97. As set forth in the following section, the facts, as alleged in the Complaint, guided by the statutory authority governing CARB, and demonstrated in the Notice of Public Hearing through which

CARB initiated the rulemaking and in the Final Statement of Reasons for Rulemaking, establish that the Phase 2 RFG proceedings were legislative, and not adjudicative.

b. Determination of whether action is legislative or adjudicatory

"As a necessary prologue to any *Noerr-Pennington* immunity analysis, . . . the Court must determine whether . . . an executive agency is more akin to a political entity or to a judicial body." *Livingston Downs Racing Assoc. v. Jefferson Downs Corp., et al.*, 192 F. Supp. 2d 519, 533 (M.D. La. 2001). When the issue is whether a deliberate misrepresentation is protected, "the basis of the type of governmental body involved (legislative or administrative) and the function it exercises (rule-making or adjudicative) also "shed light on whether the (parties being charged) were engaged in "political activity . . . ."" *United States v. AT&T Co.*, 524 F. Supp. 1336, 1362 n.108 (D.D.C. 1981) (quoting *Federal Prescription Service, Inc. v. Am. Pharmaceutical Ass'n*, 663 F.2d 253 (D.C. Cir. 1981)).

A determination of whether CARB was acting in a quasi-legislative manner, as argued by Respondent, or in a quasi-adjudicatory manner, as argued by Complaint Counsel, may be made by an examination of the following: (1) the level of political discretion granted to CARB; (2) whether CARB was setting policy; (3) the procedures used during the rulemaking; and (4) the authority invoked by CARB in adopting the Phase 2 RFG regulations. It is also useful to note that the California Supreme Court has characterized CARB's rulemakings as "quasi-legislative." *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 565 (1995).

(i) Political discretion

One factor in determining whether an executive agency is acting in a legislative or adjudicative manner depends upon the "degree of political discretion exercised by the government agency." *Kottle*, 146 F.3d at 1061. Complaint Counsel asserts that CARB, in using its technical expertise to design the applicable regulations, was merely carrying out the California legislature's mandate to implement certain policy judgments, rather than acting in an independent political manner. Opposition at 24. However, it is apparent, on the facts alleged in the Complaint, that CARB exercised political discretion. F. 9 (Complaint at ¶ 16) ("CARB's mission is to protect the

health, welfare, and ecological resources of California through the effective and efficient reduction of air pollutants, while recognizing and considering the effects of its actions on the California economy."). The regulations enacted by CARB "set particular standards for the composition of low emissions RFG. These regulations specify limits for eight RFG properties: RVP, benzene, sulfur, aromatics, olefins, oxygen, T50, and T90." F. 29 (Complaint at ¶ 44).

The statutory guidelines that govern CARB's rulemaking give CARB broad discretion to do such acts as may be necessary, consistent with the goal of providing a suitable living environment for every Californian. F. 81, 82 (Cal. Health & Safety Code §§ 39600, 39601). The statute lists only benchmarks that CARB's regulations must fulfill and interests that CARB must keep in mind when formulating its regulations. F. 83, 84 (Cal. Health & Safety Code §§ 43013, 43018). CARB retains discretion in deciding what standards it will actually impose to achieve the maximum degree of emission reduction possible from vehicular or other mobile sources. *See* F. 83, 84 (Cal. Health & Safety Code §§ 43013, 43018). Nowhere does the statute state what properties of RFG must be regulated. *See* F. 83-85 (Cal. Health & Safety Code §§ 43013, 43018, 43101). Nor does the statute set limits to be placed upon such properties. *Id.* However, these two factors are critical components of the Phase 2 regulations and were the topics of Respondent's petitioning conduct as alleged in the Complaint. F. 21, 22 (Complaint at ¶¶ 36, 37).

The California Air Resources Board described the breadth of its rulemaking discretion in the Final Statement of Reasons for Rulemaking for its Phase 2 rules as follows:

> The statutes do not mandate what specific fuel characteristics must be controlled, how stringent those controls should be, what the compliance dates should be, to whom the controls should apply, whether the limits should be statewide or limited to areas with substantial air pollution problems, whether the limits should apply year-round or only during seasons with bad air quality, whether all batches of fuel should be subject to the same limit or an "averaging" program of some sort should be instituted, how the controls should be enforced, and whether there should be provisions granting temporary "variances" based on unforeseen unique events.

F. 73. Thus, CARB exercised political discretion in promulgating the Phase 2 RFG regulations, indicating that CARB was acting in a quasi-legislative manner.

(ii) Policy setting

In deciding whether an agency is acting in a legislative or adjudicative manner, courts have focused on whether the agency has been granted the authority to create policy on its own, or is limited in its authority to apply policy that was previously established to a particular set of facts. *See Israel v. Baxter Labs., Inc.*, 466 F.2d 272, 276-77 (D.C. Cir. 1976) (*Noerr-Pennington* does not apply to private party efforts to influence an agency that is not in a position to make governmental policy, but rather carries out policy already made); *Woods*, 438 F.2d at 1298 (*Noerr-Pennington* is "inapplicable to the alleged filing of false nominations [since] this conduct was not action designed to influence policy, which is all the *Noerr-Pennington* rule seeks to protect."). The California Supreme Court has found that CARB is vested with broad discretion performing its quasi-legislative rulemaking function and its decisions are entitled to a "high degree of deference." *Western States Petroleum Ass'n*, 9 Cal. 4th at 572.

Rulemaking concerns policy judgments to be applied generally in cases that may arise in the future. *Portland Audubon Soc'y v. Endangered Species*, 984 F.2d 1534, 1540 (9th Cir. 1993). Rulemaking normally refers to the prospective allocation of benefits and penalties according to a specific standard that reflects the policy choice of the rulemaker. *Association of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 615 (D.C. Cir. 1979). By contrast, "[w]here an agency's task 'is to adjudicate disputed facts in particular cases,' an administrative decision is quasi-judicial." *Portland Audubon*, 984 F.2d at 1540. "[A]n adjudication refers to the application of a pre-existing legal standard to a well-defined set of controverted facts to determine whether a particular person or group of persons should receive a benefit or penalty." *Association of Nat'l Advertisers*, 617 F.2d at 615. In *Boone*, in determining *Noerr-Pennington* immunity, the court distinguished between actions involving the application of rules to specific parcels of property, which it deemed adjudicative in nature, and those affecting the future rights of many individuals, such as a redevelopment plan, which it deemed legislative in nature. 841 F.2d at 896.

The factual allegations of the Complaint leave no doubt that CARB's Phase 2 rulemaking was setting policy to be applied generally to the industry and affecting consumers in the future. CARB convened its rulemaking to enact regulations "governing the composition of low emissions, reformulated gasoline . . . ." F. 10 (Complaint at ¶ 1). The Complaint further avers

that CARB conducted the rulemaking pursuant to legislation that required the agency "to take actions to reduce harmful car emissions." F. 13 (Complaint at ¶ 21). Approximately 14.8 billion gallons of RFG are sold each year in California. F. 63 (Complaint at ¶ 10). To comply with Phase 2, industry participants had to modify their refineries, which, in the aggregate, cost "billions of dollars." F. 15, 62 (Complaint at ¶¶ 24, 93). Phase 2 substantially affects a large number of consumers through higher prices for summer time compliant gasoline. F. 63 (Complaint at ¶ 10). No allegations in the Complaint indicate that CARB's Phase 2 rulemaking was in any way a judicial determination of the rights and obligations of specific parties before it.

In addition, the Notice of Public Hearing through which CARB initiated the rulemaking states that CARB staff estimated future costs of between 14 cents per gallon to 20 cents per gallon, if the entire cost is passed on to the consumer, and capital investment costs to the refiners to be in the range of four to seven billion dollars. F. 67. The Notice of Public Hearing also states that CARB staff estimated that implementation of Phase 2 specifications will result in ozone precursor emission reductions of about 190 tons per day in 1996, that emissions of CO will be reduced by about 1300 tons per day and sulfur oxides by 40 tons per day, and that other Phase 2 specifications will also result in reduced toxic emissions. F. 68. These effects are not determined by individuals' specific factual circumstances, but rather are broad effects on all individuals who purchase RFG and who breathe the air in California. Thus, the application and effect of Phase 2 is more consistent with what has traditionally been understood to be legislation, not an adjudication.

(iii) Procedures used

In formal adjudications, certain procedures must be followed to comport with the Due Process Clause. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (welfare recipients could not be terminated from the program without an adjudicatory proceeding where they could present their case orally, confront adverse witnesses, appear with or through an attorney, and receive a decision based exclusively on the hearing record). *See also Association of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 635 (D.C. Cir. 1979) ("Congress never intended that participants in informal rulemaking . . . would have the type of wide-ranging cross-examination rights afforded parties in formal adjudication . . . .").

An examination of the procedures used by CARB, as alleged in the Complaint, reveals that the procedures used by CARB do not bear the indicia of a formal adjudicatory proceeding. The Complaint does not allege that CARB, in deciding on the Phase 2 regulations, conducted trial-like hearings, including cross-examination, rules of evidence, and burdens of proof. Instead, according to the Complaint, CARB conducted the Phase 2 rulemaking pursuant to California's Administrative Procedure Act, which required CARB to issue a notice of proposed rulemaking, explain the basis and purpose of the regulations, provide an opportunity to comment, and conduct hearings. F. 17. *See also* Complaint at ¶ 17. The Complaint alleges that, in developing the RFG regulations, CARB provided notice of the proposed regulations, conferred in private meetings with various interested persons, held public workshops and hearings, solicited input from various industry groups and numerous companies, conducted lengthy hearings at which oral testimony was received, and collected written comments by interested parties. F. 17, 20, 21, 33 (Complaint at ¶¶ 26, 35, 36, 47). *See also* F. 74, 75 (the Final Statement indicates the Board conducted a hearing and public workshop). In the Final Statement of Reasons for Rulemaking, CARB included all of the meaningful, relevant comments that it analyzed in formulating Phase 2 and its responses to these comments. F. 76, 77. As alleged in the Complaint, the processes used by CARB illustrate clearly that CARB's rulemaking was undertaken in a legislative, and not an adjudicative context.

(iv) Authority invoked

The Notice of Public Hearing states that CARB's regulatory action is proposed under that authority granted in sections 39600, 39601, 43013, 43018, and 43101 of the Health and Safety Code and *Western Oil and Gas Ass'n v. Orange County Air Pollution Control District*, 14 Cal. 3d 411, 121 Cal. Rprt. 249 (1975). F. 78 (Notice of Public Hearing, p. 8). These statutory provisions require CARB, *inter alia,* to consult with the public or private entities that would be impacted, prepare an economic analysis of impacts of the regulations, conduct workshops on the adoption of regulations, and submit a report of its findings to the legislature. F. 82-85 (Cal. Health & Safety Code §§ 39601, 43013, 43018, 43101). These procedures are customary in rulemaking, but not in adjudication.

Further, the Notice of Public Hearing states and the statute requires that CARB's public hearing and adoption of regulations shall be conducted in accordance with the California Administrative Procedure Act (APA), Title 2, Division 3, Part 1, Chapter 3.5 of the Government Code. F. 86 (Notice of Public Hearing, p. 8; Cal. Health & Safety Code § 39601). Compliance with California APA procedures in the context of a rulemaking does not undercut the quasi-legislative character of the rulemaking. *Rivera v. Div. of Indus. Welfare*, 265 Cal. App. 2d 576, 586 (Cal. App. 1968); *see also Wilson v. Hidden Valley Muni. Water Dist.*, 256 Cal. App. 2d 271, 278 (Cal. App. 1967) ("[t]he Legislature and administrators exercising quasi-legislative powers commonly resort to the hearing procedure to uncover, at least in part, the facts necessary to arrive at a sound and fair legislative decision"); *Joint Council of Interns and Residents v. Bd. of Supervisors of Los Angeles*, 210 Cal. App. 3d 1202, 1211 (Cal. App. 1989) (rejecting characterization of rulemaking as adjudicative based on the use of certain procedures because "[t]he decisionmaking process under review here involved much more than the mechanical application of statutory criteria to existing fact"). Thus, even where an administrative decisionmaking process embodies "certain characteristics common to the judicial process," this does "not change the basically quasi-legislative nature of the subject proceedings." *Wilson*, 256 Cal. App. 2d at 279.

Furthermore, the chapter of the California APA that CARB was required to comply with was Chapter 3.5. F. 86. Chapter 3.5, entitled "Administrative Regulations and Rulemaking," states that "the provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute . . . ." F. 90 (Cal. Gov't Code § 11346(a)). CARB was not directed to comply with Chapter 4 ("Administrative Hearings"), Chapter 4.5 ("Administrative Adjudication: General Provisions"), or Chapter 5 ("Administrative Adjudication: Formal Hearing"). F. 95.

Although CARB is empowered to conduct adjudicative proceedings (*see* Cal. Code Regs. tit. 17, §§ 60040-60053), the Notice of Public Hearing indicates that such procedures were not invoked in connection with the Phase 2 rulemaking. F. 78. Under sections 11370 et seq. of the California Government Code and Title 17 of the California Code of Regulations at sections 60040 to 60094, CARB's exercise of quasi-adjudicative powers is subject to the familiar strictures

associated with adjudications. When it is conducting adjudications, CARB must provide notice, the hearing examiner controls what evidence may be admitted, oral testimony must be under oath, the parties may cross-examine adverse witnesses or offer rebuttal evidence if the hearing examiner deems it necessary to resolve disputed issues of material fact, California's rules of privilege apply, hearsay may not be used by itself to support a finding unless it falls under an exception to the hearsay rule, official notice may be taken, and affidavits are admissible. Cal. Code Regs. tit. 17, §§ 60040-60053. CARB's "adjudication procedures" need not be considered since the Complaint does not allege that CARB followed these quasi-adjudicative procedures during its development of the Phase 2 RFG regulations and since the Notice of Public Hearing explicitly states that CARB's regulatory action was proposed, instead, under sections 39600, 39601, 43013, 43018, and 43101 of the Health and Safety Code. F. 78, 80.

It strains credulity to suggest that a "rulemaking," as it is referred to in the Complaint in at least 13 instances, was not a rulemaking in a legislative sense where the California statute governing CARB's rulemaking denominates it as administrative rulemaking and an exercise of quasi-legislative power. Nevertheless, as discussed above, an analysis of whether CARB was in a position to exercise policy discretion, whether the Phase 2 regulations affected people generally, in the future (as opposed to a determination of the specific rights of individuals), the procedures used by CARB, and the statutory authority under which CARB promulgated the regulations conclusively demonstrates that CARB was not acting in an adjudicatory manner, but in a legislative manner.

2. CARB was not wholly dependent on Respondent for information

Complaint Counsel argues that, regardless of whether CARB's rulemaking was legislative or adjudicatory, *Noerr-Pennington* immunity does not apply where the decision making agency is dependent upon the petitioner for information. Opposition at 30. Complaint Counsel relies chiefly on *Clipper Exxpress*, which holds:

> "[a]djudicatory procedures will not always ferret out misrepresentations. Administrative bodies and courts, however, rely on the information presented by the parties before them. They seldom, if ever, have the time or resources to conduct independent investigations."

Opposition at 30-31 (quoting *Clipper Exxpress*, 690 F.2d at 1262).

Clipper Exxpress involved a ratemaking proceeding before the Interstate Commerce Commission (ICC), wherein the plaintiff alleged that the defendants had attempted to influence ICC action by supplying fraudulent information to the ICC. The proceeding at issue was one in which the government agency adjudicated the entitlement of a particular party – Clipper Exxpress – to offer transport services at a particular rate. *Clipper Exxpress*, 690 F.2d at 1261. Thus, *Clipper Exxpress* does not compel a finding of no immunity under the facts alleged in the Complaint in the instant case.

In support of its argument that where the agency is dependent on facts known only to the petitioner, there is no immunity for fraud, Complaint Counsel also cites to *Whelan v. Abell*, 48 F.3d 1247, 1253-54 (D.C. Cir. 1995); *Woods*, 438 F.2d at 1295; and *De Loach v. Phillip Morris Cos.*, 2001 U.S. Dist. LEXIS 16909, *44 (M.D.N.C. 2001). Opposition at 31-32. The facts alleged in the instant case are readily distinguishable from those cases relied upon by Complaint Counsel. In *Whelan*, the court held that *Noerr-Pennington* did not protect knowing misrepresentations made in an adjudicative context – a letter of complaint to state securities administrators and to a federal court – from claims of malicious prosecution, abuse of process, and tortious interference with prospective business advantage. 48 F.3d at 1249.

In both *Woods* and *DeLoach*, the courts found that the deceptions at issue were not made during a policy making exercise, and thus were not immune. In *Woods*, plaintiffs alleged that entry of orders by the Texas Railroad Commission setting production allowables for plaintiffs' wells in specific fields had been based in part on false nomination forecasts and reports filed by defendants with the Texas Railroad Commission. 438 F.2d at 1292. The Court of Appeals discussed whether the Texas Railroad Commission was dependent on the defendants for the factual information in the context of determining whether defendants' conduct could be found to have become merged with the action of the state and thus exempt from antitrust liability under the *state action* doctrine. *Id.* at 1295. In its examination of whether defendants were exempt from antitrust liability under the *Noerr-Pennington* doctrine, the Court of Appeals focused on whether the "germination of the allowable formula was political" and thus protected, and found that where

there was no attempt by defendants to influence the policies of the Texas Railroad Commission, there was no immunity.

In *De Loach*, the United States Department of Agriculture ("USDA") was tasked with determining the annual quota for certain tobacco by calculating using a statutory formula that factored in tobacco manufacturers' purchase intentions. 2001 U.S. Dist. LEXIS 16909, *8-10. With the exception of the Secretary of Agriculture's ability to adjust the quota by plus or minus three percent from the statutory formula, the USDA had no discretion in determining the quota. *Id.* at *10. Defendants' actions of intentionally submitting false purchase intentions to the USDA that resulted in lower quotas were not protected by *Noerr-Pennington* because the "submission of their purchase intentions in no way involved the policy-making process." *Id.* at *44. "Rather, it was part of an administrative determination that relied upon [defendants'] truthfulness in calculating the annual quota." *Id.*

In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), the Supreme Court held that "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 . . . provided the other elements necessary to a § 2 case are present." *Id.* at 174. As characterized by the Court of Appeals for the Third Circuit, the Patent Office was wholly dependent on the applicant for the facts. *Armstrong Surgical Center*, 185 F.3d at 164 n.8 (3d Cir. 1999). "While the Patent Office can determine the prior art from its own records, it effectively and necessarily delegates to the applicant the factual determinations underlying the issuance of a patent." *Id. See also Charles Pfizer & Co. v. Federal Trade Commission*, 401 F.2d 574, 579 (6th Cir. 1968) ("The Patent Office, not having testing facilities of its own, must rely upon information furnished by applicants and their attorneys. [Respondents], like all other applicants, stood before the Patent Office in a confidential relationship and owed the obligation of frank and truthful disclosure.").

The facts of this case are not at all like the facts at issue in the cases relied upon by Complaint Counsel holding that where an agency is dependent upon the petitioner for truthful information, *Noerr-Pennington* immunity does not apply. CARB's rulemaking was not a ratemaking procedure. CARB's rulemaking was not the mere application of a statutory formula to the facts presented. Respondent's alleged conduct was not the filing of a complaint before an

adjudicatory body. Respondent's alleged conduct was not fraud on the Patent Office.

Instead, as set forth in the preceding section, CARB was vested with political discretion, set policy through its regulations, and was not acting in an adjudicatory manner. (Section V.B.1. *supra*). Section 43013 required CARB to consult with public or private entities that would be significantly impacted. F. 83. As alleged in the Complaint, CARB, in developing the RFG regulations, conferred in private meetings with various interested persons, held public workshops and hearings, solicited input from various industry groups and numerous companies, and collected written comments by interested parties. F. 17, 20, 21, 33 (Complaint at ¶¶ 26, 35, 36, 47). The Notice of Public Hearing states that CARB staff was to conduct an independent cost analysis using the Process Industry Modeling System refinery model. F. 69. The Final Statement of Reasons for Rulemaking contains a summary of the comments the Board received on the Phase 2 RFG regulations during the formal rulemaking process and the Board's responses to the comments. F. 76 (Final Statement of Reasons for Rulemaking, p. 3). An attachment to the Final Statement of Reasons for Rulemaking shows that 51 entities, including automobile companies, assemblymen, business associations, chemical companies, environmental associations, forestry associations, labor unions, oil companies, petroleum associations, refiners' associations, and trucking associations, all provided comments to the Board during the formal rulemaking process. F. 77 (Final Statement of Reasons for Rulemaking, pp. A-1 - A-6). The text of these comments demonstrates that CARB was not solely dependent on Respondent for information. Moreover, the Complaint alleges that CARB "relied on industry to provide research and information." F. 16 (Complaint at ¶ 25). Accordingly, because CARB was not wholly dependent on Respondent in its rulemaking proceeding, *Noerr-Pennington* applies.

3. There is immunity even if CARB was unaware it was being asked to restrain trade

Complaint Counsel asserts that there is no immunity where an agency is unaware that it is being asked to adopt or participate in a restraint of trade. Opposition at 14-15; Sur-reply at 7. Complaint Counsel further asserts that because CARB was unaware that it was being asked to adopt or participate in a restraint of trade and did not intend the consequences of its regulations,

Respondent's actions do not constitute genuine petitioning activities and thus are not shielded by *Noerr-Pennington*. Opposition at 14-15; Sur-reply at 7.

Noerr protects "the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws," regardless of the petitioner's intent in doing so. *Noerr*, 365 U.S. at 139. "Petitioning" the government, as used in *Noerr* and its progeny, equates to advocating for or persuading the government to take some action. *Noerr*, 365 U.S. at 138 (petitioning is "solicitation of governmental action with respect to the passage and enforcement of laws"); *Omni Outdoor Advertising*, 499 U.S. at 379-80 (entities must be allowed to "seek anticompetitive action from the government").

Accepting the allegations of the Complaint as true, it is clear that Respondent engaged in petitioning conduct. *E.g.*, F. 20 (Complaint at ¶ 35 (Respondent provided information to CARB for the purpose of obtaining competitive advantage)); F. 22 (Complaint at ¶ 37 (Respondent presented to CARB staff the results of its 5/14 project)); F. 32 (Complaint at ¶ 46 (Respondent submitted comments and presented testimony to CARB opposing CARB's proposal to grant small refiners a two-year exemption)); F. 34 (Complaint at ¶ 48 (Respondent submitted comments to CARB touting the predictive model as offering flexibility and furthering CARB's mandate of cost-effective regulations)). This communication of information to government regulators regarding Respondent's "desires with respect to the passage or enforcement of laws," is without question solicitation of governmental action.

Complaint Counsel asserts that *Noerr* and its progeny protect petitioning only if the government is "actually aware of the anticompetitive restraint it is imposing and takes *state action* nonetheless." Opposition at 14-15 (emphasis added). For support, Complaint Counsel cites to Areeda & Hovenkamp, at ¶ 209a and to *FTC v. Superior Ct. Trial Lawyers Ass'n* ("*SCTLA*"), 493 U.S. 411, 424-25 (1990). Neither of these cites support Complaint Counsel's proposition.

Section 209a of Areeda & Hovenkamp sets forth the general rule for the "commercial exception" to *Noerr-Pennington*. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 209a at 259 (2d ed. 2000). Within the context of the "general rule" that a private person dealing with the government as a buyer, seller, lessor, lessee, or franchisee has no greater antitrust privilege or immunity than in similar dealings with non-governmental parties, the Areeda treatise states, "a

prerequisite for *Noerr* immunity is that the government actually know about the restraint being imposed. As a result, there is no immunity for secret price-fixing agreements directed at government purchasers . . . ." *Id.* In this case, as alleged in the Complaint, CARB is not acting as a buyer, seller, lessor, lessee, or franchisee; nor are there allegations of secret price-fixing agreements directed at government purchasers. Thus, the commercial exception to *Noerr-Pennington* does not apply, and this quote, taken completely out of context, has no persuasive value.

The quote from *SCTLA* upon which Complaint Counsel relies states: "[b]ut in the *Noerr* case the alleged restraint of trade was the intended *consequence* of public action; in this case the boycott was the *means* by which respondents sought to obtain favorable legislation." Reply at 15 n.7, quoting 493 U.S. 411, 424-25 (1990) (emphasis added). This quote has very little relation to the definition of "petitioning." *SCTLA* does not hold that the legislature must have intended the consequences of its actions; rather, it compares the facts before it – where the restraint of trade was the *means* by which respondents sought legislation (boycott) – from the facts of *Noerr* – where restraint of trade was the *consequence* of petitioners' action (legislation). *SCTLA*, 493 U.S. at 424-25.

The quoted language in *SCTLA* could not reasonably be construed to mean that *Noerr* requires the legislating agency to be aware of or intend the consequences of its regulations. In *Noerr*, the public and public officials were "deliberately deceived." *Noerr*, 365 U.S. at 145. "And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." *Id.* The very concept of deception assumes that the deceived party does not know it is being deceived. *See Black's Law Dictionary* (defining "deception" as the act of deceit, and "deceit" as a deceptive misrepresentation used to deceive and trick another, who is ignorant of the true facts).

Further, *Omni Outdoor Advertising*, makes clear that an analysis of the legislature's intent should not be undertaken. In discussing state action immunity, the Supreme Court wrote that an analysis into whether legislation was thought by the state actors to be in the public interest "would require the sort of deconstruction of the governmental process and probing of official 'intent' that we have consistently sought to avoid." 499 U.S. at 378. In further context of the state action

immunity, the *Omni Outdoor Advertising* court held, "we reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade.'" *Id.* at 379. In discussing *Noerr-Pennington* immunity, the Supreme Court held:

> The same factors which . . . make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate *lawmaking* that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identify and invalidate *lobbying* that has produced selfishly motivated agreement with public officials.

Id. at 383 (emphasis added). Thus, even where the antitrust violation alleged was that the petitioner conspired with city officials to harm a competitor, an analysis of the intent of the legislature was avoided. *Id.* at 368-69. *See also* Areeda & Hovenkamp, ¶ 202b at 158 ("To be sure, the legislature may be mistaken or unaware of the consequences of its actions . . . but the antitrust court may not reappraise the legislature's assessment of the public welfare . . . . [I]f a statute excludes everyone but the monopolist from a market, the monopolist cannot itself be faulted.").

Complaint Counsel also relies on cases interpreting the state action immunity developed in *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny for Complaint Counsel's argument that petitioning is protected only if the government agency is aware of the restraint of trade it is being asked to adopt. Sur-reply at 11. *Parker* and subsequent caselaw interpreting this doctrine explain that there must be conscious and deliberate efforts of the state to restrain competition in order for the state action immunity to apply. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (Private anticompetitive activity is impliedly exempt from antitrust scrutiny under the state action doctrine only if: (1) the alleged anticompetitive conduct was taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with state regulation; and (2) the state actively supervises the implementation of its policy.). This doctrine, with its necessary focus on "whether the anticompetitive scheme is the State's own," *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992), is in no way controlling in the instant case

where the alleged anticompetitive scheme was undertaken, not by the state, but instead, by the petitioner.

Numerous cases have addressed both the *Parker* immunity and the *Noerr-Pennington* immunity. *E.g.*, *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129 (3d Cir. 1993); *Boone*, 841 F.2d 886 (9th Cir. 1988); *Woods*, 438 F.2d at 1295; and *De Loach*, 2001 U.S. Dist. LEXIS 16909, *44. In each of these cases, the courts, in analyzing the state action immunity, addressed whether the legislature or agency was aware of or intended the consequences of its actions. None of these cases addressed whether the legislature or agency was aware of or intended the consequences of its actions when analyzing the asserted *Noerr-Pennington* defense.

Respondent filed its motion to dismiss based on *Noerr-Pennington* immunity; its motion is not based on state action immunity. Thus, case law interpreting the state action doctrine has no bearing on this motion. Complaint Counsel has cited no cases holding that, for purposes of *Noerr-Pennington* immunity, the government agency must have known that it was being asked to enact a regulation that would restrain trade. Case law interpreting *Noerr-Pennington* allows deliberate deception in a legislative proceeding where the agency is not solely dependent on the petitioner for information. *Supra* V.B.2. Because Respondent's activities constitute petitioning genuinely undertaken to persuade CARB to enact regulations favorable to it and there is no requirement that the agency know what the effect of its legislation will be, Respondent's alleged conduct is protected by *Noerr-Pennington.*

C. Conduct Alleged in the Complaint Is Not Outside the Reach of *Noerr-Pennington*

Noerr-Pennington applies only where the "restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action . . . ." 365 U.S. at 136. Complaint Counsel argues that the alleged monopolization, attempted monopolization, and restraint of trade in this case is not the result of governmental action, but is instead the result of private action. Specifically, Complaint Counsel argues that the alleged anticompetitive harm at issue flows not from CARB's Phase 2 regulations, but from Respondent's private business

conduct in enforcing its patents. Opposition at 4, 18. On this basis, Complaint Counsel argues that *Noerr-Pennington* does not reach the conduct alleged in the Complaint.

In asserting that the conduct alleged in the Complaint is outside the *Noerr-Pennington* doctrine, Complaint Counsel argues, first, that this case resembles "sham" cases and *FTC v. Superior Court Trial Lawyers Ass'n* (*"SCTLA"*), 493 U.S. 411 (1990). Second, Complaint Counsel argues that because the alleged anticompetitive harm flows from the enforcement of patents, the harm in this case is analogous to the harm found to be anticompetitive in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

1. "Sham" exception and *SCTLA*

The Supreme Court, in *Noerr*, recognized that antitrust petitioning immunity could be withheld in circumstances where petitioning activity "ostensibly directed toward influencing government action, is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." 365 U.S. at 144. Subsequent decisions have clarified that the "sham" exception referred to in *Noerr* is applicable to situations in which persons use the governmental *process*, as opposed to its *outcome*, as an anticompetitive weapon. *California Motor Transport*, 404 U.S. at 510 (sham exception where complaint alleged one group of highway carriers sought to bar competitors from meaningful access to adjudicatory tribunals); *Omni Outdoor Advertising*, 499 U.S. at 381 (1991) (no sham exception where defendant set out to disrupt plaintiff's business relationships not through the process of lobbying, but through the ultimate product of that lobbying, the zoning ordinances).

The Complaint does not allege that Respondent attempted to gain monopoly through the use of CARB's process in adopting the Phase 2 RFG regulations. Instead, the Complaint alleges that Respondent sought to and did use the outcome of the government action – the Phase 2 RFG regulations. F. 29 (Complaint at ¶ 44 (CARB Board adopted Phase 2 RFG regulations that set particular standards for the composition of low emissions, reformulated gasoline. Unocal's pending patent claims recited limits for five of the eight properties specified by the regulations.)); F. 30 (Complaint at ¶ 45 (CARB adopted Phase 2 RFG regulations that substantially overlapped

with Respondent's patent claims.)). *See also* Complaint at ¶ 76 (Respondent "caused CARB to enact regulations that overlapped almost entirely with Unocal's pending patent rights.").

An effort that results in the adoption of the standards sought by petitioner into statutes and local ordinances "certainly cannot be characterized as a sham . . . ." *Allied Tube,* 486 U.S. at 502; *Armstrong Surgical Center*, 185 F.3d at 158 (3rd Cir. 1999) ("[T]he sham petitioning exception does not apply in a case like the one before us where the plaintiff has not alleged that the petitioning conduct was for any purpose other than obtaining favorable government action."). In the instant case, where the Complaint alleges Respondent used the outcome of the government action to its advantage, the sham exception does not apply.

In *SCTLA*, lawyers in private practice who served as court-appointed counsel in the District of Columbia organized a boycott in connection with their effort to force the city government to increase fees for court-appointed services. 493 U.S. at 414. Although this boycott otherwise constituted a classic restraint of trade, the lawyers argued that their conduct was protected under *Noerr* because the objective of the boycott was to obtain favorable legislation. *Id.* at 424. The Supreme Court rejected this argument finding that respondents' agreement to restrain trade was not outside the coverage of the Sherman Act simply because its objective was the enactment of favorable legislation. *Id.*

In *SCTLA*, it did not matter that the result was favorable legislation; what mattered was that horizontal competitors engaged in a concerted refusal to deal and entered into an arrangement designed to obtain higher prices. In the instant case, for *Noerr-Pennington* purposes, it does matter that the result of Respondent's alleged misconduct is the adoption by CARB of Phase 2 regulations that substantially overlap Respondent's patents. *See* F. 29, 30. The Complaint alleges that Respondent "obtained unlawful market power through affirmative misrepresentations, materially false and misleading statements, and other bad-faith, deceptive conduct that caused CARB to enact regulations that overlapped almost entirely with Unocal's pending patent rights." Complaint at ¶ 76. Because the anticompetitive harm alleged in the Complaint arises from the adoption of regulations that substantially overlap Respondent's patents, the harm arises from governmental action and thus *Noerr-Pennington* applies.

2. *Walker Process*

In *Walker Process*, the question presented was "whether the maintenance and enforcement of a patent obtained by fraud on the Patent Office may be the basis of an action under § 2 of the Sherman Act . . . . " *Walker Process*, 382 U.S. at 173. To the extent that some courts have held that *Walker Process* is not limited to fraud on the Patent Office, *see Clipper Exxpress*, 690 F.2d at 1260-63 (relying on *Walker Process* in the context of a ratemaking proceeding); *Whelan*, 48 F.3d at 1255-58 (relying on *Walker Process* in the context of a complaint filed with state securities commissioner and a lawsuit filed in federal district court), those cases arose in a context in which the state action at issue was quasi-adjudicatory and dependent on the petitioner for factual information and thus, as set forth above in Section V.B.2. *supra*, are distinguishable from the instant case.

Complaint Counsel argues that this case is like *Walker Process* because the alleged competitive harm flows from private conduct – the defendant's efforts to enforce the patent – rather than from the governmental action itself. Opposition at 17. However, in *Walker Process*, the Supreme Court held that "proof that Food Machinery *obtained* the patent by knowingly and willfully misrepresenting facts to the Patent Office" would be sufficient to strip Food Machinery of its exemption from the antitrust laws. 382 U.S. at 177 (emphasis added). Thus, the focus was on the fraud on the Patent Office in the procurement of patents.

In *Walker Process*, there could be no harm from the enforcement of a patent if the Patent Office had never issued the patent. Here, there could be no harm from the enforcement of Respondent's patents if CARB had not enacted the Phase 2 regulations that substantially overlapped with CARB's patents. Complaint at ¶ 92 ("The extensive overlap between the CARB RFG regulations and the Unocal patent claims makes avoidance of Unocal patent claims technically and/or economically infeasible."); F. 62 (Complaint at ¶ 93) (Refiners in California invested billions of dollars in sunk capital investments in order to comply with the CARB Phase 2 RFG regulations.). Thus, it is not solely private conduct – Respondent's enforcement of its valid patents – that caused the anticompetitive harm alleged. Because the alleged harm stems from the cost of compliance with CARB's regulations that substantially overlap Respondent's patents, the restraint of trade is the result of valid governmental action and *Noerr-Pennington* applies.

D. *Noerr-Pennington* Immunity is Available in Actions Brought Under Section 5 of the FTC Act

Complaint Counsel argues that "*Noerr* does not apply to actions brought under Section 5 of the FTC Act." Opposition at 33. As set forth below, while *Noerr-Pennington* was developed as an immunity to the Sherman Act, the underlying rationale for immunity is equally applicable in unfair competition cases brought under the FTC Act. Further, in later Supreme Court cases, discussed *infra*, *Noerr-Pennington* immunity has been extended more generally to antitrust cases and in other contexts. Moreover, Commission opinions and courts have applied the *Noerr-Pennington* doctrine to cases alleging violations of Section 5 of the FTC Act on numerous occasions.

In *Noerr*, the Supreme Court's "starting point" for consideration of the case was "that no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 136. Immunity from antitrust liability was based, in part, on the Constitutional right to "petition the Government for redress of grievances," U.S. Const. amend I, cl.6. "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Noerr*, 356 U.S. at 138.

The Supreme Court further held:

> Insofar as the [Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity . . . . The proscriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.

Id. at 140-41. The concerns that the Supreme Court had with Congress limiting the right to petition through the enactment of the Sherman Act must be of equal concern with respect to Congress limiting the right to petition through the enactment of the FTC Act.

Indeed, the Commission has argued as much in a brief filed with the Court of Appeals for the Ninth Circuit in *Rodgers v. Federal Trade Commission*, 492 F.2d 228 (9th Cir. 1974):

> "The proscriptions of Section 5 of the FTC Act, as we view them, like the proscriptions of the Sherman Act, are tailored for the business world, not for the political arena . . . .
>
> Even assuming a wrongful motive . . . and the willful use of distortion or deception, it is our view that actionable violation of Section 5 of the FTC Act is not indicated due to the overriding public interest in preservation of uninhibited communication in connection with political activity with legislative processes."

Id. at 230 (quoting Letter of Charles A. Tobin, Secretary, Federal Trade Commission, to William H. Rodgers, Jr., Jan. 26, 1971, in Brief of Appellant, Appendix at 10, 11-12). The Court of Appeals accepted the Commission's argument and upheld the Commission's reliance on *Noerr* to determine that action on the complaint was not warranted. *Rodgers*, 492 F.2d at 230.

The Noerr-Pennington doctrine has not been strictly limited to Sherman Act cases, but has been characterized by the Supreme Court as applying more broadly to "antitrust laws." *See Omni Outdoor Advertising*, 499 U.S. at 380 (citing *Noerr*, 365 U.S. at 141). "Those who petition government are generally immune from *antitrust liability*." *Professional Real Estate Investors*, 508 U.S. at 56 (emphasis added). In *Professional Real Estate Investors*, the Supreme Court, including in its authority a case brought under Section 5 of the FTC Act, implied that *Noerr* is not strictly limited to Sherman Act cases. "Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham." 504 U.S. at 59 (citing *SCTLA*, 493 U.S. at 424; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913-14 (1982)).

It is appropriate to apply *Noerr-Pennington*, whether as an antitrust doctrine or "in another context," to the allegations of this Complaint. The very first allegation of the Complaint, describing the "Nature of the Case," illustrates that Respondent is charged with engaging in acts and practices that, if not shielded by *Noerr-Pennington*, could provide the basis for antitrust

liability under Section 2 of the Sherman Act. 15 U.S.C. § 2 (monopolization; attempted monopolization).

> Through a pattern of anticompetitive acts and practices that continues 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 at ¶ 1. All five violations in the Complaint charge Respondent with "acts and practices [that] constitute unfair methods of competition in violation of Section 5 of the FTC Act." The Commission and courts routinely analyze causes of actions challenging unfair methods of competition through antitrust principles. *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 369 (1965) ("When conduct does bear the characteristics of recognized antitrust violations it becomes suspect, and the Commission may properly look to cases applying those laws for guidance."); *In re American Med. Assoc.*, 94 F.T.C. 701, 994 (1979) ("It is instructive to look at cases construing the Sherman Act for initial guidance as to the reach of Section 5."). Thus, even though the doctrine was developed in cases alleging violations of the Sherman Act, it is appropriate and logical to apply the *Noerr-Pennington* doctrine of immunity from antitrust liability to a case alleging unfair methods of competition in violation of the FTC Act.

Complaint Counsel argues that the Supreme Court's decision in *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002) compels the conclusion that *Noerr-Pennington* does not apply to cases brought under the FTC Act. In *BE & K Constr.*, the Supreme Court declined to extend "antitrust immunity principles" to unsuccessful retaliatory lawsuits filed under the National Labor Relations Act. 536 U.S. at 525-33. Contrary to the situation in *BE & K*, in the instant case, "antitrust immunity principles" are appropriately applied in a case alleging causes of action that could also state a claim under Sections 1 and 2 of the Sherman Act.

Despite Complaint Counsel's assertion that "no court has held that *Noerr*'s narrow exception to Sherman Act liability applies to Section 5 of the FTC Act," Sur-reply at 30, courts have analyzed the *Noerr-Pennington* defense in Section 5 cases. *E.g., Ticor Title Ins.*, 998 F.2d at 1138; *Rodgers*, 492 F.2d at 228-29 (accepting Commission argument that *Noerr* doctrine is applicable to FTC Act). Both the Commission and the Supreme Court applied the *Noerr-*

Pennington doctrine to the alleged violations of Section 5 of the FTC Act in *In re Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 590 (1984), *vacated by* 856 F.2d 226, *rev'd in part, and remanded by*, 493 U.S. 411 (1990). The Commission stated, "[i]f the respondents' activity had been limited to 'mere attempts to influence the passage of enforcement of laws,' *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. at 135, then the respondents would merit the protection of the First Amendment under *Noerr* and succeeding cases." 107 F.T.C. at 590. The Commission then held, "[w]e think that *Noerr* and *Pennington* alone provide sufficient guidance for our conclusion that First Amendment immunity should not extend to the kind of conduct in which the respondents have engaged." *Id.* at 594.

The Supreme Court also utilized *Noerr* principles to determine whether there was immunity from antitrust liability in *FTC v. Superior Court Trial Lawyers*, 493 U.S. 411 (1990). Thus, though not explicit in holding that *Noerr-Pennington* applies to actions brought under the FTC Act, by application of the doctrine to the allegations of violations of the FTC Act, *SCTLA* makes clear that *Noerr-Pennington* immunity is fully available in FTC Act cases.

In numerous other opinions, the Commission has analyzed whether respondents have asserted valid *Noerr-Pennington* defenses to Section 5 causes of action. *E.g.*, *In re Ticor Title Ins. Co.*, 112 F.T.C. 344, 460-64 (1989) (holding the *Noerr* defense inapplicable to the facts, but stating that if respondents had instead agreed on a political advocacy campaign to convince the state to adopt or change a ratemaking policy, such activity would be protected under *Noerr-Pennington*); *In re New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 283-85 (1989) (the *Noerr-Pennington* doctrine "shields from antitrust scrutiny concerted efforts by competitors to petition government officials"); *In re Michigan State Med. Soc'y*, 101 F.T.C. 191, 296-301 (1983) (applying *Noerr-Pennington* to facts and holding that respondents' activities constituted illegal conduct that fell outside the protective shield of *Noerr-Pennington*). In none of these cases did the Commission hold that *Noerr-Pennington* defenses were not available to respondents in FTC Act cases. Indeed, Complaint Counsel has cited no cases so holding.

Because Supreme Court and Commission precedent establish that the *Noerr-Pennington* doctrine is a defense to antitrust liability and have applied the doctrine in Section 5 cases, Complaint Counsel's unsupported argument that *Noerr-Pennington* should not be available where

the remedy sought is an order requiring Respondent to cease and desist from enforcing its patents, in other words, de facto invalidation of Respondent's patents, rather than the "chilling" treble damages allowed under the Sherman Act, does not withstand scrutiny. For the same reason, Complaint Counsel's argument that the "unitary nature" of the FTC Act precludes application of the *Noerr-Pennington* doctrine to cases brought under the FTC Act, also does not withstand scrutiny. Again, without citation, Complaint Counsel argues that because the FTC Act applies to the closely associated areas of "unfair methods of competition" and "unfair or deceptive practices," it would be incongruous to allow the Commission to prevent unfair or deceptive acts or practices to the full extent constitutionally permitted by the First Amendment, but prevent unfair methods of competition only to the extent permitted by antitrust principles. Opposition at 33-34. Complaint Counsel has cited no cases indicating that causes of action challenging unfair methods of competition are required to be analyzed by case law relating to causes of action challenging unfair and deceptive practices rather than antitrust law.

To hold that the *Noerr-Pennington* doctrine does not apply to Section 5 of the FTC Act, where the Commission has asserted to the contrary in another case, and where no other court or Commission opinion has so held, would be inappropriate and unfair. Accordingly, *Noerr-Pennington* immunity is fully available in this case alleging unfair methods of competition in violation of Section 5 of the FTC Act.

E. Respondent's Conduct Before Private Industry Groups

The Complaint alleges that Respondent participated in two private industry groups, the Auto/Oil Air Quality Improvement Research Program ("Auto/Oil Group") and the Western States Petroleum Association ("WSPA"), which conducted research on automobile emissions and reported their findings to the government. F. 38-40, 44 (Complaint at ¶¶ 50-52, 56). The Complaint alleges that Respondent made statements to the Auto/Oil Group and to WSPA that were materially false and misleading in that they failed to disclose Unocal's proprietary interests in its emissions research results and Unocal's intention to enforce its intellectual property rights. F. 42, 46, 48 (Complaint at ¶¶ 58, 59, 82); *see also* Complaint at ¶ 85. In its opposition to the motion to dismiss on *Noerr-Pennington* grounds, Complaint Counsel asserts that: (1)

Respondent's misrepresentations to Auto/Oil Group and WSPA are not covered by any petitioning privilege; and (2) Respondent's misrepresentations to Auto/Oil Group and WSPA form an independent basis for liability. Opposition at 35-37.

To the extent that Respondent's statements to Auto/Oil Group and WSPA were part of Respondent's alleged scheme to induce CARB to act, as alleged in the Complaint, this conduct is political petitioning protected by *Noerr-Pennington*. To the extent that Respondent made statements to Auto/Oil Group and WSPA independent of its alleged scheme to induce CARB to act, these allegations involve substantial issues of patent law and, thus, do not state an independent cause of action over which the Commission has jurisdiction as alleged in the Complaint.

1. Indirect petitioning

According to the allegations of the Complaint, Respondent made knowing and willful misrepresentations to the Auto/Oil Group and to WSPA and subverted the Auto/Oil Group's and WSPA's process of providing accurate and nonproprietary research data and information to CARB. F. 20 (Complaint at ¶ 35 (Unocal participated in industry groups that provided input into the CARB regulations)); Complaint at ¶¶ 84, 89 (Unocal subverted the Auto/Oil Group's and WSPA's process of providing accurate and nonproprietary research data and information to CARB)). The Complaint does not allege that the Respondent prevented the Auto/Oil Group or WSPA from communicating with CARB.

Misrepresentations to third parties as a means of influencing the government's passage of laws fall within the bounds of *Noerr-Pennington*. In *Noerr*, the railroads' use of "the so-called third party technique," involved deception of the public, manufacture of bogus sources of reference, and distortion of public sources of information. *Noerr*, 365 U.S. at 140-42 (holding such conduct, "so far as the Sherman Act is concerned, legally irrelevant"). In *Allied Tube*, the Supreme Court held that a "claim of *Noerr* immunity cannot be dismissed on the ground that the conduct at issue involved no 'direct' petitioning of government officials, for *Noerr* itself immunized a form of 'indirect' petitioning." *Allied Tube*, 486 U.S. at 503.

To determine whether *Noerr* immunizes anticompetitive activity intended to influence the government requires an evaluation not only of its impact, but also of the context and nature of the activity. *Allied Tube*, 486 U.S. at 504. Here, it is clear from the allegations of the Complaint that Respondent's actions with respect to the Auto/Oil Group and WSPA were part of an alleged scheme to induce these third parties to influence CARB. F. 44 (Complaint at ¶ 56 (During the CARB Phase 2 RFG rulemaking proceedings, Unocal actively participated in WSPA, which actively participated in the CARB RFG rulemaking process; WSPA commissioned, and submitted to CARB, three cost studies in connection with the CARB Phase 2 RFG rulemaking.)); Complaint at ¶ 87 (Unocal participated in WSPA committees that discussed the potential cost implications of the CARB Phase 2 RFG regulations; Unocal knew that royalties were considered in a cost study commissioned by WSPA for submission to CARB)); Complaint at ¶¶ 84, 89 (Respondent's deceptive conduct subverted Auto/Oil's and WSPA's process of providing accurate and nonproprietary research data and information to CARB.)); Complaint at ¶ 90 (But for Unocal's fraud, these participants in the rulemaking process would have taken actions including, but not limited to, advocating that CARB adopt regulations that minimized or avoided infringement on Unocal's patent claims, or advocating that CARB negotiate license terms substantially different from those that Unocal was later able to obtain.)).

This case is different from the context and nature of the private standard setting process evaluated in *Allied Tube*. There, where the anticompetitive harm was found to be a result of an implicit agreement by the private standard setting association's members not to trade in a certain type of electrical conduit, the Supreme Court held that the context and nature of the conduct was "more aptly characterized as commercial activity with a political impact." 486 U.S. at 507. While *Allied Tube* does state, as quoted by Complaint Counsel (Sur-reply at 25), "the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone sufficient to render that activity immune from antitrust liability[,]" this quote must be put in context. It was only after finding that the anticompetitive conduct was commercial activity, the Supreme Court held, "*at least outside the political context*, the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone sufficient to render that activity immune from antitrust liability." 486 U.S. at 507 (emphasis added). But in the instant case, where

according to the Complaint, Respondent's conduct was part of its attempt to influence governmental action and where the anticompetitive harm results from CARB's adoption of Phase 2 RFG regulations that "substantially overlap[] with Unocal's concealed patent claims" (Complaint at ¶ 45), the "antitrust laws should not regulate political activities 'simply because those activities have a commercial impact.'" 486 U.S. at 507 (quoting *Noerr*, 356 U.S. at 141). Thus, because Respondent's alleged misconduct occurred within the political context, *Noerr* immunity extends to protect this conduct.

Nor is this case like *California Motor Transport*, where petitioners were alleged to have "'instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.'" 404 U.S. at 512. The Supreme Court held that those actions served to deny plaintiffs free and unlimited access to administrative and judicial tribunals. *California Motor Transport*, 404 U.S. at 509, 511. In *Omni Outdoor Advertising*, the Supreme Court described *California Motor Transport* as limited to the "context in which the conspirators' participation in the governmental process was itself claimed to be a 'sham,' employed as a means of imposing cost and delay." *Omni Outdoor Advertising*, 499 U.S. at 381-82 (quoting *California Motor Transport*, 404 U.S. at 512). The Supreme Court, in *Omni Outdoor Advertising,* explained as follows:

> Any lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means to get his opponent ignored. Policing the legitimate boundaries of such defensive strategies, when they are conducted in the context of a genuine attempt to influence governmental action, is not the role of the Sherman Act. In the present case, of course, any denial to Omni of "meaningful access to the appropriate city administrative and legislative fora" was achieved by COA in the course of an attempt to influence governmental action that, far from being a "sham," was if anything more in earnest than it should have been. If the denial was wrongful there may be other remedies, but as for the Sherman Act, the *Noerr* exemption applies.

Omni Outdoor Advertising, 499 U.S. at 382. In the instant case, where it is clear from the allegations of the Complaint that Respondent's alleged conduct with respect to the Auto/Oil Group and WSPA was part of a scheme to influence CARB, Respondent's conduct with respect to these third parties falls within *Noerr*'s protection.

2. Conduct directed at Auto/Oil Group and WSPA separate from conduct directed at CARB

To the extent that the alleged misrepresentations made to the Auto/Oil Group and to WSPA were not part of Respondent's scheme to solicit favorable governmental action, the allegations of misconduct directed toward the Auto/Oil Group and WSPA, independent of the conduct directed toward CARB alleged in the Complaint, do not state an independent cause of action as a violation of Section 5 of the FTC Act over which the Commission has jurisdiction. Respondent, in its motion for dismissal of the Complaint for failure to make sufficient allegations that Respondent possesses or dangerously threatens to possess monopoly power ("Market Power Motion"), asserts that the Commission does not have jurisdiction to decide patent issues. The scope of Respondent's patents and whether or not third parties could have invented around these patents and whether any such newly created products or methods could have avoided infringement is called directly into question by the allegations of the Complaint regarding Respondent's conduct towards Auto/Oil Group and WSPA. Thus, in order to fairly and completely resolve the factual and legal allegations of the Complaint, an in depth analysis of substantial issues of patent law would be required.

(i) Allegations relating to conduct separate from conduct directed at CARB

After the conclusion that the steps that Respondent took, whether direct or indirect, to solicit CARB's adoption of the Phase 2 regulations were political petitioning conduct, immunized by *Noerr-Pennington*, the remaining allegations of the Complaint are as follows:

> Throughout all of its communications and interactions with Auto/Oil prior to January 31, 1995, Unocal failed to disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties. Complaint at ¶ 83.
>
> By deceptive conduct that included, but was not limited to, false and misleading statements concerning its proprietary interests in the results of its emissions

> research results, Unocal violated the letter and spirit of the Auto/Oil Agreement and breached its fiduciary duties to the other members of the Auto/Oil joint venture. Complaint at ¶ 84.
>
> Throughout all of its communications and interactions with WSPA prior to January 31, 1995, Unocal failed to disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties. Complaint at ¶ 88.
>
> By deceptive conduct that included, but was not limited to, false and misleading statements concerning its proprietary interests in the results of its emissions research results, Unocal breached its fiduciary duties to the other members of WSPA. Complaint at ¶ 89.
>
> But for Unocal's fraud, these participants in the rulemaking process [Auto/Oil Group and WSPA] would have taken actions including, but not limited to . . . incorporating knowledge of Unocal's pending patent rights in their capital investment and refinery reconfiguration decisions to avoid and/or minimize potential infringement. Complaint at ¶ 90(c).

In its opposition to the *Noerr-Pennington* motion to dismiss, Complaint Counsel argues that even if CARB had enacted Phase 2 knowing that the regulations substantially overlapped with Respondent's patents, the oil companies could have avoided significant harm, had Respondent not duped them independently through its fraudulent, inequitable, and bad-faith business conduct. Opposition at 36.

(ii) No independent basis for liability

The allegations in the Complaint pertaining to Respondent's conduct towards Auto/Oil Group and WSPA, separate from its alleged scheme to influence CARB, (¶¶ 83, 84, 88, 89) do not establish a legally cognizable independent cause of action under Section 5 of the FTC Act over which the Commission has jurisdiction. The issue of whether or not Respondent had a fiduciary duty arising under Section 5 of the FTC Act towards WSPA or Auto/Oil Group or breached any such duty is not reached. As discussed in detail *infra*, there is no set of facts alleged in the Complaint that could establish that any antitrust injury or harm was caused from any breach of such duty without a thorough analysis of numerous substantial patent law issues.

CARB passed regulations substantially overlapping with Unocal's patents. F. 30, 53 (Complaint at ¶¶ 45, 64). *See also* F. 29 (Complaint at ¶ 44) (Respondent's patent claims recite limits for five of the eight properties specified by the Phase 2 RFG regulations: T50, T90, olefins, aromatics, and RVP.). There is no set of facts alleged in the Complaint that, if established, would prove that anticompetitive injury and resulting harm to the Auto/Oil Group and WSPA resulted from the alleged misconduct directed at the Auto/Oil Group and WSPA, instead of from CARB's enactment of Phase 2 regulations and Respondent's subsequent enforcement of its patent rights. To the contrary, the Complaint alleges harm that resulted from compliance with the Phase 2 RFG regulations. F. 62 (Complaint at ¶ 93 (refiners invested billions of dollars in order to comply with the CARB Phase 2 RFG regulations. These refiners cannot produce significant volumes of non-infringing CARB-compliant gasoline without incurring substantial costs.)). *See also* Complaint at ¶ 92 ("extensive overlap between the CARB RFG regulations and the Unocal patent claims makes avoidance of the Unocal patent claims technically and/or economically infeasible"). Any alleged harm beyond that caused by CARB's regulations cannot be determined without knowing the scope of Respondent's patents, whether or not Auto/Oil Group and WSPA could have invented around these patents, and whether any such newly created products or methods could have avoided infringement. Accordingly, to find any other harm, as alleged, would require the substantial patent law analysis discussed herein and thus, logically, the issue of other harm can not be reached.

(iii) Allegations raise substantial patent issues

To analyze whether the allegations of the Complaint state an independent cause of action separate from the alleged violations stemming from Respondent's efforts to get CARB to adopt regulations favorable to Respondent would require a resolution of substantial patent issues. Complaint at ¶¶ 83, 88 (Respondent failed to disclose that it had *pending patent rights* and that its *patent claims overlapped* with the proposed RFG regulations.); Complaint at ¶¶ 84, 89 (Respondent made false and misleading statements concerning its *proprietary interests*.); Complaint at ¶ 90(c) (Auto/Oil Group and WSPA would have incorporated knowledge of Unocal's *pending patent rights* in their capital investment and refinery reconfiguration decisions

to avoid and/or minimize *potential infringement*.) (Emphases added). To properly determine whether there is any set of facts that, if proven, could support these allegations would require an in depth and thorough analysis of what Respondent's "proprietary interests" were, which "proprietary interests" were and were not included in any patent, what was patented, what was not patented, the scope of Respondent's patents, the scope of any competitor's patents, whether any competitor products or methods exist or could be invented, whether any of the competitor products or methods that could be created or invented infringed, and whether refineries could be reconfigured so as to avoid or minimize infringement of Respondent's patents.

These are fundamental and substantial patent issues, as defined by the Supreme Court in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988). There, the Supreme Court held that a case arises under federal patent law when the "plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims." *Id.* at 808. Whether a claim "arises under" patent law "'must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.'" *Christianson*, 486 U.S. at 809 (citations omitted) (claim did not arise under patent law where complaint only obliquely hinted at patent law issues). In the instant case, as discussed herein, allegations of the Complaint do more than obliquely hint at patent law issues. After a determination that *Noerr-Pennington* immunizes Respondent's conduct before CARB, what appears in the Complaint, particularly paragraph 90(c), – third parties would have incorporated knowledge of Unocal's pending patent rights in their capital investment and refinery reconfiguration decisions to avoid and/or minimize potential infringement – plainly alleges a claim under patent law in that patent law is a necessary element of the claims. There is no fair way to determine whether any "reconfiguration decisions" would "avoid and/or minimize potential infringement" without a determination of non-infringement. As discussed below, infringement and non-infringement are clearly fundamental and substantial patent issues.

(iv) Federal courts decide substantial patent issues

The determination of the scope of the federally created property right is a substantial question of federal patent law. *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1330 (Fed. Cir. 1998) (infringement is a substantial issue in the federal scheme for it determines what is the scope of the federally created property right), *rev'd in part on other grounds*, *Midwest Ind., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999). *See also U.S. Valves, Inc. v. Dray*, 190 F.3d 811, 814 (7th Cir. 1999) (the only way to determine whether a product is covered by the licensed patents is to apply substantive patent law). Where a court must "interpret the validity and scope of a particular patent," a claim arises under patent law. *Boggild & Dale v. Kenner Products*, 853 F.2d 465, 468 (6th Cir. 1988).

The authority to decide questions of patent law arises solely under 28 U.S.C. § 1338(a), which confers original jurisdiction over patent law questions upon the federal courts. The statute gives federal district courts original jurisdiction over "any civil action arising under any Act of Congress relating to patents," and further provides that "[s]uch jurisdiction shall be exclusive of the courts of the states in patent . . . cases." 28 U.S.C. § 1338(a). *See also Scherbatskoy v. Halliburton Co.*, 125 F.3d 288 (5th Cir. 1997) ("Section 1338(a) grants *exclusive* jurisdiction to the federal district courts in cases arising under the patent laws") (emphasis added).

Complaint Counsel argues that Section 1338 operates only to preclude state courts, not federal agencies, from asserting jurisdiction over cases arising under the patent laws. Market Power Opposition at 26. Complaint Counsel further argues that because the statute explicitly prohibits state court jurisdiction, "the canon of statutory interpretation of *expressio unis est exclusio alterius* teaches that the mention of one thing (i.e., state courts) implies that Congress chose not to exclude agencies from hearing patent cases." Market Power Opposition at 27. Under this logic, one could infer, albeit not reasonably, that Congress chose not to exclude municipal courts, tax courts, the Court of Claims, etc. from hearing patent cases. Moreover, the Federal Circuit has held that this jurisdictional question arises not only in determining if state law claims are preempted, but also with respect to determining whether there is a conflict with other federal law. *Midwest Ind., Inc.*, 175 F.3d at 1357 (Federal Circuit will apply federal patent law and precedent "in determining whether patent law conflicts with other federal statutes or preempts

state law causes of action."), *rev'd in part on other grounds by TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001). *E.g., Helfgott & Karas, P.C. v. Director of the United States Patent and Trademark Office*, 209 F.3d 1328, 1334 (Fed. Cir. 2000) (The question of whether the Commissioner of the Patent and Trademark Office has violated the Administrative Procedure Act raises a substantial question under the patent laws sufficient to vest jurisdiction with the district court based in part upon 28 U.S.C. 1338(a).).

(v) Commission without jurisdiction as Complaint is alleged

While the FTC may have jurisdiction over cases that "touch on patent law," as argued by Complaint Counsel, (Market Power Opposition at 4), the FTC has no jurisdiction over the allegations in this Complaint that depend on and require the resolution of substantial questions of federal patent law. In *Decker v. FTC*, 176 F.2d 461 (D.C. Cir. 1949), the FTC charged respondents with unfair and deceptive acts with regard to misrepresentations about the functions of respondent's product. Respondents asserted that the alleged misrepresentations were substantially like the statements that were included in the patent application, and thus respondents challenged the jurisdiction of the Commission on grounds that the proceedings were, in effect, an attack upon the patent itself. The Court of Appeals for the District of Columbia Circuit disagreed: "[t]he proceedings before the FTC related only to advertising. They did not draw into question the validity of the patent grant. Hence the case is not one arising under the patent laws, cognizable only in district court." *Id.* at 463.

Here, unlike in *Decker*, a finding of liability based upon Respondent's conduct towards the Auto/Oil Group and WSPA can be made only upon a determination of what were Respondent's proprietary interests, what was patented, what was not patented, and whether third parties could have, in their capital investment and refinery reconfiguration decisions, avoided and/or minimized potential infringement, and whether any competing patents existed or would be valid and would not infringe. These issues draw into question the very scope of Respondent's patents and whether third parties can compete without infringing. Hence, unlike in *Decker*, the allegations here arise under the patent laws, cognizable only in federal district court. To be fair to all parties involved, a determination of the scope of Respondent's patents and any other competing, similar, or

overlapping patents would be required. Due process demands that the issues raised in the allegations of the Complaint, entangled in numerous patent issues, be thoroughly and completely examined and resolved. Without such analysis and reference to federal patent law, any evidence presented would be speculative, incomplete, and not sufficient to fairly resolve the issues raised in this case.

The Federal Trade Commission is limited to the exercise of those specific powers granted to it by the Federal Trade Commission Act. *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957). Under the FTC Act, the Commission has jurisdiction to prevent unfair methods of competition and unfair or deceptive practices. 15 U.S.C. § 45. Nothing in either the language of the FTC Act or its legislative history contemplates that the Commission would exercise jurisdiction over substantial questions of federal patent law. No case was cited to, nor found, that held that the Commission has jurisdiction to decide causes of action arising under patent laws.

In *American Cyanamid*, the Commission issued a cease and desist order based on a finding that the respondent's inequitable conduct before the Patent and Trademark Office constituted a violation of Section 5 of the FTC Act. *American Cyanamid*, 63 F.T.C. 1747, 1855-57 (1963), *vac. on other grounds*, 363 F.2d 757 (6th Cir. 1966), *on rehearing*, 72 F.T.C. 623 (1967), *aff'd sub nom., Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968). The Commission held that there is nothing within 28 U.S.C. § 1338(a) which would prevent the Commission from investigating methods of unfair competition before the Patent Office. 63 F.T.C. at 1857. On appeal to the Sixth Circuit, the Court of Appeals held that the Commission has jurisdiction to determine whether conduct before the Patent Office resulting in the issuance of a patent, and the subsequent use of the fruits of such conduct, may constitute a violation of Section 5 of the FTC Act. 363 F.2d at 771.

Unlike *American Cyanamid*, this Complaint does not challenge conduct before the Patent Office, where "Pfizer and Cyanamid, like all other applicants, stood before the Patent Office in a confidential relationship and owed the obligation of frank and truthful disclosure." *Pfizer*, 401 F.2d at 579. Unlike the allegations in the instant matter, *American Cyanamid* did not require an examination of scope and infringement issues. 363 F.2d at 769. Here, there are allegations requiring an examination of the scope of patents and infringement or avoidance thereof.

Accordingly, if a fair and complete analysis of the allegations and violations of law is to be done, a resolution of the allegations in this Complaint goes far beyond what was required in *American Cyanamid*. Because questions of possible patent infringement and scope must be resolved in the instant case, these substantial questions of federal patent law vitiate jurisdiction under Section 5 of the FTC Act as this case is alleged.

Complaint Counsel also relies on *In re VISX, Inc.*, Docket No. 9286, 1999 WL 33577396, Initial Decision (filed May 27, 1999), and the Commission's recent proposed consent agreement in *Bristol-Myers Squibb* for the proposition that the Commission may examine antitrust considerations relating to patent law. Market Power Opposition at 24. To the extent that the Administrative Law Judge in *VISX* construed patent and patent issues in the initial decision, that initial decision was not appealed and was, in fact, dismissed. Subsequent to the issuance of that initial decision, complaint counsel filed a motion to dismiss the complaint in which complaint counsel asked the Commission to expressly state that the Commission does not adopt the initial decision. *In re VISX, Inc.*, Docket No. 9286, (motion filed December 1, 1999) (*available at* www.ftc.gov/os/adjpro/d9286/index.htm). By order of the Commission, dated February 7, 2001, the Commission dismissed the complaint. In addition, the Commission's recent proposed consent decree in *Bristol-Meyers Squibb*, relied upon by Complaint Counsel, provides no precedential value. "[T]he circumstances surrounding . . . negotiated [consent decrees] are so different that they cannot be persuasively cited in a litigation context." *E.I. du Pont*, 366 U.S. at 330 n.12. Indeed, the consent decree itself acknowledges, "[a] consent order is for settlement purposes only and does not constitute an admission of a law violation." *Bristol-Myers Squibb, Co.*, File Nos. 001 0221, 011 0046, and 021 0181 (F.T.C. March 7, 2003) (*available at* www.ftc.gov/opa/2003/03/bms.htm).

(vi) Complaint Counsel has burden of proof

Complaint Counsel, as the party required to assert jurisdiction, bears the burden of proving subject matter jurisdiction. *Kokkonen*, 511 U.S. at 377; *In re R.J. Reynolds Tobacco Co., Inc.*, 111 F.T.C. at 541, 549 n.17 (plaintiff bears burden of proving subject matter jurisdiction and failure to meet that burden requires dismissal of the proceeding). As this case is

alleged in the Complaint, there is no set of facts that Complaint Counsel could prove to demonstrate that the Commission has jurisdiction to resolve these claims arising under patent law. An analysis of the conduct alleged in the Complaint that was directed at Auto/Oil Group and WSPA would require a resolution of substantial issues arising under patent law. Because the Commission does not have jurisdiction to adjudicate the scope of Respondent's patents and whether the third parties could compete with other products or methods without infringing on valid patents, the allegations of the Complaint with respect to Respondent's conduct towards Auto/Oil Group and WSPA are dismissed.

VI. CONCLUSION

For the above stated reasons, Respondent's motion to dismiss the Complaint based upon immunity under *Noerr-Pennington* is GRANTED IN PART as to all violations alleged and all allegations of the Complaint, except the allegations of Respondent's conduct directed toward Auto/Oil Group and WSPA, independent of the conduct directed toward the CARB.

As stated above, the allegations of Respondent's conduct directed toward Auto/Oil Group and WSPA, independent of the conduct directed toward CARB, requires resolution of the substantial patent issues which are entangled in and raised by the allegations and violations of the Complaint. Respondent's motion to dismiss for failure to make sufficient allegations that Respondent possesses or dangerously threatens to possess monopoly power is GRANTED IN PART to the extent that the Commission lacks jurisdiction to decide the fundamental and substantial patent issues raised by the allegations of the Complaint. The remainder of Respondent's Market Power Motion is DENIED WITHOUT PREJUDICE.

As discussed in detail above, no allegations or violations of the Complaint remain and the Complaint in Docket 9305 is dismissed in its entirety.

VII. SUMMARY OF CONCLUSIONS OF LAW

1. Respondent Union Oil Company of California ("Unocal") is a corporation, as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

2. Respondent is engaged in commerce and affected commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

3. Pursuant to Section 5 of the FTC Act, the FTC has jurisdiction over the subject matter of this proceeding, except as to the claims raised in the Complaint arising under patent law.

4. Official notice is taken of the statutes governing the California Air Resources Board ("CARB"), the Notice of Public Hearing through which CARB initiated the rulemaking, and the Final Statement of Reasons for Rulemaking, all of which are beyond dispute and have not been disputed.

5. Complaint Counsel bears the burden of showing that the *Noerr-Pennington* doctrine does not immunize Respondent's conduct alleged in the Complaint.

6. Complaint Counsel bears the burden of showing that the FTC has jurisdiction on all violations of law alleged in the Complaint.

7. *Noerr-Pennington* immunizes Respondent's efforts to induce CARB to adopt regulations on low emissions, reformulated gasoline ("RFG").

8. CARB's Phase 2 RFG rulemaking process was a legislative exercise.

9. CARB was not wholly dependent on the Respondent for information during the RFG rulemaking process.

10. *Noerr-Pennington* immunity exists even if CARB did not know that it was being asked to enact a regulation that would restrain trade.

11. The restraint of trade or monopolization alleged in the Complaint is the result of valid governmental action, CARB's adoption of Phase 2 regulations that substantially overlapped with Respondent's patent claims.

12. The sham petitioning exception does not apply in this case.

13. The *Walker Process* exception does not apply in this case.

14. The *Noerr-Pennington* doctrine provides immunity in this case alleging unfair methods of competition under Section 5 of the FTC Act.

15. To the extent that Respondent's alleged conduct towards Auto/Oil Group and WSPA were part of Respondent's scheme to induce CARB to act, it constitutes indirect petitioning protected by *Noerr-Pennington*.

16. There is no set of facts alleged in the Complaint that, if established, would prove that anticompetitive injury and resulting harm to the Auto/Oil Group and WSPA resulted from the alleged misconduct directed at the Auto/Oil Group and WSPA, instead of from CARB's enactment of Phase 2 regulations and Respondent's subsequent enforcement of its patent rights.

17. There is no set of facts alleged in the Complaint that could establish that any antitrust injury or harm was caused from any breach of a fiduciary duty without a thorough analysis of substantial patent law issues.

18. To determine whether there is any set of facts that, if proven, could support the allegations of conduct directed at Auto/Oil Group and WSPA separate from the alleged violations stemming from Respondent's efforts to get CARB to adopt regulations favorable to Respondent would require an in depth and thorough analysis of what Respondent's "proprietary interests" were, which "proprietary interests" were and were not included in any patent, what was patented, what was not patented, the scope of Respondent's patents, the scope of any competitor's patents, whether any competitor products or methods exist or could be invented, whether any of the competitor products or methods that could be created or invented infringed, and whether refineries could be reconfigured so as to avoid or minimize infringement of Respondent's patents.

19. The scope of Respondent's patents, the scope of any competitor's patents, whether any of the competitor products or methods that could be created or invented infringed, and whether refineries could be reconfigured so as to avoid or minimize infringement of Respondent's patents are issues raised by the allegations of the Complaint and are substantial patent law issues.

20. Due process and fairness require that the issues raised in the allegations of the Complaint, entangled in numerous patent issues, be thoroughly and completely examined and resolved.

21. The FTC has no jurisdiction over the allegations in this Complaint in Docket 9305 that depend on the resolution of substantial questions of federal patent law.

22. Complaint Counsel can prove no set of facts in support of its Complaint in Docket 9305 that would entitle it to relief.

ORDER

For the reasons stated above,

IT IS ORDERED that Respondent's Motion to Dismiss the Complaint Based Upon Immunity Under *Noerr-Pennington* is GRANTED IN PART as to all violations alleged and all allegations of the Complaint, except the allegations of Respondent's conduct directed toward Auto/Oil Group and WSPA, independent of the conduct directed toward the CARB.

IT IS ORDERED that Respondent's Motion to Dismiss the Complaint for Failure to Make Sufficient Allegations That Respondent Possesses or Dangerously Threatens to Possess Monopoly Power is GRANTED IN PART as to all violations alleged with respect to the allegations of Respondent's conduct directed toward Auto/Oil Group and WSPA, independent of the conduct directed toward CARB. The remainder of Respondent's Market Power Motion is DENIED WITHOUT PREJUDICE.

IT IS ORDERED that all violations of the Complaint be, and hereby are, dismissed.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Dated: November 25, 2003