PUBLIC

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

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

UNION OIL COMPANY OF CALIFORNIA'S MOTION FOR DISMISSAL OF THE COMPLAINT AND MEMORANDUM IN SUPPORT BASED UPON IMMUNITY UNDER *NOERR-PENNINGTON*

Introduction

Pursuant to Rule 3.22(e) of the Commission's Rules of Practice, 16 C.F.R. § 3.22(e), Respondent Union Oil Company of California ("Unocal") respectfully moves for dismissal of 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). Although Unocal vigorously disputes that it acted wrongfully in its failed attempt to influence the outcome of the California Air Resources Board's ("CARB") Phase 2 reformulated gasoline rulemaking, the conduct alleged by the Complaint is immune from antitrust liability regardless of its purpose or effect.[1]

[1] Unocal is concurrently filing a motion to dismiss the Complaint based on the Complaint's failure to state a claim because of its failure to make sufficient allegations to support a cause of action based on monopolization or attempted monopolization.

As the Supreme Court held in *Pennington*, "efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670. Genuine petitioning activity is immune from antitrust liability unless a private actor "use[s] the governmental *process* — as opposed to the *outcome* of the process — to harm competition." *City of Columbia v. Omni Outdoor Adver., Inc.,* 499 U.S. 365, 380 (1991) (emphasis in original). It is plain from the face of the Complaint that the alleged harm to competition asserted by Complaint Counsel arises solely from the outcome of the governmental process and not its use. The Complaint alleges that Unocal "caused CARB to enact regulations that overlapped almost entirely with Unocal's pending patent rights." Compl. ¶ 76. The enactment of the regulations — the *outcome* of the process — is the sole cause of the competitive harm alleged by the Complaint.

The Complaint attempts to bring Unocal's conduct within an exception to the *Noerr-Pennington* doctrine by alleging that Unocal engaged in fraudulent conduct in connection with a *quasi-adjudicative* proceeding. This attempt is unavailing, however, for at least two reasons. As the Commission itself recently argued in an amicus brief to the Supreme Court, "no court of appeals has considered or affirmed an actual judgment awarding damages against a private defendant for competitive injuries inflicted most directly by state action, where that action was procured by the defendant's fraud." Brief for the United States and Federal Trade Commission as Amici Curiae in *Armstrong Surgical Center, Inc. v. Armstrong Cty. Mem'l Hosp.*, No. 99-905 (Filed June 2000) at 15, attached hereto as App. 1.

Moreover, CARB's enactment of rules having the force of law was, as a matter of law, a quasi-legislative action and not a quasi-judicial one. The California Clean Air Act (Cal. Health & Safety Code § 39601(a)), required CARB to enact its rules and regulations "in accordance

with the provisions of Chapter 3.5 (commencing with Section 11340) . . . of the Government Code" and CARB expressly invoked that Chapter in its Notice of Hearing in which it initiated the Phase 2 reformulated gasoline rulemaking. App. 2 at 8. Under California law, that chapter is "applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereinafter enacted . . . ." Cal. Gov't Code § 11346. Moreover, the California Supreme Court has held that CARB's rulemakings are quasi-legislative in nature. *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559 (1995).

Without doubt no fraud exception to *Noerr-Pennington* immunity has ever been recognized in the context of quasi-legislative rulemaking. The Supreme Court has made clear that even "misrepresentations" are "condoned in the political arena" of legislation. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61 n.6 (1993). Indeed, the Commission very recently cautioned against the creation of a fraud exception even in the context of a proceeding that was "in some respects adjudicatory" because the proceeding in question, convened to determine whether to permit the construction of a surgical center by an applicant, "also has aspects that are political in the *Noerr* sense." App. 1 at 19. The Commission argued that the Supreme Court's decisions "counsel caution in fashioning any theory of antitrust liability . . . for competitive injuries caused most directly by state administrative or adjudicatory action . . . ." *Id.* at 16.

Complaint Counsel's conclusory allegation that Unocal is not entitled to *Noerr-Pennington* immunity because its conduct did not constitute "petitioning" (Compl. ¶ 96(b)) is nonsensical on its face. The very essence of the Complaint is that Unocal attempted to persuade CARB to promulgate regulations that served its commercial interests. While the Complaint is flatly wrong in suggesting that Unocal caused CARB to enact regulations that overlapped with

its patents — as evidenced by CARB's own Statement of Basis for Rulemaking, which repeatedly cites Unocal's opposition to the enactment of those regulations — efforts to persuade a governmental body to enact regulations are the very essence of petitioning activity. Indeed, the Supreme Court has held that even influencing a governmental action through bribery — an indisputably reprehensible form of conduct — falls within the *Noerr-Pennington* immunity for petitioning activity. *See City of Columbia v. Omni Outdoor Advert., Inc., supra.*

The Complaint's final attempt to circumvent *Noerr-Pennington* immunity, by alleging that Unocal made misrepresentations to non-governmental groups, is also unavailing. The Complaint nowhere alleges — and cannot allege — that these groups determined the terms of CARB's Phase 2 regulations. Only CARB, as a governmental body, had the power to enact regulations that had the force of law, and any misrepresentations to the private bodies, even if it could be proved, cannot be alleged and is not alleged to have produced the anticompetitive effect alleged by the Complaint.

A. The *Noerr-Pennington* Doctrine Immunizes Genuine Petitioning of the Government from Antitrust Liability Regardless of the Petitioner's Motives or the Effects of the Governmental Action Advocated by the Petitioner

The First Amendment to the Constitution guarantees the right "to petition the Government for a redress of grievances." U.S. Const. Amend. I, cl. 6. Based in part on First Amendment considerations, the Supreme Court has held that the antitrust laws do not reach private petitioning of the government that are genuinely aimed at influencing public officials. In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961), the Court held: "[t]he 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." The Court explained that "[i]n a representative democracy such as this . . . the whole concept of

representation depends upon the ability of the people to make their wishes known to their representatives." *Id.* at 137.[2]

At issue in *Noerr* was a deceptive publicity campaign aimed at the general public and designed to persuade states to pass legislation severely limiting competition from truckers. The Court held that these lobbying efforts were immune from liability under the Sherman Act, notwithstanding the railroads' unethical and deceptive methods and anticompetitive intent. The *Noerr* Court held that the Sherman Act "condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena." 365 U.S. at 140-41. Genuine attempts to influence governmental action, even if directed at securing action that would have an anticompetitive effect, are immune from the antitrust laws. The Sherman Act does not prohibit "an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.* at 136.

The Supreme Court subsequently expanded the reach of the immunity to include petitioning activities aimed not just at the legislative branch, as in *Noerr*, but also petitioning of the executive and judicial branches. In *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Court held that the immunity shields petitioning of the executive branch, holding that "efforts to influence public officials do not violate the antitrust laws even though intended to

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[2] As the Court subsequently explained in *City of Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 379 (1991), "it is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right 'to petition the Government for a redress of grievances,' U.S. Const., Amend. 1, to establish a category of lawful state action that citizens are not permitted to urge."

eliminate competition." *Id.* at 670. In *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court held that the immunity also applies to efforts to influence the judicial branch and administrative agencies. In holding that the right to petition extends to all departments of the government, the Court stated that "[t]he same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." *Id.* at 510.

In subsequent decisions, the Supreme Court has repeatedly emphasized that the *Noerr-Pennington* doctrine immunizes anticompetitive attempts to influence governmental action so long as the anticompetitive outcome is the result of governmental action. For example, in *Allied Tube,* the Court said that "'[w]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (quoting *Noerr*, 365 U.S. at 136). Similarly in *City of Columbia,* the Court held that petitioning of governmental institutions is immune from antitrust liability unless a private actor uses the governmental process itself — "as opposed to the *outcome* of the process — as an anticompetitive weapon." *City of Columbia,* 499 U.S. at 380 (emphasis in original). As the Commission summarized the *City of Columbia* decision, "[s]o long as a private party's actions are 'genuinely aimed at procuring favorable government action,' they come within the rationale of *Noerr*, even if the party employs 'improper means' to that end." App. 1 at 11 (quoting *City of Columbia*, 499 U.S. at 380).

Although the *Noerr* decision was based on an interpretation of the Sherman Act, both the Commission and the Supreme Court have applied the *Noerr-Pennington* doctrine to cases arising

under the Federal Trade Commission Act. The Supreme Court and the Commission have consistently interpreted the doctrine as a bar to liability where the competitive harm at issue reflects the outcome of a governmental process. For example, in *FTC v. Superior Court Trial Lawyer's Ass'n*, 493 U.S. 411 (1990), the Supreme Court applied the *Noerr-Pennington* doctrine to conduct challenged by the Commission under the FTC Act but rejected its applicability because the harm at issue arose from the use of the governmental process and not its outcome. The Court stated: "[I]n 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." *Id.* at 424-25. In its decision below in that case, the Commission had rejected the immunity on the same basis, holding that the case "differ[ed] from *Noerr* and *Pennington*" because the respondents "did not merely solicit governmental action or attempt to influence the decisions of public officials through meetings or a publicity campaign." *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 590 (1984). The Commission did not dispute the fact that the immunity would have applied had the competitive harm been a consequence of the governmental action sought by the respondents in that case. *See also Michigan State Medical Soc'y*, 101 F.T.C 191 (1983) (rejecting application of *Noerr* to the facts but assuming its applicability to FTC Act); *Rodgers v. FTC*, 492 F.2d 228, 228-29 (9th Cir. 1974) (Commission arguing that *Noerr* doctrine is applicable to FTC Act).

Notably, the factual allegations of the Complaint make it clear that the alleged competitive harm that forms the basis for this case is the outcome of the governmental process—CARB's quasi-legislative promulgation of its Phase 2 reformulated gasoline regulations. The Complaint expressly alleges that Unocal's actions caused CARB to "enact regulations" that produced the allegedly anticompetitive result. Compl. ¶ 76. The Complaint's allegations make

it clear that Unocal "merely solicit[ed] governmental action or attempt[ed] to influence the decisions of public officials through meetings," the very conduct that is entitled to *Noerr-Pennington* immunity under the Commission's holding in *Superior Court Trial Lawyers Ass'n.* 107 F.T.C. at 590.

B. CARB Exercised Quasi-Legislative Authority in Enacting the Phase 2 RFG Regulations.

The Complaint alleges in paragraph 96 that Unocal's participation in CARB's development of the Phase 2 RFG regulations is not protected under the *Noerr-Pennington* doctrine because, among other things, Unocal's alleged misrepresentations "were made in the course of *quasi-adjudicative* rulemaking proceedings." Compl. at ¶ 96 (emphasis added). This mischaracterization of CARB's rulemaking process — which is directly contradicted by CARB's judicially noticeable invocation of a quasi-legislative process in its Notice of Public Hearing through which CARB initiated the rulemaking[3] — is intended to bring this case within case law interpreting the *Noerr*-Pennington doctrine in the adjudicative context.[4]

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[3] The Notice of Public Hearing, as an official government document commencing a rulemaking, is judicially noticeable in this proceeding. *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) ("Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper"); *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1197 (3d Cir. 1993) (courts may take judicial notice of published records and reports of administrative agencies in context of motion to dismiss) (citing *Mack v. South Bay Beer Distrib.,* 798 F.2d 1279, 1282 (9th Cir. 1986)); *Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.*, 129 F. Supp. 2d 578, 581 (W.D.N.Y. 2000) (on a motion to dismiss courts may consider documents attached or incorporated into the complaint as well as matters of which judicial notice may be taken).

[4] The Complaint's allegations that CARB's process was quasi-adjudicative are not determinative in the context of a motion to dismiss. *See Silver v. H&R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997) (court need not accord the presumption of truthfulness to any legal conclusions, opinions or deductions, even if they are couched as factual allegations); *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990) (the court "does not, however, blindly

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The Complaint adopts this tactic because it is clear that no conduct of Unocal in the quasi-legislative arena can give rise to antitrust liability so long as the competitive harm at issue flows from the governmental action of rulemaking. The Supreme Court has made clear that even "misrepresentations" are "condoned in the political arena" of legislation. *Prof'l Real Estate Investors,* 508 U.S. at 61 n.6 (quoting *Cal. Motor Transp.*, 404 U.S. at 512-13).

A large body of case law in the lower courts also holds that there can be no antitrust liability even for misrepresentations in the context of legislative-type activities where the harm is attributable to governmental action. *See, e.g., Armstrong Surgical Center v. Armstrong Cty. Mem'l Hosp.*, 185 F.3d 154, 166 (3d Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000); *Boone v. Redev. Agency of the City San Jose*, 841 F.2d 886, 896 (9th Cir. 1988) (no liability for fraudulent conduct before administrative agency because "the agency and council were carrying out essentially legislative tasks"); *First Am. Title Co. v. South Dakota Land Title Ass'n*, 714 F.2d 1439, 1447 (8th Cir. 1983) (no liability for misrepresentations in the context of legislative lobbying); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 228 (7th Cir. 1975) (no liability for misrepresentations to city council); *Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp*. 192 F. Supp. 2d 519, 536 (M.D. La. 2001) (no liability for "misrepresentations and other forms" that are "directed toward lawmakers"); *Aurora Cable Communications, Inc. v. Jones Intercable, Inc.*, 720 F. Supp. 600, 602 (W.D. Mich. 1989) ("misrepresentation in the political arena, as distinct from the judicial arena, is outside the scope of the Sherman Act").

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accept the legal conclusions drawn by the pleader from the facts"); *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1103 (6th Cir. 1995) (the court "need not accept as true legal conclusions or unwarranted factual inferences"); *Bath Petroleum Storage,* 129 F. Supp. 2d at 594 (court may consider documents from the underlying administrative record and need not rely on plaintiff's characterization in the complaint in ruling on a motion to dismiss).

Even in the adjudicative context, it is an open question whether a "fraud" or "misrepresentation" exception to *Noerr* exists. As the Commission recently observed, "no court of appeals has considered or affirmed an actual judgment . . . against a private defendant for competitive injuries inflicted most directly by state action, where that action was allegedly procured by the defendant's fraud." App. 1 at 15. The Supreme Court itself has never held that misrepresentations under any circumstances constitute an exception to *Noerr* immunity. *See Prof'l Real Estate Investors*, 508 U.S. at 61 n.6 ("We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations."). At most, dicta appearing in other Court opinions can be read as allowing for the possibility of a misrepresentation exception to *Noerr* in carefully limited circumstances, involving purely adjudicative processes. Moreover, in *Professional Real Estate Investors*, the Supreme Court held that a party may be held liable for its conduct *in an adjudicative setting* only if its lawsuit is baseless and "conceals 'an attempt to interfere directly with the business relationships of a competitor' through the 'use [of] the governmental *process* — as opposed to the *outcome* of that process — as an anticompetitive weapon.'" *Id.* at 60-61 (emphasis in original, internal citations omitted).

As the Commission's amicus brief in the *Armstrong* case persuasively argued, governmental proceedings that are imbued with policymaking aspects are "political in the *Noerr* sense," even when they also have "adjudicatory" qualities as well. App. 1 at 19. In *Armstrong*, the Commission argued that the proceeding in question, in which a government agency determined whether to allow an applicant to construct a surgical center, was "political in the *Noerr* sense" because the government agency was required "to consider all relevant factors prior to authorizing the construction of additional health care facilities." *Id.* Here, of course, CARB's

rulemaking consisted entirely of policymaking. CARB was not determining the rights or obligations of individual parties by prescribing regulations that have the force of law. Its rulemaking did not have the mixed character that the Commission attributed to the governmental action at issue in *Armstrong*, in supporting the Court of Appeals' holding that allegedly fraudulent representations to the governmental agency were immune under *Noerr*. *See Armstrong Surgical,* 185 F.3d at 166. Complaint Counsel's assertion that CARB's Phase 2 RFG rulemaking process was "quasi-adjudicative" is wrong as a matter of law. As shown below, even accepting the factual allegations of the Complaint as true, CARB engaged in a classic quasi-legislative process in adopting the Phase 2 RFG regulations and relied on statutory authority that expressly applies to quasi-legislative actions.

1. CARB Specifically Invoked Its Quasi-Legislative Authority Under the California Administrative Procedure Act.

The California Clear Air Act required CARB to enact the Phase 2 regulations pursuant to procedures applicable to the exercise of "quasi-legislative power" under the California Administrative Procedure Act, and CARB followed those procedures in promulgating the regulations. The California Clean Air Act required CARB to enact its rules and regulations "in accordance with the provisions of Chapter 3.5 (commencing with Section 11340) . . . of the Government Code, necessary for the proper execution of the powers and duties granted to, and imposed upon [CARB]." Cal. Health & Safety Code § 39601(a). Chapter 3.5, by its terms, is "applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereinafter enacted. . . ." Cal. Gov't Code § 11346. Pursuant to that authority, CARB specifically invoked "Chapter 3.5 (commencing with section 11340) of the Government Code" in its Notice of Public Hearing by which it initiated the rulemaking for the Phase 2 RFG regulations. App. 2 at 8.

It is evident from the face of the Notice of Public Hearing (App. 2) and CARB's Final Statement of Reasons for Rulemaking that the procedures CARB followed were limited to those involved in quasi-legislative rulemaking. As the Complaint alleges in paragraph 26, "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." These are the classic indicia of the rulemaking process, which "resembles the process of statutory enactment" by a legislature. *See* 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.8 (4th ed. 2002).

The quasi-legislative nature of CARB's rulemaking is also clearly visible in other actions that the Complaint alleges that CARB took in connection with the rulemaking. The proposed notice of rulemaking for Phase 2 RFG regulations was preceded by public workshops and numerous *ex parte* contacts with Unocal and other interested parties who stood to be affected by the regulations. Compl. ¶¶ 35-36. This openness to *ex parte* communications is common and unobjectionable in the context of essentially legislative proceedings, such as a rulemaking, but would constitute a severe deprivation of constitutional rights if undertaken in an adjudicative setting. *See, e.g.*, *Sierra Club v. Costle*, 657 F.2d 298, 400-410 (D.C. Cir. 1981).

Conclusive authority on the proper characterization of CARB's rulemakings comes from the California Supreme Court. In *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559 (1995), the state's Supreme Court evaluated CARB's promulgation of another set of environmental regulations, the low emission vehicle/clean fuel regulations. The Court characterized CARB's promulgation of the rules as a "quasi-legislative administrative decision." *Id.* at 565. In denying a writ of mandamus to introduce certain evidence in connection with a review of CARB's rulemaking, the Court said that 'because the Legislature has delegated quasi-legislative

authority to the ARB, excessive judicial interference with the ARB's quasi-legislative actions would conflict with the well-settled principle that the legislative branch is entitled to deference from the courts because of the constitutional separation of powers." *Id.* at 572 (internal citations omitted).

2. CARB's Exercise of Quasi-Legislative Powers to Conduct the Phase 2 RFG Rulemaking Is Consistent With Longstanding Precedent Distinguishing Legislative Rulemaking from Adjudicative Orders

CARB's invocation of quasi-legislative authority in the Phase 2 RFG rulemaking process is also consistent with the fundamental administrative law distinction that separates legislative rulemaking from adjudicative orders. "Rulemaking is the process by which an agency lays down new prescriptions to govern the future conduct of those subject to its authority," while "adjudication is the process by which the agency applies either law or policy, or both, to the facts of a particular case." Bernard Schwartz, *Administrative Law* 211 (3d ed. 1991).[5] The same distinction is well-established in California case law: "The one [adjudication] determines what the law is, and what the rights of the parties are, with reference to transactions already had; the other [rulemaking] prescribes what the law shall be in future cases arising under it." *Wilson v. Hidden Valley Mun. Water Dist.*, 256 Cal. App. 2d 271, 280 (Cal. App. 1967) (quoting *People v. Oakland Board of Education*, 54 Cal. 375, 376 (1880)); *see 20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 275 (1994).

Federal courts which have looked at whether a governmental action is legislative or adjudicative for purposes of determining *Noerr* immunity have relied upon identical

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[5] *See also* 1 Pierce, *Administrative Law Treatise* at § 6.1 ("Both agencies and courts are guided by the distinction between the judicial process and the political process that the Supreme Court drew early in the twentieth century for due process purposes.").

considerations; that is, when the governmental entity is determining *what the law should be for the future* it is acting legislatively, and when the government is looking *to what the rights of the parties are with respect to a specific set of past circumstances*, it is acting in an adjudicative manner. For example, in *Boone v. Redev. Agency of the City of San Jose*, 841 F.2d 886 (9th Cir. 1988), 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. *See also Sessions Tank Liners, Inc. v. Joor Mfg., Inc.,* 827 F.2d 458, 467-68 (9th Cir. 1987), *vacated on other grounds*, 487 U.S. 1213 (1988) (distinguishing between agency actions "administering" law and those "making law"); *St. Joseph's Hospital Inc. v. Hospital Corp. of Am.*, 795 F.2d 948 (11th Cir. 1996) (distinguishing between quasi-judicial and quasi-legislative agency action); *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 296-97 (8th Cir. 1978) (misrepresentations to local aviation department and city council immune); *Aggregate Products, Inc. v. Granite Construction Co.*, 1998 U.S. Dist. LEXIS 21717 (S.D. Cal. 1998) (granting a conditional use permit is adjudicatory because the decisions rests on the application of well-established policies to a specific project).

3. Adherence to the Procedural Requirements of a Rulemaking Does Not Turn a Quasi-Legislative Proceeding Into an Adjudication

Paragraph 26 of the Complaint alleges that CARB's actions were quasi-adjudicative because CARB "adhered to the procedures set forth in the California Administrative Procedures [sic] Act." A substantial body of California law makes clear, however, that the fact that CARB conducted its rulemaking within a procedural framework cannot transform a quasi-legislative action into a quasi-judicial one. *See Rivera v. Div. of Industrial Welfare*, 71 Cal. Rptr. 739, 749 (Cal. App. 1968); *see also Wilson,* 256 Cal. App. 2d at 278 ("The 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 Counsel 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 embodied "certain characteristics common to the judicial process," this fact did "not change the basically quasi-legislative nature of the subject proceedings." *Wilson*, 256 Cal. App. 2d at 279.

Moreover, there is simply no plausible argument that CARB's procedures could be found to comply with the requirements of quasi-adjudicative action. Although CARB is empowered to conduct adjudicative proceedings, it did not invoke the procedures for such proceedings in connection with its Phase 2 rulemaking. 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-judicial powers is subject to the familiar strictures associated with adjudications. In conducting adjudications, CARB is required to appoint neutral hearing officers, is prohibited from engaging *ex parte* communications, must allow for discovery procedures and follow rules of evidence, and must permit the presentation of evidence and cross-examination. CARB never cited or followed any of these quasi-judicial hearing procedures during its development of the Phase 2 RFG regulations. Indeed, if Complaint Counsel's characterization of the Phase 2 RFG rulemaking as "quasi-adjudicative" were in fact correct, CARB would be guilty of a massive deprivation of the constitutional rights of all of the parties to the alleged adjudication. *See Londoner v. Denver*, 210 U.S. 373, 385-86 (1908) (Due Process

Clause requires an adjudicatory hearing for administrative agencies determining the rights of specific parties).

C. Unocal's Involvement in CARB's Phase 2 RFG Rulemaking Was Plainly Petitioning Conduct Protected Under *Noerr.*

The Complaint also attempts to avoid the clear mandate of the *Noerr-Pennington* doctrine by alleging that Unocal's activities before CARB did not constitute petitioning. But the very recitation of Unocal's conduct in the Complaint makes it plain that Unocal was engaged in petitioning conduct. The hallmark of the "petitioning" conduct protected under *Noerr* is communication to persuade governmental decisionmakers to adopt a particular course of action. Taking the Complaint's factual allegations at face value, the only possible conclusion that can be drawn is that Unocal's interaction with CARB during the Phase 2 RFG rulemaking process was at all times intended to persuade CARB to adopt a specific type of regulatory model that Unocal believed would further its interests. The Complaint's conclusory statement in paragraph 96 that Unocal's conduct did not constitute petitioning behavior is wrong as a matter of law.

The Supreme Court in *Noerr* characterized petitioning conduct as "solicitation of governmental action with respect to the passage and enforcement of laws." *Noerr*, 365 U.S. at 138. Even a brief review of the allegations of the Complaint makes it plain that every challenged communication made by Unocal was designed to influence CARB to make the policy decisions Unocal believed were in its best interests. For example:

- Unocal is alleged to have represented to CARB that a "predictive model" would be "cost effective" and "flexible" (Compl. ¶ 2(b));
- Unocal is alleged to have made "statements and comments to CARB and other participants relating to the cost-effectiveness and flexibility of the regulations…" (*id.* ¶ 2(c));

- Unocal is alleged to have "presented to CARB staff the results of its [research] to show CARB that "cost-effective" regulations could be achieved through the adoption of the predictive model and to convince CARB of the importance of T50." (*id.* ¶ 37);

- In correspondence between Unocal and CARB Unocal's research data, Unocal stated that it would remove the confidentiality designation, "if CARB pursues a meaningful dialogue on the predictive model approach to Phase 2 gasoline. . . ." (*id.* ¶ 39).

Even if these allegations are taken as true, the conduct that they depict is the advocacy of a particular policy approach and of certain views regarding cost-effectiveness and flexibility of regulations. The conduct depicted by the Complaint is the classic definition of "petitioning" activity that is entitled to full *Noerr* immunity. It is astonishing that Complaint Counsel would characterize the communication of policy views to government regulators regarding the flexibility or effectiveness of proposed regulations as something other than petitioning when the Supreme Court has held that the petitioning immunity applies even to the bribery of government officials.

The character of Unocal's activities in the Phase 2 RFG rulemaking before CARB is also in sharp contrast with those actions that courts have held not to be petitioning activity in other contexts. For example, courts have held that actions such as mandatory tariff filings or rate filings do not constitute petitioning conduct because the governmental action that is requested by such filings is merely ministerial. *See, e.g.*, *Litton Sys. v. American Tel. & Tel. Co.*, 700 F.2d 785, 807 (2d Cir. 1983) (tariff filing); *In re Buspirone,* 185 F. Supp. 2d 363, 369-70 (S.D.N.Y. 2002) (listing of patent in Orange Book). The actions in each of the above cases were purely informational, unrelated to advocacy of any particular policy, and resulted only ministerial action by the government. Government officials to whom these communications were made lacked the discretion not to allow the filings to go into effect.

In addition, some courts which have focused on whether the challenged conduct is *Noerr*–protected petitioning have looked to whether the communication was designed to influence governmental policy. For example, in *Woods Exploration and Production Co. v. Aluminum Co. of Am.*, 438 F.2d 1286, 1298 (5th Cir. 1971), the court held that the filing of false production reports with the Texas Railroad Commission in order to subvert the proration formula that the Commission used to determine how much natural gas production to allow was not protected petitioning because *Noerr* was aimed at protecting "action designed to influence policy." *Id.*; *see also DeLoach v. Phillip Morris Cos., Inc.*, 2001 U.S. Dist. LEXIS 16909, *44 (M.D.N.C. 2001) (noting that while defendants lobbying efforts aimed at eliminating federal tobacco program would be protected activity, submission of false purchase intentions for purposes of USDA quota setting not subject to *Noerr* immunity because such submissions "in no way involved the policy-making process").

The actions solicited by Unocal's submissions to CARB share none of the characteristics of the ministerial filing cases. Unocal's filings with CARB were all made explicitly in the context of an effort to persuade an agency endowed with broad discretion to accept or reject Unocal's views and which rejected those views. No legitimate argument can be made that Unocal's statement in its letter of August 27, 1991 is simply an informational filing upon which the government acted in a ministerial matter. First, the letter itself contained a request for CARB to consider the course of action advocated by Unocal and expressed an agreement to lift the confidentiality of data in connection with CARB's consideration of this approach. App. 3.[6]

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[6] On a motion to dismiss, a court may consider documents referenced in the Complaint of which the plaintiff had noticed and upon which it relied in bringing the action. *Bath Petroleum Storage, Inc.,* 129 F. Supp. at 581.

Second, the data to which the letter refers needed to be analyzed by CARB staff and its submission did not trigger an automatic action by CARB, unlike the *Buspirone* matter.

Nowhere is it alleged that CARB staff or CARB took any ministerial action based on that statement other than analysis of the data. 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. As is apparent from even a brief perusal of CARB's judicially noticeable Final Statement of Reasons of Rulemaking (App. 4), CARB performed its own studies, and conducted an extensive analysis of the data and arguments presented to it. CARB exercised great discretion in determining what the future laws governing gasoline properties would be. In some cases it outright rejected the studies that were presented to it; in other cases, it relied on some information for one purpose, but rejected the conclusions of that study in another area. In sum, the Complaint's own allegations leave room for no interpretation other than that Unocal's actions were the classic type of petitioning activity protected under *Noerr*.

D. The Complaint Does Not Allege Facts Sufficient to Support the "Sham" Exception to the *Noerr-Pennington* Doctrine

The Complaint does not allege that Unocal engaged in "sham" petitioning. However, its misleading attempt to characterize CARB's procedures as "quasi-adjudicative" might be designed to sweep in the "sham" exception to the *Noerr-Pennington* doctrine. To the extent that this is Complaint Counsel's intent, the Complaint fails to allege the facts upon which the "sham" exception must be founded.

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 only applicable in situations in which persons use the governmental process, as opposed to its outcome, as an anticompetitive weapon. *Prof'l Real Estate Investors*, 508 U.S. at 60-61 (judicial proceedings); *City of Columbia,* 499 U.S. at 380 (1991) (legislative context).

As defined by the Supreme Court, it is apparent that the "sham" exception has no relevance to this proceeding. The Complaint does not contain a single allegation that Unocal attempted to gain monopoly power through the use of CARB's *process* in adopting the Phase 2 RFG regulations. The entire thrust of the Complaint's factual allegations is that Unocal sought to and did influence the outcome of CARB's proceeding. Under these circumstances, the sham exception is simply inapplicable.

E. The *Walker Process* Exception Is Inapplicable

A second narrow exception to *Noerr* immunity has been recognized in contexts involving the enforcement of patent rights obtained through knowing fraud on the Patent and Trademark Office. *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965). In *Walker Process*, the Supreme Court held that "enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present." *Id.* at 174. Although this case does involve Unocal's enforcement of its patent rights, the *Walker Process* exception to *Noerr* has no relevance in this proceeding.

The Complaint does not contain a single allegation that Unocal's patent rights relating to its innovative technologies and formulations of low-emission gasolines were secured through misconduct before the Patent Office. Indeed, the validity of Unocal's patents has been upheld in judicial proceedings, including a decision by the Court of Appeals for the Federal Circuit. *See*

Union Oil Co. v. Atlantic Richfield Co., 34 F. Supp. 2d 1208 (C.D. Cal. 1998), *aff'd,* 208 F.3d 989 (Fed. Cir.)¸ *cert. denied*, 531 U.S. 942 (2000).

Walker Process has not been extended beyond the context of patent examinations. Any attempt to do so in this proceeding should be unavailing. The interaction between a patent applicant and a patent examiner, while neither an adjudication nor a legislative process, has many aspects in common with an adjudication and none on common with a legislative process. Like an adjudication, a patent examination involves the application of existing law, the patent statute, to a set of facts to determine the rights of a particular party. That determination is dependent on specific outcome-determinative facts that are within the control of the applicant. For example, the existence of prior art is an absolute bar to the granting of a patent and the withholding of prior art from the patent examiner is an outcome determinative act. Although there are aspects of the interaction between the patent applicant and patent examiner that are less clear, the causal linkage between an applicant's misconduct and the outcome of the patent examination is often clear. Further, a patent examiner is not empowered to make policy decisions and does not enjoy the wide discretion to choose from among numerous available policy choices.

A rulemaking, by contrast, results in the creation of rules having the force of law that apply to everyone as opposed to specific parties. In conducting rulemakings, administrative agencies solicit and receive the views of a wide range interested persons. In the Phase 2 rulemaking, the comments from the various interested persons were so extensive that it took CARB 229 pages of single-spaced text to respond to them. Because of the wide discretion that a legislative body possesses, and the myriad influences that are brought to bear on it, it is impossible for any court to draw a causal link between "improper" petitioning activity and an

anticompetitive outcome. As the Supreme Court observed in *City of Columbia*, even unlawful conduct undertaken in connection with a legislative action "has no necessary relationship to whether the governmental action is in the public interest." 499 U.S. at 396.

Further, even the wrongfulness of a petitioning activity or the action of a government official does not as a matter of law establish whether the governmental action would have been taken even absent the wrongful action: "A mayor is guilty of accepting a bribe even if he would and should have taken, in the public interest, the same action for which the bribe was paid." *Id.* at 378. The problem of determining the basis for official action cannot be solved by examining in an antitrust action "not whether the action was in the public interest, but whether the officials involved thought it to be so. This would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *Id.* at 377. Accordingly, the Court rejected "any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns . . . ." *Id.* at 379. Moreover, "[t]he 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.

The Complaint's allegations regarding CARB's rulemaking process, as well as CARB's Statement of Reasons for Rulemaking, make it clear that numerous parties, all with unique and often competing viewpoints, engaged in petitioning and advocacy activities in connection with the adoption of the Phase 2 RFG regulations. The wide diversity of viewpoints that were communicated to CARB is evident from CARB's judicially noticeable Statement of Reasons for Rulemaking, which is attached as Appendix 3. CARB relied on information obtained from many

sources as well as information that it generated on its own during the Phase 2 RFG rulemaking, and independently assessed information gathered from all participants in the regulatory process. Antitrust theories requiring an *ex post* review to determine the "real" motivations underlying state action raise virtually insurmountable causation issues, pose serious federalism concerns, and carry the potential to chill the exercise of important First Amendment rights. Those concerns were not implicated by *Walker Process*, involving private action to enforce patent rights, but are directly implicated by the theory proposed in the Complaint.

F. Complaint Counsel Cannot Avoid Unocal's Entitlement to *Noerr-Pennington* Immunity by Alleging Misrepresentations to Private Organizations

The Complaint also attempts to avoid the application of the *Noerr-Pennington* doctrine by alleging that Unocal made misrepresentations to two private bodies, Auto/Oil Air Quality Improvement Research Program ("Auto/Oil") and the Western States Petroleum Association ("WSPA"). Compl. ¶ 96. This effort to avoid the *Noerr-Pennington* doctrine is unavailing because the injury alleged by the Complaint stems from the governmental adoption of the Phase 2 reformulated gasoline regulations and not from Unocal's inducement of those organizations. The Complaint's suggestion that Unocal somehow duped these organizations to support regulations that overlapped with Unocal's regulations (Compl. ¶ 90) is not only contrary to CARB's judicially-noticeable Statement of Reasons for Rulemaking but represents an astounding attempt to extend the law to encompass one private party's inducement of another party to petition the government.[7] Since the harm resulting from that inducement is the

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[7] Contrary to the allegations of paragraph 90 of the Complaint, CARB's Statement of Reasons for Rulemaking makes it clear that WSPA, like Unocal, opposed the adoption of CARB's Phase II RFG regulations. *See, e.g.,* App. 4 at 19 (WSPA objecting that "[s]ufficient

[Footnote continued on next page]

governmental enactment of a regulation that produces an anticompetitive effect, the ordinary principle that anticompetitive effects resulting from the *outcome* of a governmental process are outside the reach of the antitrust laws still applies.

Misrepresentations to others as a means of influencing the government's passage of laws fall well within the bounds of *Noerr-Pennington*. In *Noerr* itself, the challenged conduct was a deceptive publicity campaign aimed at third parties. 365 U.S. at 130. And in *Allied Tube*, the Supreme Court affirmed 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." 486 U.S. at 503;[8] *see also Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1092 (9th Cir. 2000) (*Noerr* applicable to defendants' efforts to write letters to residents and to encourage the local press to print articles); *Livingston Downs Racing Ass'n, Inc.*, 192 F. Supp. 2d at 531-32 (rejecting argument that efforts to influence the public, rather than government officials, took the challenged conduct outside *Noerr* because

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[Footnote continued from previous page]
data do not exist to justify the staff's regulatory proposal" and that "the regulations offer little or no benefit"; 20 (WSPA objecting to "cap standards" as an "encumbrance"; 22 (same). While the Auto/Oil group did not submit its views to CARB as a group, with the exception of Arco, its refiner members, like WSPA's members, opposed the proposed regulations. *See, e.g., id*. at 26 (Texaco opposing RVP specification); 27 (Chevron opposing RVP specification); 29 (Chevron opposing olefins specification); 40 (Mobil opposing T90 specification); 41 (Chevron and Unocal opposing T50 specification that Complaint cites as the primary basis for infringement of Unocal's patents).

[8] Although the Court in *Allied Tube* held that *Noerr* immunity did not apply to the defendants' efforts to "pack" a meeting of a private meeting of a standard setting body, the Court noted several significant limitations to its decision: First, no liability was imposed were awarded for injuries stemming from the adoption of the Code by governmental entities. And second, the Court stated that its holding was expressly limited to cases where an "economically interested party exercises *decisionmaking* authority in formulating a product standard for a private association that comprises market participants." *Id.* at 511, n.13 (emphasis in original).

"[s]uch indirect efforts to influence government officials are undeniably protected by *Noerr-Pennington*").

Here, the claimed harm arising from the alleged omissions to third parties is the same as it is for the alleged omission to CARB. In each instance, it is the overlap between Unocal's patent rights and CARB's regulations that the Complaint claims as the cause the competitive harm. The Complaint has alleged nothing more than that Unocal's failure to tell CARB or others of its patent application improperly influenced CARB to adopt its Phase 2 regulations. Unocal's alleged efforts to influence the government, both direct and indirect, are protected conduct and thus not subject to liability under Section 5 of the FTC Act.

G. Unocal's Successful Enforcement of its Patent Is Protected under *Noerr*

Finally, Complaint Counsel alleges that Unocal's enforcement of its intellectual property rights constitutes "substantial competitive harm" (paragraph 95) because of the alleged overlap between Unocal's patent rights and CARB's regulations. But Unocal's successful patent enforcement is a direct result of governmental action by the United States Patent and Trademark Office, which granted Unocal its patent rights, and the federal courts, which have sustained Unocal's enforcement of its '393 patent, holding not only that Unocal prosecuted the patent in "good faith," but also that the patent was valid and infringed and that Unocal was entitled to damages in the amount of 5.75 cents per gallon from infringing refiners. *Union Oil Co. v. Atlantic Richfield Co.*, 34 F. Supp. 2d 1208 (C.D. Cal. 1998), *aff'd*, 208 F.3d 989 (Fed. Cir. 2000). Thus Unocal's valid efforts to gain and enforce its patent rights cannot serve as the basis for an unfair competition action by the FTC.

A patent owner who brings a lawsuit to enforce the statutory right to exclude others from making, using or selling the claimed invention is exempt from the antitrust laws, even if such a

suit has an anticompetitive effect, unless the party claiming the antitrust violation proves either "(1) that the asserted patent was obtained through knowing and willful fraud within the meaning of *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp,* 382 U.S. 172, 177, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965) or (2) that the infringement suit was a mere sham to cover what is actually no more than an attempt to interfere directly with the business relationships of a competitor." *Glass Equip. Dev., Inc. v. Besten, Inc.*, 174 F.3d 1337, 1343 (Fed. Cir. 1999); *see also CSU, LLC v. Xerox Corp.*, 203 F.3d 1322, 1326 (Fed Cir. 2000) (no antitrust violation for patent enforcement efforts where there is no tying of patented product, no *Walker Process* fraud and no sham litigation.)

As a matter of law, neither condition is met here. First, Complaint Counsel cannot show that Unocal obtained its patent rights by knowing and willful fraud; in fact federal courts have already found the just the opposite: that Unocal "acted in good faith during the prosecution" of Unocal's '393 patent. *Union Oil Co.*, 34 F. Supp. 2d at 1217, *aff'd*, 208 F.3d 989, 1001-02 (Fed. Cir. 2000).

Nor can Complaint Counsel show that Unocal's infringement litigation was in any way a "sham" such that it would subject Unocal to antitrust liability. After 49 days of trial and 13 days of deliberation, a jury returned a verdict in favor of Unocal, finding that its patent was both valid and infringed. *Id.* In 2000, the Federal Circuit affirmed the jury's verdict, finding that "substantial evidence amply supports the jury's findings and the trial judge's JMOL ruling." *Union Oil Co.,* 208 F.3d at 997. "A winning lawsuit is by definition a reasonable effort at petitioning for redress." *Prof'l Real Estate Investors*, 508 U.S. at 60 n. 5. Hence, Unocal's successful enforcement of its patent cannot serve as a basis for liability under the FTC Act.

Conclusion

The allegations of the Complaint, if taken as true, do not state a case upon which relief may be granted. It is clear that the conduct that the Complaint challenges is the petitioning of a government agency performing a quasi-legislative function to adopt a particular set of policies based on the advocate's views of flexibility and cost-effectiveness. CARB's judicially noticeable Statement of Reasons for Rulemaking makes it clear that this petitioning activity was unsuccessful because CARB adopted the very policies that Unocal had opposed, including the T50 specification that is central to the Complaint's allegations. But regardless of whether Unocal was successful in its petitioning, it is clear that its petitioning is immune fro antitrust challenge. A large body of Supreme Court precedent establishes that a private party cannot be held liable for the anticompetitive consequences of governmental action that it had procured even when the means used, contrary to Unocal's conduct, are improper.

The Complaint's feeble attempt to characterize a quasi-legislative process in which government enacted rules having the force of law as quasi-adjudicative evinces a recognition of the insurmountable obstacles that the *Noerr-Pennington* doctrine places in Complaint Counsel's way if the rulemaking is taken for what it is. But in the face of the California Clean Air Act's plain mandate to CARB to use quasi-legislative procedures, CARB's invocation of those procedures, and the California Supreme Court's holding that CARB's rulemakings are quasi-legislative, this assertion by Complaint Counsel withers away. And with it an entire case that seeks to rewrite the law as laid down by the Supreme Court collapses.

Dated: March 28, 2003. Respectfully submitted,

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