UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S OPPOSITION TO UNOCAL'S MOTION FOR DISMISSAL OF THE COMPLAINT FOR FAILURE TO MAKE SUFFICIENT ALLEGATIONS THAT RESPONDENT POSSESSES OR DANGEROUSLY THREATENS TO POSSESS MONOPOLY POWER

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Introduction

Respondent Union Oil Company of California's ("Unocal's") motion to dismiss should be denied.

This case is quite simple: Unocal subverted California's regulatory process relating to Reformulated Gasoline ("RFG"). Unocal gave the California Air Resources Board ("CARB"), the gasoline industry and the public what Unocal called "non-proprietary" ideas on how to make cleaner gasoline. Unocal said that its method of making gasoline was in the "public domain" and that its method was more "cost-effective" and "flexible" (Complaint, ¶ 2). None of these statements was true.

After Unocal made sure that CARB adopted regulations that mimicked Unocal's proprietary way to make gasoline, and after the entire industry changed their refineries to make gasoline that way, Unocal announced that it had a patent, and later four more patents, on this supposedly "non-proprietary" gasoline. Now it wants billions of dollars, ultimately from California consumers – money that Unocal has the power to extract because it duped everyone into a position where they have no choice but to make Unocal's proprietary gasoline. Unocal has gone far beyond any lawful exercise of power due to the patents. It is the fraud and trickery that enhanced Unocal's power to lock-in CARB and the entire industry, so that, at this point, it is "infeasible" for the oil industry to avoid these patents (*Id.*, ¶ 92). Thus, Unocal now has the power to raise prices (forcing refiners and ultimately consumers to pay it billions of dollars) and exclude competitors (including anyone from the market who fails to pay). This is the essence of monopolization and unfair trade practices.

Unocal's present motion ignores these allegations and pretends not to understand which "markets" the Complaint asserts. We, of course, are talking about the ones which will generate

income of billions of dollars to Unocal from California consumers. If Unocal really didn't understand what these markets were, it could have filed a motion for a more definite statement under Rule 3.11(c), but Unocal forfeited that right "ten (10) days after service of the complaint," and when it answered the market allegations in the Complaint without raising these arguments.[1] Consequently, since all of Unocal's motion (except for the jurisdiction argument) is based on a claim that information is lacking in the Complaint, Unocal's arguments are waived.

All of Unocal's arguments are baseless in any event. For example, Unocal's entire market-definition argument is based on its unfounded claim that the Complaint does not assert Unocal's market power or any barriers to entry. Yet, Unocal fails to mention that these allegations are made throughout the Complaint in spades. Unocal attacks the allegation of a "technology market" on the claim that this kind of market somehow violates some kind of "bedrock principle of 'reasonable interchangeability.'" (Union Oil Company of California's Motion for Dismissal of the Complaint and Memorandum in Support for Failure to Make Sufficient Allegations That Respondent Possesses or Dangerously Threatens to Possess Monopoly Power (hereinafter, "R. Market Mot." 1)). Yet the Complaint's definition is based upon the government's *Intellectual Property Guidelines* and expressly includes what competition was and is.

Unocal then claims that it cannot control prices or exclude competition in the downstream market for California's summer-time gasoline because it no longer refines

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[1] Unocal filed the present motions on March 28, 2003, more than three weeks after the Complaint was served.

gasoline, and yet the Complaint makes it clear that Unocal will reap hundreds of millions of dollars a year from California consumers in this very market. Unocal is still trying to collect royalties from the time when it was a refiner, and, given its power to exclude, there is a dangerous probability that Unocal could re-enter or control price or output through one or more licensees.

Finally, Unocal claims that the authority to hear cases involving patents is "vested "exclusively in the federal courts," and that the patent statute "deprives the Federal Trade Commission of jurisdiction to make the determinations that arise under the patent laws." (R. Market Mot. 8-12) Yet the statute and cases Unocal cites say no such thing. ***Not even one*** of the cases Unocal cites mentions cases heard by any federal agency, much less the Federal Trade Commission. Indeed, the statute itself only mentions a lack of jurisdiction by "courts of the states" – not of federal agencies. 28 U.S.C. §1338(a).

Unocal fails to point out that the Commission, and other federal agencies (such as the International Trade Commission), have been hearing cases involving patents for decades. Instead, even Unocal is forced to admit, however, that the Commission has "refused to find that Section 1338(a) operated to divest the Commission of jurisdiction." (R. Market Mot. 16) However, Unocal implies that the *American Cyanamid* case, which completely contradicts and rejects Unocal's argument, has been overruled by the Supreme Court in *Christianson v. Colt Ind. Operating Corp.*, 486 U.S. 800 (1988). But, as explained in detail below, neither *Christianson* nor any other case has ever overruled *American Cyanamid*, or even discussed whether it was wrongly decided; rather, that case has been followed as recently as 1999 by Judge Levin in *VISX. In the Matter of VISX, Inc.*, Docket No. 9286, 1999 WL 33577396,

Initial Decision (filed May 27, 1999), available at http://www.ftc.gov/os/1999/06/visxid.pdf, at 109. Accordingly, *American Cyanamid*, which specifically rejected the same jurisdictional argument made by Respondent, is squarely controlling; it explained that nothing in the patent laws prevented it from exercising jurisdiction over the matter, period. The Commission held:

> "[T]he monopoly granted by the patent laws is a clear but narrow exception to our free enterprise system. The thought that monopoly power may be acquired through fraud, unclean hands, inequitableness or bad faith, or any borderline behavior before the Patent Office has manifest connotations of unfairness. Ironic indeed would be the result if this Commission--with power against partial, incipient and various other hybrid monopolies--could not arrest the continuance of an absolute monopoly procured by unfair methods."

American Cyanamid, 63 F.T.C. 1747, 1860 (F.T.C. 1963) ("*American Cyanamid I*"), *vac. on other grounds*, 363 F.2d 757, 771 (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).

Unocal also claims that this Tribunal will have to construe all the claims in its five patents and that this is somehow not allowed under the law. As explained below, Unocal's strained reading of *Christianson* must be rejected since many Commission cases over the years have touched on patent issues. Here, though, the patent-related issues are particularly easy, and the Court in the first litigation seemed to have little trouble construing Unocal's first patent's claims, which are quite similar to the other four RFG patents held by Unocal. In addition, Complaint Counsel is not challenging the validity of the patent. Moreover, Unocal fails to mention that even if construction of patents and patent issues were necessary, Judge Levin did just that in a case a few years ago and rejected the exact same arguments Unocal makes here today. *VISX, Inc.*, Docket No. 9286, Initial Decision at 108 ("*American Cyanamid,* decades ago, confirmed the Commission's jurisdiction to pursue such abuses of the patent system under

Section 5.").

By making this motion to dismiss, Unocal hopes to delay adjudication of its anticompetitive conduct by convincing this Tribunal that it should not hear the evidence supporting the Complaint that the full Commission unanimously issued. A hearing is what the Commission requested, and we respectfully request that your Honor deny Unocal's motion, and send this case on its way to a hearing so that Complaint Counsel can have the opportunity to protect the consumers of California from Unocal's attempt to seize billions of dollars from them through fraudulent, inequitable and bad faith conduct.

I. The Commission Easily Meets the Standard to Withstand a Motion for Dismissal of a Complaint On Market Issues.

This Tribunal has set forth the clear standard for ruling on a Motion to Dismiss: "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 allegations clearly shows that the allegations, if proven, are sufficient to make out a violation of Section 5.... 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." *In the Matter of Schering-Plough Corp., et. al.*, Docket No. 9297, 2001 WL 34039130, Order Denying Motions of Respondents Schering-Plough and Upsher-Smith to Dismiss the Complaint (filed Oct. 31, 2001) at 6 *(citing TK-7 Corp.*, 1989 FTC Lexis 32, *3 (May 3, 1989)). Indeed, as this Tribunal recognized in the *Schering-Plough* case, 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.'" *Id.* at 6 (*citing McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980)). The Supreme Court has stated that in

antitrust cases, "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976) (*quoting Poller v. Columbia Broadcasting*, 368 U.S. 464, 473 (1962)).

What Unocal claims is lacking is clearly punctuated throughout the Complaint. Thus, under the law, there is simply no basis for dismissing this case.

A. The Commission Has Properly Alleged That Unocal Has Monopoly Power in the Relevant Markets.

In its administrative Complaint, the Commission alleged two relevant markets:

> (1) "the technology claimed in patent application No. 07/628,488 (filed on December 13, 1990) and Unocal's issued RFG patents, and any alternative technologies that enable firms to refine, produce, and supply CARB-compliant "summer-time" RFG for sale in California at comparable or lower cost, and comparable or higher effectiveness, without practicing the Unocal technology" (the "Technology Market") (Complaint, ¶ 74); and
>
> (2) "CARB-compliant "summer-time" RFG produced and supplied for sale in California" (the "Downstream Market") (*Id.* ¶ 75).

Unocal's claim that no set of facts would justify a claim under these definitions as a matter of law must fail. Thus, its motion must be rejected.

1. The Complaint Alleges That Interchangeable Products Are In the Technology Market.

Unocal claims that the Complaint does not include in the Technology Market other non-infringing products that have "reasonable interchangeability." (R. Market Mot. 3) Of course, the Complaint does just that. Paragraph 74 of the Complaint includes all non-infringing "alternative technologies that enable firms to refine, produce, and supply CARB-compliant 'summer-time' RFG for sale in California at comparable or lower cost, and comparable or higher effectiveness." (Complaint, ¶ 74) The downstream CARB summer-time gasoline

market includes all gasoline "produced and supplied" for sale in California. (*Id.*, ¶ 75) These definitions could not be more broad. We are talking about gasoline here, and any dispute that Unocal may have with a particular refiner's technology or gasoline -- as to whether it should be included or excluded -- is a matter of proof to be determined at trial, not on a motion to dismiss. It is simply a question of fact as to whether these products should constitute a market or not.

Unocal argues that the Technology Market is somehow deficient because the Commission "purport[s] to exclude technologies that are interchangeable with Unocal's patented technologies but are not as efficient as Unocal's." (R. Market Mot. 4) This statement is a misrepresentation of the allegations in the Complaint.

Contrary to Unocal's claims, the Commission's Complaint explicitly ***includes*** technologies that are more expensive and/or not as efficient as Unocal's patented technology, so long as those technologies are ***comparable***. The Complaint specifically alleges that the Technology Market includes "any alternative technologies that enable firms to refine, produce, and supply CARB-compliant 'summer-time' RFG for sale in California at ***comparable*** or lower cost, and ***comparable*** or higher effectiveness, without practicing the Unocal technology." (Complaint, ¶ 74) (emphasis added) By including all "comparable" technologies, the Commission has alleged all "interchangeable" technologies, the very technologies Unocal accuses the Commission of excluding. Obviously, if a technology could now be used to comply with the California regulations as an effective competitor with Unocal's proprietary technology, that technology could be in the market.

The Commission's Technology Market includes substitutes that constrain monopoly

power, but not substitutes that do not have any constraining effect (*i.e.*, those substitutes that are not comparable). *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469 n.15 (1992) ("Whether considered in the conceptual category of 'market definition' or 'market power,' the ultimate inquiry is the same"– whether substitutes "will significantly restrain power in the relevant market.") As the Supreme Court explained 50 years ago, "For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn...." *Times-Picayune Publ'g Co. v. U.S.*, 345 U.S. 594, 612 n. 31 (1953).

The Complaint's use of the word "comparable" is simply the dictionary meaning of the word. According to the Merriam Webster's Collegiate Dictionary, 10th Edition (1993), comparable means "capable of or suitable for comparison." In other words, ***comparable*** means reasonably substitutable, or interchangeable. The government's *Antitrust Guidelines for the Licensing of Intellectual Property* (hereinafter, the "*IP Guidelines*") also defines "comparably efficient" to mean "two technologies" that "can be used to produce close substitutes at comparable cost." The United States Department of Justice and Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* 10 n.22 (1995), available at http://www.usdoj.gov/atr/public/guidelines/ipguide.pdf. Thus, there is no reason for Unocal to pretend that it does not understand what "comparable" means.

The Complaint's definition of a technology market is entirely consistent with the explanation of what such a market is, as set forth in the *IP Guidelines*:

> "Technology markets consist of the intellectual property that is licensed (the 'licensed technology') and its close substitutes--that is, the technologies or

determined only after a factual inquiry into the 'commercial realities' faced by consumers.'") (citations omitted), *aff'd*, 62 F.3d 69, 72 (2d Cir. 1995) (affirming District Court based on essential facilities theory). Two other decisions cited by Unocal were decided on post-trial briefing, not a motion to dismiss.[3]

In each of Unocal's remaining cases, the court identified a specific broader market or particular products that should have been, but were not, included in the market.[4] Not surprisingly, Unocal fails to identify a broader market or even identify what those logic-defying products that are not comparable but that constrain price may be.

In short, the alleged Technology Market is a classic market right out of the *IP Guidelines* and one that this Commission has used repeatedly.[5] The Technology Market in this Complaint includes the competition for the ways to make CARB RFG. Unocal's technology, however, came with a secret and substantial licensing charge – others did not.

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[3] *In the Matter of Schering-Plough Corp.*, Initial Decision, 2002 WL 1488085 (2002); *U.S. v. E.I. du Pont de Nemours*, 351 U.S. 377, 394-400 (1956).

[4] *Commercial Data Servers, Inc. v. Int'l Bus. Mach. Corp.*, 166 F. Supp.2d 891, 897-898 (S.D.N.Y. 2001) (Plaintiff defined the relevant product market as S/390 compatible mainframes. Defendant argued that other types of computers, such as PCs, workstations and servers were part of the relevant market.); *Hack v. President & Fellows of Yale College*, 16 F. Supp.2d 183, 195 (D.Conn. 1998) *Aff'd* 237 F 3d 81 (2d Cir 2000) (Plaintiffs argued that the relevant market consists only of student housing owned by Yale. Defendants argued that other available housing should be included in the relevant market.); *Adidas America, Inc. v. National Collegiate Athletic Ass'n*, 64 F.Supp.2d 1097 (D.Kan. 1999) (plaintiff alleged that the market was the market for the sale of NCAA Promotional Rights, but failed to include sponsorship agreements with teams or individuals competing in the National Football League, the National Basketball Association, the Women's National Basketball Association, Major League Baseball, Major League Soccer, and the Olympics); *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 437-439 (3d Cir. 1997) (Plaintiffs allege relevant market to be ingredients, supplies, materials and distribution services used in the operation of Domino's stores. Defendants argue that all pizza suppliers are in the relevant market).

[5] Recent Commission cases that have alleged a Technology Market include *In the Matter of Rambus Inc.*, Docket No. 9302 (issued June 18, 2002); *In the Matter of Intel Corp.*, Docket No. 9288 (issued June 8, 1998); and *In the Matter of VISX, Inc.*, Docket No. 9286 (issued Mar. 24, 1998).

2. Unocal has Monopoly Power in the Relevant Market.

Unocal claims that the Complaint is deficient because the Commission does not allege market share or barriers to entry. First, as a matter of law, this is not necessary since the Complaint has alleged that it has market power in both relevant markets. Second, as a matter of fact, Unocal's claim is false: the Complaint alleges both share and barriers.

Contrary to Unocal's assertion, it is not necessary for the Commission to demonstrate that Unocal has a specific market share in order to demonstrate Unocal's monopoly power. The Commission and courts have repeatedly explained that when there is evidence of anticompetitive effects, no other analysis is needed. *FTC v. Libbey, Inc.*, 211 F. Supp.2d 34, 49 (D.D.C. 2002) ("'Proof of actual detrimental effects'" can "'obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'"') (citations omitted). The *Toys "R" Us* case is directly on point. *Toys "R" Us v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000). There, the court rejected the same argument Respondent makes here – even after a trial on the merits – and held:

> "[Respondent] seems to think that anticompetitive effects in a market cannot be shown unless the plaintiff, or here the Commission, first proves that it has a large market share. This, however, has things backwards. As we have explained elsewhere, the share a firm has in a properly defined relevant market is only a way of estimating market power, which is the ultimate consideration."

See also Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1018 (6th Cir. 1999) ("an antitrust plaintiff is not required to rely on indirect evidence of a defendant's monopoly power, such as high market share within a defined market, when there is direct evidence that the defendant has actually set prices or excluded competition."). The Complaint alleges monopoly power specifically.

a. The Commission Has Made Allegations That Constitute Direct Evidence of Monopoly Power.

The Complaint alleges direct evidence of anticompetitive effects and monopoly power. In particular, the Complaint alleges that Unocal's "monopoly power" in that Unocal "vigorously enforced its RFG patent rights through litigation and licensing activities" covering refiners with at least 95% of gasoline capacity in California. (Complaint, ¶¶ 6, 95) Unocal would not have this power but for its fraud on CARB and others. (*Id.*, ¶¶ 5, 92) Unocal's conduct is the "proximate cause" of the consumer harm. (*Id.*, ¶ 95) Unocal successfully enforced the first patent in its family, the '393 patent, against the refiners, and won its patent litigation in both district court and at the court of appeals. (*Id.*, ¶¶ 68-71) In addition, Unocal has successfully licensed its entire patent family to producers of CARB RFG. (*Id.*, ¶ 72)

As the Commission has further alleged, Unocal has market power because "[t]he extensive overlap between the CARB RFG regulations and Unocal's patent claims makes avoidance of the Unocal patent claims technically and/or economically infeasible." (Complaint, ¶ 92) Indeed, "Unocal amended its patent claims in March 1992 to ensure that the patent claims more closely matched the regulations. In some cases, Unocal's patent claims were narrowed to resemble the regulations." (Complaint, ¶ 60) In essence, Unocal now has the California consumer in handcuffs, forcing the consumer to pay the extra toll to Unocal, or drive to some other state for gasoline.

In short, the indicia of market power – (i) the power to forcibly take monopoly rents from over 95% of the industry and hence all California consumers; and (ii) the power to exclude others from the markets, as it is "infeasible" for any refiner to get around the patents – are clearly set forth in the Complaint and will be proved at the hearing.

b. Unocal's Actual Market Shares Are High.

In addition to the direct allegations of market power, the Commission has also made specific allegations regarding indirect indicia of market power. "[T]he existence of [monopoly] power ordinarily may be inferred from the predominant share of the market." *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570 (1966). Contrary to Respondent's contentions, the Commission did allege that Unocal has a market share approaching ***95 percent*** in the Technology Market. The Commission has alleged that "Unocal has enforced, or threatened to enforce, its patents against those refiners that control in excess of 95 percent of the capacity for the manufacture and/or sale of CARB-compliant gasoline in California." (Complaint, ¶ 95) The Commission further alleged, "The extensive overlap between the CARB RFG regulations and the Unocal patent claims makes avoidance of the Unocal patent claims technically and/or economically infeasible." (Complaint, ¶ 92) Taken together, these two allegations indicate that Unocal has a market share in the technology market that will approach 95 percent.

With regard to the attempted monopolization in both the Technology and Downstream Markets, a high market share is not necessary to a finding of a dangerous probability of success. As Hovenkamp has noted, "some attempts to monopolize require the defendant to have significant market power while others do not." Herbert Hovenkamp et. al., FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE §6.5.b.2, at 286 (2d ed. 1999). Indeed, "the market power requirement in attempt cases vary with the conduct alleged to be an attempt. A firm that seeks to create a monopoly by dynamiting its competitors' plants does not need market power – only a saboteur and a match. The same thing generally applies to other kinds of conduct that have been held an attempt to monopolize, such as bad faith

litigation or patent fraud." *Id.*

In this case, the overlap between Unocal's patent claims and the CARB RFG regulations demonstrated by Unocal's success in patent infringement litigation and its licensing activities is more than sufficient to establish the dangerous probability of success. Once CARB promulgated its regulations, Unocal's proprietary rights locked competitors into using Unocal's technology to refine and blend compliant summertime CARB RFG.

c. The Barriers To Enter Both the Technology and Downstream Markets Are Substantial.

Unocal also claims that if the Complaint does not identify "barriers to entry," it should be dismissed. (R. Market Mot. 3-4) Not true for two reasons. ***First***, Unocal miscites the law. ***Second,*** the Complaint alleges significant barriers to entry.

The sole basis for Unocal's claim that a specific "barrier to entry" allegation must be made is *ITT Corp.*, 104 F.T.C. 280, 407 (1984). On pages 3-4 of their Motion, Respondent asserts that the Commission "held" that the "dangerous probability of success element should be evaluated" before "conduct or specific intent" and that the Complaint Counsel must "make a specific allegation regarding a defendant's market share and the existence of barriers to entry 'mandate[s] dismissal' of a complaint." (R. Market Mot. 3-4) ***This statement and quote are nowhere in the ITT case!*** The opinion in *ITT* was not on a motion to dismiss; it was an opinion after a full hearing on the merits. There was no discussion in *ITT* about pleading requirements. Thus, this argument is more than baseless, it is misleading.

In any case, this Complaint alleges substantial barriers to entry. Barriers to entry affect "the potential for competitive entry in the short or medium term." 1 Herbert Hovenkamp et.al., IP AND ANTITRUST ¶10.2b2, at 10-7 (2002). Entry into both of the alleged markets is limited

by the fact that the CARB regulations require the use of specific parameters that are mostly covered by Unocal's patents. As a result, firms seeking to enter either market must account for these regulations in devising blending and refining solutions. The "extensive overlap between the CARB RFG regulations and the Unocal patent claims" means that refiners (and hence consumers) have to pay a toll to Unocal to compete in California. (Complaint, ¶ 92) Thus capacity and incentives to refine gasoline for California have been reduced. (*Id.*, ¶ 8) "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 of non-infringing CARB-compliant gasoline without incurring substantial additional costs." (*Id.*, ¶ 93) Moreover, "CARB cannot now change its RFG regulations sufficiently to provide flexibility for refiners and others to avoid Unocal's patent claims." (*Id.*, ¶ 94)

The cases cited by Unocal for the proposition that a failure to allege market share or barriers to entry mandates dismissal of the claim simply do not say what Unocal claims. For example, in *Crossroads Cogeneration v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129, 141 (3rd Cir. 1998), the Court of Appeals held that the Plaintiff "had failed to allege a relevant market or sufficient monopoly power to state a claim under the Sherman Act." In *Dial A Car, Inc. v. Transp., Inc.*, 82 F.3d 484, 486-488 (D.C. Cir. 1996), the Plaintiff "failed to allege any facts showing that [defendants] have the actual or probable market power necessary to exclude competition generally from the market or to force [Plaintiff] out of the market."[6] Here, the

[6] None of the cases cited by Respondent stand for anything beyond the uncontroversial proposition that where a plaintiff fails to allege any relevant market whatsoever and/or any market power in the alleged market whatsoever, the complaint must fail. *See, e.g, Hennessy Indus., Inc. v. FMC Corp.*, 779 F.2d 402, 405 (7th Cir. 1985)

Commission has clearly alleged direct and indirect evidence of market power and barriers to entry.

d. Unocal Has a Dangerous Probability of Achieving Monopoly Power in the Downstream Market.

Unocal argues that it cannot be found liable for an attempt to monopolize the Downstream Market because it does not presently sell gasoline directly.[7] However, Unocal admits and the Complaint alleges that it was in the refining business (with no plans to get out) when almost all of the fraud occurred. More importantly, hundreds of millions of dollars in monopoly rents from the period when Unocal was a refiner have yet to be collected (Complaint, ¶ 9), and the Complaint seeks to stop Unocal's wrongful collection of these and other monopoly profits from 1996 through 2011. And since its patents allegedly give Unocal the right to exclude all others unless Unocal, in its discretion, chooses to allow those refiners to make Unocal proprietary gasoline, and Unocal intended to reap monopoly profits from their scheme, Count III is validly pleaded. Unocal can exercise the right to control who can enter the market and at what price.

The effects in the downstream market are pled in great detail in the Complaint, including (a) increased costs for all refiners to make and sell summer-time gasoline in

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(Plaintiff made "no allegations as to defendants' market power"); *Brunson Comm., Inc. v. Arbitron, Inc.*, 239 F. Supp.2d 550, 570 (E.D. Penn. 2002) ("Plaintiff has not only failed to allege any facts regarding Arbitron's market share, but also, none of the other factors associated with monopoly power"); *Wojcieszek v. New England Tel. & Tel. Co.*, 977 F. Supp. 527, 528 (D. Mass. 1997) ("Plaintiffs not only have failed to plead monopoly power in any relevant market, but in effect have conceded the absence of any barriers to entry into the market"); *Valet Apartment Servs., Inc. v. Atlanta Journal & Const.*, 865 F. Supp. 828, 832 (N.D. Ga. 1994) ("Here, plaintiffs do not allege any facts that could define the relevant markets or the market shares of participants in those markets that could support an allegation that defendants have a dangerous probability of monopolizing the apartment rental referral industry").

[7] Unocal actually claims that the Complaint alleges "monopolization" of the downstream market. It does not. It only alleges "attempt to monopolize" (Count III) and "unreasonable restraint of trade" under Section 5 (Count V). (R. Market Mot. 17)

California; (b) increases in the price of such gasoline; reductions in "manufacture, output, and supply" of the gasoline; and (c) "decreased incentives" (barriers to entry) for others to make or sell such gasoline. (Complaint, ¶ 8) The ultimate cost to consumers will be huge. Thus, the anticompetitive effects, and hence "market power" in the downstream market are unmistakably set forth in the Complaint.

Prior to 1997, Unocal was a refiner participating in the Downstream Market. In a claim for attempted monopolization, the probability of success is measured at the time the acts occurred. *See U.S. v. American Airlines*, 743 F.2d 1114, 1118 (5th Cir. 1984) (Courts should "examine the probability of success at the time the acts occur"); *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 992 (5th Cir. 1983) ("The time to examine dangerous probability is when the acts occur."). Unocal's attempt to monopolize the technology and downstream markets began in the early 1990s while Unocal participated in CARB RFG proceedings, and has culminated in Unocal's litigation against competing refiners for patent infringement and its efforts to collect license fees on CARB RFG technology. Thus, in the early 1990s when Unocal engaged in the fraudulent conduct that caused CARB to issue regulations that overlapped substantially with Unocal's patents, there clearly was a dangerous probability of success. At this point, Unocal should not be able to reap windfall profits from its consummated attempt to monopolize. Indeed, Unocal is seeking hundreds of millions of dollars in back royalties from the period of time when it was still in the refining business. It thus makes no sense for Unocal to suggest that its conduct at that time is not relevant.

Nevertheless, even if it were necessary for Unocal to perpetuate their monopoly power long past the point of a consummated attempt claim, that is also unquestioned. Monopoly

power is "the power to control market prices or exclude competition." *U.S. v. E.I. duPont de Nemours & Co., Inc.*, 351 U.S. 377, 391 (1956). The central question is: Can Unocal control market prices or exclude competition? According to the Complaint, the answer is unequivocally "yes."

Unocal claims to have five patents that cover the CARB summer-time regulations for gasoline. By definition, these patents "grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States" 35 U.S.C. § 154 (2003). Indeed, patents give Unocal the power to assert that it alone has the sole right to make, use or sell Unocal proprietary gasoline. Thus, it has the power, and has indeed exercised the power – as detailed in the Complaint. *See, e.g.,* (Complaint, ¶ 95) ("Unocal has exercised, and continues to exercise, its market power through business conduct by enforcing its patents through litigation and licensing activities" against "refiners that control in excess of 95 percent of the capacity for the manufacture and/or sale of CARB-compliant gasoline in California."). The ability to control a market through patent licensing is well established. *See IP Guidelines, at* § 3.2.

Unocal claims that "it is impossible for [Unocal] to monopolize a market in which it does not compete" as a refiner. (R. Market Mot. 18) Here, Unocal was a refiner when nearly a billion dollars of its royalties accrued, and it was and continues to compete as the exclusive owner of the rights to make, use or sell the Unocal proprietary gasoline that still dominates the market through Unocal's fraudulent conduct and its licensing program. Under Unocal's theory, no non-manufacturing licensor could ever monopolize a market even if it had the exclusive right to "make, use or sell" (i.e., be a monopolist over) all the products in that market. Such a

result would be nonsense, and Unocal has cited no case that actually holds such.

Moreover, it is possible for a party to have no market share and still be found to possess a dangerous probability of attaining a monopoly. *H.J., Inc. v. Int'l Tel. and Tel.*, 867 F.2d 1531, 1543 (8th Cir. 1989). In *H.J., Inc.*, the defendant had not sold the relevant product for three years. However, after a trial, the jury found that the defendant could have re-entered the market, creating a dangerous probability of attaining monopoly power. Likewise, Unocal could easily re-enter the market by, for example, enjoining all other refiners from making CARB gasoline and purchasing their refineries. Alternatively, Unocal could engage in a joint venture with one or more refiners, while enjoining other refiners from producing. This is one set of facts that Complaint Counsel can prove, and that is all that is needed. *In the Matter of Schering-Plough Corp., et. al.*, Docket No. 9297, Order Denying Motions of Respondents Schering-Plough and Upsher-Smith to Dismiss the Complaint at 6 (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.").

By contrast, where a party has no interest whatsoever in a market and therefore does not participate in that market, there is no dangerous probability of attaining monopoly power. For example, in *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 926 (2d Cir. 1980), the Court found that the defendant "had no anticompetitive motive or intent with respect to the airline industry and is engaged in a different line of commerce from that of air carriers."

This case is not at all like *Official Airline Guides*. Here, the Complaint alleges that Unocal "has exercised, and continues to exercise, its market power through business conduct by enforcing its patents through litigation and licensing activities." (Complaint, ¶ 95) Given

that "the extensive overlap between the CARB RFG regulations and the Unocal patent claims makes avoidance of the Unocal patent claims technically and/or economically infeasible," (Complaint, ¶ 92), Unocal has made itself the exclusive supplier of a required input– the intellectual property associated with gasoline compositions– for the refining and blending of CARB-compliant RFG. Thus, Unocal not only participates in the Downstream Market, it controls it.

e. Unocal Is Wrong To Claim That A Section 5 Claim For Unfair Competition Must Be Identical To A Sherman Act § 2 Claim.

Finally, Respondent claims that Counts IV and V should be dismissed simply because they are the same as the previous counts. Not true. Counts IV and V specifically allege that Unocal "unreasonably restrained trade" and that Unocal's conduct constituted unfair methods of competition" under Section 5 of the FTC Act. Unocal claims that a Section 5 claim cannot be different from a Sherman Act § 2 claim. (R. Market Mot. 19-20) This also is not true.[8]

Section 5 of the FTC Act provides the Federal Trade Commission with the authority to define and proscribe "unfair methods of competition." 15 U.S.C. § 45(a)(1). Accordingly, the Commission may sanction "conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit." *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 136-37 (2d Cir. 1984); *see also In the Matter of General Motors Corp.*,

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[8] Unocal cites to an article by the current Chairman, claiming that this somehow supports its theory that Section 5 has no greater reach than Section 2. (R. Market Mot. 19-20, citing Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 Antitrust L.J. 693, 694 (2000). The Chairman's article has nothing to do with a theory that all Section 5 cases must fall within Sherman Act § 2. To the extent that Unocal contends that there is a requirement to show a causal link between anticompetitive conduct and effects, this is not controversial: Complaint Counsel agrees with the Chairman, who joined the four other Commissioners in unanimously voting to issue this Complaint, and that is why we have alleged and will prove that consumers have and will indeed be harmed here by the conduct at issue. The "causal link" – as the Chairman calls it – has been alleged here repeatedly. (Complaint,¶¶ 1, 5, 7, 8, 9, 10, 80, 91, 92, 93, 94, 95, 97, 98, etc.)

103 F.T.C. 641, 701 (1984) ("[T]he Commission has applied Section 5 to activities that violate the spirit of certain Sherman and Clayton Act sections that were clearly intended to promote competition and deter anticompetitive acts."); *Atlantic Ref. Co. v. FTC*, 381 U.S. 357, 367 (1965) ("The Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many variable and unfair practices which prevail in commerce") (citations omitted).

As for the argument that the Sherman Act somehow limits what the Commission can do under Section 5, the Commission has rejected this argument as well:

> "[S]ince all unfair methods of competition are not necessarily Sherman Act violations, this Commission's *original* jurisdiction is clearly not restricted to these offenses which have been adjudicated to be violations of the Sherman Act. And the Supreme Court has persistently reiterated this theme and resisted all attempts to establish a comprehensive itemized list of unfair methods of competition."

American Cyanamid I, 63 F.T.C. at 1858-1859 (emphasis in original) As Judge Levin recently held in *VISX*, following *American Cyanamid*, "Any lingering doubt about the scope of the Commission's jurisdiction was clarified a few years later when the Supreme Court determined that unfair methods of competition beyond the reach of the antitrust laws may nevertheless violate Section 5." *VISX, Inc.*, Docket No. 9286, Initial Decision at 109 (*citing FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972)) (The FTC, "like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws"); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966) ("broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws").

II. The Commission Has Jurisdiction Over This Case.

Unocal argues that the Commission lacks jurisdiction over this matter because (1) this case "arises under" the patent laws, and (2) 28 U.S.C. § 1338(a) grants exclusive jurisdiction over cases "arising under" the patent laws to federal district courts, even to the exclusion of the Federal Trade Commission. (R. Market Mot. 8-17) Although Unocal's argument need fail on either one of the two points for the Commission to exercise jurisdiction over this matter, Unocal is clearly wrong on both.

A. Construing the Five Patents Does Not Strip the Commission of Jurisdiction.

As explained in section B below, Your Honor should reject Unocal's characterization of this matter as one "arising under" the patent laws. Even if that were not the case, however, the controlling case law, the federal statutes, and sound policy all authorize the Commission to exercise jurisdiction over antitrust matters raising patent issues.

First, the very jurisdictional issue raised by Respondent ***has been considered and decided*** by the Commission, and subsequently affirmed by the Sixth Circuit. *American Cyanamid*, 63 F.T.C. 1747, 1855-57 (F.T.C. 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). 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. The Commission rejected the Respondent's argument that section 1338(a) divested it of jurisdiction over the matter: "That the legitimacy of the actions of Pfizer and Cyanamid before the Patent Office is drawn into question does not, in our opinion, deprive this Commission of jurisdiction to issue

an appropriate cease and desist order *American Cyanamid I*, 63 F.T.C. at 1856. The Commission concluded that "there is nothing within 28 U.S.C. Sec. 1338(a) which would prevent this Commission from investigating unfair methods of competition before the Patent Office." *Id.* at 1857.

The Commission reaffirmed its decision to prosecute unfair trade practices enabled by patents: "[T]he monopoly granted by the patent laws is a clear but narrow exception to our free enterprise system. The thought that monopoly power may be acquired through fraud, unclean hands, inequitableness or bad faith, or any borderline behavior before the Patent Office has manifest connotations of unfairness." *Id.* at 1860. Here, Unocal should be estopped from succeeding in its bad faith solicitation of others to use its standard – purportedly for free – when it actually includes a huge cost. *C.f., Wang Labs., Inc. v. Mitsubishi Elec. America*, No. CV 92 4698 JGD, 1993 WL 645936 at *4-5 (C.D. Cal. Dec. 17, 1993) (Company cannot lure others into using a standard and hide the fact that there is a cost (i.e. a patent royalty) involved); 6 Ernest B. Lipscomb III, WALKER ON PATENTS § 20:16 at 39 (3d ed. 1987 & Supp.1995).

The *Summit/VISX* matter and the Commission's recent proposed consent in *Bristol-Myers Squibb* provide two further examples of cases where the Commission has examined antitrust considerations relating to patent law.[9] Indeed, in *VISX*, Judge Levin rejected the same argument raised by Unocal and then went through an extensive patent construction, validity

[9] *Bristol-Myers Squibb, Co.*, File Nos. 001 0221, 011 0046, and 021 0181 (F.T.C. Mar. 7, 2003) (available at http://www.ftc.gov/os/2003/03/bristolmyerscmp.pdf) (including allegations in the complaint that Respondent "misled the United States Food and Drug Administration ("FDA") about the scope, validity, and enforceability of its patents and abused FDA regulations to block generic entry; breached its duty of candor and good faith before the Patent and Trademark Office ("PTO") while pursuing patent applications purportedly related to the branded BMS products; and filed objectively baseless patent infringement lawsuits in federal court against would-be generic competitors"); *VISX, Inc.*, Docket No. 9286, Initial Decision (finding that VISX had not committed fraud on the patent office by withholding prior art).

and enforceability that Unocal claims this Tribunal should not do. *VISX, Inc.*, Initial Decision at 108-143. If Unocal is correct, then the Commission has been acting *ultra vires* in each of the cases.

A view of the real world clearly indicates that Unocal is simply wrong. For instance, the International Trade Commission routinely decides issues of patent infringement and validity[10] raised by unfair competition claims brought under 19 U.S.C. § 1337.[11] In addition, the Court of Federal Claims, which is not an article III district court, frequently rules on patent matters brought under 28 U.S.C. § 1498.[12] Unocal cites no authority suggesting that these

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[10] Co-counsel for Respondent, Gibson, Dunn & Crutcher, LLP, has itself represented a party in a § 337 patent case before the ITC. *In the Matter of Certain Field Programmable Gate Arrays and Products Containing Same*, USITC Inv. No. 337-TA-441, 2001 WL 1351123 (Oct. 30, 2001). Other cases arising under patent law decided by the ITC include: *In the Matter of Certain Microlithographic Machines and Components Thereof*, USITC Inv. No. 337-TA-468, 2003 WL 1831891 (Jan. 29, 2003) (determining infringement regarding to multiple patents and claims and existence of U.S. industry practicing technologies contained therein); *In the Matter of Certain Sortation Systems, Parts Thereof, and Products Containing Same*, USITC Inv. No. 337-TA-460, 2002 WL 31598012 (Oct. 22, 2002) (finding infringement of patent claims and recommending order barring importation of infringing products); *In the Matter of Certain Abrasive Products Made Using a Process for Making Powder Preforms, and Products Containing Same*, USITC Inv. No. 337-TA-449, 2002 WL 4809868 (Feb. 8, 2002) (finding infringement of patent claims, upholding the validity of the relevant patents, and recommending order barring importation of infringing products).

[11] The International Trade Commission ("ITC") enforces, *inter alia*, § 337 of the Tariff Act of 1930 (19 U.S.C. § 1337 (a)(1)(B)), which forbids "The importation into the United States . . . of articles that . . . infringe a valid and enforceable United States patent . . . or . . . are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent." In addition to undercutting Unocal's contention that the grant of original jurisdiction means exclusive jurisdiction for the federal courts, this specific grant of authority to the ITC undercuts Unocal's policy argument that only federal district courts should make patent law.

[12] *See, e.g., Gargoyles, Inc.v. U.S.*, 37 Fed. Cl. 95, 103-09 (1997) (engaging in elaborate analysis of hypothetical licensing negotiations, including consideration of factors such as the nature and scope of the license, licensor's licensing policy, and value of licensee's use of the invention, to determine a reasonable royalty rate), *aff'd* 113 F.3d 1572 (Fed. Cir. 1997); *Kersavage. v. U.S.*, 36 Fed. Cl. 441, 452-453 (1996) (holding that government did not infringe patent when it began but did not complete constructing potentially infringing structure and "declin[ing] to create an exception to the body of patent law which would create liability for the use of ideas disclosed in a patent or for the partial construction of a patented invention"); *Dow Chem. Co. v. U.S.*, 32 Fed. Cl. 11, 28 (1994) (finding infringement and holding that government's use was not considered "experiments or demonstrations"), *aff'd in part, rev'd in part* 226 F.3d 1334 (Fed. Cir. 2000).

tribunals exercise jurisdiction over patent matters in disregard of the purported general prohibition established in 28 U.S.C. § 1338(a).

Even putting aside the clear precedent and the real world facts, the statute simply does not support Unocal's position. In spite of the fact that Unocal's argument relies heavily on 28 U.S.C. § 1338(a), Unocal never quotes the statute in its entirety. It states:

> "The district courts shall have original jurisdiction of any civil action arising under an Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases."

28 U.S.C. § 1338(a). Unocal argues that this statute requires that every case "arising under an Act of Congress" relating to patents be heard only in federal district court and not by any federal administrative agency, including the Federal Trade Commission. Of course, the plain language of the statute says no such thing. It makes clear that federal district courts do have jurisdiction over cases "arising under" the patent laws, and that state courts do not have jurisdiction over such matters. That result is entirely appropriate given that patent rights are a creature of federal, not state, law. *Bonito Boats, Inc. v. Thunder Crafts Boats, Inc.*, 489 U.S. 141 (1989) (Federal patent law preempted ***state*** intellectual property law of hull design).[13]

However, nothing in the statute deprives federal agencies or other federal adjudicative bodies of jurisdiction over matters that they are otherwise empowered to decide simply because those matters raise patent questions. Indeed, the plain language of the statute states that federal

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[13] Apparently recognizing the controlling nature of *American Cyanamid*, Unocal lamely tries to argue that the *American Cyanamid* case should be overruled because the decision "relied in part on the ability of state courts to exercise jurisdiction over 'incidental or collateral' patent matters." R. Market Mot. 16. However, Unocal fails to mention that the Commission relied primarily on a rejection of the exact same argument Unocal makes here: namely, that Section 1338(a) excludes agency actions. *American Cyanamid I,* 63 F.T.C. at 1856-57.

court jurisdiction is "exclusive of the courts of the states," but it is silent with regard to the jurisdiction of any federal tribunal other than the district court. *See Walters v. Metropolitan Educ. Enter., Inc.*, 519 U.S. 202, 207 (1997) ("In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'") (citation omitted).

Because the statute explicitly prohibits state court jurisdiction over cases "arising under" the patent laws, under basic canons of statutory construction it cannot deprive other bodies, including federal adjudicative tribunals, of jurisdiction through silence. The canon of statutory interpretation of *expressio unius 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. BLACK'S LAW DICTIONARY 521 (5th ed. 1979); *see Christensen v. Harris County*, 529 U.S. 576, 582-84 (2000) (applying the *expressio unius* canon). Moreover, since agencies have been hearing patent cases for decades, one must assume that Congress could have stopped this practice but chose not to.

The complaint alleges that Unocal's actions constitute unfair methods of competition in violation of Section 5 of the FTC Act. (Complaint, ¶¶ 99-103) It is simply beyond debate that the Commission has jurisdiction under Section 5 to pursue enforcement actions against conduct alleged to constitute an unfair method of competition. *Sperry & Hutchinson Corp.*, 405 U.S. at 233. Nothing in any federal statute changes that analysis simply because the conduct involved a patent.

Unocal asserts that the Supreme Court's decision in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988), somehow overruled *American Cyanamid.* But

Christianson says nothing about whether a federal agency or federal tribunal other than a district court may assert jurisdiction over any case involving patents. Nothing close to that issue ever came up in the case.

Unocal is also incorrect when it asserts that because creation of the Federal Circuit "emphasize[s] the primacy of congressional intent to promote adjudication of substantial questions of patent law within the federal courts," section 1338(a) must be read as divesting the Commission of jurisdiction over cases arising under patent law. (R. Market Mot. 16) Unocal points to nothing in the statute or its legislative history creating the Federal Circuit suggesting that it changed the clear meaning of 28 U.S.C. § 1338(a), a statute which significantly predates that court. Moreover, in *Holmes Group, Inc. v. Vornado Air Circulations Sys., Inc.*, 535 U.S. 826 (2002), the Supreme Court recently rejected a similar argument that effectuating Congress' goal of ensuring patent-law uniformity, as demonstrated by its creation of the Federal Circuit, required conferring exclusive jurisdiction on the federal district courts and the Federal Circuit over every case presenting a patent issue. The Court held that a defendant's patent counterclaims do not make a case one "arising under" the patent laws for purposes of vesting a district court with jurisdiction over the case under 28 U.S.C. § 1338(a). As a result, if a plaintiff brings a state law cause of action in state court, that state court will hear any patent counterclaims raised by the defendant. *Id.*

B. The Case At Bar Does Not Arise Under Patent Law.

In any event, this case does not "arise under" patent law, as that term is used in section 1338(a), because, contrary to Unocal's assertions, Complaint Counsel can establish liability without a detailed construction of Unocal's patent claims or resolution of any substantial

question of patent law. Indeed, for purposes of this case, we assume that the patents are valid. We cannot imagine that Unocal will challenge that assumption.[14]

The *Christianson* Court held that section 1338 jurisdiction extended "only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that 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." *Christianson*, 486 U.S. at 809. Here, Section 5, not patent law, created the cause of action. Thus, Christianson's case was one "arising under" patent law only if his right to relief "necessarily depend[ed] on resolution of a substantial question of federal patent law." For example, in *Christianson*, in spite of the fact that the parties agreed that the patent issues were essential to the case as litigated, the court held that the monopolization case did not "arise under" patent law because alternative, non-patent theories might have supported the monopolization claim. *Id.* at 812. Other precedent also makes abundantly clear that a case may occasion a court to address federal patent-law issues without "arising under" patent law and falling within the ambit of section 1338(a). *See Speedco, Inc. v. Estes*, 853 F.2d 909 (Fed.Cir.1988) ("the fact that patent issues are relevant under state contract law to the resolution of a contract dispute 'cannot possibly convert a suit for breach of contract into one 'arising under' the patent laws.'") (quotations omitted). [15]

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[14] This is not a damages case, so Complaint Counsel will never need to nail down infringement to the last decimal place (*e.g.*, 63%, 92%, etc.) – only to show that the level of infringement is sufficient to show market power.

[15] *See also Holmes Group*, 122 S. Ct. at 1895 (holding that even if patent issues are central to the case as litigated, there will be no § 1338 jurisdiction if the complaint did not present claims arising under patent law); *Christianson*, 486 U.S. at 809 ("Thus, a case raising a federal patent-law defense does not, for that reason alone, 'arise under' patent law . . . 'even if both parties admit that the defense is the only question truly at issue in the case'") (citation omitted); *Mulcahey v. Columbia Organic Chem. Co.*, 29 F.3d 148, 153 (4th Cir. 1994);

Like the plaintiff in *Christianson*, Complaint Counsel can establish monopolization without requiring this Tribunal to determine any substantial question of patent law. To take one example, Complaint Counsel could demonstrate monopoly power through the exclusionary effect of fewer than all of the patents where those patents' claim meanings have been established or admitted. One of the five patents (the '393 patent) has been fully litigated. In the course of that litigation, both the district court and the Federal Circuit interpreted the patent's claim terms and definitively established their meaning. Therefore, this Tribunal need not address that issue. Under one theory, Complaint Counsel will be able to establish Unocal's monopoly power simply by relying on the established exclusionary power of the '393 patent.[16] The other patents have similar or identical terms, so that the claim construction similar or identical to the '393 would apply. Thus, at the end of the day, the prior court's decisions on claim construction may govern the entirety of this matter.

There are other types of evidence that can establish market power. For example, "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

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("*Christianson* teaches us that, if a claim is supported not only by a theory establishing federal subject matter jurisdiction but also by an alternative theory which would not establish such jurisdiction, then federal subject matter jurisdiction does not exist."); *Boggild* v. *Kenner Products,* 853 F.2d 465, 468 (6th Cir. 1988) ("Federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not of all questions in which a patent may be the subject matter of the controversy.") (*citing Combs v. Plough, Inc.*, 681 F.2d 469, 470 (6th Cir.1982) (per curiam)); *Ballard Medical Products v. Wright,* 823 F.2d 527, 530-31 (Fed. Cir. 1987) (holding that fact that case involves a patent issue does not create § 1338 jurisdiction); *Consolidated World Houseware, Inc. v. Finkle*, 831 F.2d 261, 265 (Fed. Cir. 1987) (holding that "the mere presence of a patent issue cannot of itself create a cause of action arising under the patent laws.").

[16] Unocal argues facts outside the scope of the Complaint to claim that Complaint Counsel cannot make such an argument. For example, Unocal argues about what its infringement rate was, and states that "Unocal believes that the infringement rate has been substantially reduced since then." (R. Market Mot. 14) At best, Unocal sets up a disputed issue of fact that will not be decided at trial. Moreover, Unocal's its attempts to argue facts outside the allegations of the Complaint are blatantly improper.

of all five RFG patents." (Complaint, ¶ 72) By doing so, Unocal has asserted, and the licensees have agreed, that Unocal's patents allow it to exclude from the marketplace all reformulated gasoline for which the licensees pay royalties. Unocal and the licensees have obviously a common understanding as to the scope of the coverage provided by the entire patent portfolio. Complaint Counsel will be able to demonstrate market power through the understanding of Unocal and its licensees.

Furthermore, if Unocal has admitted, internally or elsewhere, that its patents covered all or virtually all of the compositions that refiners could use to comply with CARB regulations, there would be no need to go any further. Unocal's own public statements about the scope of the patent, including statements made in press releases and to licensees, may also allow the Tribunal to assess monopoly power without a strict construction of the patent, particularly if other refiners concur with Unocal's statements. There are many more "sets of fact" that could be utilized to prove market power short of a claim construction of the five patents, but the point is made– Complaint Counsel has pleaded at least a set of facts to prove market power that do not involve a substantial issue of patent law.

Because none of these theories for establishing monopoly power require this court to resolve any substantial question of patent law, or will cause a conflict with the patent law or public policy, this is not a case "arising under" the patent law.

Conclusion

For the reasons stated above, Complaint Counsel respectfully requests that Unocal's Motion for Dismissal of the Complaint be denied. Nothing raised by Unocal should prevent this case from proceeding to a hearing.

Respectfully Submitted,

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Dated: April 21, 2003

CERTIFICATE OF SERVICE

This is to certify that on April 21, 2003, I caused a copy of Complaint Counsel's Opposition to Unocal's Motion for Dismissal of the Complaint for Failure to Make Sufficient Allegations That Respondent Possesses or Dangerously Threatens to Possess Monopoly Power

to be served to the following persons:

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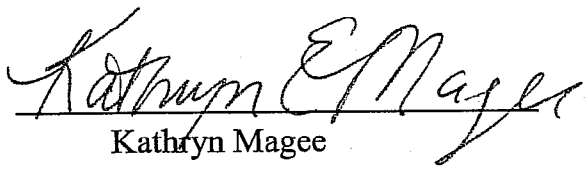

Kathryn Magee