

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'S MOTION FOR LEAVE TO RESPOND  
TO COMPLAINT COUNSEL'S STATEMENT REGARDING UNOCAL'S MOTION**

Pursuant to Commission Rule 3.22(c), the Union Oil Company of California respectfully moves for leave to file the attached memorandum to respond to Complaint Counsel's unfounded accusation that Unocal made up quotations in its Motion for Dismissal of the Complaint for Failure to make Sufficient Allegations That Respondent Possesses or Dangerously Threatens to Possess Monopoly Power. Complaint Counsel's Opposition to that Motion alleges that Unocal made up certain quotations in its Motion. Complaint Counsel's accusation is unfounded.

Although Unocal takes exception to the many other misstatements in Complaint Counsel's Oppositions to its two motions to dismiss the Complaint, the company is prepared to have those motions decided on the papers as filed and does not seek leave to reply to those pleadings. However, because Complaint Counsel impugns the integrity of Unocal's counsel, Unocal seeks leave to correct the false impression that may have been created by Complaint Counsel's statement to Your Honor.

Accordingly, Unocal respectfully asks for leave to file the enclosed Response to Complaint Counsel's Accusation, which is being filed herewith

Dated: April 23, 2003.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: Original Signature On File With Commission

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ATTORNEYS FOR UNION OIL COMPANY OF  
CALIFORNIA

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**UNION OIL COMPANY'S RESPONSE TO COMPLAINT COUNSEL'S  
STATEMENT REGARDING UNOCAL'S MOTION**

In the Opposition to the Union Oil Company of California's Motion for Dismissal of the Complaint for Failure to make Sufficient Allegations That Respondent Possesses or Dangerously Threatens to Possess Monopoly Power, Complaint Counsel accuse Unocal of making up certain quotations. Complaint Counsel Opp. at 15. This accusation is unfounded.

The passages in question in Unocal's Motion reads as follows:

The complaint must then allege sufficient facts that, if proved, can properly give rise to an inference that monopoly power has been acquired or that a dangerous threat exists that it will be acquired. No monopolization or attempted monopolization claim may be established unless Unocal has unlawfully attained or maintained a monopoly or is dangerously threatening to attain one. *Spectrum Sports*, 506 U.S. at 459. In this regard, the complaint must allege "necessary facts as defendant's market share in the markets in which plaintiff is a competitor or that barriers that exist which prevent [other companies] entry into such markets." *Crossroads Cogeneration*, 159 F.3d at 141 (quoting with approval from district court opinion). With respect to attempted monopolization, the Commission has held that the dangerous probability of success element should be evaluated "before proceeding to the other two elements" involving conduct and specific intent. *Int'l Tel. & Tel. Corp.*, 104 F.T.C. 280, 407 (1984).

Conclusory allegations of such power are insufficient. Failure to make specific allegations regarding a defendant's market share and the existence of barriers to entry "mandate[s] dismissal" of a complaint. *Id.* (quoting with approval from district court opinion). See also *Dial A Car, Inc. v. Transportation, Inc.*, 82 F.3d 484, 487-88 (D.C. Cir. 1996) (affirming dismissal of complaint that failed to allege defendant's market share); *Hennessy Indus., Inc. v. FMC Corp.*, 779 F.2d 402, 405 (7th Cir. 1985) (affirming dismissal of complaint that failed to set forth

“facts from which we can infer that defendants had sufficient market power to have been able to create a monopoly”); *Brunson Communications, Inc. v. Arbitron, Inc.*, 239 F. Supp. 2d 550, 570 (E.D. Penn. 2002) (dismissing complaint that failed to allege market share as well as other factors associated with monopoly power); *Wojcieszek v. New England Tel. & Tel. Co.*, 977 F. Supp. 527, 533 (D. Mass. 1997) (dismissing complaint for “fail[ure] to allege defendants’ share of any relevant market”); *Valet Apartment Servs., Inc. v. Atlanta Journal & Const.*, 865 F. Supp. 828, 831-33 (N.D. Ga. 1994) (same).

Unocal Motion at 3-4.

Complaint Counsel’s Opposition misstates the passage quoted above as follows:

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 and specific intent” and that Complaint Counsel must [sic] “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.”

Opp. at 12 (emphasis in original).

Unocal quoted the Commission correctly. It cannot be disputed that Unocal was correct in stating that “the Commission has held that the dangerous probability of success element should be evaluated ‘before proceeding to the other two elements’ involving conduct and specific intent. *Int’l Tel. & Tel. Corp.*, 104 F.T.C. 280, 407 (1984).”

Complaint Counsel’s allegation may be predicated on the fact that the second sentence of the second paragraph quoted above from Unocal’s motion is followed by the citation “*Id.* (quoting with approval from district court opinion).” Although it is possible to attribute that citation to the *Int’l Tel. & Tel.* case because of the inadvertent use of “*Id.*” following the citation to that case, it is obvious from the context that the citation refers to the *Crossroads Cogeneration* case that is cited in the brief immediately before the *Int’l Tel. & Tel.* case. The sentence immediately

preceding the citation to *Int'l Tel. & Tel.* is followed with the citation “*Crossroads Co-generation*, 159 F.3d at 141 (quoting with approval from district court opinion).” The repetition of the phrase “(quoting with approval from district court opinion)” in the second citation made it clear that the language regarding pleading elements came from the *Crossroads Generation* case. Although the “*Id.*” was a typographical error, its accompaniment by the parenthetical reference to the district court’s opinion should have made it clear to Complaint Counsel that this was in fact a typo and not an attempt to attribute to the Commission a statement that it did not make.

Unocal respectfully asks this Court to take note of this correction of the record.

Dated: April 23, 2003.

Respectfully submitted,

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**ORDER GRANTING UNION OIL COMPANY'S  
MOTION FOR LEAVE TO RESPOND TO COMPLAINT COUNSEL'S  
STATEMENT REGARDING UNOCAL'S MOTION**

The Union Oil Company of California ("Unocal") has filed a Motion for Leave to Respond to Complaint Counsel's Statement Regarding Unocal's Motion in which it seeks leave to respond to a statement made by Complaint Counsel in the 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.

IT IS HEREBY ORDERED that the Motion is granted and Unocal's Response to Complaint Counsel's Accusation is accepted for filing.

\_\_\_\_\_  
D. Michael Chappell  
Administrative Law Judge

Dated: \_\_\_\_\_, 2003

## CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2003, I caused a copy of the attached Union Oil Company's Motion For Leave To Respond To Complaint Counsel's Statement Regarding Unocal's Motion to be served upon the following persons :

The Honorable D. Michael Chappell (by hand)  
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Susan M. Dale