

---

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

**UNOCAL’S MOTION FOR IN CAMERA TREATMENT OF DOCUMENTS  
CONTAINING CONFIDENTIAL BUSINESS INFORMATION THAT COMPLAINT  
COUNSEL IDENTIFY AS POTENTIAL HEARING EXHIBITS**

Pursuant to Section 3.45 of the Federal Trade Commission’s Rules of Practice, Respondent Unocal Corporation (“Unocal”) hereby moves for *in camera* treatment of certain documents, or portions of documents, that Complaint Counsel identify as potential hearing exhibits because they contain highly confidential business information of Unocal.

As described more fully below and in the accompanying Declaration of Charles O. Strathman (“Strathman Decl.”), Unocal’s Vice President, Law, each exhibit contains current, highly-sensitive, non-public information that would cause Unocal serious competitive injury if published in this proceeding.

**I. Legal Standard for *In Camera* Treatment**

The documents that are described in this motion warrant *in camera* treatment as provided by Commission Rule 3.45(b), 16 C.F.R. § 3.45(b).

“There is no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible.” H.P. Hood & Sons, Inc., 58 F.T.C. 1184, 1186 (1961). As set forth in General Foods, Commission Rule 3.45(b) properly affords *in camera*

treatment on a clear showing “that the information concerned is sufficiently secret and sufficiently material” to Unocal’s business “that disclosure would result in serious competitive injury.” In re General Foods Corp., 95 F.T.C. 352 (1980), 1980 FTC LEXIS 99, at \*10.

The Commission weighs six factors in determining the secrecy and materiality of documents under Rule 3.45(b):

- 1) the extent to which the information is known outside of respondent’s business;
- 2) the extent to which it is known by employees and other involved in respondent’s business;
- 3) the extent of measures taken by respondent to guard the secrecy of the information;
- 4) the value of the information to respondent and his competitors;
- 5) The amount of effort or money expended by respondent in developing the information; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

In re Bristol-Myers Company, 90 F.T.C. 455, 456-57 (1977).

In addition, “a showing that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved” is also required. Hood, 58 F.T.C. at 1188. Within the context of this legal backdrop, “the courts have generally attempted to protect confidential business information from unnecessary airing.” Id. Moreover, in the event of uncertainty as to whether the documents are entitled to *in camera* treatment, there is precedent that such designation may preliminarily be made, subject to change at a later time. As explained in Bristol-Myers,

the general and fundamental policy favoring government decisions based on publicly available facts may warrant different treatment for similar information depending upon the importance of the information to an understanding of the Commission’s decision making processes. Taking this into consideration, it may be reasonable in some cases, as Commission Rule 3.45(a) allows, for the

law judge to grant *in camera* treatment for information at the time it is offered into evidence subject to a later determination by the law judge or the Commission that public disclosure is required in the interests of facilitating public understanding of their subsequent decisions.

Bristol-Myers Company, 90 F.T.C. at 457. Using these criteria, the Court should afford *in camera* treatment to the documents in question so that Unocal does not needlessly suffer serious competitive injury from their disclosure in this proceeding.

### **BACKGROUND**

The documents that require *in camera* treatment fall into seven general categories: A) Patent Licensing Agreements; B) License Royalty Calculations, Schedules and Strategies; C) Confidential Communications With Licensees and Potential Licensees Including for the Purpose of Settlement; D) Internal Company Policies; E) Financial and Tax Information; F) Documents Related to Unocal/Tosco Sale; and G) Confidential Deposition Testimony.

## **II. The Documents in Question Should be Afforded *In Camera* Treatment**

The documents that are the subject of this motion contain highly sensitive information that Unocal, and its business partners, need to maintain in confidence. For each document at issue, the factors set forth above compel the conclusion that the documents are secret and material within the meaning of the Commission's Rule 3.45(b) analysis. As described below, each document should be afforded *in camera* protection.

### **A. Patent Licensing Agreements**

Exhibits

**REDACTED**

**REDACTED**

These license agreements contain extremely sensitive commercial and financial information pertaining to licensing. Strathman Decl. ¶ 6. Also, because the license agreements contain Unocal's business partner cost information, it would be inappropriate to publish—to all of these licensees' competitors—the royalty costs and royalty structures that they hold with Unocal.

**REDACTED**

Allowing these agreements to become part of the public record will greatly impact the future ability of Unocal to negotiate and enter into licensing agreements. Competitors and potential licensees will be given an unfair advantage by having access to the agreements, reaping the benefits of Unocal's extensive investment in the financial, human and temporal resources to produce and

develop the information. They would be given an unfair advantage in negotiations, essentially destroying the existence of fair arms-length dealings.

**B. License Royalty Calculations, Schedules and Strategies:**

Exhibits 10 - 27 are documents containing confidential License Royalty Calculations, Schedules and Strategies and require *in camera* treatment for at least 11 years—until Unocal’s last patent at issue expires:

**REDACTED**

These documents contain highly sensitive information regarding licensing, but more specifically, price and cost analysis, including Unocal’s internal calculations. Strathman Decl. ¶ 8.

Access to this information is heavily restricted, even within Unocal. Id. Unocal's royalty calculations and schedules are viable today, are currently relied upon and will be relied upon in the future by Unocal in conducting its business. Id. These terms and strategies are commercially sensitive and disclosure would provide an unfair advantage to competitors and potential competitors. Id. Given access to this information, a competitor could exact immediate harm to Unocal in the marketplace because it would know precisely the royalty rates, schedules and strategies Unocal has employed in the past, and is employing currently. Id. Competitors could use this knowledge to exploit Unocal's position. Id. Moreover, the value of information contained in these documents to Unocal is tremendous and would provide an unfair advantage to its competitors who have no right to the internal business dealings, planning and strategies of Unocal. It would be extremely difficult and costly for competitors or the public to replicate or develop this information on their own.

**C. Confidential Communications with Licensees and Potential Licensees Including for the Purpose of Settlement**

Exhibits 28 - 41 are documents containing confidential communications between Unocal and their licensees and potential licensees, including for the purpose of settlement, that require *in camera* treatment for at least eleven years—until Unocal's last patent expires:

**REDACTED**

**REDACTED**

The information contained in these documents includes non-public, confidential correspondence and documents between Unocal and its potential and current licensees including extremely sensitive commercial, financial and trade secret information pertaining to licensing and potential settlement of the Unocal v. Arco litigation. Strathman Decl. ¶ 10. Maintaining the competitive sensitivity and the value of such information is material to Unocal's future success in its licensing efforts. The disclosure of such information would reveal to competitors Unocal's negotiating and marketing strategies with regard to licensing and afford competitors an unfair advantage. For example, because the license agreements contain Unocal's business partner cost information, it would be inappropriate to publish—to all of these licensees' competitors—the royalty costs and royalty structures that they hold with Unocal. Furthermore, it would be extremely difficult and costly for competitors or the public to replicate or develop this information on their own. Unocal never consented to the public disclosure of these documents either in connection to this proceeding or elsewhere. Id. To the extent that any of them have been disclosed to third parties, Unocal has first secured promises of confidentiality. Id.

**D. Internal Company Policies**

Exhibits 42 - 58 are confidential internal company policies that require *in camera* treatment for at least five years:

**REDACTED**

**REDACTED**

These documents are non-public, internal company policies and contain developed business strategies and plans that if revealed, would cause substantial competitive injury to Unocal. They reflect Unocal's business judgments and strategies on many levels. Similar to the licensing documents, significant measures have been taken to guard their confidentiality, and they are kept strictly within Unocal. Strathman Decl. ¶ 12. Unocal never consented to the disclosure of these documents or information to the public either in connection with this proceeding or any other context. Id.

**E. Financial and Tax Information**

Exhibits 59 - 68 are documents containing confidential financial and/or tax information that require *in camera* treatment for at least five years:

**REDACTED**



**REDACTED**

The documents contain financial terms, with respect to, among other things, licensing arrangements. Strathman Decl. ¶ 14. In addition, these documents reveal the negotiating positions and tax strategies of Unocal. Great measures have been taken to protect the confidentiality of the information contained in these documents, as well as the documents themselves. *Id.* Disclosure of such information would create an unfair competitive advantage to Unocal outsiders.

**F. Documents Related to Unocal/Tosco Sale**

Exhibits 69 - 70 are documents related to the Unocal/Tosco sale that require *in camera* treatment for a period of at least five years:

**REDACTED**

These documents contain confidential terms of a purchase agreement between Unocal and Tosco including specific licensing terms. Strathman Aff. ¶ 16. This information is confidential and neither Unocal nor Tosco has disclosed this information to a third party, nor made it available to the public. *Id.* Disclosure of such information would create an unfair competitive advantage to Unocal and Tosco outsiders, and impair Unocal's and Tosco's ability to do business with competitors in the future. *In camera* protection is particularly warranted with respect to the Unocal/Tosco agreements because they have no relevance to the current proceeding against Unocal.

**G. Confidential Deposition Testimony**

Complaint Counsel has also identified witnesses whom they plan on calling by deposition at trial. Unocal has previously designated portions of several depositions as “Restricted Confidential, Attorneys Eyes Only under the Protective Order” in this proceeding and now moves for *in camera* treatment of these designated portions attached as Exhibits 71 - 81 for a period of at least eleven years—until Unocal’s last patent expires:

John Jenkins deposition (July 30, 2003)

pp. 36 - 37

Charles Strathman deposition (April 22, 2003)

Volume 1: pp. 8:17 - 47:10

pp. 48:19 - 103:6

pp. 105:19 - 116:10

pp. 118:6 - 119:13

pp. 121:5 - 184:16

Volume 2: pp. 40:21 - 43:8

Steven Light deposition (April 25, 2003):

pp. 13:5 - 14:16

pp. 25:16 - 26:15

pp. 38: 17 - 21

pp. 46:13 - 52:8

pp. 63:4 - 64:8

Neil Schmale deposition (June 27, 2003):

pp. 6:1 - 2

pp. 77:3 - 78:21

pp. 81:24 - 82:17

Michael Thacher (June 10, 2003):

pp. 84:4 - 91:7

This deposition testimony contains confidential information revealing Unocal's licensing and marketing strategies, calculations of licensing fees and royalty rates, **REDACTED**

**REDACTED** . Strathman Decl. ¶ 18. All of this information has never been voluntarily distributed or otherwise made known outside of Unocal.

**III. Unocal Satisfies the Bristol Myers/Hood Test and Warrants *In Camera* Treatment of its Confidential Documents**

Great measures have been taken to guard the secrecy of every document for which Unocal seeks *in camera* treatment. See Bristol-Myers Company, 90 F.T.C. at 456-57. They are not already a matter of public record. To the extent any of them have been disclosed to third parties, Unocal has done so only upon first procuring assurances of confidentiality. Strathman Decl. ¶ 10. With the exception of the internal business policies, these documents have limited circulation within Unocal. Bristol-Myers Company, 90 F.T.C. at 456-57. Only designated individuals with a "need to know" basis have access to these documents. Strathman Decl. at ¶ 21.

The information is not stale and is still significant today. To the extent that certain information concerning Unocal's internal business policies may be older, it is still used to extrapolate current business operations, strategies and/or decision-making rationale. Similarly, to the extent such documents relate to licensing, such information is certainly still sensitive and worthy of protection today. Kaiser Aluminum & Chemical, 103 F.T.C. at 500 (holding that material that is over five years old is still extremely sensitive and deserving of *in camera* protections because "a serious injury would be done by release of this information, which they have never made available to the public").

Much of the information consists of significant work product that has cost Unocal a tremendous amount of money to develop. Bristol-Myers Company, 90 F.T.C. at 456-57. In addition to financial cost, the time and effort expended to create the information contained in these documents has been significant. The value of the information in each of these documents is extremely high to Unocal, as the documents reflect Unocal's business judgments and strategies on many levels. Strathman Decl. ¶¶ 6, 8, 10, 12, 14, 16, 18.

It would be extremely difficult for Unocal outsiders to replicate or develop this information on their own. It is not available from other sources either, since Unocal has never released this information to a third party without obtaining assurances of confidentiality, and Unocal's licensees and potential licensees have done the same. Bristol-Myers Company, 90 F.T.C. at 456-57.

The public interest would not be served by making these confidential documents a matter of public record. Particularly, the internal policies and business strategies documents fail to bear any relationship to consumers or other members of the public at large. The information would, however, be highly valuable to Unocal's competitors in the marketplace and as a business matter, would significantly prejudice Unocal's legitimate commercial interests. Strathman Decl. ¶¶ 6, 8, 10; see Kaiser Aluminum, 103 F.T.C. at 500 (holding that certain documents warranted *in camera* treatment reasoning that a "public understanding of this proceeding does not depend on access to these data submitted"). Certainly, a public understanding of the proceeding does not depend upon how long Unocal retains its documents or how Unocal employees are expected to use their e-mail systems. Nor does it depend in any way upon Unocal's tax strategies or the details of the Unocal/Tosco sale. None of these documents are relevant to Complaint Counsel's allegations of monopoly power and fraud.

Finally, irreparable injury to Unocal would ensue if the information contained in these documents were disclosed to the public. See Hood, 58 F.T.C. at 1188. As demonstrated above, much of the information would be invaluable to both Unocal's competitors and its licensees and provide them with an improper business advantage. The benefits of Unocal's investment, research and business expertise would be unfairly reaped. Strathman Decl. ¶¶ 6, 8, 10. Public disclosure of these documents would result in injury to Unocal without serving any countervailing public purpose.

#### **IV. Duration of *In Camera* Treatment**

##### **A. Patent License Agreements, License Royalty Calculations, Schedules and Strategies and Confidential Communications with Licensees and Potential Licensees Including for the Purpose of Settlement**

The documents in the following categories require *in camera* treatment for at least 11 years—until the last patent at issue expires: A) Patent License Agreements; B) License Royalty Calculations, Schedules and Strategies; C) Confidential Communications with Licensees and Potential Licensees Including for the Purpose of Settlement; and G) Confidential Deposition Testimony. 16 C.F.R. § 3.45(b)(3); General Foods, 95 F.T.C. at 352 n.4 (1980) (noting that *in camera* treatment may be granted indefinitely or for a period of years). Since Unocal intends to license this technology throughout the life of its relevant patents, the contents of the license agreements and information pertaining to royalties and licensees will remain sensitive for quite some time. A period of 11 years is an appropriate length of time for *in camera* protection for the documents containing confidential information regarding licensing.

Despite the fact “there is a presumption that *in camera* treatment will not be provided to information that is three or more years old,” In re Dura Lube Corp., 1999 FTC LEXIS 255 (1999) (citing General Foods, 95 F.T.C. at 353), the FTC has recognized that this presumption is rebuttable

and, on numerous occasions, granted *in camera* protection to older documents depending on their contents. See In re Coca-Cola Company, 1990 FTC LEXIS 364 (1990) (noting that a three-year standard is sometimes used, but holding that the age of a particular document offers “little guidance” as to whether *in camera* treatment is warranted; instead it is the actual justification for the treatment that matters); Kaiser Aluminum, 103 F.T.C. at 500 (extending protection to information over five years of age related to “sales of specific lines of refractories and related products”); In re E.I. duPont de Nemours & Co., 97 F.T.C. 116 (1981) (protecting 6-year-old “investment, earnings, profit, operative return and cost information” related to the sales).

**B. Internal Business Policies, Financial and Tax Information, Documents Related to the Unocal/Tosco Sale and Confidential Deposition Testimony**

The documents in the following categories require *in camera* treatment for at least five years: D) Internal Business Policies; E) Financial and Tax Information; and F) Documents Related to the Unocal/Tosco Sale. See Coca-Cola Company, 1990 FTC LEXIS at 364 (noting that while the sensitivity of various documents may decrease over time at different rates, it is “sensible to treat all documents consistently” for purposes of *in camera* treatment). Non-disclosure of this information over the next five years will prevent Unocal outsiders from learning about and taking advantage of Unocal’s secret and vital business plans and strategies, as well as some of its most sensitive and important financial data. Certainly, the general public can have little, if any, legitimate interest over the next five years in this information. Moreover, even if there were any public interest here, it would be heavily outweighed by the serious injury Unocal would suffer from disclosure.

## CONCLUSION

For the foregoing reasons, Unocal respectfully requests that the information in the documents listed above be given *in camera* treatment, kept confidential, and not placed on the public record of this proceeding. This information meets the criteria set forth in FTC precedent as qualifying for *in camera* treatment, and therefore, should be accorded such protection. In the event the Commission intends to disclose *in camera* Unocal information in a final decision, Unocal respectfully requests that the Commission notify both David W. Beehler of Robins, Kaplan, Miller & Ciresi, L.L.P., 2800 LaSalle Plaza, 800 LaSalle Avenue, Minneapolis, MN 55402, telephone: 612-349-0802, facsimile: 612-339-4181, and Unocal Vice President, Law, Charles O. Strathman, Unocal Corporation, 2141 Rosecrans, Suite 4058, El Segundo, CA 90245, telephone: 310-726-7763, facsimile: 310-726-7815.

Dated: October 10, 2003.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER, LLP

By: Signature on File with Commission

Joseph Kattan, P.C.

Chris Wood

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036-5306

Phone: 202-55-8500

Fax: 202-530-9558

and

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

Martin R. Lueck  
David W. Beehler  
Sara A. Poulos  
Diane L. Simerson  
Steven E. Uhr  
Bethany D. Krueger  
David E. Oslund

2800 LaSalle Plaza  
800 LaSalle Avenue  
Minneapolis, Minnesota 55402-2015  
Phone: 612-349-8500  
Fax: 612-339-4181

ATTORNEYS FOR UNION OIL COMPANY OF  
CALIFORNIA



---

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

**PROPOSED ORDER**

On October 10, 2003, Respondent Union Oil Company of California (“Unocal”) filed a motion for *in camera* treatment of confidential business information contained in documents that Complaint Counsel identify as potential trial exhibits.

IT IS HEREBY ORDERED that Unocal’s Motion is GRANTED. The information set forth in the following documents (or portions of documents) will be subject to *in camera* treatment under 16 C.F.R. § 3.45 and will be kept confidential and not placed on the public record of this proceeding for the following time periods:

<b><u>Exhibit Number</u></b>	<b><u>Duration</u></b>
CX2018 / RX0779	11 years
CX2019/ RX0780	11 years
CX2017 / RX0778	11 years
CX2013 / RX0776	11 years
CX2011 / RX0773	11 years
CX2009 / RX0774	11 years
CX2014 / RX0777	11 years
CX2012 / RX0775	11 years
CX2020 / RX0781	11 years
CX1271	11 years
CX2193	11 years
CX2194	11 years
CX2195	11 years

<b><u>Exhibit Number</u></b>	<b><u>Duration</u></b>
CX2196	11 years
CX2197	11 years
CX2198	11 years
CX2199	11 years
CX2200	11 years
CX0684	11 years
CX0683	11 years
CX0707	11 years
CX0531	11 years
CX0458	11 years
CX0466	11 years
CX2207	11 years
CX2016	11 years
CX2022	11 years
CX2021	11 years
CX0473	11 years
CX0535	11 years
CX0533	11 years
CX0443	11 years
CX0444	11 years
CX0528	11 years
CX2007	11 years
CX2010	11 years
CX2008	11 years
CX2015	11 years
CX2025	11 years
CX1626	5 years
CX1617	5 years
CX1618	5 years
CX1619	5 years
CX1620	5 years
CX0607	5 years
CX0714	5 years
CX0578	5 years
CX0429	5 years
CX0524	5 years
CX0536	5 years
CX0538	5 years
CX0437	5 years
CX0438	5 years
CX0445	5 years
CX0420	5 years

<u>Exhibit Number</u>	<u>Duration</u>
CX0537	5 years
CX0545	5 years
CX0563	5 years
CX0564	5 years
CX0566	5 years
CX0433	5 years
CX0421	5 years
CX0442	5 years
CX0529	5 years
CX0468	5 years
CX0471	5 years
CX0422	5 years
CX2023	5 years

The following deposition testimony will also be kept confidential and not placed on the public record of this proceeding for 11 years:

John Jenkins Deposition (July 30, 2003):

pp. 36-37

Charles Strathman Deposition (April 22, 2003):

Volume 1: pp. 8:17 - 47:10; pp. 48:19 - 103:6; pp. 105:19 - 116:10; pp. 118:6 - 119:13; pp. 121:5 - 184:16; Volume 2: pp. 40:21 - 43:8

Steven Light Deposition (April 25, 2003):

pp. 13:5 - 14:16; pp. 25:16 - 26:15; p. 38: 17- 21; pp. 46:13 - 52:8; pp. 63:4 - 64:8

Gregory Wirzbicki Deposition (June 4, 2003):

pp. 8:22 - 10:9

Charles Strathman Deposition (June 6, 2003):

pp. 91:22 - 93:9; pp. 94:22 - 96:15; pp. 99:19 - 115:12; pp. 117:10 - 124:2; pp. 130:5 - 132:10; pp. 161:13 - 162:8

Michael Thacher Deposition ( June 10, 2003):

pp. 84:4 - 91:7

Peter Jessup Deposition (June 11, 2003):

pp. 131:7 - 132:17

Dennis Lamb Deposition (June 13, 2003):

p. 7:16-23; p. 22:9-20; p. 23:2-23

William Barry Lane Deposition (June 18, 2003):

p. 49:1-10

Susan Thurman Deposition (June 23, 2003):

pp. 11:19 - 12:13; pp. 18:17 - 19:13; pp. 21:14 - 22:16

Neil Schmale Deposition (June 27, 2003):

p. 6:1-2; pp. 77:3 - 78:21; pp. 81:24 - 82:17

IT IS FURTHER ORDERED that only the respondent, their counsel, authorized Federal Trade Commission (“Commission”) personnel, and court personnel concerned with judicial review may have access to the above-referenced information, provided that I, the Commission, and reviewing courts may disclose such *in camera* information to the extent necessary for the proper disposition of the proceeding.

ORDERED:

Date: \_\_\_\_\_

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