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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

**RESPONDENT’S MOTION FOR SUBPOENAS AD TESTIFICANDUM  
UNDER RULE OF PRACTICE 3.36**

**INTRODUCTION**

Respondent Union Oil Company of California (“Unocal”) brings this motion pursuant to Federal Trade Commission Rule of Practice 3.36, 16 C.F.R. § 3.36, for the issuance of subpoenas requiring the appearance of current and former officials and employees of governmental agencies to testify at the hearing in this matter: James Aguila, James Boyd, Nelson Chan, Kevin Cleary, John Curtis, Robert Fletcher, Michael Kenny, Reza Mahdavi, Jananne Sharpless, Dean Simeroth, Peter Venturini, Catherine Witherspoon and David Balto.<sup>1</sup> Complaint Counsel do not oppose the issuance of subpoenas pursuant to this Motion. Because the testimony sought meets the requirements set out in Rule 3.36, and additionally because the individuals for whom subpoenas are sought all reside in

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<sup>1</sup> Unocal brings this motion as to Jananne Sharpless, John Curtis and David Balto simply out of an abundance of caution as Ms. Sharpless, Mr. Curtis and Mr. Balto are no longer government officials or employees. If it is determined that Rule 3.36 does not apply to Ms. Sharpless, Mr. Curtis, Mr. Balto and/or any other former government official or employee, Unocal respectfully asks that, as to those individuals, this motion be treated as an application for the issuance of subpoenas under Rule 3.34.

the United States, we respectfully ask that the motion be granted and that the subpoenas be issued as requested. An unsigned subpoena for each witness is attached at Exhibit A hereto.<sup>2</sup>

## **BACKGROUND FACTS**

### **I. The Allegations Against Unocal**

In the late 1980's and early-to-mid 1990's, the California Air Resources Board ("CARB") undertook to develop state regulations for cleaner-burning gasoline pursuant to Federal and State mandates. CARB enacted regulations in phases; the regulations at issue in this matter are referred to as the CARB Phase 2 and Phase 3 regulations for reformulated gasoline ("RFG").

Unocal owns United States Patent Nos. 5,288,393; 5,593,567; 5,653,866; 5,837,126; and 6,030,521 related to reformulated gasolines. The Complaint in this matter essentially alleges that Unocal committed fraud on CARB in connection with the development of the Phase 2 regulations in order to create or enhance the market for its patents. *E.g.*, Complaint ¶¶ 2, 4-5, 33-49. According to the Complaint, absent the alleged fraud, CARB would not have enacted the Phase 2 regulations. *Id.*, ¶¶ 5, 45.

The allegations presented by this case were litigated and abandoned by six major oil companies in private litigation against Unocal from 1995 through December 1997. There, the judge in federal district court sanctioned the refiners for pressing the allegations without any evidence. *See Union Oil Co. of Cal. v. Chevron U.S.A. [sic, Atlantic Richfield Co.]*, 34 F. Supp. 2d 1222, 1223-25 (C.D. Cal. 1998). The same claims were also investigated by the Federal Trade Commission (at the

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<sup>2</sup> Unocal reserves the right not to call any witness, including but not limited to witnesses who are brought by deposition. Designations for depositions of Nelson Chan, Reza Mahdavi and Catherine Witherspoon were served on Complaint Counsel, with a copy to the Administrative Law Judge. The parties are discussing the possibility of a joint motion on this issue.

refiners' request) in 1996. *See* Exhibit B, Deposition of David Balto at pp. 10-11, 16, 23-24. After an investigation of the matter, the Commission did not file an action against Unocal. *Id.* at 21. Also in 1996 the litigating refiners attempted to convince CARB to join the lawsuit they had filed against Unocal. Former counsel and executive officer for CARB Michael Kenny asked the then-Governor of California for permission to join the lawsuit in 1996. *See* Exhibit C, Deposition of Michael Kenny at pp. 104-107. The Governor rejected that request and CARB has refused to disclose the reasons for the denial, on the grounds of deliberative process privilege. *Id.*

## **II. The Proposed Witnesses**

James Aguila, James Boyd, Nelson Chan, Kevin Cleary, John Curtis, Robert Fletcher, Michael Kenny, Reza Mahdavi, Jananne Sharpless, Dean Simeroth, Peter Venturini, and Catherine Witherspoon were all employed or contracted by CARB and participated in the development of the CARB Phase 2 and/or Phase 3 regulations. Many interacted with Unocal and/or other refiners, companies and organizations in the regulatory processes.

David Balto is a former employee of the Federal Trade Commission. From April 1995 through the fall of 1997, Mr. Balto was Attorney Advisor to then-Chairman Robert Pitofsky. In 1996, Mr. Balto was personally involved in the Commission's investigation of the same allegations that are asserted against Unocal by Complaint Counsel in this matter.

All of these individuals were deposed in this case (in the United States) and all were/are identified on Unocal's Revised Witness List and Unocal's Final Proposed Witness List. Based on the deposition testimony, the testimony by these individuals at the hearing will tend to show, among other things:

- that Unocal did not commit fraud or any antitrust violations;

- that CARB did not rely on any conduct by Unocal in enacting the Phase 2 regulations;
- that CARB would not have enacted different regulations but for allegedly fraudulent conduct by Unocal;
- that there has been no harm under the antitrust laws because of any conduct by Unocal;
- that the Statute of Limitations bars this matter from proceeding; and
- that the Noerr-Pennington doctrine grants Unocal immunity from Complaint Counsel's claims.

A more specific description of the testimony for each proposed witness is provided at Exhibit D, Respondent's Final Proposed Witness List, at pp. 21-29, 32.

### **ARGUMENT**

Rule 3.36(b) of the Commission Rules of Practice requires the party seeking issuance of a subpoena for the appearance of an official or employee of a governmental agency to make a specific showing regarding the requested subpoena. With respect to subpoenas to be served within the United States, the party must show:

- (1) the material sought is reasonable in scope;
- (2) the material sought is reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent; and
- (3) the information or material sought cannot reasonably be obtained by other means.

16 C.F.R. § 3.36(b). The subpoenas *ad testificandum* sought by Unocal satisfy each of these requirements. Under the Scheduling Order in this matter, the party must also show that the subject for the subpoena is located in the United States. Scheduling Order at 6, ¶ 14.

**I. The Material Sought is Reasonable in Scope.**

All of the CARB witnesses who Unocal would call to testify at the hearing were directly involved in the CARB Phase 2 and/or Phase 3 processes. The testimony sought from these witnesses generally falls into four categories:

- Testimony related to the CARB Phase 2 Regulatory process including but not limited to the origins of interest in regulating the properties ultimately regulated (including T-50), and specifically including the role and influence of ARCO and the analysis of the cost-effectiveness of the regulations;
- Testimony related to CARB's consideration of patents in any regulatory process from 1989 to the present;
- Testimony related to communications regarding Unocal; and
- Testimony related to whether CARB is locked into or constrained in its ability to modify or amend the Phase 2 regulations.

Mr. Balto was involved in the 1996 investigation by the Commission into the same allegations that are asserted here in the Complaint. Mr. Kenny was involved in the 1996 request to the California Governor to join a lawsuit against Unocal based on the same allegations that are asserted here in the Complaint.

**II. The Material Sought is Reasonably Relevant to the Allegations of the Complaint, to the Proposed Relief, or to Unocal's Defenses.**

The testimony sought by Unocal from the proposed CARB witnesses goes directly to certain essential elements of Complaint Counsel's case, including but not limited to: whether Unocal had a duty to disclose the existence of a pending patent application to CARB; whether statements made

by Unocal were true or false; whether CARB justifiably relied on any conduct by Unocal in adopting the Phase 2 regulations for motor gasoline; whether – “[b]ut for Unocal’s fraud – CARB would not have adopted RFG regulations that substantially overlapped with Unocal’s concealed patent claims;” whether CARB is now unable to change its regulations in light of Unocal’s issued patents; whether California refiners are “locked-in” to refinery modifications made to comply with the Phase 2 regulations as adopted; and whether any conduct by Unocal resulted in harm. Complaint ¶¶ 5-6; *see also Hunter v. Up-Right, Inc.*, 26 Cal. Rptr. 2d 8, 13 (Cal. 1993) (*citing* 5 Witkin, Torts § 676) (stating the elements of fraud under California law). The testimony is also directly relevant to Unocal’s Noerr-Pennington and Statute of Limitations defenses.

The testimony sought from Mr. Balto about the earlier investigation of these claims and from Mr. Kenny in which California rejected becoming involved in suing Unocal on these claims bear on the question of when the statute of limitations began to run on these claims and also on the issue of Noerr-Pennington immunity.

Given that the testimony from these witnesses goes so directly to the claims and defenses of this case, the subpoenas for appearance at the hearing should be allowed.

### **III. The Material Sought Cannot be Obtained by Other Means.**

The testimony sought for the hearing cannot be obtained by other means. These are the witnesses who were directly involved in the processes at issue; these are the persons who must speak to the facts.

**IV. All Proposed Witnesses Reside in the United States.**

All of the witnesses for whom Unocal seeks a subpoena *ad testificandum* were deposed in discovery of this matter. All depositions took place in the United States, and all of the witnesses reside and are employed or retired in the United States.

**CONCLUSION**

For the reasons stated, Unocal's Motion should be granted and the subpoenas issued as requested to James Aguila, James Boyd, Nelson Chan, Kevin Cleary, John Curtis, Robert Fletcher, Michael Kenny, Reza Mahdavi, Jananne Sharpless, Dean Simeroth, Peter Venturini, Catherine Witherspoon and David Balto.

Dated: October 29, 2003.

Respectfully submitted,

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

By: Signature on File with Commission

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