PUBLIC

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

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

UNION OIL COMPANY OF CALIFORNIA'S MOTION FOR DISMISSAL OF THE COMPLAINT AND MEMORANDUM IN SUPPORT FOR FAILURE TO MAKE SUFFICIENT ALLEGATIONS THAT RESPONDENT POSSESSES OR DANGEROUSLY THREATENS TO POSSESS MONOPOLY POWER

INTRODUCTION

Pursuant to Rule 3.22(e) of the Commission's Rules of Practice, 16 C.F.R. § 3.22(e), Respondent Union Oil Company of California ("Unocal") respectfully moves for dismissal of the Complaint. The Complaint's recitals that Unocal possesses or threatens to possess monopoly power, which are essential to Complaint Counsel's case, fail to state a claim upon which relief may be granted. The Complaint's allegations are fatally defective because they (1) are based on an improper allegation of a technology market that violates the bedrock principle of "reasonable interchangeability" that must support every market definition, (2) improperly claim that Unocal is monopolizing or attempting to monopolize a goods market that, according to Complaint, Unocal exited several years ago and in which it therefore does not even compete, and (3) fail to allege the possession of a sufficient market share and the existence of barriers to entry in either of the alleged relevant markets to give rise to a monopolization or attempted monopolization claim.

In addition, any determination regarding market shares or competitive effects in the technology market alleged in the Complaint would necessarily require this Court to construe each patent claim limitation included in multiple Unocal patents and determine the existence of infringement of each patent by individual refiners. The authority to make such determinations is vested solely in the federal courts. Accordingly, it is impossible to amend the complaint to state a cause of action that can be adjudicated by this Court.[1]

A. A Complaint for Monopolization or Attempted Monopolization Must Allege a Relevant Market and Sufficient Facts That, If Proved, Would Support an Inference of Monopoly Power or the Dangerous Threat of Its Acquisition

"To state a claim for monopolization, a plaintiff must allege '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.' To state a claim for attempted monopolization, a plaintiff must allege '(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'" *Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, 159 F.3d 129, 141 (3d Cir. 1998) (*quoting Schuylkill Energy Resources v. Pennsylvania Power & Light Co.*, 113 F.3d 405, 412-13 (3d Cir. 1997)); *see also United States v. Grinnell Corp.*, 384 U.S. 563 (1966) (monopolization); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993) (attempted monopolization).

A complaint for monopolization or attempted monopolization must first allege a cognizable relevant market. "Without a definition of that market there is no way to measure [Respondent's] ability to lessen or destroy competition." *Walker Process Equipment, Inc. v.*

[1] Unocal is concurrently filing a motion to dismiss the Complaint based on the application of *Noerr-Pennington* immunity to the conduct alleged in the Complaint.

Food Machinery & Chemical Corp., 382 U.S. 172, 177 (1965). Even if Complaint Counsel can prove that Unocal's truthful representations to the California Air Resources Board were wrongful and not subject to an antitrust immunity, no antitrust claim could proceed against Unocal without an assessment of the exclusionary power of Unocal's reformulated gasoline patents "in terms of the relevant market for the product involved." *Id.* Such an evaluation is necessary to establish the existence of monopoly power because, as the Supreme Court observed in *Walker Process*, "[t]here may be effective substitutes . . . which do not infringe the patent." *Id.* at 178.[2] The market definition must comport with the Supreme Court's holding in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956), which requires the relevant market to include all "products that have reasonable interchangeability."

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).

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[2] In *Walker Process*, the Supreme Court specifically rejected the imposition of liability based upon a fraudulent acquisition of patent rights as an improper attempt to impose per se liability in a monopolization case. *Id.*

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).

B. The Complaint's Technology Market Allegations Are Incurably Deficient

1. The Relevant Market Alleged in Paragraph 74 of the Complaint Is Defective as a Matter of Law

Paragraph 74 of the Complaint pleads an alleged market for "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." By its terms, this alleged market violates the key market definition principle of "reasonable interchangeability" by purporting to exclude technologies that are interchangeable with Unocal's patented technologies but are not as efficient as Unocal's.

A relevant product market consists of "products that have reasonable interchangeability for the purposes for which they are produced – price, use and quantities considered." *E.I. du Pont de Nemours*, 351 U.S. at 404. As Your Honor observed in *Schering-Plough Corp.*, Dkt. No. 9297 (June 27, 2002) (initial decision), the criterion of interchangeability has paramount importance for purposes of market definition: "In defining a relevant product market, courts look to determine if products are 'reasonably interchangeable.' Courts consistently look to reasonable interchangeability as the primary indicator of a product market." *Id.*, slip op. at 87. As the Antitrust Law Developments treatise observes in this regard in its comprehensive review of the case law, "[f]ollowing *du Pont*, courts generally have included products in the same market if they are reasonably interchangeable in use, and have rejected proposed relevant markets that fail to include all products that are reasonably interchangeable in use." American Bar Association, I ANTITRUST LAW DEVELOPMENTS (FIFTH) 534 (2002). *See id*. at 534-36 n.38 (citing cases).

The Complaint's allegations of a technology market in paragraph 74 violate this fundamental principle of market definition by purporting to limit the market to the technologies claimed by Unocal's patents and other technologies that offer a "comparable or lower cost, and comparable or higher effectiveness." This is market gerrymandering at its very worst. It is equivalent to alleging that a loaf of bread that sells for $1.89 is in a different product market from a loaf that sells for $1.99 because the latter bread is not offered at a "comparable or lower cost." Indeed, Your Honor specifically rejected a less egregious attempt to limit the scope of a market based on price differences in *Schering-Plough*. There Your Honor rejected Complaint Counsel's claim that "the proper inquiry to determine the relevant market is not whether the products are functionally interchangeable, but whether the products constrained each other's

prices." *Schering-Plough, supra*, slip op. at 89. Your Honor ruled that "[t]he Commission has not limited the inquiry to whether certain products are sufficiently substitutable that they could constrain each other's prices." *Id.* In this case, the Complaint attempts to exclude from the market all technologies unless they comparable to or superior to Unocal's in both cost and technological effectiveness, regardless of whether they constrain Unocal's pricing.

The Complaint's disregard of the interchangeability principle is fatal. "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 437 (3d Cir. 1997); *see also Commercial Data Servers, Inc. v. Int'l Bus. Mach. Corp.*, 166 F. Supp. 2d 891, 896 (S.D.N.Y 2001) ("[b]ecause a relevant market includes all products which are reasonably interchangeable, a plaintiff's failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal"); *Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n*, 64 F. Supp. 2d 1097, 1103-04 (D. Kan. 1999) (granting judgment on the pleadings for failure to define relevant market in terms of interchangeability and cross-elasticity of demand); *Hack v. President & Fellows of Yale College*, 16 F. Supp. 2d 183, 197 (D. Conn. 1998) (dismissing complaint for failing to "allege all reasonably interchangeable substitutes in the relevant market"); *B.V. Optische Industrie De Oude Delft v. Hologic, Inc.*, 909 F. Supp. 162 (S.D.N.Y. 1995); *Int'l Audiotext Network, Inc. v. AT&T*, 893 F. Supp. 1207, 1213 (S.D.N.Y. 1994). Accordingly, the first and second counts of the Complaint must be dismissed for failure to allege a proper relevant market.

2. The Complaint Fails to Allege Sufficient Facts to Support the Claims That Unocal Has Monopolized or Attempted to Monopolize the Technology Market Alleged in Paragraph 74

The Complaint fails to make any allegations regarding Unocal's share in the purported technology market defined in paragraph 74. Further, the Complaint fails to make any allegation that barriers to entry preclude others from entering the market in competition with Unocal. Both of these deficiencies are fatal to the Complaint and mandate its dismissal. In *Dial A Car, Inc. v. Transp., Inc.*, 82 F.3d 484 (D.C. Cir. 1996), the court affirmed the dismissal of a monopolization complaint because the plaintiff "has failed even to allege any facts demonstrating that the market is capable of being monopolized, what market share of the Corporate Account Service business [appellees] possess, or any facts concerning [appellees'] market positions relative to other market participants." *Id.* at 487 (quoting district court opinion with approval). The Court held that this constituted a failure to "allege any factual basis for a legitimate claim under section 2 of the Sherman Act" that mandated dismissal. *Id*. at 488.

As explained in Part A above, the courts uniformly require complaints for monopolization or attempted monopolization to set forth sufficient facts to establish the defendant's market share and the existence of entry barriers. "Alleging market share alone is not sufficient to state a claim under the Sherman Act. Monopolization or threatened monopolization requires something more, which may include 'the strength of competition, probable development of the industry, the barriers to entry, the nature of the anti-competitive conduct, and the elasticity of consumer demand.'" *Crossroads Cogeneration*, 159 F.3d at 141 (citation omitted). The Complaint here falls far short of meeting this standard in that it does not even allege market share, let alone the nature and strength of the competition, the probable development of the industry, and the existence of barriers to entry, among other relevant factors. The first and second counts must be dismissed for this additional reason.

3. The Complaint's Technology Market Deficiencies Are Incurable Because Any Attempt to Cure Them Would Require the Court to Rule on Matters of Patent Law that Are Subject to the Exclusive Jurisdiction of the Federal Courts

Complaint Counsel cannot amend the Complaint to define a market that includes all technologies that are interchangeable with Unocal's and that alleges that Unocal possesses a sufficient market share and the other market factors needed to state a cause of action. This is because such a case, as the case pleaded by Complaint Counsel, would require this Court to take actions that are beyond its jurisdiction. To determine Unocal's power within a technology market, whether a properly pleaded one or the gerrymandered market alleged in paragraph 74, the Court will necessarily have to construe the dozens of claims of Unocal's five patents relating to reformulated gasoline and determine the rate, if any, at which each refiner that produces gasoline in California infringes these claims. Such decisions are reserved by law to the federal courts.

The market alleged in paragraph 74 is a "technology market," as that term is defined in the ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY issued jointly in 1995 by the Justice Department and the Federal Trade Commission (hereinafter "Intellectual Property Guidelines"), http://www.usdoj.gov/atr/public/guidelines/ipguide.pdf. Paragraph 3.2.2 of the Guidelines states that technology markets "consist of the intellectual property that is licensed (the 'licensed technology') and its close substitutes – that is, the technologies or goods that are close enough substitutes significantly to constrain the exercise of market power with respect to the intellectual property that is licensed."

To determine whether Unocal possesses, or dangerously threatens to possess, monopoly power within a technology market, the Court necessarily must examine all technologies and

goods that compete with Unocal's patented technology.[3] Once these technologies and goods have been identified, Unocal's share of the relevant market must be determined. As a matter of law, a share under at least two-thirds of the market is insufficient to establish monopolization. *See Colorado Interstate Gas Co. v. Natural Gas Pipeline* Co., 885 F.2d 683, 694 n.18 (10th Cir. 1989) ("a minimum market share between 70% and 80%" required); *Holleb & Co. v. Produce Terminal Cold Storage Co*, 532 F.2d 29, 33 (7th Cir. 1976) (60% insufficient); *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362, 394 (M.D.N.C. 2002) ("Seventy to seventy-five percent is generally considered the minimum market share necessary to support a finding of monopoly power.").

Similarly, the "dangerous probability of success" element of an attempted monopolization claim cannot be determined without reference to Unocal's market share, measured at the time of the allegedly anticompetitive conduct. *See Int'l Tel. & Tel. Corp.*, 104 F.T.C. 280, 412 (1984). Market shares below 50% are virtually never sufficient to establish attempted monopolization. *See, e.g., U.S. Anchor Mfg. Co. v. Rule Indus.*, 7 F.3d 986, 1001 (11th Cir. 1993); *Barr Labs. v. Abbott Labs.*, 978 F.2d 98, 122-24 (3d Cir. 1992); *Indiana Grocery v. Super-Valu Stores*, 864 F.2d 1409, 1415 (7th Cir. 1989).

There is no way to determine Unocal's market share without determining the percentage of Phase 2 reformulated gasolines produced or sold in California that infringe Unocal's patent, the alternate technologies used to produce the noninfringing gasolines that account for the

[3] The relevant technology market must include both competing technologies and competing goods. The market must include goods as well as alternative technologies because "the owner of a process for producing a particular good may be constrained in its conduct with respect to that process not only by other processes for making that good, but also by other goods that compete with the downstream good and by the processes used to produce those other goods." Intellectual Property Guidelines ¶ 3.2.2 n.18; *see also id.*, Example 2. The Complaint violates this principle by purporting to exclude downstream goods from the technology market.

remainder of the market, and the substitutability of the alternative technologies (as well as of the noninfringing gasolines themselves) for Unocal's patents. Paragraph 74 of the Complaint includes in the technology market Unocal's patented technology and "alternative technologies that enable firms to refine, produce, and supply CARB 'summer-time' RFG for sale in California . . . without practicing the Unocal technology." By necessity, to determine both Unocal's position in the market and the identity and strength of suppliers of alternative technologies, the Court will have to determine whether the technologies used by refiners to produce California 'summer time' RFG "practic[e] the Unocal technologies." Determining whether a refiner is practicing Unocal's patented technology, in turn, requires the Court to construe each of the dozens of claims in Unocal's reformulated gasoline patents and determine whether each batch of gasoline produced in California's refineries infringes those patents. The power to make those determinations, however, is vested exclusively in the federal courts.

a. Claim Construction and Infringement Determinations May Be Made Solely by the Federal Courts

The Federal Trade Commission possesses jurisdiction over unfair methods of competition. The Commission, however, has no statutory power to decide substantial questions of patent law, and nothing in the statutory grant of authority to the Commission or the legislative history of the Federal Trade Commission Act confers upon the Commission the power to decide substantial questions of patent law. The authority to decide questions of patent law arises solely under 28 U.S.C. § 1338(a), which confers original jurisdiction over patent law questions upon the federal courts. The statute gives federal district courts original jurisdiction over "any civil action arising under any Act of Congress relating to patents," and further provides that "[s]uch jurisdiction shall be exclusive of the courts of the states in patent . . . cases." *Id.* This statute deprives the Federal Trade Commission of jurisdiction to make the determinations that arise

under the patent laws that are essential to the establishment of the technology market claims in this case.

The test for whether a case arises under the patent laws within the meaning of 28 U.S.C. § 1338(a) was set out by the Supreme Court in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988). There the Court held that a case arises under federal patent law when the "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." *Id.* at 808 (emphasis added); *see also Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889, 1894 (2002) (stating same, but holding that patent law question raised in counterclaim does not give rise to "arising under jurisdiction" pursuant to § 1338(a) because doing so would deprive the plaintiff of the ability to choose the forum in which a case is to be heard "by eschewing claims" that implicate the patent laws).

Where claim construction and infringement are required under a claim pleaded in the complaint, original jurisdiction over the complaint belongs in federal district court. *Additive Controls & Measurement Systems, Inc v. Flowdata*, 986 F.2d 476, 478 (Fed. Cir. 1993). In *Additive Controls*, the Court of Appeals for the Federal Circuit explained that even a business disparagement claim can involve substantial questions of patent law since, in that particular case, the falsity of an alleged statement required proof that a product did not infringe a patent. Thus, "Adcon's right to relief necessarily depends upon resolution of a substantial question of patent law, in that proof relating to patent infringement is a necessary element of Adcon's business disparagement claim." *Id.*; *see also Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1329 (Fed. Cir. 1998) (holding "that the questions of federal patent law – validity, and

enforceability – are 'substantial' enough to convey section 1338(a) jurisdiction."); *Scherbatskoy v. Halliburton*, 125 F.3d 288, 291 (5th Cir. 1997) (finding substantial question of patent law where infringement analysis was necessary to determine whether contract had been breached by failure to pay royalties); *Univ. of Minn. v. Glaxo Welcome, Inc.*, 44 F. Supp. 2d 998, 1003-1006 (D. Minn. 1999) (same, but declaratory judgment suit); *Datapoint Corp. v. Vtel Corp.*, 1997 U.S. Dist. LEXIS 5770 at *5 (S.D.N.Y. Apr. 29, 1997) (fraud claim that required resolution of the alleged fraud's impact on patent royalty payments made it "necessary to determine the scope and validity of the underlying patent infringement claims" and thus to "determine substantial questions of patent law"). *Id.*

b. Whether Unocal Possesses or Dangerously Threatens to Possess Monopoly Power in the Alleged Technology Market Cannot Be Determined With Undertaking Claim Construction and Determining Infringement

Determining whether Unocal's possesses or dangerously threatens to possess monopoly power in the technology market alleged by the Complaint will necessarily require the Court to determine Unocal's share of that alleged market. Determining that share, in turn, will necessarily require the Court to determine the extent to which Phase II reformulated gasoline produced or sold in California infringes Unocal's patents. Any analysis of Unocal's alleged monopoly power cannot even begin without determining what proportion of California Phase II "summer time" RFG infringes Unocal's patents. Moreover, it is essential to identify the specific batches of gasoline that infringe Unocal's patents in order to determine whether alternative technologies that are not claimed by Unocal's patents are 'reasonably interchangeable" with the patented technology for purposes of producing those specific gasolines. The inquiry posed by the Complaint's technology market claims mandates determining the amount of "summer-time"

RFG "practicing Unocal technology" and the amount of "summer-time" RFG that is produced without practicing the technology claimed by Unocal's patents or that could be so produced.[4]

Answering these questions thus requires a legal and factual determination of the scope, content and meaning of each claim of all five patents as well as findings of infringement under specific claims. Claim construction and infringement analyses of all five patents is necessary because the market identified in the Complaint includes all "technology claimed in patent application No. 07/628,488." Five separate patents claim priority to that application.[5] It is impossible to determine Unocal's position within the technology market, let alone whether it possesses the requisite shares to establish monopolization or attempted monopolization, without construing each claim of each patent and determining whether each batch of gasoline produced or sold in California during the relevant period infringes any patent claim. This is the only way to determine whether a gasoline is produced in a manner that infringes Unocal's patents or "without practicing the Unocal technology."

Only one of Unocal's five RFG patents, known as the '393 patent, had been litigated previously, with a claim construction determined by the courts and infringement for a five-month period in 1996 determined by a jury. However, even now, that litigation remains pending in the Central District of the United States District Court for California with a dispute as to whether and

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[4] Even if Complaint Counsel were to attempt to prove anticompetitive effects without proving Unocal's market share, which Unocal disputes it may do consistent with the requirements of monopolization law, the proof would entail showing that Unocal exercises power over California refiners by virtue of their infringement of its patents. If the refiners do not infringe, Unocal can wield no power. To establish power, Complaint Counsel would therefore have to prove the existence and extent of infringement of each patent.

[5] The specification for patent application No. 07/628,488 provided the basis for all five Unocal patents including U.S. Patent Nos. 5,288,393 issued February 22, 1994; 5,593,567 issued January 14, 1997; 5,653,866 issued August 5, 1997; 5,837,126 issued November 17, 1998; and 6,030,521 issued February 29, 2000. All five issued patents are attached to this Motion at Apps. 1-5. The claims of only one of these patents — the '393 patent — have been construed by a court of law.

how much of motor gasoline produced prior to September of 2000 infringes the claims of the '393 patent.

Complaint Counsel cannot simply rely upon the composition claims of the '393 patent for any showing of monopoly power. While the jury found that refiners on average had infringed the claims of the '393 patent for 29% of the gasoline produced during a five month period in 1996, Unocal believes that the infringement rate for that patent has been substantially reduced since then. More fundamentally, even if the infringement rate had remained unchanged since 1996, the 29% share of the technology market that it would imply is insufficient to establish monopoly power or the dangerous threat that it will be attained. As discussed above, shares below 50% are never sufficient even for attempted monopolization. Thus, Complaint Counsel must turn to the other four, never litigated, patents to establish a sufficient infringement rate to support an antitrust violation.

While all five RFG patents derive from the same specification, they contain different claims and claim limitations that have never been construed by the courts. For example, the patents contain claims drawn to various methods of use of specific fuels used or made in combustion, refining, and distribution. No court has ever determined the meaning of these claims. No jury has ever determined infringement under the four patents issued after the '393. Moreover, many of the patent claims require the application of principles of contributory infringement or inducement to infringe, which raise additional complex issues of patent law.

This case thus presents the precise scenario that, under the Supreme Court's *Christianson* decision, constitutes a case arising under patent law. Under *Christianson*, where the antitrust claim "necessarily depends on the resolution of a substantial question of federal patent law," the claim arises under federal patent law. 486 U.S. 800. There is no question that determining

Unocal's power within the technology market necessarily depends on the resolution of claim construction and infringement issues, which are substantial questions under federal patent law.

Finally, a determination of claim construction and infringement is not limited to the market power inquiry alone. It is more fundamental. Complaint Counsel claims that two components constitute the scope of the relevant market—"summer-time" RFG "practicing Unocal technology" and "summer-time" RFG "created at comparable or lower cost, and comparable or higher effectiveness, without practicing Unocal technology." As pled, Complaint Counsel cannot prove the very scope of the alleged technology market without an analysis of Unocal's patents and their claims. The alleged technology market, by definition mandates an examination of amount of "summer-time" RFG "practicing Unocal technology" (*i.e. the amount of infringement*) and the amount of "summer-time" RFG "created at comparable or lower cost, and comparable or higher effectiveness, without practicing Unocal technology" (*i.e. the amount not infringing*). Without conducting this inquiry in order to delineate the boundaries of the relevant market, there is no way to know whether Unocal acquired or had dangerous probability of acquiring monopoly power.

c. 28 U.S.C. § 1338 Applies to Federal Trade Commission Actions

The Federal Trade Commission is limited to the exercise of those specific powers granted to it by the Federal Trade Commission Act. *See, e.g., FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957). Under the Act, the Commission has jurisdiction to prevent unfair methods of competition. 15 U.S.C. § 45. Nothing in either the language of the FTC Act or its legislative history contemplates that the Commission would exercise jurisdiction over substantial questions of patent law. Nothing in the Act or its legislative history indicates that Congress intended the Commission to exercise the functions that section 1338(a) vests exclusively in the federal courts.

Although an earlier decision of the Commission refused to find that section 1338(a) operated to divest the Commission of jurisdiction, that case arose before the Supreme Court's decision in *Christianson* and relied in part on the ability of state courts to exercise jurisdiction over "incidental or collateral" patent matters. *In re American Cyanamid Co.*, 63 F.T.C. 1747, 1856 (1963). Subsequent developments, however, have emphasized the primacy of Congressional intent to promote adjudication of substantial questions of patent law within the federal courts.

The fundamental purpose of placing exclusive jurisdiction of actions arising under the patent laws with the federal district courts was to promote "the development of a uniform body of law in resolving the constant tension between private right and public access." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 142 (1989); *see also Hunter Douglas,* 153 F.3d at 1331. Section 1338 facilitates uniformity in intellectual property, as contemplated by the Constitution. *Bonito Boats,* 489 U.S. at 142. Congress's strong interest in assuring uniformity was reinforced when Congress passed the Federal Courts Improvement Act of 1982 to promote predictability, uniformity, and the efficient administration of patent law. Pub. L. No. 97-164, 96 Stat. 25. *See* S. Rep. No. 275, 97th Cong., 1st Sess. 1, reprinted in 1982 U.S. Code Cong. & Admin. News 11.

This Act gave rise to the Court of Appeals for the Federal Circuit, which under 28 U.S.C. § 1295, was given exclusive jurisdiction "of an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on section 1338." 28 U.S.C. § 1295(a)(1). In creating the Court of Appeals for the Federal Circuit, whose jurisdiction is tied to 28 U.S.C. § 1338, Congress expressed its intent that where substantial questions of patent law are required to be determined on the face of the well-pleaded Complaint, the federal interest of uniformity in interpretation of the patent laws is of the highest priority.

The impropriety of Commission jurisdiction over the present case is further demonstrated by the remedy sought by Complaint Counsel. The Notice of Contemplated Relief proposes to require Unocal to cease and desist all efforts to enforce its patents in California. Before such relief may be granted, however, the Court will have to construe each Unocal patent claim and make an infringement determination under each patent, as part of its determination of monopoly power. Thus, the deprivation of Unocal's right to enforce four of its patents contemplated by the Complaint necessarily must be based on a construction of patent claims that have never been construed by a federal court. This proposed remedy makes clear that "some right or privilege will be defeated by one construction, or sustained by the opposite construction of [the patent laws]." *Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255, 259 (1897) (discussing the scope of arising under jurisdiction prior to the adoption of 28 U.S.C. § 1338). It further undermines any jurisdictional basis for having this matter heard by the Federal Trade Commission.

C. The Complaint's Gasoline Market Allegations Are Incurably Deficient

The Complaint's allegations that Unocal has monopolized the goods market for CARB "summer time" RFG recited in paragraph 75 are also incurably deficient. *First*, as in the case of the technology market claims, the Complaint fails to allege Unocal's market share in the relevant market or the existence of barriers to entry. *Second*, this deficiency cannot be cured because the Complaint itself alleges that Unocal has exited the relevant market. Unocal cannot monopolize or threaten to monopolize a market in which it does not participate.

1. The Complaint Fails to Allege Sufficient Facts to Support the Claims That Unocal Has Monopolized or Attempted to Monopolize the Gasoline Market Alleged in Paragraph 75

The Complaint fails to make any allegations regarding Unocal's share in the purported gasoline market defined in paragraph 75. Further, the Complaint fails to make any allegation

that barriers to entry preclude others from entering the market in competition with Unocal. Both of these deficiencies are fatal to the Complaint and mandate its dismissal for the reasons discussed in Part B.2 above.

In this case, it is notable that Unocal's share of the alleged gasoline market can be determined from the face of the Complaint, and that that share is zero. Paragraph 13 of the Complaint alleges that "[i]n March 1997, Unocal completed the sale of its west coast refining, marketing, and transportation assets to Tosco Corporation." Moreover, even prior to that sale, Unocal never possessed a share that was higher than the low double-digits. But the Court need not rely on this fact to make its determination. The Complaint's implicit allegation that Unocal has no share of the relevant market today and its failure to allege any market share for any period through March 1997 are a sufficient basis for dismissing the allegations of the third count of the Complaint.

2. The Complaint Improperly Alleges That Unocal Has and Continues to Monopolize or Attempt to Monopolize a Market in Which It Does Not Compete

It is impossible for a company to monopolize or attempt to monopolize a market in which it does not compete. As the Court of Appeals for the Third Circuit made clear in *Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, a monopolization complaint must allege a relevant market "in which the plaintiff is a competitor." 159 F.3d at 141; *see also Aquatherm Indus., Inc. v. Florida Power & Light Co.*, 145 F.3d 1258, 1261 (11th Cir. 1998) (failure to allege that defendant competes in relevant market fatal to monopolization complaint); *Fieldturf, Inc. v. S.W. Recreational Indus., Inc.*, 235 F. Supp. 2d 708, 721 (E.D. Ky. 2002) ("a firm cannot monopolize a market in which it does not compete"); *Moecker v. Honeywell Int'l, Inc.*, 144 F. Supp. 2d 1291, 1309 (M.D. Fla. 2001) (same).

This very issue has been decided in the context of an attempt by the Commission to hold a Respondent liable for anticompetitive effects in a market in which it did not compete. In *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), the Commission challenged the failure of a publisher of airline schedules to publish the schedules of certain commuter flights, alleging that this conduct had caused anticompetitive effects in 432 airline markets. The court held that the Commission lacked the power to "substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry." *Id.* at 927. Thus, the possession of monopoly power by the Respondent in its own market could not form the basis for an action against in based on effects in the market in which it did not compete.

Unocal cannot possess or dangerously threaten to possess monopoly power in a market that it exited years ago. Accordingly, the Complaint's third count must be dismissed.

D. The Complaint's Fourth and Fifth Counts Are Subject to the Same Antitrust Principles as the First Three Counts and Therefore Must Be Dismissed

The Complaint's fourth and fifth counts purport to state claims under section 5 of the FTC Act based on the same conduct and the same markets as to which the Complaint's monopolization and attempted monopolization counts are directed. These counts, however, are subject to the same legal standards, as the first three counts. Complaint Counsel cannot avoid their obligations to prove the Unocal has monopolized or attempted to monopolize a cognizable relevant market by invoking section 5 or asserting vaguely, as the fourth and fifth counts, that Unocal's actions had unreasonably restrained trade.

The Commission has held that the standard of review under section 2 of the Sherman Act should not "be changed when a case is brought under Section 5." *General Foods Corp.*, 103 F.T.C. 204, 355 (1984). "If the conduct at issue here cannot reach the early threshold of doubt under the Sherman Act, we will not condemn it under the Federal Trade Commission Act." *Id.*

This legal standard has been echoed in a recent article by the Commission's current Chairman, who observed that "[c]ourts require a causal link between the conduct under scrutiny and the existence, extension, or protection of monopoly power before a violation of Section 2 can be established." Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 Antitrust L.J. 693, 694 (2000). As the Chairman further noted, FTC monopolization cases must be based on an inquiry "whether the conduct at issue in fact created, enhanced, or preserved monopoly, whether efficiency justifications explain such behavior, and all other relevant issues." *Id*. at 723.

To the extent that the fourth and fifth counts attempt to avoid Complaint Counsel's legal obligation to prove that "the conduct at issue in fact created, enhanced, or preserved monopoly," they are contrary to law and should be dismissed on that basis. To the extent that these counts do not seek to avoid the legal requirements of monopolization law, they are governed by the same principles as the first three counts and must be dismissed for that reason.

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Respectfully submitted,

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