

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION

03 APR 14 PM 3:50

DOCUMENT PROCESSING

In the Matter of)
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)

UNION OIL COMPANY OF)
CALIFORNIA,)

a corporation.)
)
)

Docket No. 9305

**COMPLAINT COUNSEL'S RESPONSE TO UNOCAL'S MOTIONS
FOR A SUBPOENA FOR THE PRODUCTION OF DOCUMENTS FROM THE
CALIFORNIA AIR RESOURCES BOARD AND THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

Complaint Counsel has no objection to Respondent Union Oil Company of California ("Unocal") obtaining discovery from the California Air Resources Board ("CARB") and the United States Environmental Protection Agency ("EPA"). However, for the reasons set forth below, Complaint Counsel respectfully requests that this Tribunal stay a decision on such motion for ten (10) business days or until such time that Unocal represents that it has reached an impasse with CARB and EPA in negotiations for voluntary production of relevant materials. EPA and CARB have informed Complaint Counsel that Unocal had not contacted these agencies until a week after Unocal filed its motion, and neither agency considers the discussion regarding the possibility of voluntary disclosure in lieu of a subpoena to be complete.

The very existence of a separate rule governing subpoenas to a government entity indicates that such subpoenas should be requested only after other alternatives are exhausted. Indeed, Rule 3.36 of the Commission's Rules of Practice, 16 C.F.R. § 3.36, requires a particularized showing that the subpoena is reasonable in scope, seeks relevant information and

that there is *no alternative means to obtaining the information*.¹ Your Honor previously ruled that discussion between the moving party and the subpoenaed party would satisfy this rule. *See In Re MSC.Software*, Order dated May 9, 2002 at 3.

Complaint Counsel has been informed that Unocal did not contact either agency prior to making its motion in order to seek voluntary or other statutory production. Although some discussions between Unocal and these agencies have now apparently begun, the discussion about whether some or all of the material requested could be produced voluntarily has, at best, just started. It appears that these agencies may be amenable to discussions along these lines. (*See* letter from Matthew Goldman, counsel for CARB, to David W. Beehler, counsel for Unocal, dated April 14, 2003, attached hereto as Exhibit A) (“Please be advised that, with or without a subpoena, CARB would cooperate with Unocal in connection with the inspection and copying of documents, just as it did during the private party patent litigation.”)

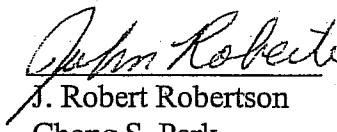
If these agencies were to agree to produce information voluntarily then this Tribunal’s intervention would not be necessary. Moreover, negotiations with the agencies prior to the issuance of the subpoenas may eliminate disputes and narrow the scope of any potential subpoena. We believe that this will have the effect of preserving this Tribunal’s resources by heading off potential motions to quash or limit by the agencies.

Accordingly, Complaint Counsel respectfully requests that this Tribunal stay a decision.

¹ In its motion, Respondent has set forth its arguments that the subpoena is reasonable in scope and that the material sought is relevant. Without hearing from the affected agencies, it is very difficult for Complaint Counsel to assess whether the subpoena is reasonable in scope, or whether the relevance of the information sought is outweighed by the burden on the agency. Complaint Counsel avers that arguments on scope and burden *vis à vis* relevance may be raised at an appropriate time, if need be.

on Unocal's motion for a period of ten (10) business days. After this 10-day period, Unocal can report on the status of negotiations and inform this Tribunal whether a ruling is necessary at that time. If Unocal and the agencies reach an impasse in negotiations, Unocal can so inform the Court and seek appropriate relief.

Respectfully Submitted,



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Dated: April 14, 2003

CERTIFICATE OF SERVICE

This is to certify that on April 14, 2003, I caused a copy of Complaint Counsel's Response to Unocal's Motion for a Subpoena for the Production of Documents from the California Air Resources Board and the United States Environmental Protection Agency to be served by to the following persons:

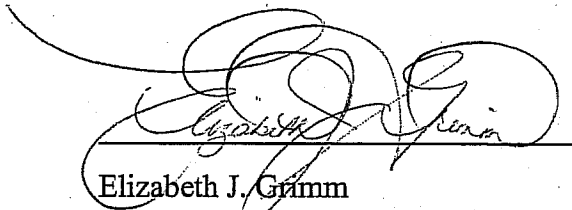
The Honorable D. Michael Chappell (by hand)
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Washington, DC 20580

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EXHIBIT A

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April 14, 2003

By Facsimile and U.S. Mail

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RE: ***Unocal Oil Company of California***
FTC Docket No: 9305

Dear Mr. Beehler:

I am writing to follow up on our telephone conversation regarding your April 11, 2003 facsimile letter. Specifically, I am writing to confirm that the California Air Resources Board ("CARB") will voluntarily produce the most appropriate person or persons who can testify as to the four topics listed in your Notice of Deposition of California Air Resources Board. Also, I received your subsequent facsimile transmission of Unocal's Motion for Subpoena for the Production of Documents from the California Air Resources Board.

I understand that you prefer to take the depositions on the four topics prior to receiving any documents from CARB that may be responsive to the document specifications listed in exhibit A to Unocal's motion. As we discussed, I will be pleased to coordinate the scheduling of the deposition(s) in conjunction with Federal Trade Commission counsel, and the prospective deponent(s). I reiterate that my own schedule does not permit me to defend any depositions for the next several weeks. I have not yet been able to determine who will be the most appropriate person or persons who can testify as to the four topics, or what their schedules may be. I am confident, however, that we will be able to schedule the depositions at a mutually convenient time within a reasonable time frame.

With respect to Unocal's Motion for Subpoena for the Production of Documents from the California Air Resources Board, I noticed that one of the factors that Unocal must show if that "the information or material sought cannot reasonably be obtained by other means." 16 C.F.R. § 3.36(b). Please be advised that, with or without a subpoena, CARB would cooperate with Unocal

David W. Beehler, Esq.
Robins, Kaplan, Miller & Ciresi LLP
April 14, 2003
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in connection with the inspection and copying of documents, just as it did during the private party patent litigation. Accordingly, on behalf of CARB, I invite you, on behalf of Unocal, to work together with me to coordinate inspection and copying of CARB documents, and thereby avoid the added expense involved in obtaining a subpoena upon CARB.

If you want to discuss this matter further, please feel free to call me.

Sincerely,


MATTHEW J. GOLDMAN
Deputy Attorney General

For BILL LOCKYER
Attorney General

MJG:jmv

cc (via fax): W. Thomas Jennings, Esq.
Chong Park, Esq.