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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

Union Oil Company of California,
a corporation.

Docket No. 9305

**COMPLAINT COUNSEL'S PETITION TO THE COMMISSION FOR EXPEDITED
REVIEW OF ADMINISTRATIVE LAW JUDGE'S EXERCISE OF DELEGATED
AUTHORITY PURSUANT TO 16 C.F.R. SECTION 0.7 AND REQUEST FOR
SUPPLEMENTAL ORDER ON REMAND**

Complaint Counsel respectfully petition the Commission to issue on an expedited basis an order supplementing and clarifying the Opinion and Order of July 6, 2004, and setting forth specific instructions to the Administrative Law Judges concerning the expeditious adjudication of this matter. Despite the Commission's order that this matter be scheduled for an adjudicative hearing "to begin as soon as practicable," no hearing date has been set by an Administrative Law Judge. Accordingly, Complaint Counsel request that the Commission order an Administrative Law Judge to schedule an adjudicative hearing to commence as soon as practicable, but no earlier than ten business days from the Administrative Law Judge's order scheduling the hearing date and no later than October 12, 2004. Complaint Counsel further petition the Commission for an order requiring an Administrative Law Judge to issue trial subpoenas within two business days of submission of revised trial subpoenas by the parties.

On July 6, 2004, the unanimous Commission reversed the Initial Decision of Administrative Law Judge D. Michael Chappell dismissing the Complaint in this matter. The Commission remanded the matter for an expeditious adjudicative hearing, stating the following:

This proceeding now requires factual development, and we remand for that purpose. The ALJ's deadline for filing motions for summary decision passed before the Initial Decision was issued, and we expect that the proceeding will now move quickly to the adjudicatory hearing.

Opinion of the Commission, *In the Matter of Union Oil Company of California*, FTC Docket No. 9305 (July 6, 2004) at 54. Indeed, the Commission's decision stated that the Administrative Law Judge's erroneous dismissal of the Complaint had "substantially delayed development" of the record in this case (*id.* at 56) and thus ordered that the matter be scheduled for an adjudicative hearing "*to begin as soon as practicable.*" Commission Order Reversing and Vacating the Initial Decision and Order and Remanding for Further Proceedings, *In the Matter of Union Oil Company of California*, FTC Docket No. 9305 (July 6, 2004), at 2 (emphasis added).

A month and a half has passed since the Commission issued its Opinion and Order remanding this matter for an expeditious adjudicative hearing. Yet – in contravention of the Commission's directive – the Administrative Law Judge has not scheduled a hearing date.

Complaint Counsel's actions seeking a hearing date have been unavailing. Complaint Counsel filed with Administrative Law Judge Chappell a Request for Trial Setting on July 15, 2004, after having heard no word from the Office of the Administrative Law Judges for over a week following the Commission's July 6, 2004 Opinion and Order. In this Request for Trial Setting, Complaint Counsel proposed that the adjudicative hearing in this matter commence on or shortly after September 20, 2004.¹ Complaint Counsel further noted in its Request for Trial Setting that because of the number of witnesses to be called at the hearing (more than sixty), a firm trial date was needed to arrange for the testimony of these witnesses and thus to ensure the

¹ Complaint Counsel's Request for Trial Setting at 1-2 (July 15, 2004) (Attached as Exhibit A).

efficient adjudication of this matter. Unocal filed a response on July 19, 2004, in which it raised some scheduling and other concerns but stated that "Unocal does not oppose Your Honor's scheduling of a hearing on September 20th."²

Subsequently, Complaint Counsel took further steps to expedite adjudication of this matter. On Monday, August 16, 2004, Complaint Counsel contacted counsel for Respondent in an attempt to arrange a joint call to the Attorney Advisor to the Administrative Law Judges to request a status conference. Counsel for Respondent stated that he was not interested in participating in any such call. On Friday, August 20, 2004, Complaint Counsel contacted the Attorney Advisor to the Administrative Law Judges to make a procedural inquiry as to whether a status conference (whether telephonic or otherwise) with the Administrative Law Judge and the parties concerning a hearing date would be feasible. Complaint Counsel were informed that this procedural inquiry would be conveyed to the Administrative Law Judge. Complaint Counsel have not received any response to this procedural inquiry.

The inexplicable silence of the Administrative Law Judge contributes to the delay in resolving a matter that the Complaint alleges will cause substantial consumer injury in California. Indeed, Unocal has now restarted its efforts to collect additional royalty payments that could ultimately be borne by California consumers.³ If Unocal is successful in its attempt to

² Unocal's Response to Complaint Counsel's Request for Trial Setting at 1 (July 19, 2004); *see also id.* at 3 ("Unocal has no objection to the September 20th date") (attached as Exhibit B).

³ Specifically, in the accounting action in *Union Oil Company of California v. Atlantic Richfield Company, et al.*, Case No. CV 95-23-79 CAS, pending in the United States District Court for the Central District of California, Unocal recently requested that the judge in that case revisit the "propriety" of Judge Christina Snyder's decision not to enter final judgment in the accounting action pending the reexamination of Unocal's '393 patent by the Patent and Trademark Office. In her May 16, 2002 Minute Order (at page 6), Judge Snyder stated that deferring entry of final judgment was appropriate given the likelihood that costs associated with any royalty payments would be passed through

extract hundreds of millions of dollars of royalty payments, most of these added costs will be passed on – in Unocal's own expert's opinion – to the California consumers. See Complaint, ¶ 98.

Pursuant to its July 6, 2004 Opinion and Order, the Commission remanded this matter to an Administrative Law Judge with instructions for the matter to be expeditiously adjudicated and for the Administrative Law Judge to assiduously assemble the factual record. Even with this specific delegation of authority, the Commission nevertheless retains the authority to ensure that its directive is followed. The Commission has authority to grant Complaint Counsel's petition pursuant to 16 C.F.R. Sec. 0.7 (2004). This section provides the following:

§ 0.7 Delegation of functions.

The Commission, under the authority provided by Reorganization Plan No. 4 of 1961, may delegate, by published order or rule, certain of its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board, and *retains a discretionary right to review such delegated action upon its own initiative or upon petition of a party* to or an intervenor in such action (emphasis added).

In exercising the authority delegated to them, the Administrative Law Judges are required to act in conformity with Commission decisions, policy directives, and Rules of Practice. 16 C.F.R. Sec. 0.14.⁴ The failure of the Administrative Law Judges to expedite adjudication of this matter

to the California consumers. The status reports filed by the parties in that action and Judge Snyder's May 26, 2002 Minute Order are attached as Exhibit C. At a August 23, 2004 status conference, counsel for Unocal expressed a desire to move forward with the accounting action. While the judge stated that she would currently maintain the status quo, she scheduled another scheduling conference for November 1, 2004.

⁴ 16 C.F.R. Sec. 0.14 provides, in relevant part:

Administrative law judges are officials to whom the Commission, in accordance with law, delegates the initial performance of statutory fact-finding functions and initial

does not conform with the specific remand instructions set forth in the Commission's July 6, 2004 Opinion and Order. Nor does it conform with the policy of the Commission to expedite adjudication of matters.⁵ Accordingly, Complaint Counsel petition the Commission for a supplemental order setting forth specific instructions for the Administrative Law Judge to schedule an administrative hearing for a specified date.

Complaint Counsel respectfully request that the Commission issue an order requiring an Administrative Law Judge to commence an adjudicative hearing in this matter as soon as practicable, but no earlier than ten business days from the Administrative Law Judge's order scheduling the hearing date and no later than October 12, 2004. Complaint Counsel also request that the Commission order an Administrative Law Judge to report back to the Commission with a hearing date within five days of the Commission's order granting Complaint Counsel's petition. Further, Complaint Counsel respectfully request that the Commission issue an order that requires the issuance of trial subpoenas by an Administrative Law Judge within two days after a party

rulings on conclusions of law, *to be exercised in conformity with Commission decisions and policy directives and with its Rules of Practice.* (Emphasis added).

⁵ Commission Rule of Practice 3.1, 16 C.F.R. Sec. 3.1 (2004) states that the Commission's policy is to conduct administrative litigation expeditiously:

The rules in this part govern procedure in adjudicative proceedings. It is the policy of the Commission that, to the extent practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously. In the conduct of such proceedings the Administrative Law Judge and counsel for all parties shall make every effort at each state of a proceeding to avoid delay.

See also Rule 3.2(f), 16 C.F.R. Sec. 3.21(f) (2004) ("The Administrative Law Judge shall hold additional prehearing and status conferences or enter additional orders as may be needed to ensure the orderly and *expeditious* disposition of a proceeding") (emphasis added); Rule 3.51(a), 16 C.F.R. Sec. 3.51(a) (setting forth one year deadline from issuance of administrative complaint for filing of Initial Decision by Administrative Law Judge); Rule 3.41(b), 16 C.F.R. Sec. 3.41(b) (requiring hearings to "proceed with all reasonable *expedition*") (emphasis added).

submits revised trial subpoenas. Complaint Counsel notes that regardless of when the adjudicative hearing is scheduled to commence, Complaint Counsel will require at least two weeks notice of the scheduled date in order to notify witnesses and arrange for their appearance at the adjudicative hearing.

Complaint Counsel respectfully request that this petition be heard by the Commission on an expedited basis to allow the parties to prepare for an adjudicative hearing in the near future should the Commission decide to grant Complaint Counsel's petition. A proposed order is attached for the Commission's consideration.

Susan Creighton
Director

D. Bruce Hoffman
Deputy Director

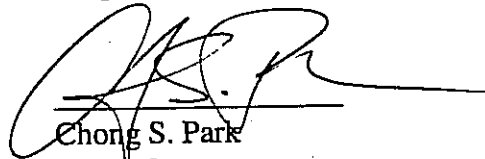
John Martin
Senior Litigation Counsel

Geoffrey Oliver
Assistant Director

Patrick Roach
Deputy Assistant Director

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Respectfully submitted,



Chong S. Park

David Conn

Peggy Bayer Femenella

Lisa Fialco

Sean Gates

Dean Graybill

Thomas Krattenmaker

John Roberti

Lore Unt

Counsel Supporting the Complaint

Dated: August 26, 2004

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

Docket No. 9305

**Union Oil Company of California,
a corporation.**

**[PROPOSED] SUPPLEMENTAL ORDER IN AID OF COMMISSION'S JULY 6, 2004
OPINION AND ORDER**

Pursuant to Commission Rule 0.7, 16 C.F.R. Sec. 0.7, the Commission issues this supplemental order in aid of its July 6, 2004 Opinion and Order in the above-captioned matter. Consistent with the instructions and specific directives set forth in the July 6, 2004 Opinion and Order, the Commission orders the following:

1. The date for the commencement of an adjudicative hearing in this matter shall be scheduled expeditiously. An Administrative Law Judge shall report back to the Commission with a hearing date within five days of this Order. The date for the adjudicative hearing shall be scheduled by an Administrative Law Judge to commence as soon as practicable, but no earlier than ten business days from the Administrative Law Judge's order scheduling the hearing date and no later than October 12, 2004.
2. Following the scheduling of a date for the commencement of an adjudicative hearing, an Administrative Law Judge shall issue trial subpoenas as soon as possible upon receipt of revised trial subpoenas by the parties. An Administrative Law Judge shall issue revised trial subpoenas no later than two days following their submission by the parties.

So ordered.

By the Commission

CERTIFICATE OF SERVICE

I, Terri Martin, hereby certify that on August 26, 2004, I caused one original and twelve copies of Complaint Counsel's Petition to the Commission for Review of Administrative Law Judge's Exercise of Delegated Authority Pursuant To 16 C.F.R. Section 0.7 and Request for Supplemental Order on Remand to be served upon the following by hand delivery:

The Commissioners
U.S. Federal Trade Commission
Via Office of the Secretary, Room H-159
600 Pennsylvania Avenue, NW
Washington, DC 20580

I caused one copy of Complaint Counsel's Petition to the Commission for Review of Administrative Law Judge's Exercise of Delegated Authority Pursuant To 16 C.F.R. Section 0.7 and Request for Supplemental Order on Remand to be served upon the following by facsimile and Federal Express delivery:

Joseph Kattan, Esq.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306

David W. Beehler, Esq.
Robins, Kaplan, Miller & Ciresi LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015


Terri Martin

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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

DOCUMENT PROCESSING

In the Matter of
Union Oil Company of California,
a corporation.

Docket No. 9305

COMPLAINT COUNSEL'S REQUEST FOR TRIAL SETTING

Complaint Counsel respectfully request that the Court issue an order scheduling an adjudicative hearing in this matter to commence on September 20, 2004 or shortly thereafter. Complaint Counsel believe that commencing an adjudicative hearing in mid-September would be practicable.

Prior to the dismissal of this matter in November 2003, all discovery had been completed and the only remaining significant items on the prior scheduling order were the parties' pretrial briefs and pretrial findings of fact and conclusions of law. Complaint Counsel believe that the remaining pretrial briefing can be completed prior to an adjudicative hearing scheduled for the middle of September. To the extent that any outstanding issues remain to be resolved, these issues can be resolved by the Court during trial.

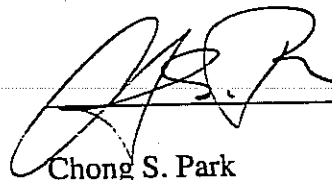
Complaint Counsel anticipate calling approximately sixty witnesses in its case in chief. These witnesses include, but are not limited to, a sitting state court judge, senior California state officials, and third-party witnesses that work in management positions across the United States and overseas. The issuance of an order setting a firm trial date as soon as possible would enable

the parties to arrange for the testimony of the witnesses in a timely and efficient fashion. Once an order setting the hearing date is entered by this Court, Complaint Counsel will submit to the Court on an expedited basis updated subpoena requests for Complaint Counsel's trial witnesses.

Complaint Counsel has met and conferred with Counsel for Respondent concerning a proposed hearing date, but did not reach agreement. Counsel for Respondent initially proposed that the hearing in this case commence in mid to late August, but subsequently reconsidered this position. As stated, Complaint Counsel believe that the parties should be able to proceed to trial in September and respectfully request that the Court set a hearing to commence on or shortly after September 20, 2004.

A proposed order is attached for the Court's consideration.

Respectfully submitted,



Chong S. Park
Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580
(202) 326-2372

Dated: July 15, 2004

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

**Union Oil Company of California,
a corporation.**

Docket No. 9305

[PROPOSED] ORDER

The Court hereby orders the following:

1. An adjudicative hearing in the above-captioned matter is scheduled to commence on September __, 2004.
2. Complaint Counsel's Pretrial Brief shall be filed no later than September 3, 2004, and Respondent's Pretrial Brief shall be filed no later than September 10, 2004.

D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Terri Martin, hereby certify that on July 15, 2004, I caused a copy of Complaint Counsel's Request for Trial Setting to be served upon the below listed persons:

VIA HAND DELIVERY TO:

The Honorable D. Michael Chappell
Administrative Law Judge
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

VIA FACSIMILE & FEDERAL EXPRESS TO:

Joseph Kattan, Esq.
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306

David W. Beehler, Esq.
Robins, Kaplan, Miller & Ciresi LLP
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015



Terri Martin

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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

**UNOCAL'S RESPONSE TO COMPLAINT COUNSEL'S
REQUEST FOR TRIAL SETTING**

Union Oil Company of California ("Unocal") respectfully submits this Response to Complaint Counsel's Request for Trial Setting ("Request") in order to clarify statements made by Complaint Counsel and to inform the Court of scheduling issues affecting Unocal's trial counsel.

In their Request, Complaint Counsel ask that Your Honor set a hearing date for September 20, 2004, or shortly thereafter. Although Complaint Counsel imply that the proposed hearing date was the reason Unocal would not consent to this Request,¹ in fact, Unocal does not oppose Your Honor's scheduling of a hearing on September 20th. Rather, Unocal declined to join Complaint Counsel's request for two reasons, both of which were conveyed to Counsel Chong Park. First, Unocal's counsel believed it was inappropriate for the lawyers in the case to direct the Court as to when the hearing should take place. Second, Unocal counsel expressed concern over the predicted length of Complaint Counsel's case-in-chief, given potential conflicts with other trials.

¹ Complaint Counsel represent that the parties have "met and conferred . . . concerning a proposed hearing date, but did not reach agreement." Request at 2. As noted above, this statement incorrectly portrays Unocal's position.

In that regard, Unocal needs to respond to Complaint Counsel's representation that "Counsel for the Respondent initially proposed that a hearing in this case commence in mid to late August, but subsequently reconsidered this position." Request at 2. Three of Unocal's trial attorneys, Martin R. Lueck, David W. Beehler, and Diane L. Simerson, are currently scheduled to be in trial in a patent infringement matter beginning October 25, 2004, in the District Court for the Eastern District of Missouri. Shortly after receiving the FTC's Order, Unocal informed Complaint Counsel of this and discussed whether Complaint Counsel would be available for an expedited August trial. The day after this discussion, the federal judge in the patent infringement matter recused herself, and the case was reassigned. While the trial is still scheduled for October, the judge's recusal may mean that this date will not hold. Upon learning that the October trial may be delayed, Unocal's counsel spoke with Mr. Park and informed him that Unocal was awaiting additional information regarding the Missouri trial before deciding whether to seek a scheduling conference with Your Honor.

Unocal would also like to inform Your Honor of two additional scheduling considerations. First, Unocal's lead trial counsel, Mr. Lueck, who was also lead counsel in the underlying litigation involving Unocal's patent, is scheduled to begin an arbitration, as lead counsel, for a separate client beginning on November 8, 2004 and concluding on November 23, 2004 in Washington D.C. If the Unocal hearing proceeds on September 20th, and goes as long as Complaint Counsel have suggested, it may be necessary for Unocal to request a continuance until after the completion of Mr. Lueck's previously scheduled arbitration.² Second, Unocal's trial team has been diligently inquiring about potential hotel accommodations for this September

² Also, should the October trial go forward as scheduled, Unocal would need an additional continuance.

through November, but on this short notice, has already been told by two hotels that they have no available accommodations.

Finally, while Unocal has no objection to the September 20th date, it does have concerns about the length of the trial and Complaint Counsel's claim that they need to call 60 witnesses to prove this purportedly straightforward "fraud" case. Unocal believes the hearing could take place in a much shorter time, and proposes, as is the practice in many courts, the imposition of time limits on the presentation of evidence by each side. Unocal believes that the imposition of time limits would most effectively alleviate the Commission's concerns about delay.

Dated: July 16, 2004.

Respectfully submitted,

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

By Dara A. Poulos

Martin R. Lueck
David W. Beehler
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2800 LaSalle Plaza
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and

GIBSON, DUNN & CRUTCHER, LLP
Joseph Kattan, P.C.
Chris Wood

1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
Phone: 202-955-8500
Fax: 202-530-9558

ATTORNEYS FOR UNION OIL COMPANY OF
CALIFORNIA

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2004, I caused the original and two paper copies to be delivered for filing via Federal Express, and caused an electronic copy to be delivered for filing via e-mail of (1) Unocal's Response to Complaint Counsel's Request for Trial Setting and (2) Notice of Removal of Counsel to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave. NW, Rm. H-159
Washington, DC 20580
E-mail: *secretary@ftc.gov*

I hereby certify that on July 16, 2004, I also caused two paper copies of (1) Unocal's Response to Complaint Counsel's Request for Trial Setting (2) Notice of Removal of Counsel to be delivered via Federal Express to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580

I hereby certify that on July 16, 2004, I also caused one paper copy of (1) Unocal's Response to Complaint Counsel's Request for Trial Setting and (2) Notice of Removal of Counsel to be served upon each person listed below via overnight delivery (Federal Express):

Chong S. Park, Esq.
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue NW, Drop 6264
Washington, DC 20001

Richard B. Dagen, Assistant Director
through Chong S. Park, Esq.
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue NW, Drop 6264
Washington, DC 20001


Bethany D. Krueger

C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MINUTE ORDER

Priority
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JS-2/JS-3
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Case No.: CV-95-2379-CAS

May 16, 2002

Title: UNION OIL COMPANY OF CALIFORNIA v. ATLANTIC RICHFIELD COMPANY; CHEVRON U.S.A., INC.; EXXON CORPORATION; MOBIL OIL CORPORATION; SHELL OIL PRODUCTS COMPANY; and TEXACO REFINING AND MARKETING, INC.

PRESIDING: HONORABLE CHRISTINA A. SNYDER, U.S. DISTRICT JUDGE

Maynor Galvez,
Deputy Clerk

Laura Elias,
Court Reporter

PLAINTIFF COUNSEL PRESENT:

Martin R. Lueck
David W. Beehler
Diane L. Simerson

DEFENDANT COUNSEL PRESENT:

Harry Marcus
Larry R. Feldman
Joel N. Klevens

PROCEEDINGS: DEFENDANTS' MOTION TO STAY PROCEEDINGS PENDING REEXAMINATION
(filed June 21, 2001)

I. BACKGROUND

Plaintiff Union Oil Company of California ("plaintiff" or "Unocal") is the owner of U.S. Patent No. 5,288,393 ("the '393 patent"), issued February 22, 1994, for reformulated gasolines. Unocal filed the complaint in the instant action on April 13, 1995, alleging that defendant oil companies were producing, distributing, and/or selling gasolines that infringed one or more claims of the '393 patent.

In an order dated May 19, 1997, then-United States District Court Judge Kim Wardlaw¹ construed the '393 patent. Subsequently, Judge Wardlaw presided over a 49-day jury trial. The jury determined that every claim of the patent is valid, approved the methodology used by Unocal to determine infringement, and determined a royalty rate of 5.75 cents per gallon to be applied against defendants. On September 29, 1998, Judge Wardlaw denied defendant's motion for judgment as a matter

¹ Judge Wardlaw has since been elevated to the United States Court of Appeals for the Ninth Circuit.

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of law, and entered an interlocutory judgment pursuant to 28 U.S.C. § 1292(c)(2)² regarding (1) the jury's verdict that the '393 patent had been infringed and was not invalid by reason of anticipation, obviousness, or failure to comply with the written description requirement and (2) the district court's determination that the patent was enforceable. The district court awarded Unocal a royalty rate of 5.75 cents per gallon which the jury found to be reasonable, and set the prejudgment interest rate at 8.24%, compounded quarterly. The district court calculated damages for defendants' infringement from March 1, 1996, through July 31, 1996. Also on September 29, 1998, the district court ordered that an accounting of defendants' production of infringing gasoline be made for the period from August 1, 1996, through the date of final judgment. However, at defendants' request, the district court stayed the accounting pending defendant's appeal of the court's denial of judgment as a matter of law to the Federal Circuit.

Defendants timely appealed that interlocutory judgment to the Federal Circuit, arguing that the '393 patent was invalid for anticipation and for failure to comply with the written description requirement, and was therefore unenforceable. On March 29, 2000, the Federal Circuit affirmed the decision of the district court, see Union Oil of California v. Atlantic Richfield et al., 208 F.3d 989 (Fed. Cir. 2000), and subsequently denied defendants' request for rehearing and rehearing *en banc*. In June 2000, defendants paid Unocal more than \$90 million in damages for the period from March 1, 1996, through July 31, 1996. Defendants timely filed a petition for writ of certiorari, raising only the anticipation and written description issues, which the Supreme Court denied on February 10, 2001.

In March 2001, agents for Chevron filed a Request for Reexamination of the '393 patent with the PTO.³ On May 22, 2001,

² 28 U.S.C. § 1292(c) provides

The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

³ 35 U.S.C. § 302 provides

Any person at any time may file a request for

the PTO ordered reexamination of the '393 patent. On January 31, 2002, the PTO issued an Office Action, rejecting all 41 claims in the '393 patent as anticipated under 35 U.S.C. § 102(b) and/or obvious over the prior art under 35 U.S.C. § 103(a), or a combination of §§ 102 and 103. See Klevens Dec., Ex. A. Pursuant to PTO rules, following the Office Action, plaintiff may seek to persuade the PTO that it erred in rejecting the claims, or attempt to overcome the rejection by amending its claims.⁴ Manual of Patent Examining Procedure § 2266 (8th ed. 2001).

On June 21, 2001, defendants filed the instant motion to stay all proceedings in this action pending completion of the PTO's reexamination of the '393 patent.⁵ The parties appeared before the Court on May 6, 2002, and the Court thereafter took the matter under submission.

II. DISCUSSION

Congress enacted the PTO reexamination procedure to provide an "inexpensive, expedient means" of determining patent validity which, if available and practical, should be deferred to by the courts. ASCII Corp. v. STD Entertainment USA, Inc., 844 F.Supp. 1378, 1380 (N.D. Cal. 1994). The primary purpose of the reexamination procedure is to "eliminate trial of that issue (when the [patent] is canceled) or to facilitate trial of that issue by providing the district court with the expert view of the [PTO] (when a claim survives the reexamination proceeding)."

reexamination by the [PTO] of any claim of a patent on the basis of any prior art cited under the provisions of section 301 of this title.

The process is designed to allow the PTO "to review the efficacy of a patent, following its issuance, on the basis of new information about pre-existing technology which may have escaped review at the time of the initial examination of the application." In re Etter, 756 F.2d 852, 856 (Fed. Cir. 1985).

⁴ Once the PTO issues its final decision, either party can appeal to the PTO's Board of Appeals and then, if still dissatisfied, to the Federal Circuit.

⁵ There are currently two motions pending before the Court: (1) defendants' motion to vacate accounting order, to reopen the record for additional evidence, and to limit accounting order to California gasolines if no new evidence is allowed, filed May 16, 2001, and (2) plaintiff's motion for summary judgment, filed August 24, 2001.

Gould v. Control Laser Corp., 705 F.2d 1340, 1342 (Fed. Cir. 1983).

The decision to grant or deny a motion to stay proceedings pending the outcome of a PTO reexamination proceeding rests with the sound discretion of the court. Ethicon v. Quigg, 849 F.2d 1422, 1426 (Fed. Cir. 1988). In ruling on a motion to stay, courts consider whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party, whether a stay will simplify the issues in question and trial of the case, whether discovery is completed and whether a trial date has been set. Target Therapeutics, Inc. v. SciMed Life Systems, Inc., 33 U.S.P.Q.2d 2022, 2023 (N.D. Cal. 1995). Courts also consider whether a stay is likely to conserve judicial resources. See Hewlett-Packard Co. v. Acuson Corp., 1993 WL 149994, *2 (N.D. Cal. 1993) ("Ordinarily, courts need not expend unnecessary judicial resources by attempting to resolve claims which may be amended, eliminated, or lucidly narrowed by the patent reexamination process and the expertise of its officers.")

Defendants contend that the Court should stay all proceedings in this case because the reexamination of the '393 patent may make further proceedings unnecessary, or may materially affect the nature and scope of the proceedings. Motion to Stay ("Mot.") at 1. Specifically, defendants contend that a stay is appropriate for four reasons. First, defendants argue that it is likely that the PTO's reexamination will change the scope of the claims of the '393 patent, thereby reducing or eliminating defendants' liability. Mot. at 9-11. Second, defendants argue that if the Court denies a stay and proceeds to final judgment in this case, defendants will be irreparably injured should reexamination later result in the cancellation or amendment of the claims, as they would not be able to obtain the benefit of the reexamination result. Mot. at 11-15. In this regard, defendants cite cases holding that parties who were found to have infringed patents could obtain the collateral estoppel benefit of invalidity and unenforceability determinations in other proceedings only if the reexamination is complete prior to entry of a final judgment in the infringement suit. See, e.g., Thompson-Hayward Chemical Co. v. Rohm and Haas Co., 745 F.2d 27 (Fed. Cir. 1983); see also Mendenhall v. Barber-Greene Co., 26 F.3d 1573, 1581 (Fed. Cir. 1994) ("Absent a final judgment ending the litigation, the issue of liability is not barred from reconsideration.")⁶ Third, defendants argue that plaintiff will

⁶ At oral argument, counsel for plaintiff conceded that if the Court were to enter a final judgment and defendants thereafter paid damages to Unocal, defendants would have no

not suffer any substantial injury if a stay is granted, because plaintiff will be entitled to an accounting, including prejudgment interest compensating for any delay occasioned by the reexamination, if any claims remain valid after reexamination. Mot. at 15; see General Motors Corp. v. Devex Corp., 461 U.S. 648, 655 (1983). Fourth, defendants contend that a stay would serve the public interest because (1) it is not in the public interest for invalid patents to be enforced; (2) a stay would conserve judicial resources; and (3) a stay would ensure that the public would not have to bear the cost of royalties paid for a potentially invalid patent.⁷ Mot. at 16-17.

In response, plaintiff contends that it is "equitable and appropriate" to deny defendants' motion to stay the proceedings for several reasons. Plaintiff's Opposition to Defendants' Motion to Stay ("Opp. Mot."), at 1. First, plaintiff argues that a stay of the proceedings would "reward [defendants] for their dilatory tactics." Plaintiff argues that defendants could have submitted their reexamination request to the PTO at any point since the inception of this litigation in 1995, but that they chose to wait until ten days after the Supreme Court denied certiorari to file the request. Opp. Mot. at 4-6. See, e.g., Freeman v. Minnesota Min. and Mfg. Co., 661 F.Supp. 886, 888 (D. Del. 1987) (denying stay where defendant was attempting to use the reexamination process as a "mere dilatory tactic"). Second, plaintiff argues that a stay is unwarranted because defendants' challenge to the '393 patent through the reexamination process is not likely to succeed, because the reexamination depends largely on the same arguments regarding obviousness that defendants relied upon at trial, and the same art considered by the PTO when it first examined Unocal's patent application in 1990. Opp. Mot. at 7-8. Third, plaintiff argues that a stay is judicially inefficient because the parties and the Court have already made substantial investments in the litigation. See, e.g., Xerox Corp. v. 3Com Corp., 69 F.Supp.2d 404 (W.D.N.Y. 1999) (denying stay where party had been aware of prior art for eight months but requested reexamination only after it received adverse court ruling). Finally, plaintiff contends that the Federal Circuit's mandate affirming the district court's judgment "compels a prompt accounting and entry of final judgment," and that there is no legal authority to depart from that mandate. Opp. Mot. at 10-11.

recourse to recover the monies paid were the reexamination to invalidate any or all of the claims of the patent.

⁷ Defendants state that approximately 90% of the royalty costs paid by defendants will be passed on to consumers. Mot. at 17.

At oral argument, plaintiff offered additional reasons why the Court should not grant a stay, including that plaintiff will suffer prejudice in the form of loss of institutional memory, witnesses and documents if the litigation does not proceed forthwith. Plaintiff also asserted that because there is no reason defendants could not continue to make new requests for reexamination, thereby delaying the final adjudication of this case indefinitely, there is no good cause for the issuance of a stay.

The Court finds that the age of this case, and the fact that the validity of the '393 patent and defendants' infringement thereof has been adjudicated and affirmed by the Federal Circuit weigh against the granting a stay. However, the Court is cognizant that the entry of a final judgment before the conclusion of the PTO reexamination could unduly prejudice defendants and, more significantly, the public, by forcing defendants to pay damages for infringing patents which are passed on to consumers. Were the patent ultimately invalidated, consumers would have no recourse to recover charges paid to cover the costs of the judgment. Therefore, while the Court denies defendants' motion to stay, it will proceed with this action, but not enter a final judgment until the PTO proceedings are finally decided.⁸

III. CONCLUSION

Therefore, defendants' motion to stay is DENIED. The Court orders the parties to appear on June 3, 2002, at 11:30 p.m. for a status conference to discuss what further briefing, if any, is required for the Court to decide plaintiff's motion for summary judgment and defendants' motion to vacate accounting order, to reopen the record for additional evidence, and to limit accounting order to California gasolines if no new evidence is allowed.

IT IS SO ORDERED.

⁸ The Court recognizes, as argued by defendants, that this procedure may result in unnecessary work for the Court and the litigants should the '393 patent be partially or wholly invalidated. However, given the considerations set forth above, the Court finds that this procedure best protects the interests of the parties and the public.



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17 Attorneys for Defendants

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19 CENTRAL DISTRICT OF CALIFORNIA

20 UNION OIL COMPANY OF)
21 CALIFORNIA,)

22 Plaintiff)

23 vs.)

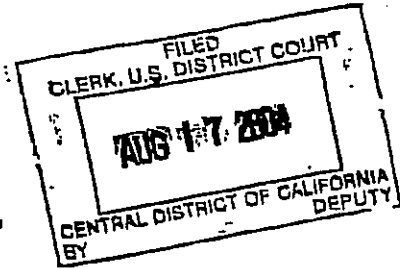
24 ATLANTIC RICHFIELD)
25 COMPANY, *et al.*,)

26 Defendants.)

Case No. CV-95-2379-CAS

**DEFENDANTS' STATUS REPORT
IN CONNECTION WITH THE
STATUS CONFERENCE OF
AUGUST 23, 2004**

Date: August 23, 2004
Time: 11:00 a.m.
Courtroom: 5



27 DEFENDANTS' STATUS REPORT IN CONNECTION WITH THE STATUS
28 CONFERENCE OF AUGUST 23, 2004

Case No. CV-95-2379-CAS

1 **I. INTRODUCTION**

2 The Court has ordered a Status Conference for this case to be held on
3 August 23, 2004 at 11:00 a.m. Defendants respectfully submit this brief report in
4 advance of the scheduled conference to apprise the Court of the status of the
5 proceedings related to the current litigation.

6 As explained below, the Court directed that the accounting move forward
7 but, to avoid prejudice primarily to consumers, no final judgment would be entered
8 until the reexamination proceedings on the '393 patent-in-suit are finally decided.
9 Since that order, the PTO rejected for a second time all of the claims of the '393
10 patent, and the FTC sued Unocal under the antitrust laws for engaging in
11 fraudulent conduct to expand the market power of its portfolio of reformulated
12 gasoline patents, including '393, to the detriment of competition and consumers in
13 California.

14 **II. BRIEF SUMMARY OF THIS ACCOUNTING**

15 On June 21, 2001, defendants moved to stay the accounting in this action
16 pending completion of the reexamination of the '393 patent. Docket Entry 972.
17 On August 24, 2001, Unocal moved for summary judgment seeking damages in
18 excess of \$280 million for infringing gasolines, including those produced and sold
19 outside of California, for the period August 1, 1996 to September 30, 2000.
20 Docket Entry 982. In opposing the motion, defendants raised issues concerning
21 the appropriate test methodology for measuring RVP, one of the parameters of the
22 claims, and whether fuels containing ethanol are gasolines within the scope of the
23 patent claims as construed by the court.

24 On May 16, 2002, this Court denied defendants' motion to stay but, to avoid
25 undue prejudice to the "defendants, and more significantly, the public" ordered that
26 no final judgment would be entered "until the PTO [reexamination] proceedings

27
28

1 are finally decided." Docket Entry 1013 at 6. The Court recognized that any
2 damages paid by defendants and passed on to the public would unduly harm
3 consumers who, if the '393 patent were ultimately found unpatentable by the PTO,
4 "would have no recourse to recover charges paid to cover the costs of the
5 judgment." *Id.* On August 28, 2002, the Court granted defendants' motion to limit
6 the accounting to California gasolines. Docket Entry 1028 at 17. Oral argument
7 has not yet been scheduled on the RVP and ethanol issues raised by the defendants.

8 Since the August 28, 2002 Order, Unocal has done nothing to move the
9 accounting forward based on the California gasoline production data previously
10 produced by defendants.

11 **III. THE '393 PATENT REEXAMINATION PROCEEDINGS**

12 On May 22, 2001, the PTO ordered reexamination of the '393 patent. On
13 February 11, 2002, the PTO rejected all 41 claims of the '393 patent as
14 unpatentable over the prior art. On March 7, 2002, Unocal attorneys met the PTO
15 Examiner and, on April 11, 2002, filed a 44-page response with an affidavit
16 addressing the Examiner's claim rejections.

17 On May 20, 2002, defendants filed a second request for reexamination.
18 Unocal, on June 24, 2002, filed a petition to deny the second reexamination request
19 on the ground that its filing constituted harassment. In that petition, Unocal made
20 arguments to the PTO similar to those made in its August 16, 2004 Status Report
21 to this Court. On July 3, 2002, the PTO returned Unocal's petition as improper,
22 and on the same day granted the second reexamination request. On September 20,
23 2002, the two reexaminations were merged into a single proceeding.

24 On December 18, 2002, the PTO issued a second Office Action again
25 rejecting all 41 claims of the '393 patent. The Office Action dismissed point by
26 point all of Unocal's arguments for patentability. Office Action of Dec. 18, 2002

1 at p. 22 *et seq.* attached as Exhibit 1. On March 13, 2003, Unocal filed a Brief on
2 Appeal to the PTO Board of Appeals. On June 25, 2003, defendants filed a third
3 reexamination request, which was granted. On April 19, 2004, all of the
4 reexaminations were merged.

5 In sum, the events in the PTO after the Court's May 16, 2002 Minute Order
6 confirm the correctness of the Court's decision to withhold entry of final judgment
7 until the PTO reexamination proceedings are finally decided. All of Unocal's
8 patent claims have been under continuous rejection. At no point in the proceedings
9 has any Unocal patent claim been upheld. The suggestion in Unocal's Status
10 Report that the multiple reexamination requests were filed for purposes of delay is
11 refuted by the PTO's decisions granting the reexamination requests and
12 determining that Unocal's patent claims are unpatentable.

13 **IV. THE FTC PROCEEDING**

14 On March 4, 2003, after the Court's May 16, 2002 Minute Order, the FTC
15 filed a Complaint charging Unocal with violations of Section 5 of the FTC Act and
16 seeking an injunction to prohibit it from enforcing the '393 patent and its four
17 other reformulated gasoline patents in California. The FTC has alleged that, by
18 making false and misleading statements to the California Air Resources Board and
19 others, Unocal subverted the process for establishing reformulated gasoline
20 regulations to acquire market power for the purpose of extracting monopoly profits
21 from refiners and ultimately California consumers. Docket Entry 1038. A copy of
22 the Complaint was provided to the Court with defendants' Notice of March 6,
23 2003.

24 On March 28, 2003, Unocal moved to dismiss the Complaint based on
25 *Noerr-Pennington* immunity and lack of jurisdiction. On November 25, 2003, the
26 ALJ granted Unocal's motion to dismiss. When FTC complaint counsel appealed

1 the dismissal to the full Commission, the Attorneys General of California and 21
2 other states as well as the California Air Resources Board ("CARB") filed an
3 *amicus* brief, arguing that a reversal of the ALJ's decision would serve the public
4 interest. On July 6, 2004, the Commission unanimously reversed the ALJ and
5 reinstated the Complaint. The FTC Opinion is attached as Exhibit 2. The
6 Commission stated its expectation "that the proceeding will now move quickly to
7 the adjudicatory hearing."¹ Opinion at 54. The Commission closed its opinion by
8 pronouncing that "[i]t is now time for the ALJ assiduously to assemble the facts
9 and compile a record necessary and sufficient for resolving the underlying issues."
10 *Id.* at 56. Trial is imminent.

11 The FTC Complaint seeks an order specifically directed at Unocal's
12 attempt to collect additional monetary damages in this action by:

13 Requiring Respondent to cease and desist all efforts it has
14 undertaken by any means, including without limitation
15 the . . . prosecution, . . . of any suits or other actions . . .
16 in which Respondent has asserted that any . . . entity, by
17 manufacturing . . . motor gasoline to be sold in California
18 infringes any of Respondent's current or future United
19 States patents that claim priority back to U.S. Patent
20 Application Number No. 07/628,488 filed December 13,
21 1990 [which matured into the '393 patent]. . . .

22 FTC Complaint at 17. In other words, the FTC is seeking to stop Unocal from
23 doing anything to collect patent royalties whether through licensing activities or
24

25 ¹ The FTC rules require the ALJ to render a decision within 90 days of trial. 16 CFR § 3.51; see
26 also 16 CFR § 3.1 ("It is the policy of the Commission that, to the extent practicable and
consistent with requirements of law, . . . proceedings shall be conducted expeditiously.")

1 through actions like this one in the courts. Despite the obvious relevance of the
2 FTC's pending complaint proceeding, Unocal has inexplicably omitted any
3 mention of it in the Status Report it recently filed with this Court.

4 Indeed, it appears from Unocal's Status Report that it will attempt to
5 preempt the FTC's effort to protect California consumers by urging the Court to
6 revisit its order withholding final judgment. It is respectfully submitted that
7 nothing has occurred which would warrant revisiting the Court's May 16, 2002
8 decision to withhold entry of final judgment. Any suggestion otherwise should be
9 rejected. The PTO's continuing repudiation of the '393 patent claims and the
10 FTC's imminent trial further fortify the Court's earlier decision.

11
12 Dated: August 17, 2004

Respectfully submitted,

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1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California. I am over
4 the age of 18 and not a party to the within action; my business address is: 2029
Century Park East, 24th Floor, Los Angeles, California 90067.

5 On August 17, 2004, I served the foregoing document(s) described as:
6 **DEFENDANTS' STATUS REPORT IN CONNECTION WITH THE STATUS**
7 **CONFERENCE OF AUGUST 23, 2004**, on interested parties in this action by
8 placing the original true copy(ies) thereof enclosed in sealed envelopes* as
9 follows:


9 Martin R. Lueck, Esq.
10 David W. Beehler, Esq.
11 Diane L. Simerson, Esq.
12 Robins, Kaplan, Miller & Ciresi L. L. P.
13 2800 LaSalle Plaza
800 LaSalle Avenue South
14 Minneapolis, MN 55402-2015
Attorneys (pro hac vice) for Plaintiff
Union Oil Company of California

15 **BY OVERNIGHT DELIVERY** I am readily familiar with the firm's practice of
16 collection and processing correspondence for mailing with an overnight/express
17 mail carrier. Under that practice it would be deposited with an overnight/express
18 mail carrier on that same day thereon fully prepaid at Los Angeles, California in
the ordinary course of business. The envelope was sealed and placed for collection
and mailing on that date following ordinary business practices.

19 **(FEDERAL)** I declare that I am employed in the office of a member of the bar
of this court at whose direction the service was made.

20 Executed on August 17, 2004 at Los Angeles, California.

21
22 ROXANA GUEVARA
[Print Name of Person Executing Proof]


[Signature]

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2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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4 the age of 18 and not a party to the within action; my business address is: 2029
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8 follows:

9 David Martinez, Esq.
10 Robins, Kaplan, Miller & Ciresi L. L. P.
11 2049 Century Park East, Suite 3700
12 Los Angeles, California 90067
13 Tel: (310) 552-0130
14 *Attorneys for Plaintiff*
15 *Union Oil Company of California*

14 BY PERSONAL SERVICE I delivered such envelope(s) by hand to the offices
15 of the addressee(s).

16 (FEDERAL) I declare that I am employed in the office of a member of the bar
of this court at whose direction the service was made.

17 Executed on August 17, 2004 at Los Angeles, California

18
19 Albert Blanco
[Print Name of Person Executing Proof]

18 
[Signature]



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