

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)

UNION OIL COMPANY OF CALIFORNIA,)

a corporation.)

Docket No. 9305

**NON-PARTY EXXONMOBIL'S MOTION FOR *IN CAMERA* TREATMENT
OF TESTIMONY GRANTED PROVISIONAL *IN CAMERA* STATUS UNDER
16 C.F.R. § 3.45(g) ON NOVEMBER 18, 2004**

Non-party ExxonMobil Corporation (“ExxonMobil”) moves for an order directing *in camera* treatment of the November 18, 2004 testimony of Thomas R. Eizember (hereinafter referred to as “the testimony”) that was, at the time, granted provisional *in camera* status by your Honor under FTC Rule 3.45(g). In particular, ExxonMobil seeks *in camera* treatment for the testimony appearing in the November 18, 2004 transcript as “Volume 18, Part 2, pages 3567-3585.”¹

On November 17, 2004, counsel for Unocal initiated questioning of Mr. Eizember regarding instructions given to Exxon, Mobil and ExxonMobil refineries concerning avoidance of the numerical property limitations of the Unocal patent claims. Counsel for ExxonMobil objected, noting that this line of questioning would likely elicit information that should be protected as *in camera*. Counsel for the parties conferred and counsel for Unocal agreed to elicit

¹ We are unable to append the transcript of the testimony for which *in camera* treatment is sought because, as a non-party, ExxonMobil does not have access to the unredacted version of the transcript.

the testimony *in camera*.² Your Honor then granted provisional *in camera* treatment for the testimony, pending the filing of this motion. The testimony was given on November 18, 2004. *In camera* treatment of the testimony is appropriate pursuant to § 3.45(b). Therefore, pursuant to § 3.45(g), ExxonMobil respectfully moves for *in camera* treatment.

**EXXONMOBIL'S CONFIDENTIAL DOCUMENTS DESERVE IN CAMERA
TREATMENT UNDER THE FEDERAL TRADE COMMISSION'S
RULES OF PRACTICE**

ExxonMobil is not a party to this proceeding. The testimony at issue is material to ExxonMobil's business because it relates to ExxonMobil's current gasoline refining operations. Specifically, the testimony concerns instructions that have been given relating to avoidance of the numerical property limitations of the Unocal patents (to all refineries, and specifically as they apply to ExxonMobil's refinery in Torrance, California). These instructions include those currently governing production and shipment of gasoline, as well as past instructions that can provide insights into the content of the current instructions. ExxonMobil has guarded the confidentiality of this information.

Public disclosure of this information could result in serious competitive injury to ExxonMobil, while adding very little incremental value to the public's understanding of the issues in this proceeding. Other companies would learn of ExxonMobil's current approach regarding avoidance of the Unocal patents, including the capabilities and limitations of ExxonMobil's refinery operation and gasoline blending. Such companies could use this information to exploit the competitive position of their refineries relative to ExxonMobil's with respect to the patents and harm ExxonMobil in the marketplace. Accordingly, the testimony

² Unocal had not given ExxonMobil notice that it intended to use Mr. Eizember's deposition testimony that related to instructions regarding avoidance of the numerical property limitations of the Unocal patents and therefore ExxonMobil had not sought *in camera* treatment of such testimony prior to the November 18, 2004 trial.

granted provisional *in camera* status merits an order for formal *in camera* treatment. *See In re Dura Lube Corp.*, 1999 FTC LEXIS 255 (Dec. 23, 1999).

A. ExxonMobil Has Preserved The Confidentiality Of Its Documents

ExxonMobil has taken significant steps to protect the confidential nature of the information in the testimony for which it seeks protection. Mr. Eizember was questioned extensively about Exxon's, Mobil's ExxonMobil's instructions regarding Unocal patent avoidance in his depositions in this matter. Mr. Eizember's individual deposition testimony in this proceeding has previously been designated as "Confidential" and his 3.33(c) deposition testimony as "Restricted Confidential," each in its entirety. Thus, ExxonMobil has preserved the confidentiality of the information in the testimony at issue.

B. Disclosure Of The Information the Testimony Could Result In Competitive Injury To ExxonMobil

The information in the testimony for which ExxonMobil seeks *in camera* treatment has a direct and tangible impact on its day-to-day refining activities and its overall competitive position. The testimony concerns ExxonMobil's (and, pre-merger, Exxon's and Mobil's) instructions regarding avoidance of the numerical property limitations of the Unocal patents. These instructions are material to ExxonMobil's business. Disclosure could cause real and serious damage to the competitive position of ExxonMobil. If this information were disclosed to a competitor, that competitor would gain insight into the capabilities and limitations of ExxonMobil's refinery operation and gasoline blending, and could exploit that information and thereby harm ExxonMobil in the marketplace. This risk applies to both the current instructions as well as to prior instructions leading up to the current instructions. Because the development of avoidance instructions was an iterative process, the prior instructions can provide insights to

competitors as to ExxonMobil's present approach to Unocal patent avoidance and provide insights into the current instructions.

**C. The Public Interest In the Testimony Is Outweighed
By The Likelihood Of Serious Competitive Harm To ExxonMobil**

ExxonMobil deserves "special solicitude" as a non-party requesting *in camera* treatment for its confidential business information. *See Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500 (order directing *in camera* treatment for sales statistics over five years old). Reasonable extensions of *in camera* treatment encourage non-parties to cooperate with future discovery requests in adjudicative proceedings. *Id.* ExxonMobil has cooperated fully with the discovery demands in this case, and as mentioned above, has even taken steps to facilitate the access of the parties to highly sensitive non-party documents. Conversely, publicly revealing testimony that concerns ExxonMobil's instructions relating to the avoidance of the Unocal patents will not promote the resolution of this matter. Nor will the testimony uniquely enhance public understanding of these proceedings, particularly in light of the fact that ExxonMobil is not seeking protection for substantial portions of the other testimony by its only live witness, Thomas Eizember. The balance of interests clearly favors *in camera* protection for the testimony. *See In re Bristol-Myers*, 90 F.T.C. 455, 456 (1977) (describing six-factor test for determining secrecy and materiality).

D. Protection For the Testimony Should Extend For Five Years

The value to ExxonMobil's business of the testimony warrants lasting protection. Similarly, confidential avoidance strategies with respect to the numerical property limitations of the Unocal patents are crucial to ExxonMobil's competitiveness as a refiner of CARB Phase 3 gasoline. Given the importance of the information in the testimony to ExxonMobil's current

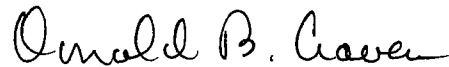
operations and competitive position, ExxonMobil respectfully requests that the testimony be afforded *in camera* protection for a period of five years.

CONCLUSION

The testimony satisfies the standard for *in camera* protection under the Commission's Rules of Practice and relevant FTC rulings. Accordingly, this Court should extend *in camera* protection to this testimony. We conferred with counsel for Unocal and the FTC during the hearing before presentation of the testimony for which *in camera* treatment is sought, and they indicated that they did not oppose such treatment.

DATED: November 29, 2004

Respectfully submitted,



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1333 New Hampshire Ave., NW
Washington, DC 20036

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

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[PROPOSED] ORDER

Upon consideration of Non-Party ExxonMobil's Unopposed Motion For *In Camera* Treatment Of Testimony Granted Provisional *In Camera* Status Under 16 C.F.R. § 3.45(g) on November 18, 2004, **IT IS HEREBY ORDERED** that the testimony on November 18, 2004 designated in the transcript as Volume 18, Part 2, pages 3567-3585 be afforded *in camera* treatment, to expire on [November 18, 2009].

This testimony concerns the prior and current instructions to avoid the numerical property limitations of the Unocal patents for Exxon, Mobil and ExxonMobil. The information sought to be protected meets the standards for *in camera* treatment. Disclosure of this testimony to competitors could result in competitive injury to ExxonMobil in the marketplace. In addition, the public interest in the testimony is outweighed by the likelihood of serious competitive harm to ExxonMobil. *In camera* treatment shall expire in five years, because ExxonMobil's confidential avoidance strategies with respect to the numerical property limitations of the Unocal patents are crucial to ExxonMobil's competitiveness as a refinery of CARB Phase 3 gasoline.

The Honorable D. Michael Chappell
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that on November 29, 2004, I caused an original and two copies of Non-Party ExxonMobil's Unopposed Motion For *In Camera* Treatment Of Testimony Granted Provisions *In Camera* Status Under 16 C.F.R. § 3.45(g) on November 18, 2004 to be filed by hand and one electronic copy of that motion to be filed by electronic mail with:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-159
Washington, DC 20580

I also certify that on November 29, 2004, I caused two copies of the foregoing motion to be served by U.S. mail upon:

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

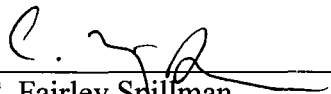
I also certify that on November 29, 2004, I caused one copy of the foregoing motion to be served by hand delivery upon each person listed below:

J. Robert Robertson, Esq.
Senior Litigation Counsel
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Chong S. Park, Esq.
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, NW, Rm. NJ-6213
Washington, DC 20001

I also certify that on November 29, 2004, I also caused one copy of the foregoing motion to be served by U.S. mail upon:


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


C. Fairley Spillman
AKIN GUMP STRAUSS HAUER
& FELD LLP
1333 New Hampshire Avenue NW
Washington, DC 20036

COPY CERTIFICATION

I certify that the electronic version of NON-PARTY EXXONMOBIL'S UNOPPOSED MOTION FOR *IN CAMERA* TREATMENT OF TESTIMONY GRANTED PROVISIONS *IN CAMERA* STATUS UNDER 16 C.F.R. § 3.45(G) ON NOVEMBER 18, 2004 filed by electronic mail with the Secretary of the Commission is a true and accurate copy of the paper original and that a paper copy with original signature has been filed with the Secretary of the Commission on this day.

Dated November 29, 2004

By: 
C. Fairley Spillman
AKIN GUMP STRAUSS HAUER
& FELD LLP
1333 New Hampshire Avenue NW
Washington, DC 20036

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of)	
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**DECLARATION OF THOMAS R. EIZEMBER IN SUPPORT OF
NON-PARTY EXXONMOBIL’S UNOPPOSED MOTION FOR *IN CAMERA*
TREATMENT OF TESTIMONY GRANTED PROVISIONS *IN CAMERA* STATUS
UNDER 16 C.F.R. § 3.45(G) ON NOVEMBER 18, 2004**

I, Thomas R. Eizember, declare as follows:

1. I am a Senior Planning Advisor in the Corporate Planning Department for Exxon Mobil Corporation (“ExxonMobil”). In that capacity, my responsibilities include business planning activities involving all of the worldwide assets of ExxonMobil and its affiliates, including ExxonMobil Oil Corporation’s refinery in Torrance, California.

2. ExxonMobil is not a party to the captioned matter.

3. The testimony for which ExxonMobil seeks *in camera* treatment is identified in the November 18, 2004 transcript as Volume 18, Part 2, pages 3567-3585.

4. On November 18, 2004, I gave the testimony for which ExxonMobil seeks *in camera* treatment. As Senior Planning Advisor, I am familiar with the type of information contained that testimony. I am also generally familiar with the confidentiality protection afforded this type of information by ExxonMobil. Based upon my knowledge of ExxonMobil’s business and my familiarity with the confidentiality protection that ExxonMobil affords information of this type, it is my belief that public disclosure of this information could cause serious competitive injury to ExxonMobil.

5. The testimony concerns instructions for avoidance of the numerical property limitations of the Unocal patents, both generally and at the Torrance, California refinery in particular. These instructions include those currently governing production and shipment of gasoline, as well as past instructions as far back as 1995 that can provide insights into the content of the current instructions. The testimony about all of these instructions contains highly confidential and commercially sensitive information about how ExxonMobil instructs its refineries regarding Unocal patent avoidance.

6. ExxonMobil has taken steps to protect the information contained in the testimony at issue from disclosure to its competitors. These steps include designating the transcript of my individual deposition in this proceeding as “Confidential,” and designating the transcript of my 3.33(c) deposition in this proceeding as “Restricted Confidential” pursuant to the protective order.

7. Disclosure of the testimony could cause real and serious damage to the competitive position of ExxonMobil. The instructions relating to the Unocal patents have a direct and tangible impact on ExxonMobil’s day-to-day refining activities and its overall competitive position. The instructions are, therefore, material to ExxonMobil’s business. If information relating to ExxonMobil’s (and pre-merger, Exxon’s and Mobil’s) instructions regarding avoidance of the numerical property limitations of the Unocal patents were disclosed to a competitor, that competitor would gain insight into the capabilities and limitations of ExxonMobil’s refinery operation and gasoline blending, and could exploit that information and thereby harm ExxonMobil in the marketplace. This risk applies to both the current instructions as well as to prior instructions leading up to the current instructions, which can provide insights into the content of the current instructions.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 23rd day of November, 2004, in IRVING, TEXAS.



Thomas R. Eizember