
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 MOTION FOR A SUBPOENA FOR THE PRODUCTION OF
DOCUMENTS FROM THE CALIFORNIA AIR RESOURCES BOARD**

INTRODUCTION

The Complaint in this action alleges that Unocal committed fraud on a California state governmental agency – the California Air Resources Board ("CARB") – during Unocal's participation in CARB's process to develop "Phase 2" regulations for low-emissions motor gasolines. More specifically, the Complaint alleges that Unocal committed fraud by: (1) telling CARB staff that Unocal considered its research data non-proprietary; and (2) telling CARB staff and CARB that a predictive model (which would not require specific compositions) would be flexible and cost-effective compared to rigid fuel specifications.

Because the allegations in the Complaint put CARB at the center of this action, Unocal moves the Court – pursuant to Rule 3.36 of the Commission's Rules of Practice, 16 C.F.R. § 3.3 – for an Order Allowing Issuance of a Subpoena for the Production of Documents to CARB. The list of documents to be requested by Unocal under such a subpoena, and the corresponding instructions and definitions are attached as Exhibit A, hereto. Complaint Counsel has stated that it does not oppose the principle of this motion, but will not state a definitive position until it has read the papers.

RELEVANT CONTEXT FOR THIS MOTION

The allegations of the Complaint center on Unocal's participation in the CARB regulatory process in the early 1990's and allege that Unocal committed fraud on CARB by telling CARB staff that it considered its auto emissions research data to be "non-proprietary." By alleging a claim of fraud, Complaint Counsel alleges not only that the statements made by Unocal were false representations of material fact and made with knowledge of the falsity and an intent to defraud CARB, but also that those statements were justifiably relied on by CARB in adopting its Phase 2 regulations for motor gasoline, that Unocal had a duty to disclose the existence of pending patent applications to CARB, that – "[b]ut for Unocal's fraud – CARB would not have adopted RFG regulations that substantially overlapped with Unocal's concealed patent claims," that CARB is now unable to change its regulations in light of Unocal's issued patents because CARB and California refiners are "locked in" to refinery modifications made to comply with the Phase 2 regulations as adopted, and resulting damage. Complaint ¶ 5-6; *see also Hunter v. Up-Right, Inc.*, 26 Cal. Rptr. 2d 8, 13 (Cal. 1993) (*citing* 5 Witkin, Torts § 676) (stating the elements of fraud under California law). Moreover, Complaint Counsel alleges that Unocal has undermined competition and harmed consumers in the "downstream product market for 'summer-time' reformulated gasoline in California." Complaint ¶ 5. Finally, according to Complaint Counsel, Unocal is not entitled to the *Noerr-Pennington* immunity that is ordinarily afforded to communications with governmental bodies who are engaged in making law and policy because, says Complaint Counsel, this rulemaking was an adjudicatory process, not legislative in nature.

ARGUMENT

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

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

16 C.F.R. § 3.36(b). The subpoena *duces tecum* sought by Unocal satisfies each of these requirements.

I. The Material Sought is reasonable in Scope.

The documents sought by Unocal fall into four general categories:

- Documents related to the CARB Phase 2 Regulatory process;
- Documents related to CARB's consideration of patents in any regulatory process from 1989 to the present;
- Documents related to communications regarding Unocal;
 - Documents related to the possibility that CARB may be locked into or constrained in its ability to modify or amend the Phase 2 regulations; and
- Documents reflecting current home and/or business addresses for Robert Fletcher and John Courtis – two former staff members of CARB involved in developing proposals for CARB's consideration in the Phase 2 Regulatory process.

Unocal does not believe that the subpoena it requests would be unduly burdensome to CARB.

Unocal believes that each of these categories of documents is kept by CARB in the ordinary course of business. While the number of documents may be fairly voluminous, it is a set of documents that should be readily identifiable and accessible. Indeed, Unocal believes that CARB has likely compiled a number of the responsive documents to support the "Final Statement of Reasons" it issued in October 1992 in connection with adopting the Phase 2 Regulations. If the number of responsive documents is too voluminous for CARB to copy, Unocal is willing to inspect and copy documents rather than to have CARB provide copies of the documents in order to accommodate CARB.¹

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

This entire case is about fraud on CARB, CARB's alleged reliance, and the idea that CARB is now "locked in" to the Phase 2 regulations and cannot change them despite its knowledge of Unocal's issued patents. Each of the categories of documents sought by Unocal under this motion is narrowly tailored to go directly to these issues; that is, to ascertain: whether and how CARB detrimentally relied on any statement, non-statement or conduct by Unocal; what "duty" CARB believed Unocal had to disclose its pending patent application; what CARB believes was "false" about Unocal's statements; when CARB first discovered the "falsity" of Unocal's statements; whether and how these statements were material to the Phase 2 regulations; what regulations CARB would have enacted "[b]ut for Unocal's fraud;" how CARB has been damaged as a result of any statement, non-statement or conduct by Unocal; how CARB is

¹Unocal submits that its requests to CARB are very well-tailored, in contrast to the broad requests made by Complaint Counsel to Unocal on the same issues. See Exhibit B (Complaint Counsel's First Request for Production of Documents and Things Issued to Respondent Union Oil Company of California).

"locked in" to the current regulations; and—as to the allegations that the Phase 2 process was "adjudicatory" in nature – what adjudicatory procedures were and were not followed for public and private CARB meetings during the Phase 2 rulemaking process and whether CARB contends that the Phase 2 rulemaking process was adjudicative or legislative in nature. Where, as here, the discovery sought goes to the very heart of the case, the discovery should be allowed.

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

The information and material sought from CARB cannot reasonably be obtained by other means. CARB members and CARB staff alone possess their notes, correspondence, internal memoranda, records from private meetings during the Phase 2 process, and the like. Without the requested material from CARB, Unocal's alternative is to search out all other persons that may have provided information to CARB in connection with the Phase 2 Regulations, the publication of any CARB policies or statements regarding the consideration of patents in connection with regulatory processes, and all other persons that may have provided information to CARB regarding patents in connection with any regulatory process since 1989. This, however, would be an insufficient alternative. Seeking discovery from persons that provided information to CARB would only yield a portion of the relevant information. It would not provide Unocal with the majority of the information it is seeking, including information indicating CARB's alleged reliance, Unocal's duty of disclosure, the perceived falsity of Unocal's statements, the discovery of the alleged falsity, and the effect of Unocal's statements on the outcome of the regulatory process.

CONCLUSION

For the reasons stated, Unocal's Motion should be granted.

Dated: April 3, 2003

Respectfully submitted,

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

Original signature on file with the Commission

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