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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

**RESPONDENT'S PROPOSED CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over Respondent, Union Oil Company of California ("Unocal").
2. Unocal is organized, existing and doing business under and by virtue of the laws of California. Its office and principal place of business is located at 2141 Rosecrans Avenue, Suite 4000, El Segundo, California 90245. Since 1985, Unocal has done business under the name "Unocal." Unocal is a wholly-owned, operating subsidiary of Unocal Corporation, a holding company incorporated in Delaware.
3. Unocal is, and at all relevant times has been, a corporation, as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
4. At all times relevant herein, Unocal has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
5. As the proponent of the Complaint, Complaint Counsel bears the burden of establishing each element of the violations alleged in the Complaint. 16 C.F.R. § 3.43.
6. Given the nature of the allegations and the remedy sought in the Complaint, Complaint Counsel must prove the elements of the alleged violations by clear and convincing evidence. *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 996 (9th Cir. 1979); *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 850 (1st Cir. 1985); *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1070-71 (Fed. Cir. 1998); *MCI Communication Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1155-56 (7th Cir. 1983). Complaint Counsel, however, have not met their burden of establishing each element of the violations alleged under either a preponderance of the evidence standard or a clear and convincing evidence standard.
7. The exercise of a patent holder's rights can serve as the basis for antitrust liability in only very limited circumstances. In the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory

right to exclude others from making, using or selling the claimed invention free from liability under the antitrust laws. *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1327 (Fed. Cir. 2000); *Townshend v. Rockwell Int'l Corp.*, No. C 99-0400, 2000 U.S. Dist. LEXIS 5070, at \*\*22-23 (N.D. Cal. Mar. 28, 2000). There is no allegation in this case that Unocal has engaged in illegal tying, fraud on the PTO, or sham litigation. These facts serve as an absolute bar to Complaint Counsel's challenge of Unocal's exercise of its lawful rights under its patents.

8. Section 5 of the FTC Act should not be expanded to cover offenses that are broader than, or create liability apart from, the monopolization and attempted monopolization claims pled in the Complaint. *In re General Foods Corp.*, 103 F.T.C. 204, 364-66 (1984). Counts 4 and 5 of the Complaint appear to be based on some undefined "antitrust policy." Counts 4 and 5 are therefore dismissed. The monopolization and attempted monopolization claims as set forth in Counts 1 through 3 must be proved under the well-established standards already developed under the Sherman Act.
9. To prevail on the Complaint, Complaint Counsel must establish all the elements of a claim for monopolization or attempted monopolization.
10. The offense of monopolization consists of "(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 historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).
11. The essential elements of an attempt to monopolize are: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).
12. A critical element of any monopolization offense is proof of anticompetitive or exclusionary conduct. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429-30 (2d Cir. 1945).
13. The exclusionary conduct alleged by Complaint Counsel is fraud. Moreover, under the Order of the Commission dated July 7, 2004, in order to fit within any exception to the immunity provided by *Noerr-Pennington*, Complaint Counsel must show that the fraud was knowing, deliberate, factually verifiable and central to the outcome of the CARB Phase 2 regulatory process.
14. In its July 7 opinion, the Commission noted that, according to the Complaint, the proximate cause of the alleged competitive harm was Unocal's *enforcement* of its patent rights. *In re Union Oil Co. of Cal.*, No. 9305, slip op. at 44 (FTC July 7, 2004) (emphasis supplied). The Federal Circuit has held that the question whether conduct in "enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law." *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068

(Fed. Cir. 1998); *Unitherm Food Sys., Inc. v. Swift-Eckich, Inc.*, 375 F.3d 1341, 1355 (Fed. Cir. 2004).

15. The elements of fraud are “(1) a representation of a material fact, (2) the falsity of that representation, (3) the intent to deceive or, at least, a state of mind so reckless as to the consequences that it is held to be the equivalent of intent (scienter), (4) a justifiable reliance upon the misrepresentation by the party deceived which induces him to act thereon, and (5) injury to the party deceived as a result of his reliance on the misrepresentation.” *Nobelpharma*, 141 F.3d at 1069-70.
16. Complaint Counsel have failed to demonstrate that Unocal made a misrepresentation of a material fact to CARB, Auto/Oil or WSPA.
17. A failure to disclose material facts is not actionable fraud unless there is a fiduciary or confidential relationship imposing a duty to disclose.” *Kruse v. Bank of Am.*, 248 Cal. Rptr. 217, 225 (Cal. App. 1988). There can be no Section 5 antitrust violation based upon a failure to disclose absent proof of a “clear and unambiguous” duty to disclose. *In re Rambus Inc.*, No. 9302, slip op. at 259 (FTC Feb. 23, 2004).
18. Complaint Counsel have failed to demonstrate that Unocal had a clear and unambiguous duty to disclose its patent application to CARB, Auto/Oil or WSPA.
19. Complaint Counsel have failed to show that Unocal had any relationship with CARB, Auto/Oil or WSPA that would create a duty for Unocal to disclose that it had filed a patent application.
20. Complaint Counsel have failed to demonstrate that Unocal’s truthful statements to CARB, Auto/Oil and WSPA gave rise to a duty to disclose its pending patent applications.
21. Complaint Counsel have failed to demonstrate that Unocal’s statements regarding its data and regarding the cost-effectiveness of a predictive model were false or misleading.
22. When the allegations of exclusionary conduct are based upon an allegation that the Respondent intentionally sought to mislead, then to establish a Section 5 violation, Complaint Counsel must prove an intent to mislead or deceive. *Rambus*, slip op. at 297; *MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1129 (7th Cir. 1983). The intent to deceive is a necessary component of both common law fraud and *Walker Process* fraud. *Kangaroos U.S.A. v. Caldor, Inc.*, 778 F.2d 1571, 1573 (Fed. Cir. 1985). In addition, the Commission’s July 7 opinion emphasized that cases recognizing a misrepresentation exception to *Noerr* all require that any such misrepresentation be made with deliberate intent. *Union Oil*, slip op. at 36

23. Complaint Counsel have failed to prove that Unocal intended to mislead or deceive the California Air Resources Board (“CARB”) or Auto/Oil or WSPA members. To the contrary, the evidence shows that Unocal acted in good faith.
24. Fraud requires that the alleged misstatements of fact be material. *Roberts v. Lomanto*, 5 Cal. Rptr. 3d 866, 876 (Cal. Ct. App. 2003).
25. Complaint Counsel have failed to demonstrate that Unocal’s alleged misrepresentation were material to CARB or to Auto/Oil or WSPA members.
26. Fraud requires proof of detrimental reliance. *Whiteley v. Philip Morris, Inc.*, 11 Cal. Rptr. 3d 807, 842-43 (Cal. Ct. App. 2004).
27. Complaint Counsel have not established that CARB, Auto/Oil or WSPA members detrimentally relied on Unocal’s alleged misrepresentations.
28. Unocal has demonstrated that there were legitimate business justifications for the conduct challenged by Complaint Counsel. Maintaining the confidentiality of patent applications is clearly related to a legitimate and normal business purpose and thus precludes a finding of exclusionary conduct in this case. *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 522 (5th Cir. 1999). Moreover, Unocal’s efforts to lobby CARB for a predictive model constitute a legitimate business justification.
29. Complaint Counsel have not shown that Unocal possesses, or is dangerously likely to attain, monopoly power in a relevant market.
30. The gasoline market claims alleged in the Complaint fails as a matter of law because Unocal is not a participant in the alleged market. *Spanish Broad. Sys. of Fla. v. Clear Channel Communications*, 376 F.3d 1065, 1075 (11th Cir. 2004); *Aquatherm Indus., Inc. v. Florida power & Light Co.*, 145 F.3d 1258, 1261 (11th Cir. 1998).
31. Complaint Counsel must establish that Unocal’s alleged conduct has an ‘anticompetitive effect.’ That is, it must harm the competitive *process* and thereby harm consumers. *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). The causal link between the alleged exclusionary conduct and competitive harm or dangerous threat must also be established in the context of FTC cases alleging monopolization or attempted monopolization. *Rambus*, slip op. at 300-02.
32. Complaint Counsel have failed to demonstrate that Unocal’s challenged conduct caused an anticompetitive effect.

33. Complaint Counsel have failed to establish that CARB is “locked in” to the current CARB regulations. Complaint Counsel have failed to establish lock-in with respect to California refiners as well.
34. Complaint Counsel have failed to demonstrate that Unocal’s challenged conduct results in higher prices to the consumer.
35. Complaint Counsel have failed to demonstrate harm to competition.
36. 28 U.S.C. § 2462 applies to this proceeding.
37. 28 U.S.C. § 2462 bars this proceeding as the challenged conduct by Unocal occurred outside of the limitations period and Unocal has not engaged in any conduct that would have the effect of restarting the limitations period.
38. The remedy proposed by Complaint Counsel in this case exceeds the Commission’s authority, as the Commission has no authority to force the forfeiture of patent rights.
39. The proposed remedy with respect to the ‘393 patent would be an impermissible attack on the judgment of an Article III court. *Deerfield v. F.C.C.*, 992 F.2d 420 (2d Cir. 1993).
40. The proposed remedies do not bear a reasonable relation to the alleged unlawful conduct. *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *La Peyre v. F.T.C.*, 366 F.2d 117, 122 (5th Cir. 1966).
41. The proposed remedies are inappropriate in light of the objective appearance of the immunity of Unocal’s actions both in 1991 and at the time of the Complaint in 2003. *In re Union Oil Co. of Cal.*, No. 9305, slip. op. at 1-2 (FTC Nov. 23, 2003) (Initial Decision); *In re Abbott Labs.*, No. C-3945 (F.T.C. May 26, 2000) (consent order); *Geneva Pharms, Inc.*, No. C-3946 (May 26, 2000) (consent order).
42. Having failed to show that Unocal engaged in knowing, deliberate, factually verifiable fraud that was central to the outcome of CARB’s Phase 2 regulatory process, Complaint Counsel has failed to demonstrate that Unocal’s conduct fits within any exception to *Noerr-Pennington* immunity as recognized by the Commission’s Opinion and Order dated July 7, 2004.
43. Because Unocal engaged in protected petitioning activity in connection with a quasi-legislative rulemaking proceeding, its actions are immune under *E. R.R. Presidents Conferences v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).
44. The challenged conduct by Unocal is immune from liability under the antitrust laws under *E. R.R. Presidents Conferences v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

45. The Commission does not have authority to order the remedy sought in this matter.
46. The Complaint raises substantial questions of patent law and as such the Commission is without jurisdiction to hear this matter. 28 U.S.C. § 1338(a); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808-09 (1988); *Decker v. FTC*, 176 F.2d 461, 463 (D.C. Cir. 1949).

Dated: October 8, 2004.

Respectfully submitted,

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

By: Signature on File with Commission

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ATTORNEYS FOR UNION OIL COMPANY OF  
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## CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2004, I caused the original and two paper copies and an electronic version on CD to be delivered for filing via overnight delivery (Federal Express) of (1) the confidential version of Respondent's Trial Brief and (2) the confidential version of Respondent's Proposed Findings of Fact, and I caused the original and two paper copies to be delivered for filing via overnight delivery (Federal Express) and caused an electronic copy to be delivered for filing via e-mail of Respondent's Proposed Conclusions of Law:

Donald S. Clark, Secretary  
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I hereby certify that on October 6, 2004, I also caused two paper copies of the (1) the confidential version of Respondent's Trial Brief, (2) the confidential version of Respondent's Proposed Findings of Fact, and (3) Respondent's Proposed Conclusions of Law to be delivered via overnight delivery (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 October 6, 2004, I also caused one paper copy of the (1) the confidential version of Respondent's Trial Brief, (2) the confidential version of Respondent's Proposed Findings of Fact, and (3) Respondent's Proposed Conclusions of Law to be served upon each person listed below via overnight delivery (Federal Express):

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