

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION

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DOCUMENT PROCESSING

In the Matter of

UNION OIL COMPANY OF CALIFORNIA,  
a corporation.

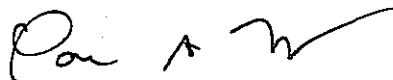
PUBLIC VERSION

Docket No. 9305

ADDITIONAL ERRATA SHEET

Certain references contained in Complaint Counsel's Post-Trial Brief and Post-Trial Findings of Fact, the public version, which was filed on March 16, 2005, should be corrected by replacing the originally-submitted pages with the attached corrected pages. The attached spreadsheet shows the changes made.

Respectfully submitted,



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**COMPLAINT COUNSEL'S FINDINGS ERRATA SHEET (PUBLIC)**

<b>FINDING</b>	<b>VOLUME</b>	<b>PAGE</b>	<b>CORRECTION</b>
1678	II	217	Delete "just one month before Dr. Jessup's presentation" from finding. Add "In August 1990," to beginning of finding.
1679	II	217	REPLACE August 23, 1991 with August 23, 1990.
3006	IV	391	Within chart, REPLACE the '126 Claim 49, T90 parameter of <del>315</del> with <b>Any</b> .
3006	IV	391	Within chart, REPLACE the '126 Claim 49, T50 parameter of <b>Any</b> with <del>215</del> .
3016	IV	394	Within chart, REPLACE the '126 Claim 49, T90 parameter of <del>315</del> with <b>Any</b> .

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**COMPLAINT COUNSEL'S PROPOSED  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

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work. (Klein, Tr. 2500-2501).

1678. In August 1990, Auto/Oil applied the language in the Agreement providing that everything from Auto/Oil would be put into the public, making clear that Unocal's position is inconsistent with Auto/Oil's own interpretation of the Agreement and course of dealing. (CX 4023 at 007).
1679. The minutes from the August 23, 1990 Auto/Oil RPC meeting reflect that Ford was willing to present certain engine speciation technology to Auto/Oil, thereby placing it in the "public domain." (CX 4023 at 007).
1680. Auto/Oil was concerned, not only with the public availability of the data but also with a third party slightly altering the technique and then patenting it. (CX 4023 at 007).
1681. Auto/Oil representatives inquired of legal counsel how to prevent the patenting by a third party of information presented to Auto/Oil in order to "ensure that, once disclosed, the technique remains in the public domain." (CX 4023 at 007).
1682. Jack Wise, one of the co-chairs of the Research Planning Task Force, stated that he understood Unocal's presentation was in effect the granting of a royalty free license to all of the members of Auto/Oil. (CX 7073 (Wise, Dep. at 19)).
1683. Mr. Wise based his understanding that Unocal granted Auto/Oil a royalty free license, on three factors: "One is the general understanding that goes back to the formulation of the program that there would be a – that this was a research program designed to develop data for regulators to use and that all the participants would pitch in without any –and that all the information that was donated to the program would become part of the program . . . . The second point was that Union [Unocal] said that the information was in the public domain." (CX 7073 (Wise, Dep. at 19-20)). Third, "under the terms of the agreement and then the practice, long-standing practice in research organizations is that you don't accept proprietary information from a third party without an agreement, a legal agreement on how to accept that." (CX 7073 (Wise, Dep. at 40)).
1684. Mr. Wise believes that the Auto/Oil members obtained a royalty-free license to anything that resulted from Unocal's underlying research on reformulated gasoline and emissions. (CX 7073 (Wise, Dep. at 19)).

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## Gasoline Regulations.

3006. The following table indicates in bold the numerical property limits of representative claims of the Unocal patents that substantially cover the limits required by the CARB Phase 2 summertime regulation: RVP, Aromatics, Olefins, T50 (°F), and T90 (°F). The plain text in the table indicates three other gasoline properties that CARB also regulated: benzene, oxygen, and sulfur. Since Unocal's patent claims do not set any specific limits for these gasoline properties, any gasoline that meets the other limits of the Unocal claims is covered by those claims.

Parameter	Representative Unocal Patent Claim Limitations						CARB Phase 2 Limits		
	'126 Claim 49	'126 Claim 4	'521 Claim 1	'393 Claim 112	'866 Claim 1	'567 Claim 6	<i>Flat Limit</i>	<i>Avg. Std.</i>	<i>Cap Limit</i>
RVP	<7.0	<7.5	<7.5	≤7.0	<7.5	<7.5	7.0	--	7.0
Aromatics	≥4.5	≥4.5	Any	Any	Any	≥4.5	25	22	30
Olefins	<8	<8	<15	<10	<10	<8	6.0	4.0	10.0
T90 (°F)	Any	≤315	≤315	Any	Any	≤315	300	290	330
T50 (°F)	≤215	≤215	≤215	≤210	≤210	<208	210	200	220
Benzene	Any	Any	Any	Any	Any	Any	1.00	0.80	1.20
Oxygen	Any	Any	Any	Any	Any	Any	1.8	--	2.7
Sulfur	Any	Any	Any	Any	Any	Any	40	30	80

The patent claims in this chart may be found at: (CX 617 at 024 ('393 patent claims); CX 618 at 027 ('567 patent); CX 619 at 027 ('866 patent); CX 620 at 027-029 ('126 patent); CX 621 at 027 ('521 patent); CX 1796A at 004 (undisclosed '393 claims). The CARB Phase 2 regulation specifications may be found at: (CX 866 at 006-013, 015-018 (CARB final Phase 2 regulation)).

3007. Because refiners are able to produce gasolines with higher Reid Vapor Pressures during the "winter" months, Unocal's RFG patents are generally not implicated during the winter months. (CX 375).

3016. Even though the CARB Phase 3 summertime gasoline regulations relaxed some of the gasoline property limitations, including limits for RVP and the flat limits for T50 and T90, the Phase 3 regulations still have substantially the same overlap with the Unocal patent claims as the Phase 2 regulations. The following table shows that representative claims of Unocal's five patents also cover most of the gasoline fuel specifications under the CARB Phase 3 summertime gasoline regulations:

Parameter	Representative Unocal Patent Claim Limitations						CARB Phase 3 Limits		
	'126 Claim 49	'126 Claim 2	'521 Claim 1	'393 Claim 12	'866 Claim 1	'567 Claim 6	Flat Limit	Avg. Std.	Cap Limit
RVP	<7.0	<7.5	<7.5	≤7.0	<7.5	<7.5	7.0/ 6.9	--	6.4- 7.2
Aromatics	≥4.5	≥4.5	Any	Any	Any	≥4.5	25	22	35
Olefins	<8	<8	<15	<10	<10	<8	6.0	4.0	10
T90 (°F)	Any	≤315	≤315	Any	Any	≤315	305	295	330
T50 (°F)	≤215	≤215	≤215	≤210	≤210	<208	213	203	220
Benzene	Any	Any	Any	Any	Any	Any	0.80	0.70	1.10
Oxygen	Any	Any	Any	Any	Any	Any	1.8-2.2	NA	3.7
Sulfur	Any	Any	Any	Any	Any	Any	20	15	60/30

(RX 190 at 010 (CARB Phase 3); CX 617 at 024 ('393 patent claims); CX 618 at 027 ('567 patent); CX 619 at 027 ('866 patent); CX 620 at 028-029 ('126 patent); CX 621 at 027 ('521 patent); CX 1796A at 004 (undisclaimed '393 claims); *see also* CX 1709 at 016 (Eskew report).

##### 5. The Coverage Rate is a Useful Indicator of Monopoly Power.

3017. The portion of a batch of gasoline that falls within the numerical property limitations of the claims of Unocal's RFG patents, referred to as the "coverage rate," "overlap rate," or "matching rate," can give a useful indication of the demand for Unocal's technology. (CX 1720A at 027 (Shapiro Expert Report)).

3018. The coverage rate of Unocal's RFG patents over the aggregate total production of CARB-compliant gasoline can be used in the determination of Unocal's market share in the relevant technology market. While market share is not as strong an indicator of

**COMPLAINT COUNSEL'S BRIEF ERRATA SHEET (PUBLIC)**

<b>VOLUME</b>	<b>PAGE</b>	<b>CORRECTION (in bold)</b>
TOC	xix	Close up space between pages
III	253	Within chart, REPLACE the '126 Claim 49, T90 parameter of <b>≤15</b> with <b>Any</b> .
III	253	Within chart, REPLACE the '126 Claim 49, T50 parameter of <b>Any</b> with <b>≤15</b> .
III	256	Delete period and close up space after <i>Unocal Noerr Opinion 2004 FTC Lexis 115</i> at *120



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Parameter	Representative Unocal Patent Claim Limitations <sup>95</sup>						CARB Phase 2 Limits <sup>96</sup>		
	'126 Claim 49	'126 Claim 4	'126 Claim 1	'393 Claim 112	'866 Claim 1	'567 Claim 6	Flat Limit	Avg. Std.	Cap Limit
RVP	<7.0	<7.5	<7.5	≤7.0	<7.5	<7.5	7.0	--	7.0
Aromatics	≥4.5	≥4.5	Any	Any	Any	≥4.5	25	22	30
Olefins	<8	<8	<15	<10	<10	<8	6.0	4.0	10.0
T <sub>90</sub> (°F)	Any	≤315	≤315	Any	Any	≤315	300	290	330
T <sub>50</sub> (°F)	≤215	≤215	≤215	≤210	≤210	<208	210	200	220
Benzene	Any	Any	Any	Any	Any	Any	1.00	0.80	1.20
Oxygen	Any	Any	Any	Any	Any	Any	1.8	--	2.7
Sulfur	Any	Any	Any	Any	Any	Any	40	30	80

In addition to the gasoline properties values that CARB directly regulated, some of Unocal's patent claims also cover gasoline property values that (i) have long been covered by state law or national industry specifications, or (ii) CARB indirectly regulated (such as octane, paraffin levels, and T10). (CCPF 3008-15). This overlap helps to show that refiners cannot escape infringement by avoiding the remainder of Unocal's claim limitations. As Complaint Counsel's experts have

as "comprising."

<sup>95</sup> (CX 617 at 024 ('393 patent claims); CX 618 at 027 ('567 patent); CX 619 at 027 ('866 patent); CX 620 at 027-29 ('126 patent); CX 621 at 027 ('126 patent); CX 1796A at 004 (undisclaimed '393 claims).

<sup>96</sup> (CX 866 at 006-013, 015-018 (CARB final Phase 2 regulation).

- (1) To the extent necessary, the Commission has jurisdiction to decide substantial issues of patent law

The Sixth Circuit and the Commission have both held that the Commission has jurisdiction over competition cases that involve substantial questions of patent law. *See American Cyanamid Co. v. FTC*, 363 F.2d 757, 771 (6th Cir. 1966); *Unocal Noerr Opinion* 2004 FTC LEXIS 115 at \*118-120. If it were necessary to do so, the Commission would have jurisdiction in this case to decide questions such as a patent-law-based determination of the likelihood that refiners' technology and gasolines infringe Unocal's patents. In its opinion in the present case, the Commission also reaffirmed that it has "jurisdiction over allegations of unfair methods of competition . . . based on a substantial issue of patent law." *Unocal Noerr Opinion* 2004 FTC LEXIS 115 at \*120; *see also American Cyanamid Co.*, 63 F.T.C. 1747, 1855-57 (1963), *aff'd in relevant part and vacated on other ground.*); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 771 (6th Cir. 1966). It has held that this rule applies to provide jurisdiction in this case. *Unocal Noerr Opinion*, 2004 FTC LEXIS 115 at \*120.

The presence of a substantial issue of patent law would not defeat jurisdiction in this case, as the Commission held, because there is nothing in the FTC Act or its legislative history that so limits the Commission's jurisdiction. *Unocal Noerr Opinion* at 2004 FTC LEXIS 115 at \*118-120. The statute apportioning jurisdiction for civil actions arising under the patent laws between federal courts and state courts, 28 U.S.C. § 1338(a), does not apply to the Commission for three independent reasons: (1) the Commission's adjudicatory proceedings are not "civil actions," (2) the Commission is not a court of the states, and (3) this case does not "arise under" the patent laws. *Id.* at \*121-122.

The presence of substantial issues of patent law in this case would not mean that the case "arises under" the patent laws. *Id.* at \*125-127. The Supreme Court's test for "arising under" jurisdiction is whether "a well-pleaded complaint establishes either that federal patent law creates

## CERTIFICATE OF SERVICE

I, Kathleen Jones, hereby certify that on March 30, 2005, I caused a copy of the public version of Complaint Counsel's Additional Errata Sheet with corrected pages to be served upon the below listed persons:

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