

Commission Opinion

IN THE MATTER OF
UNION OIL COMPANY OF CALIFORNIA

OPINION OF THE COMMISSION AND ORDER IN REGARD TO
ALLEGED VIOLATIONS OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket 9305; File No. 0110214

Complaint, March 4, 2003--Opinion and Order, July 6, 2004

The Complaint in this matter concerned a series of actions taken by Respondent Union Oil Company of California, an international energy firm, with respect to proceedings conducted by the California Air Resources Board (“CARB”) to set regulations and standards governing the composition of low emissions, reformulated gasoline (“RFG”), in an effort to reduce California air pollution levels. The Administrative Law Judge granted the respondent’s motions to dismiss the complaint and issued an Initial Decision. In a unanimous Opinion, the Commission determined to reverse and vacate the Initial Decision, reinstate the Complaint, and remand for further consideration of the Complaint allegations. The Commission determined that neither the *Noerr-Pennington* doctrine nor the claimed absence of Commission jurisdiction provided an adequate basis for the respondent’s motions to dismiss. The Commission concluded in particular that the *Noerr-Pennington* claims could not be sustained if the Complaint’s allegations were taken as established; that the jurisdictional argument was flawed as a matter of law; and therefore that the case should be remanded for factual development.

Participants

For the Commission: *J. Robert Robertson, Chong S. Park, David F. Conn, Peggy Bayer Femenella, John Roberti, Lisa Fialco, Suzanne Michel, Lore Unt, Thomas Krattenmaker, Harry Schwirk, Dean C. Graybill, John S. Martin, Richard B. Dagen, Geoffrey D. Oliver, Rendell A. Davis, Jr., Daniel P. Ducore, Terri Martin, Robert A. Walters, Elizabeth J. Grimm, Paige E. Pidano, Jessica Picone, Diana Cowen, Guru Raj, Kathleen Jones, Yasmine Carson, Mark D. Williams, Jeffrey H. Fischer, and Mark Frankena.*

For the Respondent: *Martin R. Lueck and David W. Beehler, Robins, Kaplan, Miller & Ciresi, and Joseph Kattan and Chris Wood, Gibson, Dunn & Crutcher.*

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OPINION OF THE COMMISSION

BY MURIS, Chairman, For A Unanimous Commission:

A private business allegedly has used false and misleading statements to induce a government body to issue regulatory standards that conferred market power upon the firm. Respondent argues that, even taking the Complaint's factual allegations as established as is required at this preliminary stage, its deliberate use of misrepresentations to secure monopoly power is protected from antitrust challenge under the *Noerr-Pennington* doctrine, which shelters certain petitioning for government action. We disagree.

On March 4, 2003, the Federal Trade Commission issued an administrative complaint alleging, *inter alia*, that the Union Oil Company of California ("Unocal") engaged in unfair methods of competition through knowing and willful misrepresentations, to the California Air Resources Board ("CARB") and to competing gasoline refiners, that Unocal lacked, or would not assert, patent rights concerning automobile emissions research results. The Complaint further alleged that, through these misrepresentations, Unocal (1) induced CARB to adopt reformulated gasoline standards that substantially overlapped Unocal's patent claims and (2) induced other refiners to reconfigure their refineries in ways that subsequently exposed them to Unocal's patent claims. According to the Complaint, Unocal claims it is entitled to hundreds of millions of dollars in royalties from refiners who are now required to follow CARB's standards.

Administrative litigation ensued. Unocal filed two motions to dismiss. One argued that Unocal's conduct involved petitioning the government and hence was immune from antitrust liability. The other asserted that the Complaint failed to state sufficient allegations that Unocal possessed, or dangerously threatened to possess, monopoly power.

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On November 25, 2003, Administrative Law Judge D. Michael Chappell issued an Initial Decision concluding that the *Noerr-Pennington* doctrine protects much of the conduct alleged to constitute unfair methods of competition and that the FTC lacks jurisdiction over the remaining allegations because they depend on resolution of substantial questions of patent law.¹ Judge Chappell dismissed the Complaint in its entirety. Complaint Counsel have appealed. For the reasons stated below, we reverse and vacate the Initial Decision, reinstate the Complaint, and remand for further consideration of the Complaint's allegations.

I. BACKGROUND

A. The Commission's Complaint

This case involves Unocal's actions in state regulatory proceedings concerning low-emissions, reformulated gasoline ("RFG") standards to address California's air pollution problems. The Complaint, *inter alia*, states the following allegations.²

1. Unocal, CARB, and the Reformulated Gasoline Proceedings

Prior to 1997, Unocal owned and operated refineries in California as a vertically integrated producer, refiner, and

¹ The Initial Decision denied without prejudice the remainder of Unocal's motion regarding market power.

² Omissions and rewordings of the Complaint's allegations are solely for ease of exposition in addressing the specific issues currently before the Commission. Nothing in this Opinion is intended to change the content of the Complaint, which remains the sole charging document in this proceeding.

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marketer of petroleum products.³ In March 1997, Unocal completed the sale of its west coast refining, marketing, and transportation assets, but it continues to engage in oil and gas exploration and production. *Id.* Moreover, Unocal's 2001 annual report, filed with the United States Securities and Exchange Commission, lists another of its key business activities as "[p]ursuing and negotiating licensing agreements for reformulated gasoline patents with refiners, blenders and importers."⁴

In late 1988, the California legislature amended the California Clean Air Act to require CARB, a department of the California Environmental Protection Agency, to reduce harmful automobile emissions, and directed CARB to achieve this goal through new standards for automobile fuels and low-emission vehicles. ¶ 21. CARB's specific legislative mandate, promulgated in California Health and Safety Code Section 43018, provided, *inter alia*, that CARB:

- a. Take "necessary, cost-effective, and technologically feasible" actions to achieve "reduction in the actual emissions of reactive, organic gases of at least 55 percent, a reduction in emissions of oxides of nitrogen of at least 15 percent from motor vehicles" no later than December 31, 2000;

³ ¶ 13. Paragraph references indicate paragraphs in the Complaint.

⁴ ¶ 14. Unocal is the owner, by assignment, of the following patents relating to low-emissions, reformulated gasoline: United States Patent No. 5,288,393 (issued February 22, 1994); United States Patent No. 5,593,567 (issued January 14, 1997); United States Patent No. 5,653,866 (issued August 5, 1997); United States Patent No. 5,837,126 (issued November 17, 1998); United States Patent No. 6,030,521 (issued February 29, 2000). ¶ 15. These patents all derive from, and receive priority as if they were filed with, patent application No. 07/628,488, filed on December 13, 1990. ¶ 15.

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- b. Take actions "to achieve the maximum feasible reduction in particulates, carbon monoxide, and toxic air contaminants from vehicular sources"; and
- c. Adopt standards and regulations that would result in "the most cost-effective combination of control measures on all classes or motor vehicles and motor vehicle fuels" including the "specification of vehicular fuel composition."

¶ 21.

Following the 1988 California Clean Air Act amendments, CARB embarked on two rulemakings relating to low-emissions RFG. In these proceedings – Phase 1 and Phase 2, respectively – CARB prescribed limits on specific gasoline properties. ¶ 22. In the Phase 2 RFG proceedings, on which this case focuses, CARB developed stringent standards for low-emissions RFG. ¶ 24.

2. Alleged Misrepresentations to CARB

The Complaint alleges that, beginning in 1990 and continuing throughout the CARB Phase 2 RFG rulemaking process, Unocal provided “materially misleading” information to CARB “for the purpose of obtaining competitive advantage.” ¶ 35. According to the Complaint, “This information was materially misleading in light of Unocal's suppression of facts relating to its proprietary interests in its emissions research results and Unocal's active prosecution of patents based on these research results.” *Id.* Unocal gave CARB this information in private meetings with CARB, through participation in CARB's public workshops and hearings, and through industry groups that also were commenting on the CARB regulations. *Id.*

On June 11, 1991, CARB held a public workshop regarding the Phase 2 RFG regulations. The specifications CARB proposed for discussion at this public workshop did not include a T50 specification, *viz.*, a specification based on the temperature at which 50 percent of a fuel evaporates. ¶¶ 30, 36. Nine days later,

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Unocal presented to CARB's staff the results of its "5/14 Project" emissions research program to show that "cost-effective" regulations could be achieved through adoption of a "predictive model" and to convince CARB of the importance of T50. ¶¶ 37, 78a. Unocal's then-pending patent application contained numerous claims that included T50 as a critical limitation, in addition to other fuel properties that CARB proposed to regulate. ¶ 37. Unocal's management, however, decided not to disclose Unocal's pending '393 patent application to CARB's staff. ¶ 38.

On July 1, 1991, Unocal provided CARB with the actual emissions prediction equations developed in the "5/14 Project." Unocal requested that CARB "hold these equations confidential, as we feel that they may represent a competitive advantage in the production of gasoline." ¶ 39. Nevertheless, Unocal stated:

If CARB pursues a meaningful dialogue on a predictive model approach to Phase 2 gasoline, Unocal will consider making the equations and underlying data public as required to assist in the development of a predictive model.

Id.

Following CARB's agreement to develop a predictive model, the Complaint alleges, Unocal made its emissions research results, including the test data and equations underlying its "5/14 Project," publicly available. ¶ 40. In an August 27 letter, Unocal stated to CARB:

Please be advised that Unocal now considers this data to be non-proprietary and available to CARB, environmental interest groups, other members of the petroleum industry, and the general public upon request.

¶ 41. The Complaint continues: "Read separately or in conjunction with Unocal's July 1, 1991 letter, the August 27, 1991 letter created the materially false and misleading impression that Unocal agreed to give up any 'competitive advantage' it may have

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had relating to its purported invention and arising from its emissions research results.” ¶ 42; *see* ¶ 78b. Unocal made numerous subsequent statements and comments to CARB that “reinforced the materially false and misleading impression” that Unocal had created. ¶ 78c.

The Complaint further alleges that in “reasonable reliance on Unocal's representation that the information was no longer proprietary, CARB used Unocal's equations in setting a T50 specification.” ¶ 43. Subsequently, in October 1991, CARB published Unocal's equations in public documents supporting the proposed Phase 2 RFG regulations. *Id.* On November 22, 1991, CARB adopted Phase 2 RFG regulations that set standards for the composition of low-emissions RFG with specific limits for eight gasoline properties. ¶ 44. Unocal's pending patent claims recited limits for five of those eight properties, including T50. *Id.*

In June 1994, CARB amended the Phase 2 regulations to include, as an alternative method of complying, a predictive model that was intended to provide refiners with additional flexibility. ¶ 47. This “predictive model” permits a refiner to comply with the RFG regulations by producing fuel that is predicted – based on its composition and the levels of the eight properties – to have emissions equivalent to a fuel that meets the strict gasoline property limits set forth in the regulations. *Id.* During the development of the predictive model, Unocal submitted comments to CARB touting the predictive model as offering “flexibility” and furthering CARB's mandate of “cost-effective” regulations. ¶ 48. Allegedly, these statements were “materially false and misleading because Unocal suppressed the material fact that assertion of its proprietary rights would materially increase the cost and reduce the flexibility of the proposed regulations.” *Id.*

In sum, the Complaint states that “[t]hroughout its communications and interactions with CARB prior to January 31, 1995, Unocal failed to disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG

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regulations, and that Unocal intended to charge royalties.” ¶ 79. Citing as examples CARB’s inclusion of a specification for T50 in its Phase 2 RFG regulations and its adoption of a "predictive model" that included T50 as one of the parameters, the Complaint alleges that “Unocal's misrepresentations and materially false and misleading statements caused CARB to adopt Phase 2 RFG regulations that substantially overlapped with Unocal's concealed patent claims.” ¶ 45. The Complaint concludes: “But for Unocal's fraud, CARB would not have adopted RFG regulations that substantially overlapped with Unocal's concealed patent claims; the terms on which Unocal was later able to enforce its proprietary interests would have been substantially different; or both.” ¶ 80.

3. Alleged Misrepresentations to Industry Groups

The Complaint also alleges that Unocal made misrepresentations to two industry groups. During the CARB RFG rulemaking, Unocal actively participated in the Auto/Oil Air Quality Improvement Research Program ("Auto/Oil"), a cooperative, joint research program involving the major domestic automobile manufacturers and fourteen oil companies. ¶ 50. The Auto/Oil joint research venture sought to conduct research to measure and evaluate automobile emissions and the potential improvements in air quality achievable through, and relative costs of, the use of reformulated gasolines and other techniques. ¶ 51. The Auto/Oil Agreement provided that “[n]o proprietary rights will be sought nor patent applications prosecuted on the basis of the work of the Program unless required for the purpose of ensuring that the results of the research by the Program will be freely available, without royalty, in the public domain.” ¶ 52. Thus, “once data and information were in fact presented to the Auto/Oil Group, they became the ‘work of the Program.’ ” ¶ 53.

On September 26, 1991, Unocal presented to Auto/Oil the results of Unocal's emissions research, including the test data, equations, and directional relationships derived from the “5/14” Project. ¶ 54. According to the Complaint, Unocal informed

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Auto/Oil participants that “the data had been made available to CARB and were in the public domain” and that “the data would be made available to Auto/Oil participants.” *Id.* By these representations and through subsequent testing – as part of the Auto/Oil Program – of the 5/14 fuel property relationships, Unocal’s 5/14 work allegedly became part of the “work” of the Auto/Oil Program. ¶¶ 54-55.

During the CARB RFG rulemaking, Unocal also actively participated in the Western States Petroleum Association ("WSPA"), a trade association of firms engaged in petroleum exploration, production, refining, transportation, and marketing. ¶ 56. WSPA commissioned, and submitted to CARB, three cost studies in connection with the Phase 2 RFG rulemaking. *Id.* One of these studies, used by CARB to determine the cost-effectiveness of the proposed Phase 2 RFG standards, incorporated information relating to royalty rates associated with non-Unocal patents and could have incorporated costs associated with Unocal’s pending patents. ¶ 57. According to the Complaint, however, Unocal’s presentation of its "5/14 Project" research results to WSPA on September 10, 1991 “created the materially false and misleading impression that Unocal's emissions research results, including the data and equations, were nonproprietary and could be used by WSPA or its individual members without concern for the existence or enforcement of any intellectual property rights.” ¶ 58.

The Complaint alleges that Unocal’s interactions with Auto/Oil and WSPA prior to January 31, 1995, failed to disclose Unocal’s pending patent rights and its intention to charge royalties, ¶¶ 83, 88; included “false and misleading statements concerning its proprietary interests in the results of its emissions research,” ¶¶ 84, 89; and “breached fiduciary duties” to the other members of the associations. ¶¶ 84, 89. “None of the participants in the WSPA or Auto/Oil groups knew of the existence of Unocal's proprietary interests and/or pending patent rights at any time prior to the issuance of the '393 patent in February 1994, by which time most, if not all, of the oil company participants to these groups

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had made substantial progress in their capital investment and refinery modification plans for compliance with the CARB Phase 2 regulations.” ¶ 59. Thus, “But for Unocal's fraud, these participants in the rulemaking process would have taken actions including, but not limited to, (a) advocating that CARB adopt regulations that minimized or avoided infringement on Unocal's patent claims; (b) advocating that CARB negotiate license terms substantially different from those that Unocal was later able to obtain; and/or (c) incorporating knowledge of Unocal's pending patent rights in their capital investment and refinery reconfiguration decisions to avoid and/or minimize potential infringement.” ¶ 90.

4. Unocal's Patent Applications

The Complaint alleges that the relevant Unocal patent claims all derive from patent application No. 07/628,488, filed on December 13, 1990. ¶ 15. Following the November 1991 adoption of CARB's Phase 2 RFG specifications, Unocal amended its patent claims in March 1992 to ensure that the claims more closely matched the regulations. ¶ 60; *see supra* note 4.

The Complaint further alleges that on or about July 1, 1992, Unocal received an office action from the U.S. Patent and Trademark Office (“PTO”) indicating that most of Unocal's pending patent claims had been allowed, and that, in February 1993, after submission of additional amendments, Unocal received a notice of allowance from the PTO for all its pending claims. ¶¶ 61-62. Unocal allegedly did not disclose this information to CARB or other participants to the CARB Phase 2 RFG rulemaking. *Id.*

The PTO issued the '393 patent to Unocal on February 22, 1994. Unocal, however, waited until January 31, 1995, to issue a press release announcing the patent's issuance. ¶ 64. According to the Complaint, “CARB first became aware of Unocal's '393 patent” shortly after that press release. ¶ 49.

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5. Unocal's Patent Enforcement Efforts

On April 13, 1995, ARCO, Exxon, Mobil, Chevron, Texaco, and Shell sued in federal district court to invalidate Unocal's '393 patent. Unocal counterclaimed for infringement of that patent. The jury determined that Unocal's '393 patent was valid and infringed, and found that the refiners must pay a royalty of 5.75 cents per gallon for the period from March through July 1996 for sales of infringing gasoline in California. ¶ 68. The United States Court of Appeals for the Federal Circuit subsequently affirmed the trial court's judgment, and the refiner-defendants have made payments totaling \$91 million to Unocal for damages, costs, and attorneys' fees. ¶ 69. An accounting action is still ongoing to determine damages for infringing the '393 patent during subsequent periods. ¶ 70.

On January 23, 2002, Unocal sued Valero Energy Company for willful infringement of both the '393 patent and the '126 patent. In its complaint, Unocal seeks damages at the rate of 5.75 cents per gallon, trebled for willful infringement. ¶ 71.

Moreover, "Unocal also has enforced its patent claims through licensing activities." ¶ 72. To date, Unocal has entered license agreements with eight refiners, blenders, and/or importers covering the use of all five RFG patents. Unocal has publicly stated that it expects to reap up to \$150 million a year from licensing its RFG patents. ¶ 14.

6. The Alleged Violations

The Complaint alleges that "Unocal's fraudulent conduct has resulted in Unocal's acquisition of market power in the following markets: the technology market for the production and supply of CARB-compliant "summer-time" gasoline in California, and the downstream product market for CARB-compliant "summer-time" gasoline in California." ¶ 91; *see* ¶¶ 73-75. Allegedly, "The extensive overlap between the CARB RFG regulations and the Unocal patent claims makes avoidance of the Unocal patent

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claims technically and/or economically infeasible.” ¶ 92. Refiners, having “invested billions of dollars in sunk capital investments without knowledge of Unocal’s patent claims to reconfigure their refineries in order to comply with the CARB Phase 2 RFG regulations . . . cannot produce significant volumes of non-infringing CARB-compliant gasoline without incurring substantial additional costs,” ¶ 93, and “CARB cannot now change its RFG regulations sufficiently to provide flexibility for refiners and others to avoid Unocal’s patent claims.” ¶ 94. Had Unocal disclosed its proprietary interests and pending patent rights earlier, CARB would have been able to consider the potential costs imposed by the Unocal patents, and the harm to competition and to consumers would have been avoided. *Id.* Instead, Unocal allegedly “has exercised, and continues to exercise, its market power through business conduct by enforcing its patents through litigation and licensing activities.” ¶ 95.

After asserting harm to competition and substantial consumer injury, ¶¶ 97-98, the Complaint concludes that Unocal has violated Section 5 of the FTC Act by monopolizing, attempting to monopolize, and unreasonably restraining trade in the technology market for the production and supply of CARB-compliant “summer-time” gasoline to be sold in California and by attempting to monopolize, and restraining trade in, the downstream goods market for CARB-compliant “summer-time” gasoline. ¶¶ 99-103.

B. The Initial Decision

None of the alleged facts have been proved or disproved. No trial has been held. The Administrative Law Judge’s (the “ALJ’s”) Initial Decision dismissed the Complaint on the basis of Unocal’s motions. As a general matter, the Initial Decision (cited as the “ID”) assumes that the Complaint’s allegations are true and asks whether, if proved, they would be sufficient to establish a

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violation of Section 5.⁵ It concludes, under two separate lines of reasoning, that those allegations are insufficient.

One line of analysis entails the *Noerr-Pennington* doctrine, under which “[t]hose who petition the government for redress are generally immune from antitrust liability.”⁶ The Initial Decision holds that “*Noerr-Pennington* immunizes Respondent’s efforts to induce CARB to adopt regulations on low-emissions, reformulated gasoline.” ID at 68. Moreover, that Decision concludes, “[t]o the extent that Respondent’s alleged conduct towards Auto/Oil Group and WSPA were part of Respondent’s scheme to induce CARB to act, it constitutes indirect petitioning protected by *Noerr-Pennington*.” *Id.*

In reaching these conclusions, the Initial Decision rejected claims that the alleged false and misleading nature of Unocal’s petitioning vitiates application of *Noerr-Pennington*. It considered and rejected two possible bases for exception to the doctrine. First, it ruled that the “sham” exception is inapplicable when the petitioner seeks to gain monopoly power through the *outcome* of the government action, rather than through abuse of the governmental *process*. ID at 48-49. Second, it rejected application of an exception to *Noerr-Pennington* drawn from

⁵ Although the Initial Decision includes little independent fact-finding, the ALJ does supplement his analysis of the Complaint with findings based on official notice of some of the statutes governing CARB, the Notice of Public Hearing through which CARB initiated the rulemaking, and CARB’s Final Statement of Reasons for Rulemaking.

⁶ ID at 31, quoting *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (1993). The doctrine derives its name from two Supreme Court cases, *Eastern R.R. President’s Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

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principles of *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), in which the Supreme Court ruled that enforcement of a patent obtained by fraud can constitute monopolization. The Initial Decision found that to the extent that *Walker Process* principles support an exception to *Noerr-Pennington*, they do so only when governmental action is “quasi-adjudicatory and dependent on the petitioner for factual information.” ID at 50, 68. Although the ALJ acknowledged that misrepresentations are outside the *Noerr-Pennington* doctrine “where the agency is using an adjudicatory process,” ID at 33, he found Unocal’s alleged misrepresentations protected because CARB’s Phase 2 RFG rulemaking process was “quasi-legislative.” ID at 32-40. Responding to claims that application of *Noerr-Pennington* is particularly inappropriate here because CARB necessarily relied on the truth and accuracy of information provided by Unocal, the ALJ observed that entities other than Unocal also provided some input: “because CARB was not wholly dependent on Respondent in its rulemaking proceeding,” the ALJ reasoned, “*Noerr-Pennington* applies.” ID at 40-43.

The Initial Decision also rejected arguments suggesting that Unocal’s conduct falls outside the scope of protected petitioning. To the argument that the doctrine does not apply when an agency is unaware that it is being asked to adopt or participate in a restraint of trade, the ALJ answered, “[I]t is clear that Respondent engaged in petitioning conduct,” ID at 44, and concluded that “there is no requirement that the agency know what the effect of its legislation will be” ID at 47. In response to contentions that differences between the FTC Act and the Sherman Act suggest a narrower reach for *Noerr-Pennington* protections under the former, the Initial Decision ruled that *Noerr-Pennington* protection is as “fully available” in cases alleging unfair methods of competition under the FTC Act as in cases based on the Sherman Act. ID at 51-55.

Regarding Unocal’s communications to Auto/Oil, WSPA, and their participants, the Initial Decision held that “[m]isrepresentations to third parties as a means of influencing the

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government's passage of laws fall within the bounds of *Noerr-Pennington*." ID at 56. It found that Unocal's alleged actions with respect to the private industry groups were "part of an alleged scheme to induce these third parties to influence CARB." ID at 57. It concludes that such conduct "constitutes indirect petitioning protected by *Noerr-Pennington*." ID at 68.

The Initial Decision applied a second line of analysis to the few allegations that remained after its *Noerr-Pennington* holdings, specifically, those allegations based on misrepresentations made to the Auto/Oil Group and to WSPA that were "independent of [Unocal's] alleged scheme to induce CARB to act." ID at 56. The Initial Decision identifies these allegations as culminating with Complaint ¶ 90(c), which states that "[b]ut for Unocal's fraud," the participants in Auto/Oil and WSPA would have taken actions "incorporating knowledge of Unocal's pending patent rights in their capital investment and refinery reconfiguration decisions to avoid and/or minimize potential infringement," with the result that "harm to competition and consumers . . . would have been avoided." The ALJ did not find these allegations covered by *Noerr-Pennington*, but rather held that the Commission lacked jurisdiction to resolve them.

According to the ALJ, "harm beyond that caused by CARB's regulations cannot be determined without knowing the scope of Respondent's patents, whether or not Auto/Oil Group and WSPA could have invented around those patents, and whether any such newly created products or methods could have avoided infringement." ID at 61. Necessarily embedded within these inquiries, he reasoned, are issues of patent claim interpretation and infringement. Citing 28 U.S.C. § 1338(a)⁷ and the Supreme Court's opinion in *Christianson v. Colt Indus. Operating Corp.*,

⁷ 28 U.S.C. § 1338(a) vests original jurisdiction over "any civil action arising under any Act of Congress relating to patents" in the federal district courts.

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486 U.S. 800 (1988),⁸ the ALJ concluded that the Complaint requires resolution of substantial questions of federal patent law; that it therefore “arises under” the federal patent law; and that only the federal courts, not the FTC, have the necessary jurisdiction. “Because the Commission does not have jurisdiction to adjudicate the scope of Respondent’s patents and whether the third parties could compete with other products or methods without infringing on valid patents, the allegations of the Complaint with respect to Respondent’s conduct towards Auto/Oil Group and WSPA are dismissed.” ID at 67.

II. STANDARD FOR EVALUATING MOTIONS TO DISMISS

As a matter of Commission practice, a motion to dismiss is treated analogously to a motion in federal court under Federal Rule of Civil Procedure 12(b)(6) to dismiss a complaint for failure to state a cause of action upon which relief can be granted: the Commission inquires whether the Complaint’s allegations, if proved, are sufficient to make out a violation of Section 5. *See TK-7 Corp*, 1989 FTC Lexis 32, *3 (1989); *Florida Citrus Mutual*, 50 F.T.C. 959, 961 (1954) (dismissal warranted when “the facts alleged do not state a cause of action”). In making that inquiry, the Commission assumes the Complaint’s factual allegations to be true and draws all reasonable inferences in favor of Complaint Counsel. *See TK-7* at *3; 2 MOORE’S FEDERAL PRACTICE § 12.34[1][b] (3d ed. 2003); 5AWright & Miller, FEDERAL PRACTICE & PROCEDURE § 1357 (2003) (“the complaint is construed in the light most favorable to plaintiff and its allegations are taken as true”). A case in this posture does not raise the issue whether the Complaint’s factual allegations are true, but whether Complaint Counsel is entitled to offer evidence to support the allegations. *See* 2 MOORE’S FEDERAL PRACTICE

⁸ *Christianson* holds that a case arises under federal patent law when the “plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal patent law.” 486 U.S. at 809.

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§ 12.34[1][a]. The Commission's review of an Initial Decision that grants a motion to dismiss, like its review of other Initial Decisions by administrative law judges, is *de novo*. 16 C.F.R. § 3.54.

III. AS A MATTER OF LAW, MISREPRESENTATION MAY
SOMETIMES VITIATE THE *NOERR-PENNINGTON*
DOCTRINE

Complaint Counsel appeal the Initial Decision's general application of the *Noerr-Pennington* doctrine on four principal grounds. They argue at greatest length that Unocal's conduct falls within a misrepresentation exception to the doctrine. In addition, they argue that *Noerr-Pennington* does not apply because (1) CARB's objective purpose was neither to adopt nor to participate in a restraint of trade; (2) harm from Unocal's conduct can be cured without overturning a government decision, burdening those who comply with that decision, or impairing communications between a party and a government agency; and (3) the petitioning exclusion applicable to proceedings alleging FTC Act violations, in contrast to those alleging Sherman Act violations, is only as broad as constitutionally required.

As discussed below, we resolve the *Noerr-Pennington* issues before us with an exception applicable, in appropriate circumstances, to misrepresentations. In so doing, we find it unnecessary to consider, as self-standing arguments, Complaint Counsel's theories premised on CARB's objective purposes and the nature of required remedies, although we find some elements of Complaint Counsel's discussion instructive. We do not reach the issue of a possible distinction between the scope of *Noerr-Pennington* protection under the FTC Act as opposed to the Sherman Act.

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A. *Noerr-Pennington*: Basic Principles and Evolution of the “Sham” Exception

Beginning with *Eastern R.R. President’s Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Supreme Court has fashioned and applied a doctrine that bars Sherman Act challenges “predicated upon mere attempts to influence the passage or enforcement of laws.” *Id.* at 135. *Noerr* involved allegations that a group of railroads had jointly conducted a publicity campaign “designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business” as well as “to create an atmosphere of distaste for the truckers among the general public” and “to impair the relationships existing between the truckers and their customers.” *Id.* at 129. Intertwining considerations of statutory construction with First Amendment principles, the Court found the challenged conduct beyond the coverage of the Sherman Act.

The Court first explained that “an attempt to persuade the legislature or the executive to take particular action” bears “very little if any resemblance to the combinations normally held violative of the Sherman Act” *Id.* at 136. This “essential dissimilarity” cautions against treating such conduct as trade restraints, the Court continued. *Id.* at 136-37. Next, the Court suggested that a limitation on the Sherman Act’s coverage was necessary for effective operation of a representative government. To hold that the Sherman Act forbids agreements “for the purpose of influencing the passage or enforcement of laws,” the Court explained, “would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade.” *Id.* at 137. The Court continued:

In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same

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time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

Id.

Finally, the Court turned to the First Amendment right of petitioning: “[A] construction of the Sherman Act” that forbids joint activity to influence the passage or enforcement of laws “would raise important constitutional questions.” *Id.* at 138. As the Court explained, “The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.” *Id.* The Court concluded, “[W]e think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws.” *Id.*

Noerr dealt primarily with efforts to influence legislation. Subsequently, the Supreme Court applied *Noerr*’s principles to petitioning directed at the executive branch,⁹ as well as to administrative agencies and the courts.¹⁰ “[I]t would be

⁹ *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Whereas *Noerr* had involved petitioning aimed at state government, *Pennington* applied similar principles to petitioning federal executive branch officials and independent agencies (the Secretary of Labor and the Tennessee Valley Authority). The Court emphasized that *Noerr* principles apply to efforts to influence government officials regardless of anticompetitive intent or purpose. *Id.* at 669-70.

¹⁰ *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (“The same philosophy governs the approach of citizens or groups of them to administrative agencies

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destructive of rights of association and of petition,” the Court stated, “to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.”¹¹

Nonetheless, the Court has clearly found a “sham” exception to *Noerr-Pennington*. As early as *Noerr* itself, the Court stated:

There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

Noerr, 365 U.S. at 144. In *California Motor Transport*, the Court found such a sham and rejected *Noerr-Pennington* protection for multiple administrative and judicial challenges that one group of trucking firms brought to oppose their competitors’ applications for operating rights. The Court stressed that the antitrust plaintiff had alleged that the defendants “instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases,” and concluded that “the allegations are not that the conspirators sought to influence public officials, but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process.” *California Motor Transport*, 404 U.S. at 512 (internal quotations omitted).

(which are both creatures of the legislature, and arms of the executive) and to courts . . .”).

¹¹ *Id.*

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More recently, the Court explained that “[t]he ‘sham’ exception to *Noerr* encompasses situations in which persons use the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon.”¹² Finally, in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49 (1993) (“*PREI*”), a case that held that *Noerr-Pennington* sheltered a single copyright infringement lawsuit from Sherman Act counterclaims, the Court offered a two-part definition of sham litigation:

First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. . . . Only if challenged litigation is objectively meritless may a court examine the litigant’s subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals “an attempt to interfere directly with the business relationships of a competitor” through the “use [of] the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon.”

PREI, 508 U.S. at 60-61 (citations omitted) (emphasis original).

¹² *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991) (emphasis original); *see also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507 n.10 (1988) (observing that *Noerr* described a sham exception covering “activity that was not genuinely intended to influence governmental action”). *Omni* clarified that the restriction on access to governmental fora at issue in *California Motor Transport* supported the sham exception only because “the conspirators’ participation in the governmental process was itself claimed to be a ‘sham,’ employed as a means of imposing cost and delay.” *Omni*, 499 U.S. at 381-82.

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B. *Noerr-Pennington*: Judicial Assessment of
Misrepresentation¹³

1. Legal Background

The Supreme Court has also suggested that some misrepresentations to governmental agencies fall outside of *Noerr-Pennington* protections, but it has left key questions unanswered.

Again, the line of analysis traces from *Noerr* itself. The plaintiff there alleged that the railroads' publicity campaign against the trucking industry was fraudulent, in that material prepared and produced by the railroads' public relations firm was made to appear as the spontaneously expressed views of independent persons and civic groups. Although it found this "third-party" technique unethical,¹⁴ the Court ruled that it was "legally irrelevant." *Noerr*, 365 U.S. at 140-42. "Insofar as [the Sherman] Act sets up a code of ethics at all," the Court explained,

¹³ Our references to "misrepresentations" include material omissions as well. *See, e.g., Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1070 (Fed. Cir.) (finding that a jury instruction "was not inconsistent with various opinions of the courts stating that omissions, as well as misrepresentations, may in limited circumstances support a finding of *Walker Process* fraud"), *cert. denied*, 525 U.S. 876 (1998).

¹⁴ Although use of the third party technique allegedly was deceptive, the Court recognized that the district court did not find that the railroads' publicity campaign contained false content, but rather that the railroads took "a dramatic fragment of truth and by emphasis and repetition distort[ed] it into falsehood." *Noerr*, 365 U.S. at 134 n.8 (internal quotation omitted). The fact that both sides in *Noerr* used the third party technique, *id.* at 142 n.22, vividly indicates the "rough and tumble" nature of the political context in which the parties fought their lobbying battle.

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“it is a code that condemns trade restraints, not political activity, and as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity.” *Id.* at 140-41. Congress’ “caution in legislating with respect to problems relating to the conduct of political activities” would “go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.” *Id.* at 141.

In contrast to *Noerr*’s holding that misrepresentations in a lobbying campaign in the political context were not subject to Sherman Act liability, subsequent cases apply different approaches for different contexts. As the Court explained, “Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.” *California Motor Transport*, 404 U.S. at 513. More recently, in *Allied Tube*, 486 U.S. at 499, the Court stressed that “the applicability of *Noerr* immunity varies with the context and nature of the activity.” (Comma omitted.) Thus, A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods. But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.

Id. at 499-500 (citation omitted).

The Supreme Court followed a parallel approach in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). In that case, decided after both *Noerr* and *Pennington*, Walker Process, the defendant in a patent infringement suit, counterclaimed that Food Machinery had violated Section 2 of the Sherman Act by threatening to sue, and then suing, for the alleged infringement of a patent obtained through knowing and deliberate fraud on the Patent Office. An infringement action, like other court litigation, could not give rise to antitrust liability if sheltered by *Noerr-Pennington*. Without

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mentioning *Noerr-Pennington* considerations, however, the Court concluded that “the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present.”¹⁵

The statements in *California Motor Transport* and *Allied Tube* regarding misrepresentation were *dicta*, and the Court did not explain the relationship between its *Walker Process* holding and the *Noerr-Pennington* doctrine. Nor have the Supreme Court’s latest pronouncements resolved these issues. *Omni* rejected a “conspiracy” exception to *Noerr-Pennington*, applicable “when government officials conspire with a private party to employ government action as a means of stifling competition,” 499 U.S. at 382, but did not directly discuss misrepresentation. After detailing its two-part test for sham litigation, *PREI* did discuss misrepresentation, but only to state that it was *not* deciding how it should be analyzed. The Court stated:

In surveying the “forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations,” we have noted that “unethical conduct in the setting of the adjudicatory process

¹⁵ *Walker Process*, 382 U.S. at 174. The Court explained that a patent “ ‘is an exception to the general rule against monopolies and to the right to access to a free and open market’ ” and noted the “ ‘paramount’ ” public interest “ ‘in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope.’ ” *Id.* at 177, quoting *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 816 (1945). Consequently, the Court determined, a showing of knowing and willful misrepresentations in obtaining its patent would suffice “to strip Food Machinery of its exemption from the antitrust laws,” and expose it to potential antitrust liability for seeking to enforce the fraudulently obtained patent rights. *Walker Process*, 382 U.S. at 177.

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often results in sanctions” and that “[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.” *California Motor Transport*, 404 U.S., at 512-13. We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant’s fraud or other misrepresentations. Cf. Fed. Rule Civ. Proc. 60(b)(3) (allowing a federal court to “relieve a party . . . from a final judgment” for “fraud . . . , misrepresentation, or other misconduct of an adverse party”); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.* 382 U.S. 172, 176-77

PREI, 508 U.S. at 61 n.6.

Although Supreme Court law remains unsettled, the weight of lower court authority, spanning more than thirty years, has recognized that misrepresentations may preclude application of *Noerr-Pennington* in less political arenas than the legislative lobbying at issue in *Noerr* itself. For example, courts have refused to apply the doctrine to conduct involving misrepresentations to a state railroad commission in the setting of natural gas production quotas;¹⁶ to the Interstate Commerce Commission in a ratemaking context;¹⁷ to a state health planning agency considering an application for a certificate of need (“CON”);¹⁸ to the Food & Drug Administration involving its

¹⁶ See *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

¹⁷ See *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

¹⁸ See *St. Joseph’s Hosp. v. Hospital Corp. of America*, 795 F.2d 948 (11th Cir. 1986); see also *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998) (finding that

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pharmaceutical drug approval process;¹⁹ and to state securities administrators and the federal courts with respect to allegations of franchise law violations, racketeering, and securities fraud.²⁰ The United States Courts of Appeals for the District of Columbia Circuit,²¹ the Second Circuit,²² the Fifth Circuit,²³ the Sixth Circuit,²⁴ the Seventh Circuit,²⁵ the Eighth Circuit,²⁶ the Ninth

misrepresentation in a CON proceeding would not be *Noerr*-protected but that allegations in the complaint were too vague to avoid dismissal), *cert. denied*, 525 U.S. 1140 (1999). *Armstrong Surgical Center, Inc., v. Armstrong County Memorial Hosp.*, 185 F.3d 154 (1999), *cert. denied*, 530 U.S. 1261 (2000), which takes a largely contrary approach, is discussed below.

¹⁹ See *Israel v. Baxter Laboratories*, 466 F.2d 272 (D.C. Cir. 1972).

²⁰ See *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995).

²¹ See, e.g., *Whelan; Israel*.

²² See *Juster Assoc. v. City of Rutland, Vt.*, 901 F.2d 266 (2d Cir. 1990); *Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

²³ See *Woods Exploration*.

²⁴ See *Potters Medical Center v. City Hospital Ass'n*, 800 F.2d 568 (6th Cir. 1986).

²⁵ See *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975).

²⁶ See *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077 (8th Cir. 1999); *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484 (8th Cir. 1985).

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Circuit,²⁷ the Eleventh Circuit,²⁸ and the Federal Circuit,²⁹ expressing their views in diverse terms and in varying settings, all have indicated that in some contexts misrepresentations to government may vitiate *Noerr-Pennington* protection.³⁰

²⁷ See *Kottle; Liberty Lake Investments, Inc. v. Magnuson*, 12 F.3d 155 (9th Cir. 1993), *cert. denied*, 513 U.S. 818 (1994); *Clipper Exxpress*.

²⁸ See *St. Joseph's Hospital*.

²⁹ See *Rodime PLC v. Seagate Technology, Inc.*, 174 F.3d 1294 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000); *Nobelpharma* (in the context of a patent obtained by fraud).

³⁰ As discussed below, the Third Circuit has expressed doubt whether a misrepresentation exception still exists, but even this court suggests narrow circumstances in which misrepresentation may vitiate *Noerr-Pennington* protection. See *infra* Section III.C. The Fourth Circuit has declined to rule on whether a “fraud exception” exists but has disposed of cases on the assumption that it does. See *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 401-04 (4th Cir.) (concluding that “[i]f a fraud exception to *Noerr-Pennington* does exist, it extends only to the type of fraud that deprives litigation of its legitimacy,” not to situations in which “regardless of the alleged fraud, the outcome would have been the same”), *cert. denied*, 533 U.S. 916 (2001); see also *A Fisherman's Best, Inc. v. Recreational Fishing Alliance*, 310 F.3d. 183, 192 (4th Cir. 2002) (observing that there is no “officially recognized” *Noerr-Pennington* exception for a smear campaign, misrepresentation, threats, or corrupt practices, but nonetheless considering whether misrepresentation was present as an element of an allegedly improper lobbying campaign).

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2. Policy Considerations

Ample policy grounds support a misrepresentation exception to the *Noerr-Pennington* doctrine.

a. *The First Amendment:* As *Noerr* itself suggested, 365 U.S. at 137-38, and as the Court has consistently maintained, the doctrine derives in part from First Amendment considerations. In *California Motor Transport*, 404 U.S. at 510-11, the Court explained that “it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view” Similarly, in *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990) (“*SCTLA*”), the Court described the *Noerr-Pennington* doctrine as “[i]nterpreting the Sherman Act in the light of the First Amendment’s Petition Clause.” *Id.*, 493 U.S. at 424. *Accord, BE & K Construction Co. v. National Labor Relations Bd.*, 536 U.S. 516, 525 (2002).

The Supreme Court has also made it clear that the First Amendment does not shelter knowing misrepresentations. Thus, the Court has declared that “the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.”³¹

In the free speech arena, public officials can recover damages for defamatory falsehoods made “with actual malice,” that is, with knowledge of falsity or with reckless disregard for whether the communication is false or not. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). This rule permits some defamatory falsehoods to escape challenge: some falsehood may be sheltered to avoid chilling truthful speech, but that reflects a

³¹ *Garrison v. State of Louisiana*, 379 U.S. 64, 75 (1964).

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by-product, rather than a goal, of First Amendment protections. As the Court has explained, although “there is no constitutional value in false statements of fact,” there is harm from chilling truthful speech, and “[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41 (1974); *see also* *BE & K*, 536 U.S. at 531 (“while false statements may be unprotected for their own sake,” protection may be required to shelter “*speech that matters*”) (emphasis original). Stated differently, “erroneous statement . . . must be protected if the freedoms of expression are to have the breathing space that they need . . . to survive.”³² That protection, however, has limits, and the presence of malice vitiates it.

The Court has applied analogous reasoning to petitioning, ruling that “petitions to the President that contain intentional and reckless falsehoods do not enjoy constitutional protection.”³³ As the Court explained, “The Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble,” and “there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.”³⁴

³² *New York Times*, 376 U.S. at 271-72 (internal quotations omitted). *See also* *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (ensuring necessary “breathing space” for First Amendment freedoms by requiring public figures who seek to demonstrate intentional infliction of emotional distress to show false statements of fact made with “actual malice”).

³³ *McDonald v. Smith*, 472 U.S. 479, 484 (1985) (internal quotation omitted) (upholding a libel action based on the petition).

³⁴ *Id.* at 485. Further linking its treatment of speech and petitioning, the Court tells us, “[j]ust as false statements are not immunized by the First Amendment right to freedom of speech,

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The courts of appeals have recognized that these limits on First Amendment protection may set bounds on *Noerr-Pennington*. Thus, in declining to apply the doctrine to knowing misrepresentations to state securities administrators and the federal courts, the U.S. Court of Appeals for the District of Columbia Circuit reasoned:

We see no reason to believe that the right to petition includes a right to file deliberately false complaints. . . . However broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods.

Whelan, 48 F.3d at 403, 404. Similarly, when the Ninth Circuit rejected protection for knowingly false statements to the Interstate Commerce Commission it explained:

There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body. The first amendment has not been interpreted to preclude liability for false statements.

Clipper Express, 690 F.2d at 1261. The court rejected defendants' argument that failure to shelter such statements would chill legitimate debate, because they allegedly "knew the falsity of their statements, and made those statements in a deliberate attempt

baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Restaurants v. National Labor Relations Bd.*, 461 U.S. 731, 743 (1983) (citations omitted) (construing the National Labor Relations Act in light of potential First Amendment protection of an allegedly retaliatory lawsuit). In *BE & K*, the Court clarified that this statement did not indicate that baseless litigation is "*completely* unprotected," but rather, at most, that "such litigation should be protected 'just as' false statements are." *Id.*, 536 U.S. at 531 (determining that the National Labor Relations Act does not permit penalizing all unsuccessful, but reasonably based, retaliatory litigation).

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to mislead a regulatory body.” *Id.* at 1262. In essence, the focus on *deliberate* misrepresentation provides the same type of “breathing space” for petitioning in the *Noerr-Pennington* context as it provides in the free speech arena.

b. *Preserving Federalism and Protecting the Governmental Decision-Making Process:* The Supreme Court has explained that the *Noerr-Pennington* doctrine also serves, in part, as a corollary to the state action doctrine³⁵ and reflects the maxim that “where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out.”³⁶ Unocal makes the latter point a central theme in its brief to the Commission.³⁷

³⁵ See *Omni*, 499 U.S. at 379-80 (finding it would be “peculiar” and “perhaps in derogation of . . . constitutional right . . . to establish a category of lawful state action that citizens are not permitted to urge”); *Noerr*, 365 U.S. at 135-37.

³⁶ *Noerr*, 365 U.S. at 136, citing *Parker v. Brown*, 317 U.S. 341 (1943).

³⁷ Unocal asks whether the challenged conduct would have had the same anticompetitive consequences even absent government action. “If the answer is ‘no,’” Unocal contends, “the conduct is *Noerr*-protected.” Answering Brief of Union Oil Company of California (“Unocal Brief”) at 1; see also *id.* at 11, 43, 49. Unocal derives its question from language in *SCTLA*, 493 U.S. at 425, where the Court rejected a *Noerr-Pennington* claim because the unlawful boycott there at issue had occurred *before* any governmental action. The court observed that the anticompetitive effects *while* the boycott lasted would have been precisely the same even if no legislation had been enacted. Unocal argues that rejection of the doctrine when the government action was immaterial means that the doctrine automatically applies in every instance that government action shapes the competitive effects of the challenged conduct. Nowhere does the

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Misrepresentation, however, undermines this line of analysis by blurring the distinction between private and governmental conduct. Misrepresentation undermines government's ability accurately and meaningfully to assess public benefit; it vests control over the outcome in the private purveyor of false information.

Courts have understood this point. For example, in *Woods Exploration*, defendant natural gas producers allegedly filed false demand forecasts with the Texas Railroad Commission to reduce competitors' gas production quotas, set by formula based on the demand forecasts. The Court of Appeals for the Fifth Circuit rejected defendants' contention that they did not violate the Sherman Act because it was the Railroad Commission's actions, not those of the defendant producers, that caused plaintiffs' injuries. Rather, the court concluded that in view of the misrepresentations, the Commission "neither was the real decision maker nor would have intended its order to be based on false facts."³⁸ Similarly, when the defendant cigarette manufacturers' submission of false purchase intentions allegedly caused the Department of Agriculture to set tobacco production quotas harmful to growers, the district court ruled that the defendants "do

language of *SCTLA* support this conclusion. Nor does Unocal's conclusion comport with simple logic: "always" is not the only alternative to "never." Indeed, Unocal states a test that neither *Walker Process* nor the various appellate misrepresentation cases cited *supra* in Section III.B.1. would satisfy. See Transcript of Oral Argument at 30 (March 10, 2004) ("Tr.") (conceding that under Unocal's proposed test, *Walker Process* may not stand).

³⁸ *Woods Exploration*, 438 F.2d at 1295; see also *Armstrong*, 185 F.3d at 164 n.8 (distinguishing *Walker Process* as a case in which the government was "wholly dependent on the applicant for the facts" and thus "effectively and necessarily delegates to the applicant the factual determinations underlying the issuance of a patent").

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not have immunity for deceptive information provided to the USDA simply because the USDA ultimately sets the quota.”³⁹ In like vein, the Ninth Circuit has determined that misrepresentations that go to the core of a lawsuit or administrative proceeding may so deprive the government activity of legitimacy as to vitiate *Noerr-Pennington* protection.⁴⁰

Leading commentators have agreed. Thus, Professor C. Douglas Floyd explains:

The [Supreme] Court’s decisions according immunity to state governmental action under *Parker v. Brown* assume that state action antitrust immunity is appropriate only if a governmental actor with statewide authority prospectively has determined that particular anticompetitive conduct should be approved as a matter of state policy. In cases involving the deliberate provision of false information to induce anticompetitive regulation by a state agency, however, no such deliberate determination has been made, because the authorization in question is based on a non-existent predicate. In effect, the processes of the government have been assumed by the private parties they purport to regulate. Thus, to the extent that *Noerr* immunity is accorded to private petitioning as a “corollary” to the immunity normally accorded to the effects of the completed governmental action that the petitioning seeks, the rationale for protection is significantly undermined where the governmental action in question has been induced by intentional

³⁹ *DeLoach v. Philip Morris Cos.*, 2001-2 Trade Cas. (CCH) ¶ 73,409 at 91,434 (M.D.N.C. 2001).

⁴⁰ *See Kottle*, 146 F.3d at 1060-63; *Liberty Lake*, 12 F.3d at 159.

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misrepresentations, and therefore does not represent a deliberate determination of governmental policy.⁴¹

The Areeda & Hovenkamp *Antitrust Law* treatise summarizes succinctly: although no antitrust liability normally attaches when a *bona fide* lobbying campaign or presentation to an agency obtains the requested result – because “the government’s action, not the private campaign, is the cause of the plaintiff’s harm” – an “important exception” exists when “the agency would not have acted the way it did but for the impropriety.”⁴²

Although we generally agree with the reasoning of these judicial and scholarly authorities, any rule regarding petitioning based on misrepresentation must be fashioned and applied with care, so as not to undermine principles of federalism and effective government decision making. Indeed, the Supreme Court has expressed profound concern with allowing plaintiffs to “look behind the actions of state sovereigns” to assert antitrust claims. *Omni*, 499 U.S. at 379. It has sought to avoid inquiries that require “deconstruction of the governmental process and probing of the official intent.” *Id.* at 377 (internal quotation omitted). Considerations of federalism, respect for the legitimacy of actions completed by coordinate branches of government, and the general unsuitability of antitrust statutes as tools for regulating political behavior all argue against excessive antitrust intrusion.⁴³

⁴¹ C. Douglas Floyd, *Antitrust Liability for the Anticompetitive Effects of Governmental Action Induced by Fraud*, 69 ANTITRUST L.J. 403, 414-15 (2001) (footnotes omitted).

⁴² 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 203h at 192 (2d ed. 2000) (emphasis omitted).

⁴³ See *Omni*, 499 U.S. at 377 (warning that subjecting a local zoning decision to *ex post facto* antitrust review would go far to compromise a state’s ability to regulate its domestic

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Although they are clearly reasons for caution, these reservations may be overcome in appropriate settings, as reflected by the substantial appellate case law identified in Section III.B.1. above and as further discussed in Section V.C. below.

In addition, considerations of effective government and the balance of likely costs and benefits may argue against opening the door too widely to antitrust actions flowing from misrepresentations to the government. In 1999 the FTC joined the United States in a brief that opposed *certiorari* in the Third Circuit's *Armstrong* litigation and that questioned whether the vindication of plaintiffs' rights in a few adjudicable and meritorious misrepresentation cases would warrant the judicial effort that would be involved and the private expense of litigating the many claims that likely would be rejected.⁴⁴ The brief also expressed doubt whether it would be worthwhile to focus antitrust law on the political nature of state actions and on abuses of state

commerce), 378-79 (observing that the Sherman Act is directed at preventing trade restraints, not vindicating principles of good government); *Armstrong*, 185 F.3d at 162 ("Considerations of federalism require an interpretation of the Sherman Act that forecloses liability predicated on anticompetitive injuries that are inflicted by states acting as regulators. . . . Federalism requires this result both with respect to state actors and with respect to private parties who have urged the state action."); 1 AREEDA & HOVENKAMP, ANTITRUST LAW ¶¶ 203b at 165 (antitrust laws "poorly designed" for policing the political process), 203h at 193 ("As a general matter the federal government must be slow to interfere in state political processes"); Floyd, 69 ANTITRUST L.J. at 440-44.

⁴⁴ See Brief for the United States and the Federal Trade Commission as Amici Curiae at 18, *Armstrong Surgical Center v. Armstrong County Memorial Hosp.*, 530 U.S. 1261 (2000) (No. 99-905).

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processes for which there are “presumably” other remedies.⁴⁵ Nonetheless, the brief concluded that there may be situations in which policy reservations are “muted” and “would be outweighed by the substantial public interest” in antitrust enforcement, and it refrained from concluding “that relief should never be available” in cases “alleging that competitive damages caused directly by some state action were procured by private parties, in violation of the antitrust laws, through abuse of the State’s administrative or judicial processes.”⁴⁶ Indeed, just one year later, in opposing *certiorari* in a challenge to the validity of one of Unocal’s RFG

⁴⁵ *Id.*

⁴⁶ *Id.* at 18-19. Although Unocal lays considerable stress on the United States/FTC *Armstrong* brief, the emphasis is misplaced. This brief emphasized facts suggesting that the plaintiff in *Armstrong* was “not well placed” to argue that defendants had usurped the public decision making process. *Id.* at 20. Thus, the brief noted that the plaintiff was “able to challenge the representations and threats made by its opponents” but never sought clarification or reconsideration, and it observed that it was “not clear whether the Board’s decision depended on the alleged misrepresentation.” *Id.* Moreover, the brief expressly distinguished, and did not thereafter address, the situation in *Walker Process* in which *private enforcement* of the fraudulently procured patent was the basis of the antitrust claim. *Id.* at 13. Subsequently, its language addressed only cases in which the alleged injury was caused “directly” or “most directly” by government action – there, the denial of a CON application – rather than cases like the present, in which harm requires private enforcement of a patent. *Id.* at 13, 14, 15, 18. Overall, the brief’s primary message was that *Armstrong*, under the specific facts there presented, was not a case “in which the argument for liability can be forcefully advanced” and that review by the Supreme Court “should await the illumination of further experience with such claims” in the courts of appeals. *Id.* at 19-20.

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patents, the Brief for the United States stated that “other government agencies, such as the Federal Trade Commission, may impose non-patent remedies against parties who make affirmative misrepresentations to a public or private regulatory body involved in setting industry standards.”⁴⁷

c. *The Importance of Maintaining Competition:* Antitrust law plays a critical role in maintaining a competitive marketplace, to the benefit of consumers and the nation’s economy. Indeed, the Supreme Court has termed the Sherman Act a “comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.” *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). Because of the fundamental role assigned the antitrust laws, exceptions to, and limitations on, their broad reach are generally disfavored. As the Court has explained, “It is settled law that ‘immunity from the antitrust laws is not lightly implied.’ This canon of construction . . . reflects the felt indispensable role of antitrust policy in the maintenance of a free economy . . .” *United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963).

Clearly, the Court found an implied limitation when it developed the *Noerr-Pennington* doctrine. Just as plainly, however, when confronting issues within the interstices of that doctrine, the benefits of competition and the harms from anticompetitive conduct must be among the factors considered. Expansive application of *Noerr-Pennington* has a cost, and awareness of that cost should play a role in assessing the boundary between exemption and potential liability.

Awareness of potential competitive harm is particularly important in settings like the one presented here. Government regulations such as CARB’s standards may impose potent entry

⁴⁷ See Brief for the United States as *Amicus Curiae* at 19, *Atlantic Richfield Co. v. Union Oil Co. of California*, 531 U.S. 1183 (2001) (No. 00-249).

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barriers capable of preserving market power over extended periods of time. *See, e.g.*, IIA PHILLIP E. AREEDA, HERBERT HOVENKAMP, & JOHN L SOLOW, ANTITRUST LAW ¶ 421h at 73-74 (2d ed. 2002); DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 74, 100 (3d ed, 2000); ROBERT H. BORK, THE ANTITRUST PARADOX 347-49 (1978). Whereas an exercise of unprotected market power may sow the seeds of its own erosion if firms are free to enter and compete on equal terms with the incumbent, governmentally-enforced limits on entry may impede and even prevent that process. *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 31-33 (1984). Consequently, misrepresentations that distort government decision making in ways that create or shield market power may inflict severe and long-lasting public harm. Such considerations support our conclusion that the substantial public interest in antitrust enforcement may outweigh countervailing policy reservations when those concerns are sufficiently muted.

C. The Interface between Misrepresentation and the “Sham” Exception

The courts of appeals have developed varying approaches when deciding whether *Noerr-Pennington* does or does not shield petitioning based on misrepresentations. In particular, they have analyzed two issues that the Supreme Court has left open: (i) the relationship between misrepresentations and the sham exception as formulated by *PREI*, and (ii) how to apply the distinction between the “less political arenas” in which, according to *California Motor Express* and *Allied Tube*, misrepresentations may vitiate *Noerr-Pennington* protection and those more political contexts in which, as in *Noerr* itself, misrepresentations have no such effect.

The Initial Decision holds that the *Noerr-Pennington* doctrine shields Unocal’s alleged conduct and that no exception to that protection applies. Although Complaint Counsel argued that the Complaint’s allegations fit within a “separate misrepresentation

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exception that is distinct from the ‘sham’ exception,”⁴⁸ the Initial Decision construed the argument narrowly as claiming either a sham or an exception derived from an extension of *Walker Process* principles. It held the sham exception inapplicable on grounds that it is confined to “situations in which persons use the governmental *process* as opposed to its *outcome* as an anticompetitive weapon,” whereas the Complaint alleges that Unocal sought monopoly through the outcome of the government action. ID at 48-49. It found that *Walker Process* principles require a quasi-adjudicatory setting and dependence on the petitioner for factual information, facts that it found absent in this case.

Unocal agrees with the ALJ’s conclusion that neither the sham exception nor any misrepresentation exception applies to its alleged conduct. Unocal Brief at 28 (sham), 23-43 (misrepresentation). It repeatedly, and pointedly, avoids conceding that any separate misrepresentation exception exists. *Id.* at 24-29. Indeed, it argues that *Walker Process* may not survive under its approach. *See supra* note 37.

As explained below, the Initial Decision and Unocal misread the law and misapply the underlying policies in two chief respects. First, they both are mistaken in the broad assertion that the case law precludes treating misrepresentation as a variant of sham. Moreover, whereas the Initial Decision perceives room for a very narrowly defined misrepresentation exception under facts that approximate those in *Walker Process*, Unocal refuses even to acknowledge that certain misrepresentations can ever vitiate *Noerr-Pennington* protection. As this section explains, although courts have attached varying labels to their analyses, the decided weight of precedent concludes that deliberate misrepresentation

⁴⁸ Complaint Counsel’s Memorandum in Opposition to Union Oil Company of California’s (“Unocal”) Motion for the Dismissal of the Complaint Based Upon Immunity under *Noerr-Pennington* at 22.

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that cuts to the core of an administrative proceeding's legitimacy can fall outside *Noerr-Pennington* protections. Second, both the Initial Decision and Unocal are mistaken in the narrower conclusion that, even assuming that a misrepresentation exception exists, the CARB proceeding necessarily falls outside any allowable boundaries. We address this issue *infra* in Sections IV and V.

The courts have followed varying routes to the conclusion that misrepresentations may preclude application of *Noerr-Pennington*. Some courts have held that the misrepresentations at issue were not petitioning or otherwise fell entirely outside *Noerr-Pennington*. For example, the U. S. Court of Appeals for the Second Circuit ruled that AT&T's "unsupportable claims to the FCC regarding network harm" and "feigned cooperation" with an FCC advisory committee to further AT&T's opposition to proposed standards for interconnection devices "embraced much more than merely advocating a position before the FCC" and involved "actions not within the scope of the [*Noerr-Pennington*] doctrine."⁴⁹ Similarly, the Eleventh Circuit found a misrepresentation to a state health planning agency entirely beyond *Noerr-Pennington* coverage. The appeals court did not apply the sham exception, but rather explained, "[T]o find that a situation falls within an exception to a general rule, it must first be clear that the general rule itself is applicable."⁵⁰ Other courts

⁴⁹ *Litton*, 700 F.2d at 806, 809. The court also held, in the alternative, that the sham exception applied because AT&T had acted not in the hope of influencing governmental action, but in the hope of delaying it. *Id.* at 809-12.

⁵⁰ *St. Joseph's Hospital*, 795 F.2d at 955; *see also DeLoach*, 2001-2 Trade Cas. (CCH) at 91,433-34 (finding that submission of false purchase intentions to a government agency to affect administrative determination of a tobacco production quota involved no policy-making process and fell outside *Noerr-Pennington* protections).

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analyze the issue in terms of a misrepresentation exception⁵¹ or find deliberate misrepresentation “beyond the protection of *Noerr*” without labeling their doctrinal route.⁵²

Still other courts analyze misrepresentations under the rubric of sham petitioning. Thus, the Ninth Circuit recognizes at least three distinct types of sham: (1) “bringing a single sham lawsuit (or a small number of such suits)”; (2) “the filing of a series of lawsuits . . . brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival”; and (3) the use of “knowing fraud” or “intentional misrepresentations” that “deprive the litigation of its legitimacy.” *Kottle*, 146 F.3d at 1060-61. In *Kottle*, the court applied this third sham variant in the context of an administrative proceeding. *Id.* at 1061-63. Similarly, the Sixth Circuit has stated that “the knowing and willful submission of false facts to a government agency falls within the sham exception to the *Noerr-Pennington* doctrine,” *Potters Medical Center*, 800 F.2d at 580, and the Third Circuit has analyzed misrepresentation as raising the “sham” exception. *See Armstrong; Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir.), *cert. denied*, 528 U.S. 871 (1999).

Whatever the nomenclature, the various approaches should lead to the same place. As the Areeda and Hovenkamp treatise states:

Of course, the policy is more important than the underlying labels, and in most cases it makes little difference whether we say that the provision of false information is unprotected by *Noerr* to begin with or that it falls into the sham exception to *Noerr*.

⁵¹ *See, e.g., Clipper Exxpress*, 690 F.2d at 1259-63; *Livingston Downs Racing Ass’n v. Jefferson Downs Corp.*, 192 F.Supp.2d 519, 535-36 (M.D. La. 2001).

⁵² *See, e.g., Whelan*, 48 F.3d at 1253-55.

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1 AREEDA AND HOVENKAMP, 1 ANTITRUST LAW ¶ 203f at 173. The label likely would make a significant difference, however, if misrepresentation were not merely classed with shams but also analyzed strictly under *PREI*'s "sham exception" standards. Such an approach, though consistent with, and suggested by, Unocal's arguments, is contrary to compelling policies of the law.

As suggested by three courts of appeals, the two-part test articulated in *PREI* for assessing claims of sham litigation is not well suited to address settings involving misrepresentations. Thus, the Ninth Circuit has adopted a rule that vitiates *Noerr-Pennington* protection when misrepresentations to a government agency deprive an administrative proceeding of its "legitimacy," treating this as an alternative, in the proper context, to *PREI*'s two-part test. See *Kottle*, 146 F.3d 1060-63; *Liberty Lake*, 12 F.3d at 158-59. Similarly, the D.C. Circuit treated "*PREI*'s two-part 'sham' test" as "inapplicable" when knowing fraud or intentional misrepresentations destroyed prior litigation's legitimacy. See *Whelan*, 48 F.3d at 1255 (citing *Liberty Lake*, 12 F.3d at 159). The Federal Circuit reached much the same result in a context that involved *Walker Process* fraud: "*PREI* and *Walker Process* provide alternative legal grounds on which a patentee may be stripped of its immunity from the antitrust laws . . . we need not find a way to merge these decisions. Each provides its own basis for depriving a patent owner of immunity from the antitrust laws"⁵³

⁵³ *Nobelpharma*, 141 F.3d at 1071. *Nobelpharma* emphasizes that *PREI*'s two-part test potentially provides a separate and independent basis for antitrust liability in addition to *Walker Process* principles. *Id.* By treating fraud before the PTO as support for a violation of Section 2 of the Sherman Act, the Supreme Court in *Walker Process* and the Federal Circuit in *Nobelpharma* indicate how seriously they view intentional fraud before administrative agencies.

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Leading commentators agree that courts must look beyond literal application of *PREI*'s sham test to analyze misrepresentations. Professors Areeda and Hovenkamp recognize that misrepresentations differ from traditional "sham" activities in that the purpose of misrepresentations *is* to obtain government action. See 1 AREEDA & HOVENKAMP, ANTITRUST LAW ¶¶ 203a at 164, 203f at 173. They emphasize, however, that rather than necessarily entitling misrepresentations to *Noerr-Pennington* protection, this fact merely should subject misrepresentations to a different analysis.⁵⁴ Professors Areeda and Hovenkamp observe that misrepresentation of facts peculiarly in petitioner's control poses a much more significant threat to competition than bringing lawsuits that no reasonable lawyer would have filed, *id.* ¶¶ 204a at 199, 205c2 at 230, and conclude that the literal standards of *PREI* should be confined to *PREI*'s general fact pattern, which involved the issue of *baseless theories*. *Id.*, ¶¶ 205b at 218-19, 205c at 228. Consequently, "The decision should not be read as disposing of a case in which the legal theories claimed in a lawsuit were perfectly reasonable but the plaintiff alleged facts known to be false or failed to disclose facts that it knew would defeat its claim." *Id.*, ¶ 205b at 219.

In contrast, one appellate court, the U.S. Court of Appeals for the Third Circuit, treats misrepresentations as shams *and* conducts its analysis under the *PREI* standards. While the court expresses skepticism about the idea that misrepresentation may deprive a petitioner of *Noerr-Pennington* protection, *Armstrong*, 185 F.3d at 158, even its opinions leave room for finding misrepresentation a sham under appropriate circumstances. Two cases warrant emphasis. In *Cheminor*, the Third Circuit analyzed claims that the antitrust defendant had made false statements to the International Trade Commission regarding injury from alleged dumping of

⁵⁴ See *id.*, ¶ 203f at 173-78; see also Floyd, 69 ANTITRUST L.J. at 421-22 (recognizing that imposition of antitrust liability in misrepresentation cases does not rest on application of the traditional "sham" exception).

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ibuprofen. Refusing to “carve out a new exception” to *Noerr-Pennington*, the court applied *PREI*’s objective test for “sham” litigation by setting aside the facts allegedly misrepresented and asking whether, absent those facts, the antitrust defendant’s claims still had an objective basis. *Cheminor*, 168 F.3d at 123. The court explained, “If the government’s action was not dependent upon the misrepresented information, the misrepresented information was not material and did not go to the core of [antitrust defendant’s] petition.” *Id.* at 124. In contrast, “[A] *material* misrepresentation that affects the very core of a litigant’s . . . case will preclude *Noerr-Pennington* immunity” *Id.* (emphasis original).

Subsequently, in *Armstrong*, the Third Circuit applied *PREI*’s subjective standard. There, an applicant for a certificate of need covering a new ambulatory surgical facility alleged that a competing hospital opposed the CON because the hospital’s own outpatient facility was nearing completion, despite knowledge that construction had stopped with only the building’s shell finished. The court found the sham exception unavailable under *PREI*’s subjective standard, given that the hospital’s purpose was to secure the requested outcome, denial of plaintiff’s CON. *Armstrong*, 185 F.3d at 158 n.2. The court summarized, “[T]he sham petitioning exception does not apply in a case like the one before us where the plaintiff has not alleged that the petitioning conduct was for any purpose other than obtaining favorable government action.” *Id.* at 158. Nonetheless, and despite misgivings based on considerations of federalism,⁵⁵ the court acknowledged that in narrow circumstances, such as when a government agency is wholly dependent on a petitioner for factual information on which the agency predicates its actions, the resulting government order may so reflect financially-interested

⁵⁵ See *Armstrong*, 185 F.3d at 160-62, discussed *supra* in note 43.

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decision making that an exception from *Noerr-Pennington* is warranted.⁵⁶

IV. *NOERR-PENNINGTON* IN THE CONTEXT OF
MISREPRESENTATION: ANALYSIS AND SYNTHESIS

A. The Legal Framework

The ALJ applied *PREI*'s two-part test for evaluating sham litigation and found the subjective standard unsatisfied because Unocal allegedly sought to achieve a monopoly through the *outcome* of the CARB proceeding. ID at 48-49. We find that if misrepresentations are to be treated as a form of sham, then the appropriate approach must recognize that they raise issues different from traditional sham litigation. Rote application of *PREI*'s test under these circumstances would be inconsistent with the policy goals of the *Noerr-Pennington* doctrine.

Indeed, the ALJ's decision would mean that most misrepresentation to government, even when used to monopolize or otherwise cause anticompetitive harm,⁵⁷ would fall outside antitrust review. If the petitioner desires a governmental outcome, then building a monopoly through blatant lying would be

⁵⁶ *Id.* at 164 n.8. The *Armstrong* opinion states that the facts allegedly misrepresented may not have been important to the outcome and that the government decision makers "recognized that there was a dispute and made a credibility determination concerning it." *Id.* at 163. See *infra* at Section IV.B.3.

⁵⁷ The harms may be substantial. See *1 AREEDA & HOVENKAMP, ANTITRUST LAW*, ¶ 205a at 215 (observing that, although it generally is easy to defend against baseless litigation, the "potential threat to competition is far greater when the adjudication plaintiff alleges nonpublic facts that it knows not to be true or fails to state nonpublic facts that it knows will defeat its claim.").

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protected. This result ignores the holdings of the many courts that have found intentional falsehoods actionable. It also rejects the well-established limitations on First Amendment protections for known falsehoods. It would protect petitioning leading to governmental action so distorted by misinformation that the result is contrary to the government's intention. Certainly, neither the facts nor the language of *PREI* requires that its test for sham litigation apply to the very different circumstances posed by misrepresentation.⁵⁸ Rather, the Court's express statement that it "need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations," *PREI*, 508 U.S. at 61 n.6, recognizes that misrepresentations do not easily fit the "sham" analysis. Clearly, a proceeding fundamentally tainted by misrepresentation lacks the "genuine" nature that is the hallmark of what the Supreme Court seeks to protect.⁵⁹ As does the leading antitrust treatise, we read the *PREI* tests "in the context in which they were stated – that of a factually true but legally controversial claim" – and reject their rote application to claims for which "the underlying factual allegations were false."⁶⁰

In so doing we do *not* suggest conflict with, or vitiation of, the *PREI* standards. We merely recognize that deliberate

⁵⁸ See *Liberty Lake*, 12 F.3d at 158 ("As we read the Court's footnote 6, however, it does no more than reserve the issue of whether antitrust liability may be premised on a litigant's deceptive conduct which goes to the core of a lawsuit's legitimacy").

⁵⁹ *PREI*, 508 U.S. at 61; see also *BE & K*, 536 U.S. at 532 (describing the *PREI* tests as "protect[ing] petitioning whenever it is *genuine*" and "protecting suits from antitrust liability whenever they are objectively or subjectively *genuine*") (emphasis added).

⁶⁰ 1 AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 205b at 227.

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misrepresentations that substantially affect the outcome of a proceeding or so infect its core to deprive the proceeding of legitimacy may not, in appropriate circumstances, qualify for *Noerr-Pennington* protection. This rule is consistent with the logic that underlies both *PREI*'s objective and subjective tests. According to *PREI*, the objective standard protects "reasonable effort[s] at petitioning for redress."⁶¹ It distinguishes "objectively reasonable claims" from those in which "the administrative and judicial processes have been abused," *PREI*, 508 U.S. at 58, and it supplies "intelligible guidance." *Id.* at 60. Requiring that a misrepresentation infect the core of a proceeding similarly addresses conduct that is not a reasonable effort at petitioning and provides meaningful guidance.⁶² This requirement also assures that the governmental process has truly been abused.

PREI's subjective standard considers the litigant's "subjective motivation." *PREI*, 508 U.S. at 60. It "protects petitioning that is unmotivated by anticompetitive intent." *BE & K*, 536 U.S. at 528. Absent misrepresentation, *PREI*'s focus on whether a litigant seeks to use the outcome rather than the process does serve to identify anticompetitive intent. When misrepresentation is at issue, however, the outcome/process analysis is useless for assessing motivation; the very purpose of making the misrepresentation likely *is* to obtain the desired outcome. To treat this intention as dispositive is to shelter petitioning *because* of its anticompetitive goals. Indeed, granting protection to intentional misrepresentations would create perverse incentives to lie, in abuse of judicial and administrative processes. Not surprisingly, therefore, most courts and commentators have concluded that the

⁶¹ *PREI*, 508 U.S. at 60 n.5. Similarly, *BE & K* tells us the objective test protects "reasonably based petitioning from antitrust liability." *BE & K*, 536 U.S. at 528.

⁶² *See BE & K*, 536 U.S. at 530-32 (drawing an analogy between baseless litigation and misrepresentation); *Bill Johnson's Restaurants*, 461 U.S. at 743 (same).

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outcome/process analysis is inappropriate in contexts involving misrepresentations. In such settings, a different inquiry – one focused on the knowing, deliberate nature of the falsity – serves to identify anticompetitive intent and fulfill the purposes of the subjective standard.⁶³

In sum, we find no impediment in the law of sham petitioning to an antitrust challenge based on deliberate misrepresentation. Whether we view misrepresentation as a distinct variant of sham petitioning or as a separate exception to *Noerr-Pennington*, the fabric of existing law is rich enough to extend antitrust coverage, in appropriate circumstances, to anticompetitive conduct flowing from deliberate misrepresentations that undermine the legitimacy of government proceedings.

What are those appropriate circumstances? Both the ALJ and Unocal take too narrow a view of the second major issue left open by the Supreme Court – the treatment of misrepresentation in “less political arenas” than the legislative lobbying campaign at issue in *Noerr*. The Initial Decision focuses on the administrative law distinction between legislative and adjudicatory activities and opines that misrepresentations can vitiate *Noerr-Pennington* protection only in adjudicatory contexts. ID at 31-40. Unocal advances much the same arguments. Unocal Brief at 24-40.

⁶³ In fact, the Supreme Court recently adapted *PRET*’s subjective test to fit the context of a National Labor Relations Act dispute. In *BE & K* the Court reasoned that petitioning is subjectively genuine if the petitioner’s “*purpose* is to stop conduct he reasonably believes is illegal.” *BE & K*, 536 U.S. at 533-34 (emphasis original). The Court’s subjective inquiry there was not whether the petitioner sought to win, but whether the petitioning was premised upon a belief in its legitimacy. Similarly, a focus here on knowing, deliberate falsity would bring much the same subjective inquiry to the consideration of misrepresentations: one cannot believe in the legitimacy of a petition based on known falsity.

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The case law, however, takes a much broader view than just administrative law distinctions. It considers both the context of the proceeding and the nature of the relevant communications. In the next sections, we pursue these two inquiries to develop boundaries for a misrepresentation exception that promotes the purposes of the *Noerr-Pennington* doctrine.

B. The Context of the Proceeding

The ALJ/Unocal and Complaint Counsel apply sharply conflicting analytical frameworks in building upon the Supreme Court's statement that the "applicability" of *Noerr-Pennington* "varies with the context and nature of the activity." *Allied Tube*, 486 U.S. at 499. The Initial Decision and Unocal emphasize the distinction between legislation and adjudication.⁶⁴ Applying administrative law principles, they cast the CARB proceeding as legislative.⁶⁵ At places the Initial Decision seems automatically to extend *Noerr-Pennington* protection to misrepresentations in all rulemakings, indeed in all administrative proceedings other than formal adjudications. *See* ID at 36-40. Unocal essentially equates rulemaking with legislation, terms this a political function, and urges that the ALJ correctly rejected application of a

⁶⁴ Compare ID at 32 (misrepresentations made in the context of legislative activities are protected from antitrust liability) with ID at 33 ("By contrast, where the agency is using an adjudicatory process, misrepresentations are not immunized"); compare Unocal Brief at 25 ("If a fraud exception to *Noerr* immunity exists, it is confined to adjudicative proceedings.") with *id.* at 33 ("In the legislative setting, as *Noerr* held, even deception is tolerated by antitrust tribunals).

⁶⁵ *See, e.g.*, ID at 68 ("CARB's Phase 2 RFG rulemaking process was a legislative exercise"); ID at 40 ("CARB was not acting in an adjudicatory manner, but in a legislative manner"); Unocal Brief at 30-33.

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misrepresentation exception to an industry-wide rulemaking. *See* Unocal Brief at 24, 30-32.

As Complaint Counsel argue, however, the case law has focused more directly on the distinction between activities within and outside of the political arena. *See* CCAB at 26-29. Thus, when *California Motor Transport* discusses adjudication, it is in contrast to the “political arena.”⁶⁶ When *Allied Tube* discusses a publicity campaign seeking legislation or executive action, it is in contrast to “less political arenas.”⁶⁷ *Kottle* explains, “[T]his circuit has generally shaped the sham exception [broadly defined] according to our estimation of whether the executive entity in question more resembled a judicial body, or more resembled a political entity.”⁶⁸ The legislative/adjudicatory comparison may sometimes be a useful proxy for the distinction between activities inside and outside of the political arena. When it is not, however, the courts have not hesitated to reject the faulty proxy in favor of a more nuanced inquiry into the political or non-political nature of the context.⁶⁹ In sum, the case law suggests an inquiry focused on

⁶⁶ *See California Motor Transport*, 404 U.S. at 513 (“Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.”).

⁶⁷ *Allied Tube*, 486 U.S. at 499-500 (“But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.”).

⁶⁸ *Kottle*, 146 F.3d at 1061. *See also Clipper Express* at 690 F.2d at 1261 (treating “political” and “adjudicatory” as the opposing spheres); *Livingston Downs*, 192 F.Supp.2d at 533 (asking whether the petitioned commission was “more akin to a political entity or to a judicial body”).

⁶⁹ Unocal acknowledges that *Clipper Express* treated a ratemaking, technically a rulemaking proceeding, as adjudicatory

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whether a proceeding is political or non-political, rather than on whether it is quasi-legislative or quasi-adjudicatory.⁷⁰

The political/non-political distinction turns on several attributes directly linked to *Noerr-Pennington* policy concerns. The political arena is distinguishable from the non-political arena on the basis of the nature of government expectations; the degree of governmental discretion; the extent of necessary reliance on petitioners' factual assertions; and the ability to determine causation, linking the government's actions to petitioner's communications. We discuss each point in turn.

1. Governmental Expectations of Truthful Representation

Courts and commentators have recognized that the nature of politics places government on its guard, enabling it more readily to accommodate misrepresentations. As explained in *Kottle*, "Misrepresentations are a fact of life in politics," and the "political arena has a higher tolerance for outright lies than the judicial arena does."⁷¹ As the Areeda and Hovenkamp treatise explains, "Society recognizes that politics is often a rough and tumble affair. . . . legislatures . . . have more political experience than the courts and . . . may be better able to appreciate the balance of contending forces." 1 AREEDA & HOVENKAMP, ANTITRUST LAW

for purposes of applying *Noerr-Pennington* to a misrepresentation to the Interstate Commerce Commission. Unocal Brief at 27.

⁷⁰ See *supra* section III.B.1 (providing additional discussion of the relevant case law).

⁷¹ *Kottle*, 146 F.3d at 1061-62. Similarly, the Ninth Circuit has expressed confidence that a city council and redevelopment agency, "acting in the political sphere, can accommodate false statements and reveal their falsity." *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 894 (9th Cir.) (internal citation omitted), *cert. denied*, 488 U.S. 965 (1988).

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¶ 203e at 167. In contrast, less political arenas present higher, and often clearer, norms of conduct: “the criteria of impropriety are most fully developed in the adjudicatory context and are loosest in the legislative arena. The executive and administrative worlds partake of both: sometimes one, sometimes the other, sometimes a hybrid.” *Id.*, ¶ 203f at 174 (footnote omitted).

2. The Degree of Governmental Discretion

“[T]he scope of immunity depends on the degree of political discretion exercised by the government agency.” *Kottle*, 146 F.3d at 1062 (internal citation omitted). The degree of discretion shapes the meaning of a proceeding’s legitimacy and the possibility of judicial review: with unfettered discretion, decision makers are free to act for whatever reasons they choose, without triggering court intervention. As Judge Robert Bork explains:

an executive officer . . . entrusted with what amounts to legislative discretion . . . is properly free to arrive at his conclusions in the manner he finds most expeditious. If he acts within the area of his lawful discretion, no court will interfere, and no court will impose liability, under the Sherman Act or any other statute, upon those who attempt by lawful means to persuade him to take one decision rather than another.

BORK, *THE ANTITRUST PARADOX* at 361. In such contexts, “legitimacy” of the decision-making process has no clear meaning.⁷² Accountability in the face of such broad discretion is secured through the electorate, via the political, not the legal, system.

⁷² See *Kottle*, 146 F.3d at 1062 (stating that “[o]nly when administrative officials must follow rules is it meaningful to ask whether a petition before an agency was ‘objectively baseless,’ ” and indicating that similar considerations apply to intentional misrepresentations).

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In contrast, when discretion is substantially limited, there is a meaningful basis to define legitimacy and assess whether a misrepresentation has undermined it.⁷³ Such limits may come from enforceable, substantive standards in an underlying statute or from procedural requirements tying the decision-making process to facts in a record. *See Kottle*, 146 F.3d at 1062 (“executive entities are treated like judicial entities only to the extent that their actions are guided by enforceable standards subject to review”); *Boone*, 841 F.2d at 896 (stressing the absence of standards more definite than what is “necessary or desirable” and the lack of judicial review); *Metro Cable*, 516 F.2d at 228 (contrasting a legislative body, which operates in “a political setting” with freedom “to base its actions on information and arguments that come to it from any source,” with an adjudicatory body, which, “as a prerequisite to taking action” must “compile an evidentiary record through formal proceedings”). When a decision is predicated on fact-finding and dependent on a record, it is vital that those facts be accurate. *See Israel*, 466 F.2d at 278 (stating that “[n]o actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption”); *Woods Exploration*, 438 F.2d at 1297-98 (describing the alleged misrepresentations as an “attempt to undermine” a rule’s efficacy and an “abuse of the administrative process”); *DeLoach*, 2001-2 Trade Cas. ¶ 73,409 at 91,433-34 (explaining that submission of false data undermines governmentally determined production quotas). Legitimacy in such settings has objective meaning and may be assessed through judicial review relying on the factual record.

⁷³ Consequently, a focus on discretion provides an operable tool for distinguishing the political and non-political arenas. In contrast, portions of Unocal’s Brief speak of “policy questions,” “policy considerations,” “policy judgments,” and “political judgments.” *See* Unocal Brief at 30, 31, 32, 35-36. Framing the inquiry in that fashion begs the questions of what is “policy” and what is “political.”

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3. The Extent of Necessary Reliance on the Petitioner's Factual Assertions

Proceedings outside the political arena may be more prone to reliance on a petitioner's factual assertions than activities characterized as political, and the need to so rely increases the likely harm of misrepresentations. *Clipper Express* draws the contrast starkly:

[T]he adjudicatory sphere is much different from the political sphere. There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity. In the adjudicatory sphere, however, information supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial function of these agencies and does not deserve immunity from the antitrust laws.

Clipper Express, 690 F.2d at 1261; *see also Boone*, 841 F.2d at 894 (explaining that agencies acting in political contexts can protect themselves against misrepresentations).

Similarly, the Areeda and Hovenkamp treatise places considerable emphasis on an agency's need to rely on information petitioners communicate:

There certainly is no privilege for misrepresentations to administrative agencies that base their decisions on information provided by the parties. Moreover, there is no reason here to differentiate for these purposes between adjudication and rule making or between rules grounded exclusively in a hearing record and those grounded in less formal procedures.

1 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 203e at 169 (footnotes omitted). The leading antitrust treatise thus rejects explicitly the more formal, administrative law distinctions on which the ALJ and Unocal rely.

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At the same time, courts have also recognized that an agency's practical ability to probe behind petitioners' assertions may shape the result. In *Woods Exploration* and *DeLoach*, where the agencies had no reasonable means to confirm or contradict the petitioners' demand projections and purchase intentions, the courts refused to apply *Noerr-Pennington*.⁷⁴ In contrast, the Third Circuit's *Armstrong* opinion noted that the government agencies "recognized that there was a dispute and made a credibility determination concerning it . . . conducted their own investigation, and afforded all interested parties an opportunity to set the record straight." *Armstrong*, 185 F.3d at 163. The court found that the CON proceeding at issue provided "extensive opportunities for error correction." *Id.* at 164. In these circumstances, it afforded *Noerr-Pennington* protection.

4. The Ability to Determine Causation

Differences in the ability to establish a causal link between petitioning conduct and an ensuing governmental action also distinguish political from non-political arenas. In a truly political environment, it may be impossible to establish that a given misrepresentation caused the government to act as it did.⁷⁵ "The

⁷⁴ See *Woods Exploration*, 438 F.2d at 1295 (finding "no opportunity for meaningful supervision or verification" and a "necessity" of "rely[ing] on the truthfulness" of the petitioners); *DeLoach*, 2001-2 Trade Cas. ¶ 73,409 at 91,434 (finding that the USDA "did not and, in fact, could not . . . investigate the accuracy of the submissions"); see also *In re Buspirone Patent Litigation*, 185 F.Supp.2d 363, 374 (S.D.N.Y. 2002) (refusing to apply *Noerr-Pennington* when the government agency had "neither the authority nor the ability to determine the accuracy of the representations" but rather was "required by law to rely directly upon them").

⁷⁵ Cf. *Omni*, 499 U.S. at 378 (noting that unlawful activity to influence governmental conduct may not change the ensuing

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necessary connections would be almost impossible to establish in the legislative context, where no one can say what combination of facts, arguments, politics, or other factors produced the legislation.” AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 203f3 at 177. As we move to less political arenas, such determinations become feasible:

[I]t is often much more plausible to conclude in the adjudicative context that the provision of false information “caused” the judge or administrative officer to make the decision it did. Such a claim would be strongest in the case of ex parte proceedings where the proponent’s statements are not disputed, or when the information in question was exclusively in the control of the proponent.⁷⁶

Similarly, courts making *Noerr-Pennington* assessments have considered the ability to determine causation. Compare *Nobelpharma*, 141 F.3d at 1071-72 (finding *Walker Process* fraud because “the patent would not have issued but for the misrepresentation or omission”) and *Kottle*, 146 F.3d at 1062-63 (relying in part on the presence of public hearings and written findings in determining that inquiry into the effect of misrepresentations on the proceeding’s legitimacy was appropriate), with *Cheminor*, 168 F.3d at 123-24, 127

governmental action) and 383 (noting the obstacles to identifying lobbying that has produced “selfishly motivated agreement with public officials”).

⁷⁶ AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 203e at 170 (footnote omitted); see also *id.*, ¶ 203f3 at 177 (although agencies engaging in quasi-legislative activities often behave as legislatures, “the relevant procedures may approximate the adjudicatory and the path of decision may be clearer”), ¶ 203h at 193 (with a formal record and a statement of reasons, “it may be quite possible to see the causal connection between a particular impropriety and the tribunal’s order”).

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(determining that the government's action "was not dependent upon the misrepresented information" and finding the petitioning protected) *and Baltimore Scrap*, 237 F.3d at 402-03 (finding that the alleged fraud did not affect the outcome and therefore could not vitiate *Noerr-Pennington* protection).

C. The Nature of the Relevant Communications

The *Noerr-Pennington* inquiry also requires consideration of the nature of the relevant communications. Three issues stand out: a misrepresentation or omission must be deliberate, subject to factual verification, and central to the legitimacy of the affected governmental proceeding.

1. Deliberate Misrepresentation/Omission

The Supreme Court has left no doubt that something more than mere error is necessary. The Court spoke in terms of "unethical conduct" and "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes," *California Motor Transport*, 404 U.S. at 512-13; "unethical and deceptive practices [that] can constitute abuses of administrative or judicial processes," *Allied Tube*, 486 U.S. at 500; and "knowingly and willfully misrepresenting facts," *Walker Process*, 382 U.S. at 177. *See also Liberty Lake*, 12 F.3d at 159 (looking to "knowing fraud" and "intentional misrepresentations"); *Potters Medical Center*, 800 F.2d at 581 ("Only known falsity supports an antitrust offense."). Professors Areeda and Hovenkamp explain, "There is no policy ground to impose antitrust punishments on those who make innocent errors in their dealings with governments. Without knowing falsity, moreover, there would not be the 'abuse' of government process that is the key to ousting *Noerr* . . ." 1 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 203f1 at 174.

2. Factual Verifiability

As the leading treatise states, "If false information is to be actionable in an antitrust suit, the falsity must be clear and

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apparent with respect to particular and sharply defined facts.” 1 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 203f2 at 175 (footnote omitted). In contrast, “the antitrust court . . . should not review the ‘truth’ of arguments or of general statements about the world.” *Id.*

3. Centrality to Legitimacy

Finally, to vitiate *Noerr-Pennington* protection a misrepresentation must be of central significance, such that it undermines the very legitimacy of the government proceeding. The courts have made this an essential element in the inquiry. Some require that the misrepresentations “deprive the litigation of its legitimacy.” *See Kottle*, 146 F.3d at 1060; *Liberty Lake*, 12 F.3d at 159. Others ask whether the misrepresentations infect “the very core” of the case. *See Cheminor*, 168 F.3d at 124. Still others ask whether the government action would have resulted “but for” the misrepresentation or omission. *See Nobelpharma*, 141 F.3d at 1071 (requiring, in a *Walker Process* analysis, that “the patent would not have issued but for the misrepresentation or omission”); *see also* 1 AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 205c2 at 232 (requiring that the antitrust plaintiff show that “the tribunal’s adverse decision depended on the provision of false information”) and ¶ 203h at 192 (framing the inquiry in terms of whether “the agency would not have acted the way it did *but for* the impropriety”) (emphasis original).

Having established a framework of analysis and identified the factors that require consideration, we turn in the next section to assess whether the Complaint is insufficient as a matter of law.

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V. *NOERR-PENNINGTON* DOES NOT BAR THE
COMPLAINT AS A MATTER OF LAW

A. The Complaint's Allegations about the Context of the
Proceeding

For purposes of evaluating the political nature of governmental activities, legislative lobbying presents one extreme, judicial trials the other. Rulemaking, of the type at issue in the CARB proceeding, typically falls within a more difficult middle ground.⁷⁷ To evaluate CARB's activities, we must examine the Complaint's factual allegations under each of the factors identified above and form an overall assessment based on "the totality of the circumstances." *See Kottle*, 146 F.3d at 1062. Under this analytical framework, the facts the Complaint alleges, if established, and with all inferences drawn in Complaint Counsel's favor, would support a conclusion that CARB's activities fell outside the political arena.

This is a substantially broader inquiry than that conducted by the ALJ. In determining that CARB's proceeding was legislative rather than adjudicative, the Initial Decision focused on the degree of CARB's discretion; even there, its analysis was incomplete. It asked whether the CARB proceeding was more akin to rulemaking/legislation or to adjudication, rather than considering whether the proceeding was political or non-political in the *Noerr-Pennington* sense. Unocal discusses a broader range of factors but fails to demonstrate that CARB, in this situation, acted as a political entity.

⁷⁷ *See generally Kottle*, 146 F.3d at 1061 (explaining that whereas in the legislative branch the sham exception is "extraordinarily narrow," and in the judicial branch *Noerr-Pennington* exceptions are well-recognized, the executive branch is "radically diverse," uses widely varying procedures, and exhibits "greatly varying levels of discretion," so that the sham exception must be shaped based on the circumstances presented).

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1. CARB's Expectations of Truthful Representation

The Complaint alleges facts that, if established, would support a finding that CARB's rulemaking proceeded under expectations of truthfulness. Specifically:

- Paragraph 17 alleges, "Given the scientific and technical nature of the issues involved, CARB relies on the accuracy of the data and information presented to it in the course of rulemaking proceedings."
- Paragraph 25 alleges that "In its Phase 2 RFG proceedings, CARB did not conduct any independent studies of its own, but relied on industry to provide the needed research and resulting knowledge."⁷⁸
- Paragraph 17 alleges that California's Administrative Procedures Act requires "the development of an evidentiary basis for any proposed regulations,"⁷⁹ and Paragraph 18 alleges that CARB's regulations are subject to judicial

⁷⁸ Unocal disputes this allegation. *See* Unocal Brief at 5 (quoting CARB's Final Statement of Reasons for Rulemaking (October 1992)); Surreply of Union Oil Company at 1-2. Complaint Counsel challenge Unocal's assertions. *See* Reply Brief of Counsel Supporting the Complaint at 2 (quoting a brief filed by Unocal in other litigation). Rather than attempting to resolve this dispute – which would require facts placing the bare language of the quoted materials in proper context – we note that the debate highlights a factual issue that appears to require resolution through trial, not through briefing on a motion to dismiss.

⁷⁹ *See* Cal. Gov't Code §§ 11340 *et seq.*

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review to determine, *inter alia*, whether the agency's action was "lacking in evidentiary support."⁸⁰

- Paragraphs 39 through 42 suggest that one Unocal communication that allegedly created a "materially false and misleading impression" was the *quid pro quo* for CARB's "agreement to develop a predictive model."⁸¹
- Paragraphs 21, 37 and 48 (first and second sentences), 42, and 48 (third sentence), respectively, allege that CARB's statutory mandate requires that it consider the cost-effectiveness of its actions; that discussions between Unocal and CARB focused on the cost-effectiveness of regulations under consideration; that Unocal created the misleading impression that it had "agreed" to give up any "competitive advantage" it may have had "relating to its purported invention and arising from its emissions research results"; and that Unocal's statements suppressed the "material fact that assertion of its proprietary rights would materially increase the cost and reduce the flexibility of the proposed regulations."

As Judge Bork explains, "Our society requires a wide-open political process, robust and free. It also requires that there be more formal, constrained procedures for the establishment of certain types of facts and the application of particular policies.

⁸⁰ See Cal. Gov't Code § 11350.

⁸¹ Unocal argues that the communication alleged in Paragraph 41 preceded the formal opening of CARB's Phase 2 RFG proceeding and therefore could not have been subject to any constraints attendant upon the rulemaking. Unocal Brief at 39. The Complaint, however, alleges a continuing pattern of conduct that maintained the alleged false and misleading impression throughout the rulemaking. See, e.g., Complaint, ¶¶ 2-4, 46, 48, 61, 64, 78c, and 79.

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Processes of the latter type must be guarded from abuse if they are to be effective.” BORK, *THE ANTITRUST PARADOX* at 360. The cited allegations – directed toward the nature of the issues involved, CARB’s reliance on industry research and knowledge, the procedures under which CARB operated, its course of dealing with Unocal, and the specific context in which CARB received necessary assurances regarding Unocal’s intentions – all depict a process of Judge Bork’s “latter type,” an effort to establish essential facts under norms indicating expectations of truthfulness.

2. The Degree of CARB’s Discretion

CARB operated with substantial limits on its discretion derived from a combination of enforceable statutory standards, required reliance on an evidentiary record, and the presence of judicial review.

Analysis drawn from the California Clean Air Act alone is ambiguous. The statute mandates that CARB take “necessary, cost-effective, and technologically feasible” actions to achieve specific percentage reductions of reactive, organic gases and nitrogen oxides by specific dates, but it leaves CARB with discretion how this may be achieved. Cal. Health & Safety Code § 43018(b). For particulates, carbon monoxide, and toxic air contaminants, the statute sets no specific percentages or dates, but rather mandates “maximum feasible reductions” and the “most cost-effective combination of control measures.” *Id.* at §§ 43018 (b)-(c). *See* Complaint, ¶ 21.

Complaint Counsel concede that the statute leaves discretion regarding “determination of the gasoline properties to be regulated and the limits to be set for these properties,” but argue that these were technical decisions circumscribed by the statutory mandate. To Complaint Counsel, the legislature made the central policy decisions – whether to regulate automobile emissions and the amount by which to reduce them and/or the applicable deadlines – leaving it to CARB to exercise technical expertise in implementing the legislature’s policies. CCAB at 35-38. Unocal,

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on the other hand, argues that CARB possessed and exercised broad discretion under a statute that left it to the agency to balance conflicting mandates and make tradeoffs between emission reductions and economic objectives.⁸²

It appears that the California legislature imposed significant standards concerning the amount and timing of pollution reductions and specified the factors to be applied in resolving the remaining issues, but left subsidiary, though still important, choices to CARB. Plainly some measure of discretion is inherent in all but ministerial government decision making. A modicum of discretion, by itself, does not necessarily render a proceeding political when the legislature has mandated the ultimate objectives and identified specific considerations to be balanced. *See Livingston Downs*, 192 F.Supp.2d at 534 (treating the fact that statutes “enumerate several criteria the Commission was obligated to weigh” as evidence that its discretion was circumscribed, so that the proceeding should be regarded as adjudicatory for *Noerr-Pennington* purposes). An overall judgment must depend on the *degree* of discretion removed by legislative mandate and the *degree* of discretion left to the agency, and in close cases clear answers may prove elusive.

In this case, however, other discretion-limiting factors are present. CARB’s discretion *was* substantially confined by its need to base its actions on facts in the record. CARB was required by statute to maintain a record of its Phase 2 RFG proceeding. Cal. Gov’t Code § 11347.3. It had to make written findings justifying its actions. *Id.* at § 11346.7 (1991 through 1993). It needed an

⁸² Unocal Brief at 33-37. The Initial Decision merely listed the determinations that the statute left open to CARB’s discretion and observed that the statute provided “only” benchmarks and interests that CARB must keep in mind. The Initial Decision never addressed what those benchmarks/interests were, much less the nature of their interplay with matters left to CARB’s discretion. *ID* at 34-35.

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evidentiary basis for its decisions: Cal Gov't Code §§ 11349.1 and 11350 provide, respectively, that review by the Office of Administrative Law and then by the courts be based on the file of rulemaking required by § 11347.3. *See* Complaint, ¶¶ 17, 26.

Moreover, the presence and nature of judicial review further limit CARB's discretion. The Complaint alleges that all CARB regulations are subject to review, both by California's Office of Administrative Law and then by the courts. ¶ 18. Pursuant to California Government Code § 11350(b) (1991) and § 11350(b)(1) (1992 to the present), a regulation may be declared invalid if the agency's "determination that the regulation is reasonably necessary to effectuate the purpose of the statute . . . is not supported by substantial evidence." A leading analyst of California administrative law explains that the legislative history of the 1982 amendment that added the substantial evidence requirement to the judicial review statute "makes clear that the legislature intended a significant intensification of the factual support for a regulation."⁸³

⁸³ Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1230 (1995). Unocal argues that, although the governing statute requires "substantial evidence," in practice review is more deferential. Unocal Brief at 38 n.17. The one case that Unocal relies upon for interpreting the "substantial evidence nomenclature," *Western Oil & Gas Ass'n v. Air Resources Bd.*, 37 Cal.3d 502, 508 (1984), however, was issued in 1984, and does not reference the amendments that first added the substantial evidence test, effective in 1983. The case is an appeal from a 1980 trial court order, following CARB actions in 1976-1977, *id.* at 508, and the intermediate appellate opinion states that even amendments to the Government Code in 1980 came too late to be "specifically applicable." *See Western Oil & Gas Ass'n v. Air Resources Bd.*, 181 Cal.Rptr. 199, 202-03 (Cal. Ct. App. 1982), *vacated on other grounds*, 37 Cal.3d 502. In any case, even the language relied upon by Unocal acknowledges a requirement of

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The requirements that CARB base its actions on an evidentiary record and subject its regulations to judicial review based on substantial evidence in that record are significant limits on its discretion of a type that courts have found telling. For example, the U.S. Court of Appeals for the Seventh Circuit contrasted the situation of a city council that “need not, as a prerequisite to taking action, compile an evidentiary record through formal proceedings” with “an adjudicatory setting,” in which the government “can act only on the basis of a record made at hearings.” *Metro Cable*, 516 F.2d at 228, 232. Similarly, the presence of judicial review has contributed to findings that a proceeding was not political. See *Livingston Downs*, 192 F.Supp.2d at 534. In like fashion, the procedural constraints on CARB’s discretion are significant indicia that its Phase 2 RFG proceeding fell outside the political arena.⁸⁴

judicial review to determine whether an action is “lacking in evidentiary support.” 37 Cal.3d at 509. Unocal elsewhere cites a second California case for the proposition that judicial review of CARB proceedings is highly deferential. Unocal Brief at 31, citing *Western States Petroleum Ass’n v. Superior Court of Los Angeles County*, 9 Cal.4th 559, 572 (1995). That opinion merely rejects judicial consideration of extra-record evidence; it in no sense detracts from judicial review on the basis of evidence in the record. See *id.* The specific judicial review provision discussed, Public Resources Code § 21168.5, was not California Government Code § 11350, at issue here. See *id.*

⁸⁴ Unocal argues that *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), treats Environmental Protection Act rulemakings under the federal Clean Air Act as part of the political process, Unocal Brief at 2, 32, 37, and observes that CARB termed its authority in the RFG Phase 2 proceeding “analogous” to that in Environmental Protection Agency rulemakings. See Tr. at 59-60, citing CARB’s Final Statement of Reasons for Rulemaking at 193. *Chevron*, however, does not reach as broadly as Unocal contends. It deals

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3. The Extent of CARB's Reliance on Unocal's Factual Assertions

Paragraph 80 of the Complaint alleges that CARB “reasonably relied” on Unocal’s misrepresentations. Factual inquiry may demonstrate that CARB was dependent on Unocal for information regarding its patent applications and its intentions with regard to enforcing its patent rights. The Initial Decision erred in concluding that the numerous comments submitted by other parties on various subjects during the rulemaking proceeding necessarily indicated that CARB was not “wholly dependent” on Unocal for the relevant facts. ID at 40-43. Dependence must be assessed with reference to the specific information allegedly misrepresented. For example in *Woods Exploration*, the fact that plaintiffs’ natural gas demand forecasts may have been accurate did not protect defendants’ misrepresentations of their own share of total anticipated demand. *See Woods Exploration*, 438 F.2d at 1289, 1292. Similarly, *Clipper Express* “made numerous filings with the ICC during the protest period,” yet that fact did not preclude antitrust scrutiny of the protestants’ misrepresentations. *Clipper Express*, 690 F.2d at 1257. Indeed, the Initial Decision’s reasoning seemingly would eliminate any misrepresentation

with a question of law – a statutory interpretation involving definition of a statutory term – not a matter based upon a fact-finding process and subject to substantial evidence review. Indeed, *Chevron*’s own language shows its limits: “In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgment.” *Chevron*, 467 U.S. at 865 (emphasis added). This presupposes, and is limited to, a policy-making context. Unocal fails to demonstrate why the fact that an agency as a general matter has some policy-making authority necessarily means that, in any specific context, it is operating within the political arena in the sense relevant to the *Noerr-Pennington* inquiry.

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exception in any litigation or contested adjudication, because the presence of an opposing party ensures that the judge or adjudicator is not “wholly dependent” on the petitioner in all respects.

Factual inquiry may show that no other party could provide information regarding Unocal’s patent claims and its intention to enforce them. Under the rules of the patent system then in force, the Patent and Trademark Office maintained patent applications under terms of strict confidentiality. *See* 35 U.S.C. § 122 (prior to 1999 amendments). Moreover, the Complaint, ¶¶ 60-67, alleges that, even following adoption of the CARB Phase 2 RFG requirements, Unocal amended its claims “to ensure that [they] more closely matched the regulations” and filed additional, related patent applications with priority dating from the original 1990 application. Given these evolving claims, the ultimate content of Unocal’s patent claims may have been foreseeable only to Unocal at the time of CARB’s rulemaking. Furthermore, even if all claims were known, Unocal allegedly did not reveal its intentions with regard to enforcement of its patent rights, *see, e.g.*, Complaint, ¶¶ 2-3. No party other than Unocal may have been able to shed light on this issue, and CARB may have been wholly dependent on Unocal’s factual assertions with respect to the issues most relevant to this proceeding.

4. The Ability to Determine the Effect of the
Misrepresentations on CARB’s Decision

The Complaint’s allegations, if established, would appear to demonstrate an ability to identify a causal link between Unocal’s alleged misrepresentations and CARB’s actions. The Complaint alleges that CARB was required to develop “an evidentiary basis” for its regulations and that CARB “issued written findings on the results of its rulemaking proceedings.” ¶¶ 17, 26. CARB, by statute, had to maintain, and be able to justify its actions based upon evidence in, an administrative record. Cal. Gov’t Code §§ 11347.3 and 11350. Indeed, CARB’s Final Statement of Reasons for Rulemaking, attached as Appendix 1 to Unocal’s

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Brief and taken as the subject of official notice by the ALJ, ID at 8-10, may establish some key elements of causation. For example, it identifies Unocal's study as "the only study that evaluated T50 and provided a statistical analysis" and states that it is the results of Unocal's study that "form the basis for the T50 specification." CARB Final Statement of Reasons for Rulemaking at 69. Moreover, Paragraph 27 of the Complaint alleges that Unocal's management and employees understood that information and data relating to the compliance costs or to the cost-effectiveness of the Phase 2 regulations were material to the rulemaking. If so, information in Unocal's possession would contribute to a showing about causation.

All of these considerations, of course, must be placed in proper context through fact-finding procedures. What we conclude now – when we must take the Complaint's allegations as established and draw all inferences in favor of Complaint Counsel – is that CARB's Phase 2 RFG proceedings exhibit the expectations of truthfulness, limits on governmental discretion, need to rely on petitioners' factual assertions, and ability to determine causation typically associated with activities outside the political arena.

B. The Complaint's Allegations about the Nature of the Relevant Communications

The Complaint alleges precisely the type of misrepresentation that courts and analysts have found to vitiate *Noerr-Pennington* protection in contexts outside the political arena. To begin, the Complaint plainly alleges that Unocal's conduct was deliberate, knowing, and willful. *See, e.g.*, ¶ 1 (alleging a "pattern of bad-faith, deceptive conduct"), ¶¶ 3, 77, 78, ("alleging "knowing and willful misrepresentations"), and ¶¶ 5 and 80 (alleging "fraud").

Next, the alleged misrepresentations/omissions relate to specific, verifiable facts. The Complaint alleges that Unocal, through misrepresentations/omissions, conveyed and maintained the false impression that it did not claim, or did not intend to assert, intellectual property rights implicated by CARB's

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standards. If Unocal asserted patent rights that it had previously represented either did not exist or would not be asserted, then the discrepancy would be clear, apparent, and factually verifiable.

Finally, the Complaint states allegations that, if established, would demonstrate the necessary central significance to CARB's decision making. *See, e.g.*, ¶ 45 (Unocal's alleged misrepresentations "caused CARB to adopt" regulations that substantially overlapped Unocal's patent claims). Indeed, ¶¶ 5 and 80 aver, "But for Unocal's fraud, CARB would not have adopted RFG regulations that substantially overlapped with Unocal's concealed patent claims; the terms on which Unocal was later able to enforce its proprietary interests would have been substantially different; or both."⁸⁵ Moreover, the governing statute makes cost-effectiveness a key element. Cal. Health & Safety Code § 43018(b). Paragraph 79 of the Complaint alleges that Unocal failed to disclose information that "would have impacted" CARB's analysis of this key element. We need not – and do not – decide, at this point, precisely what level of causality is essential to make *Noerr-Pennington* inapplicable. We do conclude that the very clear causation alleged in the Complaint would satisfy this aspect of the inquiry.

C. Denial of *Noerr-Pennington* Protection Would Not Raise Policy Concerns

The nature and context of Unocal's alleged communications work to minimize the policy concerns that the FTC, the courts, and commentators have voiced against an overly broad misrepresentation exception to *Noerr-Pennington*.

⁸⁵ Paragraph 90 of the Complaint explains that participants in Auto/Oil and WSPA would have advocated that CARB "negotiate license terms substantially different from those that Unocal was later able to obtain."

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First: The deliberate and knowing nature of the alleged misrepresentations negates impact on even the broadest First Amendment considerations. There should be no chilling of legitimate petitioning and no sacrifice of necessary breathing space from a case confined to deliberate fraud.

Second: The alleged misrepresentations cut so clearly to the core of CARB's proceeding that there is no question of imposing antitrust liability based on valid government action. According to the Complaint, CARB did not know that it was taking action that would subject the California oil industry and California consumers to Unocal's patent claims and ensuing market power.⁸⁶ Nor do there appear to have been means for CARB or others to counterbalance the effect of Unocal's alleged fraud and to provide the "independent investigation, . . . open process, and extensive opportunities for error correction" highlighted in *Armstrong*, 185 F.3d at 164; here, the relevant information was uniquely in Unocal's knowledge and control.⁸⁷ As pled, the facts show that this is not a case like *Omni*, in which it was impractical to identify

⁸⁶ Indeed, California has stated to the Supreme Court that Unocal sought to "commandeer" CARB's regulations and to "hijack," "distort," and "plunder" California's regulatory process. *Amici Curiae* Brief of [California and 33 States] and the District of Columbia in Support of Petition for Writ of Certiorari at 4-5, *Atlantic Richfield Co. v. Union Oil Co. of California*, 531 U.S. 1183 (2001) (No. 00-249).

⁸⁷ After-the-fact corrections also appear to have been impossible. The Complaint alleges that CARB cannot now change its regulations sufficiently to provide flexibility for third parties to avoid Unocal's patent claims. ¶ 94. Refiners have invested billions of dollars in sunk capital investments to comply with CARB Phase 2 RFG regulations, ¶ 93, and trial may show that "[r]epeal of the regulations would not undo the economic commitment to them." Brief of California *et al.* as *Amici Curiae* in support of the Complaint at 22 ("States' Brief").

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lobbying that produced a selfishly motivated city council ordinance, but rather a case like *Walker Process*, *Woods Exploration*, and *DeLoach*, in which misrepresentation effectively supplanted government action and the courts attributed anticompetitive harm to the underlying private conduct. *See supra* Section III.B.2.b.

Third: The context minimizes federalism concerns and reservations concerning regulation of political behavior. The conduct challenged does not flow directly from CARB's regulations. Rather, the Complaint emphasizes that the proximate cause of alleged competitive harm was Unocal's *enforcement* of its patent rights.⁸⁸ Moreover, the remedy sought – requiring that Unocal cease and desist from enforcing its RFG patents on gasoline sold in, or imported or exported to or from, California⁸⁹ – will not require a change in, or repeal of, any CARB regulations. Consequently, there is no reassessment of CARB's determination of public welfare and no regulation of the outcome of the state's political processes.

Fourth: The availability of objective information should lessen, and perhaps eliminate, any need to look behind CARB's decision making process. The presence of an administrative record and a written statement of reasons presenting CARB's reasoning may establish critical facts concerning the role played by Unocal's communications. Development of a factual record in this proceeding will enable an assessment of these, and any

⁸⁸ ¶ 95. Complaint Counsel, CCAB at 22-24, analogize to *Walker Process*, in which the antitrust offense was based on *enforcement* of the fraudulently obtained patent. *Id.*, 382 U.S. at 174. Of course, the violation alleged here, as in *Walker Process*, is not a mere refusal to license. The contention that misrepresentation, or fraud, contributed to the acquisition of monopoly power is a key element of the allegations.

⁸⁹ Complaint, at Notice of Relief ¶¶ 1-3.

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similar, evidentiary materials, with knowledge of their context and an understanding of their significance to the allegations in the Complaint.

Fifth: This is not a case in which unwanted interference with a state decision maker is likely. CARB, joined by California and 21 other States, has filed an *amicus* brief in support of Complaint Counsel's position ("States' Brief"). The *amici* assert a "governmental interest in insuring that citizens who participate in administrative rule-making processes do not make misrepresentations or fraudulently withhold important facts," and CARB specifically expresses concern for "the integrity of its administrative processes." States' Brief at 4, 22. According to the *amici*, "Limiting the immunity provided by the *Noerr-Pennington* Doctrine helps to protect the integrity of these administrative proceedings." *Id.* at 22. Of course, participants' briefs do not establish any fact of record, but the filing of this *amicus* brief does suggest that any prudential concerns over unwanted intrusion are attenuated here. Courts have found similar representations persuasive. *See Clipper Express*, 690 F.2d at 1262 n.34 (discussing an ICC *amicus* brief that voiced concern over misrepresentations in administrative proceedings and supported antitrust review).

All of these factors mute policy concerns that in other circumstances might raise reservations over the denial of *Noerr-Pennington* protection for a misrepresentation to the government. Moreover, as discussed in Section III.B.2.c. above, there are also compelling reasons to avoid a blanket antitrust exemption for such misrepresentations. We conclude therefore that there is no basis either in policy or in the nature and context of Unocal's alleged communications to CARB for dismissing the Complaint as a matter of law, without trial or determination of any facts, because of *Noerr-Pennington*.

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VI. UNOCAL'S COMMUNICATIONS WITH INDUSTRY GROUPS

The Initial Decision splits its treatment of Unocal's communications with the private industry groups, Auto/Oil and WSPA. It concludes that "[t]o the extent that" Unocal's alleged conduct toward Auto/Oil and WSPA was "part of [Unocal's] scheme to induce CARB to act, it constitutes indirect petitioning protected by *Noerr-Pennington*." ID at 68. In contrast, "[t]o the extent" that the alleged misrepresentations to the industry groups "were not part of [Unocal's] scheme to solicit favorable government action," the Initial Decision does not apply *Noerr-Pennington*. ID at 56, 59. The Initial Decision thus highlights the allegation that but for Unocal's fraud, the Auto/Oil and WSPA participants would have incorporated knowledge of Unocal's pending patent rights in their capital investment and refinery reconfiguration decisions, either to avoid or to minimize potential infringement. See ID at 60, citing Complaint, ¶ 90(c). Unocal argues that even those aspects of its communications that allegedly were directed toward affecting competitors' investment decisions were incidental effects of protected petitioning and therefore protected under *Noerr-Pennington*. Unocal Brief at 49.

Of course, if factual development shows that Unocal's direct communications to CARB fall outside *Noerr-Pennington* protection, there would be no question of indirect petitioning or incidental effects. If, however, Unocal's communications to CARB ultimately are protected by *Noerr-Pennington*, the status of communications to the industry groups remains a relevant issue. We conclude that Unocal misstates the controlling principles in ways that overstate potential protection for its communications to the industry groups and that the Initial Decision's formulation of the issue is ambiguous and, at a minimum, requires clarification.

In this context, both the ALJ and Unocal misapply *Noerr*. *Noerr* involved a publicity campaign sponsored by railroads as a means of influencing the adoption, retention, and enforcement of laws unfavorable to the trucking business. *Id.*, 365 U.S. at 129.

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The Court rejected the contention that, because the railroads also wished “to destroy the goodwill of the truckers among the public generally and among the truckers’ customers” and actually inflicted such injury, the publicity campaign was not protected. *Id.* at 142. As the Court explained, “There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers.” *Id.* “Moreover,” the Court continued, “all of the evidence in the record, both oral and documentary, deals with the railroads’ efforts to influence the passage and enforcement of laws.” *Id.* “In the light of this,” the Court concluded, harm to the truckers’ relationships with the public and with customers was no more than “an incidental effect” of a type “inevitable, whenever an attempt is made to influence legislation by a campaign of publicity” *Id.* at 143.

Here, the allegations are sharply different. There allegedly *was* direct misrepresentation to the industry groups and their participants. If the allegations are established, then there *would be* evidence of efforts to influence private business conduct. As alleged by the Complaint, the harm incurred as a result of communications to private parties was neither “incidental” nor “inevitable” but rather a distinct, free-standing, and potentially substantial source of competitive harm.

Under the Supreme Court’s subsequent analysis in *Allied Tube*, such conduct is not protected. Like the Auto/Oil research joint venture and the WSPA trade association, *Allied Tube* involved conduct – private standard-setting activity – that antitrust traditionally has scrutinized. *Id.*, 486 U.S. at 500, 505-07. The privately-determined standards in *Allied Tube* sometimes were adopted into state codes and sometimes were not. The plaintiff, however, sought damages only for harm resulting from the private standard alone (*e.g.*, the stigma experienced even in states that did not adopt the standard).⁹⁰ Terming the relevant conduct

⁹⁰ *Allied Tube*, 486 U.S. at 498 n.2. Although the Court suggested that such effects might still enjoy *Noerr-Pennington*

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“commercial activity with a political impact” rather than “political,” *id.* at 507, the Supreme Court refused to apply *Noerr-Pennington* to “any antitrust liability flowing from the effect the [private] standard has of its own force in the marketplace.” *Id.* at 509-10.

Under this analysis, even if communications to CARB are protected, misrepresentations to the industry groups would be actionable if they caused substantial competitive harm from their “own force in the marketplace.” That is precisely what the Complaint alleges. Independent of its allegations concerning effects on CARB, the Complaint avers that Unocal induced other oil companies to make technology adoption decisions premised on the reasonable belief that Unocal had no relevant patent rights or no intention to enforce such rights.⁹¹ If CARB had never existed, competitors still may have been harmed if induced unwittingly to subject themselves to Unocal’s patent claims. Alternatively, even given CARB’s regulation, had competitors known of Unocal’s patent claims and enforcement intentions from the start – before locking in to specific refinery configurations – they allegedly may have found ways to comply with CARB’s requirements without infringing Unocal’s patents. In either case, harm derives from

protection if “incidental to a valid effort to influence governmental action,” it found that the defendants’ petitioning activity was invalid and therefore unprotected without resolving the question of “incidental status” of the competitive harm. *See id.* at 502-03.

⁹¹ Unocal contends that “a vague patent disclosure policy” cannot serve as a basis for a finding of fraud in the private standard-setting context. The Complaint, however, traces liability to Unocal’s affirmative presentations and representations to the industry groups. *See, e.g.*, ¶¶ 54 and 58. These considerations may require both factual development and careful analysis of the substantive reach of the antitrust laws.

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unnecessarily infringing Unocal's hidden patent claims and is independent of CARB regulation.

Consequently, Unocal's claims lack merit and the Initial Decision potentially protects too much. The same conduct simultaneously may be "part of [Unocal's] alleged scheme to induce CARB to act," and yet have substantial marketplace effects independent of CARB's actions. Under the principles of *Allied Tube*, such conduct would support an antitrust violation based upon the independent effects.⁹² To the extent that the Initial Decision suggests otherwise, it errs.⁹³

⁹² This remains so notwithstanding that antitrust liability predicated on inducing CARB to act potentially could be protected as indirect petitioning. *See Allied Tube*, 486 U.S. at 503.

⁹³ Much of the Initial Decision's wording in this context is ambiguous, leaving it unclear whether conduct that was "part of [Unocal's] scheme to induce CARB to act" remains actionable to the extent that it also causes independent competitive harm. Some of the language suggests that the ALJ incorrectly assumed that conduct with one kind of effect is cleanly separable from conduct with the other. *See, e.g.*, ID at 2 ("conduct directed toward Auto/Oil Group and WSPA, independent of the conduct directed toward CARB"), 59 (beginning with the heading "Conduct directed at Auto/Oil Group and WSPA separate from conduct directed at CARB"). The Initial Decision identifies Complaint Paragraphs 83, 84 (partial), 88, 89 (partial), and 90(c) as surviving its *Noerr-Pennington* analysis. ID at 59-60. To this list our analysis would add Paragraphs 50-59, 81-82, 84 (phrase relating to violation of the integrity of Auto/Oil's procedures), 85-87, 89 (phrase relating to violation of the integrity of WSPA's procedures), and 90 (first and last sentences) from the paragraphs specifically devoted to Unocal's communications with Auto/Oil and WSPA.

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* * * * *

Unocal's *Noerr-Pennington* motion rests on the proposition that a private business may lie to a government rule maker, misrepresent its intentions regarding the enforcement of its patent rights, and then swing the trap shut after the government has enacted regulations that overlap with the patents. According to Unocal, a firm may thereby amass market power and enforce patent rights buttressed by a government mandate in ways never understood nor intended by the government agency, with absolute impunity from antitrust review. Unocal argues that regard for First Amendment freedoms and concern with interference with, or deconstruction of, governmental decision making require this result.

The First Amendment Right to Petition helps to protect, preserve, and promote representative democracy. This protection, however, is not limitless, especially with respect to intentional, egregious misrepresentation. Too broad a shield for false petitioning would actually jeopardize the representative system that it seeks to guard. The more that petitioners mislead the government, the more that government mis-leads the public. Consequently, it is not surprising that the First Amendment finds no value in false statements for their own sake, and protects misrepresentations only when necessary to protect speech that matters. When fraud controls the outcome, and the misrepresentation is intentional, denying protection to the "liar in petitioner's clothing" jeopardizes no speech that matters. Virtually all recent cases hold that in some circumstances false petitioning does not enjoy protection. Moreover, virtually all agree that First Amendment and federalism considerations require that the circumstances justifying denial of *Noerr-Pennington* protection be reasonably-bounded and clearly drawn. We join this consensus.

As a matter of law, therefore, we hold that misrepresentation can warrant denial of *Noerr-Pennington* protection, pursuant either to a separate doctrinal exception or a variant of the sham

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exception. We hold, however, that false petitioning loses *Noerr-Pennington* protection only in limited circumstances, such as when the petitioning occurs outside the political arena; the misrepresentation is deliberate, factually verifiable, and central to the outcome of the proceeding or case; and it is possible to demonstrate and remedy this effect without undermining the integrity of the deceived governmental entity. In addition, we emphasize that, even if *Noerr-Pennington* considerations do not protect the false petitioning, no liability arises under the FTC, Sherman, or Clayton Acts unless that conduct is anticompetitive. These limitations will ensure, with a substantial margin for error, that the possibility of antitrust challenge will neither chill petitioning that merits protection nor undermine the decision-making functions of other governmental entities. This approach, moreover, will also help make certain that intentionally and egregiously false petitioning does not cause competitive injury.

VII. THE COMMISSION HAS JURISDICTION OVER THE
ISSUES PLED IN THE COMPLAINT

The Initial Decision ruled that “[t]o the extent that the alleged misrepresentations made to the Auto/Oil Group and to WSPA were not part of [Unocal’s] scheme to solicit favorable governmental action,” the allegations of the Complaint require resolution of substantial questions of federal patent law over which the Commission lacks jurisdiction. ID at 59. According to the Initial Decision, “The scope of [Unocal’s] patents, the scope of any competitor’s patents, whether any of the competitor products or methods that could be created or invented infringed, and whether refineries could be reconfigured so as to avoid or minimize infringement of [Unocal’s] patents” are “substantial patent law issues” that the Complaint raises yet lie beyond Commission jurisdiction. ID at 69. Unocal supports the Initial Decision’s analysis and urges that “this matter may only be brought, if at all, in a federal district court which has original jurisdiction over patent questions.” Unocal Brief at 52. As discussed below, the ALJ and Unocal err through an unduly narrow reading of the FTC Act; an overly broad reading of the

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statute that confers patent law jurisdiction upon the federal courts; and a fundamental misinterpretation of the nature of the Commission's inquiry when patents are among the relevant assets of firms alleged to have unlawfully created or exercised market power.

A. The FTC Act Confers Broad Jurisdiction

The FTC Act confers broad power to prevent unfair methods of competition. Congress had “an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages.” *FTC v. Cement Institute*, 333 U.S. 683, 693 (1948). The ALJ and Unocal misread congressional intent in arguing that the lack of express language relating to patent questions evinces an intent to limit the FTC's role. Rather, the Supreme Court explains that the statutory prohibition of “unfair methods of competition” confers a “broad delegation of power” to the FTC: Congress “intentionally left development of the term ‘unfair’ to the Commission rather than attempting to define the many and variable unfair practices which prevail in commerce.” *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367 (1965) (internal quotation omitted).⁹⁴

⁹⁴ See also *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240 (1972), citing S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914) (explaining that a general declaration condemning unfair practices was preferable to an effort to enumerate them because “after writing 20 of them into the law it would be quite possible to invent others”), and H.R. Conf. Rep. No. 1142, 63rd Cong., 2d Sess. 19 (1914) (“There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again.”).

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Congress certainly was aware that antitrust and unfair competition cases could involve patent issues,⁹⁵ yet neither the ALJ nor Unocal identify anything in the statute or legislative history suggesting the claimed jurisdictional limit. As several provisions in the FTC Act demonstrate,⁹⁶ when Congress wishes to limit FTC jurisdiction, it knows how to do so. Given Congress' purpose to empower the Commission broadly and its deliberate choice to avoid enumerating specific suspect practices, no jurisdictional constraint should be implied.

Indeed, both the Commission and the federal courts have reached this conclusion before. In *American Cyanamid Co.*, 63 F.T.C. 1747, 1855-57 (1963), the Commission expressly found that it had jurisdiction over allegations of unfair methods of competition that were based on a substantial issue of patent law. Although the appeals court vacated the Commission's opinion on other grounds, it affirmed the jurisdictional finding: "The Federal Trade Commission Act contains no statutory exemption of Patent Office proceedings, and we find nothing in the Act indicating any intention to set aside the Patent Office as a 'city of refuge.' "

⁹⁵ A catalog of antitrust/unfair competition cases compiled while Congress considered and passed the FTC and Clayton Acts in 1914 includes substantial discussion of patent-related cases. *See, e.g.*, JOSEPH E. DAVIES, BUREAU OF CORPORATIONS, TRUST LAWS AND UNFAIR COMPETITION at LI, 115-17, 389-94, 471-72, 495 (1915) (citing cases dealing with the terms under which patent rights may be licensed or involving bad faith threats of infringement suits directed at customers or distributors of competitors).

⁹⁶ *See, e.g.*, 15 U.S.C. § 44 (exempting from FTC jurisdiction the activities of firms not organized to carry on business for profit), § 45(a)(2) (exempting from FTC jurisdiction banks, savings and loan institutions, meat packers, certain common carriers, and air carriers), and § 46 (exempting from FTC investigatory authority "the business of insurance").

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American Cyanamid Co. v. FTC, 363 F.2d 757, 771 (6th Cir. 1966).

The issue in *American Cyanamid* – inequitable conduct before the Patent Office – did not involve the scope or infringement of a patent, but the Initial Decision errs in distinguishing its jurisdictional findings on that basis. *See* ID at 65-66 (concluding that resolution of allegations in the Complaint “goes far beyond what was required in *American Cyanamid*”). The U.S. Court of Appeals for the Federal Circuit has ruled that issues of patent enforceability (which include inequitable conduct), just like issues of patent validity and infringement, are substantial issues of patent law for purposes of jurisdictional determinations. *See Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1330-31 (Fed. Cir. 1998) (“We see no reason why our jurisdictional jurisprudence should distinguish [validity and enforceability] from [infringement]”), *cert. denied*, 525 U.S. 1143 (1999), *overruled in part on other grounds*, *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999). The ALJ has drawn a distinction without a difference, and *American Cyanamid*’s conclusion that the FTC Act reaches unfair methods of competition that involve patent issues applies equally to this case.

B. Section 1338(a) is Inapplicable on its Face

Finding no basis in the FTC Act for limiting the Commission’s jurisdiction, the ALJ and Unocal rely heavily on the statute that vests federal district courts with jurisdiction over patent matters, 28 U.S.C. § 1338(a). Section 1338(a) provides:

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

The Initial Decision treats this case as arising under the patent laws and concludes that § 1338(a) vests exclusive jurisdiction in

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the federal district courts and thereby precludes jurisdiction within the FTC. ID at 63. It is apparent, however, from its very face that § 1338(a) has no bearing on Commission jurisdiction: this proceeding is not a “civil action”; the FTC is not one of the “courts of the states”; and this proceeding does not “aris[e] under” a patent statute.

1. This Proceeding is not a Civil Action

The Commission’s adjudicatory actions are “proceedings,” not the “civil action[s]” referenced in § 1338(a). See *Pepsico, Inc. v. FTC*, 472 F.2d 179, 184 (2d Cir. 1972) (distinguishing a Commission proceeding from a civil action), *cert. denied*, 414 U.S. 876 (1973). The FTC Act carefully distinguishes between “proceedings” before the Commission and “civil actions” before federal district courts.⁹⁷ Section 1338(a) deals only with civil actions, and the present administrative *proceeding* falls entirely outside its coverage.

2. Jurisdiction exclusive of the “courts of the states” is not exclusive of the FTC

Nor does § 1338(a)’s grant of jurisdiction “exclusive of the courts of the states” pertain to the Commission. The FTC is a federal administrative agency, not a court of a state. Indeed, by insisting that § 1338(a) excludes FTC jurisdiction notwithstanding that statute’s clearly limited language, the ALJ disregards a prior Commission holding. In *American Cyanamid*, the Commission squarely held that “no inference can be drawn from the statute

⁹⁷ Compare 15 U.S.C. § 45(b) (authorizing the Commission to conduct an administrative “proceeding” when it has reason to believe that a person has engaged in unfair methods of competition) with 15 U.S.C. § 45(m) (authorizing the Commission to commence a “civil action . . . in a district court of the United States” to obtain civil penalties for violations of the Commission’s rules and orders).

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[§ 1338(a)] that Congress made federal court jurisdiction of actions arising under patent laws exclusive of this Commission as well as state courts.” 63 F.T.C. at 1856. As an appellate court explains, “Simple logic dictates that because federal courts have jurisdiction exclusive of the states provides no help in deciding whether their jurisdiction is also exclusive of an administrative proceeding within the executive branch.”⁹⁸

Relying on rhetoric to supply what the words of the statute do not, the ALJ warned that unless § 1338(a) were read to exclude more than the courts of the states, “tax courts, the Court of Claims, etc.” would be able to decide patent cases. ID at 63. As even Unocal acknowledges, Unocal Brief at 57, however, the Court of Claims *does* have jurisdiction over patent claims, see 28 U.S.C. § 1498(a), and the U.S. Tax Court *does* consider factors such as “the scope of the patents, the potential availability of noninfringing substitutes, the potential for litigation over the validity of the patents, and how such matters might affect the royalty rate that would be set by parties bargaining at arm’s length” in forming a judgment about reasonable arm’s-length consideration.⁹⁹

Unocal would overcome the clear words of the statute with the assertion that FTC jurisdiction would undermine congressional goals of uniform enforcement of the patent laws. The answer here is the same that the Supreme Court recently gave in refusing to confer exclusive appellate jurisdiction on the Federal Circuit whenever there is a patent-law counterclaim: “Our task here is not to determine what would further Congress’s goal of ensuring patent-law uniformity, but to determine what the words of the

⁹⁸ *Miss America Org. v. Mattel, Inc.*, 945 F.2d 536, 541 (2d Cir. 1991) (involving activities of the Treasury Department and the U.S. Customs Service).

⁹⁹ *See Podd v. Commissioner*, 75 T.C.M. (CCH) 2575 (1998).

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statute must fairly be understood to mean.” *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 833 (2002). Here, the grant of jurisdiction “exclusive of the courts of the states” cannot fairly be understood to mean “exclusive of the Federal Trade Commission.”

3. This case does not “arise under” the patent laws

Another reason for our finding that § 1338(a) is inapplicable is that this proceeding does not “aris[e] under any Act of Congress relating to patents.” According to the Supreme Court, a case arises under the patent laws only when a “well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.” *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808-09 (1988). The ALJ and Unocal assert that this proceeding depends on resolution of substantial questions of patent law.¹⁰⁰ The Court tells us, however, that “a claim

¹⁰⁰ The nature of this dependence has been something of a moving target. Unocal’s motion to dismiss argued that establishing market power and defining markets required patent construction and infringement determinations. *See, e.g.*, Unocal’s Motion for Dismissal of the Complaint and Memorandum in Support for Failure to Make Sufficient Allegations that Respondent Possesses or Dangerously Threatens to Possess Market Power at 8-10, 12-15 (“Unocal’s Market Power Motion”). The Initial Decision focused on the allegations involving communications to Auto/Oil and WSPA and concluded that demonstrating harm to their participants requires proof of infringement. ID at 61-62, 64, 69. On appeal Unocal recasts the issue, contending now that “the Complaint’s fraud allegations necessarily require a determination of what Unocal did and did not patent as well as a claim construction and infringement analysis,” and that proof of harm requires construing Unocal’s patents and

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supported by alternative theories in the complaint may not form the basis for § 1338(a) jurisdiction unless patent law is essential to each of those theories.” *Id.* at 810.

Here there are alternative theories that do not require resolution – or necessarily even consideration – of issues regarding patent construction or infringement. Misrepresentation might be established by comparing Unocal’s conduct in creating the allegedly false and misleading impression that it would not enforce any patent rights with its subsequent enforcement activities. *See, e.g.*, Complaint, ¶¶ 2-4, 9, 42, 58, 66-72, 77-78, 82-83, and 85. Market power and competitive harm might be established through the course of dealing among Unocal and third parties, as reflected by Unocal’s licensing activities and the responses of third parties to Unocal’s threats and suits.¹⁰¹ The findings of the federal courts regarding third-party infringement of one of Unocal’s RFG patents might supplement these inquiries. *See, e.g.*, ¶¶ 9, 68-70. Under *Christianson*, the fact that the claims are supported by theories that do not require resolution of substantial questions of patent law demonstrates that this proceeding does not arise under the patent laws.

determining their scope and the infringing or noninfringing status of alternatives. Unocal Brief at 52-54.

¹⁰¹ *See, e.g.*, ¶¶ 8-9, 14, 68-72, 95. Unocal does not raise on appeal its prior contention that market definition requires determining the scope of its patents. In any case, Paragraph 74 of the Complaint, which defines a technology market, merely identifies the relevant Unocal technology by reference to Unocal’s RFG patent claims. It requires inclusion of alternatives to that technology, but no infringement determinations. The question of which alternatives compete with Unocal’s technologies is a familiar question in antitrust law, not a substantial question of patent law.

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C. Assessment of Likely Competitive Effects Does Not
Require Resolving Patent Issues

The ALJ/Unocal jurisdictional arguments falter on one further ground: the assessment of likely competitive effects in this case will not require actual resolution of substantial questions of patent law. In assessing market power and competitive harm, the FTC determines only likelihoods. It does not resolve patent questions in the sense at issue in *Christianson* and § 1338(a), but only reaches conclusions regarding how they likely would be resolved. Actual rulings on construction and infringement, of course, remain with the courts.

We need look no farther than Unocal's own brief for illustrative examples. In one cite, Unocal provides the parenthetical "ITC may not award infringement damages, which 'may only be provided by the United States District Courts'"¹⁰² Of course, the FTC has no intention of "award[ing] infringement damages." We may conclude that certain technologies are likely to infringe and therefore may not provide a significant competitive check on whatever market power Unocal may possess, but this does not find infringement. Similarly, another Unocal parenthetical describes a case as "explaining ITC's lack of jurisdiction to render binding legal conclusions on validity, given district court's original jurisdiction under § 1338."¹⁰³ Again, nothing the FTC will do in this case will constitute a "binding legal conclusion" of either validity or invalidity.

¹⁰² Unocal Brief at 61, *citing Bio-Technology General Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1564 (Fed. Cir.), *cert. denied*, 519 U.S. 911 (1996).

¹⁰³ Unocal Brief at 61, *citing In re Convertible Rowing Exerciser Patent Litigation*, 814 F. Supp. 1197, 1206-07 (D. Del. 1993).

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In fact, the specific portion of the Complaint that the Initial Decision dismissed for want of jurisdiction on its very face deals with likelihoods. It alleges that participants in Auto/Oil and WSPA would have taken actions “incorporating knowledge of Unocal’s *pending* patent rights in their capital investment and refinery reconfiguration decisions to avoid and/or minimize *potential* infringement.” ¶ 90(c) (emphasis added). There is no hint of reliance on definitive claim construction or infringement rulings, but rather an allegation based upon patent rights that remained in prosecution, infringement that remained potential, and competitive harms that entail an assessment of likelihoods. This is not an inquiry that requires resolution of substantial questions of patent law.

VIII. INSTRUCTIONS ON REMAND AND CONCLUSION

We reverse and vacate the Initial Decision. Neither the *Noerr-Pennington* doctrine nor the claimed absence of FTC jurisdiction provides an adequate basis for Unocal’s motions to dismiss. The *Noerr-Pennington* claims cannot be sustained if the Complaint’s allegations are taken as established. The jurisdictional argument is flawed as a matter of law.

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.¹⁰⁴ The Administrative Law Judge

¹⁰⁴ See Scheduling Order at 2 (April 9, 2003) (establishing September 19, 2003 as the deadline for “motions for summary decision”). Although the ALJ denied portions of Unocal’s Market Power Motion without prejudice, large portions of that motion rely upon the claimed limits on FTC jurisdiction that this opinion rejects. See Unocal Market Power Motion at 2, 8-10, 15 (explaining how the market power arguments rely on the asserted absence of jurisdiction). In light of the many months that this

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should conduct appropriate proceedings for resolving disputed facts and substantiating or rejecting the allegations of the Complaint. Unocal, of course, may raise all appropriate defenses, including any renewed arguments concerning *Noerr-Pennington* protections, based on the forthcoming factual record.

If Unocal continues to assert *Noerr-Pennington* protection, the ALJ will need to resolve any relevant, disputed facts regarding the context of CARB's proceeding and the nature of Unocal's alleged misrepresentations/omissions. In addition to determining the specific content and contextual significance of the communications/omissions relied upon by Complaint Counsel, the ALJ's inquiry should include, without limitation, consideration of:

- CARB's expectations of truthful representation, focusing, *inter alia*, on: the governing procedures, the nature of the issues and information involved, CARB's fact-finding process and the extent of its dependence on industry research and knowledge, and the course of dealing between CARB and Unocal with regard to the subject matter of the communications;
- the degree of CARB's discretion in light of relevant statutory standards, required reliance on an evidentiary record, and the presence of judicial review;
- the extent of CARB's dependence on Unocal for information regarding its patent applications and its intentions with regard to enforcing its patent rights;
- the ability to determine the effect of the misrepresentations on CARB's decision; and

proceeding already has been delayed, we urge the ALJ to resolve arguments regarding the surviving portions of Unocal's Market Power Motion, if any, without delay of the adjudicatory hearing.

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- the extent to which any relevant misrepresentation/omission was deliberate, factually verifiable, and central to the outcome of CARB's proceeding.

From the totality of the circumstances revealed by the fact-finding, the ALJ should draw conclusions of law pursuant to the framework of analysis described in Sections IV and V above. If the ALJ determines that *Noerr-Pennington* protects Unocal's communications with CARB, he must also determine whether the facts establish *Noerr-Pennington* protection for Unocal's communications to Auto/Oil and WSPA, pursuant to the principles articulated in Section VI.

Thorough and careful analysis of these questions should greatly facilitate the Commission's ultimate resolution of this case. The Commission retains the responsibility to decide both legal and factual questions in administrative litigation. *See* 16 C.F.R. § 3.54(a) (2002); *Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983) ("the Commission, not the ALJ, has the ultimate responsibility for finding of facts").¹⁰⁵ Ideally, an Initial Decision will reflect the ALJ's reasoned, independent marshaling of the record, with appropriate findings of fact and conclusions of law, so that the Commission can assess the evidence and bring this complex matter to a timely close.

¹⁰⁵ *See also Schering Plough Corp.*, Docket No. 9297, slip op. at 8 (F.T.C. Dec. 18, 2003) ("The Commission may review *de novo* both the factual findings and the legal conclusions of the Administrative Law Judge. 16 C.F.R. § 3.54(a). This *de novo* review includes findings on the credibility of witnesses.") (footnote omitted), *petition for review docketed*, No. 04-10688-AA (11th Cir. Feb. 13, 2004); *R. R. Donnelley & Sons Co.*, 120 F.T.C. 36, 137 (1995) ("The Commission reviews this matter *de novo*."). *See generally Hernandez v. National Transp. Safety Bd.*, 15 F.3d 157, 158 (10th Cir. 1994) (explaining that the Board serves as the ultimate finder of fact, even with respect to credibility determinations).

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Depending on the factual record to be developed, Unocal may or may not be subjecting competitors and consumers to massive, anticompetitive royalties and increases in the price of gasoline based on an exercise of unlawfully obtained market power. It is unfortunate that an erroneous Initial Decision has substantially delayed development of that record. It is now time for the ALJ assiduously to assemble the facts and compile a record necessary and sufficient for resolving the underlying issues.

Final Order

**ORDER REVERSING AND VACATING THE INITIAL
DECISION AND ORDER AND REMANDING FOR
FURTHER PROCEEDINGS**

The Commission has heard the appeal of Counsel Supporting the Complaint from the Initial Decision dismissing the Complaint in this proceeding and has considered the briefs and oral arguments in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion, the Commission has determined to reverse and vacate the Initial Decision and to vacate the Order accompanying it, and to remand this matter for further proceedings. Accordingly,

IT IS ORDERED that the Initial Decision granting Respondent's motions to dismiss the Complaint in this proceeding be, and hereby is, reversed and vacated, and that the Order accompanying the Initial Decision be, and hereby is, vacated;

IT IS FURTHER ORDERED that this matter be, and hereby is, remanded to an Administrative Law Judge for further proceedings in accordance with the accompanying Opinion; and

IT IS FURTHER ORDERED that an Administrative Law Judge schedule an adjudicative hearing to begin as soon as practicable.

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Union Oil Company of California (hereinafter, “Unocal” or “Respondent”) has violated Section 5 of the Federal Trade Commission (“FTC”) Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Nature of the Case

1. This case involves Unocal’s subversion of state regulatory standard-setting proceedings relating to low emissions gasoline standards. To address California’s serious air pollution problems, the California Air Resources Board (“CARB”) initiated rulemaking proceedings in the late 1980s to determine “cost-effective” regulations and standards governing the composition of low emissions, reformulated gasoline (“RFG”). Unocal actively participated in the CARB RFG rulemaking proceedings and engaged in a pattern of bad-faith, deceptive conduct, exclusionary in nature, that enabled it to undermine competition and harm consumers. Through a pattern of anticompetitive acts and practices that continues even today, Unocal has illegally monopolized, attempted to monopolize, and otherwise engaged in unfair methods of competition in both the technology market for the production and supply of CARB-compliant “summer-time” RFG and the downstream CARB “summer-time” RFG product market.
2. During the RFG rulemaking proceedings in 1990-1994, Unocal made materially false and misleading statements including, but not limited to, the following:
 - a. Representing to CARB and other participants that its emissions research results showing, *inter alia*, the

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directional relationships between certain gasoline properties (most notably the midpoint distillation temperature of gasoline or "T50") on automobile emissions were "nonproprietary," were in "the public domain," or otherwise were available to CARB, industry members, and the general public, without disclosing that Unocal intended to assert its proprietary interests (as manifested in pending patent claims) in these research results;

- b. Representing to CARB that a "predictive model" -- *i.e.*, a mathematical model that predicts whether the resulting emissions from varying certain gasoline properties (including T50) in a fuel are equivalent to the emissions resulting from a specified and fixed fuel formulation -- would be "cost-effective" and "flexible," without disclosing that Unocal's assertion of its proprietary interests would undermine the cost-effectiveness and flexibility of such a model;
 - c. Making statements and comments to CARB and other industry participants relating to the cost-effectiveness and flexibility of the regulations that further reinforced the materially false and misleading impression that Unocal had relinquished or would not enforce any proprietary interests in its emissions research results.
3. Through its knowing and willful misrepresentations and other bad faith, deceptive conduct, Unocal created and maintained the materially false and misleading impression that it did not possess, or would not enforce, any relevant intellectual property rights that could undermine the cost-effectiveness and flexibility of the CARB RFG regulations.
 4. Although Unocal knew by July 1992 that most of the pending patent claims based on its emissions research had been allowed by the United States Patent and Trademark Office, Unocal concealed this material information from CARB and other participants in the CARB RFG proceedings. Until Unocal's

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public announcement of its RFG patent rights on January 31, 1995, Unocal continued to perpetuate the false and misleading impression that it did not possess, or would not enforce, any proprietary interests relating to RFG.

5. But for Unocal's fraud, CARB would not have adopted RFG regulations that substantially overlapped with Unocal's concealed patent claims; the terms on which Unocal was later able to enforce its proprietary interests would have been substantially different; or both. Unocal's misrepresentations, on which CARB and other participants in the rulemaking process reasonably and detrimentally relied, have harmed competition and led directly to the acquisition of monopoly power for the technology to produce and supply California "summer-time" reformulated gasoline (mandated for up to eight months of the year, from approximately March through October). Unocal's "patent ambush" also has permitted it to undermine competition and harm consumers in the downstream product market for "summer-time" reformulated gasoline in California.
6. Unocal did not announce the existence of its proprietary interests and patent rights relating to RFG until shortly before CARB's Phase 2 regulations were to go into effect. By that time, the refining industry had spent billions of dollars in capital expenditures to modify their refineries to comply with the CARB Phase 2 RFG regulations. After CARB and the refiners had become locked into the Phase 2 regulations, however, Unocal commenced its patent enforcement efforts by publicly announcing its RFG patent rights and its intention to collect royalty payments and fees. Since Unocal's public announcement of the issuance of its first RFG patent on January 31, 1995, Unocal has obtained four additional patents and vigorously enforced its RFG patent rights through litigation and licensing activities.
7. The anticompetitive conduct by Unocal that is at issue in this action has materially caused or threatened to cause substantial

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harm to competition, and will in the future materially cause or threaten to cause further substantial injury to competition and to consumers.

8. The threatened or actual anticompetitive effects of Unocal's conduct include but are not limited to the following:
 - a. increased royalties (or other payments) associated with the use of technology to refine, produce, and supply low emissions, reformulated gasoline for the California market;
 - b. increases in the price of low emissions, reformulated gasoline in California;
 - c. reductions in the manufacture, output, and supply of low emissions, reformulated gasoline for the California market; and
 - d. decreased incentives, on the part of refiners, blenders, and importers, to produce and supply low emissions, reformulated gasoline to the California market.
9. Unocal's enforcement of its patent rights has resulted, *inter alia*, in a jury determination of a 5.75 cents per gallon royalty on gasoline produced by ARCO, Shell, Exxon, Mobil, Chevron, and Texaco that infringed the first of Unocal's five RFG patents – United States Patent No. 5,288,393 (the “393 patent”). These major refiners are still embroiled with Unocal in a pending accounting action to determine the total amount of infringement damages owed to Unocal for the period August 1996 through December 2000. Unocal also has sued Valero Energy Company (“Valero”) seeking the imposition of a 5.75 cents per gallon royalty (and treble damages) on gasoline produced by Valero that infringes the ‘393 patent and the fourth of Unocal's five RFG patents – United States Patent No. 5,837,126 (the “126 patent”). Taken together, the major refiners and Valero comprise approximately 90 percent of the current refining capacity of CARB-compliant RFG in the

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California market. Unocal has publicly announced that its “uniform” RFG licenses, with fees ranging from 1.2 to 3.4 cents per gallon, are available to “non-litigating” refiners.

10. Were Unocal to receive a 5.75 cents per gallon royalty on all gallons of “summer-time” CARB RFG produced annually for the California market, this would result in an estimated annual cost of more than \$500 million (assuming approximately 14.8 billion gallons per year California consumption, with up to 8 months of CARB summer-time gasoline requirements). Unocal’s own economic expert has testified under oath that 90 percent of any royalty would be passed through to consumers in the form of higher retail gasoline prices.

Respondent

11. Union Oil Company of California is a public corporation 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, Union Oil Company of California has done business under the name “Unocal.” Unocal is a wholly-owned, operating subsidiary of Unocal Corporation, a holding company incorporated in Delaware.
12. Unocal is, and at all relevant times has been, a corporation as “corporation” is defined by Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44; and at all times relevant herein, Unocal has been, and is now, engaged in commerce as “commerce” is defined in the same provision.
13. Prior to 1997, Unocal owned and operated refineries in California as a vertically integrated producer, refiner, and marketer of petroleum products. In March 1997, Unocal completed the sale of its west coast refining, marketing, and transportation assets to Tosco Corporation. Currently,

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Unocal's primary business activities involve oil and gas exploration and production, as well as production of geothermal energy, ownership in proprietary and common carrier pipelines, natural gas storage facilities, and the marketing and trading of hydrocarbon commodities.

14. In its annual report for the year 2001 filed with the United States Securities and Exchange Commission, Form 10-K, Unocal lists as another of its key business activities: "[p]ursuing and negotiating licensing agreements for reformulated gasoline patents with refiners, blenders and importers." Unocal has publicly announced that it expects to reap up to \$150 million in revenues a year from licensing its RFG patents.
15. Unocal is the owner, by assignment, of the following patents relating to low emissions, reformulated gasoline: United States Patent No. 5,288,393 (issued February 22, 1994); United States Patent No. 5,593,567 (issued January 14, 1997); United States Patent No. 5,653,866 (issued August 5, 1997); United States Patent No. 5,837,126 (issued November 17, 1998); United States Patent No. 6,030,521 (issued February 29, 2000). These patents all arise from the same scientific discovery and are related in that they all claim priority based on patent application No. 07/628,488, filed on December 13, 1990. These patents share the identical specification.

California Air Resources Board (CARB)

16. The California Air Resources Board is a department of the California Environmental Protection Agency. Established in 1967, CARB's mission is to protect the health, welfare, and ecological resources of California through the effective and efficient reduction of air pollutants, while recognizing and considering the effects of its actions on the California economy. CARB fulfills this mandate by, among other

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things, setting and enforcing standards for low emissions, reformulated gasoline.

17. California's Administrative Procedures Act governs CARB's rulemaking proceedings and requires, *inter alia*, notice of any proposed regulations, the development of an evidentiary basis for any proposed regulations, the solicitation of public comments, and the conduct of hearings. Given the scientific and technical nature of the issues involved, CARB relies on the accuracy of the data and information presented to it in the course of rulemaking proceedings.
18. All CARB regulations are subject to review by California's Office of Administrative Law to ensure that such regulations meet statutory standards of necessity, authority, clarity, consistency, reference and nonduplication. CARB's regulations are subject to judicial review to determine whether the agency acted within its delegated authority, whether the agency employed fair procedures, and whether the agency's action was arbitrary, capricious, or lacking in evidentiary support.

Reformulated Gasoline in California

19. CARB's RFG regulations had their genesis in an effort by California to study the viability of alternative fuels for motor vehicles, such as methanol. In 1987, the California legislature passed AB 234, which resulted in the formation of a panel to study the environmental impact of alternative fuels and to develop a proposal to reduce emissions. This panel included representatives from the refining industry, including Roger Beach, a high level Unocal executive who later became the Chief Executive Officer and Chairman of the Board of Unocal.
20. Based in substantial part on the representations of oil industry executives that the oil industry could, and would,

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develop gasoline that would be cleaner-burning and cheaper than methanol, the AB 234 study panel eventually recommended exploring reformulated gasoline as an alternative to methanol.

21. In late 1988, the California legislature amended the California Clean Air Act to require CARB to take actions to reduce harmful car emissions, and directed CARB to achieve this goal through the adoption of new standards for automobile fuels and low-emission vehicles. CARB's authority in conducting its Phase 2 RFG rulemaking proceedings was circumscribed by an express and limited delegation of authority by the legislature. CARB's specific legislative mandate, set forth in California Health and Safety Code Section 43018, provided, *inter alia*, that CARB undertake the following actions:
 - a. Take "necessary, cost-effective, and technologically feasible" actions to achieve "reduction in the actual emissions of reactive, organic gases of at least 55 percent, a reduction in emissions of oxides of nitrogen of at least 15 percent from motor vehicles" no later than December 31, 2000;
 - b. Take actions "to achieve the maximum feasible reduction in particulates, carbon monoxide, and toxic air contaminants from vehicular sources";
 - c. Adopt standards and regulations that would result in "the most cost-effective combination of control measures on all classes of motor vehicles and motor vehicle fuels" including the "specification of vehicular fuel composition."
22. Following the 1988 California Clean Air Act amendments, CARB embarked on two rulemaking proceedings relating to low emissions, reformulated gasoline. In these rulemaking

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proceedings – Phase 1 and Phase 2, respectively – CARB prescribed limits on specific gasoline properties.

23. The Phase 1 RFG proceedings resulted in the adoption of regulations in 1990 mandating a reduction in Reid Vapor Pressure (“RVP”), the elimination of leaded gasoline, and a requirement that deposit control additives be included in gasoline. The Phase 1 regulations did not require refiners to make large capital investments.
24. CARB’s Phase 2 RFG proceedings represented an effort by CARB to develop stringent standards for low emissions, reformulated gasoline. Participants to the Phase 2 RFG proceedings understood that the CARB Phase 2 RFG regulations would require refiners to make substantial capital investments to reconfigure their refineries to produce compliant gasoline.
25. In its Phase 2 RFG proceedings, CARB did not conduct any independent studies of its own, but relied on industry to provide the needed research and resulting knowledge.
26. CARB’s Phase 2 RFG proceedings were quasi-adjudicative in nature. In the course of these proceedings, CARB adhered to the procedures set forth in the California Administrative Procedures Act. CARB provided notice of proposed regulations; provided the language of these proposed regulations and a statement of reasons; solicited and accepted written comments from the public; and conducted lengthy hearings at which oral testimony was received. CARB also issued written findings on the results of its rulemaking proceedings. Following adoption of the regulations, several parties sought judicial review of the CARB Phase 2 RFG regulations that provided small refiners with a two-year exemption for compliance with the regulations.

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27. Unocal management and employees understood that information and data relating to the potential costs of complying with, or relating to the cost-effectiveness of, the Phase 2 regulations were material to CARB's RFG rulemaking proceedings.

Unocal's RFG Research

28. By 1989, Unocal management knew that CARB intended to achieve significant emissions reductions by regulating the chemical and physical properties of gasoline sold in California. Unocal scientists from the company's Science and Technology Division began to design experiments to determine how controlling various properties of gasoline affected automobile emissions. In January 1990, Unocal scientists conducted in-house emissions testing of various gasoline fuels in a single car to determine which gasoline properties had the greatest emissions impact.
29. On May 14, 1990, Unocal scientists Michael Croudace and Peter Jessup presented the preliminary results of the emissions research program to the highest levels of Unocal's management to obtain approval and funding for additional, confirmatory research. These research results were presented to the members of Unocal's Executive Committee, including Richard Stegemeier, the Chief Executive Officer and Chairman of the Board of Unocal. Unocal management approved funding for additional emissions testing, and this project became known as the "5/14 Project."
30. Unocal management approved the filing of a patent application covering the invention and discovery that sprang from the "5/14 Project," specifically the Unocal scientists' purportedly novel discovery of the directional relationships between eight fuel properties – RVP, T10 (the temperature at which 10 percent of a fuel evaporates), T50 (the temperature at which 50 percent of a fuel evaporates), T90

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(the temperature at which 90 percent of a fuel evaporates), olefin content, aromatic content, paraffin content, and octane – and three types of tailpipe emissions – *i.e.*, incompletely burned or unburned hydrocarbons (“HC”), carbon monoxide (“CO”), and nitrogen oxides (“NOx”).

31. Unocal management made prosecution of the patent application a high priority. Unocal’s chief patent counsel, Gregory Wirzbicki, personally undertook the task of prosecuting the patent application.
32. On December 13, 1990, Unocal filed with the United States Patent and Trademark Office a patent application, No. 07/628,488. This application presented Unocal’s emissions research results, including the regression equations and underlying data; detailed the directional relationships between the fuel properties and emissions studied in the “5/14 Project;” and set forth composition and method claims relating to low emissions, reformulated gasoline. All five Unocal RFG patents referred to in paragraph 15 are the progeny of the ‘488 application.

Unocal’s Conduct Before CARB

33. Prior to and after the filing of the patent application on December 13, 1990, Unocal employees and management discussed and considered the potential competitive advantage and corporate profit that could be extracted through effectuating an overlap between the CARB regulations and Unocal’s patent claims.
34. During the same time that Unocal participated in the CARB RFG rulemaking proceedings, specific discussions took place within the company concerning how to induce the regulators to use information supplied by Unocal so that Unocal could realize the huge licensing income potential of its pending patent claims.

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35. Beginning in 1990, and continuing throughout the CARB Phase 2 RFG rulemaking process, Unocal provided information to CARB for the purpose of obtaining competitive advantage. Unocal gave CARB this information in private meetings with CARB, through participation in CARB's public workshops and hearings, as well as by participating in industry groups that also were providing input into the CARB regulations. This information was materially misleading in light of Unocal's suppression of facts relating to its proprietary interests in its emissions research results and Unocal's active prosecution of patents based on these research results.
36. On June 11, 1991, CARB held a public workshop regarding the Phase 2 RFG regulations. This workshop included discussions of CARB staff's proposed gasoline specifications – *i.e.*, the levels at which certain gasoline properties should be set – to reduce the emissions from gasoline-fueled vehicles. The set of specifications proposed by CARB for discussion at this public workshop did not include a T50 specification.
37. On June 20, 1991, Unocal presented to CARB staff the results of its "5/14 Project" to show CARB that "cost-effective" regulations could be achieved through adoption of a "predictive model" and to convince CARB of the importance of T50. Unocal's pending patent application contained numerous claims that included T50 as a critical limitation, in addition to other fuel properties that CARB proposed to regulate.
38. Prior to the presentation to CARB, Unocal management decided not to disclose Unocal's pending '393 patent application to CARB staff.
39. On July 1, 1991, Unocal provided CARB with the actual emissions prediction equations developed in the "5/14 Project." Unocal requested that CARB "hold these

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equations confidential, as we feel that they may represent a competitive advantage in the production of gasoline.” But Unocal went on to state:

If CARB pursues a meaningful dialogue on a predictive model approach to Phase 2 gasoline, Unocal will consider making the equations and underlying data public as required to assist in the development of a predictive model.

40. Following CARB’s agreement to develop a predictive model, Unocal made its emissions research results, including the test data and equations underlying its “5/14 Project,” publicly available.
41. On August 27, 1991, Unocal unequivocally stated in a letter to CARB that its emissions research data were “nonproprietary.” Specifically, Unocal stated:

Please be advised that Unocal now considers this data to be non-proprietary and available to CARB, environmental interest groups, other members of the petroleum industry, and the general public upon request.
42. At the time Unocal submitted its August 27, 1991 letter to CARB, it did not disclose to CARB its proprietary interests in the “5/14 Project” data and equations, its prosecution of a patent application, or its intent to enforce its proprietary interests to obtain licensing income. Read separately or in conjunction with Unocal's July 1, 1991 letter, the August 27, 1991 letter created the materially false and misleading impression that Unocal agreed to give up any "competitive advantage" it may have had relating to its purported invention and arising from its emissions research results.

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43. In reasonable reliance on Unocal's representation that the information was no longer proprietary, CARB used Unocal's equations in setting a T50 specification. Subsequently, in October 1991, CARB published Unocal's equations in public documents supporting the proposed Phase 2 RFG regulations.
44. On November 22, 1991, the CARB Board adopted Phase 2 RFG regulations that set particular standards for the composition of low emissions, reformulated gasoline. These regulations specified limits for eight gasoline properties: RVP, benzene, sulfur, aromatics, olefins, oxygen, T50, and T90. Unocal's pending patent claims recited limits for five of the eight properties specified by the regulations: T50, T90, olefins, aromatics, and RVP.
45. Unocal's misrepresentations and materially false and misleading statements caused CARB to adopt Phase 2 RFG regulations that substantially overlapped with Unocal's concealed patent claims. Specifically, for example, CARB included a specification for T50 in its Phase 2 RFG regulations and eventually adopted a "predictive model" that included T50 as one of the parameters.
46. Prior to the final approval of the CARB Phase 2 RFG regulations in November 1992, Unocal submitted comments and presented testimony to CARB opposing CARB's proposal to grant small refiners a two-year exemption for complying with the regulations. Unocal vigorously opposed this proposed exemption on the grounds that it would increase the costs of compliance and undermine the cost-effectiveness of the CARB Phase 2 RFG regulations. In making these statements, Unocal again failed to disclose that it had proprietary rights that would materially increase the cost and reduce the cost-effectiveness and flexibility of the regulations that CARB had adopted in reasonable reliance on Unocal's representations.

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47. CARB amended the Phase 2 regulations in June 1994 to include a predictive model as an alternative method of complying with the regulations that was intended to provide refiners with additional flexibility. At the urging of numerous companies, including Unocal, this “predictive model” permits a refiner to comply with the RFG regulations by producing fuel that is predicted – based on its composition and the levels of the eight properties – to have equivalent emissions to a fuel that meets the strict gasoline property limits set forth in the regulations.
48. During the development of the predictive model, Unocal continued to meet with CARB, providing testimony and information. Unocal submitted comments to CARB touting the predictive model as offering “flexibility” and furthering CARB’s mandate of “cost-effective” regulations. These statements were materially false and misleading because Unocal suppressed the material fact that assertion of its proprietary rights would materially increase the cost and reduce the flexibility of the proposed regulations.
49. On February 22, 1994, the United States Patent Office issued the ’393 patent. CARB first became aware of Unocal’s ’393 patent shortly after Unocal’s issuance of a press release on January 31, 1995.

Unocal’s Participation in Industry Groups

50. During the CARB RFG rulemaking, Unocal actively participated in the Auto/Oil Air Quality Improvement Research Program (“Auto/Oil” or the “Program”), a cooperative, joint research program between the automobile and oil industries. By agreement dated October 14, 1989, the big three domestic automobile manufacturers – General Motors, Ford, and Chrysler – and representatives from fourteen oil companies, including Unocal, entered into a

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joint research agreement in accordance with the National Cooperative Research Act of 1984 (“Auto/Oil Agreement”).

51. The stated objective of the Auto/Oil joint research venture was to plan and carry out research and tests designed to measure and evaluate automobile emissions and the potential improvements in air quality achievable through the use of reformulated gasolines, methanol, and other alternative fuels, and to evaluate the relative cost-effectiveness of these various improvements.
52. The Auto/Oil Agreement provided that “[t]he results of research and testing of the Program will be disclosed to government agencies, the Congress and the public, and otherwise placed in the public domain.” This agreement specifically provided for the following dedication of any and all intellectual property rights to the public:

No proprietary rights will be sought nor patent applications prosecuted on the basis of the work of the Program unless required for the purpose of ensuring that the results of the research by the Program will be freely available, without royalty, in the public domain.

53. While the Auto/Oil Agreement permitted participating companies to conduct independent research, and further permitted them to withhold the fruits of such independent research from the Auto/Oil Group, once data and information were in fact presented to the Auto/Oil Group, they became the “work of the Program.”
54. Unocal viewed its participation in industry groups, such as Auto/Oil, as an integral part of its strategy of deception for the purpose of obtaining a competitive advantage therefrom. On September 26, 1991, Unocal presented to Auto/Oil the results of Unocal’s emissions research, including the test

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data, equations, and corresponding directional relationships between fuel properties and emissions derived from the “5/14 Project.” Unocal management authorized this presentation, which was substantially similar to that made to CARB on June 20, 1991. Unocal informed Auto/Oil participants that the data had been made available to CARB and were in the public domain. Unocal also represented that the data would be made available to Auto/Oil participants. Unocal’s 5/14 work thus became part of the “work” of the Auto/Oil Program.

55. Unocal’s 5/14 work also became part of the Auto/Oil Program through the subsequent testing – as part of the Program – of the 5/14 fuel property relationships.
56. During the CARB Phase 2 RFG rulemaking proceedings, Unocal also actively participated in the Western States Petroleum Association (“WSPA”), an oil industry trade association that represents companies accounting for the bulk of petroleum exploration, production, refining, transportation and marketing in the western United States. WSPA, as a group, actively participated in the CARB RFG rulemaking process. WSPA commissioned, and submitted to CARB, three cost studies in connection with the CARB Phase 2 RFG rulemaking.
57. One cost study commissioned by WSPA incorporated information relating to process royalty rates associated with non-Unocal patents and was used by CARB to determine the cost-effectiveness of the proposed CARB Phase 2 RFG standards. This WSPA cost study estimated the costs of the proposed regulations on a cents-per-gallon basis and estimated the incremental costs associated with regulating specific gasoline properties. This WSPA study could have incorporated costs associated with potential royalties flowing from Unocal’s pending patent rights.

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58. On September 10, 1991, Unocal presented its “5/14 Project” emissions research results to WSPA. Unocal management authorized the presentation of the research results to WSPA. This Unocal presentation created the materially false and misleading impression that Unocal’s emissions research results, including the data and equations, were nonproprietary and could be used by WSPA or its individual members without concern for the existence or enforcement of any intellectual property rights.
59. None of the participants in the WSPA or Auto/Oil groups knew of the existence of Unocal’s proprietary interests and/or pending patent rights at any time prior to the issuance of the ’393 patent in February 1994, by which time most, if not all, of the oil company participants to these groups had made substantial progress in their capital investment and refinery modification plans for compliance with the CARB Phase 2 RFG regulations.

Unocal’s Patent Prosecution and Enforcement

60. Following the November 1991 adoption of CARB Phase 2 RFG specifications, Unocal amended its patent claims in March 1992 to ensure that the patent claims more closely matched the regulations. In some cases, Unocal’s patent claims were narrowed to resemble the regulations.
61. On or about July 1, 1992, Unocal received an office action from the U.S. Patent and Trademark Office indicating that most of Unocal’s pending patent claims had been allowed. Unocal did not disclose this information to CARB or other participants to the CARB Phase 2 RFG rulemaking.
62. Subsequently, after the submission of additional amendments, Unocal received a notice of allowance from the U.S. Patent and Trademark Office for all of its pending claims in February 1993. Unocal did not disclose this

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information to CARB or other participants to the CARB Phase 2 RFG rulemaking.

63. In June 1993, Unocal filed a divisional application (No. 08/77,243) of its original patent application that allowed Unocal to pursue additional patents based on the discoveries of the “5/14 Project.”
64. The U.S. Patent and Trademark Office issued the ’393 patent to Unocal on February 22, 1994. Unocal waited until January 31, 1995, to issue a press release announcing issuance of the ’393 patent. The Unocal press release stated that the ’393 patent “covers many of the possible fuel compositions that refiners would find practical to manufacture and still comply with the strict California Air Resources Board (CARB) Phase 2 requirements.”
65. In March 1995, Unocal met separately with California Governor Pete Wilson and CARB and made assurances that Unocal would not enjoin or otherwise impair the ability of refiners to produce and supply to the California market gasoline that complied with the CARB Phase 2 RFG regulations. In or about the same time period, CARB expressed its own concern to Unocal about the coverage of the patent and even sought and received from Unocal a license to use the ’393 patent in making and using test fuels.
66. On March 22, 1995, five days after meeting with CARB staff, Unocal filed a continuation patent application (No. 08/409,074) claiming priority to the original December 1990 application. Unocal did not inform CARB or Governor Wilson that it intended to obtain additional RFG patents.
67. Unocal subsequently filed additional continuation patent applications on June 5, 1995 (No. 08/464,544), August 1, 1997 (No. 08/904,594), and November 13, 1998 (No. 08/191,924), all claiming priority based on Unocal’s original December 13, 1990 patent application.

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68. On April 13, 1995, ARCO, Exxon, Mobil, Chevron, Texaco, and Shell filed suit in the United States District Court for the Central District of California seeking to invalidate Unocal's '393 patent. Unocal filed a counterclaim for patent infringement of the '393 patent. The jury in this private litigation determined that Unocal's '393 patent was valid and infringed, and found that the refiners must pay a royalty rate of 5.75 cents per gallon for the period from March through July 1996 for sales of infringing gasoline in California.
69. The United States Court of Appeals for the Federal Circuit subsequently affirmed the trial court's judgment. The United States Supreme Court denied the refiner-defendants' petition for a writ of certiorari. The refiner-defendants have made payments totaling \$91 million to Unocal for damages, costs, and attorneys' fees.
70. An accounting action is still ongoing in the United States District Court for the Central District of California to determine damages for infringement of the '393 patent by the refiners for the period from August 1, 1996, through December 31, 2000. The court ruled in August 2002 that the 5.75 cents per gallon royalty fee awarded by the jury would apply to all infringing gasoline produced and/or supplied in California.
71. On January 23, 2002, Unocal sued Valero Energy Company in the Central District of California for willful infringement of both the '393 patent and the '126 patent (see Paragraph 9). In its complaint, Unocal seeks damages at the rate of 5.75 cents per gallon for all infringing gallons, and treble damages for willful infringement.
72. Unocal also has enforced its patent claims through licensing activities. To date, Unocal has entered into license agreements with eight refiners, blenders and/or importers covering the use of all five RFG patents. The terms of these

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license agreements are confidential. Unocal has announced that these license agreements feature a “uniform” licensing schedule that specifies a range from 1.2 to 3.4 cents per gallon depending on the volume of gasoline falling within the scope of the patents. As a licensee practices under the license more frequently, the licensing fee per gallon is reduced.

Relevant Product and Geographic Markets

73. Unocal has obtained and exercised market power and/or monopoly power in two relevant product markets.
74. One relevant product market consists of the technology claimed in patent application No. 07/628,488 (filed on December 13, 1990) and Unocal’s issued RFG patents, and any alternative technologies that enable firms to refine, produce, and supply CARB-compliant “summer-time” RFG for sale in California at comparable or lower cost, and comparable or higher effectiveness, without practicing the Unocal technology. The relevant geographic market for such technology is worldwide.
75. Another relevant market consists of CARB-compliant “summer-time” RFG produced and supplied for sale in California. The relevant geographic market is California.

**Unocal’s Materially False and Misleading Statements
During CARB’s RFG Proceedings Led to its Market Power**

76. By engaging in fraudulent conduct in connection with the CARB rulemaking proceedings, Unocal unlawfully obtained market power. Unocal obtained unlawful market power through affirmative misrepresentations, materially false and misleading statements, and other bad-faith, deceptive conduct that caused CARB to enact regulations that overlapped almost entirely with Unocal’s pending patent rights.

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77. Unocal, through its management and authorized employees, made knowing and willful misrepresentations to CARB by making materially false and misleading statements and/or by suppressing facts while giving information of other facts that were likely to mislead for want of communication of the suppressed facts. Unocal's statements were materially false and misleading in that they failed to disclose Unocal's proprietary interests in its emissions research data, and/or Unocal's intention and efforts to obtain competitive advantage and corporate profit through enforcement of its intellectual property rights.
78. Unocal's knowing and willful misrepresentations to CARB include, but are not limited to, the following:
 - a. Unocal presented its emissions research results to CARB on June 20, 1991, for the purpose, *inter alia*, of showing CARB the relationship between T50 and automobile exhaust emissions; and it represented that a predictive model that included T50 would be "cost effective" and flexible without disclosing that the assertion of its proprietary rights would materially increase the cost and reduce the flexibility of such a model. Unocal represented that these data and equations were confidential to Unocal, and "may represent a competitive advantage" to Unocal.
 - b. Having previously asserted that its equations might provide it with a competitive advantage, Unocal informed CARB by letter, dated August 27, 1991, that its emissions research data thereafter would be "nonproprietary" and available to CARB, industry members, and the general public. By this representation, Unocal created the materially false and misleading impression that Unocal had relinquished or would not enforce any proprietary interests in its emissions research results.

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- c. On numerous occasions after August 27, 1991, Unocal made statements and comments to CARB relating to the “cost effectiveness” of CARB Phase 2 regulations, and the “flexibility” offered by the implementation of a predictive model to reduce refiner compliance costs. These statements and comments include, but are not limited to, both written and/or oral statements made to CARB on the following dates: October 29, 1991, November 21, 1991, November 22, 1991, March 16, 1992, June 19, 1992, August 14, 1992, September 4, 1992, June 3, 1994, and June 9, 1994. Under the circumstances, these statements further reinforced the materially false and misleading impression that Unocal had no proprietary interests in its emissions research results and/or that Unocal had disclaimed any and all such proprietary rights and would not seek to enforce these rights.
79. Throughout its communications and interactions with CARB prior to January 31, 1995, Unocal failed to disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties. Unocal hence failed to disclose material information that would have impacted CARB’s analysis of the cost-effectiveness of the Phase 2 RFG regulations. Unocal instead perpetuated false and misleading impressions concerning the nature of its proprietary interests in its “5/14 Project” research results.
80. CARB reasonably relied on Unocal’s misrepresentations and materially false and misleading statements in developing the Phase 2 RFG regulations. But for Unocal’s fraud, CARB would not have adopted RFG regulations that substantially overlapped with Unocal’s concealed patent claims; the terms on which Unocal was later able to enforce its proprietary interests would have been substantially different; or both.

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81. Unocal, through its management and authorized employees, made knowing and willful misrepresentations to participants in the Auto/Oil joint venture by making materially false and misleading statements and/or by suppressing facts while giving information of other facts which were likely to mislead for want of communication of the suppressed facts.
82. Unocal made a presentation to Auto/Oil on September 26, 1991, at which Unocal shared its research results with the group. Unocal informed Auto/Oil that CARB also had been provided with Unocal's data and equations, and that these data and equations were in the public domain. Unocal represented that it would supply its data to the Auto/Oil Group and its members. Unocal's statements were materially false and misleading in that they failed to disclose Unocal's proprietary interests in its emissions research results and Unocal's intention and efforts to obtain competitive advantage through enforcement of its intellectual property rights.
83. Throughout all of its communications and interactions with Auto/Oil prior to January 31, 1995, Unocal failed to disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties.
84. By deceptive conduct that included, but was not limited to, false and misleading statements concerning its proprietary interests in the results of its emissions research results, Unocal violated the letter and spirit of the Auto/Oil Agreement and breached its fiduciary duties to the other members of the Auto/Oil joint venture. Such deceptive conduct violated the integrity of the Auto/Oil joint venture's procedures and subverted Auto/Oil's process of providing accurate and nonproprietary research data and information to CARB.

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85. Unocal, through its management and authorized employees, made knowing and willful misrepresentations to members of WSPA by making materially false and misleading statements and/or by suppressing facts while giving information of other facts which were likely to mislead for want of communication of the suppressed facts. Unocal's statements were materially false and misleading in that they failed to disclose Unocal's proprietary interests in its emissions research results and/or Unocal's intention and efforts to obtain competitive advantage through enforcement of its intellectual property rights.
86. Unocal made a presentation to WSPA on September 10, 1991, relating to its emissions research. At, or shortly following this presentation, Unocal provided to WSPA members the data and equations derived from this emissions research. In its interactions with WSPA, Unocal created the materially false and misleading impression that Unocal did not have any proprietary interests or intellectual property rights associated with its emissions research results.
87. Unocal actively participated in WSPA committees that discussed the potential cost implications of the CARB Phase 2 RFG regulations. Unocal knew that royalties were considered in a cost study commissioned by WSPA for submission to CARB.
88. Throughout all of its communications and interactions with WSPA prior to January 31, 1995, Unocal failed to disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties.
89. By deceptive conduct that included, but was not limited to, false and misleading statements concerning its proprietary interests in the results of its emissions research results, Unocal breached its fiduciary duties to the other members of WSPA. Such deceptive conduct violated the integrity of the

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WSPA's procedures and subverted WSPA's process of providing accurate data and information to CARB.

90. Participants in Auto/Oil and WSPA reasonably relied on Unocal's misrepresentations and material omissions. But for Unocal's fraud, these participants in the rulemaking process would have taken actions including, but not limited to, (a) advocating that CARB adopt regulations that minimized or avoided infringement on Unocal's patent claims; (b) advocating that CARB negotiate license terms substantially different from those that Unocal was later able to obtain; and/or (c) incorporating knowledge of Unocal's pending patent rights in their capital investment and refinery reconfiguration decisions to avoid and/or minimize potential infringement. As a result, if other participants in WSPA or Auto/Oil had known the truth, the harm to competition and consumers, as described in this Complaint, would have been avoided.
91. Unocal's fraudulent conduct has resulted in Unocal's acquisition of market power in the following markets: the technology market for the production and supply of CARB-compliant "summer-time" gasoline in California, and the downstream product market for CARB-compliant "summer-time" gasoline in California.
92. The extensive overlap between the CARB RFG regulations and the Unocal patent claims makes avoidance of the Unocal patent claims technically and/or economically infeasible.
93. Refiners in California invested billions of dollars in sunk capital investments without knowledge of Unocal's patent claims to reconfigure their refineries in order to comply with the CARB Phase 2 RFG regulations. These refiners cannot produce significant volumes of non-infringing CARB-compliant gasoline without incurring substantial additional costs.

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94. CARB cannot now change its RFG regulations sufficiently to provide flexibility for refiners and others to avoid Unocal's patent claims. Had Unocal disclosed its proprietary interests and pending patent rights to CARB earlier, CARB would have been able to consider the potential costs of the Unocal patents in establishing its regulations, and the harm to competition and to consumers, as described in this Complaint, would have been avoided.
95. Unocal has exercised, and continues to exercise, its market power through business conduct by enforcing its patents through litigation and licensing activities. Through its litigation and licensing related to its RFG patents, Unocal has enforced, or threatened to enforce, its patents against those refiners that control in excess of 95 percent of the capacity for the manufacture and/or sale of CARB-compliant gasoline in California. Unocal's enforcement of its patent rights is the proximate cause of substantial competitive harm and consumer injury.
96. Unocal is not shielded from antitrust liability pursuant to the Noerr-Pennington doctrine for numerous reasons as a matter of law and as a matter of fact including, but not limited to, the following: (i) Unocal's misrepresentations were made in the course of quasi-adjudicative rulemaking proceedings; (ii) Unocal's conduct did not constitute petitioning behavior; and (iii) Unocal's misrepresentations and materially false and misleading statements to Auto/Oil and WSPA, two non-governmental industry groups, were not covered by any petitioning privilege.

Anticompetitive Effects of Unocal's Conduct

97. The foregoing conduct by Unocal has materially caused or threatened to cause substantial harm to competition and will, in the future, materially cause or threaten to cause further substantial injury to competition and consumers, absent the issuance of appropriate relief in the manner set

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forth below. The threatened or actual anticompetitive effects of Unocal's conduct include, but are not limited to, those set forth in Paragraph 8 above.

98. Unocal's enforcement of its patent portfolio has caused, and will cause, substantial consumer injury. Unocal's own economic expert has testified under oath that 90 percent of any royalty costs associated with the patents will be passed through to consumers in the form of higher retail gasoline prices.

First Violation Alleged

99. As described in Paragraphs 1-98 above, which are incorporated herein by reference, Unocal has willfully engaged in anticompetitive and exclusionary acts and practices, undertaken since the early 1990s, and continuing even today, whereby it has wrongfully obtained monopoly power in the technology market for the production and supply of CARB-compliant "summer-time" gasoline to be sold in California, which acts and practices constitute unfair methods of competition in violation of Section 5 of the FTC Act.

Second Violation Alleged

100. As described in Paragraphs 1-98 above, which are incorporated herein by reference, Unocal has willfully engaged in anticompetitive and exclusionary acts and practices, undertaken since the early 1990s, and continuing even today, with a specific intent to monopolize the technology market for the production and supply of CARB-compliant "summer-time" gasoline to be sold in California, resulting, at a minimum, in a dangerous probability of monopolization in the aforementioned market, which acts and practices constitute unfair methods of competition in violation of Section 5 of the FTC Act.

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Third Violation Alleged

101. As described in Paragraphs 1-98 above, which are incorporated herein by reference, Unocal has willfully engaged in anticompetitive and exclusionary acts and practices, undertaken since the early 1990s, and continuing even today, with a specific intent to monopolize the downstream goods market for CARB-compliant “summer-time” gasoline to be sold in California, resulting, at a minimum, in a dangerous probability of monopolization in the aforementioned market, which acts and practices constitute unfair methods of competition in violation of Section 5 of the FTC Act.

Fourth Violation Alleged

102. As described in Paragraphs 1-98 above, which are incorporated herein by reference, Unocal has willfully engaged in anticompetitive and exclusionary acts and practices, undertaken since the early 1990s, and continuing even today, whereby it has unreasonably restrained trade in the technology market for the production and supply of CARB -compliant “summer-time” gasoline to be sold in California, which acts and practices constitute unfair methods of competition that harm consumers in violation of Section 5 of the FTC Act.

Fifth Violation Alleged

103. As described in Paragraphs 1-98 above, which are incorporated herein by reference, Unocal has willfully engaged in anticompetitive and exclusionary acts and practices, undertaken since the early 1990s, and continuing even today, whereby it has unreasonably restrained trade in the downstream goods market for CARB-compliant “summer-time” gasoline to be sold in California, which acts and practices constitute unfair methods of competition that harm consumers in violation of Section 5 of the FTC Act.

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Notice

Notice is hereby given to the Respondent that the fourth day of June, 2003, at 10 a.m., or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the FTC Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded to you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under § 3.52 of said Rules.

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Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a Respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

Notice of Contemplated Relief

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that Respondent's conduct violated Section 5 of the Federal Trade Commission Act as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including but not limited to:

1. Requiring Respondent to cease and desist all efforts it has undertaken by any means, including without limitation the threat, prosecution, or defense of any suits or other actions, whether legal, equitable, or administrative, as well as any arbitration, mediation, or any other form of private dispute resolution, through or in which Respondent has asserted that any person or entity, by manufacturing, selling, distributing, or otherwise using motor gasoline to be sold in California

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infringes any of Respondent's current or future United States patents that claim priority back to U.S. Patent Application Number No. 07/628,488 filed December 13, 1990 or any other Patent Application filed before January 31, 1995.

2. Requiring Respondent not to undertake any new efforts by any means, including without limitation the threat, prosecution, or defense of any suits or other actions, whether legal, equitable, or administrative, as well as any arbitration, mediation, or any other form of private dispute resolution, through or in which Respondent has asserted that any person or entity, by manufacturing, selling, distributing, or otherwise using motor gasoline to be sold in California infringes any of Respondent's current or future United States patents that claim priority back to U.S. Patent Application Number No. 07/628,488 filed December 13, 1990 or any other Patent Application filed before January 31, 1995.
3. Requiring Respondent to cease and desist all efforts it has undertaken by any means, including without limitation the threat, prosecution, or defense of any suits or other actions, whether legal, equitable, or administrative, as well as any arbitration, mediation, or any other form of private dispute resolution, through or in which Respondent has asserted that any person or entity, by manufacturing, selling, distributing, or otherwise using motor gasoline, for import or export to or from the state of California, infringes any of Respondent's current or future United States patents that claim priority back to U.S. Patent Application No. 07/628,488 filed December 13, 1990 or any other Patent Application filed before January 31, 1995.
4. Requiring Respondent to employ, at Respondent's cost, a Commission-approved compliance officer who will be the sole representative of Respondent for the purpose of communicating Respondent's patent rights relating to any standard or regulations under consideration by (a) any standard-setting organization of which Respondent is a member; and/or (b) any state or federal governmental entity

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that conducts rulemaking proceedings in which Respondent participates.

5. Such other or additional relief as is necessary to correct or remedy the violations alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourth day of March, 2003, issues its complaint against said Respondent.

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INITIAL DECISION

By D. Michael Chappell, Administrative Law Judge

I. INTRODUCTION

A. Procedural Background

This Initial Decision is filed pursuant to Rule 3.22(e) of the Commission's Rules of Practice which requires that "when a motion to dismiss a complaint . . . is granted with the result that the proceeding before the Administrative Law Judge is terminated, the Administrative Law Judge shall file an initial decision in accordance with the provisions of § 3.51. 16 C.F.R. § 3.22(e). As set forth below, the motions to dismiss filed by Respondent Union Oil Company of California ("Respondent" or "Unocal") are granted in part with the result that the proceeding before the Administrative Law Judge is terminated. Accordingly, this Initial Decision is filed in accordance with the provisions of Rule 3.51 of the Commission's Rules of Practice. 16 C.F.R. § 3.51(c).

Respondent filed two motions to dismiss pursuant to Rule 3.22(e) of the Commission's Rules of Practice, on April 2, 2003. The first motion seeks dismissal of the Complaint based upon immunity under Noerr-Pennington ("Motion"). Complaint Counsel filed its opposition on April 21, 2003 ("Opposition"). By Order dated August 25, 2003, the parties were ordered to file reply briefs. Respondent filed its reply brief on September 9, 2003 ("Reply"). Complaint Counsel filed its response to Respondent's reply brief on September 26, 2003 ("Sur-reply").

Respondent's second motion seeks dismissal of the Complaint for failure to make sufficient allegations that Respondent possesses or dangerously threatens to possess monopoly power ("Market Power Motion"). Complaint Counsel filed its opposition on April 21, 2003 ("Market Power Opposition").

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B. Summary of Decision

As set forth below, there is no set of facts that Complaint Counsel could introduce in support of the violations of law that are alleged in the Complaint that would overcome Noerr-Pennington immunity with respect to Respondent's efforts to solicit government action. Accordingly, Respondent's motion to dismiss the Complaint based upon immunity under Noerr-Pennington is GRANTED IN PART as to all violations alleged and all allegations of the Complaint, except the allegations of Respondent's conduct directed toward the Auto/Oil Air Quality Improvement Research Program ("Auto/Oil Group") and the Western States Petroleum Association ("WSPA"), independent of the conduct directed toward the California Air Resources Board ("CARB").

As set forth below, with respect to the allegations of Respondent's conduct directed toward Auto/Oil Group and WSPA, independent of the conduct directed toward CARB, there is no set of facts that Complaint Counsel could introduce in support of the violations of law that are alleged in the Complaint that would establish that the Commission has jurisdiction to resolve the substantial patent issues which are entangled in and raised by the allegations and violations of the Complaint. The motion is GRANTED IN PART to the extent that the Commission lacks jurisdiction to decide the fundamental and substantial patent issues raised by the allegations of the Complaint. Because of this determination, the remaining issues raised by Respondent's motion to dismiss for failure to make sufficient allegations that Respondent possesses or dangerously threatens to possess monopoly power are not reached. Accordingly, the remainder of Respondent's Market Power Motion is DENIED WITHOUT PREJUDICE.

Therefore, as discussed in detail below, no allegations or violations of the Complaint remain and the Complaint in Docket 9305 is dismissed in its entirety.

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II. POSITIONS OF THE PARTIES

A. Summary of the Allegations of the Complaint and Answer

1. Complaint

According to the Complaint, in the 1980s, the California Air Resources Board ("CARB") initiated rulemaking proceedings to determine "cost-effective" regulations and standards governing the composition of low emissions, reformulated gasoline ("RFG"). Complaint at P1. The Complaint alleges that, through misrepresentations and omissions, Respondent influenced the outcome of CARB's Phase 2 reformulated gasoline rulemaking. Complaint at PP35, 37, 39, 41, 42, 46, 48. On November 22, 1991, CARB adopted Phase 2 RFG regulations that set particular standards for the composition of low emissions, reformulated gasoline. Complaint at P44. CARB's Phase 2 RFG regulations substantially overlap with patents held by Respondent relating to low emissions, reformulated gasoline. Complaint at PP15, 32, 45.

In addition, the Complaint alleges that during the CARB RFG rulemaking, Respondent participated in the Auto/Oil Group, a cooperative, joint research program between automobile and oil industries, and in the WSPA, an oil industry trade association. Complaint at PP50, 56. The Complaint alleges that Respondent made misrepresentations and material omissions to the Auto/Oil Group and WSPA and that, but for Respondent's fraud, these participants in the rulemaking process would have taken actions including, but not limited to, (a) advocating that CARB adopt regulations that minimized or avoided infringement on Respondent's patent claims; (b) advocating that CARB negotiate license terms substantially different from those that Respondent was later able to obtain; and/or (c) incorporating knowledge of Respondent's pending patent rights in their capital investment and refinery reconfiguration decisions to avoid and/or minimize potential infringement. Complaint at P90.

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The Complaint further alleges that Respondent did not announce the existence of its proprietary interests and patent rights relating to RFG until shortly before CARB's Phase 2 regulations were to go into effect. Complaint at P6. By that time, the refining industry had spent billions of dollars in capital expenditures to modify their refineries to comply with the CARB Phase 2 regulations. *Id.* After CARB and the refiners had become locked into the Phase 2 regulations, Respondent commenced patent enforcement efforts by publicly announcing its RFG patent rights and its intention to collect royalty payments and fees. *Id.* Since Respondent's public announcement of the issuance of its first RFG patent on January 31, 1995, Respondent has obtained four additional patents and enforced its RFG patent rights through litigation and licensing activities. *Id.*

The Complaint charges Respondent with the legal violations of engaging in anticompetitive and exclusionary practices, whereby, in the markets defined in the Complaint, Respondent has wrongfully obtained monopoly power, has attempted monopolization, and has unreasonably restrained trade, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

2. Answer

Respondent's Answer denied the substantive allegations of the Complaint. In addition, Respondent, in its Answer, asserted that there are two basic underpinnings of the Complaint which are unsupportable and eviscerate any viability to the Complaint. First, Respondent avers that the Complaint implicitly and incorrectly suggests that when the word "non-proprietary" or "proprietary" is used, a representation is made as to the status of patent rights, and that Respondent's opinion on the flexibility and cost effectiveness of a predictive model is not a representation on the status of patent rights. Second, Respondent asserts in the introduction to the Answer, that its conduct is petitioning conduct, immune from antitrust scrutiny.

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B. Summary of Arguments Made Regarding Respondent's Motion to Dismiss Based On Noerr-Pennington Immunity

1. Respondent's arguments in support

Respondent moves to dismiss the Complaint on the ground that the conduct alleged in the Complaint is immunized from antitrust liability under the Noerr-Pennington doctrine. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Respondent asserts that CARB, an administrative agency, exercised quasi-legislative authority in enacting the Phase 2 RFG regulations. Respondent argues that its involvement in CARB's Phase 2 RFG rulemaking was political petitioning conduct, protected under Noerr-Pennington. Thus, Respondent argues, Respondent should be shielded from antitrust liability regardless of its motives or the effects of the governmental action. Respondent further asserts that the Complaint does not allege facts sufficient to support the "sham" exception to the Noerr-Pennington doctrine. See *Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, 504 U.S. 49 (1993). In addition, Respondent argues that the exception to Noerr immunity recognized in contexts involving the enforcement of patent rights obtained through knowing fraud on the Patent and Trademark Office is inapplicable to this proceeding. See *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

Respondent also asserts that immunity under the Noerr-Pennington doctrine extends to causes of action brought under Section 5 of the FTC Act. Finally, Respondent asserts that the Complaint's allegations that Respondent made misrepresentations to two private bodies, the Auto/Oil Group and WSPA, do not take Respondent's activities outside of the realm of Noerr protected political activities.

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2. Complaint Counsel's arguments in opposition

Complaint Counsel argues first that the motion to dismiss is inappropriate because there are factual disputes and because the Complaint "specifically alleges" that Noerr-Pennington immunity does not apply here as a "matter of fact." Opposition at 2; Complaint at P96. Complaint Counsel next argues that Respondent's fraudulent statements were made to an agency acting in a quasi-adjudicative manner and that misrepresentations are not immunized when made in an adjudicatory setting or where the agency is dependent upon the petitioner for information. Complaint Counsel further asserts that Noerr-Pennington immunity does not extend to situations where the government agency is unaware that it is being asked to adopt or participate in a restraint of trade.

In addition, Complaint Counsel argues that Respondent's conduct is outside the reach of Noerr-Pennington because the harm was caused not by CARB's adoption of the regulations, but by Respondent's enforcement of its patents. Complaint Counsel also asserts that Respondent's conduct falls under the sham exception to the Noerr-Pennington doctrine. Next, Complaint Counsel argues that Noerr does not immunize Respondent's conduct because this action is brought under the FTC Act, and not the Sherman Act. Finally, Complaint Counsel argues that Respondent's conduct towards Auto/Oil Group and WSPA, is not shielded by Noerr-Pennington and states an independent cause of action.

C. Summary of Arguments Made Regarding Respondent's Motion to Dismiss Based On Failure to Make Sufficient Allegations That Respondent Possesses or Dangerously Threatens to Possess Monopoly Power

1. Respondent's arguments in support

Respondent's motion to dismiss based on failure to make sufficient allegations that Respondent possesses or dangerously threatens to possess monopoly power raises several issues.

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However, the only issues raised by Respondent in that motion that are decided herein are as follows: whether the allegations of the Complaint arise under patent law; and whether the FTC has jurisdiction to decide the substantial questions of patent law alleged in the Complaint. The remaining issues are not reached because the determination on the Noerr-Pennington motion and the determination of the jurisdictional argument make any analysis of the remaining issues raised in the Market Power Motion unnecessary.

Respondent argues that the allegations of this Complaint arise under patent law because they require an inquiry into claim construction and infringement. Respondent further argues that jurisdiction to decide issues arising under patent law lies solely with federal courts and that the Commission does not have jurisdiction to decide the patent issues raised by the Complaint.

2. Complaint Counsel's arguments in opposition

Complaint Counsel asserts that the allegations of this Complaint do not arise under patent law. Complaint Counsel further asserts that the Commission has jurisdiction to decide issues that touch on patent law.

III. EVIDENTIARY STANDARDS

A. Motion to Dismiss Standard

Rule 3.22(e) of the Commission's Rules of Practice authorizes the filing of a motion to dismiss a complaint. 16 C.F.R. § 3.22(e). Although the Commission's Rules of Practice do not have a rule identical to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Commission has acknowledged a party's right to file, and the Administrative Law Judge's authority to rule on, a motion to dismiss for failure to state a claim upon which relief could be granted. E.g., *In re Times Mirror Co.*, 92 F.T.C. 230 (1978); *In re Florida Citrus Mutual*, 50 F.T.C. 959, 961 (1954) (ALJ may "dismiss a complaint if in his opinion the facts alleged do not state a cause of action.").

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Rule 3.11(b)(2) of the Commission's Rules of Practice sets forth that the Commission's complaint shall contain a "clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law." 16 C.F.R. § 3.11(b)(2). This rule requires that the complaint contain "a factual statement sufficiently clear and concise to inform respondent with reasonable definiteness of the types of acts or practices alleged to be in violation of law, and to enable respondent to frame a responsive answer." *In re New England Motor Rate Bureau, Inc.*, 1986 FTC LEXIS 5, *114 (1986). A motion to dismiss for failure to state a claim upon which relief can be granted is judged by whether "a review of the complaint clearly shows that the allegations, if proved, are sufficient to make out a violation of Section 5." *In re TK-7 Corp.*, 1989 FTC LEXIS 32, *3 (1989).

For purposes of a motion to dismiss, "the factual allegations of the complaint are presumed to be true and all reasonable inferences are to be made in favor of complaint counsel." *TK-7 Corp.*, 1989 FTC LEXIS 32, *3 (citing *Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977); *Jenkins v. McKeitchen*, 395 U.S. 411, 421-22 (1969)). If the motion to dismiss raises material issues of fact which are in dispute, dismissal is not appropriate. *In re Herbert R. Gibson, Sr.*, 1976 FTC LEXIS 378, *1 (1976); *In re Jewell Companies, Inc.*, 81 F.T.C. 1034, 1035-36 (1972) (denying motion to dismiss where there was a substantial dispute on questions of fact). See also *In re College Football Assoc.*, 1990 FTC LEXIS 485, *4 (1990) (Where facts are needed to make determination on a "close question," the motion to dismiss will be denied.).

B. Factual Allegations Accepted as True; Conclusions of Law Not Accepted as True

The standard used in Commission proceedings mirrors the standard used for evaluating motions to dismiss raised in federal district courts under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Supreme Court has held that it "is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt

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that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Moreover, it is well established that, in ruling on a motion to dismiss, allegations in the complaint must be accepted as true and construed favorably to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "In antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976) (quoting *Poller v. Columbia Broad.*, 368 U.S. 464, 473 (1962)).

While well-pleaded allegations are taken as admitted, "conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted." *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968); *Violanti v. Emery Worldwide A-CF*, 847 F. Supp. 1251, 1255 (M.D. Pa. 1994) (conclusory allegations of law need not be accepted as true). On motions to dismiss, courts routinely reject allegations that are, or contain, legal conclusions. E.g., *United Mine Workers of America, Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083, 1085 (4th Cir. 1979) (allegation that plaintiff acted under color of state law was a legal conclusion and insufficient to survive a motion to dismiss); *Donald v. Orfila*, 618 F. Supp. 645, 647 (D.D.C. 1985) (allegations that official acted in bad faith beyond the scope of his authority so as not to be entitled to immunity were legal conclusions and thus were not admitted for purposes of a motion to dismiss). "Were it otherwise, Rule 12(b)(6) would serve no function, for its purpose is to provide a defendant with a mechanism for testing the legal sufficiency of the complaint." *United Mine Workers*, 609 F.2d at 1086.

The Complaint specifically alleges that "Unocal is not shielded from antitrust liability pursuant to the Noerr-Pennington doctrine for numerous reasons as a matter of law and as a matter of fact" (Complaint at P96) (emphasis added). Whether or not Noerr-Pennington immunity applies to the facts alleged

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requires a legal conclusion and clearly is a matter of law. See *Razorback Ready Mix Concrete Co, Inc. v. Weaver*, 761 F.2d 484, 488 (8th Cir. 1985). Whether or not an issue is a matter of fact or is a matter of law is also a legal determination. In *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288 (8th Cir. 1978), although the complaint alleged that the agency was an adjudicatory body, the Court of Appeals dismissed the complaint after finding that defendant's actions, including misrepresentations to the agency and city council, were genuine political activity. *Id.* at 293, 297. In the instant case, paragraph 96 of the Complaint is not a properly plead factual allegation in so far as it alleges a conclusion of law; it need not be, and is not, taken as true for purposes of Respondent's motion to dismiss.

C. Matters Which May Be Considered on a Motion to Dismiss and For Which Official Notice May Be Taken

In ruling on a motion to dismiss, it is appropriate to consider the allegations of the complaint, as well as documents attached to or specifically referenced in the complaint, and matters of public record. *Hoffman-LaRouche Inc. v. GenPharm, Inc.*, 50 F. Supp. 2d 367, 377 (D.N.J. 1999) (citing *Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 259 (3d Cir. 1998); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357 at 299 (2d ed. 1990)). The Complaint specifically references California Health and Safety Code § 43018 and California's Administrative Procedure Act. Complaint at PP17, 18, 21, and 26. As set forth below, it is also appropriate to take official notice of the statutes governing CARB, the Notice of Public Hearing through which CARB initiated the rulemaking, and the Final Statement of Reasons for Rulemaking, all of which are beyond dispute.

The Commission's Rules of Practice authorize the use of official notice. 16 C.F.R. § 3.43(d) ("when any decision of an Administrative Law Judge or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor"). Because the Commission Rule does not define official

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notice, it is appropriate to look to Federal Rule of Evidence ("F. R. Evid.") 201(b). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." F. R. Evid. 201(b).

Under Commission precedent, official notice may be taken of references "generally accepted as reliable." *In re Thompson Medical Co.*, 104 F.T.C. 648, 790 (1984). The Commission and Administrative Law Judges have frequently taken official notice of statutes and regulations. E.g., *In re New England Motor Rate Bureau, Inc.*, 1989 FTC LEXIS 62, *16 n.6 (1989) (amendment to New Hampshire statute); *In re Great Atlantic & Pacific Tea Co.*, 85 F.T.C. 601, 608 (1975) (Trade Regulation Rule); *In re Blanton Co.*, 53 F.T.C. 580, 588 (1954) (regulations of the Secretary of Agriculture in the Federal Register).

Federal Rule of Evidence 201 authorizes federal courts to take judicial notice of adjudicative facts on a motion to dismiss. *Zimora v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503 (10th Cir. 1997). This includes taking notice of regulations and statutes. See *id.* at 1504 (to the extent that plaintiff's allegations conflicted with the provisions of the ordinance, plaintiff's allegations were appropriately rejected or ignored). In *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1988), where the district court relied upon the public records of the administrative agency in ruling on a motion to dismiss on Noerr-Pennington grounds, the Court of Appeals held that these records were properly the subject of judicial notice. *Id.* at 1064 n.7. Moreover, the Commission has taken official notice of changes in an agency's amendments to regulations in determining to dismiss a complaint. *In re Marcor Inc.*, 90 F.T.C. 183, 185 (1977).

Respondent, in its motion, specifically cited to the California Clean Air Act (Cal. Health & Safety Code § 39601) and Chapter 3.5 (commencing with Section 11340) of the Government Code, and cited to and attached the Notice of Public Hearing through

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which CARB initiated the rulemaking and the Final Statement of Reasons for Rulemaking. Motion at 11-12, 23 n.7, and Appendices B and D. Complaint Counsel had an opportunity to disprove these statutes and agency materials of which official notice is taken not only through the filing of its Opposition, but was also provided an additional opportunity when directed to submit additional briefing by Order dated August 25, 2003. These statutes and public documents were relied upon by Respondent and their veracity and accuracy were not disputed by Complaint Counsel.

D. Motions To Dismiss Involving Noerr-Pennington

Courts routinely resolve, on a motion to dismiss, the legal issue of whether Noerr-Pennington immunity shields a defendant. E.g., *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 250 (3rd Cir. 2001); *Baltimore Scrap Corp. v. The David J. Joseph Co.*, 237 F.3d 394, 396 (4th Cir. 2001); *Manistee Town Ctr. v. Glendale*, 227 F.3d 1090, 1091 (9th Cir. 2000). In *Kottle*, the court examined, on a motion to dismiss, whether an administrative agency bore many of the indicia of a true adjudicatory proceeding, such as conducting public hearings, accepting written and oral arguments, issuing written findings after hearing, and whether its decision was appealable to determine whether the sham exception to Noerr-Pennington applied. 146 F.3d at 1059. See also *Armstrong Surgical Center v. Armstrong City Mem'l Hosp.*, 185 F.3d 154, 163 (3d Cir. 1999) ("On the facts alleged in the complaint, it is also clear that the state decision makers were disinterested, conducted their own investigation, and afforded all interested parties an opportunity to set the record straight."). Thus, although other courts have deferred ruling on whether the Noerr-Pennington doctrine applies until after discovery, e.g., *Fox News Network v. Time Warner, Inc.*, 962 F. Supp. 339, 345 (E.D.N.Y. 1997); *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972), where, as here, the dispositive issues are legal, there are no facts within reasonable dispute, and the issues can be resolved on a motion to dismiss, it is appropriate to do so.

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Furthermore, courts, in ruling on motions to dismiss based on Noerr-Pennington, review the statutory authority under which an agency is acting to determine whether the conduct challenged in the complaint occurred in a political setting. For example, in *Mark Aero*, despite allegations in the complaint that the Aviation Department and the city council were "adjudicatory bodies," the court, upon reviewing state statutes, concluded that city council's passage of ordinances was an exercise of legislative power. 580 F.2d at 290. In *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 228 (7th Cir. 1975), on a motion to dismiss, the court determined that the city council was a body to which the state had delegated legislative powers, that the council did not need to compile an evidentiary record through formal proceedings, and that its members were subject to lobbying and other forms of ex parte influence, to conclude that the conduct challenged in the complaint occurred in a political setting. In *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 955 (11th Cir. 1986), the Court of Appeals for the Eleventh Circuit reviewed the statute applicable to the State Health Planning Agency's (SHPA) action in issuing a certificate of need and found that each application was reviewed individually according to a process which required consideration of a number of health planning issues, any interested party could have submitted information to SHPA in connection with the application, the initial review was conducted without an evidentiary hearing, the Act provided for a separate review board to handle any appeals from SHPA decisions, and the review board, at its discretion, could grant discovery rights prior to conducting a mandatory evidentiary hearing. This analysis led the court to determine, on a motion to dismiss, that the agency was acting in an adjudicatory manner. *Id.* Thus, a determination of whether CARB was acting in a legislative or adjudicative manner may properly be made on a motion to dismiss by review of the applicable statutes, as well as the factual allegations of the Complaint. As discussed below, other issues raised by Respondent's motions and Complaint Counsel's responses do not require the resolution of genuine factual disputes and are properly decided on the motions to dismiss.

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E. Burden of Proof

Noerr-Pennington immunity is not merely an affirmative defense. *McGuire Oil Co. v. MAPCO, Inc.*, 958 F.2d 1552, 1558 n.9 (11th Cir. 1992). "Rather, 'the antitrust plaintiff has the burden of establishing that the defendant restrained trade unreasonably, which cannot be done when the restraining action is that of the government.'" *Id.* (quoting *P. Areeda and H. Hovenkamp*, *Antitrust Law* § 203.4c). The antitrust plaintiff also bears the burden of proving that the action of the defendant comes within the sham exception to Noerr-Pennington. *Westmac, Inc. v. Smith*, 797 F.2d 313, 318 (6th Cir. 1986). Thus, the burden falls on Complaint Counsel to allege facts sufficient to show that Noerr-Pennington immunity does not attach to Respondent's actions.

In addition, where jurisdiction is limited to only that power authorized by statute, the burden of establishing jurisdiction rests upon the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). If a complaint before the Federal Trade Commission does not allege sufficient facts to confer jurisdiction, it must be dismissed. *In re R.J. Reynolds Tobacco Co., Inc.*, 111 F.T.C. 539, 541 (1988). Thus, the burden is on Complaint Counsel to demonstrate that jurisdiction exists over all violations alleged in the Complaint.

IV. STATEMENT OF FINDINGS

Rule 3.22(e) of the Commission's Rules of Practice requires that when a motion to dismiss a complaint is granted with the result that the proceeding before the Administrative Law Judge is terminated, the Administrative Law Judge shall file an initial decision in accordance with the provisions of § 3.51. 16 C.F.R. § 3.22(e). Rule 3.51(c) requires an initial decision to include a statement of findings and conclusions and an appropriate rule or order. 16 C.F.R. § 3.51(c). Accordingly, this section sets forth as findings those facts alleged in the Complaint that are taken as true only for the limited purpose of ruling on both motions to dismiss. Citations to specific numbered findings of fact in this Initial Decision are designated by "F."

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Allegations that are not relevant to the issues decided are not included. As discussed above (section III.B. *supra*) argumentative language and allegations that constitute legal conclusions need not be taken as true and are not included as findings of fact.

As is permitted when ruling on a motion to dismiss, official notice may appropriately be taken of legislative and public agency materials. (Section III.C. *supra*). Therefore, this section also includes excerpts from the Notice of Public Hearing through which CARB initiated the rulemaking at issue, the Final Statement of Reasons for Rulemaking, and the statutes governing CARB, upon which this order granting the motion to dismiss on Noerr-Pennington grounds and the Initial Decision are based. The Notice of Public Hearing and the Final Statement of Reasons for Rulemaking are Appendices B and D to Respondent's motion for dismissal based on Noerr-Pennington, available at www.ftc.gov/os/adjpro/d9305/index.htm.

A. Facts As Alleged in the Complaint

1. Respondent

1. Union Oil Company of California is a public corporation 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, Union Oil Company of California has done business under the name "Unocal." Unocal is a wholly-owned, operating subsidiary of Unocal Corporation, a holding company incorporated in Delaware. Complaint at P11.

2. Unocal is, and at all relevant times has been, a corporation as "corporation" is defined by Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44; and at all times relevant herein, Unocal has been, and is now, engaged in commerce as "commerce" is defined in the same provision. Complaint at P12.

3. Prior to 1997, Unocal owned and operated refineries in California as a vertically integrated producer, refiner, and

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marketer of petroleum products. In March 1997, Unocal completed the sale of its west coast refining, marketing, and transportation assets to Tosco Corporation. Currently, Unocal's primary business activities involve oil and gas exploration and production, as well as production of geothermal energy, ownership in proprietary and common carrier pipelines, natural gas storage facilities, and the marketing and trading of hydrocarbon commodities. Complaint at P13.

4. In its annual report for the year 2001 filed with the United States Securities and Exchange Commission, Form 10-K, Unocal lists as another of its key business activities: "pursuing and negotiating licensing agreements for reformulated gasoline patents with refiners, blenders and importers." Unocal has publicly announced that it expects to earn up to \$ 150 million in revenues a year from licensing its RFG patents. Complaint at P14.

2. Respondent's patents

5. Unocal is the owner, by assignment, of the following patents relating to low emissions, reformulated gasoline: United States Patent No. 5,288,393 (issued February 22, 1994); United States Patent No. 5,593,567 (issued January 14, 1997); United States Patent No. 5,653,866 (issued August 5, 1997); United States Patent No. 5,837,126 (issued November 17, 1998); and United States Patent No. 6,030,521 (issued February 29, 2000). Complaint at P15.

6. On May 13, 1990, Unocal scientists presented the preliminary research results of their emissions research program to the highest levels of Unocal's management to obtain approval and funding for additional, confirmatory research. Unocal's management approved funding for additional emissions testing, and this project became known as the "5/14 Project." Complaint at P29.

7. Unocal's management approved the filing of a patent application covering the invention and discovery that sprang from the 5/14 Project. Specifically, the Unocal scientists' novel

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discovery of the directional relationships between eight fuel properties -- RVP, T10, T50, T90, olefin content, aromatic content, paraffin content, and octane -- and three types of tailpipe emissions -- i.e., incompletely burned or unburned hydrocarbons, carbon monoxide, and nitrogen oxides. Complaint at P30.

8. On December 13, 1990, Unocal filed with the United States Patent and Trademark Office a patent application, No. 07/628,488. This application presented Unocal's emissions research results, including the regression equations and underlying data; detailed the directional relationships between the fuel properties and emissions studied in Unocal's 5/14 Project; and set forth composition and method claims relating to low emissions, reformulated gasoline. Complaint at P32.

3. California Air Resources Board ("CARB")

9. The California Air Resources Board ("CARB") is a department of the California Environmental Protection Agency. Established in 1967, CARB's mission is to protect the health, welfare, and ecological resources of California through the effective and efficient reduction of air pollutants, while recognizing and considering the effects of its actions on the California economy. CARB fulfills the mandate by, among other things, setting and enforcing standards for low emissions, reformulated gasoline. Complaint at P16.

4. Reformulated gasoline in California

10. CARB initiated rulemaking proceedings in the late 1980s to determine "cost-effective" regulations and standards governing the composition of low emissions, reformulated gasoline. Unocal actively participated in the CARB RFG rulemaking proceedings. Complaint at P1.

11. CARB's RFG regulations had their genesis in an effort by California to study the viability of alternative fuels for motor vehicles, such as methanol. In 1987, the California legislature passed AB 234, which resulted in the formation of a panel to

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study the environmental impact of alternative fuels and to develop a proposal to reduce emissions. This panel included representatives from the refining industry, including Roger Beach, a high level Unocal executive who later became the Chief Executive Officer and Chairman of the Board of Unocal. Complaint at P19.

12. Based in substantial part on the representations of oil industry executives that the oil industry could, and would develop gasoline that would be cleaner-burning and cheaper than methanol, the AB 234 study panel recommended exploring reformulated gasoline as an alternative to methanol. Complaint at P20.

13. In late 1988, the California legislature amended the California Clean Air Act to require CARB to take actions to reduce harmful car emissions, and directed CARB to achieve this goal through the adoption of new standards for automobile fuels and low emission vehicles. CARB's legislative mandate, set forth in California Health and Safety Code Section 43018, provided, *inter alia*, that CARB undertake the following actions:

- a. Take "necessary, cost-effective, and technologically feasible" actions to achieve "reduction in the actual emissions of reactive, organic gases of at least 55 percent, a reduction in emissions of oxides of nitrogen of at least 15 percent from motor vehicles" no later than December 31, 2000;
- b. Take actions "to achieve the maximum feasible reduction in particulates, carbon monoxide, and toxic air contaminants from vehicular sources";
- c. Adopt standards and regulations that would result in "the most cost-effective combination of control measures on all classes of motor vehicles and motor vehicle fuels" including the "specification of vehicular fuel composition."

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Complaint at P21.

14. Following the 1998 California Clean Air Act amendments, CARB embarked on two rulemaking proceedings relating to low emissions, reformulated gasoline. In these rulemaking proceedings -- Phase 1 and Phase 2 -- CARB prescribed limits on specific gasoline properties. Complaint at P22.

15. CARB's Phase 2 RFG proceedings represented an effort by CARB to develop stringent standards for low emissions, reformulated gasoline. Participants to the Phase 2 RFG proceedings understood that the CARB Phase 2 RFG regulations would require refiners to make substantial capital investments to reconfigure their refineries to produce compliant gasoline. Complaint at P24.

16. In its Phase 2 RFG proceedings, CARB did not conduct any independent studies of its own, but relied on the industry to provide research and information. Complaint at P25.

17. In the course of CARB's Phase 2 RFG proceedings, CARB adhered to the procedures set forth in the California Administrative Procedure Act. CARB provided notice of proposed regulations; provided the language of these proposed regulations and a statement of reasons; solicited and accepted written comments from the public; and conducted lengthy hearings at which oral testimony was received. CARB also issued written findings on the results of its rulemaking proceedings. Following adoption of the regulations, several parties sought judicial review of the CARB Phase 2 RFG regulations that provided small refiners with a two-year exemption for compliance with the regulations. Complaint at P26.

5. Unocal's conduct before CARB

18. Prior to and after the filing of the patent application on December 13, 1990, Unocal employees and management discussed and considered the potential competitive advantage and corporate profit that could be gained through effectuating an

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overlap between the CARB regulations and Unocal's patent claims. Complaint at P33.

19. During the same time that Unocal participated in the CARB RFG rulemaking proceedings, specific discussions took place within the company concerning how to induce the regulators to use information supplied by Unocal so that Unocal could realize the licensing income potential of its pending patent claims. Complaint at P34.

20. Beginning in 1990, and continuing throughout the CARB Phase 2 RFG rulemaking process, Unocal provided information to CARB for the purpose of obtaining competitive advantage. Unocal gave CARB this information in private meetings with CARB, through participation in CARB's public workshops and hearings, as well as by participating in industry groups that also were providing input into the CARB regulations. Unocal suppressed facts relating to its proprietary interests in its emissions research results. Complaint at P35.

21. On June 11, 1991, CARB held a public workshop regarding the Phase 2 RFG regulations. This workshop included discussions of CARB staff's proposed gasoline specifications -- i.e., the levels at which certain gasoline properties should be set -- to reduce the emissions from gasoline-fueled vehicles. The set of specifications proposed by CARB for discussion at this workshop did not include a T50 specification. Complaint at P36.

22. On June 20, 1991, Unocal presented to CARB staff the results of its 5/14 Project to show CARB that "cost-effective" regulations could be achieved through adoption of a "predictive model" and to convince CARB of the importance of T50. Unocal's pending patent application contained numerous claims that included T50 as a critical limitation, in addition to other fuel properties that CARB proposed to regulate. Complaint at P37.

23. Prior to the presentation to CARB, Unocal's management decided not to disclose Unocal's pending '393 patent application to CARB staff. Complaint at P38.

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24. On July 1, 1991, Unocal provided CARB with the actual emissions prediction equations developed in the 5/14 Project. Unocal requested that CARB "hold these equations confidential, as we feel that they may present a competitive advantage in the production of gasoline." But Unocal went on to state: "If CARB pursues a meaningful dialogue on a predictive model approach to Phase 2 gasoline, Unocal will consider making the equations and underlying data public as required to assist in the development of a predictive model." Complaint at P39.

25. Following CARB's agreement to develop a predictive model, Unocal made its emissions results, including the test data and equations underlying its 5/14 Project, publicly available. Complaint at P40.

26. On August 27, 1991, Unocal stated in a letter to CARB that its emissions research data were "nonproprietary." Specifically, Unocal stated: "Please be advised that Unocal now considers this data to be nonproprietary and available to CARB, environmental interests, groups, other members of the petroleum industry, and the general public upon request." Complaint at P41.

27. At the time Unocal submitted its August 27, 1991 letter to CARB, it did not disclose to CARB its proprietary interests in the 5/14 Project data and equations, its prosecution of a patent application, or its intent to enforce its proprietary interests to obtain licensing income. Complaint at P42.

28. CARB used Unocal's equations in setting a T50 specification. Subsequently, in October 1991, CARB published Unocal's equations in public documents supporting the proposed Phase 2 RFG regulations. Complaint at P43.

29. On November 22, 1991, the CARB Board adopted Phase 2 RFG regulations that set particular standards for the composition of low emissions, reformulated gasoline. These regulations specified limits for eight gasoline properties: RVP, benzene, sulfur, aromatics, olefins, oxygen, T50, and T90. Unocal's pending patent claims recited limits for five of the eight properties

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specified by the regulations: T50, T90, olefins, aromatics, and RVP. Complaint at P44.

30. The Phase 2 RFG regulations substantially overlapped with Unocal's patent claims. For example, CARB included a specification for T50 in its Phase 2 RFG regulations and eventually adopted a "predictive model" that included T50 as one of the parameters. Complaint at P45.

31. Although Unocal knew by July 1992 that most of the pending patent claims based on its emissions research had been allowed by the United States Patent and Trademark Office, Unocal did not disclose this material information to CARB and other participants in the CARB RFG proceedings. Complaint at P4.

32. Prior to the final approval of the CARB Phase 2 RFG regulations in November 1992, Unocal submitted comments and presented testimony to CARB opposing CARB's proposal to grant small refiners a two-year exemption for complying with the regulations. Unocal opposed this proposed exemption on the grounds that it would increase the costs of compliance and undermine the cost-effectiveness of the CARB Phase 2 RFG regulations. In making these statements, Unocal did not disclose that it had proprietary rights that would materially increase the cost and reduce the cost-effectiveness and flexibility of the regulations that CARB had adopted. Complaint at P46.

33. CARB amended the Phase 2 regulations in June 1994 to include a predictive model as an alternative method of complying with the regulations that was intended to provide refiners with additional flexibility. At the urging of numerous companies, including Unocal, this "predictive model" permits a refiner to comply with the RFG regulations by producing fuel that is predicted -- based on its composition and the levels of the eight properties -- to have equivalent emissions to a fuel that meets the strict gasoline property limits set forth in the regulations. Complaint at P47.

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34. During the development of the predictive model, Unocal continued to meet with CARB, providing testimony and information. Unocal submitted comments to CARB touting the predictive model as offering "flexibility" and furthering CARB's mandate of "cost-effective" regulations. Complaint at P48.

35. Unocal made statements and comments to CARB relating to the "cost effectiveness" of CARB Phase 2 regulations, and the "flexibility" offered by the implementation of a predictive model to reduce refiner compliance costs. These statements and comments include, but are not limited to, both written and/or oral statements made to CARB on the following dates: October 29, 1991, November 21, 1991, November 22, 1991, March 16, 1992, June 19, 1992, August 14, 1992, September 4, 1992, June 3, 1994 and June 9, 1994. Complaint at P78.

36. Throughout its communications and interactions with CARB prior to January 31, 1995, Unocal did not disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties. Complaint at P79.

37. On February 22, 1994, the United States Patent Office issued the '393 patent. CARB first became aware of Unocal's '393 patent shortly after Unocal's issuance of a press release on January 31, 1995. Complaint at P49.

6. Unocal's participation in industry groups

38. During the CARB RFG rulemaking, Unocal actively participated in the Auto/Oil Air Quality Improvement Research Program ("Auto/Oil Group"), a cooperative, joint research program between the automobile and oil industries. By agreement dated October 14, 1989, the big three domestic automobile manufacturers -- General Motors, Ford, and Chrysler -- and representatives from fourteen oil companies, including Unocal, entered into a joint research agreement in accordance with the National Cooperative Research Act of 1984 ("Auto/Oil Agreement"). Complaint at P50.

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39. The stated objective of the Auto/Oil joint research venture was to plan and carry out research and tests designed to measure and evaluate automobile emissions and the potential improvements in air quality achievable through the use of reformulated gasolines, methanol, and other alternative fuels, and to evaluate the relative cost-effectiveness of these various improvements. Complaint at P51.

40. The Auto/Oil Agreement provided that "the results of research and testing of the Program will be disclosed to government agencies, the Congress and the public, and otherwise placed in the public domain." This agreement specifically provided for the following dedication of any and all intellectual property rights to the public: "No proprietary rights will be sought nor patent applications prosecuted on the basis of the work of the Program unless required for the purpose of ensuring that the results of the research by the Program will be freely available, without royalty, in the public domain." Complaint at P52.

41. While the Auto/Oil Agreement permitted participating companies to conduct independent research, and further permitted them to withhold the fruits of such independent research from the Auto/Oil Group, once data and information were in fact presented to the Auto/Oil Group, they became the "work of the Program." Complaint at P53.

42. On September 26, 1991, Unocal presented to the Auto/Oil Group the results of Unocal's emissions research, including the test data, equations, and corresponding directional relationships between fuel properties and emissions derived from the 5/14 Project. Unocal's management authorized this presentation, which was substantially similar to that made to CARB on June 20, 1991. Unocal informed Auto/Oil participants that the data had been made available to CARB and were in the public domain. Unocal also represented that the data would be made available to Auto/Oil participants. Complaint at P55. Unocal failed to disclose Unocal's proprietary interests in its emissions research results and Unocal's intention and efforts to enforce its intellectual property rights. Complaint at P82.

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43. Throughout all of its communications and interactions with the Auto/Oil Group prior to January 31, 1995, Unocal failed to disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties. Complaint at P83.

44. During the CARB Phase 2 RFG rulemaking proceedings, Unocal also actively participated in the Western States Petroleum Association ("WSPA"), an oil industry trade association that represents companies accounting for the bulk of petroleum exploration, production, refining, transportation and marketing in the western United States. WSPA, as a group, actively participated in the CARB RFG rulemaking process. WSPA commissioned, and submitted to CARB, three cost studies in connection with the CARB Phase 2 RFG rulemaking. Complaint at P56.

45. One cost study commissioned by WSPA incorporated information relating to process royalty rates associated with non-Unocal patents and was used by CARB to determine the cost-effectiveness of the proposed CARB Phase 2 RFG standards. This WSPA cost study estimated the costs of the proposed regulations on a cents-per-gallon basis and estimated the incremental costs associated with regulating specific gasoline properties. This WSPA study could have incorporated costs associated with potential royalties flowing from Unocal's pending patent rights. Complaint at P57.

46. On September 10, 1991, Unocal presented its 5/14 Project emissions research results to WSPA. Unocal's management authorized the presentation of the research results to WSPA. This Unocal presentation created the impression that Unocal's emissions research results, including the data and equations, were nonproprietary and could be used by WSPA or its individual members without concern for the existence or enforcement of any intellectual property rights. Complaint at P58.

47. Throughout all of its communications and interactions with WSPA prior to January 31, 1995, Unocal failed to disclose

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that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties. Complaint at P88.

48. None of the participants in the WSPA or Auto/Oil Group knew of the existence of Unocal's proprietary interests and/or pending patent rights at any time prior to the issuance of the '393 patent in February 1994, by which time most, if not all, of the oil company participants to these groups had made substantial progress in their capital investment and refinery modifications plans for compliance with the CARB Phase 2 RFG regulations. Complaint at P59.

7. Unocal's patent prosecution and enforcement

49. Following the November 1991 adoption of CARB Phase 2 RFG specifications, Unocal amended its patent claims in March 1992 so that the patent claims more closely matched the regulations. In some cases, Unocal's patent claims were narrowed to resemble the regulations. Complaint at P60.

50. On or about July 1, 1992, Unocal received an office action from the U.S. Patent and Trademark Office indicating that most of Unocal's pending patent claims had been allowed. Unocal did not disclose this information to CARB or other participants to the CARB Phase 2 RFG rulemaking. Complaint at P61.

51. Subsequently, after the submission of additional amendments, Unocal received a notice of allowance from the U.S. Patent and Trademark Office for all of its pending claims in February 1993. Unocal did not disclose this information to CARB or other participants to the CARB Phase 2 RFG rulemaking. Complaint at P62.

52. In June 1993, Unocal filed a divisional application (No. 08/77,243) of its original patent application that allowed Unocal to pursue additional patents based on the discoveries of the 5/14 Project. Complaint at P63.

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53. The U.S. Patent and Trademark Office issued the '393 patent to Unocal on February 22, 1994. On January 31, 1995, Unocal issued a press release announcing issuance of the '393 patent. The Unocal press release stated that the '393 patent "covers many of the possible fuel compositions that refiners would find practical to manufacture and still comply with the strict California Air Resources Board (CARB) Phase 2 requirements." Complaint at P64.

54. In March 1995, Unocal met separately with California Governor Pete Wilson and CARB and made assurances that Unocal would not enjoin or otherwise impair the ability of refiners to produce and supply to the California market gasoline that complied with the CARB Phase 2 RFG regulations. In or about the same time period, CARB expressed its own concern to Unocal about the coverage of the patent and even sought and received from Unocal a license to use the '393 patent in making and using test fuels. Complaint at P65.

55. On March 22, 1995, five days after meeting with CARB staff, Unocal filed a continuation patent application (No. 08/409/074) claiming priority to the original December 1990 application. Unocal did not inform CARB or Governor Wilson that it intended to obtain additional RFG patents. Complaint at P66.

56. Unocal subsequently filed additional continuation patent applications on June 5, 1995 (No. 08/464,544), August 1, 1997 (No. 08/904,594), and November 13, 1998 (No. 08/191,924), all claiming priority based on Unocal's original December 13, 1990 patent application. Complaint at P67.

57. On April 13, 1995, ARCO, Exxon, Mobil, Chevron, Texaco, and Shell filed suit in the United States District Court for the Central District of California seeking to invalidate Unocal's '393 patent. Unocal filed a counterclaim for patent infringement of the '393 patent. The jury in this private litigation determined that Unocal's '393 patent was valid and infringed, and found that the refiners must pay a royalty rate of 5.75 cents per gallon for the

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period from March through July 1996 for sales of infringing gasoline in California. Complaint at P68.

58. The United States Court of Appeals for the Federal Circuit subsequently affirmed the trial court's judgment. The United States Supreme Court denied the refiner-defendants' petition for a writ of certiorari. The refiner-defendants have made payments totaling \$ 91 million to Unocal for damages, costs, and attorneys' fees. Complaint at P69.

59. An accounting action is still ongoing in the United States District Court for the Central District of California to determine damages for infringement of the '393 patent by the refiners for the period from August 1, 1996, through December 31, 2000. The court ruled in August 2002 that the 5.75 cents per gallon royalty fee awarded by the jury would apply to all infringing gasoline produced and/or supplied in California. Complaint at P70.

60. On January 23, 2002, Unocal sued Valero Energy Company in the Central District of California for willful infringement of both the '393 patent and the '126 patent. In its complaint, Unocal seeks damages at the rate of 5.75 cents per gallon for all infringing gallons, and treble damages for willful infringement. Complaint at P71.

61. Unocal also has enforced its patent claims through licensing activities. To date, Unocal has entered into license agreements with eight refiners, blenders and/or importers covering the use of all five RFG patents. The terms of these license agreements are confidential. Unocal has announced that these license agreements feature a "uniform" licensing schedule that specifies a range from 1.2 to 3.4 cents per gallon depending on the volume of gasoline falling within the scope of the patents. As a licensee practices under the license more frequently, the licensing fee per gallon is reduced. Complaint at P72.

62. Refiners in California invested billions of dollars in sunk capital investments without knowledge of Unocal's patent claims to reconfigure their refineries in order to comply with the CARB

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Phase 2 RFG regulations. These refiners cannot produce significant volumes on non-infringing CARB-compliant gasoline without incurring substantial costs. Complaint at P93.

63. Were Unocal to receive a 5.75 cents per gallon royalty on all gallons of "summertime" CARB RFG produced annually for the California market, this would result in an estimated annual cost of more than \$ 500 million (assuming approximately 14.8 billion gallons per year California consumption, with up to 8 months of CARB summer-time gasoline requirements). Complaint at P10.

B. Legislative and Agency Materials of Which Official Notice is Taken

1. Notice of Public Hearing

64. CARB issued its Notice of Public Hearing to Consider Adoption of and Amendments to Regulations Regarding Reformulated Gasoline (Phase 2 Gasoline Specifications), and the Wintertime Oxygen Content of Gasoline on September 24, 1991, ["Notice of Public Hearing"] in connection with the Phase 2 regulations. Notice of Public Hearing, p.1.

65. The Notice of Public Hearing states that the Air Resources Board ("the Board") will conduct a public hearing to consider the adoption of and amendments to regulations to establish more stringent gasoline specifications for Reid vapor pressure ("RVP"), distillation temperatures, and sulfur, benzene, olefin, oxygen and aromatic hydrocarbon content starting in 1996. Notice of Public Hearing, p. 1.

66. The Notice of Public Hearing states that the Board staff has prepared a Staff Report for the proposed Phase 2 reformulated gasoline proposal that is available to the public. Notice of Public Hearing, p. 6.

67. The Notice of Public Hearing states that based on cost data submitted to the Board, the staff has determined that the

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regulations will cost between 14 cents per gallon to 20 cents per gallon, if the entire cost is passed on to the consumer. The total capital investment costs to the refiners are estimated to be in the range of four to seven billion dollars. Notice of Public Hearing, p. 7.

68. The Notice of Public Hearing states that the staff estimates that implementation of Phase 2 specifications will result in ozone precursor emission reductions of about 190 tons per day in 1996. Emissions of CO will be reduced by about 1300 tons per day and sulfur oxides by 40 tons per day. Other Phase 2 specifications will also result in reduced toxic emissions. Notice of Public Hearing, p. 7.

69. The Notice of Public Hearing states that the staff is conducting an independent cost analysis using the Process Industry Modeling System refinery model. Notice of Public Hearing, p. 7.

70. The Notice of Public Hearing states that before taking final action on the proposed regulatory action, the Board must determine that no alternative considered by the agency would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action. Notice of Public Hearing, pp. 7-8.

71. The Notice of Public Hearing states that the public may present comments relating to this matter orally or in writing. The Board encourages members of the public to bring to the attention of staff in advance of the hearing any suggestions for modification of the proposed regulatory action. Notice of Public Hearing, p. 8.

2. Final Statement of Reasons For Rulemaking

72. The California Air Resources Board issued its Final Statement of Reasons for Rulemaking, Including Summary of Comments and Agency Response relating to the public hearing to

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consider the adoption and amendments to Phase 2 gasoline specifications held on November 21-22, 1991. ["Final Statement of Reasons for Rulemaking"].

73. Final Statement of Reasons for Rulemaking states: "the statutes do not mandate what specific fuel characteristics must be controlled, how stringent those controls should be, what the compliance dates should be, to whom the controls should apply, whether the limits should be statewide or limited to areas with substantial air pollution problems, whether the limits should apply year-round or only during seasons with bad air quality, whether all batches of fuel should be subject to the same limit or an 'averaging' program of some sort should be instituted, how the controls should be enforced, and whether there should be provisions granting temporary 'variances' based on unforeseen unique events." Final Statement of Reasons for Rulemaking, p. 190.

74. The Final Statement of Reasons for Rulemaking states that the Board conducted a hearing at which it received oral and written comments on the regulatory proposals. Final Statement of Reasons for Rulemaking, p. 1.

75. The Final Statement of Reasons for Rulemaking states that the staff conducted an informal public workshop on October 14, 1991 to discuss the Phase 2 RFG regulatory proposal. Final Statement of Reasons for Rulemaking, p. 17, n.5.

76. The Final Statement of Reasons for Rulemaking contains a summary of the comments the Board received on the Phase 2 RFG regulations during the formal rulemaking process and the Board's responses to the comments. Final Statement of Reasons for Rulemaking, p. 3.

77. An attachment to the Final Statement of Reasons for Rulemaking shows that 51 entities, including automobile companies, assemblymen, business associations, chemical companies, environmental associations, forestry associations, labor unions, oil companies, petroleum associations, refiners'

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associations, and trucking associations, all provided comments to the Board during the formal rulemaking process. Final Statement of Reasons for Rulemaking, pp. A-1 - A-6.

3. Statutory authority under which CARB's regulations were adopted

78. The Notice of Public Hearing states that CARB's regulatory action is proposed under that authority granted in sections 39600, 39601, 43013, 43018, and 43101 of the Health and Safety Code and *Western Oil and Gas Ass'n v. Orange County Air Pollution Control District*, 14 Cal. 3d 411, 121 Cal. Rptr. 249 (1975). Notice of Public Hearing, p. 8.

79. CARB also has the authority to conduct adjudicatory hearings. The procedures for hearings can be found at Cal. Code Regs. tit. 17 § § 60040-60053. The provisions of this article do not apply to review of decisions related to programs or actions of air pollution control or air quality management districts. Cal. Health & Safety Code § 60040.

80. The Notice of Public Hearing does not state that CARB's regulatory action is proposed under the authority granted in sections 60040-60053 of the Health and Safety Code. Notice of Public Hearing, p. 8.

81. Section 39600 of the Health and Safety Code states: The state board shall do such acts as may be necessary for the proper execution of the powers and duties granted to, and imposed upon, the state board by this division and by any other provision of law. Cal. Health & Safety Code § 39600.

82. Section 39601 of the Health and Safety Code states, in part:

(a) The state board shall adopt standards, rules, and regulations in accordance with the provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, necessary for the proper execution of

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the powers and duties granted to, and imposed upon, the state board by this division and by any other provision of law . . . ;

(c) The standards, rules, and regulations adopted pursuant to this section shall, to the extent consistent with the responsibilities imposed under this division, be consistent with the state goal of providing a decent home and suitable living environment for every Californian. Cal. Health & Safety Code § 39601.

83. Section 43013 of the Health and Safety Code states, in part:

(a) The state board may adopt and implement motor vehicle emission standards, in-use performance standards, and motor vehicle fuel specifications for the control of air contaminants and sources of air pollution which the state board has found to be necessary, cost-effective, and technologically feasible, to carry out the purposes of this division, unless preempted by federal law

(e) Prior to adopting or amending any standard or regulation relating to motor vehicle fuel specifications pursuant to this section, the state board shall, after consultation with public or private entities that would be significantly impacted . . . do both of the following:

(1) Determine the cost-effectiveness of the adoption or amendment of the standard or regulation. The cost-effectiveness shall be compared on an incremental basis with other mobile source control methods and options.

(2) Based on a preponderance of scientific and engineering data in the record, determine the technological feasibility of the adoption or amendment of the standard or regulation. . . .

(f) Prior to adopting or amending any motor vehicle fuel specification pursuant to this section, the state board shall do both of the following:

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(1) To the extent feasible, quantitatively document the significant impacts of the proposed standard or specification on affected segments of the state's economy. The economic analysis shall include, but is not limited to, the significant impacts of any change on motor vehicle fuel efficiency, the existing motor vehicle fuel distribution system, the competitive position of the affected segment relative to border states, and the cost to consumers.

(2) Consult with public or private entities that would be significantly impacted to identify those investigative or preventive actions that may be necessary to ensure consumer acceptance, product availability, acceptable performance, and equipment reliability. The significantly impacted parties shall include, but are not limited to, fuel manufacturers, fuel distributors, independent marketers, vehicle manufacturers, and fuel users. Cal. Health & Safety Code § 43013.

84. Section 43018 of the Health and Safety Code states, in part:

(a) The state board shall endeavor to achieve the maximum degree of emission reduction possible from vehicular and other mobile sources in order to accomplish the attainment of the state standards at the earliest practicable date.

(b) Not later than January 1, 1992, the state board shall take whatever actions are necessary, cost-effective, and technologically feasible in order to achieve, not later than December 31, 2000, a reduction in the actual emissions of reactive organic gases of at least 55 percent, a reduction in emissions of oxides of nitrogen of at least 15 percent from motor vehicles. These reductions in emissions shall be calculated with respect to the 1987 baseline year. The state board also shall take action to achieve the maximum feasible reductions in particulates, carbon monoxide, and toxic air contaminants from vehicular sources.

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(c) In carrying out this section, the state board shall adopt standards and regulations which will result in the most cost-effective combination of control measures on all classes of motor vehicles and motor vehicle fuel, including, but not [*57] limited to, all of the following:

(1) Reductions in motor vehicle exhaust and evaporative emissions.

(2) Reductions in emissions from in-use emissions from motor vehicles through improvements in emission system durability and performance.

(3) Requiring the purchase of low emission vehicles by state fleet operators.

(4) Specification of vehicular fuel composition.

(d) In order to accomplish the purposes of this division, and to ensure timely approval of the district's plans for attainment of the state air quality standards by the state board, the state board shall adopt the following schedule for workshops and hearings to consider the adoption of the standards and regulations required pursuant to this section:

(1) Workshops on the adoption of vehicular fuel specifications for aromatic content, diesel fuel quality, light-duty vehicle exhaust emission standards, and revisions to the standards for new vehicle certification and durability to reflect current driving conditions and useful vehicle life shall be held not later than March 31, 1989. . . .

(2) Notwithstanding Section 43830, workshops on the adoption of regulations governing gasoline Reid vapor pressure, and standards for heavy-duty and medium-duty vehicle emissions, shall be held not later than January 31, 1990. . . .

(3) Workshops on the adoption of regulations governing detergent content, emissions from off-highway vehicles, vehicle

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fuel composition, emissions from construction equipment and farm equipment, motorcycles, locomotives, utility engines, and to the extent permitted by federal law, marine vessels, shall be held not later than January 31, 1991. . . .

(e) Prior to adopting standards and regulations pursuant to this section, the state board shall consider the effect of the standards and regulations on the economy of the state, including, but not limited to, motor vehicle fuel efficiency Cal. Health & Safety Code § 43018.

85. Section 43101 of the Health and Safety Code states: The state board shall adopt and implement emission standards for new motor vehicles for the control of emissions therefrom, which standards the state board has found to be necessary and technologically feasible to carry out the purposes of this division. Prior to adopting such standards, the state board shall consider the impact of such standards on the economy of the state, including, but not limited to, their effect on motor vehicle fuel efficiency. The state board shall submit a report of its findings on which the standards are based to the Legislature within 30 days of adoption of the standards. Such standards may be applicable to motor vehicle engines, rather than to motor vehicles. Cal. Health & Safety Code § 43101.

4. California Administrative Procedure Act

86. The Notice of Public Hearing and Cal. Health & Safety Code § 39601 state that CARB's public hearing and adoption of regulations shall be conducted in accordance with the California Administrative Procedure Act, Title 2, Division 3, Part 1, Chapter 3.5 (commencing with section 11340) of the Government Code ["California APA"]. Notice of Public Hearing, p. 8; Cal. Health & Safety Code § 39601.

87. Part 1 of Division 3 of Title 2 of the Government Code governs state departments and agencies within the executive department. Cal. Gov't. Code, Part 1, Division 3. Chapter 3.5 is entitled "Administrative Regulations and Rulemaking." Cal.

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Gov't. Code, Part 1, Division 3, Chapter 3.5. Chapter 3.5 encompasses Sections 11340 through 11351. *Id.*

88. Section 11340.1 of the California APA declares the intent to establish an Office of Administrative Law which is charged with reviewing adopted regulations for the purpose of reducing the number of regulations and to improve the quality of those regulations adopted. It is the intent of the Legislature that neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency. Cal. Gov't Code § 11340.1

89. Section 11342 of the California APA defines "regulation" as every rule, regulation, order, or standard of general application. Cal. Gov't Code § 11342.

90. Section 11346 of the California APA states:

(a) It is the purpose of this chapter to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted . . .

(b) An agency that is considering adopting, amending, or repealing a regulation may consult with interested persons before initiating regulatory action pursuant to this article. Cal. Gov't Code § 11346.

91. Section 11346.3 of the California APA states:

(a) State agencies proposing to adopt . . . any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals. Cal. Gov't Code § 11346.3

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92. Section 11346.4 of the California APA requires notice of the proposed action prior to hearing and close of the public comment period. Cal. Gov't Code § 11346.4.

93. Section 11346.45 of the California APA requires agencies proposing to adopt regulations to involve parties who would be subject to the proposed regulations in public discussions regarding those proposed regulations. This requirement is not imposed where the state agency is required to implement federal law and regulations for which there is little or no discretion on the part of the state to vary. Cal. Gov't Code § 11346.45.

94. Section 11346.8 of the California APA states that if a public hearing is held, both oral and written statements, arguments, or contentions, shall be permitted. If a public hearing is not scheduled, the state agency shall afford any interested person the opportunity to present statements, arguments or contentions in writing. The state agency shall consider all relevant matter presented to it before adopting, amending, or repealing any regulation. In any hearing under this section, the state agency shall have authority to administer oaths or affirmations. Cal. Gov't Code § 11346.45.

95. The Notice of Public Hearing indicates that CARB's adoption of regulations was required to be in accordance with Chapter 3.5 ("Administrative Regulations and Rulemaking"). Cal. Health & Safety Code § 39601. It was not required to be in accordance with Chapter 4 ("Administrative Hearings"), Chapter 4.5 ("Administrative Adjudication: General Provisions"), or Chapter 5 ("Administrative Adjudication: Formal Hearing"). See Cal. Gov't. Code, Part 1, Division 3.

V. ANALYSIS AND CONCLUSIONS OF LAW

A. Overview of the Noerr-Pennington Doctrine

The evolution of the judicially created immunity from antitrust liability under the Noerr-Pennington doctrine begins in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*,

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Inc., 365 U.S. 127 (1961). In *Noerr*, truck operators and their trade association alleged that railroads and their trade association conspired to restrain trade in violation of Sections 1 and 2 of the Sherman Act by engaging in a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business. *Id.* at 129. The defendants argued that their activities could not create liability under the Sherman Act when they were only trying to inform the public and the legislature of certain facts. The Supreme Court agreed, noting "that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Id.* at 136 (citing *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939); *Parker v. Brown*, 317 U.S. 341 (1943)).

The Supreme Court based its finding of immunity from antitrust liability on two premises. First, to hold an entity liable under antitrust laws for actions taken to influence the passage or enforcement of laws "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." *Noerr*, 365 U.S. at 137. The Supreme Court explained:

In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

Id. at 137.

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The second premise for immunity from antitrust liability stems from the Constitutional right to "petition the Government for redress of grievances," U.S. Const. amend I, cl. 6. "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." Noerr, 356 U.S. at 138. Thus, the Supreme Court held that the Sherman Act does not apply to the activities that "comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." *Id.* at 138.

The antitrust immunity established in Noerr for attempts to influence governmental action was reaffirmed in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In *Pennington*, the union and large coal companies agreed upon steps to exclude the marketing, production, and sale of non-union coal. Together they successfully approached the Secretary of Labor to obtain a minimum wage requirement for employees of contractors selling coal to the Tennessee Valley Authority ("TVA"), making it difficult for small companies to compete for TVA term contracts. Other executive action was also sought and obtained. The Supreme Court held that the actions seeking changes in policy or law by the government were immune from antitrust liability, "regardless of intent or purpose." *Id.* at 670. "[The] legality of the conduct 'was not at all affected by any anti-competitive purpose it may have had,' . . . even though the 'sole purpose in seeking to influence the passage and enforcement of laws was to destroy . . . competitors . . .'" *Id.* at 669 (citation omitted). Accord *Mark Aero*, 580 F.2d at 294 (Noerr shields from antitrust liability a concerted effort to influence public officials regardless of intent or purpose.); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1254 (9th Cir. 1982) ("Genuine efforts to induce governmental action are shielded by Noerr even if their express and sole purpose is to stifle or eliminate competition.").

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Supreme Court extended the Noerr-Pennington doctrine to attempts to influence administrative and

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adjudicatory bodies. *Id.* at 510. Lower courts have made clear that lobbying efforts designed to influence a state administrative agency's decision are within the ambit of the Noerr-Pennington doctrine. *Kottle*, 146 F.3d at 1059; *Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558, 1570 n.17 (10th Cir. 1991); *St. Joseph's Hosp.*, 795 F.2d at 955. "Noerr-Pennington immunity extends to efforts to influence all branches of government, including state administrative agencies." *Livingston Downs Racing Assoc. v. Jefferson Downs Corp.*, 192 F. Supp. 2d 519, 532 (M.D. La. 2001).

B. Noerr-Pennington Provides Immunity to Conduct Alleged in the Complaint

The Supreme Court has a broad view of Noerr-Pennington immunity. "Those who petition the government for redress are generally immune from antitrust liability." *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993). Accord *Kottle*, 146 F.3d at 1059 (The Noerr-Pennington doctrine "sweeps broadly and is implicated by both state and federal antitrust claims that allege anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government.").

Complaint Counsel argues that the conduct alleged in the Complaint is not immunized by Noerr-Pennington because: (1) CARB was acting in a quasi-adjudicatory setting; (2) CARB was dependent on Respondent for information; and (3) regardless of whether the agency's actions are determined to be adjudicatory or legislative, there is no immunity where an agency is unaware that it is being asked to adopt or participate in a restraint of trade. The Complaint specifically alleges:

Unocal is not shielded from antitrust liability pursuant to the Noerr-Pennington doctrine for numerous reasons . . . including, but not limited to, the following: (i) Unocal's misrepresentations were made in the course of quasi-adjudicative rulemaking

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proceedings; (ii) Unocal's conduct did not constitute petitioning behavior . . . n1

Complaint at P96.

n1 Paragraph 96 of the Complaint alleges that Respondent is not shielded from antitrust liability for a third reason, that "Unocal's misrepresentations and materially false and misleading statements to Auto/Oil and WSPA, two non-governmental industry groups, were not covered by any petitioning privilege." Complaint at P96. This issue is discussed at Section V.E. *infra*.

Notwithstanding this legal conclusion contained within the factual allegations of the Complaint, the facts alleged in the Complaint, the legislative and agency materials relating to CARB's rulemaking, and applicable case law demonstrate that CARB's Phase 2 RFG rulemaking process was a quasi-legislative proceeding and that Respondent's conduct did constitute political petitioning behavior.

1. CARB's Phase 2 reformulated gasoline rulemaking process was quasi-legislative

a. Distinction made between legislative versus adjudicatory arena

Noerr and its progeny hold that misrepresentations are condoned if made in the political process, but may result in antitrust liability if made in the adjudicative process. This distinction between the context (legislative versus adjudicatory) in which misrepresentations are made is set forth most clearly in *Professional Real Estate Investors*:

In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in

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the setting of the adjudicatory process often results in sanctions" and that "misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."

508 U.S. at 61 n.6 (quoting *California Motor Transport*, 404 U.S. at 512-13). Misrepresentations condoned in the legislative arena extend to deliberate deception. "A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988). In *Noerr* itself, where the private party engaged in conduct that could be "termed unethical" and "deliberately deceived the public and public officials" in its successful lobbying campaign, the Supreme Court said, "deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 383-84 (1991); *Noerr*, 365 U.S. at 141, 145.

Circuit courts applying the *Noerr-Pennington* doctrine hold that misrepresentations made in the context of legislative activities are immune from antitrust liability. E.g., *Armstrong Surgical Center*, 185 F.3d at 162 (liability for injuries caused by states acting as regulators is precluded even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision making process); *Kottle*, 146 F.3d at 1060 ("the political arena has a higher tolerance for outright lies than the judicial arena does"); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 894 (9th Cir. 1988) (misrepresentations of facts made by defendant real estate developer to the city council relating to the city council's decision to not construct a parking garage is conduct that "certainly falls within the ambit of the *Noerr-Pennington* doctrine"); *First Am. Title Co. v. South Dakota Land Title Assn.*, 714 F.2d 1439, 1447 (8th Cir. 1983) (lobbying campaign alleged to involve "a misuse of the lobbying process' through the use of false statements and inaccuracies made by defendants to the state legislature" protected by *Noerr-Pennington* doctrine); *Metro*

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Cable, 516 F.2d at 228 (when a legislative body granted an exclusive franchise to defendant, allegedly due to defendant's illicit conduct, the complaint was dismissed, because while the legislature could have had an adjudicatory body issue the license, it chose not to do so); Woods Exploration & Producing Co., v. Aluminum Company of America, Inc., 438 F.2d 1286, 1297 (5th Cir. 1971) ("The germination of the allowable formula was political in the Noerr sense, and thus participation in those rule-making proceedings would have been protected.").

By contrast, where the agency is using an adjudicatory process, misrepresentations are not immunized. California Motor Transport, 404 U.S. at 512-13; Allied Tube, 486 U.S. at 499-500 ("in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations"). E.g., St. Joseph's Hosp., 795 F.2d at 955 (a governmental agency passing on specific certificate applications is acting judicially; misrepresentations under these circumstances do not enjoy Noerr immunity); Clipper Exxpress, 690 F.2d at 1261 ("fraudulent furnishing of false information to an agency in connection with an adjudicatory proceeding can be the basis for antitrust liability").

Thus, apparently seeking to circumvent Noerr-Pennington immunity, the Complaint alleges that "CARB's Phase 2 RFG proceedings were quasi-adjudicative in nature." Complaint at P26. Complaint Counsel argues that "where, as here, a party makes material misrepresentations in the course of 'adjudicatory' proceedings, such misconduct brings the case within the independent misrepresentation exception to Noerr." Opposition at 20. Despite this conclusory allegation, if the conduct complained about is genuine petitioning in the legislative context, the violations alleged in the complaint must be dismissed. See Mark Aero, 580 F.2d at 292-93, 97. As set forth in the following section, the facts, as alleged in the Complaint, guided by the statutory authority governing CARB, and demonstrated in the Notice of Public Hearing through which CARB initiated the rulemaking and in the Final Statement of Reasons for

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Rulemaking, establish that the Phase 2 RFG proceedings were legislative, and not adjudicative.

b. Determination of whether action is legislative or adjudicatory

"As a necessary prologue to any Noerr-Pennington immunity analysis, . . . the Court must determine whether . . . an executive agency is more akin to a political entity or to a judicial body." *Livingston Downs Racing Assoc. v. Jefferson Downs Corp., et al.*, 192 F. Supp. 2d 519, 533 (M.D. La. 2001). When the issue is whether a deliberate misrepresentation is protected, "the basis of the type of governmental body involved (legislative or administrative) and the function it exercises (rule-making or adjudicative) also "shed light on whether the (parties being charged) were engaged in "political activity" *United States v. AT&T Co.*, 524 F. Supp. 1336, 1362 n.108 (D.D.C. 1981) (quoting *Federal Prescription Service, Inc. v. Am. Pharmaceutical Ass'n*, 663 F.2d 253 (D.C. Cir. 1981)).

A determination of whether CARB was acting in a quasi-legislative manner, as argued by Respondent, or in a quasi-adjudicatory manner, as argued by Complaint Counsel, may be made by an examination of the following: (1) the level of political discretion granted to CARB; (2) whether CARB was setting policy; (3) the procedures used during the rulemaking; and (4) the authority invoked by CARB in adopting the Phase 2 RFG regulations. It is also useful to note that the California Supreme Court has characterized CARB's rulemakings as "quasi-legislative." *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 565 (1995).

(i) Political discretion

One factor in determining whether an executive agency is acting in a legislative or adjudicative manner depends upon the "degree of political discretion exercised by the government agency." *Kottle*, 146 F.3d at 1061. Complaint Counsel asserts that CARB, in using its technical expertise to design the applicable

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regulations, was merely carrying out the California legislature's mandate to implement certain policy judgments, rather than acting in an independent political manner. Opposition at 24. However, it is apparent, on the facts alleged in the Complaint, that CARB exercised political discretion. F. 9 (Complaint at P16) ("CARB's mission is to protect the health, welfare, and ecological resources of California through the effective and efficient reduction of air pollutants, while recognizing and considering the effects of its actions on the California economy."). The regulations enacted by CARB "set particular standards for the composition of low emissions RFG. These regulations specify limits for eight RFG properties: RVP, benzene, sulfur, aromatics, olefins, oxygen, T50, and T90." F. 29 (Complaint at P44).

The statutory guidelines that govern CARB's rulemaking give CARB broad discretion to do such acts as may be necessary, consistent with the goal of providing a suitable living environment for every Californian. F. 81, 82 (Cal. Health & Safety Code § § 39600, 39601). The statute lists only benchmarks that CARB's regulations must fulfill and interests that CARB must keep in mind when formulating its regulations. F. 83, 84 (Cal. Health & Safety Code § § 43013, 43018). CARB retains discretion in deciding what standards it will actually impose to achieve the maximum degree of emission reduction possible from vehicular or other mobile sources. See F. 83, 84 (Cal. Health & Safety Code § § 43013, 43018). Nowhere does the statute state what properties of RFG must be regulated. See F. 83-85 (Cal. Health & Safety Code § § 43013, 43018, 43101). Nor does the statute set limits to be placed upon such properties. *Id.* However, these two factors are critical components of the Phase 2 regulations and were the topics of Respondent's petitioning conduct as alleged in the Complaint. F. 21, 22 (Complaint at PP36, 37).

The California Air Resources Board described the breadth of its rulemaking discretion in the Final Statement of Reasons for Rulemaking for its Phase 2 rules as follows:

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The statutes do not mandate what specific fuel characteristics must be controlled, how stringent those controls should be, what the compliance dates should be, to whom the controls should apply, whether the limits should be statewide or limited to areas with substantial air pollution problems, whether the limits should apply year-round or only during seasons with bad air quality, whether all batches of fuel should be subject to the same limit or an "averaging" program of some sort should be instituted, how the controls should be enforced, and whether there should be provisions granting temporary "variances" based on unforeseen unique events.

F. 73. Thus, CARB exercised political discretion in promulgating the Phase 2 RFG regulations, indicating that CARB was acting in a quasi-legislative manner.

(ii) Policy setting

In deciding whether an agency is acting in a legislative or adjudicative manner, courts have focused on whether the agency has been granted the authority to create policy on its own, or is limited in its authority to apply policy that was previously established to a particular set of facts. See *Israel v. Baxter Labs., Inc.*, 466 F.2d 272, 276-77 (D.C. Cir. 1976) (Noerr-Pennington does not apply to private party efforts to influence an agency that is not in a position to make governmental policy, but rather carries out policy already made); *Woods*, 438 F.2d at 1298 (Noerr-Pennington is "inapplicable to the alleged filing of false nominations [since] this conduct was not action designed to influence policy, which is all the Noerr-Pennington rule seeks to protect."). The California Supreme Court has found that CARB is vested with broad discretion performing its quasi-legislative rulemaking function and its decisions are entitled to a "high degree of deference." *Western States Petroleum Ass'n*, 9 Cal. 4th at 572.

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Rulemaking concerns policy judgments to be applied generally in cases that may arise in the future. *Portland Audubon Soc'y v. Endangered Species*, 984 F.2d 1534, 1540 (9th Cir. 1993). Rulemaking normally refers to the prospective allocation of benefits and penalties according to a specific standard that reflects the policy choice of the rulemaker. *Association of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 615 (D.C. Cir. 1979). By contrast, "where an agency's task 'is to adjudicate disputed facts in particular cases,' an administrative decision is quasi-judicial." *Portland Audubon*, 984 F.2d at 1540. "An adjudication refers to the application of a pre-existing legal standard to a well-defined set of controverted facts to determine whether a particular person or group of persons should receive a benefit or penalty." *Association of Nat'l Advertisers*, 617 F.2d at 615. In *Boone*, in determining *Noerr-Pennington* immunity, the court distinguished between actions involving the application of rules to specific parcels of property, which it deemed adjudicative in nature, and those affecting the future rights of many individuals, such as a redevelopment plan, which it deemed legislative in nature. 841 F.2d at 896.

The factual allegations of the Complaint leave no doubt that CARB's Phase 2 rulemaking was setting policy to be applied generally to the industry and affecting consumers in the future. CARB convened its rulemaking to enact regulations "governing the composition of low emissions, reformulated gasoline" F. 10 (Complaint at P1). The Complaint further avers that CARB conducted the rulemaking pursuant to legislation that required the agency "to take actions to reduce harmful car emissions." F. 13 (Complaint at P21). Approximately 14.8 billion gallons of RFG are sold each year in California. F. 63 (Complaint at P10). To comply with Phase 2, industry participants had to modify their refineries, which, in the aggregate, cost "billions of dollars." F. 15, 62 (Complaint at PP24, 93). Phase 2 substantially affects a large number of consumers through higher prices for summer time compliant gasoline. F. 63 (Complaint at P10). No allegations in the Complaint indicate that CARB's Phase 2 rulemaking was in any way a judicial determination of the rights and obligations of specific parties before it.

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In addition, the Notice of Public Hearing through which CARB initiated the rulemaking states that CARB staff estimated future costs of between 14 cents per gallon to 20 cents per gallon, if the entire cost is passed on to the consumer, and capital investment costs to the refiners to be in the range of four to seven billion dollars. F. 67. The Notice of Public Hearing also states that CARB staff estimated that implementation of Phase 2 specifications will result in ozone precursor emission reductions of about 190 tons per day in 1996, that emissions of CO will be reduced by about 1300 tons per day and sulfur oxides by 40 tons per day, and that other Phase 2 specifications will also result in reduced toxic emissions. F. 68. These effects are not determined by individuals' specific factual circumstances, but rather are broad effects on all individuals who purchase RFG and who breathe the air in California. Thus, the application and effect of Phase 2 is more consistent with what has traditionally been understood to be legislation, not an adjudication.

(iii) Procedures used

In formal adjudications, certain procedures must be followed to comport with the Due Process Clause. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (welfare recipients could not be terminated from the program without an adjudicatory proceeding where they could present their case orally, confront adverse witnesses, appear with or through an attorney, and receive a decision based exclusively on the hearing record). See also *Association of Nat'l Advertisers, Inc. v. FTC*, 617 F.2d 611, 635 (D.C. Cir. 1979) ("Congress never intended that participants in informal rulemaking . . . would have the type of wide-ranging cross-examination rights afforded parties in formal adjudication . . .").

An examination of the procedures used by CARB, as alleged in the Complaint, reveals that the procedures used by CARB do not bear the indicia of a formal adjudicatory proceeding. The Complaint does not allege that CARB, in deciding on the Phase 2 regulations, conducted trial-like hearings, including cross-examination, rules of evidence, and burdens of proof. Instead, according to the Complaint, CARB conducted the Phase 2

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rulemaking pursuant to California's Administrative Procedure Act, which required CARB to issue a notice of proposed rulemaking, explain the basis and purpose of the regulations, provide an opportunity to comment, and conduct hearings. F. 17. See also Complaint at P17. The Complaint alleges that, in developing the RFG regulations, CARB provided notice of the proposed regulations, conferred in private meetings with various interested persons, held public workshops and hearings, solicited input from various industry groups and numerous companies, conducted lengthy hearings at which oral testimony was received, and collected written comments by interested parties. F. 17, 20, 21, 33 (Complaint at PP26, 35, 36, 47). See also F. 74, 75 (the Final Statement indicates the Board conducted a hearing and public workshop). In the Final Statement of Reasons for Rulemaking, CARB included all of the meaningful, relevant comments that it analyzed in formulating Phase 2 and its responses to these comments. F. 76, 77. As alleged in the Complaint, the processes used by CARB illustrate clearly that CARB's rulemaking was undertaken in a legislative, and not an adjudicative context.

(iv) Authority invoked

The Notice of Public Hearing states that CARB's regulatory action is proposed under that authority granted in sections 39600, 39601, 43013, 43018, and 43101 of the Health and Safety Code and *Western Oil and Gas Ass'n v. Orange County Air Pollution Control District*, 14 Cal. 3d 411, 121 Cal. Rprt. 249 (1975). F. 78 (Notice of Public Hearing, p. 8). These statutory provisions require CARB, inter alia, to consult with the public or private entities that would be impacted, prepare an economic analysis of impacts of the regulations, conduct workshops on the adoption of regulations, and submit a report of its findings to the legislature. F. 82-85 (Cal. Health & Safety Code § § 39601, 43013, 43018, 43101). These procedures are customary in rulemaking, but not in adjudication.

Further, the Notice of Public Hearing states and the statute requires that CARB's public hearing and adoption of regulations

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shall be conducted in accordance with the California Administrative Procedure Act (APA), Title 2, Division 3, Part 1, Chapter 3.5 of the Government Code. F. 86 (Notice of Public Hearing, p. 8; Cal. Health & Safety Code § 39601). Compliance with California APA procedures in the context of a rulemaking does not undercut the quasi-legislative character of the rulemaking. *Rivera v. Div. of Indus. Welfare*, 265 Cal. App. 2d 576, 586 (Cal. App. 1968); see also *Wilson v. Hidden Valley Muni. Water Dist.*, 256 Cal. App. 2d 271, 278 (Cal. App. 1967) ("the Legislature and administrators exercising quasi-legislative powers commonly resort to the hearing procedure to uncover, at least in part, the facts necessary to arrive at a sound and fair legislative decision"); *Joint Council of Interns and Residents v. Bd. of Supervisors of Los Angeles*, 210 Cal. App. 3d 1202, 1211 (Cal. App. 1989) (rejecting characterization of rulemaking as adjudicative based on the use of certain procedures because "the decisionmaking process under review here involved much more than the mechanical application of statutory criteria to existing fact"). Thus, even where an administrative decisionmaking process embodies "certain characteristics common to the judicial process," this does "not change the basically quasi-legislative nature of the subject proceedings." *Wilson*, 256 Cal. App. 2d at 279.

Furthermore, the chapter of the California APA that CARB was required to comply with was Chapter 3.5. F. 86. Chapter 3.5, entitled "Administrative Regulations and Rulemaking," states that "the provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute" F. 90 (Cal. Gov't Code § 11346(a)). CARB was not directed to comply with Chapter 4 ("Administrative Hearings"), Chapter 4.5 ("Administrative Adjudication: General Provisions"), or Chapter 5 ("Administrative Adjudication: Formal Hearing"). F. 95.

Although CARB is empowered to conduct adjudicative proceedings (see Cal. Code Regs. tit. 17, § § 60040-60053), the Notice of Public Hearing indicates that such procedures were not invoked in connection with the Phase 2 rulemaking. F. 78. Under sections 11370 et seq. of the California Government Code and

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Title 17 of the California Code of Regulations at sections 60040 to 60094, CARB's exercise of quasi-adjudicative powers is subject to the familiar strictures associated with adjudications. When it is conducting adjudications, CARB must provide notice, the hearing examiner controls what evidence may be admitted, oral testimony must be under oath, the parties may cross-examine adverse witnesses or offer rebuttal evidence if the hearing examiner deems it necessary to resolve disputed issues of material fact, California's rules of privilege apply, hearsay may not be used by itself to support a finding unless it falls under an exception to the hearsay rule, official notice may be taken, and affidavits are admissible. Cal. Code Regs. tit. 17, § § 60040-60053. CARB's "adjudication procedures" need not be considered since the Complaint does not allege that CARB followed these quasi-adjudicative procedures during its development of the Phase 2 RFG regulations and since the Notice of Public Hearing explicitly states that CARB's regulatory action was proposed, instead, under sections 39600, 39601, 43013, 43018, and 43101 of the Health and Safety Code. F. 78, 80.

It strains credulity to suggest that a "rulemaking," as it is referred to in the Complaint in at least 13 instances, was not a rulemaking in a legislative sense where the California statute governing CARB's rulemaking denominates it as administrative rulemaking and an exercise of quasi-legislative power. Nevertheless, as discussed above, an analysis of whether CARB was in a position to exercise policy discretion, whether the Phase 2 regulations affected people generally, in the future (as opposed to a determination of the specific rights of individuals), the procedures used by CARB, and the statutory authority under which CARB promulgated the regulations conclusively demonstrates that CARB was not acting in an adjudicatory manner, but in a legislative manner.

2. CARB was not wholly dependent on Respondent for information

Complaint Counsel argues that, regardless of whether CARB's rulemaking was legislative or adjudicatory, Noerr-Pennington

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immunity does not apply where the decision making agency is dependent upon the petitioner for information. Opposition at 30. Complaint Counsel relies chiefly on Clipper Exxpress, which holds:

"adjudicatory procedures will not always ferret out misrepresentations. Administrative bodies and courts, however, rely on the information presented by the parties before them. They seldom, if ever, have the time or resources to conduct independent investigations."

Opposition at 30-31 (quoting Clipper Exxpress, 690 F.2d at 1262).

Clipper Exxpress involved a ratemaking proceeding before the Interstate Commerce Commission (ICC), wherein the plaintiff alleged that the defendants had attempted to influence ICC action by supplying fraudulent information to the ICC. The proceeding at issue was one in which the government agency adjudicated the entitlement of a particular party -- Clipper Exxpress -- to offer transport services at a particular rate. Clipper Exxpress, 690 F.2d at 1261. Thus, Clipper Exxpress does not compel a finding of no immunity under the facts alleged in the Complaint in the instant case.

In support of its argument that where the agency is dependent on facts known only to the petitioner, there is no immunity for fraud, Complaint Counsel also cites to *Whelan v. Abell*, 48 F.3d 1247, 1253-54 (D.C. Cir. 1995); *Woods*, 438 F.2d at 1295; and *De Loach v. Phillip Morris Cos.*, 2001 U.S. Dist. LEXIS 16909, *44 (M.D.N.C. 2001). Opposition at 31-32. The facts alleged in the instant case are readily distinguishable from those cases relied upon by Complaint Counsel. In *Whelan*, the court held that *Noerr-Pennington* did not protect knowing misrepresentations made in an adjudicative context -- a letter of complaint to state securities administrators and to a federal court -- from claims of malicious prosecution, abuse of process, and tortious interference with prospective business advantage. 48 F.3d at 1249.

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In both *Woods* and *DeLoach*, the courts found that the deceptions at issue were not made during a policy making exercise, and thus were not immune. In *Woods*, plaintiffs alleged that entry of orders by the Texas Railroad Commission setting production allowables for plaintiffs' wells in specific fields had been based in part on false nomination forecasts and reports filed by defendants with the Texas Railroad Commission. 438 F.2d at 1292. The Court of Appeals discussed whether the Texas Railroad Commission was dependent on the defendants for the factual information in the context of determining whether defendants' conduct could be found to have become merged with the action of the state and thus exempt from antitrust liability under the state action doctrine. *Id.* at 1295. In its examination of whether defendants were exempt from antitrust liability under the *Noerr-Pennington* doctrine, the Court of Appeals focused on whether the "germination of the allowable formula was political" and thus protected, and found that where there was no attempt by defendants to influence the policies of the Texas Railroad Commission, there was no immunity.

In *De Loach*, the United States Department of Agriculture ("USDA") was tasked with determining the annual quota for certain tobacco by calculating using a statutory formula that factored in tobacco manufacturers' purchase intentions. 2001 U.S. Dist. LEXIS 16909, *8-10. With the exception of the Secretary of Agriculture's ability to adjust the quota by plus or minus three percent from the statutory formula, the USDA had no discretion in determining the quota. *Id.* at *10. Defendants' actions of intentionally submitting false purchase intentions to the USDA that resulted in lower quotas were not protected by *Noerr-Pennington* because the "submission of their purchase intentions in no way involved the policy-making process." *Id.* at *44. "Rather, it was part of an administrative determination that relied upon [defendants'] truthfulness in calculating the annual quota." *Id.*

In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), the Supreme Court held that "the enforcement of a patent procured by fraud on the Patent

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Office may be violative of § 2 . . . provided the other elements necessary to a § 2 case are present." *Id.* at 174. As characterized by the Court of Appeals for the Third Circuit, the Patent Office was wholly dependent on the applicant for the facts. *Armstrong Surgical Center*, 185 F.3d at 164 n.8 (3d Cir. 1999). "While the Patent Office can determine the prior art from its own records, it effectively and necessarily delegates to the applicant the factual determinations underlying the issuance of a patent." *Id.* See also *Charles Pfizer & Co. v. Federal Trade Commission*, 401 F.2d 574, 579 (6th Cir. 1968) ("The Patent Office, not having testing facilities of its own, must rely upon information furnished by applicants and their attorneys. [Respondents], like all other applicants, stood before the Patent Office in a confidential relationship and owed the obligation of frank and truthful disclosure.").

The facts of this case are not at all like the facts at issue in the cases relied upon by Complaint Counsel holding that where an agency is dependent upon the petitioner for truthful information, Noerr-Pennington immunity does not apply. CARB's rulemaking was not a ratemaking procedure. CARB's rulemaking was not the mere application of a statutory formula to the facts presented. Respondent's alleged conduct was not the filing of a complaint before an adjudicatory body. Respondent's alleged conduct was not fraud on the Patent Office.

Instead, as set forth in the preceding section, CARB was vested with political discretion, set policy through its regulations, and was not acting in an adjudicatory manner. (Section V.B.1. *supra*). Section 43013 required CARB to consult with public or private entities that would be significantly impacted. F. 83. As alleged in the Complaint, CARB, in developing the RFG regulations, conferred in private meetings with various interested persons, held public workshops and hearings, solicited input from various industry groups and numerous companies, and collected written comments by interested parties. F. 17, 20, 21, 33 (Complaint at PP26, 35, 36, 47). The Notice of Public Hearing states that CARB staff was to conduct an independent cost analysis using the Process Industry Modeling System refinery

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model. F. 69. The Final Statement of Reasons for Rulemaking contains a summary of the comments the Board received on the Phase 2 RFG regulations during the formal rulemaking process and the Board's responses to the comments. F. 76 (Final Statement of Reasons for Rulemaking, p. 3). An attachment to the Final Statement of Reasons for Rulemaking shows that 51 entities, including automobile companies, assemblymen, business associations, chemical companies, environmental associations, forestry associations, labor unions, oil companies, petroleum associations, refiners' associations, and trucking associations, all provided comments to the Board during the formal rulemaking process. F. 77 (Final Statement of Reasons for Rulemaking, pp. A-1 - A-6). The text of these comments demonstrates that CARB was not solely dependent on Respondent for information. Moreover, the Complaint alleges that CARB "relied on industry to provide research and information." F. 16 (Complaint at P25).

Accordingly, because CARB was not wholly dependent on Respondent in its rulemaking proceeding, Noerr-Pennington applies.

3. There is immunity even if CARB was unaware it was being asked to restrain trade

Complaint Counsel asserts that there is no immunity where an agency is unaware that it is being asked to adopt or participate in a restraint of trade. Opposition at 14-15; Sur-reply at 7. Complaint Counsel further asserts that because CARB was unaware that it was being asked to adopt or participate in a restraint of trade and did not intend the consequences of its regulations, Respondent's actions do not constitute genuine petitioning activities and thus are not shielded by Noerr-Pennington. Opposition at 14-15; Sur-reply at 7.

Noerr protects "the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws," regardless of the petitioner's intent in doing so. Noerr, 365 U.S. at 139. "Petitioning" the

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government, as used in Noerr and its progeny, equates to advocating for or persuading the government to take some action. Noerr, 365 U.S. at 138 (petitioning is "solicitation of governmental action with respect to the passage and enforcement of laws"); Omni Outdoor Advertising, 499 U.S. at 379-80 (entities must be allowed to "seek anticompetitive action from the government").

Accepting the allegations of the Complaint as true, it is clear that Respondent engaged in petitioning conduct. E.g., F. 20 (Complaint at P35 (Respondent provided information to CARB for the purpose of obtaining competitive advantage)); F. 22 (Complaint at P37 (Respondent presented to CARB staff the results of its 5/14 project)); F. 32 (Complaint at P46 (Respondent submitted comments and presented testimony to CARB opposing CARB's proposal to grant small refiners a two-year exemption)); F. 34 (Complaint at P48 (Respondent submitted comments to CARB touting the predictive model as offering flexibility and furthering CARB's mandate of cost-effective regulations)). This communication of information to government regulators regarding Respondent's "desires with respect to the passage or enforcement of laws," is without question solicitation of governmental action.

Complaint Counsel asserts that Noerr and its progeny protect petitioning only if the government is "actually aware of the anticompetitive restraint it is imposing and takes state action nonetheless." Opposition at 14-15 (emphasis added). For support, Complaint Counsel cites to Areeda & Hovenkamp, at P209a and to FTC v. Superior Ct. Trial Lawyers Ass'n ("SCTLA"), 493 U.S. 411, 424-25 (1990). Neither of these cites support Complaint Counsel's proposition.

Section 209a of Areeda & Hovenkamp sets forth the general rule for the "commercial exception" to Noerr-Pennington. Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law P209a at 259 (2d ed. 2000). Within the context of the "general rule" that a private person dealing with the government as a buyer, seller, lessor, lessee, or franchisee has no greater antitrust privilege or immunity

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than in similar dealings with non-governmental parties, the Areeda treatise states, "a prerequisite for Noerr immunity is that the government actually know about the restraint being imposed. As a result, there is no immunity for secret price-fixing agreements directed at government purchasers" *Id.* In this case, as alleged in the Complaint, CARB is not acting as a buyer, seller, lessor, lessee, or franchisee; nor are there allegations of secret price-fixing agreements directed at government purchasers. Thus, the commercial exception to Noerr-Pennington does not apply, and this quote, taken completely out of context, has no persuasive value.

The quote from SCTLA upon which Complaint Counsel relies states: "but in the Noerr case the alleged restraint of trade was the intended consequence of public action; in this case the boycott was the means by which respondents sought to obtain favorable legislation." Reply at 15 n.7, quoting 493 U.S. 411, 424-25 (1990) (emphasis added). This quote has very little relation to the definition of "petitioning." SCTLA does not hold that the legislature must have intended the consequences of its actions; rather, it compares the facts before it -- where the restraint of trade was the means by which respondents sought legislation (boycott) -- from the facts of Noerr -- where restraint of trade was the consequence of petitioners' action (legislation). SCTLA, 493 U.S. at 424-25.

The quoted language in SCTLA could not reasonably be construed to mean that Noerr requires the legislating agency to be aware of or intend the consequences of its regulations. In Noerr, the public and public officials were "deliberately deceived." Noerr, 365 U.S. at 145. "And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." *Id.* The very concept of deception assumes that the deceived party does not know it is being deceived. See Black's Law Dictionary (defining "deception" as the act of deceit, and "deceit" as a deceptive misrepresentation used to deceive and trick another, who is ignorant of the true facts).

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Further, *Omni Outdoor Advertising*, makes clear that an analysis of the legislature's intent should not be undertaken. In discussing state action immunity, the Supreme Court wrote that an analysis into whether legislation was thought by the state actors to be in the public interest "would require the sort of deconstruction of the governmental process and probing of official 'intent' that we have consistently sought to avoid." 499 U.S. at 378. In further context of the state action immunity, the *Omni Outdoor Advertising* court held, "we reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade.'" *Id.* at 379. In discussing *Noerr-Pennington* immunity, the Supreme Court held:

The same factors which . . . make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials.

Id. at 383 (emphasis added). Thus, even where the antitrust violation alleged was that the petitioner conspired with city officials to harm a competitor, an analysis of the intent of the legislature was avoided. *Id.* at 368-69. See also *Areeda & Hovenkamp*, P202b at 158 ("To be sure, the legislature may be mistaken or unaware of the consequences of its actions . . . but the antitrust court may not reappraise the legislature's assessment of the public welfare If a statute excludes everyone but the monopolist from a market, the monopolist cannot itself be faulted.").

Complaint Counsel also relies on cases interpreting the state action immunity developed in *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny for Complaint Counsel's argument that petitioning is protected only if the government agency is aware of the restraint of trade it is being asked to adopt. Sur-reply at 11.

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Parker and subsequent caselaw interpreting this doctrine explain that there must be conscious and deliberate efforts of the state to restrain competition in order for the state action immunity to apply. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (Private anticompetitive activity is impliedly exempt from antitrust scrutiny under the state action doctrine only if: (1) the alleged anticompetitive conduct was taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with state regulation; and (2) the state actively supervises the implementation of its policy.). This doctrine, with its necessary focus on "whether the anticompetitive scheme is the State's own," *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992), is in no way controlling in the instant case where the alleged anticompetitive scheme was undertaken, not by the state, but instead, by the petitioner.

Numerous cases have addressed both the Parker immunity and the Noerr-Pennington immunity. E.g., *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129 (3d Cir. 1993); *Boone*, 841 F.2d 886 (9th Cir. 1988); *Woods*, 438 F.2d at 1295; and *De Loach*, 2001 U.S. Dist. LEXIS 16909, *44. In each of these cases, the courts, in analyzing the state action immunity, addressed whether the legislature or agency was aware of or intended the consequences of its actions. None of these cases addressed whether the legislature or agency was aware of or intended the consequences of its actions when analyzing the asserted Noerr-Pennington defense.

Respondent filed its motion to dismiss based on Noerr-Pennington immunity; its motion is not based on state action immunity. Thus, case law interpreting the state action doctrine has no bearing on this motion. Complaint Counsel has cited no cases holding that, for purposes of Noerr-Pennington immunity, the government agency must have known that it was being asked to enact a regulation that would restrain trade. Case law interpreting Noerr-Pennington allows deliberate deception in a legislative proceeding where the agency is not solely dependent on the petitioner for information. *Supra* V.B.2. Because Respondent's activities constitute petitioning genuinely undertaken to persuade

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CARB to enact regulations favorable to it and there is no requirement that the agency know what the effect of its legislation will be, Respondent's alleged conduct is protected by Noerr-Pennington.

C. Conduct Alleged in the Complaint Is Not Outside the Reach of Noerr-Pennington

Noerr-Pennington applies only where the "restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action" 365 U.S. at 136. Complaint Counsel argues that the alleged monopolization, attempted monopolization, and restraint of trade in this case is not the result of governmental action, but is instead the result of private action. Specifically, Complaint Counsel argues that the alleged anticompetitive harm at issue flows not from CARB's Phase 2 regulations, but from Respondent's private business conduct in enforcing its patents. Opposition at 4, 18. On this basis, Complaint Counsel argues that Noerr-Pennington does not reach the conduct alleged in the Complaint.

In asserting that the conduct alleged in the Complaint is outside the Noerr-Pennington doctrine, Complaint Counsel argues, first, that this case resembles "sham" cases and *FTC v. Superior Court Trial Lawyers Ass'n* ("SCTLA"), 493 U.S. 411 (1990). Second, Complaint Counsel argues that because the alleged anticompetitive harm flows from the enforcement of patents, the harm in this case is analogous to the harm found to be anticompetitive in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).

1. "Sham" exception and SCTLA

The Supreme Court, in *Noerr*, recognized that antitrust petitioning immunity could be withheld in circumstances where petitioning activity "ostensibly directed toward influencing government action, is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." 365 U.S. at 144. Subsequent decisions have clarified that the

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"sham" exception referred to in *Noerr* is applicable to situations in which persons use the governmental process, as opposed to its outcome, as an anticompetitive weapon. *California Motor Transport*, 404 U.S. at 510 (sham exception where complaint alleged one group of highway carriers sought to bar competitors from meaningful access to adjudicatory tribunals); *Omni Outdoor Advertising*, 499 U.S. at 381 (1991) (no sham exception where defendant set out to disrupt plaintiff's business relationships not through the process of lobbying, but through the ultimate product of that lobbying, the zoning ordinances).

The Complaint does not allege that Respondent attempted to gain monopoly through the use of CARB's process in adopting the Phase 2 RFG regulations. Instead, the Complaint alleges that Respondent sought to and did use the outcome of the government action -- the Phase 2 RFG regulations. F. 29 (Complaint at P44 (CARB Board adopted Phase 2 RFG regulations that set particular standards for the composition of low emissions, reformulated gasoline. Unocal's pending patent claims recited limits for five of the eight properties specified by the regulations.)); F. 30 (Complaint at P45 (CARB adopted Phase 2 RFG regulations that substantially overlapped with Respondent's patent claims.)). See also Complaint at P76 (Respondent "caused CARB to enact regulations that overlapped almost entirely with Unocal's pending patent rights.")).

An effort that results in the adoption of the standards sought by petitioner into statutes and local ordinances "certainly cannot be characterized as a sham" *Allied Tube*, 486 U.S. at 502; *Armstrong Surgical Center*, 185 F.3d at 158 (3rd Cir. 1999) ("The sham petitioning exception does not apply in a case like the one before us where the plaintiff has not alleged that the petitioning conduct was for any purpose other than obtaining favorable government action."). In the instant case, where the Complaint alleges Respondent used the outcome of the government action to its advantage, the sham exception does not apply.

In *SCTLA*, lawyers in private practice who served as court-appointed counsel in the District of Columbia organized a boycott

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in connection with their effort to force the city government to increase fees for court-appointed services. 493 U.S. at 414. Although this boycott otherwise constituted a classic restraint of trade, the lawyers argued that their conduct was protected under Noerr because the objective of the boycott was to obtain favorable legislation. *Id.* at 424. The Supreme Court rejected this argument finding that respondents' agreement to restrain trade was not outside the coverage of the Sherman Act simply because its objective was the enactment of favorable legislation. *Id.*

In SCTL, it did not matter that the result was favorable legislation; what mattered was that horizontal competitors engaged in a concerted refusal to deal and entered into an arrangement designed to obtain higher prices. In the instant case, for Noerr-Pennington purposes, it does matter that the result of Respondent's alleged misconduct is the adoption by CARB of Phase 2 regulations that substantially overlap Respondent's patents. See F. 29, 30. The Complaint alleges that Respondent "obtained unlawful market power through affirmative misrepresentations, materially false and misleading statements, and other bad-faith, deceptive conduct that caused CARB to enact regulations that overlapped almost entirely with Unocal's pending patent rights." Complaint at P76. Because the anticompetitive harm alleged in the Complaint arises from the adoption of regulations that substantially overlap Respondent's patents, the harm arises from governmental action and thus Noerr-Pennington applies.

2. Walker Process

In Walker Process, the question presented was "whether the maintenance and enforcement of a patent obtained by fraud on the Patent Office may be the basis of an action under § 2 of the Sherman Act" Walker Process, 382 U.S. at 173. To the extent that some courts have held that Walker Process is not limited to fraud on the Patent Office, see *Clipper Express*, 690 F.2d at 1260-63 (relying on Walker Process in the context of a ratemaking proceeding); *Whelan*, 48 F.3d at 1255-58 (relying on Walker Process in the context of a complaint filed with state

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securities commissioner and a lawsuit filed in federal district court), those cases arose in a context in which the state action at issue was quasi-adjudicatory and dependent on the petitioner for factual information and thus, as set forth above in Section V.B.2. *supra*, are distinguishable from the instant case.

Complaint Counsel argues that this case is like *Walker Process* because the alleged competitive harm flows from private conduct - the defendant's efforts to enforce the patent - rather than from the governmental action itself. Opposition at 17. However, in *Walker Process*, the Supreme Court held that "proof that Food Machinery obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office" would be sufficient to strip Food Machinery of its exemption from the antitrust laws. 382 U.S. at 177 (emphasis added). Thus, the focus was on the fraud on the Patent Office in the procurement of patents.

In *Walker Process*, there could be no harm from the enforcement of a patent if the Patent Office had never issued the patent. Here, there could be no harm from the enforcement of Respondent's patents if CARB had not enacted the Phase 2 regulations that substantially overlapped with CARB's patents. Complaint at P92 ("The extensive overlap between the CARB RFG regulations and the Unocal patent claims makes avoidance of Unocal patent claims technically and/or economically infeasible."); F. 62 (Complaint at P93) (Refiners in California invested billions of dollars in sunk capital investments in order to comply with the CARB Phase 2 RFG regulations.). Thus, it is not solely private conduct - Respondent's enforcement of its valid patents - that caused the anticompetitive harm alleged. Because the alleged harm stems from the cost of compliance with CARB's regulations that substantially overlap Respondent's patents, the restraint of trade is the result of valid governmental action and *Noerr-Pennington* applies.

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D. Noerr-Pennington Immunity is Available in Actions Brought Under Section 5 of the FTC Act

Complaint Counsel argues that "Noerr does not apply to actions brought under Section 5 of the FTC Act." Opposition at 33. As set forth below, while Noerr-Pennington was developed as an immunity to the Sherman Act, the underlying rationale for immunity is equally applicable in unfair competition cases brought under the FTC Act. Further, in later Supreme Court cases, discussed *infra*, Noerr-Pennington immunity has been extended more generally to antitrust cases and in other contexts. Moreover, Commission opinions and courts have applied the Noerr-Pennington doctrine to cases alleging violations of Section 5 of the FTC Act on numerous occasions.

In Noerr, the Supreme Court's "starting point" for consideration of the case was "that no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 136. Immunity from antitrust liability was based, in part, on the Constitutional right to "petition the Government for redress of grievances," U.S. Const. amend I, cl. 6. "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." Noerr, 365 U.S. at 138.

The Supreme Court further held:

Insofar as the [Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity The proscriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we

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permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.

Id. at 140-41. The concerns that the Supreme Court had with Congress limiting the right to petition through the enactment of the Sherman Act must be of equal concern with respect to Congress limiting the right to petition through the enactment of the FTC Act.

Indeed, the Commission has argued as much in a brief filed with the Court of Appeals for the Ninth Circuit in *Rodgers v. Federal Trade Commission*, 492 F.2d 228 (9th Cir. 1974):

"The proscriptions of Section 5 of the FTC Act, as we view them, like the proscriptions of the Sherman Act, are tailored for the business world, not for the political arena

Even assuming a wrongful motive . . . and the willful use of distortion or deception, it is our view that actionable violation of Section 5 of the FTC Act is not indicated due to the overriding public interest in preservation of uninhibited communication in connection with political activity with legislative processes."

Id. at 230 (quoting Letter of Charles A. Tobin, Secretary, Federal Trade Commission, to William H. Rodgers, Jr., Jan. 26, 1971, in Brief of Appellant, Appendix at 10, 11-12). The Court of Appeals accepted the Commission's argument and upheld the Commission's reliance on Noerr to determine that action on the complaint was not warranted. *Rodgers*, 492 F.2d at 230.

The Noerr-Pennington doctrine has not been strictly limited to Sherman Act cases, but has been characterized by the Supreme Court as applying more broadly to "antitrust laws." See *Omni Outdoor Advertising*, 499 U.S. at 380 (citing *Noerr*, 365 U.S. at

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141). "Those who petition government are generally immune from antitrust liability." *Professional Real Estate Investors*, 508 U.S. at 56 (emphasis added). In *Professional Real Estate Investors*, the Supreme Court, including in its authority a case brought under Section 5 of the FTC Act, implied that Noerr is not strictly limited to Sherman Act cases. "Whether applying Noerr as [*111] an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham." 504 U.S. at 59 (citing *SCTLA*, 493 U.S. at 424; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913-14 (1982)).

It is appropriate to apply Noerr-Pennington, whether as an antitrust doctrine or "in another context," to the allegations of this Complaint. The very first allegation of the Complaint, describing the "Nature of the Case," illustrates that Respondent is charged with engaging in acts and practices that, if not shielded by Noerr-Pennington, could provide the basis for antitrust liability under Section 2 of the Sherman Act. 15 U.S.C. § 2 (monopolization; attempted monopolization).

Through a pattern of anticompetitive acts and practices that continues even today, Unocal has illegally monopolized, attempted to monopolize, and otherwise engaged in unfair methods of competition in both the technology market for the production and supply of CARB-compliant 'summer-time' RFG and the downstream CARB 'summer-time' RFG product market.

Complaint at P1. All five violations in the Complaint charge Respondent with "acts and practices [that] constitute unfair methods of competition in violation of Section 5 of the FTC Act." The Commission and courts routinely analyze causes of actions challenging unfair methods of competition through antitrust principles. *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 369 (1965) ("When conduct does bear the characteristics of recognized antitrust violations it becomes suspect, and the

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Commission may properly look to cases applying those laws for guidance."); *In re American Med. Assoc.*, 94 F.T.C. 701, 994 (1979) ("It is instructive to look at cases construing the Sherman Act for initial guidance as to the reach of Section 5."). Thus, even though the doctrine was developed in cases alleging violations of the Sherman Act, it is appropriate and logical to apply the Noerr-Pennington doctrine of immunity from antitrust liability to a case alleging unfair methods of competition in violation of the FTC Act.

Complaint Counsel argues that the Supreme Court's decision in *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002) compels the conclusion that Noerr-Pennington does not apply to cases brought under the FTC Act. In *BE & K Constr.*, the Supreme Court declined to extend "antitrust immunity principles" to unsuccessful retaliatory lawsuits filed under the National Labor Relations Act. 536 U.S. at 525-33. Contrary to the situation in *BE & K*, in the instant case, "antitrust immunity principles" are appropriately applied in a case alleging causes of action that could also state a claim under Sections 1 and 2 of the Sherman Act.

Despite Complaint Counsel's assertion that "no court has held that Noerr's narrow exception to Sherman Act liability applies to Section 5 of the FTC Act," *Sur-reply* at 30, courts have analyzed the Noerr-Pennington defense in Section 5 cases. E.g., *Ticor Title Ins.*, 998 F.2d at 1138; *Rodgers*, 492 F.2d at 228-29 (accepting Commission argument that Noerr doctrine is applicable to FTC Act). Both the Commission and the Supreme Court applied the Noerr-Pennington doctrine to the alleged violations of Section 5 of the FTC Act in *In re Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 590 (1984), vacated by 856 F.2d 226, rev'd in part, and remanded by, 493 U.S. 411 (1990). The Commission stated, "if the respondents' activity had been limited to 'mere attempts to influence the passage of enforcement of laws,' *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. at 135, then the respondents would merit the protection of the First Amendment under Noerr and succeeding cases." 107 F.T.C. at 590. The Commission then held, "we think that Noerr and Pennington alone provide sufficient guidance for our conclusion

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that First Amendment immunity should not extend to the kind of conduct in which the respondents have engaged." *Id.* at 594.

The Supreme Court also utilized Noerr principles to determine whether there was immunity from antitrust liability in *FTC v. Superior Court Trial Lawyers*, 493 U.S. 411 (1990). Thus, though not explicit in holding that Noerr-Pennington applies to actions brought under the FTC Act, by application of the doctrine to the allegations of violations of the FTC Act, SCTLA makes clear that Noerr-Pennington immunity is fully available in FTC Act cases.

In numerous other opinions, the Commission has analyzed whether respondents have asserted valid Noerr-Pennington defenses to Section 5 causes of action. E.g., *In re Ticor Title Ins. Co.*, 112 F.T.C. 344, 460-64 (1989) (holding the Noerr defense inapplicable to the facts, but stating that if respondents had instead agreed on a political advocacy campaign to convince the state to adopt or change a ratemaking policy, such activity would be protected under Noerr-Pennington); *In re New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 283-85 (1989) (the Noerr-Pennington doctrine "shields from antitrust scrutiny concerted efforts by competitors to petition government officials"); *In re Michigan State Med. Soc'y*, 101 F.T.C. 191, 296-301 (1983) (applying Noerr-Pennington to facts and holding that respondents' activities constituted illegal conduct that fell outside the protective shield of Noerr-Pennington). In none of these cases did the Commission hold that Noerr-Pennington defenses were not available to respondents in FTC Act cases. Indeed, Complaint Counsel has cited no cases so holding.

Because Supreme Court and Commission precedent establish that the Noerr-Pennington doctrine is a defense to antitrust liability and have applied the doctrine in Section 5 cases, Complaint Counsel's unsupported argument that Noerr-Pennington should not be available where the remedy sought is an order requiring Respondent to cease and desist from enforcing its patents, in other words, de facto invalidation of Respondent's patents, rather than the "chilling" treble damages allowed under the Sherman Act, does not withstand scrutiny. For the same

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reason, Complaint Counsel's argument that the "unitary nature" of the FTC Act precludes application of the Noerr-Pennington doctrine to cases brought under the FTC Act, also does not withstand scrutiny. Again, without citation, Complaint Counsel argues that because the FTC Act applies to the closely associated areas of "unfair methods of competition" and "unfair or deceptive practices," it would be incongruous to allow the Commission to prevent unfair or deceptive acts or practices to the full extent constitutionally permitted by the First Amendment, but prevent unfair methods of competition only to the extent permitted by antitrust principles. Opposition at 33-34. Complaint Counsel has cited no cases indicating that causes of action challenging unfair methods of competition are required to be analyzed by case law relating to causes of action challenging unfair and deceptive practices rather than antitrust law.

To hold that the Noerr-Pennington doctrine does not apply to Section 5 of the FTC Act, where the Commission has asserted to the contrary in another case, and where no other court or Commission opinion has so held, would be inappropriate and unfair. Accordingly, Noerr-Pennington immunity is fully available in this case alleging unfair methods of competition in violation of Section 5 of the FTC Act.

E. Respondent's Conduct Before Private Industry Groups

The Complaint alleges that Respondent participated in two private industry groups, the Auto/Oil Air Quality Improvement Research Program ("Auto/Oil Group") and the Western States Petroleum Association ("WSPA"), which conducted research on automobile emissions and reported their findings to the government. F. 38-40, 44 (Complaint at PP50-52, 56). The Complaint alleges that Respondent made statements to the Auto/Oil Group and to WSPA that were materially false and misleading in that they failed to disclose Unocal's proprietary interests in its emissions research results and Unocal's intention to enforce its intellectual property rights. F. 42, 46, 48 (Complaint at PP58, 59, 82); see also Complaint at P85. In its opposition to the motion to dismiss on Noerr-Pennington grounds, Complaint

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Counsel asserts that: (1) Respondent's misrepresentations to Auto/Oil Group and WSPA are not covered by any petitioning privilege; and (2) Respondent's misrepresentations to Auto/Oil Group and WSPA form an independent basis for liability. Opposition at 35-37.

To the extent that Respondent's statements to Auto/Oil Group and WSPA were part of Respondent's alleged scheme to induce CARB to act, as alleged in the Complaint, this conduct is political petitioning protected by Noerr-Pennington. To the extent that Respondent made statements to Auto/Oil Group and WSPA independent of its alleged scheme to induce CARB to act, these allegations involve substantial issues of patent law and, thus, do not state an independent cause of action over which the Commission has jurisdiction as alleged in the Complaint.

1. Indirect petitioning

According to the allegations of the Complaint, Respondent made knowing and willful misrepresentations to the Auto/Oil Group and to WSPA and subverted the Auto/Oil Group's and WSPA's process of providing accurate and nonproprietary research data and information to CARB. F. 20 (Complaint at P35 (Unocal participated in industry groups that provided input into the CARB regulations)); Complaint at PP84, 89 (Unocal subverted the Auto/Oil Group's and WSPA's process of providing accurate and nonproprietary research data and information to CARB)). The Complaint does not allege that the Respondent prevented the Auto/Oil Group or WSPA from communicating with CARB.

Misrepresentations to third parties as a means of influencing the government's passage of laws fall within the bounds of Noerr-Pennington. In Noerr, the railroads' use of "the so-called third party technique," involved deception of the public, manufacture of bogus sources of reference, and distortion of public sources of information. Noerr, 365 U.S. at 140-42 (holding such conduct, "so far as the Sherman Act is concerned, legally irrelevant"). In Allied Tube, the Supreme Court held that a "claim of Noerr immunity

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cannot be dismissed on the ground that the conduct at issue involved no 'direct' petitioning of government officials, for Noerr itself immunized a form of 'indirect' petitioning." *Allied Tube*, 486 U.S. at 503.

To determine whether Noerr immunizes anticompetitive activity intended to influence the government requires an evaluation not only of its impact, but also of the context and nature of the activity. *Allied Tube*, 486 U.S. at 504. Here, it is clear from the allegations of the Complaint that Respondent's actions with respect to the Auto/Oil Group and WSPA were part of an alleged scheme to induce these third parties to influence CARB. F. 44 (Complaint at P56 (During the CARB Phase 2 RFG rulemaking proceedings, Unocal actively participated in WSPA, which actively participated in the CARB RFG rulemaking process; WSPA commissioned, and submitted to CARB, three cost studies in connection with the CARB Phase 2 RFG rulemaking.)); Complaint at P87 (Unocal participated in WSPA committees that discussed the potential cost implications of the CARB Phase 2 RFG regulations; Unocal knew that royalties were considered in a cost study commissioned by WSPA for submission to CARB)); Complaint at PP84, 89 (Respondent's deceptive conduct subverted Auto/Oil's and WSPA's process of providing accurate and nonproprietary research data and information to CARB.)); Complaint at P90 (But for Unocal's fraud, these participants in the rulemaking process would have taken actions including, but not limited to, advocating that CARB adopt regulations that minimized or avoided infringement on Unocal's patent claims, or advocating that CARB negotiate license terms substantially different from those that Unocal was later able to obtain.)).

This case is different from the context and nature of the private standard setting process evaluated in *Allied Tube*. There, where the anticompetitive harm was found to be a result of an implicit agreement by the private standard setting association's members not to trade in a certain type of electrical conduit, the Supreme Court held that the context and nature of the conduct was "more aptly characterized as commercial activity with a

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political impact." 486 U.S. at 507. While Allied Tube does state, as quoted by Complaint Counsel (Sur-reply at 25), "the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone sufficient to render that activity immune from antitrust liability[,]" this quote must be put in context. It was only after finding that the anticompetitive conduct was commercial activity, the Supreme Court held, "at least outside the political context, the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone sufficient to render that activity immune from antitrust liability." 486 U.S. at 507 (emphasis added). But in the instant case, where according to the Complaint, Respondent's conduct was part of its attempt to influence governmental action and where the anticompetitive harm results from CARB's adoption of Phase 2 RFG regulations that "substantially overlap[] with Unocal's concealed patent claims" (Complaint at P45), the "antitrust laws should not regulate political activities 'simply because those activities have a commercial impact.'" 486 U.S. at 507 (quoting Noerr, 356 U.S. at 141). Thus, because Respondent's alleged misconduct occurred within the political context, Noerr immunity extends to protect this conduct.

Nor is this case like *California Motor Transport*, where petitioners were alleged to have "instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases." 404 U.S. at 512. The Supreme Court held that those actions served to deny plaintiffs free and unlimited access to administrative and judicial tribunals. *California Motor Transport*, 404 U.S. at 509, 511. In *Omni Outdoor Advertising*, the Supreme Court described *California Motor Transport* as limited to the "context in which the conspirators' participation in the governmental process was itself claimed to be a 'sham,' employed as a means of imposing cost and delay." *Omni Outdoor Advertising*, 499 U.S. at 381-82 (quoting *California Motor Transport*, 404 U.S. at 512). The Supreme Court, in *Omni Outdoor Advertising*, explained as follows:

Any lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means

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to get his opponent ignored. Policing the legitimate boundaries of such defensive strategies, when they are conducted in the context of a genuine attempt to influence governmental action, is not the role of the Sherman Act. In the present case, of course, any denial to Omni of "meaningful access to the appropriate city administrative and legislative fora" was achieved by COA in the course of an attempt to influence governmental action that, far from being a "sham," was if anything more in earnest than it should have been. If the denial was wrongful there may be other remedies, but as for the Sherman Act, the Noerr exemption applies.

Omni Outdoor Advertising, 499 U.S. at 382. In the instant case, where it is clear from the allegations of the Complaint that Respondent's alleged conduct with respect to the Auto/Oil Group and WSPA was part of a scheme to influence CARB, Respondent's conduct with respect to these third parties falls within Noerr's protection.

**2. Conduct directed at Auto/Oil Group and WSPA
separate from conduct directed at CARB**

To the extent that the alleged misrepresentations made to the Auto/Oil Group and to WSPA were not part of Respondent's scheme to solicit favorable governmental action, the allegations of misconduct directed toward the Auto/Oil Group and WSPA, independent of the conduct directed toward CARB alleged in the Complaint, do not state an independent cause of action as a violation of Section 5 of the FTC Act over which the Commission has jurisdiction. Respondent, in its motion for dismissal of the Complaint for failure to make sufficient allegations that Respondent possesses or dangerously threatens to possess monopoly power ("Market Power Motion"), asserts that the Commission does not have jurisdiction to decide patent issues. The scope of Respondent's patents and whether or not third parties could have invented around these patents and whether any such newly created products or methods could have avoided

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infringement is called directly into question by the allegations of the Complaint regarding Respondent's conduct towards Auto/Oil Group and WSPA. Thus, in order to fairly and completely resolve the factual and legal allegations of the Complaint, an in depth analysis of substantial issues of patent law would be required.

(i) Allegations relating to conduct separate from conduct directed at CARB

After the conclusion that the steps that Respondent took, whether direct or indirect, to solicit CARB's adoption of the Phase 2 regulations were political petitioning conduct, immunized by Noerr-Pennington, the remaining allegations of the Complaint are as follows:

Throughout all of its communications and interactions with Auto/Oil prior to January 31, 1995, Unocal failed to disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties. Complaint at P83.

By deceptive conduct that included, but was not limited to, false and misleading statements concerning its proprietary interests in the results of its emissions research results, Unocal violated the letter and spirit of the Auto/Oil Agreement and breached its fiduciary duties to the other members of the Auto/Oil joint venture. Complaint at P84.

Throughout all of its communications and interactions with WSPA prior to January 31, 1995, Unocal failed to disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties. Complaint at P88.

By deceptive conduct that included, but was not limited to, false and misleading statements

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concerning its proprietary interests in the results of its emissions research results, Unocal breached its fiduciary duties to the other members of WSPA. Complaint at P89.

But for Unocal's fraud, these participants in the rulemaking process [Auto/Oil Group and WSPA] would have taken actions including, but not limited to . . . incorporating knowledge of Unocal's pending patent rights in their capital investment and refinery reconfiguration decisions to avoid and/or minimize potential infringement. Complaint at P90(c).

In its opposition to the Noerr-Pennington motion to dismiss, Complaint Counsel argues that even if CARB had enacted Phase 2 knowing that the regulations substantially overlapped with Respondent's patents, the oil companies could have avoided significant harm, had Respondent not duped them independently through its fraudulent, inequitable, and bad-faith business conduct. Opposition at 36.

(ii) No independent basis for liability

The allegations in the Complaint pertaining to Respondent's conduct towards Auto/Oil Group and WSPA, separate from its alleged scheme to influence CARB, (PP83, 84, 88, 89) do not establish a legally cognizable independent cause of action under Section 5 of the FTC Act over which the Commission has jurisdiction. The issue of whether or not Respondent had a fiduciary duty arising under Section 5 of the FTC Act towards WSPA or Auto/Oil Group or breached any such duty is not reached. As discussed in detail *infra*, there is no set of facts alleged in the Complaint that could establish that any antitrust injury or harm was caused from any breach of such duty without a thorough analysis of numerous substantial patent law issues.

CARB passed regulations substantially overlapping with Unocal's patents. F. 30, 53 (Complaint at PP45, 64). See also F. 29 (Complaint at P44) (Respondent's patent claims recite limits

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for five of the eight properties specified by the Phase 2 RFG regulations: T50, T90, olefins, aromatics, and RVP.). There is no set of facts alleged in the Complaint that, if established, would prove that anticompetitive injury and resulting harm to the Auto/Oil Group and WSPA resulted from the alleged misconduct directed at the Auto/Oil Group and WSPA, instead of from CARB's enactment of Phase 2 regulations and Respondent's subsequent enforcement of its patent rights. To the contrary, the Complaint alleges harm that resulted from compliance with the Phase 2 RFG regulations. F. 62 (Complaint at P93 (refiners invested billions of dollars in order to comply with the CARB Phase 2 RFG regulations. These refiners cannot produce significant volumes of non-infringing CARB-compliant gasoline without incurring substantial costs.)). See also Complaint at P92 ("extensive overlap between the CARB RFG regulations and the Unocal patent claims makes avoidance of the Unocal patent claims technically and/or economically infeasible"). Any alleged harm beyond that caused by CARB's regulations cannot be determined without knowing the scope of Respondent's patents, whether or not Auto/Oil Group and WSPA could have invented around these patents, and whether any such newly created products or methods could have avoided infringement. Accordingly, to find any other harm, as alleged, would require the substantial patent law analysis discussed herein and thus, logically, the issue of other harm can not be reached.

(iii) Allegations raise substantial patent issues

To analyze whether the allegations of the Complaint state an independent cause of action separate from the alleged violations stemming from Respondent's efforts to get CARB to adopt regulations favorable to Respondent would require a resolution of substantial patent issues. Complaint at PP83, 88 (Respondent failed to disclose that it had pending patent rights and that its patent claims overlapped with the proposed RFG regulations.); Complaint at PP84, 89 (Respondent made false and misleading statements concerning its proprietary interests.); Complaint at P90(c) (Auto/Oil Group and WSPA would have incorporated knowledge of Unocal's pending patent rights in their capital

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investment and refinery reconfiguration decisions to avoid and/or minimize potential infringement.) (Emphases added). To properly determine whether there is any set of facts that, if proven, could support these allegations would require an in depth and thorough analysis of what Respondent's "proprietary interests" were, which "proprietary interests" were and were not included in any patent, what was patented, what was not patented, the scope of Respondent's patents, the scope of any competitor's patents, whether any competitor products or methods exist or could be invented, whether any of the competitor products or methods that could be created or invented infringed, and whether refineries could be reconfigured so as to avoid or minimize infringement of Respondent's patents.

These are fundamental and substantial patent issues, as defined by the Supreme Court in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988). There, the Supreme Court held that a case arises under federal patent law when the "plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims." *Id.* at 808. Whether a claim "arises under" patent law "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." *Christianson*, 486 U.S. at 809 (citations omitted) (claim did not arise under patent law where complaint only obliquely hinted at patent law issues). In the instant case, as discussed herein, allegations of the Complaint do more than obliquely hint at patent law issues. After a determination that Noerr-Pennington immunizes Respondent's conduct before CARB, what appears in the Complaint, particularly paragraph 90(c), -- third parties would have incorporated knowledge of Unocal's pending patent rights in their capital investment and refinery reconfiguration decisions to avoid and/or minimize potential infringement -- plainly alleges a claim under patent law in that patent law is a necessary element of the claims. There is no fair way to determine whether any "reconfiguration decisions" would "avoid and/or minimize

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potential infringement" without a determination of non-infringement. As discussed below, infringement and non-infringement are clearly fundamental and substantial patent issues.

(iv) Federal courts decide substantial patent issues

The determination of the scope of the federally created property right is a substantial question of federal patent law. *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1330 (Fed. Cir. 1998) (infringement is a substantial issue in the federal scheme for it determines what is the scope of the federally created property right), rev'd in part on other grounds, *Midwest Ind., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999). See also *U.S. Valves, Inc. v. Dray*, 190 F.3d 811, 814 (7th Cir. 1999) (the only way to determine whether a product is covered by the licensed patents is to apply substantive patent law). Where a court must "interpret the validity and scope of a particular patent," a claim arises under patent law. *Boggild & Dale v. Kenner Products*, 853 F.2d 465, 468 (6th Cir. 1988).

The authority to decide questions of patent law arises solely under 28 U.S.C. § 1338(a), which confers original jurisdiction over patent law questions upon the federal courts. The statute gives federal district courts original jurisdiction over "any civil action arising under any Act of Congress relating to patents," and further provides that "such jurisdiction shall be exclusive of the courts of the states in patent . . . cases." 28 U.S.C. § 1338(a). See also *Scherbatskoy v. Halliburton Co.*, 125 F.3d 288 (5th Cir. 1997) ("Section 1338(a) grants exclusive jurisdiction to the federal district courts in cases arising under the patent laws") (emphasis added).

Complaint Counsel argues that Section 1338 operates only to preclude state courts, not federal agencies, from asserting jurisdiction over cases arising under the patent laws. Market Power Opposition at 26. Complaint Counsel further argues that because the statute explicitly prohibits state court jurisdiction, "the canon of statutory interpretation of *expressio unis est*

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exclusio alterius teaches that the mention of one thing (i.e., state courts) implies that Congress chose not to exclude agencies from hearing patent cases." Market Power Opposition at 27. Under this logic, one could infer, albeit not reasonably, that Congress chose not to exclude municipal courts, tax courts, the Court of Claims, etc. from hearing patent cases. Moreover, the Federal Circuit has held that this jurisdictional question arises not only in determining if state law claims are preempted, but also with respect to determining whether there is a conflict with other federal law. *Midwest Ind., Inc.*, 175 F.3d at 1357 (Federal Circuit will apply federal patent law and precedent "in determining whether patent law conflicts with other federal statutes or preempts state law causes of action."), rev'd in part on other grounds by *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001). E.g., *Helfgott & Karas, P.C. v. Director of the United States Patent and Trademark Office*, 209 F.3d 1328, 1334 (Fed. Cir. 2000) (The question of whether the Commissioner of the Patent and Trademark Office has violated the Administrative Procedure Act raises a substantial question under the patent laws sufficient to vest jurisdiction with the district court based in part upon 28 U.S.C. 1338(a).).

(v) Commission without jurisdiction as Complaint is alleged

While the FTC may have jurisdiction over cases that "touch on patent law," as argued by Complaint Counsel, (Market Power Opposition at 4), the FTC has no jurisdiction over the allegations in this Complaint that depend on and require the resolution of substantial questions of federal patent law. In *Decker v. FTC*, 176 F.2d 461 (D.C. Cir. 1949), the FTC charged respondents with unfair and deceptive acts with regard to misrepresentations about the functions of respondent's product. Respondents asserted that the alleged misrepresentations were substantially like the statements that were included in the patent application, and thus respondents challenged the jurisdiction of the Commission on grounds that the proceedings were, in effect, an attack upon the patent itself. The Court of Appeals for the District of Columbia Circuit disagreed: "the proceedings before the FTC related only to

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advertising. They did not draw into question the validity of the patent grant. Hence the case is not one arising under the patent laws, cognizable only in district court." *Id.* at 463.

Here, unlike in *Decker*, a finding of liability based upon Respondent's conduct towards the Auto/Oil Group and WSPA can be made only upon a determination of what were Respondent's proprietary interests, what was patented, what was not patented, and whether third parties could have, in their capital investment and refinery reconfiguration decisions, avoided and/or minimized potential infringement, and whether any competing patents existed or would be valid and would not infringe. These issues draw into question the very scope of Respondent's patents and whether third parties can compete without infringing. Hence, unlike in *Decker*, the allegations here arise under the patent laws, cognizable only in federal district court. To be fair to all parties involved, a determination of the scope of Respondent's patents and any other competing, similar, or overlapping patents would be required. Due process demands that the issues raised in the allegations of the Complaint, entangled in numerous patent issues, be thoroughly and completely examined and resolved. Without such analysis and reference to federal patent law, any evidence presented would be speculative, incomplete, and not sufficient to fairly resolve the issues raised in this case.

The Federal Trade Commission is limited to the exercise of those specific powers granted to it by the Federal Trade Commission Act. *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957). Under the FTC Act, the Commission has jurisdiction to prevent unfair methods of competition and unfair or deceptive practices. 15 U.S.C. § 45. Nothing in either the language of the FTC Act or its legislative history contemplates that the Commission would exercise jurisdiction over substantial questions of federal patent law. No case was cited to, nor found, that held that the Commission has jurisdiction to decide causes of action arising under patent laws.

In *American Cyanamid*, the Commission issued a cease and desist order based on a finding that the respondent's inequitable

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conduct before the Patent and Trademark Office constituted a violation of Section 5 of the FTC Act. *American Cyanamid*, 63 F.T.C. 1747, 1855-57 (1963), vac. on other grounds, 363 F.2d 757 (6th Cir. 1966), on rehearing, 72 F.T.C. 623 (1967), aff'd sub nom., *Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968). The Commission held that there is nothing within 28 U.S.C. § 1338(a) which would prevent the Commission from investigating methods of unfair competition before the Patent Office. 63 F.T.C. at 1857. On appeal to the Sixth Circuit, the Court of Appeals held that the Commission has jurisdiction to determine whether conduct before the Patent Office resulting in the issuance of a patent, and the subsequent use of the fruits of such conduct, may constitute a violation of Section 5 of the FTC Act. 363 F.2d at 771.

Unlike *American Cyanamid*, this Complaint does not challenge conduct before the Patent Office, where "Pfizer and Cyanamid, like all other applicants, stood before the Patent Office in a confidential relationship and owed the obligation of frank and truthful disclosure." *Pfizer*, 401 F.2d at 579. Unlike the allegations in the instant matter, *American Cyanamid* did not require an examination of scope and infringement issues. 363 F.2d at 769. Here, there are allegations requiring an examination of the scope of patents and infringement or avoidance thereof. Accordingly, if a fair and complete analysis of the allegations and violations of law is to be done, a resolution of the allegations in this Complaint goes far beyond what was required in *American Cyanamid*. Because questions of possible patent infringement and scope must be resolved in the instant case, these substantial questions of federal patent law vitiate jurisdiction under Section 5 of the FTC Act as this case is alleged.

Complaint Counsel also relies on *In re VISX, Inc.*, Docket No. 9286, 1999 WL 33577396, Initial Decision (filed May 27, 1999), and the Commission's recent proposed consent agreement in *Bristol-Myers Squibb* for the proposition that the Commission may examine antitrust considerations relating to patent law. *Market Power Opposition* at 24. To the extent that the Administrative Law Judge in *VISX* construed patent and patent

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issues in the initial decision, that initial decision was not appealed and was, in fact, dismissed. Subsequent to the issuance of that initial decision, complaint counsel filed a motion to dismiss the complaint in which complaint counsel asked the Commission to expressly state that the Commission does not adopt the initial decision. In re VISX, Inc., Docket No. 9286, (motion filed December 1, 1999) (available at www.ftc.gov/os/adjpro/d9286/index.htm). By order of the Commission, dated February 7, 2001, the Commission dismissed the complaint. In addition, the Commission's recent proposed consent decree in Bristol-Meyers Squibb, relied upon by Complaint Counsel, provides no precedential value. "The circumstances surrounding . . . negotiated [consent decrees] are so different that they cannot be persuasively cited in a litigation context." E.I. du Pont, 366 U.S. at 330 n.12. Indeed, the consent decree itself acknowledges, "[a] consent order is for settlement purposes only and does not constitute an admission of a law violation." Bristol-Myers Squibb, Co., File Nos. 001 0221, 011 0046, and 021 0181 (F.T.C. March 7, 2003) (available at www.ftc.gov/opa/2003/03/bms.htm).

(vi) Complaint Counsel has burden of proof

Complaint Counsel, as the party required to assert jurisdiction, bears the burden of proving subject matter jurisdiction. *Kokkonen*, 511 U.S. at 377; *In re R.J. Reynolds Tobacco Co., Inc.*, 111 F.T.C. at 541, 549 n.17 (plaintiff bears burden of proving subject matter jurisdiction and failure to meet that burden requires dismissal of the proceeding). As this case is alleged in the Complaint, there is no set of facts that Complaint Counsel could prove to demonstrate that the Commission has jurisdiction to resolve these claims arising under patent law. An analysis of the conduct alleged in the Complaint that was directed at Auto/Oil Group and WSPA would require a resolution of substantial issues arising under patent law. Because the Commission does not have jurisdiction to adjudicate the scope of Respondent's patents and whether the third parties could compete with other products or methods without infringing on valid patents, the allegations of the

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Complaint with respect to Respondent's conduct towards Auto/Oil Group and WSPA are dismissed.

VI. CONCLUSION

For the above stated reasons, Respondent's motion to dismiss the Complaint based upon immunity under Noerr-Pennington is **GRANTED IN PART** as to all violations alleged and all allegations of the Complaint, except the allegations of Respondent's conduct directed toward Auto/Oil Group and WSPA, independent of the conduct directed toward the CARB.

As stated above, the allegations of Respondent's conduct directed toward Auto/Oil Group and WSPA, independent of the conduct directed toward CARB, requires resolution of the substantial patent issues which are entangled in and raised by the allegations and violations of the Complaint. Respondent's motion to dismiss for failure to make sufficient allegations that Respondent possesses or dangerously threatens to possess monopoly power is **GRANTED IN PART** to the extent that the Commission lacks jurisdiction to decide the fundamental and substantial patent issues raised by the allegations of the Complaint. The remainder of Respondent's Market Power Motion is **DENIED WITHOUT PREJUDICE**.

As discussed in detail above, no allegations or violations of the Complaint remain and the Complaint in Docket 9305 is dismissed in its entirety.

VII. SUMMARY OF CONCLUSIONS OF LAW

1. Respondent Union Oil Company of California ("Unocal") is a corporation, as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

2. Respondent is engaged in commerce and affected commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

Initial Decision

3. Pursuant to Section 5 of the FTC Act, the FTC has jurisdiction over the subject matter of this proceeding, except as to the claims raised in the Complaint arising under patent law.

4. Official notice is taken of the statutes governing the California Air Resources Board ("CARB"), the Notice of Public Hearing through which CARB initiated the rulemaking, and the Final Statement of Reasons for Rulemaking, all of which are beyond dispute and have not been disputed.

5. Complaint Counsel bears the burden of showing that the Noerr-Pennington doctrine does not immunize Respondent's conduct alleged in the Complaint.

6. Complaint Counsel bears the burden of showing that the FTC has jurisdiction on all violations of law alleged in the Complaint.

7. Noerr-Pennington immunizes Respondent's efforts to induce CARB to adopt regulations on low emissions, reformulated gasoline ("RFG").

8. CARB's Phase 2 RFG rulemaking process was a legislative exercise.

9. CARB was not wholly dependent on the Respondent for information during the RFG rulemaking process.

10. Noerr-Pennington immunity exists even if CARB did not know that it was being asked to enact a regulation that would restrain trade.

11. The restraint of trade or monopolization alleged in the Complaint is the result of valid governmental action, CARB's adoption of Phase 2 regulations that substantially overlapped with Respondent's patent claims.

12. The sham petitioning exception does not apply in this case.

Initial Decision

13. The Walker Process exception does not apply in this case.

14. The Noerr-Pennington doctrine provides immunity in this case alleging unfair methods of competition under Section 5 of the FTC Act.

15. To the extent that Respondent's alleged conduct towards Auto/Oil Group and WSPA were part of Respondent's scheme to induce CARB to act, it constitutes indirect petitioning protected by Noerr-Pennington.

16. There is no set of facts alleged in the Complaint that, if established, would prove that anticompetitive injury and resulting harm to the Auto/Oil Group and WSPA resulted from the alleged misconduct directed at the Auto/Oil Group and WSPA, instead of from CARB's enactment of Phase 2 regulations and Respondent's subsequent enforcement of its patent rights.

17. There is no set of facts alleged in the Complaint that could establish that any antitrust injury or harm was caused from any breach of a fiduciary duty without a thorough analysis of substantial patent law issues.

18. To determine whether there is any set of facts that, if proven, could support the allegations of conduct directed at Auto/Oil Group and WSPA separate from the alleged violations stemming from Respondent's efforts to get CARB to adopt regulations favorable to Respondent would require an in depth and thorough analysis of what Respondent's "proprietary interests" were, which "proprietary interests" were and were not included in any patent, what was patented, what was not patented, the scope of Respondent's patents, the scope of any competitor's patents, whether any competitor products or methods exist or could be invented, whether any of the competitor products or methods that could be created or invented infringed, and whether refineries could be reconfigured so as to avoid or minimize infringement of Respondent's patents.

Initial Decision

19. The scope of Respondent's patents, the scope of any competitor's patents, whether any of the competitor products or methods that could be created or invented infringed, and whether refineries could be reconfigured so as to avoid or minimize infringement of Respondent's patents are issues raised by the allegations of the Complaint and are substantial patent law issues.

20. Due process and fairness require that the issues raised in the allegations of the Complaint, entangled in numerous patent issues, be thoroughly and completely examined and resolved.

21. The FTC has no jurisdiction over the allegations in this Complaint in Docket 9305 that depend on the resolution of substantial questions of federal patent law.

22. Complaint Counsel can prove no set of facts in support of its Complaint in Docket 9305 that would entitle it to relief.

ORDER

For the reasons stated above,

IT IS ORDERED that Respondent's Motion to Dismiss the Complaint Based Upon Immunity Under Noerr-Pennington is GRANTED IN PART as to all violations alleged and all allegations of the Complaint, except the allegations of Respondent's conduct directed toward Auto/Oil Group and WSPA, independent of the conduct directed toward the CARB.

IT IS ORDERED that Respondent's Motion to [*146] Dismiss the Complaint for Failure to Make Sufficient Allegations That Respondent Possesses or Dangerously Threatens to Possess Monopoly Power is GRANTED IN PART as to all violations alleged with respect to the allegations of Respondent's conduct directed toward Auto/Oil Group and WSPA, independent of the conduct directed toward CARB. The remainder of Respondent's Market Power Motion is DENIED WITHOUT PREJUDICE.

Initial Decision

IT IS ORDERED that all violations of the Complaint be, and hereby are, dismissed.

Complaint

IN THE MATTER OF

**ROBERT LEWIS, JAMES SOWDER, GERALD WEAR,
AND JOEL R. YOSEPH, INDIVIDUALLY**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4111; File No. 0310155
Complaint, July 23, 2004--Decision, July 23, 2004*

This consent order, among other things, prohibits four attorney Respondents -- who provide criminal defense services to indigents in Clark County, Washington -- from entering into or facilitating any agreement between or among any attorneys: (1) to negotiate with payors on any attorney's behalf; (2) to deal, to refuse to deal, or to threaten to refuse to deal with payors; (3) regarding the terms of dealing with any payor; or (4) not to deal individually with any payor. The order also prohibits the respondents from facilitating exchanges of information between attorneys concerning whether, or on what terms, to deal with a payor; from attempting to engage in, or inducing anyone to engage in, any action prohibited by the order.

Participants

For the Commission: *Joseph Lipinsky, Stuart Hirschfeld, Robert Schroeder, Charles A. Harwood, Michele Cerullo, and Roberta S. Baruch.*

For the Respondents: *Robert Lewis, James Sowder, Gerald Wear, and Robert Yoseph.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended ("FTC Act"), 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Robert Lewis, James Sowder, Gerald Wear, and Joel R. Yoseph, hereinafter collectively referred to as "Respondents," have violated Section 5 of the FTC Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest,