PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
WASHINGTON D.C.

In the Matter of UNION OIL COMPANY OF CALIFORNIA, a corporation.	Docket No. 9305

UNION OIL COMPANY OF CALIFORNIA'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR DISMISSAL OF THE COMPLAINT BASED ON *NOERR-PENNINGTON* IMMUNITY

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The Union Oil Company of California ("Unocal") respectfully submits this reply memorandum in support of its motion to dismiss pursuant to the Court's Order of August 25, 2003.

I. INTRODUCTION

Complaint Counsel's Opposition to Unocal's motion centers on arguments that attempt to transform black into white and white into black. According to Complaint Counsel, this Court has no right even to decide a motion to dismiss because the Complaint alleges that Unocal is not protected by *Noerr-Pennington* immunity "as a matter of fact." Complaint Counsel claim that this pleading contrivance compels the Court to accept a legal conclusion as an incontrovertible fact. Complaint Counsel are wrong. Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Governor of Mississippi*, 478 U.S. 265, 286 (1986).

Complaint Counsel's attempts to rewrite the law with a stroke of a pen go even further, and extend into an attempt to reinvent the entire field of administrative law by treating rulemakings to establish broad rules of future conduct as adjudications. Complaint Counsel claim that an administrative agency acts quasi-legislatively in promulgating rules only when it operates "virtually unguided by enforceable standards" and is not bound by any procedural norms. Opp. at 24, 26. Beyond this null set of agencies that enact rules untethered to any legal standard, Complaint Counsel claim, administrative agencies adjudicate when they promulgate rules for the future.

That rulemakings are legislative in nature is a bedrock administrative law principle. The Supreme Court views the exercise of rulemaking authority as the enactment of "legislative regulations." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984). The authoritative Attorney General's Manual on the Administrative Procedure Act underscores that "[r]ule making is . . . essentially legislative in nature" whereas "adjudication is concerned with the determination of

past or present rights and liabilities." *Attorney General's Manual on the Administrative Procedure Act* 14 (1947) (hereinafter "Attorney General's Manual"), available at http://www.oalj.dol.gov/public/apa/refrnc/ag01.htm. Likewise, a leading administrative law treatise states that "[r]ulemaking is analogous to legislating" Richard J. Pierce, Sidney A. Shapiro & Paul R. Verkuil, *Administrative Law and Process* 307 (3d ed. 1999). Ignoring these fundamental principles, Complaint Counsel's entire Opposition proceeds from the premise that any rulemaking that is guided by a statutory mandate is in fact an adjudication.

Complaint Counsel's desperation to rewrite the entire administrative law field is understandable. Complaint Counsel *must* characterize the California Air Resources Board's Phase 2 reformulated gasoline rulemaking as adjudicative to proceed with their claims. No court has ever allowed antitrust liability to be imposed for the solicitation of favorable legislation or regulations, even by corrupt means, but some courts have indicated that liability might be imposed for defrauding administrative agencies in quasi-adjudicative proceedings. Every case relied on by Complaint Counsel to support a fraud exception involved such proceedings.

Notably, the Supreme Court has reserved judgment whether a fraud exception to *Noerr-Pennington* may be recognized even in the litigation context. *Prof. Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61 n.6 (1993). And the Commission has argued that misrepresentations even in an adjudicative context are immune where the proceedings also have some policymaking attributes. Brief for the United States and Federal Trade Commission as Amici Curiae in *Armstrong Surgical Center, Inc. v. Armstrong Cty. Mem'l Hosp.*, No. 99-905 (filed June 2000), filed as App. 1 to Unocal's motion (hereinafter "FTC *Armstrong* Br."). But whether a fraud exception may be recognized in any adjudicative setting ultimately is of no con-

sequence in this case, which involves a regulatory agency's political decisionmaking in enacting rules of future conduct affecting entire industries.

Perhaps inadvertently, Complaint Counsel's Opposition at one point frames the central *Noerr-Pennington* question correctly: "Would the anticompetitive consequences be the same if the government had never acted?" Opp. at 19. This articulation of the issue is compelled by the Supreme Court's holding that petitioning activity is immune from antitrust liability unless a private actor "use[s] the governmental *process* – as opposed to the *outcome* of the process – as an anticompetitive weapon" *City of Columbia v. Omni Outdoor Adver., Inc.,* 499 U.S. 365, 380 (1991) (emphasis in original). Yet having correctly framed the question, Complaint Counsel fail to answer it. Their Opposition leaves the answer hanging.

This critical question may be answered easily based on the Complaint's allegations. Had the California Air Resources Board not promulgated its Phase 2 reformulated gasoline regulations, the harm alleged by the Complaint would not exist. But for CARB's adoption of "Phase 2 RFG regulations that substantially overlapped with Unocal's concealed patent claims" (Compl. ¶ 45), none of the harm would exist.

In the discussion that follows, this memorandum demonstrates that the Court may decide Unocal's motion to dismiss and is not deprived of its jurisdiction to do so by Complaint Counsel's characterization of a legal issue as a fact. It then demonstrates that *Noerr-Pennington* immunity broadly applies to petitioning conduct that does not itself bring about anticompetitive harm, and shows that the harm alleged by the Complaint is the result of governmental action and not of the petitioning conduct that led to it. The memorandum proceeds to show that CARB's enactment of Phase 2 regulations was a quasi-legislative act, and that the case law roundly rejects the creation of any fraud exception to *Noerr-Pennington* immunity for petitioning conduct before

agencies that exercising policymaking functions even short of rulemaking. It also demonstrates that Complaint Counsel's proposal to deny *Noerr-Pennington* for participation in proceedings in which governmental agencies are guided by legal standards does not enjoy even a scintilla of support in either administrative law or *Noerr-Pennington* jurisprudence. The memorandum concludes by showing that Complaint Counsel's additional arguments for eviscerating *Noerr-Pennington* immunity have no basis in law.

II. DISCUSSION

A. THE *NOERR-PENNINGTON* IMMUNITY IS A PROPER ISSUE FOR DECISION ON A MOTION TO DISMISS

Complaint Counsel claim that this Court may not decide whether the *Noerr-Pennington* immunity compels dismissal because the Complaint alleges that the immunity is inapplicable "as a matter of fact." Opp. at 1. This assertion is nonsensical on its face. If Complaint Counsel were right, no court could ever decide a motion to dismiss if the plaintiff adopted the simple expediency of pleading that the defendant violated the law "as a matter of fact." But the sleight of hand of alleging a legal conclusion as a supposed fact can neither transform a legal issue into a factual one nor allow a complaint to escape judicial scrutiny. Courts deciding dismissal motions "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan,* 478 U.S. at 286. Nor must they "blindly accept the legal conclusions drawn by the pleader from the facts." *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). *See also Silver v. H&R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997); *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1103 (6th Cir. 1995).

Based on these principles, courts have not hesitated to dismiss antitrust claims based on the *Noerr-Pennington* immunity. *See, e.g., Armstrong Surgical Center, Inc. v. Armstrong Cty. Mem'l Hosp.,* 185 F.3d 154, 159-60 (3d Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000); *Oregon*

Natural Resources Council v. Mohla, 944 F.2d 531, 533-36 (9th Cir. 1991); *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 (10th Cir. 1982); *Syncsort Inc. v. Sequential Software, Inc.*, 50 F. Supp. 2d 318, 334-45 (D.N.J. 1999); *Forest Ambulance Serv., Inc. v. Mercy Ambulance, Inc.*, 952 F. Supp. 296, 302-03 (E.D. Va. 1997); *Mylan Laboratories, Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1059 (D. Md. 1991). These cases refute Complaint Counsel's claim that *Noerr-Pennington* immunity is an improper basis for dismissal. Opp. at 2, 9.

Complaint Counsel attempt to get around of the shortcomings of their position by claiming that Unocal is "unwilling[] to take the facts alleged in the Complaint as true." Opp. at 8. But Complaint Counsel do not point to any factual assertion in Unocal's motion that controverts the Complaint's *factual* allegations. Although Unocal properly relies on judicially noticeable facts,[1] the Complaint alone compels dismissal by pleading alleged anticompetitive harm that would not have occurred but for CARB's regulatory action. *See Mylan Laboratories*, 770 F. Supp. at 1064 (barring antitrust claims on motion to dismiss where defendants' actions were directed not at using "the petitioning process itself as an anticompetitive weapon, but in the anticompetitive outcome of that process").[2]

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[1] It is entirely legitimate to rely on matters of which the court may take judicial notice in the context of a motion to dismiss. *See Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998); *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1197 (3d Cir. 1993); *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986); *Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.*, 129 F. Supp. 2d 578, 581 (W.D.N.Y. 2000).

[2] There is no support for Complaint Counsel's claim that *United States v. AT&T*, 524 F. Supp. 1336 (D.D.C. 1981), shows that *Noerr-Pennington* immunity cannot be resolved by a motion to dismiss before trial. The *AT&T* court ruled on a motion to dismiss after the government's case-in-chief because AT&T filed its motion after the completion of the case-in-chief. *MCI Comm. Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), also does not support Complaint Counsel's position. The court there concluded that AT&T's initiation of proceedings "with

[Footnote continued on next page]

B. COMPLAINT COUNSEL'S OPPOSITION MISCHARACTERIZES THE SCOPE OF THE *NOERR-PENNINGTON* IMMUNITY

Complaint Counsel accept the *Noerr-Pennington* doctrine only grudgingly, if at all. In the face of a broad immunity that has only narrowly-carved exceptions, Complaint Counsel characterize *Noerr-Pennington* as a "narrow" immunity that applies only to petitioning to "legislative policymakers" and only "under specific circumstances." Opp. at 1, 2. This hostility to the doctrine pervades Complaint Counsel's Opposition and shapes Complaint Counsel's arguments for severely limiting the immunity. This view of the doctrine cannot be reconciled with the case law.

1. THE *NOERR-PENNINGTON* DOCTRINE PROVIDES A BROAD IMMUNITY TO PETITIONING ACTIVITIES BEFORE ALL BRANCHES OF GOVERNMENT, SUBJECT ONLY TO NARROW EXCEPTIONS

Contrary to Complaint Counsel's parsimonious view of *Noerr-Pennington,* the Supreme Court has a broad view of the immunity: "Those who petition government for redress are generally immune from antitrust liability." *Prof. Real Estate Investors*, 508 U.S. at 56. The very cases on which Complaint Counsel rely similarly describe a broad immunity. For example, *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998), emphasizes that 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

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[Footnote continued from previous page]

the knowledge that the agencies involved lacked jurisdiction" indicated that "AT&T did not engage in a genuine effort to influence public officials." *Id.* at 1156. It is hardly surprising that whether AT&T sought to inflict harm through the governmental process itself would be an issue for trial. Here, however, the Complaint itself makes clear that the alleged harm flows from governmental action and not from Unocal's use of the petitioning process.

either federal or state government." *Id.* at 1059. *See also Cheminor Drugs, Ltd, v. Ethyl Corp.*, 168 F.3d 119, 123 (3d Cir. 1999); *USS-Posco Indus. v. Contra Costa Bldg. & Constr. Trades Council*, 31 F.3d 800, 810 (9th Cir. 1994).

Although it is clear, as discussed in Part II.C, that Unocal engaged in petitioning activities directed at legislative policymakers, Complaint Counsel's claim that *Noerr-Pennington* protects *only* "petitioning to legislative policymakers" is baseless. The Supreme Court decided nearly 40 years ago in *Pennington* that the immunity reached petitioning activities aimed at the executive and judicial branches. Since then, the Court has made clear that "[t]he same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Subsequent decisions have broadened the immunity's scope, as Unocal's motion showed.

There is no support for Complaint Counsel's claim that the immunity applies only in "specific circumstances" any more than there is support for the proposition that citizens possess a right to petition the government only "in specific circumstances."[3] As the Supreme Court has explained, "[i]n a representative democracy such as this . . . the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

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[3] It is even more misleading to say that *Noerr-Pennington*'s application to petitioning of legislative decisionmakers is limited to "specific circumstances." There has never been a case in which petitioning of a legislative or quasi-legislative body has been deemed unprotected by *Noerr-Pennington* immunity except where the anticompetitive injury resulted from the petitioning conduct itself and not from the outcome of the governmental process.

The antitrust laws do not prohibit "an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.* at 136.

Exceptions to a broad *Noerr-Pennington* immunity have been limited to very narrow specific circumstances. The Supreme Court has recognized only two exceptions. One is the sham exception for objectively baseless litigation that is brought to inflict harm through the litigation process itself. *Prof. Real Estate Investors*, 508 U.S. at 60-61. Such conduct does not constitute genuine petitioning. The other exception is for fraudulent misrepresentations to the Patent and Trademark Office in connection with a patent application. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).

Neither of the two exceptions is relevant to this case. The Complaint does not claim that Unocal engaged in sham petitioning or that its alleged misrepresentations caused anticompetitive harm through the petitioning conduct itself. Similarly, *Walker Process* has little relevance because the Court has not extended *Walker Process* beyond the specific circumstances of the patent application process. The Complaint does not allege that Unocal secured its patents relating to reformulated gasoline through the commission of fraud on the Patent Office.[4] Indeed, it could not, given that the courts have already evaluated Unocal's conduct before the PTO and determined that there was "ample evidence of good faith in contrast to the lack of evidence of intentional de-

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[4] Unocal's opening brief explained at length why *Walker Process* fraud is analogous to fraud in the adjudicative setting. Complaint Counsel did not dispute Unocal's arguments in that regard. Complaint Counsel's Opposition does not even recognize the basis for the dichotomy between legislative and adjudicative proceedings other than with its unprecedented claim that only administrative agencies that operate without binding legal guidance operate in the quasi-legislative arena. Complaint Counsel's unsupported attempt to create a broad fraud exception to *Noerr-Pennington* is discussed immediately below.

ception." *Union Oil Co. v. Atlantic Richfield Co.*, 34 F. Supp. 2d 1208, 1222 (C.D. Cal. 1998), *aff'd*, 208 F.3d 989 (Fed. Cir. 2000) (endorsing district court's determination of good faith).

2. TO THE EXTENT THAT A FRAUD EXCEPTION TO *NOERR-PENNINGTON* HAS BEEN RECOGNIZED, ITS REACH HAS BEEN LIMITED TO ADJUDICATIVE PROCEEDINGS

Complaint Counsel's theory of liability in this case rests on a so-called "fraud exception" to *Noerr-Pennington* immunity, which has never been recognized by the Supreme Court. The best that can be said for such an exception is that the Court has left open whether antitrust liability could be imposed for "a litigant's fraud or other misrepresentations." *Prof. Real Estate Investors,* 508 U.S. at 61 n.6. Support for an exception in the courts of appeals is meager. As the Commission noted, "no court of appeals has considered or affirmed an actual judgment awarding damages against a private defendant for competitive injuries inflicted most directly by state action, where that action was allegedly procured by the defendant's fraud." FTC *Armstrong* Br. at 15.

The reach of *Noerr-Pennington* protection is exceptionally broad in its sweep when the petitioning is to a governmental body that makes policy. In the legislative arena, even the use of "unethical and deceptive methods" is immune *Id.* at 500-01. As the Supreme Court observed in *California Motor Transp.*, 404 U.S. at 513, misrepresentations are "condoned in the political arena." "'Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (*quoting Noerr*, at 365 U.S. at 136). The use of "improper means" does not strip the immunity where petitioning is genuinely aimed at procuring favorable governmental action. *City of Columbia*, 499 U.S. at 380. *See also FTC v. Superior Court Trial Lawyer's Ass'n,* 493 U.S. 411, 424-25 (1990) (distinguishing between immune peti-

tioning to procure anticompetitive benefits as outcome of governmental action and petitioning that produces anticompetitive consequences without governmental action).

To be sure, the Supreme Court has left open the possibility that *Noerr-Pennington* protection *in the litigation arena* may be subject to a fraud exception. Its willingness to leave this door open while closing it to claims of improper conduct in the legislative arena reflects fundamental differences between the two governmental processes. As Areeda & Hovenkamp observe, "the expected standards of conduct are much higher" in adjudication than in other governmental forums, and "there are well developed and highly elaborated definitions of what is or is nor proper behavior by litigating parties." 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 203e at 169 (2d ed. 2000) (hereinafter cited as "Areeda & Hovenkamp").

In policy-oriented governmental forums, there is no well-developed structure of norms of conduct comparable to that present in adjudications.[5] Moreover, because policymaking draws upon more diverse sources of information and is less constrained by narrow legal standards, it is typically impossible to draw a causal link between alleged misconduct and an anticompetitive outcome. Whereas there is typically only one correct legal outcome in an adjudication based on a given set of facts, there is no such constraint in policymaking arenas, such as legislation and rulemaking. As Areeda and Hovenkamp emphasize, regardless of the government arm involved, it is "often difficult and frequently impossible to say that the only reason the government acted

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[5] This can be seen by the Complaint in this case. While the Complaint alleges that Unocal failed to disclose to CARB that it had a patent application, it does not allege that CARB had a rule or policy mandating such disclosure or that it otherwise informed rulemaking participants that patent applications must be disclosed.

was because of the false information, bribery, or other corruption undertaken by the antitrust defendant." Areeda & Hovenkamp, ¶ 203a at 164.[6]

Indeed, even in the context of administrative proceedings that are predominantly adjudicative in character, courts have cautioned against carving out a fraud exception. For example, in *Armstrong Surgical*, the Third Circuit refused to recognize a fraud exception even in a proceeding that "involved an individualized application of established criteria." 185 F.3d at 162. The court reasoned that a broad *Noerr-Pennington* immunity applied in spite of the proceeding's adjudicative characteristic because the proceeding was "essential to the execution of the sovereign's regulatory policy." *Id.* at 163. The Commission subsequently agreed with this assessment, arguing that *Noerr-Pennington* immunity reaches even proceedings with "adjudicatory" qualities if they are imbued with policymaking components. FTC *Armstrong* Br. at 19. In *Armstrong*, according to the Commission, the fact that the government agency had "to consider all relevant factors prior to authorizing construction of additional health care facilities" rendered its activities "political in the *Noerr* sense" and mandated immunity for participants in its proceeding, even participants accused of misrepresentations. *Id.*

The relevant factors that rendered the essentially adjudicative proceeding in *Armstrong* sufficiently political to call for the application of a broad *Noerr-Pennington* immunity included the adequacy of existing health care providers and the need for additional services or facilities. 185 F.3d at 156. The conflict between this position of the Commission and the position adopted by Complaint Counsel in this proceeding is unmistakable. Whereas the Commission correctly

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[6] The judicially noticeable Final Statement of Reasons for Rulemaking for CARB's Phase 2 regulations responds to 407 separate comments submitted by 52 commenters. The notion that a single participant's communication dictated the outcome of such a process is untenable on its face. Unocal submitted the Final Statement of Reasons as Appendix 3 to its motion.

viewed the existence of legislative guidance as evidence of the policymaking aspects of governmental decisionmaking, Complaint Counsel argue that any agency that is "guided by enforceable standards" performs no policymaking functions. The correct resolution of this conflict is also unmistakable. The Commission's clearly articulated statement in *Armstrong*, which is consistent with decades of *Noerr-Pennington* jurisprudence, trumps Complaint Counsel's revisionism.

Given the policy concerns and practical difficulties associated with any fraud exception, it is unsurprising that courts recognizing such an exception to *Noerr-Pennington* have limited its application to judicial or quasi-judicial proceedings. Every case on which Complaint Counsel rely for such an exception involved quasi-adjudicative proceedings. Typical of these cases is *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240 (9th Cir. 1982), where the court said "that the fraudulent furnishing of false information to an agency in connection with *an adjudicatory proceeding* can be the basis for antitrust liability." *Id.* at 1261 (emphasis added). The proceeding at issue was one in which a government agency adjudicated the entitlement of a particular party – Clipper Exxpress – to offer transport services at a particular rate.

All other cases on which Complaint Counsel rely for the existence of a "fraud" exception similarly involved the application of existing law to establish the rights and obligations of individual parties. For example, *Kottle,* 146 F.3d 156, involved a certificate of need ("CON") proceeding to determine the eligibility of a specific applicant to operate a kidney dialysis center. The court held that the CON proceeding "bears many indicia of a true adjudicatory proceeding," including the submission of written and oral argument, representation by counsel, and the right of affected parties to question witnesses. *Id.* at 1062. *St. Joseph's Hospital v. Hospital* Corp., 795 F.2d 948 (11th Cir. 1986), also involved a CON proceeding to determine the right of an individual party to expand its cardiac care services, which employed an "adjudicatory process"

(*id.* at 955) including "a full evidentiary hearing" (id. at 951).[7] Likewise, *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972), involved a proceeding to determine a particular applicant's right to distribute a specific drug. The issue in that case was not what characteristics drugs generally must possess in order to be eligible for distribution – the equivalent to CARB's decision of the properties that gasolines must possess in order to be sold in California – but whether a specific drug satisfied the existing legal standard by which all new drug applications must be judged.

Another of Complaint Counsel's cases, *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), expressly supports Unocal's position. That case involved a Texas Railroad Commission proceeding to determine the allowable production from a specific gas field and individuals wells within it by applying a preexisting formula. The court viewed the proceeding to determine production rights as adjudicative in nature and held that misrepresentations made in it were not *Noerr-Pennington* protected. At the same time, the court underscored that the proceeding differed fundamentally from a rulemaking proceeding and that participation in a rulemaking enjoys a far broader immunity:

> [I]n the instant case there has been no attempt by defendants [] to influence the policies of the Railroad Commission. The germination of the allowable formula was political in the *Noerr* sense, and thus *participation in those rule-making proceedings would have been protected.* But the formula's subsequent implementation is apolitical. Once the rule is promulgated, defendants may not plead immunity in their attempt to undermine its efficacy for anti-competitive purposes."

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[7] As noted earlier, the Commission has concluded that even CON proceedings, though "adjudicatory" in character, have sufficient policymaking attributes to render any "fraud exception," to the extent one exists, inapplicable.

Id. at 1297 (emphasis added). Thus, *Woods Exploration* expressly recognized that fundamental difference between rulemaking and adjudication and concluded that any fraud exception is inapplicable to rulemaking proceedings.[8]

C. CARB'S PROMULGATION OF RULES GOVERNING THE COMPOSITION OF GASOLINE TO BE SOLD IN CALIFORNIA WAS A QUINTESSENTIALLY LEGISLATIVE ACT

Complaint Counsel claim that CARB's quasi-legislative adoption of the Phase 2 RFG rules was an adjudicative exercise. Their Opposition, however, fails to identify a single case in which a court has characterized a rulemaking to establish legal norms for future conduct, such as the Phase 2 rulemaking, as "adjudicative" or "quasi-adjudicative." That omission is unsurprising. Contrary to Complaint Counsel's contention, Unocal's argument that CARB acted legislatively in developing and promulgating the Phase 2 RFG regulations is neither an anomaly of California law nor a mere exercise in "classification and nomenclature." (Opp. at 26). Instead, this characterization is a fundamental administrative law principle. Support for the proposition that

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[8] Complaint Counsel rely on cases that discuss whether a fraud exception exists in the context of litigation. *See Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394 (4th Cir. 2001); *Cheminor Drugs,* 168 F.3d 119; *Liberty Lake Investments, Inc. v. Magnuson,* 12 F.3d 155 (9th Cir. 1993). These cases are irrelevant given the fundamental difference between litigation and rulemaking. Moreover *Baltimore Scrap* did not even adopt a fraud exception for litigation. That court merely observed 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." *Id* at 401-02 (emphasis added).

Equally irrelevant is *Whelan v. Abell,* 48 F.3d 1247 (D.C. Cir. 1995), which held that persons who make misrepresentations to courts or agencies may be sued for malicious prosecution and abuse of process. As Areeda and Hovenkamp note, application of *Noerr-Pennington* immunity in antitrust cases is entirely consistent with allowing state-law remedies for malicious prosecution to reach antitrust-immune conduct. Areeda & Hovenkamp, ¶ 203b at 165. Finally, Complaint Counsel's reliance on *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998), is also misplaced. That case merely recognized the continued viability of the *Walker Process* doctrine.

CARB acted quasi-legislatively is grounded in extensive federal *and* California authority, is reflected in the statutory delegation of power to CARB, and is clear from CARB's own judicially noticeable statements regarding the scope of its authority in the Phase 2 RFG rulemaking.

1. THE DISTINCTION BETWEEN QUASI-LEGISLATIVE AND QUASI-JUDICIAL AGENCY ACTIONS IS A BEDROCK PRINCIPLE OF ADMINISTRATIVE LAW

Unocal's motion demonstrated that the distinction between quasi-legislative and quasi-judicial authority is fundamental under California law. Complaint Counsel denigrate this legal authority as a semantic exercise peculiar to California law. They are wrong. The dichotomy between rulemaking and adjudication is equally fundamental under federal law. In 1947, shortly after the passage of the federal Administrative Procedure Act, the Department of Justice described the structure of that statute as follows, in an authoritative and widely cited manual:

> [T]he entire Act is based upon a dichotomy between rule making and adjudication . . . . *Rule making is . . . essentially legislative in nature*, not only because it operates in the future but also because it is *primarily concerned with policy considerations*. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of the respondent's past conduct . . . . Conversely, adjudication is concerned with the determination of past and present rights and liabilities.

Attorney General's Manual at 14 (emphasis added).

This characterization of agency actions is the underpinning of the Supreme Court's administrative law jurisprudence. The Court has stressed that its decisions reflect "a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973). Within this framework, according to the Court, policy-type rules are viewed as "legislative regulations." *Chevron v. NRDC*, 467 U.S. at 844. An administrative agency, the Court

said, fills in the interstices of a statutory mandate through the "quasi-legislative promulgation of rules to be applied in the future." *SEC v. Chenery*, 332 U.S. 194, 202 (1947).

The Court has emphasized that "all rulemaking is nonjudicial in the sense that rules impose standards of general application divorced from the individual fact situation which ordinarily forms the predicate for judicial action." *Mistretta v. United States*, 488 U.S. 361, 392 (1989). Contrary to Complaint Counsel's claim that the promulgation of legal standards of future effect is adjudicative, the Supreme Court has said that such promulgation is "political or 'quasi-legislative.'" *Id.* at 393. Elsewhere the Court has said that rulemaking "may resemble lawmaking." *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (internal quotation omitted).

This fundamental distinction between quasi-legislative rulemaking and quasi-adjudicative actions that determine the rights and obligations of specific parties is also reflected in numerous decisions of the courts of appeals. The Ninth Circuit has held "[w]here an agency's task 'is to adjudicate disputed facts in particular cases,' an administrative decision is quasi-judicial. By contrast, rulemaking concerns policy judgments to be applied generally in cases that may arise in the future." *Portland Audobon Soc'y v. Endangered Species*, 984 F.2d 1534, 1540 (9th Cir. 1993). *See also Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 753 (D.C. Cir. 2001) ("EPA acted in a quasi-legislative fashion" in promulgating a rule); *Redwood Village Partnership v. Graham*, 26 F.3d 839, 842 (8th Cir. 1994) (referring to "the quasi-legislative act of rulemaking"); *Deerfield v. FCC*, 992 F.2d 420, 427 (2d Cir. 1993) (agency acts quasi-judicially "if it does 'not purport to engage in formal rulemaking or in the promulgation of any regulations'" but instead engages in "adjudication of the rights and obligations of parties before it."); *Ameron, Inc. v. Army Corps of Engineers*, 787 F.2d 875, 894 (3d Cir. 1986) (rulemaking "is legislative in character").

Scholarly authority is similarly unanimous in this regard. The leading administrative law treatise states that rulemaking "resembles the process of statutory enactment" by a legislature and "closely resembles a statute in its form and effect." 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.8 (4th ed. 2002). Other leading authorities agree. *See, e.g.,* 3 Jacob A. Stein, *Administrative Law*, 14.01 (1994) ("Rulemaking, the quasi-legislative power, is intended to add substance to the Acts of Congress . . . . Adjudication, the quasi-judicial power, is intended to provide for the enforcement of agency . . . regulations on a case-by-case basis."); Bernard Schwartz, *Administrative Law* 211 (3d ed. 1991) ("Rulemaking is the process by which an agency lays down new prescriptions to govern the future conduct of those subject to its authority," while "adjudication is the process by which the agency applies either law or policy, or both, to the facts of a particular case").

The distinction between legislative rulemaking and adjudications recognized by the courts and commentators alike recognizes the fundamentally different nature of the two processes. Rulemaking determines the law or policy that an agency will apply in the future whereas adjudications determine the rights and obligations of specific ascertainable parties by applying an existing legal standard to a specific set of facts. Rather than being a matter of nomenclature, this distinction is the very foundation of all administrative law.

2. CARB'S PHASE 2 RFG RULEMAKING WAS QUASI-LEGISLATIVE

The factual allegations of the Complaint leave no doubt that CARB engaged in the classic exercise of quasi-legislative power in its Phase 2 RFG rulemaking. According to the Complaint, CARB convened its rulemaking to enact regulations "governing the composition of low emissions, reformulated gasoline ('RFG')." Compl. ¶ 1. The Complaint further avers that CARB conducted the rulemaking pursuant to legislation that required the agency "to take actions to

reduce harmful car emissions." *Id.* ¶ 21. The Complaint makes clear that, while the legislation identified broad statutory targets, it left CARB with broad discretion to fill in the interstices in the law by adopting regulations to meet the broad statutory objectives. Thus, the law permitted CARB to regulate "vehicular fuel composition" among other "control measures," *id.* ¶ 21, but it neither specified how to distribute emission reductions among various types of regulatory controls nor spelled out what fuel properties were to be regulated. This, of course, is the very type of exercise of regulatory authority that the Supreme Court has characterized as legislative. *Chevron,* 467 U.S. at 844; *Chenery*, 332 U.S. at 202.

The Complaint also alleges that CARB used the classic procedures of legislative rulemaking. According to the Complaint, CARB conducted the Phase 2 rulemaking pursuant to California's Administrative Procedure Act, which required CARB to issue a notice of proposed rulemaking, provide an opportunity to comment, and explain the basis and purpose of the regulations. Compl. ¶¶ 17, 26. These, of course, are the very type of procedures that the Attorney General's Manual referenced in stating that "[r]ule making is . . . essentially legislative in nature." Attorney General's Manual at 14. The Complaint also alleges that CARB conferred in "private meetings" with various interested persons and solicited input from various "industry groups" in developing its regulations. Compl. ¶ 35. In contrast to the adjudicative setting, in which such contacts are wholly inappropriate, they are quite proper in the legislative arena of rulemaking. *See Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981).

The California Supreme Court has addressed the proper characterization of CARB's rulemaking in litigation involving CARB's clean air rulemaking, and its decision equated CARB's clean air rulemaking to actions by the California legislature itself:

> [B]ecause the Legislature has delegated quasi-legislative authority to the ARB (see Health & Safety Code § 43000, 43000.5, 43013, 43018, 43101),

> excessive judicial interference with the ARB's quasi-legislative actions would conflict with the well-settled principle that the legislative branch is entitled to deference from the courts because of the separation of powers. . . . The propriety or impropriety of a particular legislative decision is a matter for the Legislature and the administrative agencies to which it has lawfully delegated quasi-legislative authority; such matters are not appropriate for the judiciary.

Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 572, 888 P.2d 1268, 1274 (1995). This view is grounded not in an anomaly of California law, as Complaint Counsel would have it, but in fundamental administrative law doctrine recognized by federal and state courts alike.

It is of no small importance to note that Complaint Counsel have been unable to identify a single instance in which an agency notice-and-comment rulemaking has been deemed "quasi-adjudicative" by a court or recognized legal authority. The reason for this failure seems clear – any authority describing an agency rulemaking as "quasi-adjudicative" would fly in the face of decades of Supreme Court precedent and a myriad of other authorities. Acceptance of Complaint Counsel's contention that the Phase 2 rulemaking was "quasi-adjudicative" would require the Court to find that the Supreme Court, the Attorney General, the federal courts of appeals, the California courts, and administrative law scholars alike fundamentally misunderstand the relationship between rulemaking and adjudication. It is far more plausible, however, that it is Complaint Counsel who misunderstand that relationship.

3. CARB'S PHASE 2 RFG RULEMAKING WAS A POLICYMAKING EXERCISE

> 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. The ARB does not need explicit statutory language to implement any of these approaches.

This is how the California Air Resources Board described the breadth of its rulemaking discretion in the judicially noticeable Final Statement of Reasons for Rulemaking for its Phase 2 rules. Final Statement of Reasons for Rulemaking at 190 (submitted as App. 3 to Unocal motion). CARB's authority, the agency said in its Final Statement of Reasons, was so broad that CARB could confer preferential treatment upon a class of refiners based on a broad mandate to assess the impact of its regulations on the economy of the state. *Id.* at 129.

In the quoted passage, CARB identified its independent discretionary authority as encompassing what to regulate, how stringently to regulate, whom to regulate, where to regulate, and when and how to require compliance with the regulations. The enabling statute contained no guidance on any of these fundamental policy questions. The California legislature delegated the discretion to CARB to make those judgments. Similarly, it delegated to CARB the discretion to take into account the impact of any regulatory scheme on the state's economy. Without any doubt, CARB engaged in policymaking in adopting its Phase 2 rules.

Complaint Counsel's Opposition strains mightily to transform this policymaking exercise of enacting legislative regulations into an adjudication, but it fails to offer any plausible basis for doing so. Complaint Counsel claim that the Phase 2 RFG rulemaking involved only "technical decisions" arising from a "highly circumscribed exercise of [] delegated authority." Opp. at 25. This argument cannot be reconciled with CARB's own statement of the scope of its authority. What, whom, where, when, and how to regulate are not "technical decisions" and the authority to make those decisions cannot be described as "highly circumscribed."

Nor can Complaint Counsel's assertion be reconciled with the views expressed by courts reviewing similar delegations of authority. Illustrative in this regard is the Supreme Court's

Chevron v. NRDC opinion, which described the EPA's rulemaking as the enactment of "legislative regulation." Although the EPA conducted its rulemaking pursuant to a "lengthy, detailed, technical, complex, and comprehensive" statutory mandate (467 U.S. at 848), the Court had no trouble viewing the EPA's rules as "legislative regulations" (*id.* at 844). Similarly, in *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784 (6th Cir. 1995), the Court reviewed an EPA Clean Water Act rulemaking under a statutory mandate that was far more detailed than that governing CARB's Phase 2 rulemaking. Among other things, the statute required the EPA to assess available technologies, engage in a cost-benefit analysis, and evaluate a host of industry-specific factors prescribed in the statute. *See id.* at 789-90. The court characterized this rulemaking as an "exercis[e] of quasi-legislative authority." *Id.* at 792.

Complaint Counsel also assert that CARB's Phase 2 rulemaking must have been quasi-adjudicative because it "was conducted in accordance with APA procedures." Opp. at 24. But compliance with APA procedures in the context of a rulemaking hardly undercuts the quasi-legislative character of rulemaking.[9] Indeed, as discussed above, the exact opposite is true; rule-making pursuant to APA procedures is recognized as the quintessential form of quasi-legislative agency action. Moreover, a substantial body of California law cited in Unocal's Motion to Dismiss unambiguously holds that procedural safeguards imposed on rulemaking by the California APA do not transform those proceedings from quasi-legislative to quasi-judicial.[10] It could not be otherwise. If it were, the Supreme Court, the lower courts, the Attorney General, and admini-

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[9] Indeed, any CARB rulemaking that failed to follow the California APA would not be quasi-legislative, but would instead simply be lawless.

[10] Complaint Counsel cite no authority for their assertion that APA rulemaking procedures equate to quasi-adjudicative action, and the Opposition's failure to address any of the authorities cited by Unocal underscores the speciousness of the argument.

strative law scholars would have had to be blind to the APA's procedural requirements for rulemakings each time they characterized APA rulemaking as quasi-legislative action.

Ultimately Complaint Counsel are reduced to arguing that any agency action that is subject to binding statutory constraints on the agency's discretion or employs procedural safeguards to limit the agency's discretion is adjudicative in nature. Opp. at 24-26. According to Complaint Counsel, an administrative agency acts in a quasi-legislative capacity only when it operates "virtually unguided by enforceable standards." *Id* at 24. This legal standard, of course, is made out of whole cloth. Each Supreme Court decision cited in this brief that characterized rulemakings as legislative addressed a rulemaking to fill in the interstices of a statutory mandate that set enforceable standards by which the agency's decisionmaking must be guided. Each rulemaking used the APA notice-and-comment process that CARB used in its rulemaking. To say that the existence of bounds on the agency's discretion and constraints on its procedural freedom convert rulemaking into adjudication is to turn administrative law on its head.[11]

This novel definition of quasi-legislative acts is not even supported by the case upon which Complaint Counsel purport to rely. In *Boone v. Redevelopment Agency*, 841 F.2d 886, 896 (9th Cir. 1988), the court relied on the same basic tenets of administrative law discussed in this memorandum to distinguish between quasi-adjudicative and quasi-legislative action. Thus, the *Boone* court described a redevelopment plan that "involve[d] a large area and affect[ed] virtually every member of the community" as legislative. *Id.* at 896. By contrast, the court noted

[11] Indeed, it is doubtful that a delegation to an agency to enact rules that leave the agency "virtually unguided by enforceable standards" would be lawful. The Supreme Court has repeatedly confirmed that delegations of authority to agencies must contain "intelligible principles" sufficient to guide the agency in its exercise of that authority. *See, e.g.*, *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 472-73 (2001); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

that adjudicative actions "affect[] the relatively few" and are "'determined by the facts peculiar to the individual case.'" *Id.* (citation omitted). The *Boone* court also specifically rejected Complaint Counsel's argument in this case that the presence of "some of the trappings normally associated with adjudicatory procedures" is sufficient to change the nature of a fundamentally quasi-legislative proceeding. *Id.* Thus, far from supporting Complaint Counsel's radical redefinition of the law, *Boone* actually confirms that the CARB Phase 2 rulemaking was quasi-legislative.

D. *NOERR-PENNINGTON* IMMUNITY IS APPLICABLE TO UNOCAL'S CONDUCT AS ALLEGED IN THE COMPLAINT

Complaint Counsel raise several additional arguments in an effort to block the application of the *Noerr-Pennington* doctrine. Like the other arguments advanced by Complaint Counsel to eviscerate *Noerr-Pennington* immunity, none of these arguments has any basis in law.

1. UNOCAL'S CONDUCT WAS POLITICAL PETITIONING OF THE TYPE PROTECTED BY THE *NOERR-PENNINGTON* DOCTRINE

As Complaint Counsel inadvertently concede, the central question for purposes of determining the applicability of *Noerr-Pennington* immunity is: "Would the anticompetitive consequences be the same if the government had never acted?" Opp. at 19. As shown above, it is clear that the alleged anticompetitive harm is the product of governmental action and not Unocal's petitioning activity. This should be the end of the inquiry.

Complaint Counsel insinuate that this case is not about genuine petitioning that is protected by *Noerr-Pennington* because the fraud alleged in the Complaint is an improper form of business conduct. But as the Supreme Court's *City of Columbia* decision makes clear, this argument is specious. In *City of Columbia*, the Court held that a reprehensible form of petitioning, bribery, was immune from antitrust challenge because it was directed at securing favorable governmental action. Because the competitive harm challenged in that case was caused by the governmental

action that was secured by the bribery, and not by the bribery itself, the conduct was immune. Although the private party used "improper means," its conduct constituted genuine petitioning. 499 U.S. at 380. Indeed, the very holding of *Noerr* was that antitrust immunity extended even to deceptive conduct that "falls far short of the ethical standards generally approved in this country" so long as the conduct is designed to secure favorable governmental action. *Noerr,* 365 U.S. at 140.

Complaint Counsel also claim that "[n]o court or Commission has granted *Noerr* immunity" where a government entity "had no clue" that it was being misled by a private party. Opp. at 2. This claim is a thinly veiled attempt to impose a fraud exception on petitioning before quasi-legislative bodies notwithstanding the absence of any authority permitting the imposition of such liability. Unable to find judicial authority that permits the imposition of antitrust liability on genuine petitioning conduct in a rulemaking, Complaint Counsel attempt to bootstrap such a rule through an "awareness" standard that has no mooring in any case law. Significantly, Complaint Counsel can muster no judicial support for their "awareness" standard. Complaint Counsel cite *FTC v. Superior Court Trial Lawyer's Ass'n*, 493 U.S. 411 (1990), for support, but nothing in that decision gives even a hint of such support. The decision turns instead on the whether the petitioning conduct itself was the source of the anticompetitive harm. *Id.* at 425-26.

Central to Complaint Counsel's argument is the claim that the CARB did not intend to restrain competition through its regulations. That is a remarkable claim with regard to regulations that CARB, according to its judicially noticeable Statement of Reasons for Rulemaking, expected to increase the price of gasoline in California by 12 to 17 cents per gallon, with the cost impact "vary[ing] from refiner to refiner." CARB Statement of Reasons at 77. Indeed, CARB's Statement expressly discussed the possibility that the regulations "could have significant anti-

competitive effects" and required regulatory action to ameliorate those effects. *Id.* at 9. *See also id.* at 181.

In any event, Complaint Counsel's position proves too much. If there is no fraud exception in the quasi-legislative arena, as shown conclusively above, this legal principle cannot be circumvented by arguing that the broad *Noerr-Pennington* immunity is only available when the defrauded governmental body knows that it is being defrauded. After all, the very concept of fraud assumes that the defrauded party is not aware of it. If the courts' and this Commission's rejection of a fraud exception in the policymaking arena can be defeated because the defrauded party's lack of awareness, their decisions in this regard mean nothing at all.[12]

2. COMPLAINT COUNSEL'S CLAIM THAT FIRST AMENDMENT DEFINES THE OUTER BOUNDS OF *NOERR-PENNINGTON* IMMUNITY IS MERITLESS

There is also no basis for Complaint Counsel's claim that Unocal is not entitled to *Noerr-Pennington* protection because the conduct alleged by the Complaint allegedly is not entitled to first amendment protections. Opp. at 4. Even assuming arguendo that Unocal was not entitled to first amendment protection, the absence of such protection would be irrelevant to the application of *Noerr-Pennington* immunity. The case law does not condition the immunity on entitlement to first amendment protections but focuses instead on the *source of the alleged competitive injury*. Thus, in *City of Columbia*, the Supreme Court held that bribery of public officials – an

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[12] Complaint Counsel reliance on the Areeda and Hovenkamp treatise is misplaced. The treatise does not support the claim that fraud – of which a deceived party is by definition unaware – may be the basis for antitrust liability in the political arena: "[I]f antitrust recognized liability for misstatements or partially untruthful statements made in the political arena, there would be no shortage of such challenges, and the results would increase the risk and thus the cost of even truthful political representations." Areeda & Hovenkamp, ¶ 203e at 167.

action that is plainly subject to criminal prosecution – was nevertheless immune because the anticompetitive harm was the result of the ensuing governmental action. 499 U.S. at 380.

As Areeda and Hovenkamp observe, "the antitrust laws were never intended to police the political process, and they are poorly designed for that role, because they spell out no specific criteria of political impropriety." Areeda & Hovenkamp, ¶ 203b at 165. Indeed, the Supreme Court in *Noerr* declined to attach liability to improper petitioning activities because it feared that "excessive judicial control would chill legitimate modes of exercising a right to petition." Areeda & Hovenkamp, ¶ 203d at 166. Unocal's failure to disclose information that CARB never sought is hardly comparable to the reprehensible conduct at issue in *City of Columbia*, which violated the criminal laws.[13] Yet the fact that even constitutionally unprotected criminal conduct was held immune under *Noerr-Pennington* completely rebuts Complaint Counsel's claim. The clear absence of a fraud exception to *Noerr-Pennington* immunity in proceedings that are imbued with policymaking characteristics reflects a balancing of the proper scope of the immunity based on all the relevant factors, including the scope of the first amendment. To say that that rejection in the specific context of *Noerr-Pennington* litigation can be trumped with non-antitrust cases addressing the scope of the amendment is to reject the *Noerr-Pennington* doctrine itself.

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[13] The Complaint nowhere alleges that CARB ever requested Unocal or any other participant in its rulemaking to disclose *anything* about their patent portfolios, let alone disclose patent applications that may or may not result in the issuance of a patent. Nevertheless, Unocal assumes arguendo for purposes of this argument that the Complaint states a claim for fraudulent conduct that is unprotected by the Constitution.

3. COMPLAINT COUNSEL'S CLAIM THAT *NOERR-PENNINGTON* IMMUNITY DOES NOT REACH ACTIONS THAT TAKE ADVANTAGE OF A BENEFICIAL GOVERNMENT ACTION HAS NO BASIS IN LAW

Complaint Counsel claim that the harm in this case flows from Unocal's private business conduct in enforcing its patent rights and not from a governmental decision. Complaint Counsel are wrong, as shown by repeating Complaint Counsel's own rhetorical question regarding the source of the harm: "Would the anticompetitive consequences be the same if the government had never acted?" Opp. at 19. The answer to that question, as shown by the factual allegations of the Complaint, is plainly "No." The "anticompetitive consequences" would not be the same if CARB had not acted. They would not exist. Thus the Complaint alleges:[14]

- "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." Compl. ¶ 45 (emphasis added).

- "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." *Id.* ¶ 76 (emphasis added).

- "*CARB reasonably relied* on Unocal's misrepresentations and materially false and misleading statements *in developing the Phase 2 RFG regulations*." *Id.* ¶ 80 (emphasis added).

- "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." *Id.* ¶ 92 (emphasis added).

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[14] Unocal, of course, denies every one of these allegations, which have no basis in fact. For purposes of Unocal's motion to dismiss, however, these allegations are deemed to be true and correct.

Each and every one of these allegations makes it clear that the anticompetitive harm at issue in this case would not have come about without CARB's promulgation of regulations that "substantially overlap" with Unocal's patents. It could not be clearer that the Complaint is alleging harm resulting from governmental action.

Complaint Counsel's argument can be seen as an elaborate bootstrap that is designed to circumvent settled law. Deconstruction of that bootstrap demonstrates its essentially vacuous logic. The analysis must begin with Unocal's petitioning during CARB's rulemaking proceedings. To the extent that this petitioning brought about favorable governmental action, and did not in and of itself cause competitive harm, it is clear that Unocal's conduct during the rulemaking is immune. As demonstrated earlier, the Complaint does not allege that the petitioning activity itself caused competitive harm, but focuses on the resulting governmental regulations, which renders the petitioning in connection with CARB rulemakings immune.

For purposes of Complaint Counsel's claim that Unocal's subsequent exercise of its patent rights provides an *independent* basis for liability, Unocal's conduct during CARB's rulemaking must be deemed immune, for otherwise the subsequent patent enforcement is not being adjudged independently. If the Court were to disagree with Unocal's analysis and to conclude for any reason that the rulemaking conduct was not *Noerr-Pennington* protected, the determination regarding the rulemaking conduct would compel denial of the motion. But if the Court were to conclude that the underlying rulemaking conduct is protected, the question must be framed as whether the rulemaking conduct may nevertheless somehow taint Unocal's subsequent patent enforcement and render it wrongful.

It is obvious that conduct that is *Noerr-Pennington* protected cannot be taken into account to render wrongful some other conduct that otherwise would be lawful. If the rulemaking

conduct is *Noerr-Pennington* protected, the Court must treat that conduct as if it never occurred. Thus, once the rulemaking conduct is cast aside as irrelevant to the subsequent patent enforcement, some other *independent* basis must exist for holding the enforcement activity as falling outside the scope of *Noerr-Pennington* immunity. It is impossible to find such a basis.

Enforcing patent rights is a legitimate exercise of the rights inherent in the patent itself. It is common and wholly unexceptional for a company whose patent increased in value as a result of a regulation, as the Complaint alleges here, to take advantage of the regulatory benefit. Such conduct cannot be deemed anticompetitive. Thus, Unocal's patent enforcement can only be deemed anticompetitive if it is tainted by the rulemaking conduct, which is tantamount to denying *Noerr-Pennington* protection for the rulemaking conduct itself. Applying such taint is inconsistent with any claim that the patent enforcement is *by itself* an unlawful practice falling outside the immunity.

That the logic breaks apart so readily should not be surprising. Complaint Counsel's position is tantamount to arguing that a party that engages in petitioning activity and induces a favorable governmental action loses the immunity if it has the temerity to take advantage of the governmental action.[15] Complaint Counsel's position is refuted by *A & M Records Inc. v.*

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[15] Complaint Counsel wrongly assert that the Commission's *Armstrong Surgical* brief distinguished between antitrust actions that require rescinding a governmental action and those that do not and supported immunity only in the former case. The antitrust claim in *Armstrong* sought relief from the petitioning party and did not require rescinding any governmental action. As the Commission stated in its brief: "We do not understand petitioner to challenge the 'validity' of Pennsylvania's CON decision . . . . It has not, for instance, sought a federal injunction setting aside the State's decision and allowing petitioner to construct its surgical facility. Nonetheless, the premise of petitioner's claim is that the State's denial of the CON should not insulate respondents from antitrust liability, because the state process in question is fundamentally adjudicatory rather than legislative, and because respondents defrauded the State's decision-making agents, through factual misrepresentations and threats of an unlawful

[Footnote continued on next page]

A.L.W., Ltd., 855 F.2d 368 (7th Cir. 1988). There record companies jointly petitioned Congress to pass legislation forbidding the rental of recorded music without a license from the copyright holder. The Seventh Circuit showed no hesitation in affirming a dismissal of antitrust claims against the record companies for denying licenses pursuant to the legislation. In Complaint Counsel's world, *Noerr-Pennington* would presumably not apply to the denial of licenses because the alleged harm to competition was caused by the record companies' actions in denying the licenses caused the alleged harm to competition.

Moreover, Unocal's enforcement of its patents is itself protected by *Noerr-Pennington* unless the company's assertion of infringement claims is "objectively baseless." *Prof. Real Estate Investors,* 508 U.S. at 60. The immunity applied not only to Unocal's initiation of infringement litigation but to attempts to enforce the patents that are short of litigation.[16] The Complaint contains no allegation that Unocal's assertion of patent rights is objectively baseless, and could not contain such an assertion given Unocal's vindication in the courts both with respect to the infringement of its patents and with respect to its good faith prosecution of its patent prosecution

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[Footnote continued from previous page]

boycott . . . ." FTC *Armstrong* Br. at 17. Thus, the fact that the remedy sought by Complaint Counsel could be implemented without rescinding CARB's regulations is legally meaningless.

[16] The *Noerr-Pennington* doctrine immunizes threats of infringement lawsuits just as much as it immunizes their actual prosecution. *Glass Equip. Dev., Inc. v. Besten, Inc.,* 174 F.3d 1337, 1343-44 (Fed. Cir. 1999); *Miller Pipeline Corp. v. British Gas PLC*, 69 F. Supp. 2d 1129, 1138 (S.D. Ind. 1999) ("activities that fall short of litigation but which manifest the patentholder's intent to protect its rights through judicial action" are protected); *Primetime 24 Joint Venture v. NBC*, 21 F. Supp. 2d 350, 357 (S.D.N.Y. 1998). Because infringement notices are "reasonably and normally attendant upon effective litigation," they are fully protected under *Noerr*. *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983).

before the PTO. *Union Oil Co. v. Atlantic Richfield Co.*, 34 F. Supp. 2d 1208 (C.D. Cal. 1998), *aff'd*, 208 F.3d 989 (Fed. Cir. 2000).

E. THE *NOERR-PENNINGTON* DOCTRINE IS FULLY APPLICABLE TO PROCEEDINGS BROUGHT UNDER THE FEDERAL TRADE COMMISSION

Complaint Counsel claim that the *Noerr-Pennington* doctrine is inapplicable to cases brought under the Federal Trade Commission Act. In the face of Unocal's extensive citations to Supreme Court and Commission precedent applying the doctrine in cases brought under the Act, Complaint Counsel respond only with an *ex cathedra* pronouncement that the immunity is not available. As Unocal's opening brief, both the Commission and the Supreme Court applied the *Noerr-Pennington* doctrine in the *Superior Court Trial Lawyers Ass'n* case. Both rigorously applied the teachings of the doctrine in concluding that the immunity was not available to the respondents because anticompetitive injury resulted from the respondents' petitioning conduct and not from subsequent governmental action. In its holding, the Commission held that the case "differ[ed] from *Noerr* and *Pennington*" because the respondents "did not merely solicit governmental action or attempt to influence the decisions of public officials through meetings or a publicity campaign." *Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 590 (1984). The Commission nowhere suggested that the *Noerr-Pennington* doctrine was inapplicable to the FTC Act. Having no response to the clear authority in this area, Complaint Counsel ignore it, again attempting to create law out of whole cloth.

Complaint Counsel's position also ignores the very Complaint that Complaint Counsel are defending. Paragraph 96 of the Complaint asserts that Unocal's conduct is not shielded by the *Noerr-Pennington* doctrine. Although this pleading of law as fact is improper, it does set out the Commission's position on the applicability of Noerr-Pennington immunity. The paragraph

gives three reasons for the alleged inapplicability of the immunity, none of which is that the immunity is unavailable in FTC Act cases. Had the Commission deemed the immunity inapplicable in FTC Act cases, it is reasonable to expect that it would have said so, particularly because it is on record in extending the immunity to respondents in proceedings brought under the Act.[17]

F. THE *NOERR-PENNINGTON* DOCTRINE PROTECTS UNOCAL'S ALLEGED MISREPRESENTATIONS TO PRIVATE INDUSTRY GROUPS IN CONNECTION WITH LOBBYING EFFORTS

Complaint Counsel's Opposition largely fails to respond to the arguments in Unocal's Motion that demonstrate that Unocal's alleged misrepresentations to industry groups are protected pursuant to *Noerr-Pennington*. The Opposition ignores the fact that the harm alleged in the Complaint relates directly to lobbying efforts undertaken by those industry groups – the very essence of *Noerr-Pennington* protected conduct. Thus, Complaint Counsel's contention that Unocal induced the Western States Petroleum Association ("WSPA") and the Auto/Oil Group into being "unwitting instrumentalities of Unocal" in the Phase 2 rulemaking through misrepresentations alleges conduct that, even if proved, defines the very essence of the immunity. The *Noerr* case itself involved alleged misrepresentations aimed at third parties for the purpose of influencing government action, and the Supreme Court held that this type of "indirect" petitioning is immune from the antitrust laws. Complaint Counsel also ignore the fact that Complaint's allegations may be disregarded because they are refuted entirely by CARB's judicially-

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[17] Complaint Counsel presumably will rely on the fact that the Complaint stated that the reasons for the doctrine's inapplicability included but were not limited to the enumerated reasons. Yet one would expect that the unavailability of the immunity under any circumstances would be articulated explicitly as the principal reason for the Complaint's assertion, rather than left to be deduced as an unarticulated reason beyond those expressly stated in the Complaint.

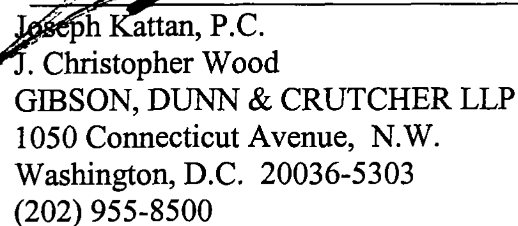
noticeable Statement of Reasons for Rulemaking. There is no legal basis to allow these charges of immune conduct to proceed to trial.

III. CONCLUSION

Complaint Counsel's Opposition repeatedly ignores settled to support an unsupportable conclusion. The Opposition attempts to rewrite the rules of civil and administrative procedure, the entire body of administrative law established in the over half century since the enactment of the federal Administrative Procedure Act, and all of *Noerr-Pennington* jurisprudence. But Complaint Counsel cannot overrule settled law by inventing it out of thin air. This Court can decide Unocal's motion in spite of Complaint Counsel's inventive attempt to transform law into fact. And unless every court and commentator to address the issue is wrong, rulemakings do not become adjudications whenever an administrative agency acts with the guidance of enforceable standards. The intellectual bankruptcy of Complaint Counsel's position is ultimately revealed by Complaint Counsel's failure to answer their own rhetorical question whether "the anticompetitive consequences be the same if the government had never acted[.]" Opp. at 19. But this Court can answer that question based on the Complaint and act accordingly to dismiss the Complaint.

Unocal's motion is ripe for decision. There is no set of facts that Complaint Counsel could prove that would overcome the fact that this case is barred by the *Noerr-Pennington* immunity. Unocal respectfully requests the Court to enter an Order dismissing the Complaint.

Respectfully submitted,



Joseph Kattan, P.C.
J. Christopher Wood
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8500

-and-

Martin R. Lueck
David W. Beehler
Sara A. Poulos
Diane L. Simerson
Bethany D. Krueger
Steven E. Uhr
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
(612) 349-8500

Attorneys for Respondent Union Oil Company of California

Dated: September 9, 2003

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2003, I caused a copy of the attached Union Oil Company Of California's Reply Memorandum In Support Of Its Motion For Dismissal Of The Complaint Based on *Noerr-Pennington* Immunity to be served upon the following persons via hand delivery :

The Honorable D. Michael Chappell
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

J. Robert Robertson, Esq.
Senior Litigation Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

John Roberti, Esq.
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W., Drop 6264
Washington, DC 20580

Richard B. Dagen, Esq. through service upon
Chong S. Park, Esq.
Complaint Counsel
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W., Drop 6264
Washington, DC 20580

Susan M. Dale

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