UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
UNION OIL COMPANY OF CALIFORNIA,	)	**DOCKET NO. 9305**
a corporation.	)	

COMPLAINT COUNSEL'S SUR-REPLY MEMORANDUM IN OPPOSITION TO UNION OIL COMPANY OF CALIFORNIA'S MOTION FOR DISMISSAL OF COMPLAINT BASED UPON *NOERR-PENNINGTON* IMMUNITY

INTRODUCTION

Unocal's Reply misstates the governing law and ignores the Complaint's well-pleaded facts. The Complaint in this matter alleges a straightforward violation of the antitrust proscription on monopolization. The Supreme Court settled long ago that the offense of monopolization, which also violates Section 5 of the FTC Act, consists of two elements – "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966).

Tracking these elements, the Complaint alleges that Unocal obtained a monopoly in the market for supplying to gasoline refiners technology that permits those refiners to produce reformulated gasoline that will satisfy certain standards imposed by the State of California.

Further, the Complaint alleges that Unocal obtained that monopoly by the exclusionary acts of leading various oil refiners and CARB into incorporating Unocal's proprietary technology into CARB's reformulated gasoline ("RFG") regulations through misrepresenting that the technology was "non-proprietary" and in the "public domain." The refiners now confront a Unocal monopoly in the market for reformulated gasoline technology, instead of a competitive one, because of the strategic, deceitful, and exclusionary acts of Respondent Unocal. Further, Unocal has now obtained the power to drive prices up significantly beyond that which would have prevailed in a competitive market for technology, such as existed before Unocal induced the refiners to adopt Unocal's standard. The appropriate remedy, to dissipate that market power, is for Unocal to stop demanding royalties from those who employ the technology to make CARB-compliant gasoline.

Unocal now claims that the conduct charged in the Complaint is exempt from antitrust scrutiny and that Unocal's anticompetitive behavior is immune from remedial oversight. Astonishingly, Unocal asserts that this immunity derives from so-called "petitioning" behavior, even

though the case, as described above, seems devoid of any such activity. Indeed, as we show below, that is the central flaw in Unocal's various arguments, for the facts of this case make it quite clear that this is a matter to which *Noerr*[1] does not speak at all.

In any event, to resolve the immunity claim on the pleadings one must take as given both the factual allegations of the Complaint – such as those set out above – and the legal conclusions that, but for any possible *Noerr* immunity, these acts constitute unlawful monopolization and produced harsh anticompetitive effects.

For purposes of this motion, then, Unocal necessarily concedes that it willfully acquired and subsequently exercised monopoly power in a relevant market by exclusionary acts. Notably, Unocal does not claim that its conduct is exempt from antitrust review because it engaged in constitutionally protected First Amendment activity. *Noerr*, upon which Unocal relies entirely, is a statutory interpretation case, not a substantive First Amendment decision; and no court has ever suggested that any clause within the First Amendment protects knowing and willful lying to governmental agencies in order to gain monopoly profits. Nor does Unocal suggest that its immunity stems from a federal law or regulation that authorized its acts or otherwise shields its behavior.

Rather, Unocal asks that it be relieved of liability for deliberately anticompetitive behavior, that in fact produced severely anticompetitive consequences, not because of anything in the U.S. Constitution or any federal law, but solely because of a narrow judicially crafted exception first enunciated in the *Noerr-Pennington* cases. This sort of request for antitrust immunity requires the most compelling justification, because it is elementary hornbook law that "exemptions from the antitrust laws are to be narrowly construed." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979).

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[1] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

What sort of justification does Unocal provide? Why does Unocal claim that this Tribunal must protect its "right" to deceive its rivals and its regulator so that it may obtain a monopoly over the supply of a vital technology to those rivals? Unocal claims that it was involved in "petitioning behavior" within the meaning of *Noerr* (although surely not within the meaning of the First Amendment, as noted above). Yet, as the Complaint alleges, Complaint Counsel expects that the evidence will demonstrate the opposite.

Most of the remainder of this brief explains in greater detail why the assertion that *Noerr-Pennington* and their progeny shield Unocal's acts, as alleged in the instant Complaint, from antitrust scrutiny is wrong for at least four separate reasons:

First, the *Noerr* doctrine is inapplicable to cases in which the government is unaware, after the asserted petitioning conduct, that it is being asked to adopt or participate in a restraint of trade. *Noerr* protects petitioning by private parties who want the government to alter the usual rule against restraints of trade; it would be pointless, then, for *Noerr* to apply to cases where the government is completely unaware that the "petitioner" seeks a state-conferred monopoly. The Complaint alleges that CARB's regulations were intended to reduce automobile emissions, not to foster a monopoly. Unocal does not and cannot cite a single case in which *Noerr* immunity was extended to "petitioning" of government to adopt a restraint of trade where the government was, because of the deceit, unaware that it was being asked to adopt a trade restraint. Indeed, were Unocal's behavior to constitute *Noerr* petitioning immune from antitrust liability, then so would collusive bids filed on government contracts, and as explained below, they are not.

Second, as the Supreme Court effectively held in *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965), *Noerr* immunity does not extend to anticompetitive conduct that – like the conduct in this case – can be fully remedied without enjoining any communicative activity or disrupting or burdening any government program. A central purpose of the narrow *Noerr*

exception was to protect state governments' authority, recognized in *Parker v. Brown*, 317 U.S. 341 (1943), to consider and to adopt rules for governing local affairs that are at variance with the Sherman Act's rules. That purpose is not served by extending *Noerr* to a case whose remedy would impose no restraints on communications to or from any government, and would not alter or burden in any way any government program. The remedy here simply calls for Unocal to stop insisting on royalties from private, nongovernmental parties. No regulation of CARB, no communication to or from CARB, is affected in any way. We seek only to stop Unocal's exercise of market power, not to halt CARB's program. Again, Unocal does not and cannot cite a single decision in which *Noerr* immunity was extended to a case in which the remedy did not entail any limitation on petitioning activity or any limit or burden on any governmental program. In fact, to rule for Unocal here effectively would require overruling *Walker Process*.

Third, even were *Noerr*, for the first time in the history of antitrust, to be extended to so-called "petitioning" activity where the government is unaware that a restraint of trade is sought, and where the remedy will affect neither communicative activity nor any government program, this case as alleged in the Complaint falls squarely within the "misrepresentation" category of petitioning conduct that lower courts have walled off from *Noerr* immunity. The *Kottle* decision establishes that even petitioning that the government knows seeks to induce a restraint of trade, that culminates in such a restraint, and that requires burdening the government program to remedy, is unprotected by *Noerr* where the petitioning was a misrepresentation and occurred in circumstances like those here. *See Kottle v. Northwest Kidney Ctrs., Inc.*, 146 F.3d 1056 (9th Cir. 1998). This is especially true when the agency is making a decision based upon the factual submission of a party such as Unocal and which is subject to judicial review as CARB's decision was here. The determining factors are not defined by administrative law concepts but by application of the principles underlying *Noerr*. When the decisionmaking body and process is not political in nature, antitrust remedies may

be imposed. Thus, where behavior fits the *Kottle* factors, as here, even petitioning activity is not protected by *Noerr*.

Fourth, the Complaint alleges that Unocal lied to various oil refiners and, by this tactic of excluding other competing technologies, induced those refiners to acquiesce in a proposed course of regulation rather than to follow other options then open to them. Unocal achieved a monopoly over California-compliant reformulated gasoline technology as the refiners adopted Unocal's technology and then, by investing in them, were locked into them. Those allegations do not touch upon any behavior that can be said to constitute *Noerr* petitioning.

Each of the foregoing arguments explains why *Noerr* – an exception to the antitrust laws that must be narrowly construed – does not require dismissal of this Complaint. Put another way, this court must reject each and every one of the preceding four arguments before it can grant Unocal's motion to dismiss on *Noerr* grounds.

Yet Unocal cannot cite a single case in which a *Noerr* defense was upheld where either (1) the government was completely unaware, because of defendant's behavior, that the government was fostering monopoly behavior and had no intent to do so; or (2) the remedy will not interfere in any way with any government program or any communication to or from government; or (3) the advocacy was aimed at a private group, which induced members of that group to make marketplace decisions and investments that contributed to the defendant's acquiring a monopoly. In fact, however, given the allegations of this complaint, it is Unocal's burden to point to cases in which *Noerr* immunity was granted in the presence of ***all three*** conditions before this case can be dismissed at this stage. There are of course no such cases. In any event, the case as pleaded squarely fits within the category of "misrepresentation" cases that lower courts find are untouched by *Noerr*.

Finally, *Noerr* is a principle of federal statutory construction, not an antitrust doctrine. The

Noerr doctrine was formulated to help courts ascertain and enforce Congressional intent, to accommodate federalism concerns, and to leave "breathing space" for the exercise of the right to petition. *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 531 (2002). None of these concerns or values is unique to antitrust, and so *Noerr* applies to all federal statutes. Unsurprisingly, however, this means that behavior protected by *Noerr* under one statutory regime may be unprotected or differently protected under another. *Id.* at 528-529. As we show, no court has ever held that *Noerr* places limits on FTC Act section 5 that are precisely congruent with those that *Noerr* places on the Sherman Act, section 2. In fact, as this sur-reply and the initial opposition brief show in detail, cogent reasons support the application of a more confined rule of immunity in a case, like this, filed as an administrative complaint under Section 5, which seeks only an injunction barring the extreme harm that Unocal must admit for purposes of this motion.

ARGUMENT

I. Because CARB Was Unaware That It Was Being Asked To Adopt Or Participate In A Restraint Of Trade, Unocal Cannot Make the Requisite Threshold Showing That Its Fraudulent and Anticompetitive Conduct Constituted the Type of Petitioning Reached By *Noerr*.

Whether Unocal specifically asked and requested that CARB knowingly impose an anticompetitive restraint is a threshold question that determines whether the *Noerr* doctrine even reaches the type of conduct engaged in by Unocal in this case.[2] Under the facts alleged here, CARB asked Unocal if its technology was non-proprietary and thus could be used by CARB and others to make reformulated gasoline. Unocal said that the technology was "non-proprietary" and available for anyone to use. There was no petition to CARB to take any action, let alone for it to grant Unocal

[2] Contrary to Unocal's arguments (*see* Reply at 24), this question is different from the question as to the fraud exception to *Noerr*. The *Noerr* misrepresentation cases all deal with *Noerr* petitioning – where the government did in fact understand that the parties sought a trade restraint.

the monopoly that is being alleged here. CARB did not know that Unocal wanted a monopoly or desired to charge for the use of its technology. Unocal induced CARB to believe the opposite was true.

As the leading antitrust treatise explains, the law is that in "general, a prerequisite for *Noerr* immunity is that the government actually know about the restraint being imposed." Philip Areeda and Herbert Hovenkamp, *Antitrust Law* ¶ 209a at 260 (Aspen Law & Business, rev. ed., 2002). For example, the treatise explains that the law is clear that "there is no immunity for secret price-fixing agreements directed at government purchasers, and bid-rigging on government contracts is a common offense." *Id.* (citations omitted). When the government neither understands that a restraint is proposed nor intends to adopt a restraint, there is no point in regarding the anticompetitive conduct as a petition to be *Noerr* protected. The Areeda-Hovenkamp treatise explains all the myriad cases that make this principle clear. *Id.* If this were not the law, then one could allow the government to use a patented product in all government contracts free of charge, and then later sue the government for infringement.[3] One could also secretly bid rig or price fix as long as the government accepted one of the bids. But as the Areeda-Hovenkamp treatise explains, "there is no immunity for secret price fixing agreements" or "bid rigging." *Id.*, ¶ 209a at 260. Bid rigging precisely parallels this case. The rigged bid is a communication to government ostensibly seeking to participate in a competitive market while furtively seeking a monopoly. That is exactly what Unocal did here.

There is no immunity for secret, wrongful conduct just because some information is

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[3] *See, e.g.*, *De Forest Radio Tel. & Tel. Co. v. United States*, 273 U.S. 236, 241 (1927) ("[A]greement by the Telephone Company that it would not do anything to interfere with the immediate making of the audions for the United States ... [and] in furnishing the needed information ... for such manufacture, ... made such conduct clearly a consent to their manufacture and use). In other words, if you give the impression you're not going to charge for a patent, you cannot later insist on payment for its use – even from the government.

forwarded for the government's use at its peril. This is especially true in this case, where CARB delegated the fact finding to other parties such as Unocal and simply took as gospel the information that was conveyed. *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hosp.*, 185 F.3d 154, 164 n.8 (3d Cir. 1999) (No immunity should apply in cases like *Walker Process* "when the applicant has submitted false factual information" and "the state action is dependent on financially interested decision making" of the applicant), *citing* Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CALIF. L. REV. 1177, 1247-50 (1992) (Delegation of fact-finding to third parties precludes those third parties from claiming immunity). Accordingly, Unocal's conduct simply does not amount to petitioning potentially subject to any constitutional or statutory protection.[4]

An examination of the *Noerr* case itself supports this conclusion. The Supreme Court in *Noerr* assumed that the railroads and truckers were "petitioning" the Pennsylvania legislature and the Governor as to whether to enact a "Fair Truck Bill." *Noerr*, 365 U.S. at 130. That was obvious. *Id.* at 146 (each party "appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other"). The Court reasoned that since the legislature had the "power" to enact anti-competitive legislation that may be contrary to the Sherman Act (referring to the *Parker* case, which explained the state's right to do so), it made no sense to "hold at the same time, that the people cannot freely inform the government of their wishes" to have such legislation enacted. *Noerr*, 365 U.S. at 137-38 (*citing Parker v. Brown*, 317

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[4] In its Reply, Unocal effectively concedes that no constitutional concerns are implicated here, whether First Amendment rights or otherwise. The First Amendment protects the right of people to "petition the Government for a redress of grievances." U.S. Constitition, Am. I. The people have the right to "'communicate their will' through direct petitions to the legislature and government officials." *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (*quoting* James Madison, 1 Annals of Cong. 738 (1789)). But nowhere is there any evidence that this right protects someone who knowingly and deliberately misleads government in order to obtain monopoly rents in private markets. *Id.* at 483-84.

U.S. 341, 352 (1943)) (holding that the Sherman Act did not allow the invalidation of a state regulatory program that imposed competitive restraints). Thus, the Court found that the Sherman Act did not apply to cases based on a "mere solicitation of government action with respect to the passage and enforcement of laws." *Noerr*, 365 U.S. at 138. If the legislature, under *Parker*, could decide to pass anti-competitive legislation, then it followed that the Sherman Act could not proscribe "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. The logic of *Noerr* cannot apply to this case when Unocal was not soliciting CARB to pass any anticompetitive regulation. The Supreme Court later explained that this was the meaning of *Noerr*: that the Sherman Act should not apply to those "who merely urge the government to restrain trade." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988).

Noerr's holding that the Sherman Act does not apply to political requests for a competitive restraint cannot be stretched to encompass any and all requests for "favorable governmental action." While Unocal argues that "nothing" in the Supreme Court's decision in *FTC v. Superior Court Trial Lawyer's Ass'n ("SCTLA")* 493 U.S. 411 (1990), "gives even a hint of such support" to Complaint Counsel's argument in this regard (Reply at 24), the *SCTLA* court clearly observed that, in *Noerr*, the "alleged restraint of trade was the ***intended consequence*** of public action." *Id.* at 424-25 (emphasis added). Indeed, in *SCTLA*, the Commission explained:

> In the usual case in which the Noerr-Pennington doctrine has been held to apply, the government has played the role of an independent decision maker who is not a participant in the market. Usually, the goal has been to persuade the government, for whatever reasons and in response to whatever political influences, to impose requirements causing competitive harm to the buyers, sellers or other players in a market ....

SCTLA, 107 F.T.C. 510, 596 (1986), *rev'd in part*, 856 F.2d 226 (D.C. Cir. 1988), *rev'd in part*, 493 U.S. 411 (1990).

Unocal's reliance on *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365 (1991) ("*Omni*"), does not alter this analysis. Reply at 23. In *Omni*, it was clear that the purpose of the proffered bribe was as a *quid pro quo* for the imposition of a trade restraint. There was no dispute there, unlike in this case, that the government knew what was being requested. Similarly, the *Omni* court's holding that, under *Noerr*, the Sherman Act did not apply in that case was premised on the understanding that if a legislative political body wished to impose anticompetitive restraints that caused harm to parties, no antitrust liability could attach to such a knowing, political decision under the *Parker* state action immunity doctrine. *Omni*, 499 U.S. at 379-380 ("federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government").[5] As recognized by the Court in *Omni*, *Noerr* and *Parker* are Janus-like doctrines. *See Omni*, 499 U.S. at 379 (observing that *Noerr* developed as "a corollary to *Parker*," precluding antitrust liability for "the conduct of private individuals in seeking anticompetitive action from the government").

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[5] In its Reply, Unocal relies on additional cases to support its premise that Unocal engaged in petitioning activity that is protected by *Noerr*. However, as in *Omni* and *Noerr*, in all of these cases cited by Unocal, the facts are different than the case at hand in that the defendant requested that the government impose a trade restraint. *See Armstrong Surgical*, 185 F.3d 154 (Hospitals petitioned for Department to deny CON application); *California Motor Transp. v. Trucking Unltd.*, 404 U.S. 508 (1972) (Trucking companies petitioned to defeat applications by other companies); *Cheminor Drugs, Ltd, v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999) (Defendant petitioned ITC and DOC for protection of its bulk ibuprofen industry from imports); *Mylan Labs., Inc. v. Akzo, N.V., et al.*, 770 F.Supp. 1053 (D. Md. 1991) (Defendants petitioned FDA to deny competitor meaningful access to FDA approval process); *Boone v. Redevelop. Agency of San Jose*, 841 F.2d 886 (9th Cir. 1988) (Defendant petitioned public officials to relocate proposed parking structure and not give other developers exclusive parking there).

Noerr itself explains why in a *Parker* situation (*i.e.*, where the state deliberately restrains trade) it would make no sense to impose Sherman Act liability that 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 point the Court was making was a narrow one: if the state can grant a monopoly, then the Sherman Act should not apply to a person who is asking for one. But, of course, Unocal did not ask for one here.

Parker and subsequent caselaw interpreting this doctrine explain that immunity from the antitrust laws requires conscious and deliberate efforts of the state to restrain competition. *See, e.g.*, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980) (private anticompetitive activity is impliedly exempt from antitrust scrutiny under the state-action doctrine only if (1) the challenged restraint on competition is "clearly articulated and affirmatively expressed as state policy," and (2) the anticompetitive conduct is "actively supervised by the State itself").[6] Thus, to the extent that a private party urges the state to impose the particular anticompetitive restraint under consideration, the state would be immune from antitrust liability under *Parker* and the private party would be potentially immune under *Noerr*. Such is not the case here.

Notably, Unocal acknowledges in its Reply that there is, in fact, significance, under a *Noerr* analysis, as to whether the government engaged in a knowing and deliberate imposition of an anticompetitive restraint. Unocal highlights this fact because it seeks to rewrite the allegations of the Complaint. Unwilling to take the facts alleged as true, Unocal makes the fact-based argument that CARB, in fact, understood and intended to restrain competition and impose a trade restraint through its regulations. Reply at 24. But Unocal's arguments are highly misleading. Specifically, Unocal argues that CARB's estimates of increased costs that would be incurred by the various refiners reflects an intent to displace competition. *Id.* But the actual reference cited by Unocal states just the opposite.

Specifically, Unocal cites to portions of CARB rulemaking documents relating to CARB's

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[6] The *Midcal* test is "rigorous" and designed to "ensure that private parties [can] claim state-action immunity from Sherman Act liability only when their anticompetitive acts [are] truly the product of state regulation." *Patrick v. Burget*, 486 U.S. 94, 101 (1988); *see also FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992) ("[T]he analysis asks whether the State has played a substantial role in determining the specifics of the economic policy...whether the anticompetitive scheme is the State's own.").

consideration of small-refiner exemption to support its contention that CARB "expressly discussed the possibility that the regulations 'could have significant anticompetitive effects.'" Reply at 24-25 (*citing* CARB's Final Statement of Reasons). But the very purpose of this exemption was to encourage the continued viability of small refiners in the marketplace and thus ensure *greater*, not less, competition in the marketplace. The pertinent section of the reference selectively quoted by Unocal actually says:

> Elimination of the small refiner segment of the California refining industry would result in job losses and could have significant anticompetitive effects because small refiners ***contribute to competition*** in the petroleum industry. We have concluded that it is preferable to tailor our regulations in a way to minimize the likelihood that they will put a number of companies out of business . . . .

CARB Final Statement of Reasons, at 9-10).[7] (Emphasis added) As a result, it is clear that CARB did not intend its regulations to harm competition or know that they would enable anyone to monopolize this market.[8]

Nor does Complaint Counsel's position – i.e., that *Noerr* does not reach cases where the state action that results from the "petitioning" is not a knowing or deliberate trade restraint -- "prove[] too much." Reply at 25. Unocal states in its Reply that "the very concept of fraud assumes the defrauded party is not aware of it." *Id.* But in fact *Noerr* ***has never*** been applied to circumstances where the fraud included hiding the very fact of petitioning. In all cases where *Noerr* has applied, the defendant has lied or engaged in fraud in support of its known attempt to restrain trade. It is Unocal that seeks to extend *Noerr* in a way unprecedented in the history of the antitrust laws. This

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[7] Unocal also cites page 181 of CARB's Final Statement of Reasons in support of its contention that CARB knew and intended to restrain competition. However, the document states the opposite: CARB wanted to make sure that it did ***not*** "reduce competition in the gasoline market and [cause] an ultimate increase in gasoline prices."

[8] Of course, to the extent that the parties have a dispute concerning CARB's intent – and to the extent that this issue bears on the question of *Noerr* immunity – this factual dispute militates against resolution of *Noerr* immunity on a motion to dismiss.

effort should be rejected. Under *Noerr* there is simply no basis for any immunity to Unocal here.[9]

II. Consistent With *Walker Process, Noerr* Does Not Reach Unocal's Conduct Because Its Anticompetitive Conduct Can Be Remedied Without Enjoining Any Communicative Activity or Disrupting Any Governmental Program.

The proper scope of *Noerr*, like any other case, depends on its facts. In *Noerr*, complainants sought damages from government behavior and an injunction restricting information that could have been disseminated to the government. A review of all the *Noerr* precedents unsurprisingly reveals that *Noerr* immunity has never been held to prevent resolution of an antitrust complaint completely unlike that in *Noerr* – a complaint, such as the one here, seeking a remedy that did not burden or alter any government program or restrain communications to or from government. Indeed, this is the obvious basis on which *Walker Process* rests. For this simple reason alone, Unocal's motion must be denied.

Unocal ignores this point about remedies, while pretending to answer it, by focusing on a different question. Unocal repeatedly states that Complaint Counsel framed the following question correctly in its Opposition, but left the question hanging without an answer: "Would the anticompetitive consequences be the same if the government had never acted?" *See* Reply at 23-25. Unocal suggests that if the answer to the question is "No," then "[t]his should be the end of the inquiry," as this would establish that the alleged anticompetitive harm is the product of governmental action, and not private conduct. *See id.* Not so. In fact, *Walker Process* would flunk Unocal's test.

In *Walker Process,* the private party was able to inflict competitive harm precisely ***because***

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[9] Unocal's reliance on *A&M Records, Inc. v. A.L.W., Ltd.*, 855 F.2d 368 (7th Cir. 1988), is misplaced. *A&M Records* does not support, as Unocal suggests, the proposition that private enforcement action subsequent to valid governmental action is by definition also protected for the following reasons: (i) the trade restraint was imposed deliberately by governmental action; and (ii) the claim was dismissed for lack of evidence on summary judgment, not on *Noerr* immunity grounds.

the government had, in fact, acted and issued patents to the requesting party. *Walker Process*, 382 U.S. 172. Nonetheless, as the Commission explained in its amicus brief in *Armstrong*, "it was the antitrust defendant's attempt to *enforce* the fraudulently procured patent directly against a would-be competitor that the Court held could support an antitrust counterclaim." Brief for the United States and the Federal Trade Commission as Amici Curiae, *Armstrong Surgical Ctr., Inc. v. Armstrong County Mem'l Hospital*, Sup. Ct. No. 99-905 ("*Armstrong* Amicus Brief") at 13 (emphasis in original). Indeed, the Supreme Court described the wrongful conduct in *Walker Process*, not as a wrongful petition before the PTO, but as a use of monopoly power "obtained by fraud to exclude a competitor from the market." *Calif. Motor Transp.*, 404 U.S. at 513. As such, the answer in *Walker Process* to the question as to whether the anticompetitive consequences would be the same if the government had never acted would be "No." Yet, *Noerr* did not apply. Indeed, as in *Walker Process*, *Noerr* cannot possibly apply here.

Walker Process supports the Complaint's allegations that the competitive harm here was inflicted by Unocal's private business conduct in enforcing its patent rights.[10] Proof of this is in the appropriate remedy in both cases. Neither in this case nor in *Walker Process* does the remedy require any revocation or alteration of the relevant governmental action. *Walker Process* did not require, as a remedy, an invalidation of the patents. This case entails no challenge to CARB's regulations. Accordingly, the remedy has no impact or effect – either direct or indirect – on any government program or any party's communications with a government body.

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[10] Unocal confuses a "but for" cause of the anticompetitive harm with the direct and most proximate cause of that harm. It claims that "the Complaint alone compels dismissal by pleading alleged anticompetitive harm that would not have occurred but for CARB's regulatory action" Reply Brief at 5. However, the case that Unocal cites in support of this argument involved state action that was itself anticompetitive; no additional private conduct was involved. *Mylan Labs.*, 770 F.Supp. at 1063-64 (holding that the sham exception to the *Noerr* doctrine does not apply to "private attempts to win anticompetitive action from the government."). In this case, Unocal's private conduct was the proximate cause of the anticompetitive harm.

Thus, the more pertinent question in this case is the ***other*** question posed by Complaint Counsel in its Opposition: If CARB's regulation remains unchanged, can injunctive relief against the private party alone remedy the alleged anticompetitive consequences? Opposition at 19. *Walker Process* stands for the proposition – uncontradicted by any *Noerr* precedent – that *Noerr* does not apply where the anticompetitive harm is caused by private conduct, such that the appropriate remedy enjoins private action, and not governmental action, and does not restrain any communication to or from government.

As to Unocal's causation argument, though not directly relevant to this motion to dismiss on *Noerr* grounds, *Walker Process* also undermines Unocal's arguments in its Reply that its private business conduct in enforcing its patents cannot be, in any way, the basis for the imposition of antitrust liability. Specifically, Unocal claims that there is "no basis in law" for Complaint Counsel's arguments that *Noerr* immunity does not attach to Unocal's private conduct which, according to Unocal, merely constituted "tak[ing] advantage of beneficial government action." Reply at 27. In fact, Unocal's claim once again is squarely contradicted by Supreme Court authority.

Unocal's subsequent enforcement of its patent rights is inextricably linked with its fraudulent conduct in connection with the Phase 2 rulemaking. Unocal's efforts to separate its fraudulent conduct in the Phase 2 rulemaking from its subsequent private enforcement efforts are therefore misplaced. The Complaint clearly alleges the connection between Unocal's conduct before CARB and Unocal's later private enforcement of its patents – all were part and parcel of an overall anticompetitive scheme. As alleged, that anticompetitive scheme had two, interrelated, parts. The exclusionary scheme would not have succeeded and the anticompetitive effects would not have been inflicted without both steps – i.e., Unocal's fraudulent conduct during the CARB rulemaking (both before CARB and private industry groups outside the CARB proceeding) ***and*** Unocal's subsequent enforcement of its concealed patent rights. The latter is clearly the alleged, proximate cause of the

harm and is not part of what Unocal claims is petitioning to CARB. Accordingly, the enforcement of these patent rights cannot be considered in isolation, as Unocal seeks to do.[11] Again, that is exactly the type of conduct that the Supreme Court described as being covered by the analysis in *Walker Process. See Calif. Motor Transp.,* 404 U.S. at 513 (Describing *Walker Process* as an example of antitrust liability that is not immune under *Noerr*, because the patent holder "used a patent obtained by fraud to exclude a competitor from the market").[12]

In sum, in *Walker Process*, the Supreme Court held that a patent holder could be enjoined from collecting monopolistic royalties when the power to do so had been obtained from the government through fraudulent conduct. These facts put *Walker Process*, and hence this case, outside of the reach of *Noerr*. *Calif. Motor Transport*, 409 U.S. at 512-513. Because Unocal's exercise of market power can be prevented without damaging, altering, or burdening any government program or communication, there is simply no way that Unocal can receive immunity here unless this Tribunal and the Commission ignore *Walker Process* as binding precedent.[13]

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[11] Significantly, Unocal concedes that if the Court concludes that Unocal's rulemaking conduct was not *Noerr-Pennington* protected – whether because *Noerr* does not reach the conduct or because Unocal's fraudulent conduct falls within the misrepresentation exception to *Noerr* – '"the determination regarding the rulemaking would compel denial of the motion [to dismiss]." Reply at 28.

[12] *See also Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 993 (9th Cir. 1979) (held that antitrust liability would lie for enforcement of a patent known to be invalid).

[13] Unocal also seeks to distinguish *Walker Process* as limited to patent cases. In fact, however, lower courts have agreed that *Walker Process* is not limited to the patent context. *See, e.g., Clipper Exxpress v. Rocky Mountain Motor Tariff*, 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983) (relying on *Walker Process* in the context of a ratemaking proceeding); *Whelan v. Abell*, 48 F.3d 1247, 1255-1258 (D.C. Cir. 1995) (relying on *Walker Process* in holding that *Noerr* did not bar claims of tortious interference with prospective advantage, malicious prosecution, and abuse of process for filing submissions with state officials containing deliberately false statements).

III. Unocal's Fraudulent Conduct Is Within the Misrepresentation Exception to *Noerr*.

Courts have held that even where a defendant petitioned the government for an anticompetitive restraint, and the antitrust claim would require the court to impinge upon the government decision granting that restraint, there is an exception to *Noerr* in circumstances where the defendant made fraudulent statements of fact to the government decisionmaker. *See, e.g., Kottle*, 146 F.3d 1056*; St. Joseph's Hosp. v. Hospital Corp. of America*, 795 F.2d 948 (11th Cir. 1986). Accordingly, even were Unocal's conduct reached by *Noerr –i.e.,* had Unocal actually engaged in petitioning conduct by openly seeking a monopoly or an anticompetitive restraint, and were Complaint Counsel challenging conduct that, to be remedied, would require interfering with a government regulation or restraining communications to or from government – Unocal's fraudulent conduct would still fall within the misrepresentation exception to *Noerr*.

In its Reply, Unocal attempts to confuse this issue through its inappropriate efforts to plaster administrative law principles onto *Noerr* jurisprudence. *See* Reply at 9-23. There is no basis for this approach. No court has used the specialized lexicon of administrative law to make the *Noerr* determination.

Rather, the issue as explained in *Noerr* is whether the misrepresentation occurred during "political" exchange or not. Indeed, this is supported by authority cited by Unocal in its Reply. See Reply at 25 n. 12 (*quoting* Areeda & Hovenkamp, ¶ 203e, at 167, to support contention that antitrust liability disfavored for misstatements or partially untruthful statements in the ***"political arena."***). *See also* Reply at 26 (*quoting* Areeda & Hovenkamp, ¶ 203b, at 165, observing that "the antitrust laws were never intended to police the ***political process***"). But Areeda & Hovenkamp believe that in less political arenas, such as in proceedings before administrative agencies, no privilege for misrepresentations attach to a party's misrepresentations or fraud. *See* Areeda & Hovenkamp, ¶ 203e, at 169.

Two reasons, neither of which support any administrative law overlay to *Noerr*, explain why courts apply *Noerr* to misrepresentations only in cases involving political exchange in political processes. First, as Areeda & Hovenkamp explain, in political arenas it is very difficult to determine the extent to which any representation, accurate or not, influenced outcomes. Areeda & Hovenkamp, ¶ 203f3, at 177 (necessary causal connections almost impossible to establish "where no one can say what combination of facts, arguments, politics, or other factors produced the legislation").

Secondly, as Bork explains, the *Noerr* value of avoiding burdens on speech is particularly acute when the communication occurs in political arenas. R. Bork, *The Antitrust Paradox*, pp. 359-360 (1978). But this does not justify extending the misrepresentation exception beyond its proper bounds:

> To say that everything that is said to any kind of tribunal is "political expression" and therefore unregulable is to "politicalize" the courts, legislative fact-finding committees, and administrative tribunals so that they lose much of their present value and may become unmanageable. This is why the character of the governmental decisionmaking process affects the scope of conspirators' immunity from liability.

Id. at 360.

As discussed in our Opposition, the Ninth Circuit in *Kottle* understood the limited basis for *Noerr's* misrepresentation exception. *See* Opposition at 23. With that understanding, the Ninth Circuit set forth a non-exhaustive list of factors it analyzed to make its determination that the administrative agency acted outside the political arena – more like an adjudicatory agency than a political body – in Certificate of Need ("CON") proceedings. Significantly, the *Kottle* court recognized that the administrative agency there defied ready classification, as it was "neither a court nor a legislature." *Kottle*, 146 F.3d at 1061. The Ninth Circuit nevertheless found that the administrative agency there operated in a sufficiently non-political fashion such that *Noerr* immunity

would not attach to misrepresentations or fraud made in agency proceedings. In its Reply, Unocal does not address these arguments; instead Unocal simply argues that the *Kottle* court's decision supports the view that a certificate of need proceeding bears indicia of adjudicatory proceedings. *See* Reply at 12.

But in *Kottle*, and in other the *Noerr* cases involving fraud and misrepresentations to an administrative agency, courts look at factors such as:

- whether the administrative proceedings at issue place a premium on the accuracy and truthfulness of the information provided to the agency;
- the existence of procedural mechanisms relating to information gathering (hearings, examination of witnesses, potential judicial review); and
- whether the agency's determinations are guided by "enforceable standards."

Kottle, 146 F.3d at 1061-1062. In addition, another factor is whether the chain of causation can be drawn from a party's fraud or misrepresentation and the government's actions. *See* Areeda & Hovenkamp, ¶ 203e, at 170; ¶ 203f3, at 177, ¶ 203f3, at 178.[14]

To the extent that an agency's proceedings rely on the truthfulness and accuracy of facts and information provided by private parties, such reliance indicates that the agency operates in a non-political manner. To the extent that agency proceedings do not exhibit particularized concern as to the ensuring the truthfulness of the submissions of participating parties, the absence of such procedural safeguards indicates agency decisionmaking based on broad policy decisions as opposed to hard-eyed analysis of the relevant facts. In this regard, contrary to Unocal's contentions otherwise, an agency's focus on a formalized process of information gathering and subsequent

[14] These factors apply here at least as much as they would in *Walker Process*, where the PTO uses obviously not a court proceeding and which the Supreme Court explained was an example of when *Noerr* should not apply. *Calif. Motor Transp.*, 404 U.S. at 512-513. These circumstances are what is meant by "quasi-adjudicative" in *Noerr* analysis–not what Unocal asserts. *See id.* (describing *Walker Process* as like an adjudicative proceeding).

adherence to "enforceable standards" is highly relevant to determining the application of *Noerr* immunity.

In this case, as in *Kottle*, the administrative agency's adherence to Administrative Procedures Act standards, requiring that it have an evidentiary basis for every decision it makes, demonstrates that CARB placed a premium on, and depended upon, the accuracy of facts presented to it on which to base its rulemaking decisions.[15] In addition, the guidance of "enforceable standards" signifies that review of the administrative body's decision will be substantive and content-based, and not simply an appeal to a legislative body, which is reviewed on a much more deferential standard. *See* Opposition at 31-32. These facts are alleged in the complaint, which must be accepted as true here. *See* Cmplt. ¶ 43 (CARB relied on Unocal's information); ¶ ¶ 45, 77-80.

Unocal argues that the asserted existence of a bright-line dichotomy in administrative law between "legislative" and "adjudicative" bodies is dispositive here. But the line between administrative law definitions of quasi-adjudicative and quasi-legislative in terms of a *Noerr* analysis is blurry and unhelpful.[16] Moreover, Unocal's Reply -- despite the length of its discussion

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[15] *See, e.g.,* Cmplt., ¶ 43 (CARB relied on accuracy of information provided by participants to the rulemaking). Again, this reliance on the facts submitted by the private party is yet another factor that makes this case analogous to *Walker Process.* As set forth in our Opposition, *Noerr* cases have consistently held that such a reliance is a critical determinant as to the whether a party's fraud and misrepresentations will vitiate the potential application of *Noerr* immunity. *See* Opposition at 31-32. In this case, CARB had to necessarily rely on the information submitted by Unocal concerning the proprietary or non-proprietary nature of its research results. In its Reply, Unocal simply fails to respond to Complaint Counsel's arguments in this regard.

[16] *See, e.g.,* C. Douglas Floyd, *Antitrust Liability for the Anticompetitive Effects of Governmental Action Induced By Fraud*, 69 Antitrust L.J. 403, 461 (2001) (emphasis added):

> [S]erious practical problems would attend any effort to draw a sharp dichotomy between legislative or policy-making activity on the one hand, and adjudicative or policy-application activity on the other . . . ***In terms of the policies relevant to the imposition of antitrust liability on private parties who have fraudulently induced anticompetitive governmental action, it is far from clear that the attempt to draw such an elusive line***

of "bedrock" administrative law issues -- says little, if anything, that ties its analysis to the doctrinal considerations underlying *Noerr*. For example, in order to emphasize the distinction between "quasi-legislative" and "quasi-adjudicative" proceedings, Unocal asserts that legislative proceedings are "forward-looking" in nature, while that "adjudicative" proceedings relate to backwards-looking determination of rights and obligations of specific parties. Reply at 17. But, as stated, that is not a factor that courts consider because it has no bearing on the policies that underlie *Noerr*. In its reply, Unocal has failed to establish why its administrative law distinctions matter here. And they do not.[17]

On the other hand, the critical *Noerr* inquiries – as reflected in *Kottle* – relating to an agency's information gathering ability, guidance by enforceable standards, and the existence of a causal nexus between a party's fraud and the government agency's actions, all are relevant to a *Noerr* analysis. In other words, if the agency is gathering facts to make a determination under legislatively prescribed standards and subject to judicial review, as is the case here, misrepresentations are not protected by *Noerr*.

In *Armstrong*, for example, the court considered whether the "state decision makers were disinterested, conducted their own investigation," concerning the supposed misrepresentation, "and afforded all interested parties an opportunity to set the record straight," and whether there were "extensive opportunities for error correction." Since all these factors existed, it made little sense for

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should be made.

[17] Unocal's heavy reliance on federal administrative law principles and caselaw is inapposite. California administrative law differs from federal administrative law in a significant respect: it provides for more rigorous scrutiny of administrative decisions inasmuch as it provides for substantial evidence review of all regulations by the Office of Administrative Law ("OAL") and potentially by a court of law. *See* Cal. Govt. Code §11349(a); *WSPA v. Superior Court*, 9 Cal. 4th 559, 573 (1995) ("both types of substantial evidence review [by OAL and court] are governed by similar evidentiary rules").

the court to reverse the state's "decision concerning where the public interest lies," in light of those facts. The Court then explained an example where such factors would not apply: In a case "like *Walker Process*" where "the decision making process there was an ex parte one in which the Patent Office was wholly dependent on the applicant for the facts." *Armstrong*, 185 F.3d at164. Like *Kottle*, *Armstrong* explains what *Noerr* courts are considering: Does the case involve political discourse where no participant is expected to tell the whole truth and where "right" and "wrong" are determined by feel? Or does the case involve communications of fact to an agency that does not have independent access to the truth and which must make bedrock factual determinations? The latter is exactly like this case.

Unocal's criticism of Complaint Counsel's reference to *Boone* is therefore misplaced. Unocal argues that *Boone* highlighted the distinction between legislative and adjudicative actions and "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." Reply at 23. As Complaint Counsel noted in its Opposition (*see* Opposition at 23-24), the *Kottle* court cited and distinguished the *Boone* case because, unlike the case in *Kottle*, *Boone* dealt with misrepresentations in the political sphere, where the final decisions were made by a "distinctly legislative body," the city council.[18] The *Boone* court cited to the ability of the city council "to accommodate false statements and reveal their falsity."

Here, as set forth above, since CARB was dependent and relied on the accuracy of information provided by Unocal, it could not ferret out the fraud and misrepresentation any more

[18] As the *Kottle* court explained, "in *Boone*. . ., we noted that the administrative agency in question made decisions virtually unguided by enforceable standards and that these decisions could be appealed only to a legislative body. 841 F.2d at 896. We concluded that the agency was essentially a political body." 146 F.3d at 1061.

than could the agency in *Kottle* or the PTO in *Walker Process*.[19] Moreover, CARB's decisions were subject to potential scrutiny by two independent bodies – one administrative and the other judicial – under a substantial evidence test. Thus, it was dependent upon accurate fact finding. It would be ironic if CARB could be sued for a failure to use proper fact finding here, but Unocal could say that its submission of false facts are somehow immune from scrutiny.

Finally, determining whether a causal nexus can be established between a party's fraud and one or more of the government agency's actions is another key part of the *Noerr* analysis. Areeda & Hovenkamp, ¶ 203f3, at 177 (the more political the arena, the more difficult to determine the cause of a restraint). Here again, the usefulness of Unocal's focus on the bright-line distinction between "legislative" and "adjudicative" proceedings is further undermined. Admittedly, in political decisions, it may be difficult to trace the chain of causation. But this, as Unocal's Reply itself admits, is a fact-intensive inquiry. Specifically, Unocal concedes that resolution of the *Noerr* question is rife with factual issues by the very language used in its Reply in describing the difficulty of tracing causation in rulemakings. Unocal asserts the following: "it is ***typically*** impossible to draw a causal link..."; "there is ***typically*** only one correct legal outcome in adjudication..."; and "it is '***often*** difficult and ***frequently*** impossible" to state why a government acted as it did. *See* Reply at 10. Complaint Counsel contends, however, that – as the Complaint alleges – this is ***not*** the typical case; and Complaint Counsel expects to establish at trial that the chain of causation can, in fact, be traced in this case from Unocal's fraudulent conduct to its effect on the administrative agency.

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[19] Unocal overreaches again when it argues that *Boone* court rejected argument that the trappings associated with adjudicatory procedures transforms a quasi-legislative proceeding. This is apparent when the final phrase from *Boone* is included: "even though proceedings before the agency have some of the trappings normally associated with adjudicatory procedures, ***all final decisions are made by the council, a distinctly legislative body.***" *Boone*, 841 F.2d at 896.

For purposes of determining the applicability of *Noerr* immunity, the spotlight should be trained on the inappropriateness of Unocal's fraudulent conduct in the administrative proceedings at issue here. It should not be diverted, as Unocal's Reply scrambles to do, to a detailed analysis of whether, for administrative law purposes, the CARB proceedings are classified as a rulemaking or an adjudication. Under the *Kottle* factors and under *Noerr*, the facts will show that Unocal was not engaged in a political discourse here, but that it was giving factual information to CARB that the agency and the oil industry could use the Unocal technology without any strings attached – without any cost. Thus, under the *Kottle* factors, and under the basic principles of *Noerr*, even if Unocal's misrepresentation was directed to government, it was a statement of fact that CARB relied upon, and thus is within the misrepresentation exception to *Noerr*.

IV. Unocal's Conduct Before Private Industry Groups Is Not Protected By *Noerr* and Forms an Independent Basis for Antitrust Liability.

The Complaint alleges anticompetitive conduct before private industry groups and their members that is simply not reached by *Noerr* because these claims are independent of any conduct by Unocal before CARB. Cmplt., ¶¶ 50-59, 90, 96. In its Reply, Unocal states that it should be immune from antitrust liability because the complaint alleges only "indirect" petitioning by these third parties. Unocal misstates the Complaint's allegations as well as the law.

As set forth in the Opposition (*see* Opposition at 35-36), the Complaint (¶¶ 50-59, 81-90) alleges that Unocal's anticompetitive scheme encompassed and incorporated private conduct that was independent and not necessarily related to the CARB proceedings. The Complaint cites several examples, such as:

- Unocal promised its joint-venture partners in Auto-Oil that the 5/14 project was in the "public domain" and thus "freely available, without charge." (*Id.* at ¶ 52)
- Unocal gave the same impression to WSPA. (*Id.* at ¶¶ 56-59)
- But for Unocal's fraud, the oil companies would have incorporated knowledge of

> Unocal's pending patent rights in their capital investment and refinery reconfiguration decisions to avoid or minimize potential infringement. (*Id.* at ¶ 90).

None of this conduct has anything to do with CARB. The fact that Unocal also misrepresented the facts to CARB does not "alone" bring these independent allegations within *Noerr*. *Allied Tube*, 486 U.S. at 509 n.11 ("The mere fact that an anticompetitive activity is also intended to influence governmental action is not alone sufficient to render that activity immune."); *Clipper Exxpress*, 690 F.2d at 1263-1264 ("[V]iolations do not become immune simply because the defendants used legal means – protests before the ICC – as a means to enforce the violations.").

Unocal did not use the Auto Oil Group and WSPA to "petition" CARB. Instead, it misrepresented the facts to them to ***prevent them from stopping Unocal's scheme***. *See, e.g.*, Cmplt., ¶ 81-90. This corruption of the process prevented the truth from being communicated to CARB, and hindered these groups' own Right to Petition. The law is clear that this type of behavior falls completely outside of *Noerr*. *Calif. Motor Transp.*, 404 U.S. at 515 (*quoting Noerr*, 365 U.S. at 144) (Preventing others from petitioning is an "attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified").

To the extent that, in some measure, Unocal's activities before private industry groups could be construed as "indirect" petitioning under *Noerr*, the arguments raised above apply with equal force. No court has ever held that the exceptions to *Noerr* do not apply when the Respondent uses third parties to help in the process. Rather, the most recent Supreme Court cases like this have found that *Noerr* did not afford immunity under these circumstances. *Cal. Motor Transp.*, 404 U.S. at 515; *Allied Tube*, 486 U.S. at 507 ("[T]he antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact.").

V. *Noerr* Does Not Immunize Unocal's Misconduct Because these Proceedings Are Brought Under the FTC Act and Not the Sherman Act.

None of the cases cited by Unocal directly addressed whether, or the extent to which, *Noerr*

provides immunity from FTC Act proceedings.[20] Unocal simply argues that *Noerr* applies broadly, and that the *SCTLA* case proves this point. But neither assertion is correct. Moreover, Unocal failed to address the Supreme Court's recent decision in *BE&K*, which makes it clear that *Noerr* is an interpretation only of the Sherman Act and its method of interpretation may yield different rules when applied to other statutes.

As established above, *Noerr* does not preclude a finding that Unocal violated the Sherman Act. Moreover, notwithstanding Unocal's arguments to the contrary, *Noerr* does not separately immunize Unocal from FTC Act liability. Thus, while *Noerr* establishes the manner in which the First Amendment right to petition affects the scope of the Sherman Act, it does not dictate how the right to petition affects other statutes. In each such case -- to determine the proper interaction between the statute or statutes at issue and the First Amendment -- the Supreme Court instead has conducted a careful analysis of the statutory provisions at issue; of the governmental interests which the statutory provisions effectuate; and of the extent to which the First Amendment interests at issue should consequently constrain the operation of the statutory provisions.

Each such analysis is inherently and necessarily statute-specific. In *Noerr* itself, the Supreme Court based its decision on a statute-specific construction of the Sherman Act. Thus, in the case on which Unocal primarily relies, the Court characterized its decision in *Noerr* as "[i]nterpreting the Sherman Act in the light of the First Amendment's Petition Clause." *SCTLA*, 493 U.S. at 424. Indeed, the Court divided its analysis into two components: Whether the respondents' conduct "is outside the scope of the Sherman Act *or is immunized from antitrust regulation by the First Amendment*." *Id.* at 421 (emphasis added). Statute-specific analysis is the preferable approach to statutory interpretation designed to account for constitutional questions, because it ensures that

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[20] In *Ticor*, however, the Court identified without resolving the possibility that "the antitrust statutes can be distinguished...." *Ticor*, 504 U.S. at 634.

the objectives of a particular statute can be achieved as effectively and comprehensively as possible, consistent with constitutional principles.

For example, in *Omni*, the Court once again carefully limited its reliance on *Noerr* to the allegations of Sherman Act violations. 499 U.S. at 384. While the Court determined that the petitioning and other conduct at issue did not provide a basis for Sherman Act liability, it also determined that *Noerr* did not preclude a finding of liability against Columbia Outdoor Advertising – on remand, on the basis of the same conduct – for "private anticompetitive actions such as trade libel, the setting of artificially low rates, and inducement to breach of contract," and for violations of the South Carolina Unfair Trade Practices Act. *See id.*

Similarly, as we noted in our Memorandum In Opposition, the Court followed the same approach in its most recent analysis of the Petition Clause in *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002). There, the Court summarized the *Noerr* line of cases (including *Professional Real Estate Investors, Inc. v. Columbia Pictures Industry, Inc.*, 508 U.S. 49 (1993)); stated that "[t]his case raises the same underlying issue of when litigation may be found to violate federal law, but this time with respect to the NLRA rather than the Sherman Act." *BE & K Constr.*, 536 U.S. at 526. And yet, the Court found that the National Labor Relations Act was not subject to the Sherman Act analysis of *Noerr*. That same conclusion applies here.

The substantial remedial and organizational differences between the Sherman Act and the FTC Act detailed in our Memorandum In Opposition establish more particularly -- in conjunction with the same type of statute-specific analysis -- that *Noerr* does not preclude the imposition of an injunction under the FTC Act that is not aimed at any governmental program. Significant remedial and organizational differences between the Sherman Act and the FTC Act establish two important reasons to refrain from applying *Noerr* to the latter statute. The remedial concerns which led the Supreme Court to create *Noerr* as a limitation on the Sherman Act do not extend to the FTC Act.

There is simply no basis for immunizing speech or petitioning that constitutes an unfair method of competition from FTC Act liability.

Unocal's only response to the foregoing arguments is to note that the Commission and the Supreme Court discuss *Noerr* in their respective decisions in *FTC v. Superior Court Trial Lawyers Association*. Unocal's interpretation is incorrect. Those decisions do not even suggest, much less establish, that *Noerr* precludes a finding of FTC Act liability. They are rather fully consistent with conducting a statute-specific analysis of the manner in which the FTC Act interacts with the First Amendment. Thus, in *SCTLA*, while the Commission indicated that *Noerr* guided "[its] conclusion that First Amendment immunity should not extend" to the respondents' conduct, the Commission concluded that it "would reach the same conclusion, however, under a general First Amendment analysis of expressive conduct." SCTLA., 107 F.T.C. at 594. Thus, the Commission did not consider – and so the Supreme Court was not asked to review – whether Section 5 might support a different result.

The *SCTLA* opinions are thus fully consistent with the manner in which the FTC Act interacts with the First Amendment. The FTC Act empowers *and directs* the Commission to prevent unfair methods of competition and unfair or deceptive acts or practices. It would be anomalous to interpret this directive to mean that the Commission should prevent unfair or deceptive acts or practices to the full extent constitutionally permitted by the First Amendment, but should prevent unfair methods of competition only to the extent permitted by a statutory construction of a different statute – the Sherman Act. This is especially ironic, considering that the reason there is a Commission is due in part to a desire to employ different processes in making and enforcing competition policy.[21] Indeed, as President Wilson said, the Commission was created to be "an

[21] An excellent history of this development can be found in Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L. J.

instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case." H.R. Doc. No. 625, 63d Cong., 2d. Sess. 5 (1914).

As in *SCTLA*, under the FTC Act, the Commission has the power to enjoin Unocal from harming consumers, which has nothing to do with interfering Unocal's opportunity to communicate with CARB, through damages or injunctive relief not aimed at any governmental program, which greatly reduces the potential exposure of defendants. Indeed, in *SCTLA,* the Commission made the independent determination that its decision to enjoin the private conduct would not inhibit the Right to Petition or disrupt any government program. The Commission reasoned that to allow the harm to continue would not "foster the *Noerr* goal of free exchange of information between people and the government," and yet "prohibiting such conduct does not interfere with anyone's ability to choose to sell his services to the government or to make his views on the appropriate price known to government." 107 F.T.C. at 599. That reasoning equally applies here.

In every other case, cited by Unocal, the plaintiff sought damages, and in some cases injunctions to prevent further petitioning or to halt or burden a government program. That is what *Noerr* itself was. An FTC case is different. The Commission is protecting consumers from the future effects of wrongful conduct, and as such does not implicate the core First Amendment political petitioning issues in any way. This case is a great example. The equitable relief that the Commission can obtain here will not in any way change the CARB Phase 2 regulation; it will not alter Unocal or any other party's right to tell CARB or any agency what it thinks. It simply enjoins Unocal from reaping the benefits it seeks from an ill-gotten monopoly.

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1 (2003).

If the state of California had intentionally granted Unocal a monopoly and satisfied the requirements of *Parker*, we wouldn't have this case. But the state is powerless to stop this disaster. The Commission has the power to correct a wrong that will go unremedied unless the Commission acts.

The Complaint alleges under Section 5 of the FTC Act that Unocal has engaged in "unfair competition" in seeking to collect billions of dollars from the oil industry – and hence from consumers who buy the gasoline – for using Unocal's technology after Unocal asserted that it was "non-proprietary" and in the "public domain." At its core, Unocal's conduct is anticompetitive and also fundamentally unfair. To the extent that Unocal argues that the Sherman Act would not cover such conduct – to which we disagree – Complaint Counsel has alleged that this conduct violates Section 5 of the FTC Act. No court has held that *Noerr*'s narrow exception to Sherman Act liability applies to Section 5, and it is thus not appropriate for Unocal to ask this Tribunal to change the law to prevent the Commission from stopping the anticompetitive effects of Unocal's conduct.

CONCLUSION

No court has held that, under the sort of circumstances at issue here, that a private party can use *Noerr* to escape the consequences of its antitrust violation – especially where its private conduct allegedly caused independent harm. Accordingly, this Court should deny Unocal's motion.

Dated: December 11, 2003

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I, Terri Martin, hereby certify that on September 26, 2003, I caused a copy of Complaint Counsel's Sur-Reply Memorandum in Opposition to Union Oil Company of California's Motion for Dismissal of Complaint Based Upon *Noerr-Pennington* Immunity to be served upon the below listed persons:

BY HAND DELIVERY TO:

The Honorable D. Michael Chappell
Administrative Law Judge
The Federal Trade Commission
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