

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

---

**DOCKET NO. 9305**

**PUBLIC VERSION**

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**IN THE MATTER OF  
UNION OIL COMPANY OF CALIFORNIA**

---

**APPEAL BRIEF OF  
COUNSEL SUPPORTING THE COMPLAINT**

Susan A. Creighton  
*Director*

Bruce D. Hoffman  
*Deputy Director*

Richard B. Dagen  
*Assistant Director*

Bureau of Competition  
Federal Trade Commission  
Washington, DC 20580

J. Robert Robertson  
Chong S. Park  
John Roberti  
Lisa Fialco  
Peggy D. Bayer  
Harry Schwirck  
*Counsel Supporting the Complaint*

Thomas Krattenmaker  
Suzanne T. Michel  
*Office of Policy & Evaluation*

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## STATEMENT OF THE CASE

Despite taking as true the allegations that fraudulent and anticompetitive conduct by Union Oil Company of California (“Unocal”) will result in billions of dollars of consumer harm, the ALJ ruled that such conduct is beyond the reach of the Commission and dismissed the Complaint. The Initial Decision is contrary to law and should be vacated.

As the Complaint alleges, in 1991 Unocal gave its reformulated gasoline research to California’s Air Resources Board (“CARB”) and separately to the Auto/Oil Air Quality Improvement Program (“Auto/Oil”) and the Western States Petroleum Association (“WSPA”), two private industry groups. Unocal told them that the research was “non-proprietary” and in the “public domain.” Unocal told CARB and the oil industry that they could make reformulated gasoline using Unocal’s research without charge. This was business, not politics. And it was a lie, the centerpiece of a strategy to trick both CARB and the oil industry into making gasoline the Unocal way, which is now covered by five patents.

Neither CARB nor the refiners had reason to believe that Unocal was gaming the regulatory process to create a monopoly for Unocal. Neither had the means to discover the truth, because only Unocal could know the truth: that it had applied for patents and intended to demand royalties once the patents issued. Only later, in 1995, after CARB and the oil industry each were locked in, did Unocal publicly announce for the first time the plan to charge for use of its reformulated gasoline technology. Now, unless the Commission stops Unocal, the people of California will pay billions of dollars of monopoly rents, as a reward to Unocal for its deceit, for reformulated gasoline sold in California between 1996 and 2011.

Unocal’s defense that the *Noerr-Pennington* doctrine protects its deceit and trickery from antitrust scrutiny is simply without foundation. Although Unocal’s lies to CARB do entail communications to government, they nevertheless fall outside *Noerr* immunity for several

reasons, detailed below. Unocal's lies to WSPA and Auto/Oil entailed no "petitioning" conduct whatsoever and provide separate and distinct grounds for holding Unocal liable for unfair methods of competition.

Further, the ALJ erroneously found that 28 U.S.C. § 1338(a) deprives the Commission of jurisdiction to hear this or any case that might involve substantial issues of patent law. Section 1338(a) says no such thing: it only excludes "courts of the states" from hearing "civil actions arising under" patent or copyright laws. This is not a "civil action" "arising" out of the patent laws, and the Commission is not a court "of the states." Indeed, even if the claims here involved substantial issues of patent law, as the ALJ wrongly asserted, antitrust law has addressed patents since before the Commission's creation in 1914, and the Commission clearly has the right to hear such cases. *American Cyanamid*, 63 F.T.C. 1747, 1856 (1963), *vac. on other grounds*, 363 F.2d 757, 771 (6th Cir. 1966). As the Commission opinion unanimously concluded in *Schering*: "If it were logically necessary to decide the issue of patent validity in order to decide" the Section 5 issue, "we would do so – regardless of the difficulties." *In re Schering-Plough Corp., et al.*, Docket No. 9297, Opinion at 35. Thus, this Commission should vacate the Initial Decision and remand this case for an evidentiary hearing.

## **STATEMENT OF FACTS**

The Commission Complaint alleges that Unocal engaged in deceptive conduct before CARB and before private industry groups for the purpose and with the effect of illegally acquiring monopoly power and thereby causing substantial harm to competition and consumers.

### **1. The Technical Nature of CARB's Rulemaking Process.**

In 1988 the California legislature required that CARB take actions to reduce car emissions through, among other things, regulating standards for automotive fuels. CARB adopted regulations relating to reformulated gasoline ("RFG") in two phases. Phase 1 was

relatively limited in scope. Phase 2 RFG proceedings were more comprehensive and contemplated that refiners would have to make substantial investments to produce compliant gasoline. Comp. ¶¶21-24.

CARB's rulemaking authority was circumscribed. The relevant statute limited CARB's actions to those that were "necessary, cost-effective, and technologically feasible." Comp. ¶21. All CARB regulations are subject to review by California's Office of Administrative Law, and then to judicial review under a substantial evidence standard. Comp. ¶18. CARB relied on industry to provide the needed research constituting the substantial evidence to support the Phase 2 RFG regulations. Comp. ¶¶17, 25. CARB also adhered to the procedures established in the California Administrative Procedures Act. Comp. ¶26.

## **2. Unocal Researches Emissions for Competitive Advantage.**

By 1989, Unocal management understood that CARB intended to regulate the specifications of RFG and decided to capitalize on this opportunity by developing a proprietary reformulated gasoline and charging royalties. Comp. ¶¶28, 34. Based on Unocal's research to develop proprietary gasoline, Unocal management approved the filing of a patent application (the "393 patent"), which was filed with the U.S. Patent and Trademark Office ("PTO") on December 13, 1990. Comp. ¶1-32.<sup>1</sup> Meanwhile, Unocal executives specifically considered how to induce the regulators to use Unocal's research results in order to realize the huge licensing income potential of its pending patent claims and to secure a competitive advantage. Comp. ¶¶34-35.

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<sup>1</sup> All five Unocal RFG patents at issue are the progeny of this initial application. Comp. ¶32.

### 3. Unocal Fraudulently Presents “Non-Proprietary” Research to CARB.

On June 20, 1991, Unocal presented its research results to CARB staff to show CARB that “cost-effective” regulations could be achieved by adopting a “predictive model,” and to convince CARB of the importance of the midpoint distillation temperature (“T50”) of gasoline. Significantly, most of Unocal’s patent claims set forth in its original application are based upon this same “T50” discovery. Comp. ¶37.

Prior to the presentation to CARB, Unocal management decided not to disclose Unocal’s pending ‘393 patent application to CARB staff. Comp. ¶38. Instead, Unocal told CARB in writing that the Unocal research was “publicly available,” *“non-proprietary and available to CARB, environmental interest groups, other members of the petroleum industry, and the general public upon request.”* Comp. ¶¶40-41 (emphasis added). Unocal never informed CARB that its “non-proprietary” research results were in fact covered by a pending patent application and that far from contributing its research to the public domain, Unocal intended to demand royalties covered by its patent claims. CARB did not learn of these proprietary interests or Unocal’s planned licensing scheme until Unocal issued its press release on January 31, 1995. Comp. ¶¶42, 49.

CARB used Unocal’s research results to set a T50 specification in the regulation, and published Unocal’s equations and other data in the public record. Comp. ¶43. Throughout the Phase 2 rulemaking process, Unocal continued to offer information, comments and testimony to CARB regarding the cost-effectiveness and viability of various CARB Phase 2 RFG regulations. Simultaneously, Unocal concealed the existence of its proprietary rights and the fact that its anticipated assertion of these rights would materially increase the cost and reduce the flexibility of the proposed regulations. Comp. ¶¶46-48.

By July 1992, Unocal knew that the PTO would approve most of the pending patent claims, and that these claims covered all the types of gasoline required by CARB's proposed regulations. Nevertheless, Unocal continued to conceal this information from CARB and other participants in the CARB RFG proceedings. Until January 31, 1995, Unocal conveyed the false and misleading impression that it neither possessed, nor would enforce, any proprietary interests relating to its RFG research. Comp. ¶4. As a result, CARB adopted Phase 2 RFG regulations that substantially overlapped with Unocal's concealed patent claims. Comp. ¶45.

#### **4. Unocal Deceives Industry Groups.**

Unocal deceived industry groups Auto/Oil and WSPA to obtain market power. Comp. ¶54.

Auto/Oil, a cooperative joint research venture among fourteen oil companies (including Unocal) and the three largest automobile manufacturers, provided government regulators with research regarding the emissions impact and cost-effectiveness of automotive fuel improvements. Comp. ¶¶50-51. The Auto/Oil Agreement provided for dedicating all intellectual property rights relevant to the group's work to the public, including research shared by the members to the group. Comp. ¶52. On September 26, 1991, Unocal presented to Auto/Oil its RFG research and told the members that the Unocal data had been made available to CARB and were in the "public domain." Unocal also represented that the data would be made available to Auto/Oil and its members. Comp. ¶54.

WSPA is an oil industry trade association that participated in the CARB RFG rulemaking. On September 10, 1991, Unocal presented its RFG research to WSPA and created the false and misleading impression that the research was nonproprietary. Comp. ¶58. WSPA submitted three cost studies to CARB in connection with the Phase 2 rulemaking. Unocal actively participated in WSPA and in developing these studies – and knew that these studies



considered royalties – but nevertheless concealed the potential cost of the royalties associated with its planned enforcement of its RFG patent(s). Comp. ¶¶56-57, 87.

#### **5. Unocal Prosecutes and Enforces Patent Rights.**

At the same time, Unocal aggressively prosecuted its patent application, and through amendments ensured that its patent claims overlapped with the specifications in the new CARB regulations. Comp. ¶¶31, 60.

In April 1995, following Unocal's public announcement of the '393 patent in January, the six largest California refiners filed suit in federal court in the Central District of California seeking to invalidate Unocal's '393 patent. Unocal filed a counterclaim for patent infringement. The court found Unocal's '393 patent to be valid and infringed, and the refiners were ordered to pay a royalty rate of 5.75 cents per gallon. The refiner-defendants have paid Unocal \$91 million, and an accounting action for additional royalties has been stayed pending the resolution of other proceedings. Comp. ¶¶68-70.

On January 23, 2002, Unocal sued Valero Energy Company under both the '393 and '126 patents and sought damages of 5.75 cents per gallon for all infringing gasoline and treble damages for willful infringement. Comp. ¶71. Unocal also has enforced its patent claims through licensing activities covering all five RFG patents. Comp. ¶72.

#### **6. Impact of Unocal's Fraudulent Conduct.**

The Complaint alleges that Unocal illegally acquired and exercised monopoly power, which it achieved through two sets of actions, each of which was sufficient, standing alone, to violate Section 5 of the FTC Act. First, Unocal lied to CARB and engaged in fraudulent and deceptive conduct in connection with the CARB proceedings. But for Unocal's misconduct, CARB would not have adopted RFG regulations that substantially overlapped with Unocal's concealed patent claims; or the terms on which Unocal was later able to enforce its proprietary

interests would have been substantially different; or both. Comp. ¶80. Another deceptive and anticompetitive set of actions involved Unocal's lies to refiners in California, who were members of either Auto/Oil or WSPA. The refiners would have taken different actions – such as changing their investment strategy or insisting on pre-regulation bargaining with Unocal over royalties – to prevent the anticompetitive effects that have occurred. Comp. ¶ 90.

Now it is too late. Comp. ¶94. Unocal has enforced or threatened to enforce its patents against refiners controlling more than 95 percent of the capacity for the manufacture and/or sale of CARB-compliant gasoline in California. Comp. ¶95. It is neither technically nor economically feasible to change these refineries to make CARB-compliant summertime RFG while avoiding Unocal's patent claims. Comp. ¶¶92-93. Similarly, CARB cannot now change its RFG regulations sufficiently to allow refiners to avoid Unocal's patent claims.

## **7. History of Proceedings Below.**

The Commission issued the Complaint in this matter on March 4, 2003. On April 2, 2003, Respondent Unocal filed two motions to dismiss based on: (1) a claimed immunity under the *Noerr-Pennington* doctrine; and (2) a supposed failure to make sufficient allegations that Respondent possesses or dangerously threatens to possess monopoly power. Complaint Counsel filed its opposition briefs on April 21, 2003, and upon the order of the judge, filed additional briefs in September, 2003. While these motions were pending, the parties completed extensive discovery, including 94 depositions. On November 25, 2003 – nearly 8 months after Unocal's motions were filed and three weeks before the scheduled trial date – the ALJ issued the Initial Decision dismissing the Commission's Complaint.

## **SUMMARY OF ARGUMENT**

The ALJ dismissed the Commission Complaint on two primary grounds: (1) the *Noerr-Pennington* doctrine precludes the Commission from considering allegations that Unocal

defrauded CARB, a state governmental agency, and private industry groups; and (2) the Commission lacks jurisdiction to resolve substantial patent law issues needed to assess, in his view, Unocal's market power. Both of these rulings are wrong.

**1. The *Noerr-Pennington* Doctrine Cannot Be Invoked Here for Several Reasons.**

*First*, the *Noerr* doctrine does not even reach Unocal's fraudulent and deceptive conduct. *Noerr* immunity protects two interrelated rights: the authority of government to choose regulation or monopoly over competition in matters of economic regulation; and the concomitant right of citizens to petition the government to impose such restraints. From these purposes, *Noerr* is inapplicable to cases in which the government is unaware that it is being asked to adopt or participate in a restraint of trade. *Noerr* has never been extended to cases, such as this one, where the government is completely unaware, nor even has any basis to believe, that the "petitioner" seeks a state-conferred monopoly. Upholding Unocal's *Noerr* claim would not further any state policy or any ability of private parties to petition state authorities; it would only further Unocal's private monopolization agenda.

*Second*, even if CARB had had a purpose in the rulemaking to restrain trade, *Noerr* immunity should not apply because the Commission's remedy neither seeks to alter or burden any government regulation nor to restrain any challenged communication. As reflected in the Supreme Court's decision 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 the communications to government that restrained trade or caused a restraint of trade and without disrupting or burdening any government program. In *Walker Process*, the Court authorized an antitrust action against a private party who had expressly petitioned for, and been granted a potential monopoly

by the U.S. government. Yet the Court did not find that *Noerr* presented any obstacle. The facts and results in *Walker Process* parallel those here - the remedy here simply requires Unocal to stop insisting on royalties from private, nongovernmental parties. No CARB regulation and no communication to or from CARB are affected in any way. As a result, *Noerr* provides no defense.

*Third*, even were this a case where the government knew it was imposing a trade restraint, and the remedy would require overturning governmental action or impairing communications with the government, Unocal's deceptive conduct brings this case squarely within the "misrepresentation" exception to *Noerr*. The critical inquiry for purposes of applying the misrepresentation exception is not whether a government agency is "legislative" or "adjudicative" under administrative law principles, but whether the misrepresentations were made inside or outside the "political arena." Examination of the rulemaking record (of which the ALJ took official notice) and the relevant statutes reveals that CARB operated in a non-political manner. Moreover, the instant case particularly fits the misrepresentation exception because of the nature of the challenged communications. The communications were solely factual (the research is "non-proprietary" and in the "public domain") – not expressions of opinion. Further, no one but the speaker had any way of knowing the misrepresentation was false. Because Unocal knowingly misrepresented facts solely within its knowledge in a non-political arena in order to secure a monopoly, Unocal forfeits any claim to *Noerr* immunity.

*Fourth*, *Noerr* does not immunize Unocal's misconduct because the Commission's enforcement action is brought under the FTC Act and not the Sherman Act. The *Noerr* doctrine was formulated to enforce Congressional intent underlying certain statutes, 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). Thus, behavior protected by *Noerr*

under one statutory regime may be unprotected or differently protected under another. *Id.* at 526-29. No court has ever held that *Noerr* places limits on FTC Act Section 5 that are congruent with those that *Noerr* places on the Sherman Act, Section 2. Indeed, *Noerr* should not immunize anticompetitive conduct in a case, like this, filed as an administrative complaint under Section 5, which seeks only a cease and desist order from the Commission.

*Finally*, Unocal's deception of private industry groups and their members is not immunized by *Noerr*. The Commission's Complaint alleges that Unocal's lies to various oil refiners induced those refiners unknowingly to acquiesce in Unocal's preferred course of regulation rather than to pursue other available options that could have defeated Unocal's strategy of monopolization. Unocal achieved a monopoly over California-compliant reformulated gasoline technology when the refiners adopted Unocal's technology and then, by investing in their refineries, were locked into Unocal's technology. This conduct by Unocal constitutes another basis – fully independent of its conduct towards CARB – for concluding that the Unocal monopoly is unlawful. Those allegations do not touch upon any behavior that can be said to constitute *Noerr* petitioning.

**2. The ALJ's Ruling That the Commission Has No Jurisdiction To Hear This Case is Clearly Erroneous.**

The ALJ relied on 28 U.S.C. § 1338(a) and found that the Commission lacked jurisdiction because the case raised substantial issues of patent law. The ALJ's reliance on 28 U.S.C. § 1338(a) is misplaced. By its terms, the statute has no effect on FTC jurisdiction. Moreover, under Section 5 of the FTC Act, the Commission has broad powers to prevent and prohibit unfair methods of competition, including those that raise substantial patent law issues, as the ALJ incorrectly believed are raised in this case. Commission precedent directly supports

this view. To assess whether conduct is anticompetitive frequently requires judgments about patent strength and scope, which the Commission is fully empowered to make.

## QUESTIONS PRESENTED

1. Can a party that intentionally made misrepresentations to a state administrative agency properly invoke the *Noerr* doctrine when those misrepresentations caused the state unknowingly to take anticompetitive actions contrary to the state's purpose?
2. Can a party that intentionally made misrepresentations to an administrative agency properly invoke the *Noerr* doctrine to immunize itself from antitrust liability where Commission enforcement action will not result in any change in the government action or hamper the party's communications with the state agency?
3. Does Unocal's deceptive and anticompetitive conduct fall within the scope of the misrepresentation exception to *Noerr*?
4. Does *Noerr* apply to immunize Unocal's deceptive conduct even though the Commission action is taken under the FTC Act rather than the Sherman Act?
5. Does *Noerr* immunize Unocal's deceptive and anticompetitive conduct targeted to private industry groups and their members?
6. Does the Commission have jurisdiction, under its mandate under the FTC Act to enjoin and remedy "unfair methods of competition," to address and resolve matters raising issues of patent law, such as the extent to which anticompetitive conduct confers market power on a patent holder?

## ARGUMENT

### **I. The ALJ Erred in Holding That the *Noerr* Doctrine Immunizes Unocal’s Deceptive and Anticompetitive Conduct from Liability Under Section 5 of the FTC Act.**

The allegations of the Commission’s Complaint detail deceptive and exclusionary conduct by Unocal which led to its acquisition and exercise of unlawful monopoly power. The ALJ, however, determined that “no set of facts” could be alleged in this case to overcome the application of *Noerr* immunity. ID-1, 69. That is wrong for each of the reasons set forth below.

#### **A. The *Noerr* Doctrine Cannot Be Invoked in This Case Because Unocal’s Deceptive and Anticompetitive Conduct Falls Outside the Reach of *Noerr*.**

The ALJ’s Initial Decision failed to recognize that whether *Noerr* even reaches Unocal’s deceptive conduct is a different question from whether the misrepresentation exception to *Noerr* applies to the facts of this case. The former question must be answered in the affirmative before even reaching the latter inquiry. Unocal’s deceptive conduct simply does not amount to the type of conduct intended to be shielded from antitrust liability by the *Noerr* doctrine.

#### **1. Imposition of Antitrust Liability Does Not Impinge Any of the Constitutional Concerns That Are at the Heart of the *Noerr* Doctrine.**

The *Noerr* doctrine has been characterized as either the direct offspring of constitutional principles, a creature of Sherman Act statutory construction, or both. To the extent that constitutional concerns – either First Amendment or federalism – govern the scope and applicability of the *Noerr* doctrine, Unocal’s fraudulent conduct is not protected by *Noerr* because it is not constitutionally protected.

*First*, *Noerr* generally shields from antitrust liability a party’s petitioning for governmental action to restrain trade. In *Eastern R.R. President’s Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the U.S. Supreme Court held that a party was immune from antitrust liability for attempting to influence the passage of laws restraining trade. The Court



based its holding, in large part, on the right of citizens to petition the government for action. Thus, the Court stated: “In a representative democracy such as this, these [legislative and executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives.” *Id.* at 137. Accordingly, the Court held that “where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out.” *Id.* at 136 (citation omitted).

Although the ALJ correctly observed that one of the underlying principles for *Noerr* immunity is the Constitutional right to petition (ID-29), the ALJ failed to mention any constitutional concerns that are implicated here. There are none. Constitutionally, Unocal has no more right to lie to CARB to obtain a monopoly than to lie to the Patent Office for the same purpose.

The First Amendment protects the right of people to “petition the Government for a redress of grievances.” U.S. Const., amend. 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 indication that this right protects someone who tricks the government into unwittingly granting it a monopoly. *See id.* at 483-84. Indeed, under the First Amendment, “the knowingly false statement, and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.” *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).<sup>2</sup> In short,

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<sup>2</sup> *See also Illinois ex rel. Madigan v. Telemarketing Assocs.*, 123 S.Ct. 1829, 1836 (2003) (“[T]he First Amendment does not shield fraud.”); *BE&K Constr.*, 536 U.S. at 530-31 (“false statements are not immunized by the First Amendment right to freedom of speech”) (citation omitted); *McDonald*, 472 U.S. at 484-85 (“[p]etitions to the President that contain intentional and reckless falsehoods ‘do not enjoy constitutional protection’”) (citation omitted); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (The “intentional lie” is “no essential part of any

“[t]here is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body.” *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982); *see also Walker Process*, 382 U.S. at 174 (“[T]he enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act.”).

*Second*, no federalism concerns support a determination that Unocal’s conduct merits *Noerr* immunity. Courts that have conferred *Noerr* immunity have expressed reluctance generally either to “look behind” or overturn a government decision to restrain trade. *See City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 377-78 (1991) (hereafter *Omni*). In *Omni*, the anticompetitive effect resulted directly from an ordinance passed by the city council, and the optimal remedy would have been to rescind or overturn this ordinance. Unlike *Omni*, and thus contrary to the ALJ’s concerns (ID-46), no onerous deconstruction of the governmental process is required in this case. Moreover, the injunctive relief proposed in the Complaint does not require any change in CARB’s regulation. It only asks that Unocal not reap the benefits of its fraud.

Further, nothing in this prayer for relief undermines any California policy. Significantly, the state supports the Commission’s enforcement action in this case. Complaint Counsel understands that California will contemporaneously file an amicus brief supporting the appeal of the Initial Decision and Order in this matter.

Thus, none of the constitutional principles underlying the *Noerr* doctrine conceivably bar the Commission from taking action to remedy Unocal’s fraudulent and anticompetitive conduct.

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exposition of ideas.”) (citations omitted); *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (Even criticism of public officials in their official duties is actionable if made “with knowledge that it was false or with reckless disregard of whether it was false.”).

To the extent that *Noerr* is a constitutionally-based doctrine, *Noerr* is not implicated by the facts alleged in the Complaint. Indeed, as we now show, the extreme remoteness of this case from any constitutional issue goes far to explain why *Noerr* is inapplicable here.

**2. Because CARB’s Stated Purpose Was Neither to Adopt Nor to Participate in a Restraint of Trade, Unocal’s Fraudulent Conduct Is Not the Type of “Political” Petitioning Reached By Noerr.**

Since no constitutional principles are implicated here, case law and authority interpreting *Noerr* as a statutory doctrine determine whether Unocal’s deceptive conduct is immunized from Sherman Act liability. The ALJ found, without any authority, that statutory *Noerr* immunity is implicated “even if CARB was unaware that it was being asked to restrain trade” (ID-43). In fact, *Noerr* and its progeny stand for the proposition that *Noerr* immunity is implicated only where parties specifically “seek[s] anticompetitive action from the government,” *Omni*, 499 U.S. at 379-80, and the stated purpose of the government action is to restrain trade. Otherwise, the so-called “petitioning” could not possibly be asking for any “redress of grievances,” as required by the First Amendment, nor be seeking state action to displace competition, the prerogative protected by *Noerr*. Unocal never asked for a monopoly, and CARB did not intend to confer one. Accordingly, this case is simply outside *Noerr*’s limits.

No evidence exists in the CARB rulemaking record (of which the ALJ took selective official notice) that CARB knowingly chose to impose an anticompetitive restraint or had any purpose to do so. Rather, that record reflects just the opposite – that CARB wanted to alleviate any anticompetitive effects of its decision to specify summertime RFG by providing for a competitive refiner market to supply that gasoline.<sup>3</sup>

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<sup>3</sup> See CARB Final Statement of Reasons, at 181 (reflecting CARB’s desire *not* to “reduce competition in the gasoline market and [cause] an ultimate increase in gasoline prices”); *id.* at 9-10 (evincing concern for impact of regulations on small refiners because “small refiners *contribute to competition* in the petroleum industry”).

The *Noerr* opinion itself explains why antitrust immunity for “petitioning” extends only to a request that the government knowingly impose a restraint of trade. The Supreme Court in *Noerr* found that the railroads and truckers were “petitioning” the Pennsylvania legislature and the Governor to reject a “Fair Truck Bill.” *Noerr*, 365 U.S. at 130, 145 (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 anticompetitive legislation that may be contrary to the Sherman Act, 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 U.S. 341, 352 (1943)) (holding that the Sherman Act did not invalidate a state regulatory program that imposed competitive restraints). Thus, the *Noerr* Court found that the Sherman Act did not apply to cases based on a “mere solicitation of governmental action with respect to the passage and enforcement of laws.” *Noerr*, 365 U.S. at 138. If the legislature could decide to pass anticompetitive legislation, then it followed that the Sherman Act should not be construed to 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 (emphasis added).<sup>4</sup> The Supreme Court later reiterated 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).

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<sup>4</sup> The *Noerr* Court further explains that 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. See *Greenwood Utils. Comm’n. v. Mississippi Power Co.*, 751 F.2d 1484, 1505 (5th Cir. 1985) (*Noerr* applied because exclusive government contract resulted from “petitioning”). Similarly, although the *Parker* doctrine applies to the states, the same reasoning applies to petitions to, and anticompetitive decisions made by, the federal government.

The ALJ's reliance on *Omni* was therefore misplaced. *See* ID-45-46. The ALJ cited to language in *Omni* in which the Court expressed reluctance to engage in “deconstruction of the governmental process.” *Id.* But the ALJ failed to see why this was an important factor: in *Omni*, the governmental agency intended to impose a trade restraint, which it had the right to do under the *Parker* state action immunity doctrine, and its concern with petitioning arose in the context of private individuals seeking such anticompetitive action.<sup>5</sup> *Omni*, 499 U.S. at 379-80 (“[F]ederal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government.”).

The ALJ thus further erred by holding that state action cases were irrelevant to the *Noerr* discussion. *See* ID-47. As recognized by the Court in *Omni*, *Noerr* and *Parker* are interconnected doctrines. *See Omni*, 499 U.S. at 379 (observing that *Noerr* developed as “a corollary to *Parker*”). *Parker* and subsequent caselaw interpreting the state action 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). Thus, where a party urges the state to impose an anticompetitive restraint, the state would be immune from antitrust liability under *Parker* and the private party would be potentially immune under *Noerr*. This is because it would be manifestly unfair for a private party who urges a state to take a patently anticompetitive action to be liable under the Sherman Act while the state actor itself is immune and its laws exempt from antitrust scrutiny. As Areeda and Hovenkamp explain:

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<sup>5</sup> This view is supported by the section of the Areeda & Hovenkamp treatise cited by the ALJ (¶202b at 158) in the discussion of *Omni*. ID-46. The ALJ omitted the Treatises’ reason for this view: “the antitrust court may not reappraise the legislature’s assessment of the public welfare,” because “whatever the petitioner’s objective in seeking legislation that **harms or excludes a rival**, the resulting enactment declares the public interest as perceived by the legislature.” Areeda & Hovenkamp, *Antitrust Law*, ¶202b at 158.

The main issue concerning the relationship of the *Noerr* and *Parker* immunities is the following. Assuming non-“sham” activity... the private party is immune where the government is the key deciding force and either ***approves with intent to displace antitrust law*** or compels the challenged action. The private party is not immune where the operative restraint results from its own private action inadequately supervised....

Areeda & Hovenkamp ¶229 at 519 (emphasis added). Contrary to the ALJ’s holding, the *Parker* doctrine was expressly relied upon by the Court in *Noerr* as the basis for its decision and should not be ignored.

As the leading antitrust treatise states, “[i]n general, a prerequisite for *Noerr* immunity is that the government actually know about the restraint being imposed.” Areeda and Hovenkamp, *Antitrust Law* ¶ 209a at 260. For example, 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 trade restraint is proposed nor intends to adopt such 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 demonstrate this principle. *Id.* Otherwise, one could secretly bid rig or price fix as long as the government accepted one of the bids because the bid is a communication to government (surreptitiously) seeking a restraint of trade. But this is not the law. *Id.*, ¶ 209a at 260.

In *FTC v. Superior Court Trial Lawyer’s Ass’n* (“*SCTLA*”), 493 U.S. 411 (1990), the Court observed that, in *Noerr*, the “alleged restraint of trade was the ***intended consequence*** of public action.” *Id.* at 424-25 (emphasis added). The ALJ found that the language in *SCTLA* relied on by Complaint Counsel “could not reasonably be construed to mean that *Noerr* requires the legislating agency to be aware of or intend the consequences of its regulations.” ID-45. But,

as the language of *SCTLA* explains, to say that laws may have unintended consequences is not to say that government acts without purpose; and for *Noerr* purposes, it is the “intended consequence” that counts.

The logic of *Noerr* simply cannot apply to this case because Unocal did not solicit CARB to impose any anticompetitive regulation, and CARB had no purpose to displace competition. Rather, Unocal simply gave CARB false information upon which it relied. The ALJ cited Black’s Law Dictionary for the proposition that “[t]he very concept of deception assumes that the deceived party does not know it is being deceived.” ID-45. But the ALJ missed the point. While it may be true that conduct that misleads government about the consequences or extent of a trade restraint may be protected by *Noerr*, this case is quite different: Here, the government body did not know and did not intend to impose a trade restraint of any kind.

No value or policy sought to be promoted in *Noerr* is furthered by extending it to this case. That is why, until the ALJ’s decision, no court or other forum had ever extended *Noerr*’s reach in this way. Neither the ALJ nor Respondent Unocal have cited to a single case upholding *Noerr* immunity where the government body that was the subject of the “petitioning” was

unaware that it was imposing a restraint of trade and had no purpose to impose such a restraint.<sup>6</sup>

Accordingly, the *Noerr* doctrine cannot be invoked here.

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<sup>6</sup> In *Noerr*, and in all of the *Noerr* cases cited in the Initial Decision where *Noerr* immunity was granted, the courts were faced with situations where the petitioning sought the knowing imposition of a trade restraint by the government. See *Professional Real Estate Investors, Inc. v. Columbia*, 508 U.S. 49 (1993) (*PREI*) (copyright infringement suit was “objectively reasonable” and therefore *Noerr* protected even if intent was anticompetitive); *Omni*, 499 U.S. 365 (competitor lobbied for zoning ordinance that restricted competition); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (union’s lobbying efforts and cooperation with large coal mining companies aimed at eliminating small coal mining operations); *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239 (3d Cir. 2001) (tobacco manufacturers negotiated multi-state settlement that encouraged output limitations and discouraged market entry); *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394 (4th Cir. 2001) (antitrust defendant supported litigation aimed at denying operating permit to competitor); *Manistee Town Ctr. v. Glendale*, 227 F.3d 1090 (9th Cir. 2000) (defendants lobbied county to prevent county lease for a justice center); *Armstrong Surgical Ctr., Inc. v. Armstrong City Mem’l Hosp.*, 185 F.3d 154 (3d Cir. 1999) (hospitals petitioned for Department to deny certificate of need application); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1058 (9th Cir. 1998) (dialysis center sought denial of potential competitor’s certificate of need application); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1557-58 (11th Cir. 1992) (petroleum wholesalers jointly threatened and initiated litigation); *Boone v. Redevelopment Agency of City 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 in that structure); *Westmac, Inc. v. Smith*, 797 F.2d 313, 314 (6th Cir. 1986) (grain elevators’ operators sought to prevent potential competitor from receiving public financing); *St. Joseph’s Hosp., Inc. v. Hospital Corp. of Am.*, 795 F.2d 948 (11th Cir. 1986) (competitor sought to prevent approval of rival’s certificate of need application); *Razorback Ready Mix Concrete Co. v. Weaver*, 761 F.2d 484, 486 (8th Cir. 1985) (competitors opposed issuance of industrial development revenue bonds to plaintiff); *First American Title Co. of South Dakota v. South Dakota Land Title Ass’n*, 714 F.2d 1439, 1443 (8th Cir. 1983) (established abstracters lobbied for amendments to statutes making market entry more difficult for competitors); *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288 (8th Cir. 1978) (defendant airlines sought to induce city to block reopening of airport that competing airline proposed to use); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975) (cable company sought to induce city council to grant exclusive cable television franchise and deny competitor’s application); *Livingston Downs Racing Ass’n Inc. v. Jefferson Downs*, 192 F. Supp. 2d 519, 521 (M.D.La. 2001) (racetrack sought denial of racing license to potential competitor).



**B. Consistent With *Walker Process*, *Noerr* Immunity Does Not Apply Because Unocal’s Anticompetitive Conduct Can Be Remedied Without Enjoining Any Challenged Communicative Activity or Disrupting Any Governmental Program.**

Even had Unocal expressly petitioned for a monopoly (*i.e.*, the government knew and had a purpose to impose a trade restraint), *Noerr* immunity would not apply. As illustrated by *Walker Process*, *Noerr* applies to antitrust enforcement actions only where the action seeks either to alter any government program or to restrain the challenged communication to government. If the remedy’s impact does not threaten any of the values protected by *Noerr*, then *Noerr* immunity is simply not available.

The remedy in this case would not threaten any communications by Unocal to CARB or any CARB regulations. Thus, both the values *Noerr* protects – government’s authority to govern as it sees fit and private parties’ ability to communicate to government without that communication being censored as an antitrust offense – are fully protected here.

This is precisely what happened in *Walker Process*, where the Court held that the “maintenance and enforcement of a patent obtained by fraud on the Patent Office may be the basis of an action under §2 of the Sherman Act.” *Walker Process*, 382 U.S. at 173. As in the instant case, the remedy contemplated in *Walker Process* would not revoke or alter the relevant government action – *i.e.*, the patents would not be invalidated. Rather, the Court specifically approved the use of *private* remedies, such as treble damages arising from a party’s enforcement of a fraudulently procured patent. 382 U.S. at 176-77. Nor did the *Walker Process* Court suggest in any way that the appropriate remedy would constrain the patent holder’s communications with the Patent Office. Instead, the Court simply authorized the long-standing rules of equity, established in over one-hundred years of antitrust jurisprudence, to keep the patent holder from exercising a monopoly that had been achieved by deceit or fraud, as is the

case here. *See id.* (citations omitted). That is why the Court later used *Walker Process* as an example of “unethical conduct” that is not reached by *Noerr*. *California Motor Transp.*, 404 U.S. at 512-13.

Consistent with *Walker Process*, the relief sought in this case is appropriately tailored to halt the competitive harm without infringing any right of Unocal or the state of California. The Complaint does not propose rescission or suspension of CARB’s regulations as the means to remedy Unocal’s anticompetitive conduct. Rather, the Complaint contemplates a cease and desist order barring Unocal from enforcing its patents against those harmed by its fraud. (Comp., Notice of Contemplated Relief, ¶¶1-3). Although Unocal’s lies to CARB are a basis for finding an illegal monopoly, the remedy does not burden in any way Unocal’s ability to communicate to CARB. It is clear that the remedy has no impact or effect – either direct or indirect – on any governmental program or any party’s communications with a governmental body, other than a ban on seeking judicial process to enforce an illegal monopoly.<sup>7</sup>

The ALJ erroneously held that “[t]he *Walker Process* exception does not apply in this case” (ID-68) because he found it limited to cases involving fraud on the patent office. ID-42-43, 50. However, the ALJ has advanced no principled reason why *Walker Process* should be limited solely to the patent context. We have explained why it is not. *Walker Process* obtained a monopoly by lying to the government. So did Unocal. The Court in *Walker Process* understood that *Noerr* was not about antitrust liability, but about the effects of remedies for antitrust

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<sup>7</sup> The remedy here seeks to restrict Unocal’s *use* of illegal market power, not to impair or hinder communications to government. Although the cease and desist order may prohibit Unocal from executing on a judgment to obtain royalties from California refiners, every successful Commission action ends with an explicit or implicit admonition that a party refrain from reaping the fruits of its anticompetitive behavior – including, in some cases, the filing of lawsuits. Such remedies for antitrust violations are not *Noerr* protected. Commission action will not censor Unocal’s communications but will simply enjoin Unocal from obtaining its monopoly rents.

violations on state government and private petitioning. Thus, confronted with a remedy that neither altered or burdened any government program nor restrained the challenged communication to government, the *Walker Process* Court naturally did not find *Noerr* controlling. This Commission should follow that precedent. Significantly, the ALJ did not cite a single case granting *Noerr* immunity where correction of the antitrust harm required neither enjoining any petitioning activity that is alleged to cause an antitrust violation nor interfering with any government program.

**C. Unocal’s Fraudulent Conduct Falls Within the Misrepresentation Exception to *Noerr*.**

This case also falls squarely within the misrepresentation exception to *Noerr*. As noted above, in *Walker Process* itself, the remedy sought did not require rescission of any government regulations or enjoining communications with government. The courts, however, subsequently have recognized that, even where the remedy would entail interference with a governmental program or communications with the government, *Walker Process* and its rationale justify an exception to *Noerr* where a party makes material misrepresentations of fact to a government agency outside the “political arena” (and hence *Noerr* otherwise might apply).<sup>8</sup>

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<sup>8</sup> See *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512-13 (1972); *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1071 (Fed. Cir. 1998) (“*PRE* and *Walker Process* provide alternative legal grounds on which a patentee may be stripped of its immunity from the antitrust laws”); *Whelan v. Abell*, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (relying on *Walker Process* and holding that *Noerr* does not immunize the filing of “deliberately false complaints” before an administrative agency or court); *Clipper Express*, 690 F.2d at 1260 (“*Walker Process* doctrine ... provides antitrust liability for the commission of fraud on administrative agencies, for predatory ends”); *Israel v. Baxter Labs.*, 466 F.2d 272, 278 (D.C. Cir. 1972) (drawing analogy between FDA drug approval process and PTO process in *Walker Process*; holding that “[n]o actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption.”). See also *In re Buspirone Patent Litigation*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002); *Livingston Downs Racing Ass’n v. Jefferson Downs Corp.*, 192 F. Supp. 2d 519 (M.D. La. 2001).

Courts have not defined the metes and bounds of the misrepresentation exception with absolute precision. No court has articulated a definitive test or set forth an exhaustive list of requirements. Case law supports the view that “knowing and willful submission of false facts to a government agency” undermines a claim of *Noerr* immunity.<sup>9</sup> This suggests a *scienter* requirement equivalent to that of common law fraud and deceit.<sup>10</sup> Other courts have set forth a materiality requirement – *i.e.*, that an exception to *Noerr* applies where the misrepresentation of facts affect the “core” of the government proceedings.<sup>11</sup> And, of course, courts have focused on whether the misrepresentations were made in administrative or judicial fora.<sup>12</sup>

Whatever the precise boundaries of the misrepresentation exception, Unocal’s deceptive conduct before CARB clearly falls within the exception. The Complaint alleges that Unocal purposefully misrepresented facts – related to core issues in an administrative proceeding – to an agency that necessarily relied on the truthfulness and accuracy of facts submitted to it during the course of its fact-finding proceedings. Comp. ¶¶2, 3, 25. These allegations are sufficient in themselves to vitiate *Noerr* immunity, as they establish fraudulent conduct outside the “political arena.” The egregious nature of Unocal’s conduct is further highlighted by the fact that the

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<sup>9</sup> *Potters Med. Ctr. v. City Hosp. Ass’n*, 800 F.2d 568, 580 (6<sup>th</sup> Cir. 1986); *see St. Joseph’s Hosp.*, 795 F.2d at 955 (holding *Noerr-Pennington* immunity does not protect misrepresentations made to an administrative agency, even though it does cover dilatory administrative motions filed with anticompetitive intent).

<sup>10</sup> The *scienter* requirement for fraud may be satisfied, under certain circumstances, by a showing of recklessness. *See Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 974 (1997) (holding that “[f]alse representations made recklessly and without regard for their truth ... are the equivalent of misrepresentations knowingly and intentionally uttered”) (citation omitted); Restatement (Second) of Torts, §§526, 527.

<sup>11</sup> *See Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 401-02 (4<sup>th</sup> Cir. 2001); *Cheminor Drugs v. Ethyl Corp.*, 168 F.3d 119, 123-24 (3<sup>d</sup> Cir. 1999); *Liberty Lake v. Magnuson*, 12 F.3d 155, 158-59 (9<sup>th</sup> Cir. 1993).

<sup>12</sup> *See, e.g., Clipper Express*, 690 F.2d at 1260; *Whelan v. Abell*, 48 F.3d at 1255.

material information was within Unocal’s exclusive possession during the pendency of the CARB rulemaking.

Accordingly, even had Unocal actually engaged in petitioning conduct by openly seeking a monopoly or an anticompetitive restraint – and were the Commission challenging conduct that, to be remedied, would require interfering with a government regulation or restraining communications to or from government – Unocal’s fraud would still strip it of *Noerr* protection.<sup>13</sup>

**1. The Administrative Law Distinction Between “Legislative” and “Adjudicative” Is Irrelevant to Determining Whether Unocal’s Misrepresentations Were Made Outside the “Political Arena.”**

There is no reason – in law, logic, or policy – why *Noerr* immunity should extend to material misrepresentations of fact made outside the core political arena that cause restraints of trade. The Supreme Court has understood this for decades and lower courts have accordingly fashioned a “misrepresentation exception” to *Noerr*. The ALJ missed this point and incorrectly concluded that *Noerr* immunity applies in this case despite Unocal’s misrepresentations to CARB. The ALJ focused on the nature of the governmental body and primarily based this ruling on a bright-line determination that Unocal’s misrepresentations were made in a “legislative versus adjudicatory arena.” ID-32-34. Adjudication, in turn, he defined narrowly as a “formal adjudication,” as defined by administrative law. *See* ID-37-38. This analysis makes no sense; it rests on distinctions meant to address issues of due process and administrative efficiency, not issues of petitioning and competition.

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<sup>13</sup> The ALJ mischaracterized this argument and asserted that Complaint Counsel argued below only that Unocal’s deceptive conduct falls within the “sham” exception to *Noerr*. ID-5. This is not correct. Complaint Counsel raised the same arguments it raises in this brief.

The correct analysis, reflecting the policies described in *Noerr*, examines whether the conduct constitutes “petitioning” in the “political arena.” Supreme Court decisions subsequent to *Walker Process*, as well as the decisions of lower courts, support this approach. For example, in *California Motor Transport*, the Supreme Court specifically cited *Walker Process* and stated:

There are many other forms of illegal and reprehensible practices which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. . . . Insofar as the ***administrative or judicial processes*** are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of ‘political expression.’

404 U.S. at 513 (emphasis added).

Subsequently, in *Allied Tube*, 486 U.S. 492 (1988), the Court reaffirmed that petitioning conduct outside of the political sphere – in that case in connection with a private standard-setting body’s proceedings – could not lay claim to *Noerr* immunity. The Court stated that the scope of *Noerr* protection depends on the “source, context, and nature of the anticompetitive restraint at issue.” 486 U.S. at 499. The Court further stated that “the *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity.” *Id.* According to the *Allied Tube* Court, petitioning is only protected by *Noerr* if it is “political” petitioning:

A publicity campaign directed at the general public, seeking legislative or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods. ***But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.***

*Id.* at 499-500 (emphasis added) (citation omitted). As Professor Bork explains, the *Noerr* value of avoiding burdens on speech applies to purely “political” speech; otherwise:

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.

Robert Bork, *The Antitrust Paradox*, 360 (1978). The leading antitrust treatise agrees:

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

Areeda & Hovenkamp, ¶203e at 169 (footnotes omitted). Accordingly, the line between administrative law definitions of quasi-adjudicative and quasi-legislative has nothing to do with a *Noerr* analysis.<sup>14</sup>

Rather, the critical question for *Noerr* purposes is whether the petitioning activity occurs within the “political arena.” As set forth below, answering this question requires an assessment of both the character of the communications and the nature of the governmental body. The administrative law distinction between legislative and adjudicative action is largely irrelevant to this inquiry. The Initial Decision refers to California statutes and case law that provide that CARB’s exercise of its rulemaking authority is “quasi-legislative” in nature. *See* ID-38-39. But under California law, the designation of an administrative agency as “quasi-legislative” only indicates the source of the authority for actions taken by the agency and the scope of judicial review for such agency actions. *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 6 n.3 (1988). The state law designation of an administrative body, such as CARB, as

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<sup>14</sup> Compare *Metro Cable Co.*, 516 F.2d 220 (holding that city council’s decision to award a franchise was political for *Noerr* purposes, even though such a decision would generally be classified under federal administrative law principles as an adjudicatory licensing or contracting action under 5 U.S.C. §551(6)-(9)), with *Clipper Exxpress*, 690 F.2d 1240 (denying *Noerr* immunity in ratemaking context, which is classified as rulemaking under the federal APA, 5 U.S.C. § 551(4)-(5)).

“quasi-legislative” *does not* determine whether it is “political” for *Noerr* purposes. *Cf. Crosby v. Hospital Auth. of Valdosta*, 93 F.3d 1515, 1524 (11th Cir. 1996) (holding that “definition of ‘political subdivisions’ for purposes of sovereign immunity” under state law not controlling for purposes of determining immunity under federal state action doctrine).

For example, ratemaking by an administrative agency is defined as “quasi-legislative” under California law for the purpose of defining the scope of judicial review.<sup>15</sup> *Consumer Lobby Against Monopolies v. Public Util. Comm’n*, 25 Cal. 3d 891, 908 (1979). Yet, in *Clipper Express*, the Ninth Circuit treated the I.C.C. ratemaking proceedings at issue as “adjudicatory” for *Noerr* purposes and held that *Noerr* immunity did not apply to misrepresentations made in connection with such ratemaking proceedings. 690 F.2d at 1252 n.17. As a result, the fact that CARB engaged in a rulemaking does not by definition, as the Initial Decision suggests, render the proceedings “political” for *Noerr* purposes. *See* ID-40.

Moreover, even if the CARB rulemaking is considered “legislative” action, this does not automatically confer immunity for misrepresentations made by a party that lead to anticompetitive consequences. As the Supreme Court recognized in *Allied Tube*, even misrepresentations to a legislative committee can be deemed to fall outside the “political arena” and can therefore vitiate *Noerr* protection:

A misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena simply because the odds were very good that the court's decision would be codified – ***nor for that matter would misrepresentations made under oath at a legislative committee hearing in the hopes of spurring legislative action.***

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<sup>15</sup> Under the federal Administrative Procedures Act, ratemaking is not considered an adjudication, it is considered a rulemaking. *See* 5 U.S.C. § 551(4)-(5). In addition, the Supreme Court has long viewed ratemaking as “quasilegislative.” *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 388 (1932).



*Allied Tube*, 486 U.S. at 504 (emphasis added). See also Bork, *supra*, 359-60; *Forro Precision, Inc. v. IBM*, 673 F.2d 1045, 1060 (9th Cir. 1982) (holding that giving false information to the police, an executive branch agency, was not protected by *Noerr*). *Allied Tube* indicates that the simple labels attached to governmental bodies are not dispositive in a *Noerr* analysis.<sup>16</sup>

**2. Unocal’s Misrepresentation of Material Facts Exclusively Within its Possession Did Not Amount to “Political Petitioning.”**

Rather than apply simplistic labels, following *California Motor Transport* and *Allied Tube*, courts have focused the application of a misrepresentation exception to *Noerr* on an examination of whether the particular communications at issue were “political” in the *Noerr* sense. See, e.g., *Woods Exploration & Prod. Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1296-97 (5th Cir. 1971). The character of the communications is key here: Unocal submitted fraudulent factual information about its research results to CARB and others in order to induce them to use the results. This is not political petitioning immunized by *Noerr*.

Put differently, in cases where there is some indication that the governmental decision depends and is predicated on truthful and accurate submission of *facts* – regardless of the branch of government – bad faith misrepresentations of such facts vitiates *Noerr* immunity. The *Allied Tube* Court’s example of misrepresentations under oath to a legislative committee supports this point. *Allied Tube*, 486 U.S. at 504. In such a case, while the forum is “legislative,” the Court suggests that misrepresentations would nonetheless be unprotected by *Noerr* even where

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<sup>16</sup> The more closely an administrative proceeding resembles a legislative session, the more difficult it may become to determine whether a particular misrepresentation was the cause of anticompetitive effects. See *Areeda & Hovenkamp*, ¶203 at 177. The Complaint clearly alleges sufficient facts to establish the requisite causal links. Comp. ¶¶76-96.

legislative action – presumably imposing a trade restraint – is sought. *See also Forro*, 673 F.2d at 1060.<sup>17</sup>

Since CARB necessarily relied on the truth of information provided in the rulemaking (Comp. ¶ 25), Unocal’s misrepresentation and concealment of material facts cannot be deemed “political” petitioning. That no one else could rebut Unocal’s misrepresentations further removes it from the political arena. The ALJ, however, erroneously concluded that CARB’s reliance on Unocal’s factual submissions did not undermine the application of *Noerr* immunity because “CARB was not wholly dependent on Respondent for information.” ID-40. Although other parties submitted information to CARB during the Phase 2 rulemaking proceedings, no one possessed information that could dispel the effect of Unocal’s fraud because only Unocal knew (but deliberately concealed) the truth. Comp. ¶¶2c, 35, 42. By law, the PTO had to preserve the confidentiality of Unocal’s patent application. Unocal, and only Unocal, could have provided accurate information to CARB concerning its pending patent claims and its corresponding intent to enforce proprietary interests in its purportedly “non-proprietary” research results. Accordingly, Unocal’s misrepresentations and half-truths are all the more pernicious and unworthy of *Noerr* protection. *See Areeda & Hovenkamp*, ¶205a at 215 (“The potential threat to competition is far greater when the adjudication plaintiff alleges nonpublic facts that it knows not to be true or fails to state nonpublic facts that it knows will defeat its claim.”).

Contrary to the ALJ’s analysis, *Noerr* precedents provide ample support for this approach. In *Woods*, for example, numerous entities, including but not limited to the antitrust

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<sup>17</sup> Factual misrepresentations are highly disfavored in any forum. Indeed, Areeda and Hovenkamp have suggested the rigorous test for the “sham” exception set forth in *PREI* does not apply to factual misrepresentations. They state: “[F]alse claims of fact whose falsity is not immediately discovered or known could still be a sham. *PREI* spoke only of claims where the legal theory was novel or questionable, not where factual allegations were made in bad faith.” Areeda & Hovenkamp, ¶205 at 228.

defendants in that case, filed nomination forecasts with the Texas Railroad Commission in connection with proceedings by that body to determine the production allowable limits for the state's gas producers. *Woods*, 438 F.2d 1286. Thus, in that case, the state “was not wholly dependent on [the antitrust defendants] for information.” ID-40. But the *Woods* court held that, as here, the state *was* dependent on the false information specifically submitted by the defendants. *Woods*, 438 F.2d at 1295. Significantly, the *Woods* court held that “[t]he situation is analogous to the filing of fraudulent statements with the Patent Office, which has been held to be evidence of an antitrust violation.” *Id.*; see also *Clipper Express*, 690 F.2d at 1261-62 (involving submissions from plaintiff and defendants); *De Loach v. Phillip Morris Cos.*, No. 1:00CV01235, 2001 U.S. Dist. LEXIS 16909, at \*44 (M.D.N.C. 2001) (involving numerous separate submissions from defendant tobacco companies, and denying *Noerr* immunity to defendants for the submission of false purchase intentions to the USDA since “it was part of an administrative determination that relied on Defendant Manufacturers' truthfulness”).<sup>18</sup>

The Third Circuit's decision in *Armstrong Surgical* is instructive. There, the court explained where *Noerr* 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

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<sup>18</sup> Moreover, the ALJ's efforts to distinguish this case from *Noerr* precedents based on the nature of the government proceedings at issue in those cases is incorrect. The CARB rulemaking at issue here was no more political than the proceedings in *Woods*, *Clipper Express*, *Whelan*, or *De Loach*. In addition, CARB appears to have fewer ties to the political realm than, for example, the agency at issue in *Woods Exploration*, as the commissioners of that agency were directly elected by the Texas citizenry. See Tex. Const. art. XVI, § 30(b). CARB also seems no more political than the Maryland Division of Securities in *Whelan*, 48 F.3d at 1255. That agency is headed by a Securities Commissioner who is appointed by, and serves at the pleasure of, the State Attorney General. See Md. Corps. & Ass'ns Code § 11-201(b); *Townsend v. Kurtz*, 34 A. 1123, 1123 (Md. 1896).

the applicant for the facts.” *Armstrong*, 185 F.3d at 164 n.8.<sup>19</sup> *Armstrong* explains what *Noerr* courts are considering: Does the case involve political discourse where no participant is expected to tell the whole truth? 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.

Since only Unocal could know whether its representations about dedication of its research results to the public were truthful, CARB could not ferret out the fraud and misrepresentation any more than could the PTO in *Walker Process*. Even if CARB had discovered the patent application, this discovery still would not have shown that Unocal actually intended to enforce its patents and not dedicate them to the public. Courts have found this sort of deceit to be a significant reason not to apply *Noerr*. See *Clipper Express*, 690 F.2d at 1262 (“Administrative bodies and courts, however, rely on the information presented by the parties before them.... [A] private right of action based on the fraudulent misrepresentation, might be sufficient incentive to induce parties not to fraudulently misrepresent facts”); *Whelan v. Abell*, 48 F.3d at 1253-56 (*Noerr* misrepresentation exception applied where plaintiffs had no opportunity to contest contentions raised in letter of complaint to administrative agency submitted by defendants).

### **3. An Evaluation of the Context and Nature of the CARB Rulemaking Proceedings Reveals That CARB Operated in a Non-Political Way for *Noerr* Purposes.**

The concrete policies reflected in *Noerr* and *Allied Tube*, and not abstract administrative law principles, properly determine whether the “context and nature” of governmental activity are

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<sup>19</sup> See Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 Cal. L. Rev. 1177, 1248 (1992) (*Walker Process* explained as a situation “where the government has in effect delegated to a financially interested party the factual determinations that trigger governmental action”).

within the “political arena.” The Ninth Circuit in *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998), understood the basis for *Noerr*’s misrepresentation exception. The court outlined a non-exhaustive list of factors it analyzed to make its determination that the administrative agency acted outside the political arena 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.” 146 F.3d at 1061. The Ninth Circuit nevertheless found that the administrative agency there “operate[d] in a sufficiently non-political way” such that *Noerr* immunity would not attach to misrepresentations or fraud made in agency proceedings which were not “political” for *Noerr* purposes. *Id.* at 1061-62.

In *Kottle*, and in other *Noerr* cases involving fraud and misrepresentations to an administrative agency, courts have looked at several factors such as:

- the degree of political discretion exercised by the agency;
- 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.<sup>20</sup> The above factors illustrate what is meant by “non-political” in *Noerr* analysis. See *California Motor Transp.*, 404 U.S. at 512-13 (describing patent office process as like an adjudicative proceeding); see also *City of Atlanta v. Ashland-Warren, Inc.*, 1982-1 Trade Cas. P 64,527, 1981 WL 2187 (N.D. Ga. 1981) (characterizing informal allocation

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<sup>20</sup> See also *Livingston Downs*, 192 F. Supp. 2d at 534 (applying *Kottle* factors and determining that Louisiana Racing Commission was non-political because its discretion “was adequately circumscribed that it should be regarded as an adjudicatory body” for *Noerr* purposes).

hearings at issue in *Woods Exploration* as “quasi-adjudicatory” for *Noerr* purposes). Applied here, these factors vitiate any *Noerr* immunity.

**(a) CARB Exercised Limited Discretion in the Phase 2 RFG Rulemaking.**

The ALJ’s *Noerr* ruling was based in part on a conclusion that “CARB exercised political discretion.” ID-35. But the ALJ’s analysis fundamentally misapprehended the fact that *Kottle* and other courts look to the *degree* of political discretion exercised by a government body, not merely whether such discretion exists at all. To be sure, even in formal adjudications judges retain considerable discretion in developing rules. In fact, one could argue that a “government official without discretion” is an oxymoron.

As the express allegations of the Complaint make clear, however, what CARB lacked was political power in the *Noerr* sense. CARB’s authority was expressly circumscribed by the legislative mandate embodied in the California Clean Air Act. Comp. ¶21. CARB did not have discretion to make the central policy judgments – whether or not to regulate automobile emissions, the amount by which to reduce such emissions, and/or the deadline for achieving such emissions reductions. The California legislature made all of these decisions and directed CARB to implement its directives. Thus, to the extent that CARB retained discretion, such discretion was *limited* to the exercise of its specialized technical expertise to effectuate the terms of its legislative mandate.

Second, the ALJ misread the relevant California statutes in a manner that created the misleading impression that CARB was invested with broad, political discretion in the Phase 2

RFG rulemaking.<sup>21</sup> Nowhere in the relevant analysis was there any discussion of the express allegations of the Complaint concerning the limitations of CARB’s discretion:

CARB’s authority in conducting its Phase 2 RFG rulemaking proceedings was *circumscribed by an express and limited delegation of authority* by the legislature. CARB’s specific legislative mandate, set forth in California Health and Safety Code Section 43018, provided, *inter alia*, that CARB undertake the following actions:

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

Comp. ¶21 (emphasis added). The ALJ’s analysis ignored the express allegations of the Complaint and the statutory limitations referenced in the Complaint. In addition, the Initial Decision’s analysis concerning CARB’s political discretion referred selectively to statutes and language from CARB’s rulemaking documents which, if placed in proper context, undermine the ALJ’s conclusion that CARB exercised broad political discretion.

For example, the ALJ stated: “The statutory guidelines that govern CARB’s rulemaking give CARB broad discretion to do such acts as may be necessary, consistent with the goal of

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<sup>21</sup> This brief cites to the California statutes in effect during the CARB Phase 2 RFG rulemaking. The Initial Decision mistakenly refers to the statutes in their current incarnation. The following statutes referred to by the ALJ were either added or modified since the time of the rulemaking: Cal. Health & Safety Code § 43013; Cal. Gov’t Code §§ 11343, 11346, 11346.3, 11346.45.

providing a suitable living environment for every Californian.” ID-35. But the statutes cited by the ALJ relating to CARB’s general powers and duties, California Health & Safety Code §§ 39600-39601, do not provide unfettered discretion for CARB to take any necessary acts, but only those necessary “for the proper execution of the powers and duties granted to, and imposed upon, the state board by this division and by any other provision of law.” In the CARB Phase 2 rulemaking, CARB’s discretion was limited to taking actions necessary to effectuate the goals and purposes set forth in the California Clean Air Act. And while the ALJ correctly noted that such discretion included CARB’s determination of the gasoline properties to be regulated and the limits to be set for these properties (ID-35), these were *technical* decisions, not *political* decisions, which were constrained by the legislature’s mandate that CARB take “necessary,” “cost-effective,” and “technologically feasible” actions to achieve “at least 55 percent” reduction in “organic gases.” Cal. Health & Safety Code § 43018(b). The legislature’s formulation of its mandate, not CARB’s implementation of it, is the narrow “political arena” to which the misrepresentation exception does not extend.

Third, the technical nature of the decisions the California legislature left to CARB further undermines the ALJ’s finding that CARB’s Phase 2 rulemaking constituted legislative “policy setting” sufficient to trigger *Noerr* immunity. *See* ID-36-37.<sup>22</sup> Distilled to its essence, the ALJ’s

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<sup>22</sup> The technical nature of the decisionmaking is reflected in the detailed nature of the fact-finding conducted by CARB, as evidenced by the rulemaking documents, such as the Initial Statement of Reasons and the Technical Support Document. California Air Resources Board, Proposed Regulations for California Phase 2 Reformulated Gasoline: Staff Report, Initial Statement of Reasons (Oct. 4, 1991) (Appendix A); California Air Resources Board, Proposed Regulations for California Phase 2 Reformulated Gasoline: Technical Support Document (Oct. 4, 1991) (Appendix B). Both illustrate the technical decisions generally made by CARB and specifically the fact that CARB directly relied on Unocal’s factual submissions for, among other things, setting the T50 specification. *See* Technical Support Document, at 28, App. 11. The Commission may appropriately take official notice of these documents to support a determination that CARB operated in a non-political manner and that Unocal’s misrepresentations took place outside the “political arena.” *See* Order Denying Motion to Strike



analysis relating to CARB’s “policy setting” amounted to nothing but a restatement of the analysis of the importance of the administrative law distinction between rulemaking and adjudication which, as we have established, is irrelevant for *Noerr* purposes. Indeed, it is well established that some measure of policymaking is inherent in administrative adjudications, as well as formal adjudications.<sup>23</sup> But the existence and/or resolution of such “policy” issues does not transform these proceedings into “political” ones for *Noerr* purposes. CARB’s use of Unocal’s supposedly “non-proprietary” research and its determination that it had no attendant cost was a technical, not a political, decision. The technical nature of the CARB rulemaking renders the proceedings non-political for *Noerr* purposes. *See, e.g., George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 32 (1st Cir. 1970) (“[E]fforts of an industry leader to impose his product specifications by guile, falsity, and threats on a harried architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws” and is not protected by *Noerr*). Moreover, while the ALJ relied on the forward-looking aspects of the Phase 2 regulations, significant *Noerr* cases in which no immunity arose also involved proceedings that were, to some extent, forward-looking in nature.<sup>24</sup> This is not a

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Reliance on FTC Study, *In re Schering*, 2003 WL 136156 (F.T.C.), Docket No. 9297 (Jan. 6, 2003).

<sup>23</sup> The Supreme Court has noted that “all *adjudications* by administrative agencies are to some degree judicial and to some degree political.” *INS v. Abudu*, 485 U.S. 94, 110 (1988) (emphasis added).

<sup>24</sup> For example, *Woods* involved the setting of production limits by the Texas Railroad Commission for oil and gas producers in Texas which also had prospective effects across the industry. *Railroad Comm’n v. Woods Exploration & Prod. Co.*, 405 S.W.2d 313, 315 (Tex. 1966); *see* Kenneth Culp Davis and York Y. Willbern, *Administrative Control of Oil Production in Texas*, 22 Tex. L. Rev. 149, 164-71 (1943). *Clipper Express* involved ratemaking by the I.C.C. which, by its very nature, is prospective in nature. 690 F.2d at 1261-62.

meaningful distinction for *Noerr* purposes, as it is unrelated to any of the considerations underlying *Noerr*.

**(b) CARB Operated Under Significant Procedural Constraints in the Phase 2 RFG Rulemaking.**

The ALJ improperly confined his analysis to a determination of whether CARB’s procedures approximated those found in “formal adjudications” like a court conducts. ID-37. Regardless of whether an agency’s proceedings are classified as a “formal adjudication” or not, an agency’s focus on a formalized process of information gathering and subsequent adherence to “enforceable standards” are highly relevant to a *Noerr* analysis. Indeed, while other administrative proceedings might present a close call, here the totality of circumstances shows that CARB was acting in a non-political manner.

Like the state agency in *Kottle*, CARB’s Phase 2 RFG rulemaking was conducted in accordance with APA procedures: CARB provided notice of its proposed regulations; it provided the language of these proposed regulations with a statement of reasons; it solicited and accepted written comments; and it conducted hearings at which oral testimony was heard and transcribed. Comp. ¶26. CARB also maintained a rulemaking record file and issued extensive written findings on the results of its rulemaking, with detailed answers to concerns or questions raised by affected parties.<sup>25</sup> See Cal. Gov’t Code §§ 11340 *et seq.* CARB’s regulations were reviewed by the Office of Administrative Law, a separate state agency, to ensure that the regulations met the

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<sup>25</sup> The ALJ stated in the Initial Decision that CARB “was empowered to” invoke adjudicative proceedings available to it under Sections 11370 *et seq.* of the California Government Code and Title 17 of the California Code of Regulations at sections 60040 to 60094. ID-39-40. As such, the ALJ suggested that CARB’s decision not to do so reflects a conscious decision to forego formal adjudication. This is misleading. The adjudicatory hearing procedures to which the ALJ referred are limited to review of certain executive officer decisions and are not available in rulemaking proceedings. See 17 Cal. Code Regs. § 60040 (adjudicatory hearing provisions apply to executive officer decisions relating to vehicle or engine recalls; revocation or suspension of vehicle test laboratory licenses).

statutory standards of necessity, authority, clarity, consistency, reference and nonduplication. Cal. Gov't Code §§ 11340 *et seq.*, § 11349.1. The OAL conducted a review in accordance with a “substantial evidence” standard and was authorized to reject the agency’s regulations. *Id.*

Finally, CARB’s rulemaking was subject to judicial review to determine whether the agency acted within its delegated authority; whether the agency employed fair procedures; and whether the agency’s action was arbitrary, capricious, or lacking in evidentiary support. *Id.*, § 11350; Comp. ¶18. CARB must have an evidentiary basis for every decision it makes and thus must depend on the accuracy of facts presented to it on which to base its rulemaking decisions. Comp. ¶17. A reviewing court is authorized to overturn a regulation if the court finds that the “agency’s determination ... is not supported by substantial evidence.” *Id.*, § 11350(b)(1). This “substantial evidence” test was added in 1982 and was intended by the Legislature to authorize “a significant intensification of review of the factual support for a regulation.” Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1230 (1995); *see also Agricultural Labor Relations Bd. v. Exeter Packers, Inc.*, 184 Cal. App. 3d 483, 492 (Ct. App. 1986) (noting that the “legislative history [of this provision] demonstrates the Legislature intended to change the standard of review” to require substantial evidence).

Thus, even though CARB’s procedures are not identical to all of the procedures found in a “formal adjudication,” the nature of the applicable procedural constraints – coupled with the substantive constraints imposed by legislative directive, as discussed above – militate against immunizing misrepresentations made to CARB in connection with the Phase 2 rulemaking.<sup>26</sup>

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<sup>26</sup> *See Metro Cable*, 516 F.2d at 232 (distinguishing *California Motor Transport* as “involv[ing] an adjudicatory setting, in which governmental action is taken by means of a highly structured procedure before a body that can act only on the basis of a record made at hearings”).

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 the Initial Decision does, to a misleading analysis of whether, for administrative law purposes, the CARB proceedings are a formal adjudication or whether others gave information to CARB on other matters besides Unocal’s pending patent. 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 the basic principles of *Noerr*, Unocal’s factual misrepresentations fall within the misrepresentation exception to *Noerr*.<sup>27</sup>

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

The Initial Decision erroneously concludes that it would be “inappropriate and unfair” to hold that “the *Noerr-Pennington* doctrine does not apply to Section 5 of the FTC Act.” ID-55. None of the cases relied on by the ALJ to support this conclusion directly addressed whether, or the extent to which, *Noerr* provides immunity from actions brought under the FTC Act, as opposed to the Sherman Act.<sup>28</sup> The *Noerr* doctrine derives from a statute-specific analysis of the

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<sup>27</sup> The Commission should also give serious consideration to the State of California’s position, as reflected in its amicus brief. In *Clipper Express*, 690 F.2d at 1262 n.34, the Ninth Circuit bolstered its finding in favor of a misrepresentation exception with a cite to an amicus filed by the ICC, which explained that the agency could not function properly if such misrepresentations were allowed.

<sup>28</sup> The ALJ cited cases that putatively support the finding that the “*Noerr-Pennington* immunity is fully available . . . [under] Section 5 of the FTC Act.” ID-51-55. However none of these cases directly addresses the question of *Noerr*’s applicability under the FTC Act. In fact, in all of the cited FTC decisions that discuss *Noerr*, the doctrine was raised as a defense by respondents and was rejected by the Commission. See *Ticor Title Ins. Co.*, 112 F.T.C. 344, 460-64 (1989); *New England Motor Rate Bureau, Inc.*, 112 F.T.C. 200, 283-85 (1989); *Superior Court Trial Lawyers Ass’n*, 107 F.T.C. 510, 590-95 (1986); *Michigan State Med. Soc’y*, 101

interaction between the Sherman Act and the First Amendment right to petition. Thus, while *Noerr* establishes the manner in which the right to petition affects the scope of the Sherman Act, it does not necessarily dictate how that right affects other statutes, such as the FTC Act. The Commission has the authority to determine that *Noerr* applies to Section 5 actions only to the extent constitutionally required by First Amendment right to petition principles.<sup>29</sup>

The *Noerr* doctrine “was developed in cases alleging violations of the Sherman Act.” ID-53. The Supreme Court has not, however, (as the Initial Decision erroneously suggests, ID-31) taken a “broad view” of *Noerr* immunity that would encompass Section 5 of the FTC Act. The Supreme Court cases addressing the issue, including *Noerr* itself, have instead made it clear that the doctrine is a narrow, statute-specific exception to Sherman Act liability.<sup>30</sup> The Supreme

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F.T.C. 191, 296-301 (1983). In these cases, the Commission concluded that *Noerr* immunity was unavailable in any event, so there was no necessity for the Commission to raise or reach the issue of its applicability under the FTC Act.

<sup>29</sup> The ALJ misquotes *Rodgers v. FTC*, 492 F.2d 228, 230 (9th Cir. 1974) (ID-52-53), which arose from an “anti-litter” initiative placed before Washington state voters in 1970. The plaintiff had asked the Commission to investigate joint representations to the voters by grocery chain stores and beer and soft drink manufacturers that they would raise prices if the initiative was approved. In response, the Secretary of the Commission noted that the representations – which in any event, unlike this case, were not alleged to be false or otherwise deceptive – were made in “connection with political activity, particularly in connection with the legislative process.” The Secretary also pointed out that the petitioners were not trying to harm anyone’s “trade freedom,” but had simply told the voters that the proposed anti-litter initiative would lead to “higher prices, increased costs, economic hardships, and the like” – hardly the kind of speech that the Commission should be against. *Id.* This was clearly “political activity,” as the Secretary said. The Secretary’s statement does not support the ALJ’s view that the “concerns that the Supreme Court had with limiting the right to petition through the enactment of the Sherman Act must be of equal concern with respect” to the “FTC Act” in every circumstance.

<sup>30</sup> See *SCTLA*, 493 U.S. at 424 (stating that in *Noerr* the Court conducted a statute-specific analysis of the Sherman Act in the light of the First Amendment’s Petition Clause); *Cardtoons v. Major League Baseball Players Ass’n*, 208 F.3d 885, 889-90 (10th Cir. 2000); *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1364-65 (5th Cir. 1983) (“*Noerr* was based on a construction of the Sherman Act. It was not a first amendment decision.”); *In re Airport Car Rental Antitrust Litigation*, 474 F.Supp. 1072, 1083 (N.D.Cal. 1979) (“In *Noerr*, the Supreme Court strongly suggested that its exemption was the result of statutory construction.”).

Court has followed the same statute-specific analytical approach in all its subsequent *Noerr* cases.<sup>31</sup>

Significantly, the Supreme Court reaffirmed this approach in its most recent analysis of the interaction between the Petition Clause and federal legislation, *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002). In that case, the Court applied an analysis specific to the National Labor Relations Act in determining the manner in which that statute interacts with the right to petition. Summarizing the *Noerr* line of cases, the Court 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,” and rendered its decision based in large part on its earlier statute-specific analysis of the interaction between the NLRA and the First Amendment in *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). *See* 536 U.S. at 526. Thus, the Commission may determine the contours of any statutory immunity to Section 5 consistent with First Amendment right to petition principles.

Such an approach is supported by the substantial differences between the Sherman Act and the FTC Act. Section 5(b) of the FTC Act (15 U.S.C. § 45(b)) empowers and directs the Commission – when it determines that a particular practice constitutes an unfair method of competition or an unfair or deceptive act or practice – to issue “an order requiring [the offending] person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.” Although the relief available under the Sherman Act includes a number of retrospective and punitive remedies – including treble damages and criminal fines and other penalties – the remedies available to the Commission are exclusively civil and are not punitive. Thus, as the Supreme Court noted in sustaining a Commission order

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<sup>31</sup> *See, e.g., Pennington*, 381 U.S. at 660-61, 670; *California Motor Transp.*, 404 U.S. at 513-14; *Allied Tube*, 486 U.S. at 499-500; *PREI*, 508 U.S. at 52.

in *FTC v. Cement Institute*, “[t]he Commission is not a court. It can render no judgment, civil or criminal.” 333 U.S. 683, 703 n.12 (1948). The Court concluded:

[T]he effect of the Commission’s order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress.

*Id.* at 706.

In short, Commission processes and remedies differ significantly from those of the Sherman Act, so that the FTC’s impact on *Noerr* values is significantly attenuated.

The unitary nature of the FTC Act further supports the conclusion that *Noerr*’s limitations do not constrain the Commission here. The substantive provisions and legislative history of the FTC Act make it clear that the concepts of “unfair methods of competition” prohibited by the original statute and of “unfair or deceptive acts or practices” added by the Wheeler-Lea Amendments of 1938 are closely connected.<sup>32</sup> It would be anomalous to interpret this language 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.

This would be especially ironic, considering that one reason the Commission exists is to employ processes in making and enforcing competition policy different from those already present in the Sherman Act. Indeed, as President Wilson said, the Commission was created to be “an 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

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<sup>32</sup> See generally, e.g., Timothy J. Muris and J. Howard Beales, III, *The Limits of Unfairness Under the Federal Trade Commission Act*, Report Commissioned by the Association of National Advertisers (1991) (“ANA Report”); Neil W. Averitt, *The Meaning of “Unfair Acts or Practices” in Section 5 of the Federal Trade Commission Act*, 70 Geo. L.J. 225 (1981).

that will meet all the equities and circumstances of the case.” H.R. Doc. No. 625, 63d Cong., 2d Sess. 5 (1914). In this case, the Commission can tell Unocal and the world that acquiring a monopoly by defrauding an administrative agency is not only unethical but also illegal.

Contrary to the Initial Decision, the respective decisions of the Commission and the Supreme Court in *SCTLA* do not indicate that *Noerr* necessarily applies to the FTC Act. In *SCTLA*, the Commission explained that while the *Noerr* and *Pennington* cases provided “sufficient guidance for [the] conclusion that First Amendment immunity should not extend” to the respondents’ conduct, it “would reach the same conclusion, however, under a general First Amendment analysis of expressive conduct.” 107 F.T.C. at 594. To that end, the Commission adopted the Supreme Court standard governing the permissible regulation of commercial speech.<sup>33</sup> The Commission then conducted a statute-specific analysis of the interaction between the FTC Act and the right to petition – unconstrained by any aspect of *Noerr* – and concluded that its cease and desist order was fully consistent with the First Amendment. Significantly, the Supreme Court approved this analytical approach in sustaining the Commission order. *SCTLA*, 493 U.S. at 428-32.

This case differs in important respects from the *Noerr* cases on which the ALJ relied. In those cases (including *Noerr* itself), pursuant to the Sherman Act, the plaintiff sought damages, and in some cases injunctions to prevent further petitioning or to halt or burden a government program. By contrast, this case seeks to protect consumers from the future effects of wrongful

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<sup>33</sup> *Id.* at 594, quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968). The Supreme Court has reaffirmed that the First Amendment does not at all protect commercial speech that is misleading or that concerns unlawful activity. See *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367 (2002); *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980); see also *McDonald*, 472 U.S. at 485 (“there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions”).



conduct, and therefore does not implicate core First Amendment political petitioning issues in any way. The relief sought would simply prevent Unocal from reaping the benefits of an ill-gotten monopoly. In this case, the Commission has the power to correct a wrong that will go unremedied unless the Commission acts.

As in *SCTLA*, under the FTC Act the Commission can enjoin Unocal from harming consumers without interfering with Unocal's opportunity to communicate with CARB or making Unocal liable for damages or other retrospective remedies. Indeed, in *SCTLA*, the Commission independently determined that enjoining 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 the government." 107 F.T.C. at 599. That reasoning applies equally here.

Accordingly, even if false or otherwise deceptive petitioning undertaken to acquire a monopoly were immunized from Sherman Act liability by *Noerr* – and we have established above that it is not – such conduct should not be, and is not, immune from FTC Act liability. The Commission may articulate a narrow rule of immunity – based on sound policy and the Commission's interpretation of its own statutory mandate – that communications to a government agency are immunized from Section 5 liability *only* to the extent required by the First Amendment right to petition. In particular, the FTC Act does not immunize "petitions" to government under the circumstances set forth in sections A-C, above. Commission determinations to that effect, arising as they do from the Commission interpreting its own statute, are of course entitled to considerable deference by the courts. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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

By lying to CARB, Unocal induced CARB to grant a monopoly to Unocal. Unocal also gained market power by lying to Auto/Oil and WSPA refiners, behavior that is distinct from the misrepresentations to CARB and has no conceivable *Noerr* protection. Comp. ¶¶50-59, 90, 96. Nothing in the ALJ's Initial Decision disputes or undermines this conclusion.

As explained in the Complaint, Unocal informed the refiners that Unocal's RFG research results were in the "public domain" and thus "freely available without charge." Comp. ¶54. But for Unocal's deceit, the oil companies could have incorporated knowledge of Unocal's pending patent rights into their capital investment and refinery reconfiguration decisions to avoid or minimize potential infringement. Comp. ¶90. Alternatively, the refiners might have insisted on pre-regulation bargaining over royalty rates.

None of this conduct has anything to do with CARB. None of it constitutes *Noerr* petitioning. The fact that Unocal separately misrepresented the facts to CARB does not, by some sort of "immunity by affinity," bring these independent allegations within *Noerr*. *Allied Tube*, 486 U.S. at 509 n.11 ("[T]he mere fact that an anticompetitive activity is also intended to influence governmental action is not alone sufficient to render that activity immune from antitrust liability.").<sup>34</sup>

Unocal did not use the Auto Oil Group and WSPA to "petition" CARB. Instead, Unocal misrepresented facts to them to prevent these groups and their members from taking action to avoid the effects of Unocal's monopoly. Comp. ¶81-90. Regulation of this conduct regulates business, not politics.

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<sup>34</sup> To the extent that Unocal's activities before private industry groups can be construed as "indirect" petitioning under *Noerr*, the arguments raised above as to the inapplicability of any immunity apply with equal force.

## **II. The ALJ Erroneously Found That This Commission Has No Jurisdiction over This Case.**

In order to dismiss the rest of the Complaint's allegations of fraud on private industry groups, the ALJ found that under 28 U.S.C. § 1338 the Commission has no jurisdiction to hear any claim that may require resolution of substantial issues of patent law. But both the Commission and the Sixth Circuit have held that § 1338 does not preclude the Commission from considering unfair competition cases that involve patent law issues. *American Cyanamid*, 63 F.T.C. 1747, 1856 (F.T.C. 1963) (*American Cyanamid I*), *vac. on other grounds*, 363 F.2d 757, 771 (6th Cir. 1966), *on rehearing*, 72 F.T.C. 623 (1967), *aff'd sub nom.*, *Charles Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968). In addition, language in the Commission's recent decision in *Schering-Plough* reiterated this view. The ALJ's order is incorrect and should be reversed.

### **A. 28 U.S.C. § 1338 Does Not Divest the Commission of Jurisdiction over Unfair Trade Practices Involving Questions of Patent Law.**

The ALJ incorrectly holds that the Commission lacks the authority to decide whether Unocal has market power by examining "the scope of Respondents' patents" and what other substitutes are available. ID-67. According to the ALJ, 28 U.S.C. § 1338(a) requires that such "questions of patent law" can be heard only by federal district courts and not by this Commission. *Id.* at 63-66. This is not true. Neither the language of § 1338(a) nor the precedent interpreting it supports the ALJ's holding. The statute states:

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

28 U.S.C. § 1338(a).

The plain language of the statute makes clear that federal district courts do have jurisdiction over “civil actions arising under” the patent laws, and that “courts of the states” do not. This statute simply does not apply to agency proceedings for the following reasons:

*First*, an agency proceeding is not a “civil action.” *See, e.g., Sullivan v. Hudson*, 490 U.S. 877, 891-92 (1989) (as a rule an agency adjudication is not “a civil action”); *PepsiCo., Inc. v. FTC*, 472 F.2d 179, 184 (2d Cir. 1972) (distinguishing a Commission proceeding from a civil action); *In re Trans-Continental Clearing House*, 56 F.T.C. 390, 394 (1959) (“The present proceeding is not a civil action at law on the contract, but is a proceeding....”).<sup>35</sup>

*Second*, the plain and unambiguous language in § 1338(a) excluding only “courts of the states,” in conjunction with its silence regarding other federal forums, should not be interpreted to deprive this Commission of jurisdiction over unfair competition cases that involve patents. *See Christensen v. Harris County*, 529 U.S. 576, 582-84 (2000) (applying the canon of statutory construction, *expressio unius est exclusio alterius*, the explicit exclusion of one thing suggests others should not be excluded by implication); *Tafflin v. Levitt*, 493 U.S. 455, 460-61 (1990) (grant of original jurisdiction to federal court does not preclude another court from having jurisdiction over the same cause of action). Nothing in section 1338(a) excludes jurisdiction from administrative agencies or any forum other than state courts. *Miss America Org. v. Mattel*,

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<sup>35</sup> The FTC Act also carefully distinguishes between “proceedings” before the Commission and “civil actions” before federal district courts. *Compare* 15 U.S.C. § 45 (b) (authorizing the Commission to conduct a “proceeding”) *with* 15 U.S.C. § 45 (m) (permitting the Commission to bring “a civil action” in a district court). Section 56 requires the Commission to notify the Department of Justice in any case where it brings a “civil action” to enforce the Act. *See also* Rule 3 of Federal Rules of Civil Procedure (defining “Commencement of Action” as follows: “A civil action is commenced by filing a complaint with the court”); *Cann v. Carpenters Pension Trust Fund*, 989 F.2d 313, 316 (9th Cir. 1993) (citing *Black’s Law Dictionary* for proposition that the word “action” in its usual legal sense means “a suit brought in a court; a formal complaint within the jurisdiction of a court of law,” and “includes all the formal proceedings in a court of justice attendant upon the demand of a right ... in such court.”).

*Inc.*, 945 F.2d 536, 541 (2d Cir. 1991) (analyzing § 1338(a) and stating that “Simple logic dictates that because federal courts have jurisdiction exclusive of the states provides no help in deciding whether their jurisdiction is also exclusive of an administrative proceeding within the executive branch.”); *see also Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 703 (9th Cir. 1995) (“[T]here is simply no support for Creative’s argument that 28 U.S.C. § 1338(a) bars the High Court of Singapore from applying United States copyright law,” because a court in Singapore is not one of the “courts of the states.”); *Institut Pasteur v. Cambridge Biotech Corp.*, 186 F.3d 1356, 1370-72 (Fed. Cir. 1999) (Bankruptcy court may hear a case arising under the patent laws because it is a bankruptcy claim).

Using sweeping language without citation to any authority, the ALJ posited that the phrase in § 1338 referring solely to “courts of the states” must by implication include all federal forums besides district courts; otherwise, according to the ALJ, one would be forced to “infer, albeit unreasonably, that Congress chose not to exclude ... tax courts, the Court of Claims, etc. from hearing patent cases.” ID-63. But, apparently unknown to the ALJ, these forums do hear cases involving patent issues. *See, e.g., Dow Chem. Co. v. U.S.*, 32 Fed. Cl. 11, 28 (1994) (finding patent infringement), *aff’d in part, rev’d in part*, 226 F.3d 1334 (Fed. Cir. 2000); *United States v. Palmer*, 128 U.S. 262, 271-72 (1888) (Court of Claims could hear a claim of implied patent license); *Podd v. CIR*, T.C. Memo. 1998-231 (U.S. Tax Ct. 1998) (The Tax Court may consider “evidence to show the scope of the patents, the potential availability of noninfringing substitutes, the potential for litigation over the validity of the patents, and how such matters might affect the royalty rate that would be set by parties bargaining at arm's length.”) (citations omitted).

In short, without any authority, and in violation of basic and fundamental tenets of statutory construction, the ALJ’s ruling would severely hamper the Commission’s ability to

protect the public's "paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope." *Walker Process*, 382 U.S. at 177 (citation omitted). The implications of such a ruling are obvious. Given the manner in which a patent "by its very nature is affected with a public interest" due to its "far-reaching social and economic consequences," (*id.*), it is critical to the Commission's mission of acting in the public interest that the agency have authority to determine issues relating to patents when necessary.

**B. Section 5 of the FTC Act Grants the Commission Broad Powers to Prevent Unfair Methods of Competition, Including Those Raising Patent Issues.**

The Commission has stated on more than one occasion that it has the right to hear substantial issues of patent law that are necessary to determine a violation of Section 5 of the FTC Act. Its recent pronouncement in *Schering* could not be more clear: "If it were logically necessary to decide the issue of patent validity in order to decide" the Section 5 issue, "we would do so, regardless of the difficulties." *In re Schering-Plough*, Opinion at 35. Moreover, in *American Cyanamid I*, the Commission found that respondents had committed inequitable and fraudulent conduct before the Patent Office and that this violated the FTC Act § 5. 63 F.T.C. 1747 (F.T.C. 1963).

In *American Cyanamid I*, the Commission held that § 1338(a) does not divest the Commission from hearing cases that involve patents. Rather, as the Commission held, § 1338(a) merely adopted language used for the first time in 1878 and "[s]ince the Federal Trade Commission, as well as other quasi-judicial agencies, were created in later years, no inference can be drawn from that statute that Congress made federal court jurisdiction of actions arising under patent laws exclusive of the Commission as well as state courts." *American Cyanamid I*,

63 F.T.C. at 1856. Although the Sixth Circuit vacated the Commission’s decision on other grounds, it affirmed the Commission’s jurisdictional analysis, stating, “[t]he Federal Trade Commission Act contains no statutory exemption of Patent Office proceedings, and we find nothing in the Act indicating any intention to set aside the Patent Office as a ‘city of refuge’ from the Commission’s jurisdiction over unfair trade practices.” *American Cyanamid Co.*, 363 F.2d at 771 (footnotes omitted).

The ALJ’s attempt to distinguish *American Cyanamid* and avoid its clear holding by concluding that the case did not require resolution of patent issues is wrong. *See* ID- 65. First, both the Commission and the Sixth Circuit held that the Commission had jurisdiction over unfair methods of competition raising patent issues. 63 F.T.C. at 1857-62; 363 F.2d at 768-71. Second, the Federal Circuit has expressly held that the issue raised in *American Cyanamid*, whether the patentee had committed inequitable conduct, is a substantial question of patent law, sufficient to make a claim one “arising under” the patent laws for purposes of 28 U.S.C. § 1338(a). *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1330-31 (Fed. Cir. 1998) (the enforceability of a patent, i.e., whether it was procured through inequitable conduct, is a substantial question of patent law); *see also Pro-Mold & Tool Co. v. Great Lakes Plastics*, 75 F.3d 1568, 1574 (Fed. Cir. 1996) (inequitable conduct in an unfair competition case “arises under” the patent laws). Thus, the ALJ here was incorrect.

Examination of the language of 28 U.S.C. § 1338(a) supports this conclusion. The statute’s exclusion of state courts could not possibly have been meant to exclude the Commission (created in the century after the patent jurisdiction statute) from hearing unfair competition cases that happen to involve patents. Instead, through the FTC Act, Congress delegated to the Commission broad power to regulate unfair methods of competition. *See Atlantic Ref. Co. v. FTC*, 381 U.S. 357, 367 (1965) (Section 5 provides “a broad delegation of

power” that “empowers the Commission, in the first instance, to determine whether a method of competition or the act or practice complained of is unfair.”). Congress’s goal in making this broad grant of power was to enable the Commission to bring administrative expertise to a wide variety of business practices. As the Court has explained, “[a]ll of the committee reports and the statements of those in charge of the Trade Commission Act reveal an abiding purpose to vest both the Commission and the courts with adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages.” *FTC v. Cement Inst.*, 333 U.S. at 693. Congress even considered and rejected proposals to limit the Commission’s power. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-40 (1972); S. Rep. No. 597, 63rd Cong. 2d Sess. (1914) at 13; H.R. Rep. No. 1142, 63rd Cong., 2d Sess. 18-19 (1914).

Against this backdrop, the fallacy of the ALJ’s statement – “[n]othing in either the language of the FTC Act or its legislative history contemplates that the Commission would exercise jurisdiction over substantial questions of federal patent law” – is obvious. *See* ID-65. There is no logical basis, and the ALJ offers none, for assuming that Congress meant to preclude the Commission from considering cases involving patents, copyrights, or plant variety (all the categories in § 1338). It would make no sense for Congress to grant the Commission power over all “unfair competition” cases and yet implicitly deny such power over any case involving patents, since “unfair competition” law had included myriad cases involving patents long before the FTC Act was enacted in 1914 and has continued since. *See, e.g.*, Joseph E. Davies, Bureau of Corporations, *Trust Laws and Unfair Competition* 115-117, 329, 389-94 (1915) (citing cases).<sup>36</sup> Congress was surely aware that many antitrust cases involved patent issues, and yet

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<sup>36</sup> The ALJ mistakenly cited *Decker v. FTC*, 176 F.2d 461, 463 (D.C. Cir. 1949), a false advertising case, for the proposition that the FTC “has no jurisdiction” to hear any case that



never mentioned that the Commission was somehow limited in its power to consider any antitrust case that might raise a substantial issue of patent law. No such restraint exists, and it is illogical to assume one.

Instead, the ALJ ignored the warning of the Supreme Court that judges should be cautious in “going behind the plain language of a statute” because it could lead to improper “legislation” by a judge. *United States v. Locke*, 471 U.S. 84, 95-96 (1985) (citation omitted). What the ALJ should have done is interpret both the FTC Act and Section 1338(a) consistently, giving the Commission plenary power over all unfair competition cases, even those involving patents. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective”).

The ALJ’s holding, if sustained by this Commission, would improvidently oust the Commission of jurisdiction to consider any antitrust or unfair competition case that happens to require resolution of patent issues. This result would prohibit the Commission from reviewing conduct that would otherwise violate the Sherman Act and the other antitrust laws and would be contrary to Supreme Court precedent establishing that the FTC Act is at least as broad as these laws. *E.g., FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 454 (1986); *Cement Inst.*, 333 U.S. at 691.

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“draw[s] into the question the very scope of Respondents’ patents.” ID-64. But that is exactly the contrary of the holding in *Decker*. In that case, the D.C. Circuit actually held that the FTC *could* hear the case because a respondent “can claim no immunity” from Section 5 of the FTC Act “by reason of a patent,” which “cannot be made a cover for violation of law.” 176 F.2d at 463. The court explained only that the Commission was not challenging the “validity” of the patent, which Complaint Counsel has not done in this case either. *Id.* *Decker* does not hold that the Commission could not examine the “scope of Respondents’ patents” to determine market power. ID-64.

Unlike many antitrust cases involving patents, this case assumes that the patents here are valid and enforceable. Nevertheless, like all antitrust cases, this case will require an examination of Unocal's "market power," and thus may include a comparison of many of the fuels claimed in the patent with other fuels produced and sold in California. *See Abbott Labs. v. Brennan*, 952 F.2d 1346, 1354 (Fed. Cir. 1991) ("a patent does not of itself establish a presumption of market power in the antitrust sense.") (citations omitted); 35 U.S.C. § 271(d) (Patent misuse requires a finding of "market power"); 134 Cong. Rec. S14434-03 (Sen. Leahy stating that Section 271(d) was added to "harmoniz[e] our intellectual property and antitrust laws."). However, no case has ever held that a mere examination of undisputed claims in a patent as part of a market power analysis somehow excludes the Commission from jurisdiction.

Moreover, this case does not even fall within § 1338(a) because there are independent theories of liability in this case that do not depend on any substantial issues of patent law. As the U.S. Supreme Court recently held, "[n]ot all cases involving a patent-law claim fall within" the meaning of 28 U.S.C. § 1338. *The Holmes Group, Inc. v. Vornado Circulation Sys, Inc.*, 535 U.S. 826, 834 (2002). A case does not "arise under" the patent laws unless the "well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief *necessarily* depends on resolution of a substantial question of federal patent law." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808-09 (1988) (emphasis added). Although like *Christianson*, this case may include analyses of patent issues, a *resolution* of patent issues is not necessary for the prima facie case for at least one or more claims. For example, a patent holder like Unocal can wield market power through licensing efforts. *See, e.g.*, Comp. ¶95 (Unocal achieved "its market power through business conduct by enforcing its patents through litigation and licensing activities ... against those refiners that

control in excess of 95 percent of the capacity for the manufacture and/or sale of CARB-compliant gasoline in California.”); *see also* Comp. ¶¶9, 14, 68-72, 90(a).<sup>37</sup>

In sum, if the ALJ is correct, then any analysis of market power where a patent is involved will necessarily require resolution of patent law issues, and the Commission will be powerless to address it. The ALJ is wrong. Congress granted the Commission broad authority to deal with “unfair competition,” and nothing in § 1338(a) is to the contrary. Given this mandate, the Commission clearly has jurisdiction to resolve patent issues, if necessary, to assess market power arising from a company’s enforcement of its patents.

### CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Commission vacate the ALJ’s decision and order the ALJ to hear the evidence in the case so that the Commission can decide whether the people of California will have to pay billions of dollars due to Unocal’s deceitful and monopolistic conduct.

Dated: January 14, 2004

Respectfully submitted,

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J. Robert Robertson  
Chong S. Park  
*Counsel Supporting the Complaint*

Bureau of Competition

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<sup>37</sup> The ALJ also suggests that this case requires resolution of patent issues because, to assess causation it is necessary to “determine the scope of any competitors’ patents” and “whether any competing patents existed or would be valid and would not infringe.” ID-62, 64. The ALJ is wrong. Assessing the anticompetitive effects of Unocal’s asserted patent rights does not require such analysis. Moreover, none of the ALJ’s speculations about facts that might relate to our theories of Unocal’s defenses are even alleged or contemplated in the Complaint.

Federal Trade Commission  
Washington, D.C. 20580  
(202) 326-2372  
Facsimile (202) 326-3496

## CERTIFICATE OF SERVICE

I, Terri Martin, hereby certify that on January 14, 2004:

I caused one original and twelve copies of Complaint Counsel's Appeal Brief to be served upon the following by hand delivery:

The Commissioners  
U.S. Federal Trade Commission  
Via Office of the Secretary, Room H-159  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

I caused one copy of Complaint Counsel's Appeal Brief to be served upon the following person by hand delivery:

Joseph Kattan, Esq.  
Gibson, Dunn & Crutcher LLP  
1050 Connecticut Avenue, N.W.  
Washington, DC 20036-5306

I caused one copy of Complaint Counsel's Appeal Brief to be served upon the following by facsimile and Federal Express delivery:

David W. Beehler, Esq.  
Robins, Kaplan, Miller & Ciresi LLP  
2800 LaSalle Plaza  
800 LaSalle Avenue  
Minneapolis, MN 55402-2015

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Terri Martin