

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

In the Matter of

DOCKET NO. 9305

**UNION OIL COMPANY OF CALIFORNIA,
a corporation.**

**ANSWER OF RESPONDENT UNION OIL COMPANY
OF CALIFORNIA**

Introduction

Respondent Union Oil Company of California ("Unocal") denies that it has violated Section 5 of the Federal Trade Commission ("FTC") Act, as amended, 15 U.S.C. §45. While many of the detailed allegations in the Complaint are false, there are two basic underpinnings which, together or alone, are unsupportable and eviscerate any viability to the Complaint.

First, the Complaint alleges that Unocal committed fraud in three ways: (1) by telling the staff of the California Air Resource Board ("CARB") that Unocal considered its research data non-proprietary; (2) by telling competitors that Unocal's data was in the public domain; and (3) by telling CARB staff and CARB that a predictive model (which would not require the sale of specific gasoline compositions) would be flexible and cost-effective compared to rigid fuel regulations that mandate specific compositions. None of these allegations can withstand scrutiny.

With respect to the first allegation, the Complaint implicitly suggests that when the word "non-proprietary" or "proprietary" is used, a representation is necessarily made as to the status of patent rights. That suggestion is not true. Depending upon its context, the word "proprietary" is used differently. For example, it may mean "not accessible to others" as when the petroleum refining industry refers to a "proprietary pipeline." The Complaint itself uses the term in this fashion in paragraph 13 below. More importantly, the word "proprietary" is often

used, as it was in this case, to mean "confidential." Usage of the term "proprietary" to simply refer to confidentiality and not patent rights may be shown through its typical use in correspondence, e-mails or protective orders, which may refer to "proprietary financial data" or "proprietary consumer research."

Unocal used the term "non-proprietary" in response to a request by CARB staff that it lift the "confidential" designation of data previously shown to CARB staff. CARB staff was creating a large database of thousands of raw data-points reflecting the measured amount of emissions from a variety of vehicles and fuels. CARB staff asked Unocal to lift the confidentiality of Unocal's data so that the data could be included in that database and analyzed by CARB staff to develop their own conclusions. Unocal responded by telling staff that Unocal considered its data to be "non-proprietary" and thus "available upon request." This statement can only be viewed as a statement of "non-confidentiality." Likewise, while Unocal does not believe it ever used the words "in the public domain" to refer to its data or equations, such a statement, even if made, is not a representation of patent rights. It is common for scientists, after patent applications are filed, to publish their findings in the public domain. In no way can such a publication represent a statement of patent status.

The Complaint also inappropriately attempts to turn the expression of opinion on a matter of public policy (whether a regulation is "flexible" or "cost-effective") into fraud. Unocal submits that its opinion on the flexibility and cost effectiveness of a predictive model is not a representation on the status of patent rights, and, in any event, was and is a true opinion. In short, Unocal never made any statement regarding the status of its patent rights to anyone and CARB and its staff never asked anyone for such a disclosure. To now suggest that the status of patent rights was critical to CARB when CARB or its staff never disclosed it as a factor for consideration is inappropriate hindsight.

The second major fault of the Complaint is its attempt to avoid the obvious immunity given to all citizens and corporations when they petition the government. Under the *Noerr-Pennington* doctrine and the First Amendment to the United States Constitution, petitioning in connection with governmental activities (especially but not limited to legislative or quasi-legislative activity) is immune from antitrust scrutiny. Unocal has a right under the Constitution and United States Supreme Court precedent to advocate its opinion and present the information it believes appropriate on matters of public policy, especially here where proposed regulations were to be forced upon the industry by government. This immunity, as expressly described by the Supreme Court, allows one to advocate a position completely and solely within the advocate's self-interest, even if the effect of the regulation would bring about an anticompetitive outcome.

The Complaint attempts to sidestep these fundamental Constitutional rights and Supreme Court precedent by characterizing CARB's proceedings as similar to court proceedings – quasi-adjudicative – in the hope of creating a better chance of effecting a change in the law so as to avoid this immunity. But CARB and its staff did not use any of the adjudicative procedures required to be used in adjudications under California law and as a matter of due process. For example, CARB and its staff repeatedly met privately with interested parties off the record, did not require statements to be made under oath, and did not permit cross-examination. Such activities are proper under the quasi-legislative procedures which CARB expressly invoked in its rulemaking but would have been a grievous violation of the quasi-adjudicative procedures it did not invoke. Regardless of the characterization of “quasi-legislative” or “quasi-adjudicative,” the anticompetitive effect alleged by the Complaint is the result of the regulations adopted by CARB, the essence of the situation in which the *Noerr-Pennington* doctrine confers antitrust immunity. Accordingly, Unocal's conduct, as well as the conduct of others who petitioned CARB and its staff, is protected and immune from antitrust scrutiny.

Pursuant to Rule 3.12 of the Commission's Rules of Practice, 16 C.F.R. §3.12, Unocal makes the following response to the specific allegations raised in the Complaint and additionally asserts additional defenses as noted. With the exception of what is specifically admitted, Unocal denies each and every allegation contained in the Complaint.

Response to the Specific Allegations in the Complaint

Nature of the Case

1. This case involves Unocal's subversion of state regulatory standard-setting proceedings relating to low emissions gasoline standards. To address California's serious air pollution problems, the California Air Resources Board ("CARB") initiated rulemaking proceedings in the late 1980s to determine "cost-effective" regulations and standards governing the composition of low emissions, reformulated gasoline ("RFG"). Unocal actively participated in the CARB RFG rulemaking proceedings and engaged in a pattern of bad-faith, deceptive conduct, exclusionary in nature, that enabled it to undermine competition and harm consumers. Through a pattern of anticompetitive acts and practices that continues even today, Unocal has illegally monopolized, attempted to monopolize, and otherwise engaged in unfair methods of competition in both the technology market for the production and supply of CARB-compliant "summer-time" RFG and the downstream CARB "summer-time" RFG product market.

ANSWER:

1. Unocal denies each and every allegation of paragraph 1 of the Complaint. CARB did not engage in "standard-setting proceedings" in enacting regulations that have the force of law. While the regulations may have, on occasion, been generically referred to as standards, any "standards" created by CARB's regulations are legal standards. CARB in fact developed its Phase 2 regulations that are the subject of the Complaint pursuant to a quasi-legislative process in

which it expressly invoked “Chapter 3.5 (commencing with section 11340) of California’s Government code.” Under the California Government Code, Chapter 3.5 is “applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereinafter enacted....” Cal. Gov’t Code § 11346. CARB did not invoke the Government Code sections governing adjudicative proceedings in its Phase 2 rulemaking and did not observe the procedural requirements applicable to adjudicative proceedings under that Code. Instead, CARB followed the normal practice for rulemaking, in which it exercised the quasi-legislative powers conferred upon it by California law pursuant to procedures governing the exercise of its quasi-legislative powers. In enacting the Phase 2 rules, CARB exercised the coercive powers of the state and did not engage in the consensus process of standard-setting organizations, in which participants are given the right to vote on proposed standards. The outcome of CARB’s rulemaking reflected CARB’s exercise of the quasi-legislative power to impose regulations on the petroleum refining industry, whether or not industry supported the regulations. In fact, Unocal and many others opposed the regulations that CARB adopted. Unocal, as it has the right to do under the First Amendment to the Constitution, petitioned CARB to adopt regulations that would not have mandated the use of any gasoline compositions and instead would have given refiners the flexibility to blend gasoline in any manner that satisfies emission targets. CARB rejected and continues to reject Unocal’s suggested approach, and has instead adopted the rigid fuel specifications that Unocal opposed throughout the Phase 2 rulemaking. Unocal’s legitimate petitioning and advocacy activities in CARB’s quasi-legislative process is immune from antitrust challenge under the First Amendment and *Noerr-Pennington* doctrine. Unocal did not engage in any wrongful conduct, acts, or practices and did not engage in “subversion” of the rulemaking process or engage in bad faith or deceptive conduct. Unocal conducted itself in good faith and CARB officials have testified under oath in related private litigation involving the facts alleged in the Complaint that Unocal’s representations to CARB were neither deceptive nor misleading. Moreover, the judiciary has previously determined that Unocal acted in good faith in prosecuting

its patent applications. Unocal has neither attempted to create nor created an illegal monopoly in any alleged technology market or in any downstream product market. Furthermore, Unocal has not participated in any product market implicated by the Complaint for several years because it has exited the refining business. Unocal is legally incapable of monopolizing or adversely affecting competition in a market in which it does not even participate.

2. During the RFG rulemaking proceedings in 1990-1994, Unocal made materially false and misleading statements including, but not limited to, the following:

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

b. Representing to CARB that a "predictive model" -- *i.e.*, a mathematical model that predicts whether the resulting emissions from varying certain gasoline properties (including T50) in a fuel are equivalent to the emissions resulting from a specified and fixed fuel formulation -- would be "cost-effective" and "flexible," without disclosing that Unocal's assertion of its proprietary interests would undermine the cost-effectiveness and flexibility of such a model;

c. Making statements and comments to CARB and other industry participants relating to the cost-effectiveness and flexibility of the regulations that further reinforced the materially false and misleading impression that Unocal had relinquished or would not enforce any proprietary interests in its emissions research results.

ANSWER:

2. Unocal denies each and every allegation of paragraph 2 of the Complaint.

a. Unocal denies each and every allegation of paragraph 2(a) of the Complaint. Unocal truthfully communicated to CARB staff, in response to a request from the staff, that certain research data that Unocal had provided to CARB staff designated as “confidential,” would no longer be deemed confidential in order to enable CARB staff to incorporate the data into a large database that CARB staff was creating with data obtained from numerous sources, so that CARB staff could reach its own analysis and conclusions. The sole subject of Unocal’s communications to CARB was the confidential treatment of the data. CARB never sought any disclosures, and Unocal never made any representations, regarding inventions or intellectual property rights pertaining to inventions. Unocal’s communication cannot be reasonably understood to be a representation regarding such rights, much less an intentional fraud. Indeed, the CARB official to whom Unocal directed its communication has testified under oath that he had understood Unocal’s communication simply to grant CARB staff access to the Unocal data and that Unocal’s communications were neither deceptive nor misleading. Unocal denies that it ever communicated to “other participants” in CARB’s rulemaking that its research results were in the public domain or that Unocal did not have or would not enforce potential intellectual property rights over inventions relating to gasoline compositions.

b. Unocal denies each and every allegation of paragraph 2(b) of the Complaint. Unocal admits that it expressed its truthful opinion to government regulators, in opposing the promulgation of regulations that would require refiners to adhere to rigid fuel recipes and use oxygenates like MTBE in their gasolines, that a predictive model would be more cost-effective and allow greater flexibility in refining. In fact, other companies communicated this view as well to CARB staff. The expression of an opinion on a policy choice by a regulatory body engaged in legislating is not a proper subject for examination in an antitrust proceeding. In any event, the opinion expressed by Unocal to CARB’s staff was and remains true and correct. Upon

information and belief, both CARB and other refiners have expressed the opinion that a predictive model is more cost-effective and allows greater flexibility than the rigid RFG regulations adopted by CARB in 1991.

c. Unocal denies each and every allegation of paragraph 2(c) of the Complaint. The validity of Unocal's expressed opinions as to cost-effectiveness or flexibility of certain regulatory approaches is not the proper subject of an antitrust proceedings. Moreover, these opinions were true and correct and did not communicate and cannot reasonably be said to have communicated any representation of the status of or intended assertion of intellectual property rights.

3. Through its knowing and willful misrepresentations and other bad faith, deceptive conduct, Unocal created and maintained the materially false and misleading impression that it did not possess, or would not enforce, any relevant intellectual property rights that could undermine the cost-effectiveness and flexibility of the CARB RFG regulations.

ANSWER:

3. Unocal denies each and every allegation of paragraph 3 of the Complaint. Unocal never intended to and did not make any representation or create an impression as to whether Unocal possessed or intended to enforce intellectual property rights regarding any inventions.

4. Although Unocal knew by July 1992 that most of the pending patent claims based on its emissions research had been allowed by the United States Patent and Trademark Office, Unocal concealed this material information from CARB and other participants in the CARB RFG proceedings. Until Unocal's public announcement of its RFG patent rights on January 31, 1995, Unocal continued to perpetuate the false and misleading impression that it did not possess, or would not enforce, any proprietary interests relating to RFG.

ANSWER:

4. Unocal admits that some claims of its then pending patent application had been allowed as of July 1992 and that Unocal did not disclose, and had no duty to disclose, whether it had intellectual property rights or whether it would assert such rights if and when they were acquired. Unocal thus denies that it "concealed" anything from CARB or from "other participants." Unocal had no duty of disclosure either to CARB or to any rulemaking participant. Unocal further avers that it informed the Patent and Trademark Office prior to the issuance of its patent of the CARB regulations promulgated in 1991. Unocal denies each and every remaining allegation of paragraph 4 of the Complaint.

5. But for Unocal's fraud, CARB would not have adopted RFG regulations that substantially overlapped with Unocal's concealed patent claims; the terms on which Unocal was later able to enforce its proprietary interests would have been substantially different; or both. Unocal's misrepresentations, on which CARB and other participants in the rulemaking process reasonably and detrimentally relied, have harmed competition and led directly to the acquisition of monopoly power for the technology to produce and supply California "summer-time" reformulated gasoline (mandated for up to eight months of the year, from approximately March through October). Unocal's "patent ambush" also has permitted it to undermine competition and harm consumers in the downstream product market for "summer-time" reformulated gasoline in California.

ANSWER:

5. Unocal denies each and every allegation of paragraph 5 of the Complaint.

6. Unocal did not announce the existence of its proprietary interests and patent rights relating to RFG until shortly before CARB's Phase 2 regulations were to go into effect. By that time, the refining industry had spent billions of dollars in capital expenditures to modify their refineries to comply with the CARB Phase 2 RFG regulations. After CARB and the refiners had become locked into the Phase 2 regulations, however, Unocal

commenced its patent enforcement efforts by publicly announcing its RFG patent rights and its intention to collect royalty payments and fees. Since Unocal's public announcement of the issuance of its first RFG patent on January 31, 1995, Unocal has obtained four additional patents and vigorously enforced its RFG patent rights through litigation and licensing activities.

ANSWER:

6. Unocal admits that it publicly stated in 1995 that it had received a patent on certain gasoline compositions but further states that other refiners knew of the issuance of the patent shortly after its issuance in 1994. Rather than let Unocal proceed with licensing negotiations, these refiners jointly determined to obstruct Unocal's patent rights by filing a baseless declaratory judgment action against Unocal which asserted the same allegations as Complaint Counsel's Complaint. Unocal prevailed in that litigation at trial and on appeal. Unocal admits that it has obtained four additional patents relating to RFG and that it has enforced the rights conferred upon it by the Patent and Trademark Office and vindicated by the federal courts. With respect to the amount of money spent by the industry to comply with CARB regulations, Unocal lacks specific knowledge but denies CARB or the industry are locked into the Phase 2 regulations. Upon information and belief, CARB has had the ability to amend its regulations, has done so, and, to the extent CARB has not further amended its regulations, it is because of the policy judgment that the regulations are achieving cost-effective reductions in air pollution.

7. The anticompetitive conduct by Unocal that is at issue in this action has materially caused or threatened to cause substantial harm to competition, and will in the future materially cause or threaten to cause further substantial injury to competition and to consumers.

ANSWER:

7. Unocal denies each and every allegation of paragraph 7 of the Complaint.

8. The threatened or actual anticompetitive effects of Unocal's conduct include but are not limited to the following:
 - a. increased royalties (or other payments) associated with the use of technology to refine, produce, and supply low emissions, reformulated gasoline for the California market;
 - b. increases in the price of low emissions, reformulated gasoline in California;
 - c. reductions in the manufacture, output, and supply of low emissions, reformulated gasoline for the California market; and
 - d. decreased incentives, on the part of refiners, blenders, and importers, to produce and supply low emissions, reformulated gasoline to the California market.

ANSWER:

8. Unocal denies each and every allegation of paragraph 8 of the Complaint.
9. Unocal's enforcement of its patent rights has resulted, *inter alia*, in a jury determination of a 5.75 cents per gallon royalty on gasoline produced by ARCO, Shell, Exxon, Mobil, Chevron, and Texaco that infringed the first of Unocal's five RFG patents - United States Patent No. 5,288,393 (the "'393 patent"). These major refiners are still embroiled with Unocal in a pending accounting action to determine the total amount of infringement damages owed to Unocal for the period August 1996 through December 2000. Unocal also has sued Valero Energy Company ("Valero") seeking the imposition of a 5.75 cents per gallon royalty (and treble damages) on gasoline produced by Valero that infringes the '393 patent and the fourth of Unocal's five RFG patents - United States Patent No. 5,837,126 (the "'126 patent"). Taken together, the major refiners and Valero comprise approximately 90 percent of the current refining capacity of CARB-compliant RFG in the

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

ANSWER:

9. Unocal lacks knowledge as to the percentage of current refining capacity of the identified refiners in California and accordingly denies the allegation regarding the same. Unocal admits that it has successfully petitioned the federal courts for redress for infringement of the '393 patent by the identified refiners, that the United States District Court for the Central District of California has awarded royalties of 5.75 cents per gallon against the infringing refiners with respect to one patent, and that the judgment has been upheld on appeal by the United States Court of Appeals for the Federal Circuit, and that the United States Supreme Court has denied the infringing refiners' petition for certiorari. Unocal also admits that it has exercised its First Amendment right to petition the federal courts for redress by bringing an action for patent infringement against Valero Energy Company. Unocal further admits that it has offered to license its patents for 1.2 to 3.4 cents per gallon but denies that only "non-litigating" refiners may avail themselves of this royalty rate.

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

ANSWER:

10. Unocal denies each and every allegation of paragraph 10 of the Complaint, which is based on the unfounded assumptions that every gallon of California RFG infringes a Unocal

patent and/or that Unocal is seeking 5.75 cents per gallon as a patent royalty in negotiated licenses. The royalty rate that Unocal has made available to anyone willing to secure a license from Unocal and, in the case of adjudicated infringers, to make Unocal whole for past infringement is a fraction of the 5.75 cent royalty imposed by a jury on past infringers who had refused to negotiate a patent license. Unocal lacks sufficient information to determine the infringement rate for gasolines sold in California. On information and belief, the infringement rate would vary by refinery. Further, according to the refiners involved in the litigation of the '393 patent, a dispute exists, not yet determined by the Court, as to what gasolines previously produced infringe the '393 patent and no court or jury has yet determined infringement, the royalty rate, or construed the claims of Unocal's other four patents. While Unocal has made available a license for any and all of its patents to litigating and non-litigating refiners, absent agreement on such a license, Complaint Counsel's attempt to define or prove market power or alternatives necessarily requires a determination of infringement and claim construction, which rests in the exclusive jurisdiction of the judiciary. Unocal further states that the allegation as to the testimony of Unocal's expert witness was based upon a hypothetical not applicable to the current proceeding.

Respondent

11. Union Oil Company of California is a public corporation organized, existing, and doing business under, and by virtue of, the laws of California. Its office and principal place of business is located at 2141 Rosecrans Avenue, Suite 4000, El Segundo, California 90245. Since 1985, Union Oil Company of California has done business under the name "Unocal." Unocal is a wholly-owned, operating subsidiary of Unocal Corporation, a holding company incorporated in Delaware.

ANSWER:

11. Unocal admits the allegations of paragraph 11 of the Complaint.

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

ANSWER:

12. Unocal admits the allegations of paragraph 12 of the Complaint.

13. Prior to 1997, Unocal owned and operated refineries in California as a vertically integrated producer, refiner, and marketer of petroleum products. In March 1997, Unocal completed the sale of its west coast refining, marketing, and transportation assets to Tosco Corporation. Currently, Unocal's primary business activities involve oil and gas exploration and production, as well as production of geothermal energy, ownership in proprietary and common carrier pipelines, natural gas storage facilities, and the marketing and trading of hydrocarbon commodities.

ANSWER:

13. Unocal admits the allegations of paragraph 13 of the Complaint. Unocal further avers that the use of the term "proprietary" in paragraph 13 of the Complaint demonstrates that the term is not synonymous with the existence of patent rights and is contrary to the Complaint's allegation in paragraph 41 that Unocal's use of the term "non-proprietary" with regard to data constitutes a statement that waives patent protection with regard to patented inventions or inventions in which patent protection has been sought.

14. In its annual report for the year 2001 filed with the United States Securities and Exchange Commission, Form 10-K, Unocal lists as another of its key business activities: "[p]ursuing and negotiating licensing agreements for reformulated gasoline patents with

refiners, blenders and importers." Unocal has publicly announced that it expects to reap up to \$150 million in revenues a year from licensing its RFG patents.

ANSWER:

14. Unocal admits the allegations contained in paragraph 14 of the Complaint but further avers that pursuing and negotiating licensing agreements for patented or patent pending inventions on reformulated gasolines was not a key business activity for the company during the period in which the Complaint alleges that Unocal failed to disclose its patent position to CARB.

15. Unocal is the owner, by assignment, of the following patents relating to low emissions, reformulated gasoline: United States Patent No. 5,288,393 (issued February 22, 1994); United States Patent No. 5,593,567 (issued January 14, 1997); United States Patent No. 5,653,866 (issued August 5, 1997); United States Patent No. 5,837,126 (issued November 17, 1998); United States Patent No. 6,030,521 (issued February 29, 2000). These patents all arise from the same scientific discovery and are related in that they all claim priority based on patent application No. 07/628,488, filed on December 13, 1990. These patents share the identical specification.

ANSWER:

15. Unocal admits the allegations of paragraph 15 of the complaint as to the issuance dates of the patents and their identity of specification. Unocal further admits that the patents claim priority to the same invention date, but denies that there is only one invention or one scientific discovery. Inventions may typically include multiple aspects. Here, the claims of the patents describe the distinct ranges of compositions of motor gasoline and methods of refining, use and distribution of compositions as an aspect of the invention which was patented.

However, other aspects of the invention include, for example, directional teachings of emissions reduction for specific criteria pollutants and specific mathematical equations relating to predicting specific amounts of criteria pollutants, not in and of themselves claimed by any of the patents. Unocal further notes that, while the specifications of the various patents are identical, the claims of the various patents differ, including claims not construed by the judiciary.

California Air Resources Board (CARB)

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

ANSWER:

16. Unocal admits the first sentence of the allegations of paragraph 16 of the Complaint but lacks knowledge of the remaining allegations characterizing CARB's mission and mandate, except to specifically deny that CARB set and enforced standards. To the contrary, CARB adopted regulations. Unocal further avers that CARB staff publicly stated in 1991 that CARB's objective was to reduce emissions.

17. California's Administrative Procedures Act governs CARB's rulemaking proceedings and requires, *inter alia*, notice of any proposed regulations, the development of an evidentiary basis for any proposed regulations, the solicitation of public comments, and the conduct of hearings. Given the scientific and technical nature of the issues involved, CARB relies on the accuracy of the data and information presented to it in the course of rulemaking proceedings.

ANSWER:

17. Unocal admits that CARB developed its Phase 2 regulations pursuant to a quasi-legislative process under Chapter 3.5 of California's Government code, which is part of the California Administrative Procedure Act. That chapter is "applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereinafter enacted...." Cal. Gov't Code § 11346. Unocal denies the Complaint's characterization of the procedure specified by the California Administrative Procedure Act insofar as it suggests that rulemakings are subject to evidentiary standards applicable to adjudications and that the legislative-type hearings conducted in connection with rulemakings are comparable to evidentiary hearings that are conducted in adjudicative proceedings. In fact, rulemakings are governed by a different set of procedures and evidentiary standards than adjudications, and the two types of proceedings are governed by different chapters of the California Government Code. CARB followed none of the procedural requirements for adjudicative proceedings in promulgating the Phase 2 RFG rules. Unocal further denies that CARB relied uncritically on information or data provided to it by others and avers that CARB conducted its own evaluation of information and data in reaching its conclusions. CARB expected companies that petitioned it to seek to advance their individual interests, as the Chairperson of CARB testified under oath. Upon information and belief, others petitioned CARB staff and CARB to adopt regulations designed to and/or which had the effect of creating a competitive advantage.

18. All CARB regulations are subject to review by California's Office of Administrative Law to ensure that such regulations meet statutory standards of necessity, authority, clarity, consistency, reference and nonduplication. CARB's regulations are subject to judicial review to determine whether the agency acted within its delegated authority, whether the agency employed fair procedures, and whether the agency's action was arbitrary, capricious, or lacking in evidentiary support.

ANSWER:

18. Unocal admits that CARB's regulations are subject to review by California's Office of Administrative Law and that they are further subject to judicial review. Unocal denies that the existence of such review transforms a rulemaking from a quasi-legislative proceeding into an adjudication. The procedures that CARB is permitted to use in rulemakings and that it did use in promulgating its Phase 2 RFG rules do not contain any of the procedural safeguards associated with adjudications specified by the California Administrative Procedure Act, such as a prohibition of ex parte communications or an opportunity to cross-examine witnesses, because rulemakings are not adjudicative in nature. The substantive review conducted by courts with respect to rulemakings is not based on the type of evidence necessary to support an adjudicated judgment in an administrative forum.

Reformulated Gasoline in California

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

ANSWER:

19. Unocal admits that the California legislature had considered the use of alternative fuels, such as methanol, and that it had also considered banning motor gasoline. Unocal admits CARB's Phase 2 rulemaking was an outgrowth of this legislative process. Unocal admits that a

panel was formed in 1987 which included Roger Beach, but lacks sufficient information to form a belief as to the truth or falsity of the remaining allegations, and therefore denies same.

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

ANSWER:

20. Unocal denies each and every allegation of paragraph 20 of the Complaint, which is based on speculation regarding the reasons and motivations for the adoption of the recommendations by the members of the study panel. Unocal lacks sufficient information to form a belief as to the basis upon which members of the study panel formed their recommendation and therefore denies the allegation regarding that basis. Unocal admits that ARCO's George Babikian expressed his opinion to the effect that gasoline should not be replaced by methanol since in Mr. Babikian's opinion, gasoline could be made to combust as cleanly as methanol, but is uncertain as to whether such statements had any effect on the panel.

21. In late 1988, the California legislature amended the California Clean Air Act to require CARB to take actions to reduce harmful car emissions, and directed CARB to achieve this goal through the adoption of new standards for automobile fuels and low-emission vehicles. CARB's authority in conducting its Phase 2 RFG rulemaking proceedings was circumscribed by an express and limited delegation of authority by the legislature. CARB's specific legislative mandate, set forth in California Health and Safety Code Section 43018, provided, *inter alia*, that CARB undertake the following actions:

- a. Take "necessary, cost-effective, and technologically feasible" actions to achieve "reduction in the actual emissions of reactive, organic gases of at least 55

percent, a reduction in emissions of oxides of nitrogen of at least 15 percent from motor vehicles" no later than December 31, 2000;

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

ANSWER:

21. Unocal admits the express language of the statute referenced but specifically denies the Complaint's characterization of the statute. CARB is empowered by law to enact regulations having the force of law and did so in enacting the Phase 2 RFG rules. Its rules are legal mandates and not "standards." California law gives CARB broad discretion and the agency has exercised broad discretion in formulating its conclusions and policy decisions and in developing and implementing regulations having future effect.

a. Unocal admits the express language of the statute referenced in paragraph 21(a) of the Complaint. Unocal further avers that it stated to CARB on November 21, 1991 that "no further action was necessary" under the referenced language of the California Clean Air Act for CARB to comply with the Act.

b. Unocal admits the express language of the statute referenced in paragraph 21(b).

c. Unocal admits the express language of CARB's statutory authority but denies that CARB was charged with specifying "standards." Unocal additionally denies that CARB's statutory authority placed CARB in a quasi-adjudicative role in fulfilling its mission. CARB was empowered to adopt and did adopt regulations having the force of law based on its own analysis and conclusions, including policy, and not standards.

22. Following the 1988 California Clean Air Act amendments, CARB embarked on two rulemaking proceedings relating to low emissions, reformulated gasoline. In these rulemaking proceedings - Phase 1 and Phase 2, respectively - CARB prescribed limits on specific gasoline properties.

ANSWER:

22. Unocal admits the allegations of paragraph 22 of the Complaint.

23. The Phase 1 RFG proceedings resulted in the adoption of regulations in 1990 mandating a reduction in Reid Vapor Pressure ("RVP"), the elimination of leaded gasoline, and a requirement that deposit control additives be included in gasoline. The Phase 1 regulations did not require refiners to make large capital investments.

ANSWER:

23. Unocal admits the first sentence of paragraph 23 of the Complaint but lacks sufficient knowledge to form a belief as to the truth or falsity of whether all refiners considered their mandatory compliance to require "large capital investments" and therefore denies same.

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

ANSWER:

24. Unocal admits that CARB's Phase 2 proceedings represents an effort by CARB to develop stringent rules for low emissions, reformulated gasoline. Unocal specifically denies that CARB developed standards. Unocal admits that participants in the Phase 2 RFG rulemaking understood after CARB proposed its Phase 2 RFG rules that the rules proposed by CARB might

require them to make investments but avers that the nature and extent of the investment could not be known until CARB enacted its final rules. Unocal further states that refinery investments at this time, as contemplated or completed, included investments that were not necessary to achieve compliance with the Phase 2 rulemaking proposals.

25. In its Phase 2 RFG proceedings, CARB did not conduct any independent studies of its own, but relied on industry to provide the needed research and resulting knowledge.

ANSWER:

25. Unocal denies the allegations of paragraph 25 of the Complaint. CARB staff and CARB conducted their own studies, analyses, and evaluations in connection with and in reaching their own policy decisions and conclusions in rulemaking. For example, with respect to Unocal, CARB did not accept Unocal's opinion that no further regulations were necessary, did not accept that a pure predictive model should be implemented, did not accept that California should opt out of requiring the use of oxygenates like MTBE in Phase 2 gasolines, and did not accept that no T50 specification was necessary. Even following the 1991 regulations, CARB did not accept Unocal's opinion that caps on specific gasoline properties from the rigid fuel specifications not be made part of its predictive model regulations. CARB did also not accept Unocal's opinion that the caps should be loosened, both in 1991 and in 1994. To the extent that CARB expected innovation from individual companies in order to find ways to reduce exhaust pollution, CARB's failure to seek disclosures of patent rights from rulemaking participants signified an intent and expectation that such innovations would be the sole property of the inventors and their assignees as provided and required by the United States Constitution.

26. CARB's Phase 2 RFG proceedings were quasi-adjudicative in nature. In the course of these proceedings, CARB adhered to the procedures set forth in the California Administrative Procedures Act. CARB provided notice of proposed regulations; provided the language of these proposed regulations and a statement of reasons; solicited and accepted written

comments from the public; and conducted lengthy hearings at which oral testimony was received. CARB also issued written findings on the results of its rulemaking proceedings. Following adoption of the regulations, several parties sought judicial review of the CARB Phase 2 RFG regulations that provided small refiners with a two-year exemption for compliance with the regulations.

ANSWER:

26. Unocal denies each and every allegation of paragraph 26 of the Complaint other than that judicial review of the Phase 2 RFG may have been sought by some refiners. Unocal admits that CARB adhered to the procedures set forth in the California Administrative Procedure Act for quasi-legislative proceedings and that CARB invoked none of the procedures set forth in that Act with regard to quasi-adjudicative proceedings. CARB expressly invoked "Chapter 3.5 (commencing with section 11340) of the Government code." That chapter is "applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereinafter enacted...." Cal. Gov't Code § 11346. CARB did not invoke the Code sections governing adjudicative proceedings as part of its Phase 2 rulemaking. In the course of judicial review of a related CARB rulemaking, the California Supreme Court stated that the petition before it "seeks review of a quasi-legislative action by the ARB - the adoption of air quality regulations"

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

ANSWER:

27. Unocal denies the allegations of paragraph 27 of the Complaint. While Unocal considered its own potential costs of complying with regulations a part of its refining decisions, Unocal did not disclose publicly its own opinion as to what its own costs would be or ask other refiners what their costs would be to comply with the regulations. Unocal was not asked by

CARB or any other organization and, to its knowledge, no one else was asked, to describe whether or how previously unlicensed technology would affect compliance with proposed regulations.

Unocal's RFG Research

28. By 1989, Unocal management knew that CARB intended to achieve significant emissions reductions by regulating the chemical and physical properties of gasoline sold in California. Unocal scientists from the company's Science and Technology Division began to design experiments to determine how controlling various properties of gasoline affected automobile emissions. In January 1990, Unocal scientists conducted in-house emissions testing of various gasoline fuels in a single car to determine which gasoline properties had the greatest emissions impact.

ANSWER:

28. Unocal denies the allegations of paragraph 28 in that in 1989 neither Unocal nor CARB nor anyone else knew whether and/or what chemical or physical properties of gasoline CARB might choose to regulate. Unocal further avers that Unocal conducted its own independent study on a single car in early 1990 to assess whether properties Unocal chose to examine had an effect on tailpipe emissions.

29. On May 14, 1990, Unocal scientists Michael Croudace and Peter Jessup presented the preliminary results of the emissions research program to the highest levels of Unocal's management to obtain approval and funding for additional, confirmatory research. These research results were presented to the members of Unocal's Executive Committee, including Richard Stegemeier, the Chief Executive Officer and Chairman of the Board of

Unocal. Unocal management approved funding for additional emissions testing, and this project became known as the "5/14 Project."

ANSWER:

29. Unocal admits the allegations of paragraph 29 of the Complaint but further clarifies that the 5/14 project was a ten-car study and not the one-car study referred to in paragraph 28.

30. Unocal management approved the filing of a patent application covering the invention and discovery that sprang from the "5/14 Project," specifically the Unocal scientists' purportedly novel discovery of the directional relationships between eight fuel properties - RVP, T10 (the temperature at which 10 percent of a fuel evaporates), T50 (the temperature at which 50 percent of a fuel evaporates), T90 (the temperature at which 90 percent of a fuel evaporates), olefin content, aromatic content, paraffin content, and octane - and three types of tailpipe emissions - *i.e.*, incompletely burned or unburned hydrocarbons ("HC"), carbon monoxide ("CO"), and nitrogen oxides ("Nox").

ANSWER:

30. Unocal admits that Unocal management, through its regular Conception Committee, approved the decision to go forward with preparing a patent application. Unocal management did not see, review, or approve the application itself. Unocal further denies that the invention "sprang from the 5/14 project" in that the invention, as found by the United States District Court for the Central District of California, occurred in March 1990 based on the one-car study. The 5/14 project was, in part, confirmatory testing. Unocal further denies and objects to the derogatory reference to "purportedly novel discovery" to the extent that it implies a contrary implication but notes that it is a function of the judiciary and jury to determine novelty of compositions and methods of use, distribution and refining of motor gasoline using various combinations of RVP, distillation points, olefin, paraffin, and octane.

31. Unocal management made prosecution of the patent application a high priority. Unocal's chief patent counsel, Gregory Wirzbicki, personally undertook the task of prosecuting the patent application.

ANSWER:

31. Unocal denies the allegations of paragraph 31 of the Complaint. Other than through the regular duties of its Conception Committee, which approved going forward with preparing an application, Unocal management did not participate in any decision regarding the manner of prosecution of the patent application or on whether it should be given a high priority. Unocal management was focused on the company's refining operations at that time and did not view the exploitation of intellectual property, much less pending applications, as a priority. Mr. Wirzbicki's decision to prosecute the application was not made by management but by Mr. Wirzbicki himself.

32. On December 13, 1990, Unocal filed with the United States Patent and Trademark Office a patent application, No. 07/628,488. This application presented Unocal's emissions research results, including the regression equations and underlying data; detailed the directional relationships between the fuel properties and emissions studied in the "5/14 Project;" and set forth composition and method claims relating to low emissions, reformulated gasoline. All five Unocal RFG patents referred to in paragraph 15 are the progeny of the '488 application.

ANSWER:

32. Unocal admits that its patent application contained the specific equations from the one-car experiment and not the specific equations from the 5/14 project. Unocal further admits the application contained data, information regarding certain directional relationships, and composition and method claims and that it contained results from Unocal's research. Insofar as paragraph 32 attempts to blur the distinction between data, equations, and patented claims, Unocal denies such allegation.

Unocal's Conduct Before CARB

33. Prior to and after the filing of the patent application on December 13, 1990, Unocal employees and management discussed and considered the potential competitive advantage and corporate profit that could be extracted through effectuating an overlap between the CARB regulations and Unocal's patent claims.

ANSWER:

33. Unocal denies each and every allegation of paragraph 33 of the Complaint as an incomplete and thus inaccurate attempt to summarize the true facts. Unocal's management never agreed to attempt to persuade regulators to promulgate regulations that would effectuate an overlap with Unocal's patent claims. To the contrary, the company made a substantial effort to persuade CARB not to promulgate the Phase 2 rules that CARB adopted. This is shown by CARB's Statement of Reasons for Rulemaking in which CARB acknowledged that Unocal had opposed the rules that CARB decided to adopt and that Unocal had argued that "we don't see the T50 specification as necessary." Unocal management specifically rejected the concept of attempting to persuade regulators to adopt regulations that would require the use of such a formulae. Management did not discuss effectuating an overlap of patent claims with the regulations. The claim prosecution was left to Mr. Greg Wirzbicki, who prosecuted the application in accordance with the specification, invention and alleged prior art, a common and accepted practice. In fact, Unocal concluded, with regard to CARB's proposed regulations, that "if 514 is the specified formula then we have no competitive advantage."

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

ANSWER:

34. Unocal denies each and every allegation of paragraph 34 of the Complaint as incomplete and inaccurate. While Unocal scientists suggested that one option for Unocal to consider was to seek royalties from licensing the invention, the company's management was focused on how possible regulations could affect refinery operations. Unocal's management decided to have discussions with regulators for the purpose of trying to persuade them to adopt regulations that would not mandate rigid fuel specifications or which would at least allow a pure predictive model to be used as an alternative, and that would not mandate the use of oxygenates like MTBE, which placed Unocal at a great competitive disadvantage. Further, even after CARB and its staff proposed imposing caps on fuel properties, Unocal argued for a loosening of those caps. Had CARB done what Unocal had urged, on information and belief, other refiners could have a lesser infringement rate of Unocal's patents, none of which had issued or had claims allowed at the time of these discussions.

35. Beginning in 1990, and continuing throughout the CARB Phase 2 RFG rulemaking process, Unocal provided information to CARB for the purpose of obtaining competitive advantage. Unocal gave CARB this information in private meetings with CARB, through participation in CARB's public workshops and hearings, as well as by participating in industry groups that also were providing input into the CARB regulations. This information was materially misleading in light of Unocal's suppression of facts relating to its proprietary interests in its emissions research results and Unocal's active prosecution of patents based on these research results.

ANSWER:

35. Unocal denies the allegations of paragraph 35 of the Complaint. Unocal's purpose in providing information to CARB staff was an attempt to persuade regulators to adopt regulations that would not impose rigid fuel specifications, and CARB has acknowledged that Unocal opposed

the enactment of regulations that impose a rigid fuel specification. Unocal believed that the adoption of regulations based on a predictive model, which is based on a gasoline's emissions and not its composition, would be advantageous to it and the rest of industry, potentially, because it would allow refiners to find the lowest cost method of achieving emissions goals. Such a competitive environment was diminished when CARB chose to promulgate rigid fuel specifications in 1991 and then incorporate caps in its predictive model in 1994. Had Unocal been intent on deriving a competitive advantage from its patent application, it would have urged CARB to promulgate the rules that CARB ultimately adopted or even more stringent rules with more restrictive caps on gasoline properties, as ARCO, GM, Toyota, Nissan, and environmental organizations did. But CARB has expressly acknowledged that Unocal opposed such rules and that Unocal argued for a loosening of the caps.

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

ANSWER:

36. Unocal admits the allegations of paragraph 36 of the Complaint.

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

ANSWER:

37. Unocal admits that it presented to CARB research showing the scientific truth that T50 levels had a significant effect on emissions levels. Unocal further avers that CARB has officially stated in its Statement of Reasons for Rulemaking that Unocal had taken the position that “we don’t see the specification of T50 as necessary” for inclusion in the Phase 2 RFG regulations. Unocal further avers that no claims of its patent application had been allowed by the Patent and Trademark Office at any time prior to the conclusion of the 1991 CARB rulemaking with CARB’s promulgation of the final Phase 2 rules. The remaining allegations of paragraph 37 are denied.

38. Prior to the presentation to CARB, Unocal management decided not to disclose Unocal’s pending ’393 patent application to CARB staff.

ANSWER:

38. Unocal denies the allegations of paragraph 38 of the Complaint. Unocal avers that its management made no express decision with regard to the disclosure of the patent application and that the matter had not been the subject of a discussion. Unocal further avers that the company had a longstanding policy, consistent with the policy followed by other industry members, that pending applications were not to be disclosed outside the company. Unocal further states that the confidentiality of pending applications is mandated by rule, regulation and case law.

39. On July 1, 1991, Unocal provided CARB with the actual emissions prediction equations developed in the “5/14 Project.” Unocal requested that CARB “hold these equations confidential, as we feel that they may represent a competitive advantage in the production of gasoline.” But Unocal went on to state:

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

ANSWER:

39. Unocal admits the allegations of paragraph 39 of the Complaint.
40. Following CARB's agreement to develop a predictive model, Unocal made its emissions research results, including the test data and equations underlying its "5/14 Project," publicly available.

ANSWER:

40. Unocal admits that, following CARB's agreement, in response to Unocal's petitioning activities, to consider the adoption of a predictive model, Unocal made publicly available certain raw data that it had previously disclosed to CARB pursuant to confidentiality restrictions. Unocal denies the remaining allegations.
41. On August 27, 1991, Unocal unequivocally stated in a letter to CARB that its emissions research data were "nonproprietary." Specifically, Unocal stated:

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

ANSWER:

41. Unocal admits that it agreed to make publicly available the specific raw data to which the letter cited in paragraph 41 of the Complaint refers. Unocal further avers that the letter itself shows that the letter was sent in response to CARB staff's request that Unocal lift the confidentiality restrictions applicable to that data and that Unocal was willing "to make the data public" to facilitate the consideration of a predictive model. Unocal denies it intended its use of the term "non-proprietary" with regard to the data to mean or that it could reasonably be interpreted as stating that Unocal was foregoing potential or actual patent rights. Unocal further avers that the use of the term "proprietary" in Paragraph 13 of the Complaint and elsewhere manifests the fact that the use of the term "proprietary" with respect to matters other than

patented inventions does not connote a reference to patent rights. CARB staff have previously testified under oath that they understood the letter as allowing staff to include the data in a mega-database so that it could be analyzed, which is how Unocal intended it to be understood.

42. At the time Unocal submitted its August 27, 1991 letter to CARB, it did not disclose to CARB its proprietary interests in the "5/14 Project" data and equations, its prosecution of a patent application, or its intent to enforce its proprietary interests to obtain licensing income. Read separately or in conjunction with Unocal's July 1, 1991 letter, the August 27, 1991 letter created the materially false and misleading impression that Unocal agreed to give up any "competitive advantage" it may have had relating to its purported invention and arising from its emissions research results.

ANSWER:

42. Unocal admits that it did not disclose to CARB its prosecution of a patent application and denies the remaining allegations of paragraph 42 of the Complaint. Any objective reading of the August 27, 1991 letter shows that the term "non-proprietary" was used to mean "non-confidential." The letter addressed, and its subject line so stated, the "PUBLIC AVAILABILITY OF UNOCAL RESEARCH DATA," and affirmed Unocal's willingness to "make the data public if necessary in the development of a predictive model for use in the certification of reformulated gasoline." The letter removed the confidentiality of the data by stating that "Unocal now considers this data to be non-proprietary and available to CARB, environmental interest groups, other members of the petroleum industry, and the general public upon request." The letter referred solely to the raw data, and made no reference to patented inventions. CARB staff members who received the letter have testified under oath that they understood the letter to be in response to staff's request to lift the confidentiality of the data so that it could be analyzed with other data. With this background, Unocal admits that it did not inform CARB staff or anyone else outside the company as to the existence of its pending patent application, which was consistent with its policy, a

petroleum industry practice of maintaining the confidentiality of patent applications and with rules, regulations and case law allowing for such confidentiality. Unocal specifically denies that it intended or that the letter created any false or misleading impression and denies that Unocal gave up its rights to intellectual property, pending or actual through such a letter. Unocal further notes the complete absence of any allegation in the Complaint that Unocal intended to defraud anyone, a necessarily element of proof in an allegation of fraud.

43. In reasonable reliance on Unocal's representation that the information was no longer proprietary, CARB used Unocal's equations in setting a T50 specification. Subsequently, in October 1991, CARB published Unocal's equations in public documents supporting the proposed Phase 2 RFG regulations.

ANSWER:

43. Unocal denies the allegations of paragraph 43 of the Complaint.

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

Unocal's pending patent claims recited limits for five of the eight properties specified by the regulations: T50, T90, olefins, aromatics, and RVP.

ANSWER:

44. Unocal admits that CARB adopted Phase 2 RFG regulations on November 22, 1991, but denies these regulations set out "standards." CARB promulgated regulations that have the force of law and not industry standards. Unocal admits that CARB adopted specifications for eight gasoline properties but denies the recitation of what was then pending in Unocal's application. Unocal's then pending claims included limitations, among others, drawn to paraffin volume

percentage, olefin volume percentage, octane, T50, and RVP in addition to the specification and/or original claims describing the additional limitations of T10 and T90.

45. Unocal's misrepresentations and materially false and misleading statements caused CARB to adopt Phase 2 RFG regulations that substantially overlapped with Unocal's concealed patent claims. Specifically, for example, CARB included a specification for T50 in its Phase 2 RFG regulations and eventually adopted a "predictive model" that included T50 as one of the parameters.

ANSWER:

45. Unocal denies the allegations of paragraph 45 of the Complaint. Unocal never misrepresented or made any materially false or misleading statements to CARB staff or CARB and Unocal's statements did not cause CARB to adopt the Phase 2 regulations. Unocal opposed the regulations that CARB adopted and CARB officially acknowledged Unocal's opposition in its Statement of Reasons for Rulemaking. CARB specifically recognized that Unocal opposed the inclusion of a T50 specification in the Phase 2 RFG rules. Unocal also denies that CARB ever promulgated the "predictive model" that Unocal advocated because Unocal's proposal would have given refiners complete freedom to blend gasolines without regard to specific limits for particular fuel characteristics. CARB's "predictive model" did not offer such freedom and continued to subject refiners to rigid fuel specifications in the form of caps on specific gasoline characteristics. CARB chose what properties to include and what caps to put on those properties based on its own conclusions and analysis.

46. Prior to the final approval of the CARB Phase 2 RFG regulations in November 1992, Unocal submitted comments and presented testimony to CARB opposing CARB's proposal to grant small refiners a two-year exemption for complying with the regulations. Unocal vigorously opposed this proposed exemption on the grounds that it would increase the costs of compliance and undermine the cost-effectiveness of the CARB Phase 2 RFG regulations. In

making these statements, Unocal again failed to disclose that it had proprietary rights that would materially increase the cost and reduce the cost-effectiveness and flexibility of the regulations that CARB had adopted in reasonable reliance on Unocal's representations.

ANSWER:

46. Unocal admits that it opposed putting itself as a major refiner at a competitive disadvantage by requiring it to comply with regulatory mandates from which other competitors would be exempted. Unocal further avers that it had opposed the adoption of the Phase 2 RFG regulations on many other grounds as well. Unocal denies that it failed to disclose that it had "proprietary" rights because the allegation presumes that Unocal had a duty to disclose its pending patent application when no such duty existed and because the allegation attempts to use the term "proprietary" to include patent rights, a usage not contemplated or used by Unocal in responding to staff's request to lift the confidentiality of raw data. Unocal denies that its conduct increased the cost or reduced the cost-effectiveness or flexibility of the regulations. Unocal further denies that CARB or CARB staff acted in reliance or reasonable reliance on Unocal's petitioning activities, in which Unocal made no representations of the status or enforceability of intellectual property rights over its inventions. Unocal denies the remaining allegations of paragraph 46 of the Complaint.

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

ANSWER:

47. Unocal admits the allegations contained in paragraph 47 of the Complaint with respect to the date of CARB's adoption of its predictive model and further admits that CARB staff made statements to the effect that the proposed predictive model would provide additional flexibility to refiners. Unocal further avers that the predictive model adopted by CARB was not the pure predictive model Unocal had advocated because it was subject to caps on various gasoline characteristics, the adoption of which Unocal opposed. Unocal further states that CARB and CARB staff were solely responsible for the form of the predictive model adopted by CARB.

48. During the development of the predictive model, Unocal continued to meet with CARB, providing testimony and information. Unocal submitted comments to CARB touting the predictive model as offering "flexibility" and furthering CARB's mandate of "cost-effective" regulations. These statements were materially false and misleading because Unocal suppressed the material fact that assertion of its proprietary rights would materially increase the cost and reduce the flexibility of the proposed regulations.

ANSWER:

48. Unocal admits that it had communications with CARB staff prior to 1994 in which it criticized the staff for failing to deliver on staff's promise to have a predictive model in place within a year of the 1991 regulations. Unocal denies that it provided "testimony" to the extent that such allegation implies that anyone provided adjudicative testimony. Although participants or speakers generically referred to their comments as testimony, in fact no requirements were made for the taking of testimony under oath and no affidavits were submitted under oath in these proceedings. Unocal admits it continued to advocate to the staff that CARB should enact a pure predictive model that would free refiners of the constraints of a rigid fuel specification. Unocal further admits that a predictive model would provide additional flexibility and be cost-effective compared to the rigid fuel specifications adopted by CARB, which was and remains true regardless of patent rights. Unocal further avers that the predictive model that it advocated would have given refiners the

ultimate freedom to blend fuels outside or inside the claims of its patents. Unocal denies each and every allegation of the final sentence of paragraph 48 of the complaint.

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

ANSWER:

49. Unocal admits the date of issuance of its '393 patent but lacks sufficient knowledge to form a belief as to when CARB or CARB staff first became aware of the patent. On information and belief, other refiners did know of the patent's issuance in 1994, but said nothing to CARB before CARB adopted its "predictive model" regulations.

Unocal's Participation in Industry Groups

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

ANSWER:

50. Unocal admits the allegations of paragraph 50 of the Complaint.

51. The stated objective of the Auto/Oil joint research venture was to plan and carry out research and tests designed to measure and evaluate automobile emissions and the potential improvements in air quality achievable through the use of reformulated gasolines,

methanol, and other alternative fuels, and to evaluate the relative cost-effectiveness of these various improvements.

ANSWER:

51. Unocal admits the allegations contained in paragraph 51 of the Complaint.

52. The Auto/Oil Agreement provided that "[t]he results of research and testing of the Program will be disclosed to government agencies, the Congress and the public, and otherwise placed in the public domain." This agreement specifically provided for the following dedication of any and all intellectual property rights to the public:

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

ANSWER:

52. Unocal admits that the Auto/Oil Agreement contains the language quoted in paragraph 52 of the Complaint but specifically denies that language applied to research conducted independently by participating companies. To the contrary, and as noted by the Solicitor General in his brief to the United States Supreme Court, the Agreement specifically provided that research activities under the Agreement would not constitute the exclusive vehicle of research for any of the members for research and testing and further provided that each member retained the right to engage in independent research and that such research would not be deemed to be undertaken by the Program. When Unocal disclosed aspects of its independent research to the Auto/Oil Group, it did not request that Auto/Oil pay for Unocal's independent research and Auto/Oil did not assert at that time that the Unocal study had become part of the Auto/Oil program. Unocal's independent work never became the product of the Auto/Oil Group.

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

ANSWER:

53. Unocal admits that the Auto/Oil Agreement permitted participating companies to conduct independent research, and further permitted them to withhold the fruits of such independent research from the Auto/Oil Group. Unocal denies each and every remaining allegation of paragraph 53 of the Complaint and avers that it is contrary to the language of the Auto/Oil Agreement.

54. Unocal viewed its participation in industry groups, such as Auto/Oil, as an integral part of its strategy of deception for the purpose of obtaining a competitive advantage therefrom. On September 26, 1991, Unocal presented to Auto/Oil the results of Unocal's emissions research, including the test data, equations, and corresponding directional relationships between fuel properties and emissions derived from the "5/14 Project." Unocal management authorized this presentation, which was substantially similar to that made to CARB on June 20, 1991. Unocal informed Auto/Oil participants that the data had been made available to CARB and were in the public domain. Unocal also represented that the data would be made available to Auto/Oil participants. Unocal's 5/14 work thus became part of the "work" of the Auto/Oil Program.

ANSWER:

54. Unocal admits that it gave a presentation to the Auto/Oil group on or about the September 26, 1991, and that it published discussion from its independent research. Unocal further admits that the presentation was either approved by or in keeping with prior approval by Unocal. Unocal denies that it used the term "public domain" during the presentation but admits that it

offered to make copies of raw data available. Unocal denies each and every remaining allegation of paragraph 54 of the Complaint.

55. Unocal's 5/14 work also became part of the Auto/Oil Program through the subsequent testing - as part of the Program - of the 5/14 fuel property relationships.

ANSWER:

55. Unocal denies each and every allegation of paragraph 55 of the Complaint.

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

ANSWER:

56. Unocal admits the allegations of the first two sentences of paragraph 56 of the Complaint, except to clarify that the participation by Unocal and by WSPA in CARB's rulemaking proceedings was petitioning activity. Unocal lacks knowledge as to what three cost studies are referred to in the last sentence of paragraph 56 of the Complaint and therefore denies the allegations of that sentence.

57. One cost study commissioned by WSPA incorporated information relating to process royalty rates associated with non-Unocal patents and was used by CARB to determine the cost-effectiveness of the proposed CARB Phase 2 RFG standards. This WSPA cost study estimated the costs of the proposed regulations on a cents-per-gallon basis and estimated

the incremental costs associated with regulating specific gasoline properties. This WSPA study could have incorporated costs associated with potential royalties flowing from Unocal's pending patent rights.

ANSWER:

57. Unocal denies each and every allegation of paragraph 57 of the complaint.
58. On September 10, 1991, Unocal presented its "5/14 Project" emissions research results to WSPA. Unocal management authorized the presentation of the research results to WSPA. This Unocal presentation created the materially false and misleading impression that Unocal's emissions research results, including the data and equations, were nonproprietary and could be used by WSPA or its individual members without concern for the existence or enforcement of any intellectual property rights.

ANSWER:

58. Unocal does not presently have sufficient information that it presented discussion of aspects of its 5/14 research on or about September 10, 1991, and therefore denies the allegation that it made such a presentation. Unocal further denies that any presentation it gave disclosing raw data or equations, and discussing its research, created any materially false and misleading impression that WSPA or its individual members could make, use or sell gasoline without concern for the existence or enforcement of any intellectual property rights.
59. None of the participants in the WSPA or Auto/Oil groups knew of the existence of Unocal's proprietary interests and/or pending patent rights at any time prior to the issuance of the '393 patent in February 1994, by which time most, if not all, of the oil company participants to these groups had made substantial progress in their capital investment and refinery modification plans for compliance with the CARB Phase 2 RFG regulations.

ANSWER:

59. Unocal has no knowledge whether other companies had learned of the existence of the pending patent application prior to the issuance of the '393 patent but avers, upon information and belief that other refiners became aware of the patent shortly after its issuance and prior to CARB's adoption in June 1994 of regulations that incorporated a "predictive model" subject to caps on fuel properties that CARB elected to maintain from its rigid fuel specification. Unocal denies the remaining allegations contained in paragraph 59 of the Complaint.

Unocal's Patent Prosecution and Enforcement

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

ANSWER:

60. Unocal denies each and every allegation of paragraph 60 of the Complaint. Unocal further states that any implication that Unocal did anything improper in the manner in which it amended its claims during prosecution was flatly rejected by the judiciary. The Solicitor General of the United States, in an amicus brief to the United States Supreme Court, joined by the Patent and Trademark Office, examined the allegation of whether Unocal amended its claims to resemble the CARB regulations. In that brief, the Solicitor General emphasized that even if such an amendment had occurred, the patent's validity would not be affected since an inventor is allowed to narrow a patent's claims to focus on its most useful applications.

61. On or about July 1, 1992, Unocal received an official action from the U.S. Patent and Trademark Office indicating that most of Unocal's pending patent claims had been allowed.

Unocal did not disclose this information to CARB or other participants to the CARB Phase 2 RFG rulemaking.

ANSWER:

61. Unocal admits that on or about July 1, 1992, it received notice that most of its then pending patent claims had been allowed. Unocal admits that it did not disclose the allowance of such claims but denies that it had any duty to make such a disclosure.

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

ANSWER:

62. Unocal admits that in February 1993 it received a notice of allowance of its pending patent claims and that it did not disclose the allowance of such claims. Unocal further denies that it had any duty to make such a disclosure. Unocal further avers that it informed the Patent and Trademark Office of the existence of the CARB regulations prior to the notice of allowance referred to in paragraph 62 of the Complaint.

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

ANSWER:

63. Unocal admits that it filed a divisional application in June 1993 but denies the remaining allegations of paragraph 63 of the Complaint.

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

ANSWER:

64. Unocal admits the allegations of the first and third sentences of paragraph 64 of the Complaint. Unocal denies the allegations of the second sentence insofar as they imply that Unocal violated some duty by not publicly disclosing its patent before January 31, 1995.

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

ANSWER:

65. Unocal admits that it exercised its First Amendment right to petition the government and that it met with the California Governor and with CARB officials. Unocal specifically states that its assurances were directed to not causing a disruption with the roll-out of the Phase 2 program set for 1996. This was because CARB had previously experienced problems in attempting to roll out its diesel regulations. Unocal specifically denies that CARB expressed any concern to Unocal during the same period about the coverage of the '393 patent so as to imply that Unocal had been

fraudulent, misleading, or deceitful. Unocal admits that CARB then asked and received from Unocal an agreement that CARB could use test fuels for its continuing test programs without having to pay a royalty. Unocal denies the remaining allegations of paragraph 65 of the Complaint.

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

ANSWER:

66. Unocal admits the allegations of the first sentence paragraph 66 of the Complaint. Unocal denies that it had any obligation to inform anyone outside the company of its filing of a continuation application.

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

ANSWER:

67. Unocal admits the allegations contained in paragraph 67 of the Complaint.

68. On April 13, 1995, ARCO, Exxon, Mobil, Chevron, Texaco, and Shell filed suit in the United States District Court for the Central District of California seeking to invalidate Unocal's '393 patent. Unocal filed a counterclaim for patent infringement of the '393 patent. The jury in this private litigation determined that Unocal's '393 patent was valid and infringed, and found that the refiners must pay a royalty rate of 5.75 cents per gallon for the period from March through July 1996 for sales of infringing gasoline in California.

ANSWER:

68. Unocal admits that it exercised its First Amendment right to petition the courts for redress by filing a counterclaim for patent infringement against the refiners identified in paragraph 68 of the Complaint and further admits the remaining allegations in that paragraph. Unocal further avers that refiners sought not only to invalidate the '393 patent but to hold the patent unenforceable based on the same alleged conduct that forms the basis of the Complaint in this case. The district court sanctioned the refiners for such allegations. The determination of infringement was affirmed by the Court of Appeals for the Federal Circuit and the Supreme Court denied the infringing refiners' petition for certiorari. In connection with that petition, the Solicitor General of the United States, in a brief joined by the Patent and Trademark Office , recommended that the writ of certiorari be denied.

With the Supreme Court's final disposition of the case, the infringing refiners are bound by that judgment, and the Commission lacks the authority to overturn these judicial determinations.

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

ANSWER:

69. Unocal admits the allegations of paragraph 69 of the Complaint.

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

ANSWER:

70. Unocal admits the allegations of paragraph 70 of the Complaint.

71. On January 23, 2002, Unocal sued Valero Energy Company in the Central District of California for willful infringement of both the '393 patent and the '126 patent (see Paragraph 9). In its complaint, Unocal seeks damages at the rate of 5.75 cents per gallon for all infringing gallons, and treble damages for willful infringement.

ANSWER:

71. Unocal admits that it exercised its First Amendment right to petition the courts for redress by bringing a patent infringement action against Valero Energy and that it seeks the relief summarized in paragraph 71 of the Complaint.

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

ANSWER:

72. Unocal admits the allegations of paragraph 72 of the Complaint.

Relevant Product and Geographic Markets

73. Unocal has obtained and exercised market power and/or monopoly power in two relevant product markets.

ANSWER:

73. Unocal denies the allegations of paragraph 73. Unocal further states that it has exercised its constitutional and statutory rights as well as its rights granted by way of the judgment of the judiciary in its patents.

74. One relevant product market consists of the technology claimed in patent application No. 07/628,488 (filed on December 13, 1990) and Unocal's issued RFG patents, and any alternative technologies that enable firms to refine, produce, and supply CARB-compliant "summer-time" RFG for sale in California at comparable or lower cost, and comparable or higher effectiveness, without practicing the Unocal technology. The relevant geographic market for such technology is worldwide.

ANSWER:

74. Unocal denies the allegations of paragraph 74 of the Complaint.

75. Another relevant market consists of CARB-compliant "summer-time" RFG produced and supplied for sale in California. The relevant geographic market is California.

ANSWER:

75. Unocal denies the allegations contained in paragraph 75 of the Complaint. Unocal further avers that it does not sell gasoline in California and therefore does not participate in the alleged relevant market.

Unocal's Materially False and Misleading Statements

During CARB's RFG Proceedings Led to its Market Power

76. By engaging in fraudulent conduct in connection with the CARB rulemaking proceedings, Unocal unlawfully obtained market power. Unocal obtained unlawful market power through affirmative misrepresentations, materially false and misleading statements, and other bad-

faith, deceptive conduct that caused CARB to enact regulations that overlapped almost entirely with Unocal's pending patent rights.

ANSWER:

76. Unocal denies the allegations of paragraph 76 of the Complaint.
77. Unocal, through its management and authorized employees, made knowing and willful misrepresentations to CARB by making materially false and misleading statements and/or by suppressing facts while giving information of other facts that were likely to mislead for want of communication of the suppressed facts. Unocal's statements were materially false and misleading in that they failed to disclose Unocal's proprietary interests in its emissions research data, and/or Unocal's intention and efforts to obtain competitive advantage and corporate profit through enforcement of its intellectual property rights.

ANSWER:

77. Unocal denies the allegations of paragraph 77 of the Complaint.
78. Unocal's knowing and willful misrepresentations to CARB include, but are not limited to, the following:
- a. Unocal presented its emissions research results to CARB on June 20, 1991, for the purpose, inter alia, of showing CARB the relationship between T50 and automobile exhaust emissions; and it represented that a predictive model that included T50 would be "cost effective" and flexible without disclosing that the assertion of its proprietary rights would materially increase the cost and reduce the flexibility of such a model. Unocal represented that these data and equations were confidential to Unocal, and "may represent a competitive advantage" to Unocal.

- b. Having previously asserted that its equations might provide it with a competitive advantage, Unocal informed CARB by letter, dated August 27, 1991, that its emissions research data thereafter would be "nonproprietary" and available to CARB, industry members, and the general public. By this representation, Unocal created the materially false and misleading impression that Unocal had relinquished or would not enforce any proprietary interests in its emissions research results.

- c. On numerous occasions after August 27, 1991, Unocal made statements and comments to CARB relating to the "cost effectiveness" of CARB Phase 2 regulations, and the "flexibility" offered by the implementation of a predictive model to reduce refiner compliance costs. These statements and comments include, but are not limited to, both written and/or oral statements made to CARB on the following dates: October 29, 1991, November 21, 1991, November 22, 1991, March 16, 1992, June 19, 1992, August 14, 1992, September 4, 1992, June 3, 1994, and June 9, 1994. Under the circumstances, these statements further reinforced the materially false and misleading impression that Unocal had no proprietary interests in its emissions research results and/or that Unocal had disclaimed any and all such proprietary rights and would not seek to enforce these rights.

ANSWER:

78. Unocal denies the allegations of paragraph 78 of the Complaint and its sub-parts. Unocal further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

79. Throughout its communications and interactions with CARB prior to January 31, 1995, Unocal failed to disclose that it had pending patent rights, that its patent claims overlapped with the proposed RFG regulations, and that Unocal intended to charge royalties. Unocal

hence failed to disclose material information that would have impacted CARB's analysis of the cost-effectiveness of the Phase 2 RFG regulations. Unocal instead perpetuated false and misleading impressions concerning the nature of its proprietary interests in its "5/14 Project" research results.

ANSWER:

79. Unocal denies the allegations of paragraph 79 of the Complaint and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

80. CARB reasonably relied on Unocal's misrepresentations and materially false and misleading statements in developing the Phase 2 RFG regulations. But for Unocal's fraud, CARB would not have adopted RFG regulations that substantially overlapped with Unocal's concealed patent claims; the terms on which Unocal was later able to enforce its proprietary interests would have been substantially different; or both.

ANSWER:

80. Unocal denies the allegations of paragraph 80 of the Complaint and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

81. Unocal, through its management and authorized employees, made knowing and willful misrepresentations to participants in the Auto/Oil joint venture by making materially false and misleading statements and/or by suppressing facts while giving information of other facts which were likely to mislead for want of communication of the suppressed facts.

ANSWER:

81. Unocal denies the allegations of paragraph 81 of the Complaint and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

82. Unocal made a presentation to Auto/Oil on September 26, 1991, at which Unocal shared its research results with the group. Unocal informed Auto/Oil that CARB also had been provided with Unocal's data and equations, and that these data and equations were in the public domain. Unocal represented that it would supply its data to the Auto/Oil Group and its members. Unocal's statements were materially false and misleading in that they failed to disclose Unocal's proprietary interests in its emissions research results and Unocal's intention and efforts to obtain competitive advantage through enforcement of its intellectual property rights.

ANSWER:

82. Unocal denies the allegations of paragraph 82 of the Complaint and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

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

ANSWER:

83. Unocal denies that it had any duty to disclose its patent application or its intentions with respect to the enforcement of any patent arising from such application and that it "failed" to do so.

84. By deceptive conduct that included, but was not limited to, false and misleading statements concerning its proprietary interests in the results of its emissions research results, Unocal violated the letter and spirit of the Auto/Oil Agreement and breached its fiduciary duties to the other members of the Auto/Oil joint venture. Such deceptive conduct violated the integrity of the Auto/Oil joint venture's procedures and subverted Auto/Oil's process of providing accurate and nonproprietary research data and information to CARB.

ANSWER:

84. Unocal denies the allegations of paragraph 84 of the Complaint and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

85. Unocal, through its management and authorized employees, made/ knowing and willful misrepresentations to members of WSPA by making materially false and misleading statements and/or by suppressing facts while giving information of other facts which were likely to mislead for want of communication of the suppressed facts. Unocal's statements were materially false and misleading in that they failed to disclose Unocal's proprietary interests in its emissions research results and/or Unocal's intention and efforts to obtain competitive advantage through enforcement of its intellectual property rights.

ANSWER:

85. Unocal denies the allegations of paragraph 85 of the Complaint and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

86. Unocal made a presentation to WSPA on September 10, 1991, relating to its emissions research. At, or shortly following this presentation, Unocal provided to WSPA members the data and equations derived from this emissions research. In its interactions with WSPA, Unocal created the materially false and misleading impression that Unocal did not have any proprietary interests or intellectual property rights associated with its emissions research results.

ANSWER:

86. Unocal denies the allegations of paragraph 86 of the Complaint and further refers to and incorporates its detailed denial of these allegations in the previous paragraphs of its Answer.

87. Unocal actively participated in WSPA committees that discussed the potential cost implications of the CARB Phase 2 RFG regulations. Unocal knew that royalties were considered in a cost study commissioned by WSPA for submission to CARB.

ANSWER:

87. Unocal denies the allegations of paragraph 87 of the Complaint and further refers to and incorporates its detailed denial of these allegations in the previous paragraphs of its Answer.

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

ANSWER:

88. Unocal denies the allegations of paragraph 88 of the Complaint and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

89. By deceptive conduct that included, but was not limited to, false and misleading statements concerning its proprietary interests in the results of its emissions research results, Unocal breached its fiduciary duties to the other members of WSPA. Such deceptive conduct violated the integrity of the WSPA's procedures and subverted WSPA's process of providing accurate data and information to CARB.

ANSWER:

89. Unocal denies the allegations of paragraph 89 of the Complaint and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

90. Participants in Auto/Oil and WSPA reasonably relied on Unocal's misrepresentations and material omissions. But for Unocal's fraud, these participants in the rulemaking process would have taken actions including, but not limited to, (a) advocating that CARB adopt regulations that minimized or avoided infringement on Unocal's patent claims; (b) advocating that CARB negotiate license terms substantially different from those that Unocal was later able to obtain; and/or (c) incorporating knowledge of Unocal's pending patent rights in their capital investment and refinery reconfiguration decisions to avoid and/or minimize potential infringement. As a result, if other participants in WSPA or Auto/Oil had known the truth, the harm to competition and consumers, as described in this Complaint, would have been avoided.

ANSWER:

90. Unocal denies the allegations of paragraph 90 and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

91. Unocal's fraudulent conduct has resulted in Unocal's acquisition of market power in the following markets: the technology market for the production and supply of CARB-compliant "summer-time" gasoline in California, and the downstream product market for CARB-compliant "summer-time" gasoline in California.

ANSWER:

91. Unocal denies the allegations of paragraph 91 and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

92. The extensive overlap between the CARB RFG regulations and the Unocal patent claims makes avoidance of the Unocal patent claims technically and/or economically infeasible.

ANSWER:

92. Unocal denies the allegations of paragraph 92 of the Complaint.

93. Refiners in California invested billions of dollars in sunk capital investments without knowledge of Unocal's patent claims to reconfigure their refineries in order to comply with the CARB Phase 2 RFG regulations. These refiners cannot produce significant volumes of non-infringing CARB-compliant gasoline without incurring substantial additional costs.

ANSWER:

93. Unocal denies the allegations of paragraph 93 of the Complaint.

94. CARB cannot now change its RFG regulations sufficiently to provide flexibility for refiners and others to avoid Unocal's patent claims. Had Unocal disclosed its proprietary interests and pending patent rights to CARB earlier, CARB would have been able to consider the potential costs of the Unocal patents in establishing its regulations, and the harm to competition and to consumers, as described in this Complaint, would have been avoided.

ANSWER:

94. Unocal denies the allegations of paragraph 94 of the Complaint and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

95. Unocal has exercised, and continues to exercise, its market power through business conduct by enforcing its patents through litigation and licensing activities.

Through its litigation and licensing related to its RFG patents, Unocal has enforced, or threatened to enforce, its patents against those refiners that control in excess of 95 percent of the capacity for the manufacture and/or sale of CARB-compliant gasoline in California.

Unocal's enforcement of its patent rights is the proximate cause of substantial competitive harm and consumer injury.

ANSWER:

95. Unocal denies the allegations of paragraph 95 of the Complaint. Unocal further states that it has exercised its constitutional and statutory rights in enforcing its patent and securing an infringement judgment.

96. Unocal is not shielded from antitrust liability pursuant to the Noerr-Pennington doctrine for numerous reasons as a matter of law and as a matter of fact including, but not limited to, the following: (I) Unocal's misrepresentations were made in the course of quasi-adjudicative rulemaking proceedings; (ii) Unocal's conduct did not constitute petitioning behavior; and (iii) Unocal's misrepresentations and materially false and misleading statements to Auto/Oil and WSPA, two non-governmental industry groups, were not covered by any petitioning privilege.

ANSWER:

96. Unocal denies the allegations of paragraph 96. Unocal further avers that (I) the allegation that the Phase 2 RFG rulemaking proceeding was “quasi-adjudicative” is contradicted by CARB’s own rulemaking documents, which invoked CARB’s powers pursuant to the Chapter of the California Government Code that is “applicable to the exercise of any quasi-legislative power conferred by any statute;” (ii) Unocal’s unsuccessful efforts to influence CARB are the paradigm of petitioning activities protected by the *Noerr-Pennington* doctrine; and (iii) Unocal made no representations to the private groups cited in paragraph 96 of the Complaint and those groups, in any event, did not take any action in reliance on any Unocal conduct that is the proximate cause of any injury alleged in the Complaint, which has been caused solely by CARB’s quasi-legislative action in enacting the Phase 2 RFG regulations. Unocal further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

Anticompetitive Effects of Unocal's Conduct

97. The foregoing conduct by Unocal has materially caused or threatened to cause substantial harm to competition and will, in the future, materially cause or threaten to cause further substantial injury to competition and consumers, absent the issuance of appropriate relief in the manner set forth below. The threatened or actual anticompetitive effects of Unocal's conduct include, but are not limited to, those set forth in Paragraph 8 above.

ANSWER:

97. Unocal denies the allegations of paragraph 97 of the Complaint and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

98. Unocal's enforcement of its patent portfolio has caused, and will cause, substantial consumer injury. Unocal's own economic expert has testified under oath that 90 percent

of any royalty costs associated with the patents will be passed through to consumers in the form of higher retail gasoline prices.

ANSWER:

98. Unocal denies the allegations contained in paragraph 98 of the Complaint.

First Violation Alleged

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

ANSWER:

99. Unocal denies the allegations of paragraph 99 of the Complaint and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

Second Violation Alleged

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

ANSWER:

100. Unocal denies the allegations of paragraph 100 and of the Complaint and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

Third Violation Alleged

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

ANSWER:

101. Unocal denies the allegations of paragraph 101 of the Complaint and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer. Unocal further avers that it is not a participant in the market alleged in paragraph 101 of the Complaint, as paragraph 13 of the Complaint tacitly admits, and that it is legally incapable of monopolizing or threatening to monopolize a market in which it does not participate.

Fourth Violation Alleged

102. As described in Paragraphs 1-98 above, which are incorporated herein by reference, Unocal has willfully engaged in anticompetitive and exclusionary acts and practices, undertaken since the early 1990s, and continuing even today, whereby it has unreasonably restrained

trade in the technology market for the production and supply of CARB -compliant "summer-time" gasoline to be sold in California, which acts and practices constitute unfair methods of competition that harm consumers in violation of Section 5 of the FTC Act.

ANSWER:

102. Unocal denies the allegations of paragraph 100 of the Complaint and further refers to and incorporates by reference its detailed denial of these allegations in the previous paragraphs of its Answer.

Fifth Violation Alleged

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

ANSWER:

103. Unocal denies the allegations contained in paragraph 103 of the Complaint and further refers to and incorporates its detailed denial of these allegations in the previous paragraphs of its Answer. Unocal further avers that it is not a participant in the market alleged in paragraph 103 of the Complaint, as paragraph 13 of the Complaint tacitly admits, and that it is legally incapable of restraining trade in a market in which it does not participate.

ADDITIONAL DEFENSES

First Additional Defense

The complaint fails to state a claim upon which relief may be granted.

Second Additional Defense

The Complaint fails to comply with the requirements of Section 5(b) of the Federal Trade Commission Act because the Federal Trade Commission should have no reason to believe that Unocal has violated the Federal Trade Commission Act.

Third Additional Defense

The conduct that is the subject of the complaint is immune from antitrust challenge under the First Amendment and the *Noerr-Pennington* doctrine, which confers an immunity upon persons engaged in genuine petitioning activities to influence governmental action. The Federal Trade Commission, in a brief to the United States Supreme Court two years ago, recognized that the Supreme Court's decisions under that doctrine "counsel caution in fashioning any theory of antitrust liability ... for competitive injuries caused most directly by state administrative or adjudicatory action" even in the context of allegations of fraudulent conduct. The Commission recognized that "no court of appeals has considered or affirmed an actual judgment awarding damages against a private defendant for competitive injuries inflicted most directly by state action, where that action was procured by the defendant's fraud." The Complaint here seeks to impose antitrust liability for alleged competitive injuries that (i) were directly caused by state actions of a quasi-legislative nature; (ii) were not caused by the Respondent's actions and were openly opposed by the Respondent; and (iii) cannot be linked to any wrongful conduct by the Respondent.

Fourth Additional Defense

The Complaint is barred by 28 U.S.C. § 2462 because the alleged fraudulent conduct (which was not fraud in any event) recited in the Complaint is alleged to have occurred and accrued more than five years before the filing of the Complaint. The Complaint seeks a penalty and forfeiture of Unocal's property rights of enforcement in its patents in California, even though the Complaint does not allege that Unocal committed any wrongful acts in obtaining its patents. The acts complained of consist of conduct that allegedly occurred in 1991, and the Complaint contains no allegation that any conduct giving rise to a violation has occurred within the five years preceding the Complaint. Likewise, the Commission lacks jurisdiction in this forum to seek a forfeiture or penalty for infringement damages or royalties accrued prior to the entry of an appropriate final judgment.

Fifth Additional Defense

The Complaint fails to state a claim for which relief can be granted in that the alleged claim of monopoly power is based upon assumptions regarding the infringement of patents not yet construed by a court or determined to be infringing by a jury. Such matters are exclusively reserved to the judiciary, and when such allegations are made as part of the original complaint, then reserved exclusively for the Federal District court with review by the Court of Appeals for the Federal Circuit.

Sixth Additional Defense

The Complaint improperly seeks to overturn a binding judgment secured by Unocal in the United States District Court for the Central District of California that has been affirmed by the Court of Appeals for the Federal Circuit and declined review by the Supreme Court. By attempting to nullify binding judicial determinations, the Complaint seeks to violate the constitutional and statutory protection afforded judicial determinations and the principle of separation of powers.

Seventh Additional Defense

Unocal is not subject to antitrust liability in this matter because it acted at all times in accordance with legitimate business justification.

Eighth Additional Defense

The Commission lacks jurisdiction to bar Unocal's exercise of its rights under its patents or to order compulsory licensing without payment of reasonable royalties

Ninth Additional Defense

Relief is barred in this action under the doctrine of laches. The Commission's previous decision to not pursue relief in this action in 1997 has resulted in evidentiary prejudice to Unocal.

Tenth Additional Defense

The contemplated relief would violate Respondent's First Amendment Right by seeking to regulate its right to petition governmental bodies.

PRAYER FOR RELIEF

WHEREFORE having fully answered the Complaint, Unocal respectfully requests judgment dismissing the complaint with prejudice and awarding to Unocal the costs of the action, expert fees and reasonable attorney fees, as may be allowed by law, and such other relief deemed just and appropriate.

Dated: March 21, 2003

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

David W. Beehler
Original Signature on File with Commission

By _____

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ATTORNEYS FOR UNION OIL COMPANY OF
CALIFORNIA

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2003, I caused an original, two paper copies, and an electronic copy by e-mail of Answer of Respondent Union Oil Company of California to be filed via overnight delivery (Federal Express) with:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave. NW, Rm. H-159
Washington, DC 20580
E-mail: *secretary@ftc.gov*

I hereby certify that on March 21, 2003, I also caused two paper copies of Answer of Respondent Union Oil Company of California to be delivered via overnight delivery (Federal Express) upon:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580

I hereby certify that on March 21, 2003, I also caused one paper copy via U.S. mail of Answer of Union Oil Company of California below via overnight delivery (Federal Express):

J. Robert Robertson, Esq.
Senior Litigation Counsel
Federal Trade Commission
600 Pennsylvania Avenue NW, Drop 374
Washington, DC 20580

Chong S. Park, Esq.
Federal Trade Commission
Bureau of Competition
601 New Jersey Avenue NW, Drop 6264
Washington, DC 20001

Original Signature on File with Commission

David W. Beehler