

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

Commissioners: Timothy J. Muris, Chairman  
Mozelle W. Thompson  
Orson Swindle  
Thomas B. Leary  
Pamela Jones Harbour

In the Matter of )  
 )  
UNION OIL COMPANY OF CALIFORNIA, )  
 )  
a Corporation. )

Public

Docket No. 9305

**SURREPLY AND MOTION OF UNION OIL COMPANY OF CALIFORNIA FOR LEAVE TO FILE LIMITED SURREPLY BRIEF**

The Union Oil Company of California ("Unocal") respectfully requests leave to file this Surreply to Complaint Counsel's Reply Brief for the limited purpose of addressing an unfounded accusation by Complaint Counsel that Unocal has misstated facts.

In their Reply Brief, Complaint Counsel argue that "the Commission should be skeptical of Unocal's version of the facts" because Unocal supposedly has taken a position that is inconsistent with its prior arguments before the Supreme Court. Reply at 2 n.1. Notably, Complaint Counsel do not even attempt to dispute the truth of the matter asserted in Unocal's pleading, which is a direct quotation from the California's Air Resources Board's officially noticeable Final Statement of Reasons for Rulemaking. Unocal has provided the Commission with a copy

of the Final Statement and the Commission can judge based on that document whether Unocal has misstated this fact or any other fact drawn from officially noticeable documents. In spite of their suggestion that Unocal has misstated facts, Complaint Counsel do not argue that Unocal has misstated any fact before the Commission for the simple reason that Unocal has not done so.

This brings us to the supposed contradiction between Unocal's reliance before the Commission on CARB's Final Statement and its statement before the Supreme Court. Unocal argued to the Commission that CARB's final statement states that "the ARB staff has conducted its own emissions test programs." App. 1 to Unocal's Response at 19. This is a true and correct recitation of CARB's Final Statement. Unocal argued to the Supreme Court, based on the trial record in the patent litigation in which Supreme Court review was sought, that "CARB had not conducted studies of its own, but relied on industry to provide the needed research and resulting knowledge." App. A to Reply at 3. This was a true and correct statement of the trial record in that case, as evidenced by the record excerpt cited to the Supreme Court and appended to this Surreply as Appendix 1. As the excerpt shows, CARB official Peter Venturini testified at trial that he could not recollect any study conducted by CARB. App. 1 at JA 5115-16. Unocal properly relied on that testimony.

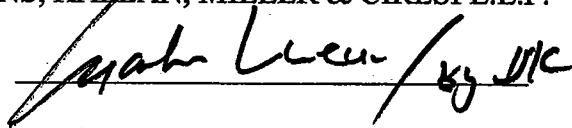
Far from revealing any misconduct on Unocal's part, Complaint Counsel's claim highlights the danger of allowing the deconstruction of governmental decisionmaking. The recollections of government officials about their official actions in testimony given years after the fact may not always agree with their agencies' official pronouncements, as was the case here.

Dated: February 27, 2004

Respectfully submitted,

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## **APPENDIX**

JOINT APPENDIX  
VOLUME III OF V: Pages 5000 to 5451

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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No. 99-1066

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UNION OIL COMPANY OF CALIFORNIA,

Plaintiff-Appellee,

v.

ATLANTIC RICHFIELD COMPANY, CHEVRON  
U.S.A. INC., EXXON CORPORATION, MOBIL OIL  
CORPORATION, SHELL OIL PRODUCTS COMPANY, and  
TEXACO REFINING AND MARKETING, INC.

Defendants-Appellants.

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Appeal from the Judgment of the United States  
District Court for the Central District of California in  
CV-95-2379, Circuit Judge Kim McLane Wardlaw.

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Attorneys for  
Defendants-Appellants

1 Q. Did you have an opportunity to meet with Mr. Keker on a  
2 number of occasions to prepare for your testimony?

3 A. Yes.

4 Q. How many times did you meet with him?

5 A. Four.

6 Q. How many hours each time did you meet with him, sir?

7 A. Several hours.

8 Q. So you've met with him maybe twelve, fifteen hours to  
9 prepare for your testimony?

10 A. I can't recall the exact hours, but it was several  
11 hours.

12 Q. I'd like to try to get a little bit of an understanding  
13 of what your knowledge and area of work has been at CARB.

14 You went to CARB right after you left graduate  
15 school; is that right, sir?

16 A. Correct.

17 Q. Do you hold any patents?

18 A. No.

19 Q. Did you ever design, personally design, a fuel  
20 parametric study?

21 A. No.

22 Q. Did you ever analyze any motor gasoline fuels yourself?

23 A. I'm not sure I understand what you mean by "analyze".

24 Q. Did you ever chemically analyze yourself any fuels?

25 A. No.

1 Q. Have you ever held a position of any nature or kind  
2 whatsoever in a refinery?

3 A. No.

4 Q. Have you ever held a position of any kind or nature  
5 whatsoever for an oil company?

6 A. No.

7 Q. Have you ever had any specific formal training in  
8 chemical engineering?

9 A. No.

10 Q. Have you yourself ever personally participated in and  
11 conducted a study to determine the emissions that may result  
12 from motor gasoline as a result of the properties or  
13 variability of those properties?

14 A. Not personally.

15 Q. Now, you are the chief of the Stationary Source Division  
16 of CARB; correct?

17 A. Yes.

18 Q. And as I understand your direct testimony, you are  
19 responsible for approximately 125 people.

20 A. Correct.

21 Q. And you've had that job, sir, for what? About 10 years?

22 A. A little more than 10 years.

23 Q. Okay. And you've been supervising those folks during  
24 that period of time; correct?

25 A. Yes.

1 Q. And that's a management job, is it not?

2 A. Yes.

3 Q. And the people you supervise actually go out and do the  
4 work, do they not?

5 A. Yes.

6 Q. And in your division, the Stationary Source Division,  
7 you are responsible -- or that division is responsible for a  
8 number of things; isn't that right?

9 A. Yes.

10 Q. And one of the things you mentioned is refineries;  
11 correct?

12 A. Yes.

13 Q. Another thing is hair sprays; correct?

14 A. I believe I mentioned consumer products.

15 Q. Hair sprays?

16 A. They are included.

17 Q. Okay. You're responsible for antiperspirant; is that  
18 right?

19 A. Yes.

20 Q. You're responsible for chrome plating facilities;  
21 correct?

22 A. Yes.

23 Q. You are responsible for power plants; is that right?

24 A. Yes.

25 Q. And you are responsible for all other types of consumer



1 products; correct?

2 A. Yes.

3 Q. You're even responsible for hospitals; is that correct?

4 A. Yes.

5 Q. And that's all within the authority of the Stationary  
6 Source Division of ARB, or CARB?

7 A. Yes.

8 Q. Is the correct term CARB, or is it ARB?

9 A. It's CARB.

10 Q. Now, the Mobile Source Division that you are not in  
11 charge of, that deals with emissions from motor vehicles;  
12 correct?

13 A. Yes.

14 Q. Now, you mentioned that there was a Phase 1 and Phase 2  
15 of regulations. Do you recall that, sir?

16 A. Yes.

17 Q. And you were relating that back to the period of the  
18 late 80's; correct?

19 A. Late 80's through the early 90's.

20 Q. And what happened during that period of time is that  
21 there was an evolution of investigations and discoveries that  
22 led to some regulations; is that correct?

23 MR. KEKER: Objection, your Honor. Compound and  
24 form.

25 THE COURT: Sustained.

1 BY MR. CIRESI:

2 Q. Was there a investigation conducted by a number of  
3 people into the properties of gasoline which may affect  
4 emissions during that period of time?

5 MR. KEKER: Objection. Foundation.

6 THE COURT: Overruled.

7 THE WITNESS: Can you please repeat the question.

8 MR. CIRESI: Certainly.

9 (Record Read.)

10 THE WITNESS: Yes.

11 BY MR. CIRESI:

12 Q. And you yourself attended public meetings to describe  
13 for various citizen groups and others the status of those  
14 investigations, did you not, sir?

15 A. I believe so.

16 Q. Indeed on August 8th of 1989, you attended such a  
17 meeting, did you not, sir?

18 A. I don't recall that specific date.

19 Q. Would you please take a look at the book right to your  
20 right, and go to exhibit 1,373, which is the CVS news of  
21 September 1989.

22 Do you see that, sir?

23 A. Yes.

24 Q. Now, can you just to refresh your recollection, go to  
25 page 3 where it says "meeting attendance".

1 A. Yes.

2 Q. Now, you were there, weren't you, sir?

3 A. According to this, yes.

4 Q. In fact you presided at that meeting, didn't you,  
5 Mr. Venturini?

6 A. That's what this indicates.

7 Q. Do you have any reason to deny that?

8 A. No.

9 MR. KEKER: Objection. Argumentative, your Honor.

10 THE COURT: Overruled.

11 BY MR. CIRESI:

12 Q. Now, the major presentation was made by Susan Huscroft,  
13 manager of the Technical Analysis Section in the Toxic Air  
14 Contaminant Control Branch; correct?

15 A. That's what this indicates.

16 Q. And there was also present one of the CARB board members  
17 at that meeting, and his name was Jack LaGarius (ph);  
18 correct?

19 A. That's what this indicates.

20 Q. And also Mr. Tom Cackette, C-a-c-k-e-t-t-e?

21 A. That's the correct pronunciation.

22 Q. And he was the CARB deputy executive officer; is that  
23 right?

24 A. Yes.

25 Q. Now, at this meeting, you and the other members of CARB

1 advised the people who were in attendance at the meeting that  
2 the California Air Resources plan consisted of two parts, a  
3 short-term regulatory package addressing gasoline  
4 composition, and a longer term strategy aimed at promoting  
5 clean fuels; isn't that correct?

6 A. Yes.

7 Q. And you said in this one that the short-term package may  
8 include new restrictions on benzene and/or aromatic content;  
9 correct?

10 A. I don't recall the specifics. That's what's indicated  
11 here.

12 Q. And that was part of the initial program of CARB, was it  
13 not, sir?

14 A. Yes.

15 Q. And the second part of the strategy was that there may  
16 be a reduction in Reid Vapor Pressure; correct?

17 A. Yes.

18 Q. And the third part was there may be requirements for  
19 detergent additives for deposit control and minimum and/or  
20 maximum limits on oxygenate content; correct?

21 A. That's what this indicates.

22 Q. And that is consistent with your understanding of what  
23 CARB was proposing in August of 1989; correct?

24 A. I believe it's consistent with my recollection of what  
25 we were considering.

1 Q. And finally you were looking at whether there would be  
2 minimum and/or maximum limits on oxygenate content and  
3 possibly further restrictions on sulfur content; isn't that  
4 right?

5 A. Again, that's what this indicates.

6 Q. And sir, if you look to the bottom, would you agree that  
7 at that time, the options that CARB was discussing were  
8 vaguely defined as of August of 1989?

9 A. I'm not clear on the question.

10 Q. Okay. Would you agree that, as of August 8, 1989, the  
11 options that CARB was looking at with regard to this initial  
12 regulatory package were vaguely defined?

13 A. We knew generally what things that we wanted to evaluate  
14 and investigate, but we didn't have all the details at that  
15 time.

16 Q. CARB wasn't going to conduct its own independent  
17 investigations, was it?

18 A. I'm having trouble answering that with a yes or a no  
19 because I don't think I can be truthful with a yes or a no.

20 Q. Well, I want you to be truthful, Mr. Venturini. So let  
21 me see if I can rephrase the question to help.

22 At this point in time, was CARB conducting any  
23 independent study of its own where it was looking at the  
24 properties of gasoline and how they may be changed  
25 interrelatedly in whatever direction to attempt to reduce

1 emissions?

2 A. I don't believe so.

3 Q. In fact CARB never ever did such a study, did it, sir?

4 A. I don't recall.

5 Q. Well, certainly with this tremendous program that you  
6 talked about, if CARB had conducted such an investigation and  
7 study on its own, you would remember it, wouldn't you?

8 A. We relied -- my recollection is that we relied in great  
9 part on the studies that were being conducted by auto  
10 manufacturers, by oil companies, by the Auto/Oil Program.

11 Q. But that's not what I asked, sir.

12 A. Okay.

13 Q. I asked whether CARB did any independent study of its  
14 own, and wouldn't you certainly remember that if they had?

15 A. I wouldn't necessarily remember it, no.

16 Q. But at least, as you sit here today, you can't testify  
17 to any such study, can you, sir?

18 A. No.

19 Q. Now, sir, you opened up this meeting on August 8th,  
20 1989, didn't you?

21 A. That's what this indicates.

22 Q. And you stated that CARB's goal, goal, was to look at  
23 what could be done so as to reduce pollutants of  
24 hydrocarbons, CO, NOx, and SOx, didn't you?

25 A. That's what this indicates.

1 Q. And you stated that CARB's goal was to combine the best  
2 fuel-based technology with the best vehicle technology in  
3 order to get the greatest overall reduction in pollutants;  
4 isn't that right?

5 A. I believe that's correct.

6 Q. And in order to do that, people had to investigate how  
7 they might be able to change the hardware of vehicles, didn't  
8 they?

9 A. Yes.

10 Q. And there were all kinds of new proposals for new  
11 vehicles that had never been tested before that were being  
12 discussed at that time; isn't that right?

13 A. Yes.

14 Q. And there were all kinds of proposals with respect to  
15 how you would look at fuel and what you might do to change it  
16 in order to see how a reduction in emissions might take  
17 place; isn't that correct?

18 A. Yes.

19 Q. And Miss Susan Huscroft then made the major presentation  
20 at this meeting, didn't she?

21 A. That's what this indicates.

22 Q. And that's consistent with what you understood her  
23 responsibilities and duties were at that time, is it not,  
24 sir?

25 A. Yes.

1 A. Yes.

2 Q. That's directed to the vehicle itself; isn't that  
3 correct?

4 A. Yes.

5 Q. And then you leave it up to the manufacturers or  
6 subcontractors or whoever has a creative or inventive genius  
7 to come up with a way to reduce emissions due to hardware;  
8 isn't that right?

9 A. Yes.

10 Q. And another way to do it was to reduce excess in use  
11 emissions; is that correct?

12 A. Yes.

13 Q. And again, you would rely on people who were out there  
14 across this vast country to find some way through inventive  
15 or developmental genius to come up with ways to do it; isn't  
16 that right?

17 A. That plus our own staff investigations.

18 Q. Okay. Another way was to use cleaner reformulated  
19 gasoline; isn't that right?

20 A. Yes.

21 Q. And again, you would rely on people out there in the  
22 country no matter where they are or whoever they work for to  
23 develop and come up with creative new ways to reformulate  
24 gas; isn't that right?

25 A. Yes.



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

Commissioners: Timothy J. Muris, Chairman  
Mozelle W. Thompson  
Orson Swindle  
Thomas B. Leary  
Pamela Jones Harbour

**In the Matter of**

**UNION OIL COMPANY OF CALIFORNIA,**

**a Corporation.**

**Public**

**Docket No. 9305**

**[PROPOSED] ORDER**

Upon consideration of the Motion of Union Oil Company of California for Leave to File a Limited Surreply Brief, it is hereby ORDERED that the motion is GRANTED.

By the Commission.

Issued: March \_\_\_\_\_, 2004

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 5, 2004, I caused an original and twelve paper copies (via hand delivery) and an electronic copy (via e-mail) of the Surreply and Motion of Union Oil Company of California for Leave to File a Limited Surreply and Proposed Order to be filed with:

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

I hereby certify that on March 5, 2004, I also caused two paper copies of the Surreply Motion of Union Oil Company of California for Leave to File a Limited Surreply and Proposed Order to be served via hand delivery upon:

Richard B. Dagen, Esq. through service upon  
Chong S. Park, Esq.  
Bureau of Competition  
Federal Trade Commission  
601 New Jersey Avenue NW, Drop 6264  
Washington, DC 20001



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J. Christopher Wood