PUBLIC

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

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

MOTION IN LIMINE TO EXCLUDE EXTRINSIC EVIDENCE ON THE AUTO/OIL AGREEMENT'S UNAMBIGUOUS INDEPENDENT RESEARCH PROVISIONS

INTRODUCTION

In 1989, the three major United States auto manufacturers and fourteen United States oil companies established a collaborative research project known as the Auto/Oil Air Quality Improvement Research Program ("Auto/Oil" or "the Program"). Auto/Oil's principal purpose was to design and conduct research and testing related to auto exhaust emissions.

The Program's membership agreement ("Auto/Oil Agreement") clearly delineated between the "work of the Program," on the one hand, and "independent research" conducted by individual members of the Program, on the other. All members signed this founding agreement. And, with their signatures, the members expressly stated that the Auto/Oil Agreement embodied "the entire agreement of the Members" which "superced[ed] any other agreements or understandings among the Members." By its terms, it could not be amended except in writing signed by every member.

Complaint Counsel has indicated that it intends to present witnesses during the hearing to testify regarding their understanding of Unocal's rights (or lack thereof) to independent research that it partially presented to the Auto/Oil Program. Otherwise stated, Complaint Counsel will proffer testimony from employees of Auto/Oil members that, contrary to the Auto/Oil Agreement's

unambiguous language, Unocal's independent research became the "work of the Program" after Unocal presented information about it at a Program meeting. Thus, the Court should exclude this extrinsic evidence offered more than fourteen years after the execution of the Auto/Oil Agreement, particularly given the written agreement's unambiguous terms.

RELEVANT CONTEXT FOR THIS MOTION

I. The Auto/Oil Agreement

Auto/Oil was a joint research venture between numerous automobile manufacturers and oil companies, which was governed exclusively by a written agreement executed by all of its members. Auto/Oil Agreement, preamble, whereas clauses, and section 1, at 1-3 (attached hereto as Exhibit A). According to the Auto/Oil Agreement, Auto/Oil's objective was to plan and carry out research and tests designed to measure and evaluate automobile emissions and the potential improvements in air quality, particularly through reformulated gasoline and other alternative fuels. *Id*., § 2, at 3

As a joint research venture, the rights of the individual members to conduct independent research and maintain their ownership of that research (and its results) was important. The Auto/Oil Agreement, therefore, squarely addressed the issue. First, the Auto/Oil Agreement drew a clear distinction between the "work of the Program" and "independent research." The former was work that was conducted, paid for, and published by the Program; the latter was work that was conducted, paid for, and published (if at all) by the individual member(s). *Id*., §§ 5.A, 5.C at 12, 13. Second, the Auto/Oil Agreement allocated the rights to that work:

> E. . . . . 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.

> F. Nothing in this Agreement shall constitute the Program as the exclusive vehicle of the Members for research and testing in the fields covered by the Programs.
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> 6. Confidentiality And Intellectual Property Rights.
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> B. Independent Research. Each Member (and each Associate Member) shall retain the right to engage in independent research, alone or with others, including other participants in the Program, on any matter, including reformulated gasoline, methanol, other alternative fuels or automotive technology including emission control systems. A Member who has undertaken or desires to undertake an independent research project shall not be obligated by reason of this Agreement to (i) disclose to the Program or the other Members the fact that such independent research has been or is being undertaken, the nature of the project or the results thereof, or (ii) permit the Program or the other Members to participate in such project. ***If a Member engages in independent research, (i) the project shall not be deemed to be undertaken by the Program***; (ii) neither the Program nor the other Members shall have any rights or obligations relating thereto by reason of this Agreement; (iii) the Member undertaking such project shall not be credited by the Program with any expenditures or research time relating to such project; (iv) the other Members shall not have any rights to participate in such project by reason of this Agreement; and (v) the Research Planning Task Force shall not have any right to review or approve any contracts relating to such project. Nothing in this Agreement shall be deemed to constitute a waiver of existing or future proprietary rights that a Member may otherwise possess.

Id., §§ 2.E, 2.F, 6.B, at 7-8, 14 (emphasis added). Simply stated, the work of the Program was the property of the Program to be donated to the public; the independent research of an individual member was the property of that member.

Finally, the Auto/Oil Agreement contains a clear integration clause, stating that the written document "embod[ies] the entire agreement of the Members and supercede[s] any other agreements or understandings among the Members, whether oral or written." *Id*., § 15, at 24. Moreover, "No amendment or modification or waiver of a breach of any term or condition of this Agreement will be valid unless in writing signed by each and every Member." *Id.*

II. The Testimony that Complaint Counsel is Expected to Offer

Complaint Counsel has identified witnesses who are expected to testify "about Auto/Oil and its activities, including Unocal's participation therein." *See, e.g.*, Complaint Counsel's Final Witness List, § 38, at 11 (attached hereto as Exhibit B). Apparently, this is a broad description for testimony offered in support of Complaint Counsel's allegation against Unocal that "[w]hile 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," and the like. Complaint at ¶ 53 (quotation marks omitted).

ARGUMENT

The Federal Trade Commission Rules of Practice provide that "[i]rrelevant, immaterial, and unreliable evidence ***shall*** be excluded" from adjudicative hearings. FTC Rules of Practice § 3.43(b), 16 C.F.R. § 3.43(b) (emphasis added). Under the plain meaning rule, extrinsic evidence of the purported meaning of an unambiguous contract is irrelevant, immaterial, and unreliable. *See In re Orkin Exterminating Co., Inc.*, Docket No. 9176, 1986 FTC LEXIS 3, at *24 (Dec. 15, 1986) ("If the court concludes that no reasonable ambiguity exists, it may proceed without trial to interpretation or construction of the contract"). In fact, a basic tenet of contract law is that "under no circumstances will extrinsic evidence be admissible to reveal the subjective intent of a party to a contract unambiguous on its face . . . extrinsic evidence of parties' subjective intent may be resorted to only if the document is ambiguous." *Capital City Mortg. Corp. v. Habana Village Art & Folklore, Inc.*, 747 A.2d 564, 570 (D.C. 2000) (citations, quotations, and parentheses omitted).[1]

[1] Section 17.A of the Auto/Oil Agreement provides that it "shall be governed by, and (continued...)

Complaint Counsel will likely, but incorrectly, argue that the Auto/Oil Agreement is ambiguous as to the rights of the Auto/Oil members when they presented information about their research to the Program. Preliminarily, a contract is not ambiguous simply because the parties disagree over its meaning "and courts are enjoined not to create ambiguity where none exists." *Washington Props. v. Chin, Inc.*, 760 A.2d 546, 548 (D.C. 2000). Rather,

> a contract is ambiguous when, and only when, it is, or the provisions in controversy are, reasonably or fairly susceptible of different constructions or interpretations, or of two or more different meanings, and it is not ambiguous where the court can determine its meaning without any other guide than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends. While it is commonly said that contracts are to be construed to effectuate the intent of the parties, where a contract is unambiguous, intent is properly an objective, not subjective, issue.

Id. (citations and quotations omitted); *see also In re Orkin*, 1986 FTC LEXIS 3, at *24 ("The court may properly determine that an instrument is unambiguous notwithstanding that the parties do not agree on the construction of the contract, that a party has asserted that the contract is ambiguous or that the parties have introduced extrinsic evidence bearing on intent").

Here, the Auto/Oil Agreement unambiguously states the parties' intent regarding independent research:

(1) "the project shall not be deemed to be undertaken by the Program";

(2) "neither the Program nor the other Members shall have any rights or obligations relating thereto by reason of this Agreement";

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[1] (...continued)
construed in accordance with the laws of the District of Columbia without regard to the choice of law provisions thereof." Auto/Oil Agreement, § 17A, at 25. Unocal submits that the exclusion of extrinsic evidence in interpreting an unambiguous contract is basic contract law and would be the rule regardless of what law applied.

(3) "the other Members shall not have any rights to participate in such project by reason of this Agreement"; and

(4) "Nothing in this Agreement shall be deemed to constitute a waiver of existing or future proprietary rights that a Member may otherwise possess."

Auto/Oil Agreement, § 6A, at 14-15. Where, as here, the objective intent of an agreement can be ascertained from the four corners of the document, extrinsic evidence of subjective intent must be excluded.

Anticipating this problem, Complaint Counsel may argue that the testimony it offers does not go to the Auto/Oil Agreement but rather to the members' understanding about the allocation of rights if and when a member would present information about its independent research to Program or a committee of the Program. This argument fails for three reasons. First, the offer of testimony regarding such an "understanding" is nothing more than an attempt to inject an unwritten exception to the Auto/Oil Agreement's written rule – in direct contravention of the Auto/Oil Agreement's integration clause and provision regarding amendments. *See* Auto/Oil Agreement, § 15, at 24 (explaining that the written document "embod[ies] the entire agreement of the Members and supercede[s] any other agreements or understandings among the Members, whether oral or written. . . . No amendment or modification or waiver of a breach of any term or condition of this Agreement will be valid unless in writing signed by each and every Member"). Indeed, the written agreement is what guided the members when they decided whether to participate in the Program, when they decided whether to conduct independent research, and when they decided whether to present information or data from their research. Testimony about some other "understanding," offered fourteen years later, must not be permitted.

Second, the language of the Auto/Oil Agreement unambiguously informs Auto/Oil members of their rights: if they do independent research, they have the option of disclosing or not disclosing that work to other members. Whichever option they end up choosing, the work still belongs to them and not to the Program. If this were not the case, the contract provision would have been extremely misleading to members, and should instead have been written as follows: "members shall not be obligated by reason of this Agreement to disclose their independent research to the Auto/Oil Program, but if they do elect to make such a disclosure, their independent research then becomes the work of the Program. . . ."

Third, the language of paragraph 6.B clearly contemplates that a member might disclose information about its research by stating that the member shall not be obligated by reason of the Auto/Oil Agreement to "permit the Program or the other Members to participate in such project." This language only makes sense if there in fact has been a disclosure of the independent research of one of the members to the Program. Thus, the only reasonable inference from this clause is that even if there has been such a disclosure of independent research by a member to the Program, such research project still belongs to that member and not to the Program. The contrary position taken by Complaint Counsel in the Complaint – *i.e.*, that information disclosed to the Program becomes the "work of the Program" – makes no sense at all since clearly members of the Program have the right to participate in work of the Program.

The independent research provision of the Auto/Oil Agreement is susceptible to only one reasonable construction – one that preserves the rights of an Auto/Oil member to conduct independent research and to retain its rights in the results of its work whether or not it discusses the work with the other members of the Program. Extrinsic evidence regarding the intent of the Auto/Oil Agreement, or some other "understanding," should be excluded.

CONCLUSION

For the reasons stated, the Court should grant Unocal's Motion in Limine to Exclude Extrinsic Evidence on the Auto/Oil Agreement's Unambiguous Independent Research Provisions.

Dated: October 16, 2003.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER, LLP

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ORDER GRANTING UNOCAL'S MOTION IN LIMINE TO EXCLUDE EXTRINSIC EVIDENCE ON THE AUTO/OIL AGREEMENT'S UNAMBIGUOUS INDEPENDENT RESEARCH PROVISIONS

Upon consideration of Unocal's Motion in Limine to Exclude Extrinsic Evidence on the Auto/Oil Agreement's Unambiguous Independent Research Provisions and the record as a whole, it is hereby ORDERED that the Motion is GRANTED. Since the Auto/Oil Agreement's independent research provisions are unambiguous, in accordance with Commission Rule 3.43(c), Complaint Counsel may not proffer testimony or other extrinsic evidence regarding any interpretation or construction of the Auto/Oil Agreement's provisions governing research independent of the Auto/Oil Program.

ORDERED:

Dated: October ___, 2003

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D. Michael Chappell
Administrative Law Judge