

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

In the Matter of

Union Oil Company of California,

a corporation.

Docket No. 9305

**COMPLAINT COUNSEL'S OPPOSITION TO UNOCAL'S
MOTION TO EXCLUDE EVIDENCE REGARDING AUTO/OIL**

INTRODUCTION

Unocal asserts that its interpretation of the Auto/Oil Agreement is correct, and anyone who disagrees should not be heard. But all of the 16 other members of Auto/Oil were defrauded by Unocal and each had every reason to rely not just on the clear contractual terms stating that Unocal's research data could be freely used, but also Unocal's very own representation (now false) that the research data was "in the public domain." Unocal wants this Tribunal to change the plain meaning of the term, "PUBLIC DOMAIN," which is unambiguous and means: "The realm of publications, inventions, and processes that are not protected by copyright or patent. Things in the public domain can be appropriated by anyone without liability for infringement." Black's Law Dictionary (7th ed. 1999). That is what Unocal told Auto/Oil; that is how the Auto/Oil Agreement uses the words; and that is what both Unocal and Auto/Oil members understood the words to mean.

Unocal appears to claim that the Independent Research clause of the Auto/Oil Agreement is unambiguous, and therefore, the Tribunal should exclude extrinsic evidence about the members' intent or the meaning of this clause. Unocal's Motion in Limine ("Motion") at 1-2. Unocal claims that the Independent Research clause means that no matter what a member does with independent research, "the work still belongs to them and not to [Auto/Oil]." Motion at 7. Unocal's motion fails on four fronts.

First, the Complaint charges Unocal with, among other things, deceptive conduct. Nothing in the Auto/Oil Agreement permits Unocal to deceive other members. The Auto/Oil evidence that Complaint Counsel will present – and Unocal seeks to exclude – are directly relevant to the fraudulent conduct allegations of the Complaint.

Second, it is undisputed that in addition to the Independent Research clause, the Auto/Oil Agreement contains several provisions that unambiguously state that members will exchange research, disclose research to the public, and place research in the public domain. Unocal had the right to keep its research secret pursuant to the Independent Research clause. However, Unocal affirmatively told Auto/Oil that it was taking the research out of the Independent Research box and placing it “in the public domain.”

Third, to the extent Unocal’s reading of the Independent Research clause is tenable, that clause clearly conflicts with the Agreement’s provisions regarding research that is offered to Auto/Oil for the public domain. Under these circumstances, the Agreement is ambiguous and extrinsic evidence is necessary to assist the Tribunal interpret the contract.

Fourth, the general rule of contract law prohibiting the introduction of extrinsic evidence does not bar a third party – particularly a government agency such as the FTC – from introducing extrinsic evidence “to discover the true facts.” *Stern v. Commissioner of Internal Revenue*, 137 F.2d 43, 46 (2nd Cir. 1943); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 n. 12 (1971).

Complaint Counsel believe that the Agreement is unambiguous and means that once an Auto/Oil member exchanges research with the group, that research is in the public domain unless the member expressly states – which Unocal did not do here – that it is proprietary and should be protected accordingly. The evidence from the Auto/Oil members will be used to show that they understood the plain language of the Agreement and acted according to that understanding.

This evidence is also relevant to the fraudulent conduct allegations of the Complaint. Unocal has offered absolutely no precedent that the parole evidence rule has any application to a

fraud case. Complaint Counsel's proof will use the Agreement's plain language as part of the evidence of what members believed to be the meaning and context of Unocal's statement that the research was "in the public domain," and their reasonable reliance on the misrepresentation. Complaint Counsel is not attempting to vary, add or otherwise rewrite the plain language of the Agreement. Thus, Unocal's assertion of the parole evidence rule that might be applicable in a strict contract case is simply inapplicable to Complaint Counsel's allegations of fraud.

However, Unocal offers a different interpretation of the Agreement, which Complaint Counsel believes is contrary to the plain meaning of the Agreement. If this Tribunal were to find that Unocal's interpretation is another plausible way to read the Agreement, then this same course of conduct evidence would be used to show what the terms actually mean in a way that does not add to or vary the terms of the Agreement.

THE RELEVANT FACTS

Auto/Oil's Formation and the Agreement

On October 16, 1989, Unocal and 13 of the other largest domestic oil companies and the three big domestic automobile manufacturers created the joint venture Auto/Oil Air Quality Improvement Research Program ("Auto/Oil"). CX 4001 at 001-002. Aware that various government agencies, such as the California Air Resources Board ("CARB"), would enact regulations mandating the reduction of harmful car emissions, Auto/Oil wanted the regulators to proceed with "data that allows for a comprehensive, reasonable, fair, and accurate comparison of the benefits and costs of the various alternatives to improving air quality," including

reformulated gasoline (“RFG”). CX 4001.¹ As discussed in greater detail below, Auto/Oil’s *raison d’etre* was the recognition that through collaborative research and then donation of the research to the public, members could together achieve more than they could on their own.

On October 16, 1989, Unocal and 16 other companies entered into an agreement that underscored the cooperative nature of Auto/Oil (the “Agreement”).² CX 4001. In order to achieve the objectives of Auto/Oil, the Agreement provides that the “Program” – which simply meant the “joint research venture” established by the 17 members – may *inter alia* engage in “the collection, *exchange*, or analysis of research information.” CX 4001 at 006 (¶ 2(D)(iv)) (emphasis supplied); CX 4001 at 002 (¶ 1). The Agreement adds that members agree to engage in “cooperative research.” CX 4001 at 002. Consistent with the purpose for which members joined it, Auto/Oil was marked by an unprecedented level of cooperation: "There had been a lot of work in the industry prior to even Auto/Oil on programs to figure out the relationship between fuels and emissions and how they impacted. It wasn't until Auto/Oil that a cohesive effort was developed between the two industries involved, autos and oils. You had the best scientific people from both those industries that were familiar with the past history and how to use that knowledge to proceed in the future." Segal, Dep. 44-45.

¹ Auto/Oil was created to take advantage of Congress’ desire, under the National Cooperative Research Act of 1984, 15 U.S.C. § 4301 *et seq.*, to permit and encourage cooperative research. CX 4001 at 002. The Act permits competitors to engage in collective research but prohibits other conduct traditionally deemed anticompetitive, such as agreements to exchange competitively sensitive information or to restrict output. 15 U.S.C. § 4301 (a)-(b). The Act provides that in any action under the antitrust laws, the joint venture shall not be deemed illegal per se, but rather shall be judged on the basis of the rule of reason. 15 U.S.C. § 4302.

² The Agreement states that it shall be governed by and construed under the laws of the District of Columbia. CX 4001 at 025 (¶ 17). The Agreement also contains an integration clause and, among other things, prohibits modifications that are not in writing. CX 4001 at 024 (¶ 15).

Research Would Be Placed in the “Public Domain”

Throughout its existence, Auto/Oil provided emissions research to regulators, including CARB, and the public through numerous newsletters, publications and data disks. CX 4110; CX 4112; CX 4083; CX 4085; CX 4087 at 002. All the members agreed that the research would be donated without any charge to CARB or the public: the “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***.”³ CX 4001 at 007 (¶ 2 E). The Agreement adds that it is the “objective of this Program that the principles of full disclosure to government agencies, the Congress and the public will apply as to the research and writing . . .” CX 4001 at 007 (¶ 2 E).

In furtherance of the “full disclosure” principle, Unocal and the other members agreed as follows: “***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***.” CX 4001 at 007 (¶ 2 E) (emphasis supplied).

Unocal’s senior representative to Auto/Oil (and the boss of Unocal emissions research scientists Drs. Jessup, Croudace and Mallet), defines “public domain” to mean that the research material is “***freely available***,” *i.e.*, “anybody can use it, run with it, do whatever they want to with it;” the research material would be “***free of charge***.” CX 846 at 38 (Alley, Dep.). The other Auto/Oil members have the same definition of “public domain.” Klein, Dep. 37, 39; Segal, Dep.

³ See also CX 4001 at 014 (¶ 6A (“It is contemplated that all of the research and testing to be carried out in the Phase I Program will be disclosed in the final report in regard to such research and otherwise dedicated to the ***public domain***. The same principles of full disclosure and dedication to the ***public domain*** shall apply in regard to Phase II research”)) (emphasis added).

49-50, 64; Wise, Dep. 42-3; CX 4001 at 007.

Auto/Oil members retained the right to engage in “Independent Research.” CX 4001 at 014 (¶ 6 B). A member was not obliged to disclose to the Program the nature or results of the independent project; the research would “not be deemed to be undertaken by the Program;” and Auto/Oil would not have any “rights or obligations relating to the research by reason of the Agreement.” CX 4001 at 015 (¶ 6 B). The Agreement adds that nothing in it “shall be deemed to constitute a waiver of existing or future proprietary rights that a Member may otherwise possess.” CX 4001 at 015 (¶ 6 B).

Unocal and other Auto/Oil members understood that while each member retained the right to engage in independent research, the member could also forego those rights. This would occur when the member presents its research to Auto/Oil and puts it in the public domain, at which point Auto/Oil members do not have to worry that if they used the research, they might later be sued for patent infringement or face a demand for royalties. Klein (Shell), Dep. 29, 31-3, 36-7, 46-7, 52; Ingham (Chevron-Texaco), Dep. 182-4, 186, 190-1; Segal (BP (formerly ARCO)), Dep. 48-50, 70; Wise (Exxon-Mobil), Dep. 18, 42-3, 52.

Starling K. Alley, Unocal’s senior representative to Auto/Oil, admitted that research presented to Auto/Oil is properly considered the “work of the Program,” and therefore, freely available to all members. CX 846 at 40 (Alley, Dep.).⁴ Unocal understood the implications of

⁴ Following a break in the deposition, Mr. Alley recanted this testimony; he testified that in presenting research to Auto/Oil, the research “did not become part of the Auto/Oil program.” CX 846 at 53 (Alley, Dep.). When asked if his position was that he did not understand the question the first time, Mr. Alley answered that he “did not understand what you were after.” *Id.* at 56. Mr. Alley’s first answer should be given weight because it is corroborated by the testimony of all the other Auto/Oil members.

presenting research to Auto/Oil and deliberately chose to withhold it. In December of 1990, a Unocal representative told another member that Unocal had conducted an “internal analysis” on the impact of fuel composition variables on emissions, and “made some interesting and useful conclusions from the data, but were unwilling to present these results to [Auto/Oil].” CX 4031. Why? Because, as Alley explained, doing so made the research the “work of the Program.”⁵

Consistent with these rules, it was not uncommon for Auto/Oil members to present the results of their independent research, and each Auto/Oil member understood that, as the Agreement makes clear, the exchanged research was then in the public domain. Klein, Dep. 32-3, 48; Segal, Dep. 49-50, 64; Ingham, Dep. 182-4, 186, 190-1; Wise, Dep. 18, 42-3, 52. Indeed, Unocal applied these rules to its own benefit. In November of 1990, a Unocal memorandum reports that “ARCO presented some information about their EC-Premium (EC-P) at the recent Auto/Oil meeting.” CX 709. The memo goes on to provide details about the composition of ARCO’s fuel, how ARCO blended the fuel, and attaches 12 pages of charts and data about the ARCO fuel’s properties and emissions results. CX 709 at 002-013. The memo concludes that “[w]e need to follow ARCO’s trend of lowering sulfur levels; currently EC-P is at 50% of industry spec.” CX 709. Unocal then tested and used the ARCO research results itself and even gave this data to CARB. *E.g.*, CX 196; CX 220; CX 221; CX 231; CX 256. There is no evidence that ARCO ever demanded payment from Unocal nor that Unocal expected to pay

⁵ The Auto/Oil member who spoke with the Unocal representative testified about Unocal’s initial reluctance to share research with Unocal’s subsequent disclosure: “I think that bolsters my – the feeling that I had back then and certainly that I still have that when Unocal did present this information that it was free for everybody to use. When they had information that they didn’t want everybody to use they wouldn’t present it as happened in December of 1990.” Hochhauser, Dep. 138.

ARCO for the research results.

Because of antitrust concerns about collaboration among competitors, it was expected that Auto/Oil members generally would not discuss proprietary material with each other. Members (except Unocal in this case) took caution to explicitly state and identify that certain technology was proprietary, and then Auto/Oil would apply special procedures for the handling of that technology. Segal, Dep. 49-50, 60, 63, 70; Wise, Dep. 21, 40-1, 45-6; CX 4001 at 008-009 (¶ 3 B.) (“production or marketing of proprietary information is, however, not contemplated, except to assure that the results of the research will be freely available, in the public domain . . .”); CX 4001 at 014 (¶ 6 A.) (“to the extent that proprietary technology and/or other proprietary information is reasonably required to conduct such research and testing, certain limitations on disclosure may be required to ensure compliance with applicable law and to protect individually owned proprietary information supplied to the Program by companies whether or not Members of this Program.”).

Unocal’s Emissions Research

The Auto/Oil research involved testing fuels with different combinations of properties in different car engines, and tabulating the resulting emissions. CX 4024 at 005; CX 4033 at 001. Upon its formation in 1989, Auto/Oil had to decide which gasoline properties it would focus on for the emissions research. Auto/Oil decided to limit the Phase 1 compositional fuel set research to four fuel properties: aromatics, methyl tertiary butyl ether (MTBE), olefins and T90 (the temperature at which 90% of a fuel evaporates) (“AMOT”).⁶ CX 4016 at 009. Auto/Oil

⁶ In 1989, Unocal scientist Peter Jessup made a presentation to urge Auto/Oil to adopt a broader research program (10 fuel properties). CX 697; CX 1304 at 023-024.

provided the results of its Phase 1 research to CARB and other agencies. CX 4016 at 026.

While Auto/Oil pursued AMOT, Unocal was conducting its own research on the impact of a larger group of fuel composition variables on exhaust emissions. CX 142 at 007; CX 181. One particular variable that Unocal studied was “T50,” the temperature at which 50% of a fuel evaporates. CX 4028 at 058. Within Unocal, this emissions research, spearheaded by Drs. Peter Jessup and Michael Croudace, under the supervision of Dr. William Mallet, was referred to as the “5/14 Project,” in reference to the date in 1990 when the scientists first presented their preliminary results to senior Unocal management. CX 181. On December 13, 1990, Unocal filed a patent application for its emissions research results, which contained numerous claims that included T50 as a critical limitation. CX 1788 at 006.

In early 1991, Auto/Oil’s Phase 1 research was coming to a close and its members began to consider what areas to focus on for the Phase 2 research. CX 4056 at 001; CX 4057 at 001. At the same time, CARB was working with the oil industry to develop Phase 2 regulations for RFG. Within Unocal, management was discussing the potential competitive advantage that could be extracted through effectuating an overlap between the CARB regulations and Unocal’s patent claims. CX 500; CX 200; CX 188 at 002; CX 210; CX 386. The Unocal discussions focused on how to induce CARB to use the emissions research information supplied by Unocal so that Unocal could realize the huge licensing income potential of its pending claims. CX 3004; CX 2; CX 207.

Unocal Represents to CARB that Research Is “Non-Proprietary”

On June 20, 1991, Unocal presented CARB with the results of its 5/14 Project to show CARB, among other things, the importance of T50 in reducing emissions. CX 24 at 002. On

July 1, Unocal provided CARB with the actual emissions prediction equations developed in the 5/14 Project, but asked CARB to keep the equations confidential. CX 25. Unocal told CARB that if CARB agreed to consider a “predictive model approach to Phase 2 gasoline,” Unocal would consider making the equations and underlying data “public.” *Id.* CARB agreed to develop a predictive model. CX 29. On August 27, Unocal advised CARB that Unocal now considered its research data to be “non-proprietary and available to CARB” and “other members of the petroleum industry.” CX 29. Throughout these discussions (and until 1995), Unocal never told CARB about the patent application, that the patent claims would cover nearly all of CARB gasoline, or Unocal’s plans to enforce its proprietary interest to obtain licensing income.

Up until Unocal’s meetings, CARB’s proposed Phase 2 regulations never contained a T50 specification. On November 22, 1991, CARB adopted Phase 2 RFG regulations that set particular standards for the composition of low emissions RFG, including, for the first time, a limit for T50. RX 67. In reliance on Unocal’s representation that the research information was non-proprietary, CARB used Unocal’s equations in setting the T50 specification. CX 10 at 41-42. These Phase 2 regulations substantially overlap with Unocal’s concealed patent claims. CX595; CX371 (Unocal’s “formulations probably cover over 95% of CARB spec fuels.”).

Unocal Represents to Auto/Oil that Research Is in the “Public Domain”

Unocal viewed its participation in Auto/Oil as an integral part of its overall strategy to gain a competitive advantage through manipulation of the RFG regulatory process. In December of 1990, a Unocal memorandum observed that with Auto/Oil behind it, Unocal had a “far better likelihood that regulations will be more palatable,” but “without the weight of the A/O group it will be a long up hill struggle which may be ultimately unwinnable.” CX 210 at 3; *see also* CX

3005 (“We must make a presentation to the Auto/Oil analysis committee . . . [before] the Auto/Oil committees are scheduled to release to the CARB and EPA their mistaken analysis of the data that implicates T90's importance. Once the results are presented it will be a long uphill struggle to convince the regulatory bodies that the results are in error”).

In September of 1991, just a few weeks after Unocal had advised CARB that its research information was “non-proprietary,” Unocal finally authorized Drs. Jessup and Mallet to present the same emissions research provided to CARB at the next Auto/Oil meeting. CX 846 at 53 (Alley, Dep.). Unocal admits that the purpose of the presentation was to “influence” Auto/Oil to change its research focus and concentrate on T50 as an important parameter in emissions reduction. CX 846 at 55 (Alley, Dep.).

On September 26, 1991, at a meeting of Auto/Oil’s Research Program Committee, the committee charged with conducting Auto/Oil’s RFG research, Drs. Jessup and Mallet gave a “slide presentation on studies undertaken by Unocal regarding the impact of various fuel composition variables on exhaust emissions.” CX 4027 at 010. Dr. Jessup presented Unocal’s 5/14 Project research results, and explained the directional relationships between certain gasoline properties, most notably T50, and their impact on emissions. CX 4027 at 010.

The minutes of the meeting state that “Mr. Jessup explained that the data from Unocal’s research has been provided to CARB and is in the *public domain*.” CX 4027 at 010 (emphasis supplied). The data itself, as reflected on numerous charts, was even attached to the minutes for all the members to see. *Id.* at Encl. 11. Copies of the presentation were also given to the members at the meeting. CX 461; CX 4027 at 010 (the slide presentation was marked as Exhibit 11). Consistent with its representation, Unocal also stated that it would “supply its data *to the*

Program and Program members.” CX 4027 at 010 (emphasis supplied). Dr. Mallet’s notes of the meeting state that Unocal had “offered the data and data disks *to Auto/Oil* + to all members.” CX 293 (emphasis supplied).

Unocal never retracted its statements that the research material was in the public domain or otherwise suggested to Auto/Oil that the research material was not in the public domain.⁷ CX 4027 at 010; CX 4014. Unocal did not assert that its material was “independent research” and, therefore, subject to the protections afforded such technology under the Agreement. CX 4027 at 010. Unocal also never asserted that its research was “proprietary” and, therefore, subject to Auto/Oil’s rules and protections for the handling of proprietary technology. CX 4027 at 010.

Auto/Oil had no way of knowing that Unocal had filed a patent application and that it intended to extract licensing fees or claim patent infringement. Instead, Auto/Oil members took Unocal’s statements at face value – the research, including the data about T50 – was in the public domain, *i.e.*, freely available to be used in any manner and without any strings attached. Klein, Dep. 28-9; Hochhauser, Dep. 138; Segal, Dep. 59-60.

Had members known of Unocal’s fraud in 1991, Auto/Oil members would have taken alternative measures that likely would have resulted in a competitive landscape dramatically different than the monopoly held by Unocal today. Complaint ¶ 90.

⁷ Recorded minutes of the September 1991 Auto/Oil meeting and Unocal’s presentation were prepared by Auto/Oil’s antitrust counsel. CX 4027 at 001-015. The antitrust counsel believes that his minutes accurately reflect the events of the Auto/Oil meeting and Unocal’s presentation. Meyer, Dep. at 67. The minutes were sent to Unocal, and Unocal never corrected them. Meyer, Dep. at 57-8. At the October 1991 meeting of Auto/Oil, members reviewed the September minutes and made corrections. There were no changes to the portion of the September minutes relating to Unocal’s presentation. CX 4014; CX 4027 at 010; Meyer, Dep. 61. Dr. Mallet of Unocal was present at the October 1991 meeting and had an opportunity to correct the September meeting minutes, but did not. CX 4014.

ARGUMENT

Relying on the Agreement's Independent Research clause, Unocal claims that under principles of contract law, "extrinsic evidence of the purported meaning of an unambiguous contract is irrelevant, immaterial, and unreliable." Motion at 4. There are four reasons why Unocal's motion fails.

1. Evidence of Unocal's Fraudulent Conduct Is Highly Relevant

Unocal forgets that the Complaint alleges, among other things, a category of anticompetitive exclusionary conduct similar to common law fraudulent conduct. The evidence on Auto/Oil is directly relevant to the fraudulent conduct allegation. There was a misrepresentation: Unocal told Auto/Oil that its research data was in the "public domain," which, according to Unocal and everyone else, means "freely available," "anybody can use it, run with it, do whatever they want with it . . . free of charge." CX 846 at 38 (Alley (Unocal), Dep.). Unocal's representation was false: Unocal never told Auto/Oil about its patent application or its intent to assert proprietary rights against members. CX 4027 at 010. Finally, there was detrimental reliance by Auto/Oil members. Complaint ¶ 90. Nothing in the Agreement gave Unocal the right to commit fraud. Complaint Counsel is entitled to present this evidence regardless of how the Agreement is interpreted.⁸

⁸ D.C. courts have held that even in a business transaction memorialized by a contract, if a person undertakes to speak, either voluntarily or in response to inquiries, he is "bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which materially qualify those stated." *Borzillo v. Thompson*, 57 A.2d 195, 198 (D.C. Mun. App. 1948) (quoting *Sullivan v. Helbing*, 226 P. 803, 805 (Cal. Dist. Ct. App. 1924)); *see also Equitable Life Ins. Co. of Iowa v. Halsey Stuart & Co.*, 312 U.S. 410, 425-26 (1941) ("A statement in a business transaction which, while stating the truth so far as it goes, the maker knows or believes to be materially misleading because of his failure to state qualifying matter is a fraudulent misrepresentation. Such a statement of a half truth is as much a misrepresentation as

2. The Agreement Is Unambiguous: Unocal's Research Was in the Public Domain

The provisions of the Agreement that are unambiguously applicable to the facts here are not the Independent Research clause, as Unocal argues, but rather the provisions dealing with research put in the “public domain.” A critical function of the Program was “the collection, *exchange*, or analysis of research information.” CX 4001 at 006 (¶ 2(D)(iv)) (emphasis supplied). The Agreement states that the results of the Program’s research and testing “will be disclosed to government agencies, the Congress and the public, and otherwise placed in the *public domain*.”⁹ CX 4001 at 007 (¶ 2 E) (emphasis supplied). This meant that “[n]o 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*.” CX 4001 at 007 (¶ 2 E) (emphasis supplied). The Independent Research clause repeats the same principle.¹⁰ CX 4001 at 014 (¶ 6A).

Unocal does not contend that these provisions are ambiguous. Instead, Unocal claims that its research fell into the category of Independent Research and is therefore entitled to the

if the facts stated were untrue”); *Kraft v. Lowe*, 77 A.2d 554, 557 (D.C. Mun. App. 1950).

⁹ See also CX 4001 at 014 (¶ 6A (“It is contemplated that all of the research and testing to be carried out in the Phase I Program will be disclosed in the final report in regard to such research and otherwise dedicated to the *public domain*. The same principles of full disclosure and dedication to the *public domain* shall apply in regard to Phase II research”)) (emphasis added).

¹⁰ “It is contemplated that all of the research and testing to be carried out in the Phase I Program will be disclosed in the final report in regard to such research and otherwise dedicated to the *public domain*. The same principles of full disclosure and dedication to the *public domain* shall apply in regard to Phase II research” (emphasis supplied). CX 4001 at 014.

rights thereunder no matter what Unocal said or did. Motion at 7. The problem is that Unocal itself rendered the Independent Research clause moot by placing it in the “public domain” provisions of the Agreement. Consider the following facts:

- ! The Program calls for members to “exchange” research information; Unocal’s presentation was consistent with this category of the Program’s work, thereby rendering Unocal’s research “the work of the Program.”
- ! It would have been proper for Unocal never to disclose the research; the Agreement warns members generally not to disclose “proprietary technology.” CX 4001 at 014 (¶ 6 A. & B.). Unocal chose to ignore these provisions and presented the research to Auto/Oil without any qualifications.
- ! Indeed, rather than attempt to preserve the proprietary nature of its research, Unocal told Auto/Oil members that the “data from Unocal’s research has been provided to CARB and is in the *public domain*.” CX 4027 at 010 (emphasis supplied).

Unocal never retracted the “public domain” statement. Unocal never stated that its research material was “Independent Research” or “proprietary.” The evidence unequivocally points to the conclusion that Unocal deliberately abandoned its right not to disclose independent research, and instead offered its research “to the Program,” *i.e.*, “to Auto/Oil,” for the purpose of placing the material “in the public domain,” thereby making it “freely available, without royalty” as explicitly and unambiguously stated in the Agreement.

Prior to the September 1991 Auto/Oil presentation, Unocal clearly understood how the Agreement worked. Auto/Oil members were warned by the Agreement and throughout Auto/Oil’s existence against presenting or communicating proprietary information. Segal, Dep. 49-50, 60, 63, 70; Wise, Dep. 21, 40-1, 45-6; CX 4001 at 008-009 (¶ 3 B.), at 014 (¶ 6 A.), at 007 (¶ 2 E (ii)). Unocal recognized that when ARCO presented its research on EC-P fuels, Unocal

was free to make use of it in its own refining and blending operations. CX 709 at 001. Unocal's senior representative to Auto/Oil admitted that research presented to Auto/Oil is properly considered the "work of the program," and therefore, freely available to all members. CX 846 at 40 (Alley (Unocal), Dep.). When asked by another Auto/Oil member to present its "internal analysis" that showed "some interesting and useful conclusions" about emissions and fuel properties, Unocal was "unwilling to present these results to [Auto/Oil]." CX 4031. When it suited Unocal's strategy to "influence" Auto/Oil into supporting T50 in furtherance of its overall strategy with CARB, Unocal had no reservation offering its research to "the Program" for the "public domain."¹¹ CX 4027 at 010.

3. Unocal's Interpretation of the Agreement Creates an Inherent Ambiguity

Complaint Counsel believes that the Agreement's "public domain" provisions are unambiguous and binding on Unocal. However, Unocal's interpretation of the Independent Research clause creates a conflict. In this situation, extrinsic evidence is required. *Holmes v. Keets*, 153 F.2d 132, 134 (D.C. Cir 1946); *Computer Data Systems v. Kleinberg*, 759 F.Supp. 10, 14 (D.D.C. 1990) (inconsistent provisions render a contract ambiguous).

Unocal urges the Tribunal to read the Independent Research clause to mean that a member "retains its rights in the results of its work whether or not it discusses the work with the other members of the Program."¹² Motion at 7. But if this were true, then the "public domain"

¹¹ Because the "public domain" provisions of the Agreement are unambiguous, and controlling under the facts of this case, it is Unocal who should be prevented from offering "extrinsic" evidence concerning the Independent Research clause.

¹² In order to make the Independent Research clause fit its litigation strategy, Unocal defines independent research as work "conducted, paid for, and published (if at all) by the individual member(s)." Motion at 2. Unocal cites §§ 5.A and 5.C of the Agreement, but

provisions of the Agreement and the provision stating that members will “exchange” research would be meaningless. For example, if a member conducted independent research and wanted to donate it, the group could not “exchange” research and Auto/Oil could not fulfill its overarching objectives of full disclosure and placement of research in the public domain because the member would always “retain its rights in the results of its work.” These contract terms would be superfluous. This would be impermissible because the “writing must be interpreted as a whole, giving a reasonable, lawful, and effective meaning to all its terms.” *Saul Subsidiary II Ltd. Partnership v. Venator Group Specialty, Inc.*, 830 A.2d 854, (D.C. 2003); *1010 Potomac Assoc. v. Grocery Mfrs of Am., Inc.*, 485 A.2d 199, 205 (D.C. 1984)..

Unocal believes that Complaint Counsel will argue that the Agreement “is ambiguous as to the rights of the Auto/Oil members when they presented information about their research to the Program,” and that extrinsic evidence will go to the “members’ understanding about the allocation of rights” when a member presents information to Auto/Oil. Motion at 5 and 7. This is a straw man. Unocal did more than “present” information; Unocal offered data “to the Program” and “to Auto/Oil” and “explained that the data from Unocal’s research . . . is in the public domain.”¹³ This evidence is not just about the “understanding” of members; it is evidence

Unocal’s definition of “independent research” does not appear in these nor any other section of the Agreement. Unocal has fashioned contractual terms out of whole cloth. Moreover, by advertent to definitions that are themselves extrinsic to the contract, Unocal has done what its motion in limine seeks to prevent. See *Federal Marketing Co. v. Virginia Impression Products Co., Inc.*, 823 A.2d 513, 524 (D.C. 2003) (extrinsic evidence permitted if operative language is not defined within the contract and parties disagreed as to their meaning).

¹³ At a minimum, the Agreement’s failure to address specifically the scenario where a member presents independent research to Auto/Oil and offers to place it in the public domain, but does not explicitly abandon its rights under the Independent Research clause, creates an ambiguity that can only be resolved through reliance on extrinsic evidence. *Gryce v. Lavine*, 675

demonstrating that Unocal caused Auto/Oil to understand that the research was freely available.

Unocal also relies on the Agreement’s “integration” clause to prevent relevant evidence from being heard at trial. Motion at 6. Complaint Counsel does not seek to modify the plain meaning of the Agreement; the Agreement makes clear from the outset that a member has the right to offer data to the Program for placement in the public domain, which is what Unocal did here. In any event, even a “completely integrated” contract does not preclude a court from hearing “extrinsic evidence to determine the *meaning* of an ambiguous contract.” *NRM Corp. v. Hercules Inc.*, 758 F.2d 676, 682 n.15 (*quoting* Restatement (Second) of Contracts § § 210 & 2114 ©) (1981) (emphasis in original)); 5-24 Corbin on Contracts § 24.12 (“If the court seeks merely to interpret a contract term, which is to discern the meaning of a term already contained in the contract, the question of whether the parties intended their agreement to be integrated is not relevant.”).

Finally, Unocal offers the following non sequitur: because each member has the option to disclose or not disclose its independent research, “[w]hichever option they end up choosing, the work still belongs to them and not to the Program.” Motion at 7.¹⁴ Having the option to disclose or not disclose has no bearing on the proprietary status of the research once the member goes beyond disclosure and into the territory of offering the research to Auto/Oil for placement in the public domain.

A.2d 67, 68-69 (D.C. 1996).

¹⁴ A similar non sequitur is offered in connection with the Independent Research’s clause regarding the ability of a member to refuse to “permit the Program or the other Members to participate in such project.” Motion at 7. The language does not touch on the issue of what would happen if a member chose to disclose research to the Program, let alone, by its own admission, offer it to the Program and represent that it is in the public domain.

4. **The Parole Evidence Rule Does Not Apply to Complaint Counsel**

Complaint Counsel was not a party to the Agreement. As a matter of law, Complaint Counsel cannot be barred from presenting extrinsic evidence regarding the Agreement. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 347 n.12 (“the parole evidence rule is usually understood to be operative only as to parties to a document“) (citing *Stern v. Commissioner of Internal Revenue*, 137 F.2d 43, 46 (2nd Cir. 1943); *Deckerd v. Gen. Motors Corp.*, 307 F.3d 556, 564-65 (7th Cir. 2002) (parole evidence rule inapplicable “in cases ‘where the controversy is between third parties, or one party to the instrument and a third party’”); *Landa v. Commr. of Internal Revenue*, 206 F.2d 431, 432 (D.C. Cir. 1953) (“oral testimony here was not barred by the parol evidence rule since the [IRS] Commissioner ‘was not a party or privy of a party to (the) written agreement(s)’”); *Truong v. Smith*, 28 F. Supp.2d 626, 630 (D. Colo. 1998) (“Parol evidence can be used to vary or contradict the terms of the release when the litigation is between a party to the contract and a stranger thereto.”).

CONCLUSION

Exclusion of the evidence of Unocal's fraudulent conduct before Auto/Oil would be akin to what Unocal was able to get away with in 1991: a story that standing alone and without more – as told by Unocal – leaves the listener with a false understanding of the facts. The Tribunal and the Commission are entitled to a complete record of the facts, not just as Unocal desires to spin. Complaint Counsel respectfully submits that Unocal's motion in limine should be denied.

Respectfully submitted,

J. Robert Robertson
Chong S. Park
Chul Pak
Harry Schwirek
Counsel Supporting the Complaint

Yasmine Carson
Honors Paralegal

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

October 24, 2003