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**LOS ANGELES
SUPERIOR COURT**

**Superior Court of the State of California
For the County of Los Angeles**

Sunoco, Inc. et al.,
Plaintiffs,
vs.

American International Specialty Lines
Insurance Company, et al.,
Defendants

Case No.: BC330538

Assigned: Hon. Peter D. Lichtman

Courts Ruling re:

1. Plaintiff's Motion for Enforcement of
Settlement Pursuant to CCP § 664.6;
and

2. Defendant's Application for Dismissal
Based on the Release of the Jalisco
Settlement Agreement

Hearings Held: December 11, 2007;
and January 25, 2008

Submitted: January 25, 2008

On December 11, 2007 and December 12, 2007 this Court heard the oral arguments of counsel in connection with Plaintiff's Motion for Enforcement of Settlement Pursuant to CCP § 664.6 and Defendant's Application for Dismissal Based on the Release of the **Jalisco** Settlement Agreement.

Due to the extent of oral arguments presented over two days of hearings and the nature of the legal issues discussed, this Court requested further briefing from the parties. As a result, the matter was continued to January 25, 2008 for further oral argument and was submitted on that date. Having read and

considered all moving and opposing papers, replies and further briefs submitted, this Court now proceeds with its ruling.

The ultimate issue in this case is whether the settlement agreement resolving the **Jalisco** action between Sunoco and American Home Assurance Company, Granite State Insurance Company, Lexington Insurance Company, and National Union Fire Insurance of Pittsburgh, PA (collectively referred to as the “**Jalisco** AIG insurers”) acts as a bar to coverage under a policy issued by defendant AISLIC, policy no. 2676978 to Sunoco. Simply put, did the judicially supervised **Jalisco** settlement, as intended by the parties, release the AISLIC policy from claims now being submitted by its insured, Sunoco?

Background Facts

In October 1996, Sunoco filed suit against a number of liability insurers including four AIG Companies (American Home, Granite State, Lexington and National Union) in a case captioned **Jalisco Corporation, Inc. v. Argonaut Insurance Company**, LASC Case No. BC 158 441 (hereinafter “**Jalisco**”). The operative fifth amended complaint put at issue the pre-1986 occurrence based policies issued to Sunoco.

On May 18, 2000, in open court pursuant to CCP § 664.6, the **Jalisco** AIG Insurers and Sunoco placed the terms of the judicially supervised settlement on the record.

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That exchange between counsel was memorialized in the notes of the official court reporter and transcribed as follows:¹

Mr. Luttinger (counsel for Sunoco): Okay. The terms of the settlement are that we are going to have a full policy release as to all the policies that are at issue in the Fifth-amended complaint in this action. The gross payment is going to be \$5.75 million . . .

The Court: All right. Is there anything you wish to add, Mr. Pepek?

Mr. Luttinger: Oh, and, your honor, we'd also like to have the record under seal.

The Court: All right. Mr. Pepek, anything you want to add?

Mr. Pepek (counsel for AIG): Well, just for clarity, it is a full policy buy-back for the amount stated by Mr. Luttinger. . . .

The Court: And then I have Mr. Pepek. There's nothing further for you to add in terms of terms and conditions?

Mr. Pepek: All parties will bear their own fees and costs

The court put on the record that the parties themselves understood the settlement. Mr. White, a representative of the AIG insurers and Mr. Waller, a representative of Sunoco both stated that they understood the terms and

¹ The key term, from Sunoco's perspective, was the agreed upon policy release to extend only to those policies in controversy by way of the operative fifth amended complaint.

conditions of the settlement and agreed to those terms. The parties also stated that they intended to execute a written settlement agreement memorializing that which had just been placed on the record. The parties proceeded to do just that. The term "Policies" in the written agreement was eventually defined as:

2.4 "Policies" means all third party liability policies issued by American Home, et al. to Sun [**short titled referring to Sunoco**] including but not limited to the policies of insurance set forth on Exhibit "A" hereto, and all such policies issued by any member company of the American International Group (identified in Exhibit "B" hereto) to Sunoco. For purposes of this Agreement, "Policies" does not include Illinois National Insurance Company policy GL 3596485 RA and Commerce & Industry Insurance Company policy PLS 5298672 issued to Sunoco.

Exhibit A did not include the AISLIC policy at issue herein and exhibit B likewise did not mention AISLIC.²

The written settlement agreement defines **American Home** as:

2.5 "American Home, et al." means American Home Assurance Company, Granite State Insurance Company, Lexington Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, and their past, present and future employees, officers, directors, principals, parents, subsidiaries, divisions, current affiliates, affiliate agents, managers, managing agents, representative, predecessors, successors, beneficiaries, grantees, assigns, attorneys and shareholders, any other person or entity

² However it should be noted that AISLIC takes the position that it was named in Exhibit B but under a different name.

corporately affiliated with the American International Group, and all other persons acting on their behalf with respect to the events, transactions, or occurrences that are the subject of this Agreement.

However, it is critical to note that the first paragraph of the operative settlement agreement itself identifies the settling insurers as: "American Home Assurance Company ("American Home"), Granite State Insurance Company ("Granite State"), Lexington. Insurance Company ("Lexington") and National Union Fire Insurance Company of Pittsburgh, PA ("National Union") (collectively hereinafter "American Home, et al.")".

The difference between the first paragraph of the settlement agreement regarding the identification of the settling insurers and paragraph 2.5 of the same agreement wherein American Home is defined puts in play the chain of events that has led the parties to proceed with the very motions now before this Court.

ASLIC argues that the definition of American Home as set forth in paragraph 2.5 serves to release the AISLIC policy from any further claims. Sunoco, on the other hand, argues that the settlement placed on the record and memorialized by the settlement agreement wherein the settling insurers are identified in the opening paragraph in conjunction with both exhibits A and B failing to list the AISLIC policy demonstrates that the AISLIC policy was never intended to be released and was never identified as a policy to be released.

The written settlement agreement was fully executed on June 29, 2000. In December of 2000 Sunoco made a claim under the AISLIC policy for certain MtBE-related liabilities. On June 6, 2001, ASLIC informed Sunoco that it was

denying coverage for the claims based on the release executed in the **Jalisco** settlement.

After a few years of trying to resolve this rather difficult issue, Sunoco commenced the instant action on March 18, 2005. Because of the complexity regarding the factual circumstances and the legal arguments presented by both sides, this Court has set forth in detail the positions of the parties from both an evidentiary and legal standpoint. The Court's own analysis and ruling follows each parties respective contentions.

Sunoco's Evidence and Contentions

Plaintiff's contentions are based on the following facts:

The terms of the settlement as recited on the record state that the policies included are those at issue in the Fifth Amended Complaint. The AISLIC policy was not at issue in the **Jalisco** litigation. AISLIC was not a party to the **Jalisco** action. The AISLIC policy was purchased after the **Jalisco** litigation was filed. No additional consideration was paid for release of the AISLIC policy.

The negotiations between the parties that transpired after the settlement was placed on the record but before the settlement was reduced to writing demonstrate that the definition of "Policies" was amended by the **Jalisco** AIG Insurers for one stated purpose: to avoid the possibility that Sunoco would seek coverage for the claims in the Fifth Amended Complaint as an "additional insured" under some other policyholder's coverage.

Prior to the execution of the settlement agreement, drafts were exchanged between the parties. The first draft provided by Sunoco on May 23, 2000 reflected the parties' agreement to "buy back" the policies identified in **Jalisco** in exchange for \$5,750,000. After deliberations between the **Jalisco** AIG Insurers and their counsel, on June 12, 2000, an edited version of the memorialization was sent to Sunoco. This redline version kept intact the scope of the release: the settlement was a "buyback" of the policies in the Fifth Amended Complaint in exchange for \$5,750,000. On June 13, 2000, counsel for Sunoco, Mr. Steven Knott wrote to Mr. Pepek (counsel for the AIG insurers) agreeing to all of the changes requested by the **Jalisco** AIG Insurers save for one relating to paragraph 4.3.

At that time, the **Jalisco** AIG Insurers identified only one "concern" relating to Sunoco's rights as an "additional insured" under some other entity's policies – in situations where Sunoco entered into a joint venture. The insurers requested a modification reflecting that Sunoco would not seek coverage for these dismissed claims as an "additional insured" under unknown liability policies issued to some other policyholder. Sunoco protested that the language proposed by the **Jalisco** AIG Insurers was too broad insofar as it could be read to expand the "scope of the release beyond the [Sunoco] policies at issue in this litigation."

On June 13, 2000, Mr. Knott explained this one open issue to his client, as relayed to him by Mr. Pepek:

"AIG has told Pepek that the [changed] language was to ensure that Sunoco did not sue AIG after the settlement based upon coverage that Sunoco may have as an additional named insured on another policy that was also covered by the policies released in this Settlement. On that same date, Mr.

Pepek wrote his client acknowledging that "[i]t appears section 4.3 (relating to the additional insured issue) is the last remaining point of dispute in the draft agreement."

From June 12, 2000 forward, the parties never discussed any other open issues. Mr. Pepek proposed some additional language on June 19, 2000. In proffering this language, Mr. Pepek did not indicate any new or open issues. No additional consideration was provided for the further memorialization and there was no discussion of the AISLIC policy.

The subsequent written settlement agreement defines "American Home" twice, once to mean the four defendants in the **Jalisco** action and later more broadly as:

"2.5 "American Home, et al." means American Home Assurance Company, Granite State Insurance Company, Lexington Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, and their past, present and future employees, officers, directors, principals, parents, subsidiaries, divisions, current affiliates, affiliate agents, managers, managing agents, representative, predecessors, successors, beneficiaries, grantees, assigns, attorneys and shareholders, any other person or entity corporately affiliated with the American International Group, and all other Persons acting on their behalf with respect to the events, transactions, or occurrences that are the subject of this Agreement."

At all relevant times, AISLIC treated policy no. 2676978 as a policy in full force and effect. For example, AISLIC:

1. Paid claims under its policy no. 2676978 and Lexington policy no. 5576108 that attached directly below it;
2. Failed to indicate the release of AISLIC policy no. 2676978 internally, as required;
3. Failed to allocate any of the **Jalisco** settlement monies to the AISLIC policy;
4. Increased reserves for AISLIC policy no. 2676978 after it allegedly was cancelled;
5. Provided “renewal” coverage five months after the purported cancellation of the AISLIC policy that acknowledged that the AISLIC policy was still in effect;
6. Received reservation of rights letter from its counsel finding coverage under AISLIC policy no. 2676978 for the MtBE claims
7. Delayed a coverage determination for over a year after the Jalisco settlement; and
8. Failed to cancel the policy in accordance with policy’s terms or statutory requirements and failing to return unearned premiums.

AISLIC’s Evidence and Contentions

As a starting point, AISLIC notes that the term “Policies” is defined in the written agreement to mean “all third party liability policies issued by American Home, et al. to Sun” (referring to Sunoco). “American Home, et al.” in turn is defined to include all “current affiliates” of the AIG companies. Because the AISLIC policy at issue was a third party liability policy issued by a current AIG-affiliated company, the term “Policies” on its face encompasses the AISLIC policy.

The agreement excludes from the definition of “Policies” two policies that had been recently issued by Illinois National Insurance Company (“Illinois National”) and Commerce & Industry Insurance Company (“C&I”), two other affiliates of the AIG Companies. Like the AISLIC policy, the Illinois National and C&I policies were not a part of the **Jalisco** action. Until its principal witness, Jonathan Waller, testified, Sunoco’s position was that the parties only intended to release the specific policies at issue in the **Jalisco** action. Mr. Waller testified, however, that during the negotiation of the written agreement, Sunoco agreed to expand the definition of “Policies” beyond the policies at issue in the **Jalisco** action to include “any other policies” issued by AIG affiliated companies (except for the Illinois National and C&I policies) that afforded coverage for the same pre-1986 occurrences as the policies in the **Jalisco** action.

On May 18, 2000, the parties advised the Court that they had reached a settlement, which the parties sought to place on the record. After Sunoco’s counsel stated that the parties were “going to have a full policy release as to all policies at issue in the Fifth-Amended Complaint in this action”, Mr. Pepek clarified that the settlement was “a full policy buy back.”

When asked what he meant by the term “full policy buyback,” Mr. Pepek testified that there “would be a full policy buyback of all policies issued by the AIG member companies to the Sunoco related companies,” including “policies other and in addition to what was” at issue in the **Jalisco** action. Mr. Pepek testified that Mr. White and/or Mr. Eddows (another AIG representative) had told him that Sunoco had agreed to a settlement that included policies beyond those at issue in the **Jalisco** action, which is what he sought to convey at the hearing.

In any event, Sunoco's counsel advised this Court that the parties had agreed to "fully execute a written settlement agreement." The Court set a hearing date in the event the parties were unable to "consummate the settlement." Thereafter, the parties began negotiating the terms of the written agreement.

Sunoco's usual routine with settling defendants in the **Jalisco** action was to include all policies issued by the insurer up to the date of the execution of the written settlement. As a general rule, Sunoco prepared the first draft of the agreement. In these initial drafts, Sunoco typically defined the term "Policies" to mean the policies set forth in an Exhibit A, which listed only the policies at issue in the **Jalisco** action. Then, through the negotiation process, Sunoco routinely agreed to expand the definition of the term "Policies" to include all liability policies issued by an insurer or its affiliates to Sunoco up to the date of execution of the written settlement agreement. This occurred with several of the settling defendants in the **Jalisco** action.

Mr. Waller, who negotiated and approved the **Jalisco** settlement with the AIG Companies, approved all the other settlements as well. To ensure that Sunoco did not mistakenly release a policy that Sunoco did not want to release, Sunoco's insurance department and outside counsel performed due diligence covering the period up until the date of the settlement agreement.

Here, similarly, Sunoco prepared the first draft of the settlement agreement between itself and the AIG Companies. The first draft defined the term "Policies" to mean "the policies of insurance set forth on Exhibit A hereto." Exhibit A included only the policies issued by AIG-affiliated companies that were at issue in the **Jalisco** action. Notwithstanding the fact that the parties fully negotiated a written contract that included various terms, including the definition of the term

“Policies,” Sunoco’s position here is that the AIG Companies are bound by the definition of “Policies” contained in Sunoco’s first draft. However, the parties subsequently agreed to modify the definition of “Policies” in a manner consistent with the broad release Sunoco gave to various other insurers.

Mr. Waller testified that he saw the black-lined version of the settlement agreement with the proposed change to the term “Policies” and probably discussed the revisions with Mr. Knott and/or fellow in-house lawyer Steve LeBaron. In addition, Mr. Knott’s time records reflect that on June 19, 2000, he “analyze[d] and prepared[] response to additional revisions requested by AIG.” According to Mr. Waller, Sunoco never advised the AIG Companies that Sunoco did not intend the release in the agreement to extend to the AISLIC policy.

Sunoco ultimately accepted every revision proposed by the AIG Companies in their June 19, 2000 letter, including the revised definition of “Policies.” Mr. Waller confirmed that Sunoco’s insurance department performed due diligence with respect to the AIG settlement to make sure that Sunoco did not mistakenly release a policy that Sunoco did not want to release. Sunoco’s insurance department was aware of the existence of the AISLIC policy, and that AISLIC was an AIG-affiliated company.

Sunoco signed the final version of the agreement on June 29, 2000. In the preceding six days, Sunoco executed two agreements with other defendants in the *Jalisco* action that defined the term “Policy” to mean all known and unknown liability policies issued by those insurers and their affiliates to Sunoco prior to the execution of the settlement agreements, including but not limited to the policies at issue in the case. The AIG Companies signed the settlement agreement on or around July 5, 2000.

On December 27, 2000, Sunoco made a claim under the AISLIC policy for certain MtBE-related liabilities. It was Mr. White's view upon receiving the claim that Sunoco's MtBE-related liabilities under the AISLIC policy were released in the **Jalisco** settlement agreement. However, before denying coverage, Mr. White's superiors wanted Lynberg & Watkins, the firm that represented the AIG Companies in the **Jalisco** action, to provide their opinion. By letter dated May 8, 2001, Jeff Carlisle and Bianca Putters of Lynberg & Watkins concluded that the AISLIC policy was released in the agreement.

Sunoco's own Director of Risk Management, Mr. Vryhof and Sunoco's Insurance Claims Specialist requested that Sunoco's broker, Mr. Tavani, attempt to resolve the coverage denial. After reviewing the agreement, Mr. Tavani advised that the release was very broad and that "no coverage exists under any third party liability policy issued by AIG in the past, present or future," except for those carved out specifically (i.e. the Illinois National and C & I policies)

Mr. Tavani then wrote that while he believed his interpretation of the words of the agreement was correct, he did not believe they correctly expressed the intent of the parties. In this regard, Mr. Tavani's concern was that the release could be construed to release policies issued after execution of the agreement. Mr. Tavani stated that he "believe[d] the intent [wa]s for all the policies issued prior to the settlement agreement date be released, but not those purchased by Sunoco from AIG after the date." He recommended that Sunoco try to "[q]uickly amend the settlement agreement so that it cannot be construed to include any policy issued after July 2000." Mr. Vryhof acknowledged that based on Mr. Tavani's understanding of the intent of the parties, the AISLIC policy was released because it ,in fact, was issued before the execution of the agreement.

In December 2003, when it became apparent that its MtBE-related exposure could be significant, Sunoco revisited AISLIC's coverage denial. In January 2004, Mr. Tavani asked Sunoco to have Paul Zevnik (the lead lawyer at the former Zevnik Horton firm, which represented Sunoco in the underlying *Jalisco* action) review Mr. Tavani's February 20, 2002 e-mail. Shortly thereafter, Sunoco retained the lawyers at the former Zevnik Horton firm to advise Sunoco in connection with AISLIC's coverage denial.

On January 19, 2005, AISLIC was sent a letter (drafted by Morgan Lewis) in which Sunoco took the position that the *Jalisco* settlement released only the specific policies that were at issue in that action. AISLIC argues that this position was completely different from three years earlier, when supposedly a Sunoco representative acknowledged that all policies issued before the agreement was executed (except for those explicitly carved out) were released.

Legal Arguments

Sunoco's Position

First, Sunoco argues that the *Jalisco* settlement, **as placed on the record**, is the settlement that must be enforced. An "[o]ral agreement's statement that the parties would later sign a written agreement did not affect the enforceability of the settlement on the record under section 664.6." *Elyaudayan v. Hoffman* (2003) 104 Cal. App. 4th 1421.

In interpreting the "intent" of the parties to the *Jalisco* settlement, this Court is "governed by the same principles applicable to any other contractual

agreement." **Winet v. Price** (1992) 4 Cal. App. 4th 1159, 1165. These principles include:

"[T]he mutual intention of the parties at the time the contract is formed governs interpretation." **Waller v. Truck Ins. Exchange, Inc.** (1995) 11 Cal. 4th 1, 18-19; Cal. Civ. Code, § 1636.

"It is the outward expression of the agreement, rather than a party's unexpressed intention, which the court will enforce." **Winet**, 4 Cal. App. 4th at 1166. A party's undisclosed subjective intent is irrelevant. **Brant v. California Dairies, Inc.** (1935) 4 Cal. 2d 128, 133.

"When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is 'reasonably susceptible' to the interpretation urged by the party. If it is not, the case is over." **Southern California Edison Co. v. Superior Court** (1995) 37 Cal. App. 4th 839, 851.

"A contract is ambiguous when, on its face, it is capable of two different reasonable interpretations." **United Teachers of Oakland v. Oakland Unified Sch. Dist.** (1977) 75 Cal. App. 3d 322, 330. However, "[c]ourts will not strain to create an ambiguity where none exists." **Waller**, 11 Cal. 4th at 18-19.

If there is ambiguity in the agreement, it is resolved by interpreting the ambiguous provision in the sense that the promisor (i.e., AIG) believed the promisee (i.e., Sunoco) understood it at the time of formation. Cal. Civ. Code § 1649.

In the event of an ambiguity, "the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." Cal. Civ.Code §1654.

Here, Sunoco's counsel recited on the record that the settlement was limited to the policies at issue in **Jalisco**. AIG's counsel stated that the settlement was a full policy buyback but did not identify any third party or any policy beyond those identified as being at issue in the **Jalisco** litigation.

AIG never indicated that the settlement included nonparties or policies outside of those enumerated in the Fifth Amended Complaint. AISLIC cannot demonstrate that it was an express, intended third party beneficiary under the **Jalisco** settlement. See **Sofias v. Bank of America**(1985) 172 Cal. App. 3d 583 (third party beneficiary must show the contract was made expressly for his or her benefit.) It must be remembered that AISLIC was not a party to the **Jalisco** action and was not identified as an operative policy in the action as well.

Third-party AISLIC bears the burden of proof on the issue of whether it was an intended third-party beneficiary. **Neverkovec v Fredericks** (1999) 74 Cal. App. 4th 337, 348-349; see also **Vahle v. Barwick** (2001) 93 Cal. App. 4th 1323, 1328.

AISLIC attempts to meet this burden by asking this Court to ignore (i) the four-year history of the **Jalisco** litigation to which it was not a party; (ii) the May 18 settlement on the record at which it was not represented or mentioned, (iii) the negotiations between and among the actual parties to the **Jalisco** settlement, and (iv) the **Jalisco** AIG Insurers' contemporaneous admissions and conduct and

AISLIC's own conduct demonstrating that AISLIC policy 2676978 remained in full force and effect.

AISLIC's plea to have this Court, which oversaw the settlement, ignore the representations made before it by the parties to the settlement and extrinsic evidence consistent with these representations and, instead, focus on selective portions of the subsequent agreement fails as a matter of law and fact.

Third-party AISLIC fails to acknowledge black-letter California law in determining whether a third party is an intended beneficiary. AISLIC's position is that the Court should ascertain the intent of parties to the **Jalisco** settlement with blinders and ignore all contemporaneous evidence. California courts, however, recognize the importance of extrinsic evidence in determining a third party's claim:

Release agreements are governed by the generally applicable law of contracts. A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him. The circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement. The contracting parties must have intended to confer a benefit on the third party. It is not necessary for the third party to be specifically named in the contract, but such a party bears the burden of proving that the promise he seeks to enforce was actually made to him personally or to a class of which he is a member. In making that determination, the court must read the contract as a whole in light of the circumstances under

*which it was entered....Because the court must consider the circumstances of the contracting parties' negotiations to determine whether a third party not named in the release was an intended beneficiary, it will seldom be sufficient for the third party simply to rely on a literal application of the terms of the release. **Neverkovec**, 74 Cal. App. 4th at 348-49 (internal quotations and citations omitted)*

AISLIC suggests that the Court should look only to selective portions of the subsequent written settlement agreement and ignore uniform extrinsic evidence that demonstrates that Sunoco and the **Jalisco** AIG insurers who signed the memorialization did not intend to cancel the AISLIC Policy. In so advocating, AISLIC ignores that the purported authority for its position, the **Winet** case, did not eliminate the role of extrinsic evidence to demonstrate that an agreement is susceptible to a reasonable interpretation and, most importantly, was found to have no application in the context of a third-party beneficiary claim. See **Vahle**, 93 Cal. App. 4th at 1332 ("Other than stating general principles of contract interpretation, **Winet** has no application here. **Winet** was not a third party beneficiary case.").

The subsequent memorialization was required to reflect the terms of the settlement put on the record. The four corners of the written agreement do reflect that the AISLIC policy was not intended to be released. The settlement agreement was tied to the Fifth Amended Complaint.

Through a prior draft, the **Jalisco** AIG Insurers themselves defined "Policies" as only those identified in the Fifth Amended Complaint. Later, the **Jalisco** AIG Insurers proffered a different definition admittedly to address a single open issue: Sunoco's additional insured rights on joint venture projects

(identified in the complaint) with other AIG policyholders. Accordingly, the new definition defined "Policies" "as all third party liability policies issued by American Home, et. al. to Sun, including but not limited to the policies of insurance set forth on Exhibit 'A' hereto, and all such policies issued by any member company of the American International Group (identified in Exhibit 'B' hereto) to Sun." The first part of the new definition of "Policies" that focuses on the policies in the Fifth Amended Complaint refers to "American Home, et. al.," which is first defined to include solely the settling defendants in **Jalisco**.

In this regard, Exhibit A to the settlement agreement identifies solely those policies issued by the **Jalisco** AIG Insurers. Additionally, AIG Technical Services admitted that AISLIC is not included on that list. Accordingly, the subsequent memorialization mirrors the **Jalisco** settlement in not identifying or releasing AISLIC (Exhibit B) or its Policy (Exhibit A).

One other problem with defendant's interpretation of the written settlement agreement is that it lacks consideration. Modification to an agreement that imposes more onerous terms upon one of the parties without any compensating advantage, requires consideration to support it. **Main St. & APR Co. v. Los Angeles Traction Co.** (1900) 129 Cal. 301, 304. The AISLIC policy provided \$50 million dollars worth of claims made coverage. It is absurd to think that Sunoco would give that up for nothing.

If their current position is to be believed, the **Jalisco** AIG Insurers not only concealed their intent to release the AISLIC policy from Sunoco but affirmatively represented to Sunoco that the scope of the subsequent memorialization would not be expanded to include release of the AISLIC policy. See **Rosenthal v. Great Western Fin. Securities Corp.** (1996) 14 Cal. 4th 394, 415 ("Fraud in the

inducement is a subset of the tort of fraud. It occurs when the promisor knows what he is signing but his consent is induced by fraud.”) (citations omitted); **DeBois v. Sparrow** (1979) 92 Cal. App. 3d. 290, 293, (“[i]f the releaser was under a misapprehension, not due to his own neglect, as to the nature or scope of the release, and if this misapprehension was induced by the misconduct of the releasee, then the release, regardless of how comprehensively worded, is binding only to the extent actually intended by the releaser”).

To the extent the defendants intended the language of the subsequent memorialization to encompass AISLIC policy no. 2676978, they admittedly did not disclose those intentions. The only representations to Sunoco related solely to historic policies issued to other policyholders under which Sunoco might have "additional" insured rights. Mr. Pepek’s affirmative representation to Mr. Knott – memorialized not only in a contemporaneous memo from Mr. Knott to his client, but also in Mr. Pepek’s own representation to his client– reflects that the **Jalisco** AIG Insurers never raised the AISLIC policy. Accordingly, defendants are bound by the representations made, not those withheld.

To the extent an ambiguity still exists under the rules of contract interpretation – and none exists – it was created solely by the additional language added by the insurers under false pretenses and would, in any event, be interpreted against the defendants who created it. Cal. Civ. Code § 1654.

Construction given to a contract by the parties before any controversy has arisen as to its meaning will, when reasonable, be adopted and enforced by the courts. **Crestview Cemetery Assn v. Dieden** (1969) 54 Cal. 2d 744, 753. As described above AISLIC and all other AIG companies acted consistent with the fact that AISLIC’s policy was not intended to be released.

AISLIC's Legal Arguments

First, defendant urges that the written settlement agreement is the enforceable agreement and not the bare bones settlement that was placed on the record.

“Although a judge hearing a section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment, nothing in section 664.6 authorizes a judge to create the material terms of a settlement, as opposed to deciding what terms the parties themselves have previously agreed upon.” *Weddington Productions, Inc. v. Flick* (1998) 60 Cal. App. 4th 793, 810 (internal citations omitted). Here, the terms the parties agreed upon are set forth in the written agreement they signed.

Sunoco has argued that to determine the terms agreed upon, the Court should look at the transcript from the May 18, 2000 hearing when the settlement terms were placed on the record. Sunoco makes this argument because its counsel stated at the hearing that the settlement was limited to the policies at issue in the *Jalisco* action. However, the subsequently negotiated agreement says the exact opposite. Sunoco's attempt to escape the terms of the written agreement Sunoco signed should be summarily rejected:

First, “the oral settlement remains binding and enforceable under section 664.6” only “[i]f difficulties or unresolvable conflicts arise in drafting the written agreement.” *Elyaoudayan v. Hoffman* (2003) 104 Cal. App. 4th 1421, 1431. Where parties have entered into a written settlement agreement, however, courts in § 664.6 proceedings must treat the settlement agreement as “a contract,”

“governed by the same legal principles applicable to contracts generally.”

Timney v. Lin (2003) 106 Cal. App. 4th 1121, 1127.

Second, the written settlement agreement contains an integration clause, which the parties retained unchanged from Sunoco’s first draft:

This Agreement contains the entire understanding of the parties hereto in connection with the subject matter hereof and it supersedes and replaces all prior negotiations, statements, and representations except as contained herein.

Thus, the written agreement is the parties’ “sole agreement,” superseding and replacing any statements made during settlement negotiations or on the record at the May 18, 2000 hearing. **Casa Herrera, Inc. v. Beydoun** (2004) 32 Cal. 4th 336, 344-45 (“[a]n integrated written agreement may not be contradicted by prior or contemporaneous agreements”).

Third, Mr. Waller, who negotiated the settlement for Sunoco, conceded that during negotiations over the terms of the written agreement, Sunoco agreed to a broader definition of “Policies” than just the policies in the Jalisco action. To the extent the release in the written agreement is broader in scope than the release placed on the record, no new consideration was necessary because “[a] written instrument is presumptive evidence of a consideration.” Cal. Civ. Code § 1614. See Cal. Civ. Code § 1541 (“[a]n obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration”); Cal. Civ. Code § 1697 (“[a] contract not in writing may be modified in any respect by consent of the parties, in writing,

without a new consideration, and is extinguished thereby to the extent of the modification.”).

Finally, Sunoco considered the written agreement to be the sole embodiment of the parties’ agreement. For example, on September 5, 2000, shortly after the agreement was executed, Mr. Waller sent AON a letter quoting the settlement terms from the written agreement without referencing the May 18, 2000 hearing before this Court. Similarly, Sunoco’s insurance department maintained a copy of the written agreement in its files—not the May 18, 2000 hearing transcript—for the settlement terms. And when Sunoco wanted advice from AON on the scope of the settlement, it sent Mr. Tavani the written agreement. Despite all evidence to the contrary, Sunoco now seeks to make the parties’ agreement the brief comments made at the May 18 hearing, rather than the 23 page document they negotiated and signed over the succeeding five weeks.

The release contained in the written settlement agreement encompassed the AISLIC policy. The written settlement agreement contains a broad release:

In consideration of the promises contained in this Agreement, Sun hereby releases and discharges American Home, et al. from any and all obligations, duties and responsibilities of any nature and to anyone arising under the Policies from the beginning of time forward to the end of the world, including, but not limited to, any liability under the Policies arising out of property damage, bodily or personal injury, natural resource damage, toxic tort, chemical exposure, environmental, asbestos, pyrocrete, or MTBE claims. A complete extinguishment and termination of

the Policies, and any and all rights and obligations thereunder are hereby effected.

Mr. White expressly requested his counsel add MtBE to the release during the drafting process because Sunoco had agreed to release all MtBE claims during settlement negotiations. Based on the broad definitions of “American Home, et al.” and “Policies” in the agreement, the AISLIC policy was released.

In Section 2.5 of the agreement, “American Home, et al.” is defined to mean the four AIG Companies in the Jalisco action (American Home, Granite State, Lexington and National Union), their “current affiliates” and “any other person or entity corporately affiliated with the American International Group”:

“American Home, et al.” means American Home Assurance Company, Granite State Insurance Company, Lexington Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA, and their past, present and future employees, officers, directors, principals, parents, subsidiaries, divisions, current affiliates, affiliate agents, managers, managing agents, representative[s], predecessors, successors, beneficiaries, grantees, assigns, attorneys and shareholders, any other person or entity corporately affiliated with the American International Group, and all other Persons acting on their behalf with respect to the events, transactions, or occurrences that are the subject of this Agreement.

Mr. Waller testified that he understood the term “American Home, et al.” to include corporate affiliates of the AIG Companies. “American

Home, et al.” encompasses AISLIC because AISLIC was an AIG-affiliated company at the time.

In Section 2.4 of the agreement, “Policies” is defined as follows:

“Policies” means all third party liability policies issued by American Home, et al. to Sun, including but not limited to the policies of insurance set forth on Exhibit “A” hereto, and all such policies issued by any member company of the American International Group (identified in Exhibit “B” hereto) to Sun. For purposes of this Agreement, “Policies” does not include Illinois National Insurance Company policy GL 3596485 RA and Commerce & Industry Insurance Company policy PLS 5298672 issued to Sunoco.

Exhibits A and B are, by the express terms of the agreement, exemplars and not exclusive lists. Because the definition of “Policies” includes “all third party liability policies” issued by “American Home, et al.”—which is defined to mean their “current affiliates” as well as “any other person or entity corporately affiliated with the American International Group”—the term “Policies” includes the AISLIC policy.

Clearly AISLIC is a third party beneficiary to the settlement agreement. In determining whether a third party is encompassed within a settlement, “[i]t is not necessary that the contract identify the third party by name as long as such third party can show that it is one of a class of persons for whose benefit it was made.” **General Motors Corp. v. Superior Court** (1993) 12 Cal. App. 4th 435, 444. For example, in **General Motors**, a general release operated to release General Motors even though it was not specifically named or identified in the release.

Similarly, in *Performance Plastering v. Richard American Homes of California* (2007) 63 Cal. Rptr. 3d 537, 544, the court held that an insurer “was one of a class for whose benefit the [] settlement agreements were made” even though “not mentioned by name.” See also *Eustace v. Dechter* (1942) 53 Cal. App. 2d 726, 735 (same).

Here, Sunoco released and discharged “American Home, et al. from any and all obligations, duties and responsibilities of any nature and to anyone arising under the Policies from the beginning of time forward to the end of the world.” “American Home, et al.” is defined to mean the four AIG Companies in the *Jalisco* action (American Home, Granite State, Lexington and National Union), their “current affiliates” and “any other person or entity corporately affiliated with the American International Group.” Because AISLIC was a “current affiliate” and “corporately affiliated with the American International Group,” AISLIC was one of the class for whose benefit the agreement was made. “American International Surplus Lines Ins. Co” is included on Exhibit B to the agreement, which is the exact same entity as AISLIC before a minor name change that substituted “Specialty” for “Surplus.”

Moreover, Sunoco excluded from the definition of “Policies” the Illinois National and C&I policies which were designed to replace coverage that Sunoco released in the *Jalisco* settlements. If Sunoco wished to preserve the AISLIC coverage and not rely upon the Illinois National/C&I coverage, Sunoco should have done so.

For example, in *Edwards v. Comstock Ins. Co.* (1988) 205 Cal. App. 3d 1164, the court held that by releasing “all claims,” the insureds had relinquished their right to pursue an action against their insurer for unfair claims settlement

practices. The court stated that it could not rewrite the release agreement “to include a concept [the insureds] failed to enunciate at the time they accepted the terms of the settlement with their insurer.” *Id.* at 1167.

Sunoco is bound by the terms of the written settlement agreement even if its provisions are contrary to its professed intentions or understandings. “The general rule is that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents, and is estopped from saying that its provisions are contrary to his intentions or understanding; but it is also a general rule that the assent of a party to a contract is necessary in order that it be binding upon him.” *Edwards*, 205 Cal. App. 3d at 1167; *Bethany Bardin v. Lockheed Aeronautical Systems Company* (1999) 70 Cal. App. 4th 494, 505 (same). Here, Mr. Waller testified that:

- Sunoco, which was represented by sophisticated in-house and outside counsel, executed the written agreement willingly, voluntarily, and without coercion or duress. He was not aware of any misrepresentations which induced Sunoco to enter into the agreement.
- The written agreement did not contain any mistakes because it reflected the terms Sunoco wanted.

Under the circumstances, Sunoco cannot argue that the settlement agreement provisions are “contrary to [its] intentions or understanding.” *Edwards*, 205 Cal. App. 3d at 1167-68. In *Edwards*, for example, the court rejected an insured’s contention that his agreement to release “all claims” was not binding where the insured presented no evidence of any physical or mental

disability, that he was unable to comprehend the language of the release, or that the parties did not deal at arm's length. *Id.*

Similarly, in ***Winet v. Price***, *supra*, the court held that a plaintiff's release of his former attorney for "any and all ... claims" was binding even though the plaintiff was unaware of a certain claim when he signed the release and did not intend to release it—just as Mr. Waller has testified that he was unaware of the existence of the AISLIC policy and did not intend to release it. The court found it "significant that the parties were able to, and did, fashion language memorializing their agreement to preserve identified claims from the operation of the release when such was their intention"—just as the parties here carved out the Illinois National and C&I policies from the definition of "Policies." *Id.* at 1168.

Sunoco has argued that the definition of "Policies" cannot encompass the AISLIC policy because AISLIC never sent a cancellation notice to Sunoco. However, "[a]n insurance policy may be cancelled by mutual agreement of the insurer and insured, express or implied . . . independently of the existence of conditions authorizing cancellation under the provisions of the policy." ***Ohio Casualty Ins. Co. v. Northwestern Mut. Ins. Co.*** (1971) 17 Cal. App. 3d 204, 208 ; 2 Couch on Ins. § 31:52 (2007) (same).

Parol evidence is inadmissible to contradict the settlement agreement language. Extrinsic evidence cannot be used to contradict or explain a written agreement especially where as here the agreement is fully integrated. ***Founding Members of the Newport Beach Country Club v. Newport Beach Country Club*** (2003) 109 Cal. App. 4th 944, 954.

Parol evidence is admissible only "when a party can identify an alternative,

semantically reasonable, meaning of a writing.” *Benedek v. PLC Santa Monica, LLC* (2002) 104 Cal. App. 4th 1351, 1357. For example, in *Wolf v. Superior Court* (2004) 114 Cal. App. 4th 1343, custom and practice in the entertainment industry was used to show that the undefined term “gross receipts” in a royalty agreement could mean not just cash receipts but also other valuable consideration received.

If the extrinsic evidence does not support a semantically reasonable interpretation of the contract language, however, such evidence is inadmissible to determine contractual intent. *Winet*, 4 Cal. App. 4th at 1167 (citations omitted) (“[p]arol evidence is admissible only to prove a meaning to which the language is ‘reasonably susceptible,’ not to flatly contradict the express terms of the agreement”).

For example, in *Wagner v. Columbia Pictures Industries, Inc.* (2007) 146 Cal. App. 4th 586, the court rejected a party’s attempt to use extrinsic evidence in a contract dispute to “explain what the agreement was” which did not support a “semantically reasonable interpretation” of the language at issue:

The problem with [plaintiff’s] extrinsic evidence is that it does not explain the contract language, it contradicts it. Under the parol evidence rule, extrinsic evidence is not admissible to contradict express terms in a written contract or to explain what the agreement was. The agreement is the writing itself. Parol evidence cannot be admitted to show intention independent of an unambiguous written instrument. Thus, as Justice Holmes explained, parol evidence is not admissible to show that when the parties said five hundred feet they agreed it should mean one hundred

inches, or that Bunker Hill Monument should signify the Old South Church.
Id. at 592.

Here, none of the extrinsic evidence relied upon by Sunoco supports a “semantically reasonable” interpretation of the contract language. The definition of “Policies” in the agreement encompasses “all third party liability policies issued by American Home, et al. to Sun, including but not limited to”. No matter what Sunoco may argue, the phrase “including but not limited to” cannot be construed to mean “only.”

The payment of some claims under a policy does not estop an insurer from refusing to pay other claims. Sunoco highlights the fact that, after execution of the agreement and denying coverage for the MtBE claims under the AISLIC policy, AISLIC paid certain non-MtBE claims.

This is a classic example of “no good deed goes unpunished.” Mr. White explained that, during settlement discussions, he agreed to continue to handle two previously noticed claims, including a claim stemming from an oil release at the John Heinz Wildlife Refuge (the “Heinz claim”). Mr. White said that Sunoco should have carved the Heinz claim out of the agreement but failed to do so. Nevertheless, consistent with Mr. White’s prior commitment, the Heinz claim was paid under policies issued by Lexington and AISLIC. Lexington began making payments in late 2001, and AISLIC made a payment in 2005, after this litigation had incepted.

Regardless of the reason for paying the Heinz claim, AISLIC is not estopped from denying coverage for one claim based on the payment of a separate claim:

Whether the defendant paid it by oversight, or because it was so small it did not care to provoke a controversy, or to promote public relations, or because of any other reason[,] . . . the governing rule is clear [T]he doctrine of implied waiver and of estoppel, based on the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded there from . . .

The rule seems to be of general, in fact universal, application.

Atlantic Mutual Insurance Cos. v. Lotz, 384 F. Supp. 2d 1292, 1301 (E.D. Wis. 2005).

Under California law, an insurer can be equitably estopped only if the policyholder can show that the insurer's course of conduct caused: "(1) a 'reasonable' belief that the insurer was providing coverage or (2) any detrimental reliance on such conduct, both of which are essential to an estoppel claim." ***State Farm Fire & Cas. Co. v. Jioras*** (1994) 24 Cal. App. 4th 1619, 1627-28 (emphasis added). See also ***Westoil Terminals Co., Inc. v. Industrial Indem. Co.*** (2003) 110 Cal. App. 4th 139, 152 (no estoppel because insurer did not intend for the insured to believe the exclusion would not be enforced, nor was there detrimental reliance).

Here, Sunoco plainly knew that AISLIC would not provide coverage for its MtBE-related liabilities. By letter dated June 6, 2001, four years before AISLIC made a single payment on the Heinz claim, AISLIC denied coverage based on the ***Jalisco*** release and repeatedly reiterated its position. Moreover, Sunoco responded in writing to AISLIC with respect to its coverage denial. Thus, Sunoco could not—and did not—believe that AISLIC

would provide coverage for the MtBE-related liabilities based on AISLIC's conduct with regard to the Heinz claim, and did not detrimentally rely on such conduct.

Court's Analysis and Ruling

Contract Language

California Code of Civil Procedure § 664.6 provides:

If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part hereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

Disputes regarding the terms of the settlement may be adjudicated by way of a noticed motion per CCP § 664.6. The motion itself may be based on declarations and other admissible evidence. ***Malouf Bros. v. Dixon*** (1991) 230 Cal. App. 3d 280; ***Fiore v. Alvord*** (1985) 182 Cal. App. 3d 561, 566.

This Court must decide what the intended agreement between the parties was. Here, AISLIC argues that one agreement was made before this Court and another was made subsequently in writing. At the outset, it must be emphasized and noted that this Court was the same Court that met with both the parties and

counsel on a number of occasions and judicially supervised the very settlement that has ultimately led to the dispute herein.

Based on the evidence presented by both parties, there is simply no doubt that the settlement that was placed on the record (May 18, 2000) is the settlement that was intended by the parties. The policy buy-backs as well as the policies to be released were those that were the subject of the operative fifth (5th) amended complaint. This Court believes that this finding is consistent with the settlement placed on the record, the subsequently memorialized written agreement and with the conduct and interpretation by AIG's own representatives and agents.

AISLIC's assertions that its counsel's statement made at the May 18, 2000 hearing to the effect that the settlement embodies "a full policy buy back" really meant to include a release of policies not subject to the fifth amended complaint is not persuasive.

Nowhere does the written settlement agreement specify that the AISLIC policy is released. Exhibits A and B to the agreement do not mention, identify or specify a release of the AISLIC policy.

To get to that result, AISLIC follows a series of definitional paragraphs which it believes make it a third party beneficiary to a settlement in an action that never triggered any coverage allegations concerning its policy. AISLIC then follows this reasoning with a conclusion that the exhibits to the settlement agreement (i.e., A and B) were really not meant to be inclusive or exclusive but rather a guide.

Under the analysis proffered by AISLIC, the policy in question (while never specified as released or identified) simply disappears through the process of definitional osmosis. This Court does not believe that AISLIC's definitional analysis is enough to support a release of approximately \$50,000,000.00 worth of coverage.

The AISLIC policy was not the subject of the **Jalisco** coverage action in any way, shape or form. In fact, the ASLIC policy was never the subject of any charging allegations. If the ASLIC policy was the subject of an intended release, this would mean that the settlement placed on the record released a non-party insurer, an unspecified policy as well as a policy that was not the subject of any declaration of rights. The release of the AISLIC policy would have meant that an unnamed carrier and policy were released from an action to which there existed no nexus. In fact, the ASLIC policy did not even exist at the time of the filing of the **Jalisco** action. It was purchased after the filing of the action.

In **Elyaudayan v. Hoffman** (2003) 104 Cal. App. 4th 1421, the court stated:

"Often, in cases where an oral settlement is placed on the record in the trial court, a written agreement will follow. If difficulties or unresolvable conflicts arise in drafting the written agreement, the oral settlement remains binding and enforceable under section 664.6. Having orally agreed to settlement terms before the court, parties may not escape their obligations by refusing to sign a written agreement that conforms to the oral terms. The oral settlement, like any agreement, "imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." ((citations omitted)" *Id.* at 1431

This Court is well aware of the fact that here, unlike in *Elyaudayan*, the parties did reduce the recorded settlement to writing. When parties orally agree on all the terms and conditions of an agreement with the mutual intention that it shall thereupon become binding, the mere fact that a formal written agreement to the same effect is to be prepared and signed does not alter the binding validity of the oral agreement. *Kohn v. Jaymar-Ruby, Inc.* (1994) 23 Cal App 4th 1530 Again, this Court acknowledges that the parties here did ultimately reduce the oral settlement to written form.

“Although a judge hearing a section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment, nothing in section 664.6 authorizes a judge to create the material terms of a settlement, as opposed to deciding what terms the parties themselves have previously agreed upon.” *Weddington Productions, Inc. v. Flick, supra* at 810 (internal citations omitted). The trial court is empowered to resolve factual issues and determine what terms were intended to be included in a settlement and what terms were not. See *Osumi v. Sutton* (2007) 151 Cal. App. 4th 1355, 1360.

There is no dispute that Sunoco and the AIG Insurers recited a settlement on the record which unambiguously included a release of *only* those policies at issue in the *Jalisco* action itself. Likewise, there is no dispute that the agreement was intended to be binding on the parties and enforceable pursuant to CCP § 664.6. When a settling party intends to preserve certain rights, it should do so when the settlement is placed on the record and not “wait in the bushes and jump at the proper time. . . .” *Skulnick v. Roberts Express, Inc.* (1992) 2 Cal. App. 4th 884. The cancellation of the AISLIC policy (at issue herein) was never discussed by the parties and was never discussed in any of

the settlement conferences that this Court presided over. Moreover, it was never discussed in any subsequent negotiations during the drafting phase of the settlement agreement before this Court.

Even assuming *arguendo*, the subsequent written settlement agreement supersedes the oral recitation of the terms placed on the record this Court believes the result would be the same.

This is due to the fact that this Court finds the written agreement to be reasonably susceptible to an interpretation that is consistent with the record made by the parties on May 18, 2000. While AISLIC argues that the definitional path could lead one to argue that its policy is released, that argument is not a reasonable interpretation or construction of the agreement itself. For example, the opening paragraph of the written settlement agreement contains a definition of the entity "American Home" which clearly does not include AISLIC in any release. Moreover, the definition of "policies" is unambiguously tied to the policies at issue in the *Jalisco* action; and finally, neither of the exhibits attached to the written agreement reference the AISLIC policy.

"When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is 'reasonably susceptible' to the interpretation urged by the party. If it is not, the case is over." ***Southern California Edison Co. v. Superior Court*** (1995)37 Cal. App. 4th 839, 851. "A contract is ambiguous when, on its face, it is capable of two different reasonable interpretations." ***United Teachers of Oakland v. Oakland Unified Sch. Dist.*** (1977) 75 Cal. App. 3d 322, 330. However, "[c]ourts will not strain to create an ambiguity where none exists." ***Waller***, 11 Cal. 4th at 18-19.

Here, the language urged by AISLIC to support its conclusion is not semantically reasonable to the interpretation that it suggests.

In ruling on a motion to enter judgment on an oral settlement before the court, the trial court acts as a trier of fact. It must determine whether the parties entered into a valid and binding settlement. To do so, it may receive oral testimony in addition to declarations. If the **same judge** presides over both the settlement and the section 664.6 hearing, the judge may avail himself or herself of the benefits of his or her own recollection. The appellate court then determines whether the trial court's ruling was supported by substantial evidence. **Kohn v. Jaymar-Ruby, Inc.** (1994) 23 Cal App 4th 1530. ³

It is axiomatic that when interpreting contracts, courts must stick to the four corners of the agreement. See CCP§ 1856. Parol evidence is inadmissible to vary the terms of a written contract. See e.g. **Dollar v. International Banking Corp.** (1910) 13 Cal App 331. However, when language used in the written contract is fairly susceptible to one of two constructions, extrinsic evidence may be considered not to vary or modify terms of agreement, but to aid the court in ascertaining the true intent of parties; not to show that parties meant something other than was said but to show what they meant by what they said. **Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co.** (1956) 46 Cal 2d 517.

While this Court does not believe AISLIC's interpretation would permit the introduction of parol evidence, an indulgence to that path would yield no change in the result. In fact, parol evidence greatly strengthens the arguments and position of Sunoco.

³ This is precisely the situation here. This Court served as the settlement judge and now serves as the trier of fact for the instant motion.

Sunoco's evidence regarding the intent of the parties demonstrates that there was no mutual intent by either side to release the AISLIC policy.

First, the settlement language as placed on the record limited the policies at issue to those in the **Jalisco** action itself. In that regard, there is no dispute that the AISLIC policy was not at issue in **Jalisco**.

Second the drafting history of the written agreement reflects no stated intent to release the AISLIC policy. The policy definition in earlier drafts of the written agreement mirror the oral agreement placed on the record. The drafting history reflects that the change to the current definition was intended to address the issue of Sunoco being an additional insured on some other entity's policies. **Moreover, the record is devoid of any evidence showing that the release of the AISLIC policy was ever discussed.** Additionally, it is to be noted that no new consideration was given for the alleged modification of the oral agreement placed on the record.

Third, when considering the conduct of the parties after the settlement but before the instant dispute, this Court finds that the parties themselves acted as if the policy was not released. For example, AISLIC continued to handle and pay claims under AISLIC policy no. 2676978; Lexington sought reinsurance recoveries for claims paid under its claims made policy after the **Jalisco** settlement; Lexington and AISLIC increased reserves under these policies after the **Jalisco** settlement; AIGTS did not identify either of these policies as released in the internal database; upon renewal, in late-2000, AISLIC policy 2676978 was identified as still being in full force and effect; AISLIC's outside counsel wrote a coverage opinion to the effect that the AISLIC policy was still in force and effect;

and AISLIC waited over 18 months after the claim was brought and one year after the settlement to deny coverage.

AISLIC has tried to explain these actions by suggesting that payment of the Heinz claims under the AISLIC policy was done pursuant to a gentlemen's agreement. However, there is no evidence of such an agreement other than Mr. White's testimony. Even Mr. White's conduct in this regard is inconsistent and incredulous. For example, Mr. White admitted that there is no writing reflecting this agreement. AIG's own internal policy memo in this regard, provides the following:

REMEMBER:
If it isn't documented...
it didn't happen

See AIG document Bates number: AIG 019087.

Additionally, Mr. White told Sunoco's brokers (two weeks before the Settlement) that three environmental claims that Sunoco had tendered under the AISLIC policy would be unaffected by the *Jalisco* action. Hence, even if the gentlemen's agreement theory is accepted, the deal itself was somewhat selective as to which claims would be accepted and which claims would not. Two of the claims submitted and accepted by AISLIC involved MtBE (Plymouth and Alexander Hamilton). So the alleged gentlemen's agreement was not just limited to the Heinz claim. Mr. White's own lawyer (Mr. Pepek) knew nothing about the gentlemen's agreement. In fact, AISLIC's own counsel wrote a reservation of rights letter finding coverage under the AISLIC policy for the MtBE claims.

Based on the record there are only two scenarios that AISLIC can pursue and both lead this Court to the conclusion that the AISLIC policy was not the subject of any release in the **Jalisco** settlement.

Under the first scenario, AISLIC contends that the subsequent written agreement conclusively establishes that the parties intended to broaden the oral settlement by including a release of the AISLIC policy. The problem with this scenario is that the evidence, the written agreement itself and the subsequent conduct of the parties do not show a **mutual intent** to release the AISLIC policy.

Under the second scenario, AISLIC argues that the definitional terms as set forth in the written settlement agreement operates to release the policy at issue. However, once again, there is no evidence of a **mutual intent** to support a release of the policy since the first paragraph of the settlement agreement precludes that result.

Conclusion

Based on the record, this Court finds and orders that the settlement of the **Jalisco** action placed on the record by the parties on May 18, 2000 (and subsequently memorialized in writing) is the agreement to be enforced. Specifically, to the extent that the subsequent written memorialization is interpreted to release the AISLIC policy, this Court finds no such release was intended by the parties. Thus, this Court finds that the AISLIC policy was neither released by the oral terms nor the subsequent written memorialization.

Accordingly, the ASLIC policy is in full force and effect and was not and has not been released by the **Jalisco** settlement.

Sunoco's motion to enforce the settlement agreement is **granted**.
Defendant AISLIC's motion for dismissal based on an alleged release of the
AISLIC policy is **denied**.

FEB 13 2008

Dated: _____

PETER D. LICHTMAN
Peter D. Lichtman
Judge of the Superior Court