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15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**

17 IN RE: REFORMULATED  
18 GASOLINE (RFG) ANTITRUST  
19 AND PATENT LITIGATION.

) MDL Case No. 05-1671 CAS (VBKx)

) Honorable Christina A. Snyder

)

) **Class Action**

20 This Document Relates To:

)

21 All Actions

) **MEMORANDUM OF POINTS AND**

) **AUTHORITIES IN SUPPORT OF**

) **MOTION FOR PRELIMINARY**

) **APPROVAL OF CLASS ACTION**

) **SETTLEMENT**

)

) [Filed Concurrently with Proposed Order,

) Notice of Unopposed Motion and Motion

) for Preliminary Approval of Class

) Action Settlement, and Declarations of

) Daniel Hume, R. Duane Westrup,

) Maxwell Blecher and Jenelle Welling in

) support of motion]

)

) Hearing: August 11, 2008

) Time 10:00 a.m.

) Courtroom: 5 – 2<sup>nd</sup> Floor

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This case arises from allegations that Defendants Union Oil Co. of California  
4 and Unocal Corporation (collectively, “Defendants” or “Unocal”) unlawfully obtained  
5 market power and engaged in unfair business practices by manipulating the California  
6 Air Resources Board (“CARB”) rule-making proceedings regarding emission  
7 standards for reformulated gasoline (“RFG”). Plaintiffs allege that California  
8 consumers were overcharged and have paid inflated prices at the gas pumps for their  
9 purchases of summertime RFG as a result of Defendants’ conduct. On September 12,  
10 2005, Plaintiffs filed their Consolidated Class Action Complaint in this Court alleging  
11 that Defendants violated California’s *Business & Professions Code* §§ 16720 *et seq.*  
12 (the “Cartwright Act”), *Business & Professions Code* §§ 17200 *et seq.* (the “Unfair  
13 Competition Law” or “UCL”), common law monopolization, and unjust enrichment  
14 (collectively, the “Federal Court Action”).<sup>1</sup>

15 In addition to the above-captioned Federal Court Action, three other lawsuits are  
16 coordinated and currently pending in the Superior Court of the State of California,  
17 County of Los Angeles making substantially similar allegations and purporting to  
18 represent a substantially similar or overlapping class (collectively, the “State Court  
19 Action”).<sup>2</sup> After two years devoted to jointly prosecuting the Federal Court Action  
20 and the State Court Action, the parties now present the proposed Settlement  
21 Agreement seeking global resolution of this litigation. Upon entry by this Court of a  
22 final approval of the Settlement Agreement in the Federal Action, pursuant to the  
23

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24 <sup>1</sup> Plaintiffs and appointed Class Representatives in the Federal Court  
25 Action include: Caleb Kleppner, Corrine Sealey, Christopher Sheppard, Stephen  
26 Buckser, Asher Rubin, Jeffrey Rubin, Corey Rosen and Gail Harper. Michael  
Shames has withdrawn as a Class Representative and has filed a Stipulation to  
Dismiss his individual claims.

27 <sup>2</sup> Plaintiffs in the State Court Action include: Carlos Lossada, William  
28 Jordan, Christopher Lorenzo, and Jennifer Haro.

1 parties' proposed Settlement Agreement, the State Court Action will be dismissed with  
2 prejudice.

3 Prior to reaching a resolution, the parties exchanged written discovery requests,  
4 produced over two million pages of documents, took dozens of depositions, briefed  
5 dispositive motions, hired experts, investigated applicable law, and engaged party  
6 representatives in numerous meetings and conferences. Following several months of  
7 hard fought negotiations, which included lengthy mediation sessions with Hon. Layne  
8 R. Phillips (Ret.) and Hon. Edward A. Infante (Ret.), nationally-recognized  
9 mediators, and numerous direct negotiations between counsel, Plaintiffs and  
10 Defendants have executed a Settlement Agreement, dated July 18, 2008, which is  
11 intended to resolve this litigation. Under the terms of the Settlement Agreement,  
12 Defendants will pay \$48,000,000 for the benefit of the Class previously certified by  
13 the Court. The Settlement, which contemplates a *cy pres* distribution, constitutes a  
14 good and fair result, given the totality of the circumstances facing Plaintiffs and the  
15 Class. For the reasons set forth herein, the Plaintiffs respectfully submit that the  
16 Court should preliminarily approve the parties' Settlement, approve the proposed plan  
17 of notice, and schedule a Fairness Hearing to consider final approval of the proposed  
18 settlement. *See* Fed. R. Civ. P., Rule 23(c)(2) & (e).

## 19 **II. NATURE OF THE LITIGATION**

### 20 **A. The Federal Action**

21 This litigation stems from claims that Unocal, in an effort to secure for itself an  
22 economic advantage in the highly competitive oil industry, actively manipulated,  
23 misled, and deceived CARB, a California state agency, along with industry  
24 associations, into adopting regulatory standards that overlapped with its undisclosed  
25 patents. Specifically, Plaintiffs allege that, despite Unocal's knowledge of its pending  
26 patents and probable issuance, Unocal did not disclose the existence of its patents and  
27 represented that its technology was "non-proprietary." Accordingly, Plaintiffs claim  
28

1 that a state agency, which had spent years investigating and researching feasible  
2 alternatives for reducing air pollution, had unwittingly selected standards for RFG  
3 that mandated the use of Unocal's technology. Plaintiffs allege that Unocal's anti-  
4 competitive conduct caused substantial harm to consumers of gasoline due to  
5 increased retail prices for RFG in California. These higher prices were passed on to  
6 consumers and arose from refiners' actual and potential liability for patent  
7 infringement legal liabilities, substantial costs incurred by refiners to "blend around"  
8 the patents, royalties paid by refiners, harm to supply in the market due to reluctance  
9 of importers to import RFG into California, and disincentives to refiners to make  
10 capital investments necessary to increase production of RFG.

11 This private civil litigation comes on the heels of governmental action by the  
12 Federal Trade Commission alleging Unocal committed fraud against a regulatory  
13 agency and engaged in anti-competitive activity in violation of the FTC Act. The  
14 FTC filed an administrative complaint on March 4, 2003 after discovering conduct  
15 suggesting that Unocal illegally acquired a monopoly on summertime RFG gas. A  
16 verdict was never reached in the FTC action, however, because while the matter was  
17 under submission following forty-three days of trial testimony, the FTC entered into a  
18 consent agreement with Unocal. On June 8, 2005, in exchange for approval of a  
19 merger between Unocal and Chevron Corporation, Unocal agreed to disclaim its RFG  
20 patents and cease enforcement of its RFG intellectual property rights, including  
21 collection of any future licensing fees, royalties, or other payments. As a result, the  
22 FTC action was withdrawn. Nonetheless, these private class action lawsuits against  
23 Unocal continued to seek recovery on behalf of the consumers of RFG for the  
24 allegedly supracompetitive prices already paid.

25 By mid-2005, there were several cases against Unocal pending in various  
26 district courts throughout California challenging Defendants' conduct. Therefore, on  
27 May 4, 2005 the Judicial Panel on Multidistrict Litigation transferred nine of these  
28

1 cases to this United States District Court for the Central District of California,  
2 pursuant to 28 U.S.C. § 1407. On September 12, 2005, Plaintiffs filed a consolidated  
3 Class Action Complaint against Unocal alleging claims for: (1) equitable and  
4 injunctive relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26; (2)  
5 common law monopolization; (3) violation of the Cartwright Act, *California Bus. &*  
6 *Prof. Code* § 16720 *et seq*; (4) violation of the Unfair Competition Law, *California*  
7 *Bus. & Prof. Code* § 17200 *et seq*; and (5) unjust enrichment. *See* Consolidated  
8 Amended Complaint (“CAC”), attached as Exhibit 1 to Declaration of Daniel Hume  
9 (“Hume Decl.”), filed concurrently herewith. Plaintiffs brought their action  
10 individually and as a class action pursuant to Fed. R. Civ. P. 23(b)(3) on behalf of  
11 “All consumers who purchased CARB-compliant summertime reformulated gasoline  
12 in the State of California at any time during the period from January 1995 to and  
13 including August 11, 2005.” CAC ¶ 176.

#### 14 **B. The State Action**

15 Similar to the Federal Court Action, three related cases against Unocal are  
16 currently pending in the Superior Court of the State of California, County of Los  
17 Angeles making substantially similar allegations and purporting to represent a  
18 substantially similar or overlapping class. These lawsuits are consolidated and  
19 coordinated as *In re CARB Compliant Gasoline Cases II*, Case No. JCCP 4449 and  
20 include *Lossada v. Union Oil Company of California*, Case No. BC324356; *Jordan*  
21 *et. al. v. Union Oil Company of California*, Case No. BC335521; and *Haro v. Union*  
22 *Oil Company of California*, Case No. CG04-43621. *See Lossada* Complaint and  
23 *Jordan* Complaint attached as exhibits, respectively, to the Declaration of Maxwell  
24 M. Blecher (“Blecher Decl.”) and to the Declaration of R. Duane Westrup (“Westrup  
25 Decl.”) and Declaration of Jenelle Welling (“Welling Decl.”) filed concurrently  
26 herewith. On October 5, 2006, prior to any class certification, the Hon. Judge  
27 Anthony J. Mohr stayed these cases pending the outcome of the Federal Court  
28

1 Action. Judge Mohr did permit, however, the parties to engage in joint discovery  
2 with the federal litigation so as to eliminate duplicative efforts.

3 Accordingly, from October 2006 through the summary judgment briefing prior  
4 to Settlement, Plaintiffs and counsel for the State Court Action, actively participated  
5 in the prosecution of the Federal Court Action. For example, counsel for the State  
6 Court Action reviewed documents, developed case strategy, conducted legal research,  
7 edited briefs, drafted stipulations of fact, took and defended depositions, drafted legal  
8 memoranda, responded to discovery, and participated in settlement negotiations.  
9 Thus, Plaintiffs in the Federal Court Action and Plaintiffs in the State Court Action,  
10 through their counsel, have jointly prosecuted their claims and potential claims  
11 against Defendants through cooperative investigation, motion practice, and extensive  
12 discovery. Further, Plaintiffs in the State Court Action are willing to submit to this  
13 Court's jurisdiction for purposes of effectuating the jointly proposed Settlement  
14 Agreement seeking global resolution of the State Court Action and the Federal Court  
15 Action (collectively, "Plaintiffs").

### 16 **C. Procedural History**

17 On September 26, 2005, Unocal filed a motion to dismiss the Consolidated  
18 Amended Complaint challenging jurisdiction and asserting immunity, failure to state  
19 a claim, statute of limitations, claim preclusion, and other pleading defects. *See*  
20 Docket Entry Nos. 32 and 34. While Defendants' dismissal was pending, parties to  
21 both the federal and state court cases engaged in an all day mediation before the Hon.  
22 Layne R. Phillips (Ret.) of JAMS in Los Angeles. Unfortunately, that mediation did  
23 not lead to resolution of the case. On June 21, 2006, the Court dismissed Plaintiffs'  
24 Clayton Act claim, and upon deciding to exercise supplemental jurisdiction pursuant  
25 to 28 U.S.C. § 1367, denied the remainder of Defendants' motion to dismiss as to  
26 Plaintiffs' other causes of action. *See* Docket Entry No. 63.

1 After conducting extensive discovery, including written discovery, depositions,  
2 review of volumes of transcripts from the FTC litigation, and assistance from an  
3 economics expert, Plaintiffs filed their Motion for Class Certification. The  
4 certification issues were fully briefed by both parties and came on for hearing on  
5 March 19, 2007. By Order dated March 27, 2007, the Court certified this lawsuit to  
6 proceed as a class action pursuant to Fed. R. Civ. P. Rule 23(b)(3) and certified a  
7 Class comprised of:

8 All consumers who purchased CARB-compliant summertime  
9 reformulated gasoline in the State of California at any time during the  
10 period from January 1995 to and including August 11, 2005. Excluded  
11 from the Class are governmental entities, defendants, their co-  
12 conspirators, along with all of their respective parents, subsidiaries,  
13 and/or affiliates, and any and all judges and justices assigned to hear any  
14 aspect of this litigation. [*See* Docket Entry No. 98.].

15 Following certification, the parties re-attempted settlement negotiations and  
16 participated in two full day mediation sessions before the Hon. Edward A. Infante  
17 (Ret.) of JAMS in San Francisco. Nonetheless, the parties were unable to reach  
18 agreement at that time.

19 Thereafter, the parties resumed their discovery efforts, focusing on merits and  
20 damages issues in preparation for a trial in June 2008. During this time, Plaintiffs'  
21 counsel reviewed over two million pages of documents, took over 30 depositions, and  
22 met and conferred with Defendants regarding designating testimony from prior  
23 litigation. On November 2, 2007, Defendants filed a motion for summary judgment  
24 based on three discrete issues: (1) the existence (or lack thereof) of a conspiracy  
25 required for a Cartwright Act violation; (2) immunity for Unocal's conduct pursuant  
26 to the *Noerr-Pennington* doctrine; and (3) the viability (or lack thereof) of a common  
27 law monopolization claim. *See* Docket Entry Nos. 116 and 117. Recognizing the  
28 risks attendant with the novelty of the issues pending before the Court, the parties re-  
instituted settlement negotiations with the assistance of Judge Infante. These

1 negotiations spanned several days of informal and telephonic conferences between  
2 experienced counsel from both the federal and state forums and resulted in the present  
3 Settlement. *See* Stipulation Of Settlement (“Settlement Agreement”) attached as  
4 Exhibit 2 to Hume Decl.

5 **D. Defendants’ Denial Of Wrongdoing**

6 Defendants assert a variety of defenses and deny any wrongdoing or legal  
7 liability with regard to any and all of the claims asserted in this litigation. Defendants  
8 contend, for example, that they are immune from prosecution under the *Noerr-*  
9 *Pennington* doctrine because the CARB proceedings were political and/or legislative  
10 in nature. Further, Defendants argue that Unocal’s conduct was unilateral and that  
11 there was no combination of resources with another independent entity, a necessary  
12 element of a Cartwright Act claim. Moreover, Defendants maintain that California  
13 does not recognize a claim for common law monopolization. Finally, should the  
14 litigation proceed past summary judgment on these issues, Defendants anticipate  
15 raising additional defenses based on the four-year statute of limitations and claim  
16 preclusion arising from the stipulated release in *Aguilar v. Atlantic Richfield Corp.*,  
17 No. 00700810 (San Diego Sup. Ct. June 12, 1996).

18 Defendants nevertheless desire to settle the class actions and claims asserted on  
19 the terms and conditions set forth in the Settlement Agreement, for the purpose of  
20 avoiding the burden, expense, and uncertainty of continuing litigation, and for the  
21 purpose of putting to rest the controversies advanced by the litigation. Should this  
22 litigation not resolve, the parties believe that there are legitimate factual and legal  
23 issues in dispute that will undoubtedly be vigorously contested in future legal  
24 proceedings.

25 As explained above (and in more detail below) the present class action  
26 settlement was reached after arm’s-length negotiations by experienced counsel on  
27 both sides. The terms of this Settlement, as outlined below, are an excellent result  
28

1 achieved by experienced Plaintiffs' and Defendants' counsel with the aid of  
2 experienced mediator, Hon. Edward A. Infante (Ret.).

### 3 **III. SUMMARY OF THE SETTLEMENT TERMS**

4 Plaintiffs and Defendants have agreed to a settlement of their lawsuit on a  
5 class-wide basis. In short, the Settlement provides that Defendant will pay  
6 \$48,000,000 into an escrow account. The Settlement Agreement also provides for a  
7 specific release of Class Members' claims. This release will forever terminate this  
8 litigation once the Settlement becomes effective as defined in the Settlement  
9 Agreement. The common fund ("Settlement Fund") will be used to pay the cost of a  
10 notice program approved by the Court. The Settlement Agreement further provides  
11 that Plaintiffs' Counsel may apply to the Court for an award of attorneys' fees not to  
12 exceed one-third of the Settlement Fund, plus reimbursement of all Court-approved  
13 expenses. Upon final approval, the remainder of the Settlement Fund will be  
14 distributed to *cy pres* recipients pursuant to the *Cy Pres* Plan of Allocation. This Plan  
15 of Allocation has two principal parts: (1) at the time of final approval, 75% of the net  
16 proceeds would be distributed through the Foundation for the California Community  
17 Colleges ("FCCC") using FCCC's infrastructure to implement various air quality  
18 programs, including, principally a program to "Identify and Repair or Scrap" high  
19 emitting vehicles state-wide in California; and (2) the remaining 25% of the net  
20 settlement proceeds would be distributed, with court approval, through a Grant  
21 Program based on applications by organizations demonstrating clean air or fuel  
22 benefits. This program would be implemented after final approval.

#### 23 **A. Award to The Foundation for California Community Colleges**

24 The funds allocated to this grant would provide funding for a program to  
25 "Identify and Repair or Scrap" (the "Repair or Scrap Program") high emitting  
26 vehicles under the administration of the FCCC. The FCCC is operating a pilot  
27 program in the South Coast Air Quality Management District (SCAQMD) under the  
28

1 Carl Moyer Program Guidelines. The *cy pres* grant would permit the FCCC to  
2 expand the program to other parts of California and assist the FCCC by providing  
3 funds to purchasing additional testing equipment. Funds would be used to provide  
4 cash incentives to either repair or replace high emitting vehicles thereby both  
5 reducing air pollutants and encouraging the purchase of more fuel-efficient  
6 automobiles.

7 The FCCC is the official auxiliary to the California Community Colleges'  
8 Board of Governors. Its mission is to benefit, support, and enhance the missions of  
9 the California Community College system. The Foundation receives no direct state or  
10 public support and is a qualified 501(c)(3) tax-exempt nonprofit corporation with  
11 special legal status as a public agency for contracting purposes.

12 The FCCC is currently operating a pilot program in the South Coast Air  
13 Quality Management District (SCAQMD) under the guidelines set by the Carl Moyer  
14 Memorial Air Quality Standards Attainment Program ("Moyer Program"). The  
15 Moyer Program which is administered by the California Air Resources Board  
16 ("CARB") provides incentive grants for engines, equipment and other sources of  
17 pollution for the purpose of achieving earlier or extra emissions reductions. The  
18 contemplated allocation of this portion of the award to the FCCC, however, is not part  
19 of the Moyer Program nor would it be administered by the Moyer Program or by  
20 CARB. The expectation of this grant to the FCCC to be administered over a four-year  
21 period is that the Repair/Scrap Program would be expanded and available to other Air  
22 Quality Management Districts throughout California and not subject to Moyer  
23 Program guidelines in order to achieve greater flexibility in emissions reduction  
24 potential. Further, the *cy pres* grant would permit the FCCC to purchase additional  
25 testing equipment to achieve additional emissions and particulate reductions benefits.  
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1           **B. Grant Awards to Clean Air and Fuel Benefit Programs**

2           This program would be implemented after final approval of the settlement has  
3 been granted. The funds allocated to this program would be distributed pursuant to  
4 grant applications submitted by organizations to fund programs that can demonstrate  
5 clean air or fuel benefits. Counsel will submit Application Guidelines and an  
6 Application form to the Court as part of the final approval motion. At the time of final  
7 approval, the Program Guidelines and Application forms would be posted on the  
8 Settlement Website with an announcement setting the deadline for submitting grant  
9 applications. Plaintiffs, with the assistance of a technical advisor to be retained if the  
10 court approves the settlement, will evaluate the applications in accordance with the  
11 Program Guidelines, and then in consultation with defendant, will prepare a report to  
12 the Court recommending the grant recipients and the amounts to be awarded to each.  
13 The report and a proposed distribution order would then be presented to the Court for  
14 its review and approval.

15           The key terms of the Settlement Agreement are as follows:

16           1.    Class Definition: The Class is defined as certified by the Court on  
17 March 27, 2007: “All consumers who purchased CARB-compliant summertime  
18 reformulated gasoline in the State of California at any time during the period from  
19 January 1995 to and including August 11, 2005. Excluded from the Class are  
20 governmental entities, defendants, their [alleged] co-conspirators, along with all of  
21 their respective parents, subsidiaries, and/or affiliates, and any and all judges and  
22 justices assigned to hear any aspect of this litigation.” Settlement Agreement at ¶ 1.  
23 Further, “Class Members” means each and every member of the Class who does not  
24 timely and validly elect to be excluded from the Class. Settlement Agreement at ¶ 2.

25           2.    Settlement Amount: Defendants agree to a total payout settlement of  
26 forty-eight million dollars (\$48,000,000) cash into an interest-bearing escrow  
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1 account, with designated signatories from the Federal Court Action and State Court  
2 Action, the Settlement Fund. Settlement Agreement at ¶¶ 8, 10.

3 3. Deductions: Includes Court-authorized costs of reasonable notice,  
4 administration, tax expenses, attorneys' fees (up to one-third (33%) of the Settlement  
5 Fund), Plaintiffs' reasonable costs and expenses, and incentive awards to each named  
6 Plaintiff in the Federal Court Action and the State Court Action (not to exceed \$2,500  
7 per Plaintiff). Further, any dispute among Plaintiffs' counsel as to the allocation and  
8 division of any aggregate attorneys' fee award that cannot be resolved by negotiation  
9 or alternative dispute resolution shall be submitted to the Court for disposition.  
10 Settlement Agreement at ¶¶ 8, 12, 13.

11 4. Award Allocation: After Court-authorized deductions described *supra*,  
12 the remaining funds shall be distributed in the form of *cy pres* payment(s) to one or  
13 more qualified recipients agreed to by the parties and approved by the Court. The *cy*  
14 *pres* distribution shall be designed to achieve a fuel or air emissions benefit to the  
15 Class. Settlement Agreement at ¶ 14.

16 5. Notice And Opt-Out Procedure: The parties to this Settlement  
17 Agreement contemplate that, prior to final approval, appropriate notice of: 1) the  
18 Settlement; 2) the Fairness Hearing at which the Court will consider the approval of  
19 this Settlement; and 3) the right of members of the Class to elect to excluded  
20 themselves from the Class or to object - will be given to members of the Class.  
21 Settlement Agreement at ¶ 21. The parties contemplate that notice will be  
22 disseminated in accordance with the proposed Notice Program, which includes an  
23 established web page, press release, and summary notice published in newspaper  
24 publications throughout California. *See* Notice Program, attached as Exhibit 3 to  
25 Hume Decl. Plaintiffs will hire a settlement claims administrator, Complete Claims  
26 Solutions LLC, who will establish a toll-free number for members of the Class to  
27 request copies of the Notice. *See* [Proposed] Notice Of Pendency Of Class Action  
28

1 And Proposed Settlement, attached as Exhibit 4 to Hume Decl. The claims  
2 administrator shall also process the opt-outs received.

3 6. Release: Class members who do not opt out of the class action are  
4 forever barred from bringing antitrust, unfair competition, unfair and deceptive trade  
5 practices, price discrimination, consumer protection, and other similar claims with  
6 respect to any and all purchases of RFG, which have been or could have been asserted  
7 in the Federal Court Action or State Court Action. The release does not apply to  
8 claims not related to, or arising from, claims of the type alleged or argued in the  
9 Federal Court Action or the State Court Action, for example, including without  
10 limitation: personal injury claims, product defect claims, ERISA claims, securities  
11 claims, negligence, and tort claims. The release may also be asserted by Chevron  
12 Corporation, as a successor-in-interest to Defendants by way of its acquisition of  
13 Defendants in August 2005, but only to the extent Defendants are released.  
14 Settlement Agreement at ¶ 25.

#### 15 **IV. THE COURT SHOULD PRELIMINARILY APPROVE THE** 16 **PROPOSED SETTLEMENT**

##### 17 **A. Standards For Approval**

18 Rule 23(e) of the Federal Rules of Civil Procedure requires court approval of  
19 any settlement of a certified class action. Approval of a proposed settlement in a  
20 class action is discretionary with the court. *DeBoer v. Mellon Mortgage Co.*, 64 F.3d  
21 1171, 1176-77 (8th Cir. 1995). To meet the court's approval, "it is well-settled that a  
22 proposed settlement, taken on the whole, need only be fair, adequate, and reasonable  
23 in light of the interests of all the parties and not the product of fraud or collusion." *In*  
24 *re Chicken Antitrust Litig.*, 560 F. Supp. 957, 960 (N.D.Ga. 1980). In making such a  
25 determination the court should not engage in a trial on the merits. The policy  
26 favoring settlements could not be achieved "if the test on hearing for approval meant  
27 establishing success or failure to a certainty." *In re Corrugated Container Antitrust*  
28

1 *Litig.*, 643 F.2d 195, 212 (5th Cir. 1981) (quoting *Florida Trailer & Equipment Co. v.*  
2 *Deal*, 284 F.2d 567, 571 (5th Cir. 1960)).

3 **B. The Proposed Settlement Satisfies The Requirements For**  
4 **Preliminary Approval**

5 **1. The Settlement Negotiations Occurred At Arm's-Length.**

6 Here, the Settlement Agreement was reached after vigorous arms-length  
7 negotiations by experienced counsel on both sides and with the aid of two highly  
8 respected mediators who are retired Judges. Hume Decl. at ¶¶ 7, 8. The Settlement  
9 was negotiated over a period of months and was ultimately concluded with the  
10 mediation assistance of Judge Infante. Hume Decl. at ¶¶ 9, 10. All in all, the  
11 settlement process spanned more than one year and the dynamic shifted with each  
12 litigation event. Because of the extensive bargaining process employed throughout  
13 the settlement process, there can be little doubt that the Settlement Agreement was the  
14 product of good-faith negotiations.

15 **2. Plaintiffs' Counsel Engaged In Sufficient Discovery To Make**  
16 **An Informed Judgment Concerning The Merits Of Their**  
17 **Claims.**

18 The stage of the proceedings and the amount of discovery completed at the  
19 time a settlement is reached is relevant to the parties' knowledge of the strengths and  
20 weaknesses of the various claims in the case, and consequently affects the  
21 determination of the settlement's fairness. "Through this lens, courts can determine  
22 whether counsel had an adequate appreciation of the merits of the case before  
23 negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir.  
24 2004) (quoting *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) (internal  
25 citation omitted)).

26 Plaintiffs' counsel here certainly had an appreciation of the merits before  
27 reaching the proposed Settlement. Counsel in both forums have been actively  
28 engaged in this litigation for over three years and have diligently pursued the

1 necessary discovery. Plaintiffs' counsel reviewed in excess of two million pages of  
2 documents produced by Unocal and third parties, including, but not limited to,  
3 volumes of depositions, exhibits, and testimony produced in the 43-day FTC  
4 administrative trial and previous patent litigation. Hume Decl. at ¶ 4. Plaintiffs also  
5 deposed over 30 witnesses comprising of former Unocal and Chevron employees,  
6 witnesses from oil companies, the California Air Resources Board ("CARB"), oil and  
7 industry trade groups, and industry experts. Hume Decl. at ¶ 3. Plaintiffs' counsel  
8 further engaged four expert testifying witnesses: Dr. Janet Netz, and Dr. Robert Hall,  
9 expert economists experienced in antitrust cases; David Hirshfield, an industry expert  
10 specializing in economic analysis of the petroleum industry; and Thomas L.  
11 Darlington, an expert in emissions modeling. Hume Decl. at ¶ 5.

12 As the Court is aware, the parties also engaged in extensive law and motion  
13 practice. Hume Decl. at ¶ 6. Significantly, despite having a factually well-developed  
14 case, both sides still face significant uncertainty because of the novelty of the factual  
15 and legal issues. More than any other factor, the risks Plaintiffs face on the merits are  
16 best reflected in the arguments raised by Defendants in their possibly dispositive  
17 Motion For Summary Judgment, pending resolution at the time of settlement. The  
18 circumstances and attendant risks favor settlement. *See Hanlon v. Chrysler Corp.*,  
19 150 F.3d 1011, 1026 (9th Cir. 1998).

### 20 **3. The Proponents Of The Settlement Are Highly Experienced** 21 **Class Action Litigators.**

22 Plaintiffs' counsel have considerable experience in handling complex class  
23 action in general, and antitrust and consumer class actions in particular. The Court  
24 has previously determined that Plaintiffs' counsel in the Federal Court Actions are  
25 adequate representatives of the Class. *See* Docket Entry No. 98, at p. 8 (stating that  
26 "It appears to the Court that the named plaintiffs and their counsel will adequately  
27 represent the class."). In addition to the recognized qualifications of Class Counsel,  
28

1 the Class is further benefited by the substantial experience of Plaintiffs' counsel in the  
2 State Court Actions. The law firms representing Plaintiffs in the State Court Actions  
3 are involved in several other class actions. *See* Westrup Decl. at ¶ 8, Blecher Decl. at  
4 ¶ 7, Welling Decl. at ¶ 3 (detailing the experience of Plaintiffs' counsel in the State  
5 Court Action). Given this experience, Plaintiffs' counsel have developed in-depth  
6 knowledge of the applicable law. For purposes of this preliminary approval motion,  
7 experienced and competent counsel believe that the proposed settlement, in the  
8 circumstances of this case, is fair, reasonable and adequate. This factor heavily  
9 favors preliminary approval.

10 **4. The Settlement Is Within The Range Of Possible Approval.**

11 **a) The Amount of Recovery**

12 A recovery of \$48,000,000, minus Court-authorized deductions, fairly reflects  
13 the strength of Plaintiffs' claims. The determination of a "reasonable" settlement is  
14 not susceptible to a mathematical equation yielding a particularized sum.

15 **b) Cy Pres Distribution**

16 The Ninth Circuit and other courts have recognized that cy pres distributions  
17 are proper and frequently part of class action settlements. *See, e.g., Six (6) Mexican*  
18 *Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990) (permitting use of  
19 *cy pres* distribution, generally, but disapproving of cy pres ordered as part of a  
20 judgment, not a negotiated settlement, absent a defined purpose, distribution  
21 procedure, and assurances that the class itself would benefit); *Keele v. Wexler*, 149  
22 F.3d 589, 592 (7th Cir. 1998) (approving *cy pres* contribution to legal aid  
23 foundation); *In re Three Mile Island Litig.*, 557 F. Supp. 96, 97 (M.D.Pa. 1982)  
24 (approving settlement provided for \$20 million to claimants and \$5 million to finance  
25 public health studies and evacuation planning).

26 Particularly in cases like this, where it will be difficult to identify Class  
27 Members - consumers of CARB-compliant summertime RFG who purchased  
28

1 gasoline within the State of California during a ten-year period - a *cy pres* distribution  
2 is useful. *See, e.g., Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997)  
3 (finding *cy pres* recovery ideal where “it is difficult or impossible to identify the  
4 persons to whom damages should be assigned or distributed”); *Simer v. Rios*, 661  
5 F.2d 655, 675 (7th Cir. 1981) (finding *cy pres* recovery useful where class members  
6 “are not likely to come forward and prove their claims or cannot be given notice of  
7 the case”); *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1031-32 (N.D.  
8 Ill. 2000) (approving *cy pres* contribution where class includes undocumented  
9 persons who may be reluctant to seek settlement benefits regardless of how simple  
10 the claims procedures). Here, the size, geographic dispersion, and mobility of Class  
11 Members are likely to render Class Members impossible to locate.

12 Further, antitrust class actions often aggregate the relatively small claims of  
13 consumers in order to attack wrongful business practices, so it is not unusual for there  
14 to be settlement in an amount that, for practical purposes, cannot be distributed  
15 directly to class members. For example, in *State of N.Y. ex rel. Koppell v. Keds*  
16 *Corp.*, No. 93 CIV. 6708 (CSH), 1994 WL 97201 (S.D.N.Y. Mar. 21, 1994), over  
17 five million purchasers of Keds shoes suffered damages between \$1 and \$1.25 per  
18 pair due to alleged price-fixing. The Attorneys General of the fifty states brought a  
19 consumer antitrust action and settled it for injunctive and monetary relief in the  
20 amount of \$7.2 million. Of the \$7.2 million, \$5.7 million was distributed to the fifty  
21 states, and through the states to designated charities or to any other charity benefiting  
22 women aged 15 to 44, the population that primarily purchased the price-fixed shoes.  
23 The court held that “[i]n these circumstances, the *cy pres* resolution adopted by the  
24 settlement agreements is reasonable and adequate.” *Id.* at \*3.<sup>1</sup> Given the size of the  
25

26 <sup>3</sup> *See also Bourlas v. Davis Law Assoc.*, 237 F.R.D. 345, 356 (E.D.N.Y.  
27 2006) (granting preliminary approval to proposed *cy pres* settlement); *New York v.*  
28 *Salton, Inc.*, 265 F. Supp. 2d 310, 314 (S.D.N.Y. 2003) (approving *cy pres*  
distribution to non-profit or governmental entities); *In re Toys “R” Us Antitrust Litig.*,  
191 F.R.D. 347, 353 (E.D.N.Y. 2000) (approving proposed settlement and certifying  
(continued)

1 class, which is estimated in the tens of millions, and the small size of any individual  
 2 recovery, the cost of identifying and administering any claims process would  
 3 consume the entire settlement.

4 Here, the *cy pres* contribution will benefit Class Members who may never be  
 5 identifiable by funding charitable and public interest projects that strive to achieve  
 6 fuel or air emissions benefits. Moreover, California drivers (*i.e.*, class members)  
 7 who receive cash incentives to repair or replace their old, smog producing vehicles  
 8 will receive direct benefits from the settlement. The repairs also have the effect of  
 9 increasing fuel efficiency, providing another direct economic benefit to the class. The  
 10 other key benefit to the class is the reduction of air emissions caused by motor  
 11 vehicles, which is in harmony with the alleged misconduct before CARB which  
 12 formed the gravamen of the case.

### 13 **5. The Settlement Provides For A Comprehensive Notice** 14 **Program.**

15 The method of notice described in the Notice Program, see Exhibit 3 to Hume  
 16 Decl., is reasonably calculated to reach the Class Members by the best means  
 17 practicable under the circumstances, and should, therefore, be approved. The  
 18

19 \_\_\_\_\_  
 20 class, noting that the “decision to forego individual recoveries was sensible, given the  
 21 difficulty of identifying proper claimants and the difficulty, especially the costs, that  
 22 such recoveries and their administration would have entailed.”); *Ramos v. Philip*  
 23 *Morris Companies, Inc.*, 743 So. 2d 24, 32 (Fla. Dist. Ct. App. 1999) (upholding  
 24 settlement where \$300 million class recovery was used to establish research  
 25 foundation); *New York v. Reebok Int’l. Ltd.*, 96 F.3d 44, 49 (2d Cir. 1996) (finding  
 26 that the “impracticality of attempting to distribute the settlement proceeds among the  
 27 multitude of unidentified possible claimants is obvious”); *In re Agent Orange Prod.*  
 28 *Liab. Litig.*, 818 F.2d 179, 184-85 (2d Cir. 1987) (approving use of portion of  
 settlement fund to fund assistance programs for the class as a whole where  
 distribution to individuals was not feasible), *cert. denied*, 487 U.S. 1234 (1988);  
*Williams Foods, Inc. v. Eastman Chem. Co.*, No. 99C16680, 2001 WL 1298887, at  
 \*10 (D. Kan. Aug. 8, 2001) (stating “The Court finds that a *cy pres* award in the  
 amount of \$25,000 each to the United Community Services of Johnson County and  
 the Children’s Therapeutic Learning Center is fair, reasonable and adequate”).

1 proposed Notice informs the Class that, upon final approval, this case will be over  
2 and preserving their claims, if any, will require them to opt-out.

3 These factors militate in favor of preliminary approval of the proposed  
4 Settlement, as it is within the range of what is fair, reasonable, and adequate under the  
5 circumstances.

6 **V. THE FORM AND METHOD OF CLASS NOTICE SHOULD BE**  
7 **APPROVED**

8 **A. The Form And Method Of Class Notice Should Be Approved**

9 If preliminary approval is granted, notice of the proposed settlement, dismissal,  
10 or compromise must be given to all class members in such a manner as the Court  
11 directs. Fed. R. Civ. P., Rule 23(e). Accordingly, the parties seek Court approval of  
12 the proposed form of Notice to be disseminated in the manner set forth in the  
13 proposed Notice Program. *See* Exhibits 3 and 4 to Hume Decl.

14 The class notice should fairly apprise class members of the gist of the claims  
15 raised in the action, the basic terms of the proposed settlement, the options available  
16 to class members (*e.g.*, submitting a claim form, opting-out, and/or objecting),  
17 explain the procedures for allocating and distributing settlement funds, indicating a  
18 time and place of the hearing to object to the settlement indicating the time and place  
19 for the court to consider approval of the settlement and prominently display the  
20 address and phone number of class counsel and the procedures for making inquiries.  
21 *Manual for Complex Litigation*, § 21.312 (4<sup>th</sup> ed. 2004); *Marshall v. Holiday Magic*,  
22 550 F.2d 1173, 1178 (9th Cir. 1977). As seen in the proposed Notice, these standards  
23 are clearly met. In fact, the proposed Notice goes beyond those standards. The  
24 proposed Notice, which combines both notice of class certification and settlement,  
25 have been routinely approved by courts. *See, e.g., Weinberger v. Kendrick*, 698 F.2d  
26 61, 72 (2d Cir. 1982).

1 Class notice by newspaper publication has been held to satisfy due process, and  
2 thus, constitute sufficient notice. In *In re Domestic Air Transp. Antitrust Litig.*, 141  
3 F.R.D. 534 (N.D.Ga. 1992), the court approved plaintiffs' proposed plan of class  
4 notice by publication and public awareness programs because of the inability to  
5 identify members of the class. The court noted, "Notice by publication...has been  
6 approved in several consumer class actions. In addition, there is no question that  
7 publication notice is constitutionally sufficient as to those persons who cannot be  
8 identified and therefore individually notified." *Id.* at 550-51 (citations omitted). *See*  
9 *also Eisen v. Carlisle*, 417 U.S. 156, 166-67, 173-75 (1974); *New York v. Nintendo of*  
10 *Am. Inc.*, No. 91 CIV 2498, 1991 WL 148830, at \*3 (S.D.N.Y. July 31, 1991)  
11 (approving publication notice of proposed settlement in nationwide class action and  
12 noting that courts have upheld newspaper publication to disseminate notice of  
13 settlement in class actions under Federal Rule 23). Due process does not require that  
14 class members actually receive notice, but rather, requires a procedure reasonably  
15 certain to reach class members. *Mullane v. Central Hanover Bank & Trust Co.*, 339  
16 U.S. 306 (1950). Further, if appropriate notice is given, class members will be bound  
17 by the judgment even if they never actually receive the notice. *Fontana v. Elrod*, 826  
18 F.2d 729, 732 (7th Cir. 1987).

19 As in *In re Domestic Air Transp.*, *supra*, Class Members here are not readily  
20 identifiable because they are indirect purchasers of RFG, cash consumers, and records  
21 of their gasoline purchases during the relevant class period have undoubtedly been  
22 lost or discarded. Accordingly, notice of publication is constitutionally sufficient for  
23 Class Members.

#### 24 **B. The Court Should Schedule A Hearing On Final Approval**

25 Following adequate notice to class members, a hearing is held on the proposed  
26 settlement. Manual for Complex Litigation, § 21.633. Accordingly, it is requested  
27 that the Court schedule a hearing for final approval of the Settlement and set a cut-off  
28

1 date for Class Members to opt-out or object. The hearing on final settlement approval  
2 should be scheduled now so that the date can be disclosed in the Notice. Cut-off  
3 dates for submission of opt-out requests and objections must be established so that the  
4 parties can determine, at some specified date, the actual membership in the Class.  
5 The parties are prepared to cause notice to be disseminated and published, as  
6 approved by the Court, within seven (7) days of entry of the preliminary approval  
7 order of this Settlement. The parties suggest that the cut-off date for mailing opt-out  
8 requests and submitting objections be set for a date sixty-seven (67) days after the  
9 notice program begins. This will provide sufficient time for members of the Class to  
10 decide whether or not they wish to participate in this class action and Settlement. Not  
11 later than ten (10) calendar days after the date fixed by the Court for Class Members  
12 to opt-out, Plaintiffs' counsel shall provide, in writing, to Defendants' counsel and the  
13 Court, a complete list of any opt-outs. To this end, Plaintiffs recommend that the  
14 hearing on final approval of the Settlement be set for November 3, 2008.

## 15 VI. CONCLUSION

16 For the reasons stated above, the Court should: 1) preliminarily approve the  
17 Settlement; 2) approve the form and method of class notice; 3) approve the proposed  
18 procedure for members of the Class to object and/or opt-out; and 4) schedule a  
19 hearing for final approval of the class action Settlement on November 3, 2008.

20 Date: July 21, 2008

Respectfully submitted,

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