

**ENDORSED  
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San Francisco County Superior Court

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19 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

20 COUNTY OF SAN FRANCISCO

21 (UNLIMITED JURISDICTION)

22 JOEL I. ROOS and TOM SANTOS, on  
23 behalf of themselves and all others  
24 similarly situated,

25 Plaintiffs,

26 v.

27 HONEYWELL INTERNATIONAL,  
28 INC. and DOES 1-100, inclusive,

Defendants.

Case No. CGC 04-436205 (RAK)

CLASS ACTION

**SECOND AMENDED COMPLAINT**

[Cartwright Act, Common Law Monopolization  
and Unfair Competition Law]

**JURY TRIAL DEMAND**

1  
2 Plaintiffs JOEL I. ROOS and TOM SANTOS, on behalf of themselves and all others  
3 similarly situated (collectively “plaintiffs”), and demanding trial by jury, complain and allege  
4 upon information and belief as follows:

5 **SUMMARY OF CASE**

6 1. Plaintiffs bring this Cartwright Act (Bus. & Prof. Code section 16700, et seq.) Unfair  
7 Competition Law (Bus. & Prof. Code section 17200, et seq.) and Common Law Monopolization  
8 case individually and as a class action on behalf of a consumer or end-user class consisting of  
9 all persons who purchased, in California, for their own use and not for resale Honeywell  
10 International, Inc. (“Honeywell”) circular thermostats, known as “rounds” or “HRT” indirectly  
11 from defendants during the Class Period (as defined below).

12 2. Honeywell has engaged in anticompetitive practices to exclude potential competitors  
13 from manufacturing and selling circular thermostats. Honeywell misrepresented that it had a  
14 proper trademark for the thermostats, engaged in a pattern of threatening rival thermostat  
15 manufacturers with litigation so as to discourage such rivals from competing in the circular  
16 thermostat market, entered into combinations and agreements with potential competitors in  
17 unreasonable restraint of trade to cement foreclosure of entry into the market and entered into a  
18 series of exclusive dealing contracts with Heating Ventilation and Air Conditioning (“HVAC”)   
19 original equipment manufacturers (“OEM”), premised in part on the bogus trademark claims  
20 that also foreclosed competition in the relevant market. However, as found by the United States  
21 District Court for the Southern District of Indiana, Honeywell had acquired its trademark by  
22 deceiving the U.S. Patent Office (the “PTO”) and withholding material information from the  
23 PTO. Honeywell also made secret arrangements with a rival thermostat manufacturer to  
24 prevent the PTO from learning of competing circular thermostat products, entered into  
25 anticompetitive agreements with other rivals and took other actions to suppress competition. It  
26 even made bogus trademark claims before it deceived the PTO and employed inequitable  
27 conduct to get the HRT trademark.



1 and equitable remedies as a result of defendants’ unlawful, unfair or fraudulent business  
2 practices alleged herein, as prohibited by Business and Professions Code section 17200 *et. seq.*,  
3 the Unfair Competition Law (“UCL”). Defendant’s violations of the UCL include business acts  
4 and practices constituting violations of the UCL that are distinct and independent of the  
5 violations of the Cartwright Act.

6 12. Plaintiffs’ claims also arise and are brought for violations of the common law of  
7 monopolization for injunctive relief, compensatory and punitive damages.

8 13. This Court has jurisdiction over the subject matter of this action pursuant to Business  
9 & Professions Code section §16750(a) (Cartwright Act) and Business & Professions Code  
10 section §17203 (UCL). Jurisdiction may also be exercised over defendant by virtue of the  
11 California long-arm statute, Code of Civil Procedure section 410.10 and the jurisdictional  
12 provisions of Code of Civil Procedure section 410.50. Defendant’s anticompetitive acts,  
13 practices, policies and facilitating devices as alleged herein occurred within the State of  
14 California and affected commerce therein.

15 14. Defendant resides or is found, or its agents reside or are found, within this county.

16 15. This complaint is not based on federal law and does not arise under, or relate to  
17 federal law and plaintiff’s right to relief does not depend upon resolution of any substantial  
18 questions of federal law. The amount in controversy for each named class representative does  
19 not exceed \$75,000.

20 16. Venue is proper in this judicial district pursuant to Business and Professional Code  
21 section 16750(a) and sections 395(a) and 395.5 of the California Code of Civil Procedure.  
22 Honeywell maintains significant corporate offices in California and the illegal acts and  
23 transactions alleged herein had a direct or indirect effect on consumers within the State of  
24 California. As a result of the sale of circular thermostats to consumers throughout the State of  
25 California, defendant obtained the benefit of the laws of the State of California and the California  
26 market for circular thermostats.

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1 **PARTIES**

2 **Plaintiffs**

3 17. The damages or losses as to each plaintiff individually do not exceed \$75,000,  
4 however calculated, and no federal questions are asserted herein.

5 a. Plaintiff Joel I. Roos is a resident of the State of California who, during the Class  
6 Period, indirectly purchased Honeywell ‘round’ thermostats, for his own use and  
7 not for resale, paying supra-competitive prices and thereby suffering injury.

8 b. Plaintiff Tom Santos is a resident of the State of California who, during the Class  
9 Period, indirectly purchased Honeywell ‘round’ thermostats, for his own use and  
10 not for resale, paying supra-competitive prices and thereby suffering injury.

11 **Defendants**

12 18. Defendant Honeywell International, Inc. is a multinational diversified technology  
13 and manufacturing company, involved in aerospace, control, sensing and security technologies  
14 for buildings, homes and industry, automotive products, specialty chemicals, fibers, and  
15 electronic and advanced materials, including thermostats which are organized into four main  
16 reporting segments: Aerospace, Automation and Control Solutions, Specialty Materials and  
17 Transportation Systems. Honeywell maintains significant corporate offices in the State of  
18 California, is the largest seller of thermostats in the United States and sells approximately 1.5  
19 million HRT in the United States annually.

20 19. The true names and capacities, whether individual, corporate, associate,  
21 representative, or otherwise of defendants named herein as DOES 1-100 are unknown to  
22 plaintiffs at this time, and they are therefore sued by such fictitious names pursuant to Code of  
23 Civil Procedure section 474. Plaintiffs will amend this Complaint to allege the true names and  
24 capacities of DOES 1 through 100 when plaintiffs know them. Each of DOES 1-100 is in some  
25 manner legally responsible for the violations of law alleged herein.

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1                    **AGENCY, JOINT VENTURE, ALTER EGO AND CO-CONSPIRATORS**

2                    20. Each of the defendants named herein, including DOES 1-100, acted as the agent,  
3 joint venturer, alter ego, or co-conspirator of or for the other defendants, named or unnamed,  
4 with respect to the acts, violations, and common course of conduct alleged herein.

5                    21. The acts charged in this Complaint as having been accomplished by defendant and  
6 the DOE defendants were authorized, ordered, ratified or accomplished by their officers, agents,  
7 employees, or representatives, while actively engaged in the management of the defendants’  
8 businesses or affairs.

9    **CLASS ACTION ALLEGATIONS**

10                    22. Plaintiffs bring this action, on behalf of themselves and all others similarly situated,  
11 as a class action pursuant to section 382 of the California Code of Civil Procedure. The class  
12 (hereinafter “Plaintiff Class”), which plaintiffs seek to represent, is composed of and defined as  
13 follows:

14    All persons residing in California who purchased Honeywell round  
15 thermostats (“HRT”), indirectly from defendants, in California  
16 from June 30, 1986, through the date of Class Notice (hereinafter  
17 “Class Period”) for their own use and not for resale. Specifically  
18 excluded from the Plaintiff Class are person who purchased a  
19 building with a HRT pre-installed and who have not otherwise  
20 acquired an HRT. Also specifically excluded are the defendants  
21 herein; officers, directors, or employees of any defendants; any  
22 entity in which any defendant has a controlling interest; the  
affiliates, legal representatives, attorneys, heirs or assigns of any  
defendant. Also excluded are any federal, state or local  
governmental entity, and any judge, justice, or judicial officer  
presiding over this matter and the members of their immediate  
families and judicial staffs.

23                    23. This action has been brought and may properly be maintained as a class action,  
24 pursuant to the provisions of Code of Civil Procedure section 382 because there is a well-defined  
25 community of interest in the litigation and the proposed class is easily ascertainable.

26                    24. Numerosity: The Plaintiff Class is so numerous that the individual joinder of all  
27 members is impracticable under the circumstances of this case. While the exact number of class  
28 members is unknown to plaintiffs at this time, based upon the amount of trade and commerce in

1 HRT, plaintiffs are informed and believe that approximately 1.5 to 2 million HRTS are sold  
2 annually in the United States to hundreds of thousands of consumers. Joinder of all members of  
3 the Plaintiff Class is not practicable.

4 25. Common Questions Predominate: Common questions of law and fact exist as to all  
5 members of the Plaintiff Class and predominate over any questions which affect only individual  
6 members of the class. These common questions of law and fact include, without limitation:

7 a. Whether defendants violated California Business and Professions Code  
8 section 16720;

9 b. Whether defendants engaged in monopolization;

10 c. Whether defendants violated the Unfair Competition Law;

11 d. The existence, duration, and illegality of the restrictions, limitations,  
12 obligations, conditions, agreements, understands, trusts and course of conduct  
13 alleged herein;

14 e. The effect upon and the extent of injuries sustained by plaintiffs and each  
15 member of the Plaintiff Class and the appropriate type and/or measure of  
16 damages; and

17 f. The appropriate nature of class wide equitable relief.

18 Further, defendant(s) has acted on grounds generally applicable to the entire Class,  
19 thereby making final injunctive relief and ancillary equitable relief appropriate with respect to  
20 the Class as a whole.

21 26. Typicality: Plaintiff's claims are typical of the claims of the members of the Plaintiff  
22 Class because plaintiffs and each member of the Plaintiff Class purchased, indirectly, HRT, for  
23 their own use and not for resale, paying supra-competitive prices and suffering injury thereby as  
24 a result of defendants' common course of conduct in violation of law as alleged herein.

25 27. Adequacy: Plaintiff will fairly and adequately protect the interests of the members of  
26 the Plaintiff Class. Plaintiff resides in California, is an indirect purchaser of HRT and purchased,  
27 in California, HRT during the Class Period for its own use and not for resale, and thus is an  
28 adequate representative of the Plaintiff Class. They have no interests that are adverse to the

1 interests of absent class members. Plaintiff has retained counsel with substantial experience in  
2 the prosecution of complex class action antitrust and consumer protection litigation.

3 28. Superiority: A class action is superior to other available means for the fair and  
4 efficient adjudication of this controversy since individual joinder of all members of the Plaintiff  
5 Class is impracticable. Class action treatment will permit a large number of similarly situated  
6 persons to prosecute their common claims in a single forum simultaneously, efficiently, and  
7 without the unnecessary duplication of effort and expense that numerous individual actions  
8 would engender. Furthermore, as the monetary injuries suffered by each individual member of  
9 the class may be relatively small, the expenses and burden of individual litigation would make it  
10 difficult or impossible for members to individually redress the wrongs done to them.  
11 Additionally, an important public interest will be served by addressing the matter as a class  
12 action. The cost to the court system of adjudication of such individualized litigation would be  
13 substantial. Individualized litigation would also present the potential for inconsistent or  
14 contradictory judgments.

15 29. Plaintiffs are unaware of any difficulties that are likely to be encountered in the  
16 management of this action that would preclude its maintenance as a class action.

17 **RELEVANT MARKET AND DEFENDANTS' MONOPOLY AND MARKET POWER**

18 30. One relevant market consists of electromechanical thermostats for residential use in  
19 the United States and California. Another relevant market consists of circular thermostats for  
20 residential use in the United States and California.

21 31. Honeywell represents that it is “the worlds leading manufacturer of thermostats”.  
22 Thermostats are distinct from other types devices used for controlling air temperature in homes.  
23 Electromechanical thermostats are not electronic and are not programmable.

24 32. Circular thermostats are distinct from other types of thermostats due to their unique  
25 design and consumer preference. According to Honeywell, “The Round thermostat can be found  
26 on more residential walls than any other thermostat in the world” and “The simplicity and  
27 elegance of The Round thermostat elevated the thermostat in design and function to a level that,  
28 even today, manufacturers around the world strive for.” On May, 19 2003, the *Indiana Business*



1 *Journal* reported that the CEO of ECO LLC, a rival manufacturer, said the Honeywell Round  
2 thermostat sells for roughly double the price of a square or rectangular thermostat with the same  
3 functionality.

4 33. As a result of the acts and practices complained of herein, Honeywell has acquired  
5 and maintained a monopoly in the market for thermostats with a market share of approximately  
6 70% for residential use; a market share of approximately 70% of electromechanical thermostats  
7 for residential use and more particularly, a market share of almost 100% in the market for  
8 circular thermostats for residential use in the United States and California.

9 34. The HRT is the biggest selling thermostat in the United States. Honeywell has sold  
10 more than 85 million HRT and spent more than \$70 million to advertise HRT.

11 35. Current annual sales of HRTS are approximately 1.5 million to 2 million units, or  
12 more than \$40 million.

13 36. The HRT is virtually the only circular thermostat sold in California. Honeywell has  
14 a 100% monopoly over circular thermostats in the United States and California. A substantial  
15 factor in Honeywell's monopolization of the thermostat and electromechanical thermostat  
16 markets is due to its absolute monopolization of the circular thermostat market.

17 37. Class Members purchase the HRT through three main channels of distribution:  
18 national account retailers, HVAC contractors who in turn purchase from distributors and from  
19 HVAC OEMs who include HRT in their systems. The HRT is not substantially altered or  
20 modified at the various levels of distribution. The HRT purchased by an end-user is virtually  
21 identical to the HRT that Honeywell ships to distributors and retailers.

22 38. Honeywell provides a one year manufacturer's warranty on every HRT that it ships  
23 from its manufacturing facilities, which begins on the date that an end-users purchases the HRT.

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1 relevant to the HRT), functional or utilitarian characteristics cannot be trademarked because of  
2 the benefit they offer to the public at large. Honeywell’s trademark application was found futile  
3 due to the functional qualities of the HRT’s circular shape and by the Company’s receipt of the  
4 HRT Utility Patent, which emphasized the functionality of the HRT’s circular design.

5 45. The PTO’s examining attorney denied the HRT Trademark Application  
6 reasoning that trademark protection would improperly extend the monopoly enjoyed by  
7 Honeywell (via the HRT Design Patent). The examining attorney declared that an extension of  
8 Honeywell’s monopoly on the HRT would be “contrary to the purpose and intent of the patent  
9 law.”

10 46. Honeywell appealed the examiner’s decision. The appellate body, the  
11 Trademark Trial and Appeal Board (the “TTAB”), declared that the circular shape of the HRT  
12 was functional and therefore could not be protected by trademark.

13 **C. Exclusionary Acts**

14 47. Therefore, by the end of the 1970s, neither patent nor trademark protected the  
15 HRT. Following the end of the Honeywell monopoly, thermostat manufactures other than  
16 Honeywell sought to compete in the circular thermostat market, including in California.

17 a. Between 1969 and 1979, a company called Penn Controls manufactured  
18 and sold a thermostat with a circular and convex cover that closely resembled the HRT  
19 (the “Penn Controls Round Thermostat”).

20 b. In 1985, a company called Quad Six began manufacturing and selling a  
21 circular thermostat that was designed to be compatible with the base of the HRT (the  
22 “Quad Six Round Thermostat”).

23 c. In 1985, a company called the Hunter Fan Company began manufacturing  
24 and selling a circular thermostat (the “Hunter Fan Round Thermostat”).

25 d. In 2003, a company called ECO Manufacturing introduced a circular  
26 thermostat that does not use mercury (the ECO Round Thermostat).

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1           48. Since the beginning of the Class Period, Honeywell has engaged in  
2 anticompetitive practices to acquire and maintain its monopoly in the circular thermostat market,  
3 including:

4           a. threatening and coercing rival thermostat manufactures into not producing  
5 competing circular thermostats by a pattern of sham and baseless trademark infringement  
6 litigation;

7           b. entering into agreements, combinations and understandings with competitors and  
8 potential competitors to prevent, foreclose or forestall their entry into the relevant market,  
9 to cement their exist from the market and to lessen competition;

10          c. deceiving the PTO into believing no competition existed for the HRT, something  
11 Honeywell knew to be false, and thereby securing a registered trademark;

12          d. combining with a rival manufacturer to prevent that rival giving unfavorable  
13 testimony to the PTO concerning a trademark application;

14          e. purchasing at least one rival thermostat manufacturer so as to suppress  
15 competition for circular thermostats in the relevant market and to mislead the PTO; and

16          f. entering into exclusive dealing contracts with OEMs so as to prevent potential  
17 rivals from entering the circular thermostat market, to substantially lessen competition or  
18 tend to create a monopoly and to acquire, maintain, and increase their monopoly.

19          49. As a result of the above described deceptive and monopolistic business practices  
20 engaged in by Honeywell during the Class Period, Honeywell suppressed competition and  
21 caused the price of its HRT to be inflated, thereby harming those persons or entities, including  
22 plaintiffs and the proposed Class, who purchased HRT during that period. As a result of  
23 Honeywell's illegal deceptive business practices, Honeywell has: 1) excluded competitors from  
24 the circular thermostat market; and 2) sold the HRT at supra-competitive prices during the Class  
25 Period.

26          50. QUAD SIX: As described above, in 1985 Quad Six began manufacturing and  
27 selling the Quad Six Round Thermostat that was designed to be compatible with the base of the  
28 HRT. The Quad Six Round Thermostat had the same purpose as the HRT, was interchangeable

1 with the HRT and competed with the HRT. In 1985, Honeywell threatened Quad Six with  
2 expensive litigation and claimed that Quad Six violated trademark rights owned by Honeywell.  
3 However, Honeywell owned no trademark rights in the circular shape of the HRT and its  
4 attempts to register such rights had been rejected in 1968. And, Honeywell had no opportunity  
5 to legally obtain trademark rights in the circular shape of the HRT due to its functionality.  
6 Nevertheless, as part of a pattern of sham and baseless litigation, Honeywell threatened Quad Six  
7 with expensive trademark infringement litigation should Quad Six continue to sell the Quad Six  
8 Round Thermostat. Shortly thereafter, in late 1985, Honeywell and Quad Six entered into  
9 negotiations that resulted in an agreement whereby Honeywell acquired Quad Six, and removed  
10 the Quad Six Round Thermostat from the market. The stock purchase agreement whereby  
11 Honeywell acquired Quad Six and its assets contained a clause that prevented either party from  
12 making the details of the purchase public without the express written consent of the other.  
13 Honeywell used this clause to control the publication of the details of the purchase agreement in  
14 order to prevent the PTO and the public from learning the true purpose of its purchase of Quad  
15 Six. Honeywell concealed information from the TTAB that Quad Six had been selling the Quad  
16 Six Round Thermostat in competition with Honeywell and that Honeywell had purchased Quad  
17 Six as a means of eliminating a competing round thermostat from the market. The details of the  
18 purchase agreement of Quad Six were concealed until the onset of the Eco litigation in 2003.

19       51. HUNTER FAN: Honeywell learned of the competing Hunter Fan Round  
20 Thermostat in 1985. The Hunter Fan Round Thermostat had the same purpose as the HRT, was  
21 interchangeable with the HRT and competed with the HRT. Honeywell sent a ‘cease and desist’  
22 letter to Hunter Fan on June 30, 1986 insisting that the Hunter Fan Round Thermostat infringed  
23 on trademark rights owned by Honeywell. Honeywell also threatened Hunter Fan with  
24 expensive litigation unless it ceased to market the Hunter Fan Round Thermostat. Hunter Fan  
25 and Honeywell then exchanged terse letters concerning the Hunter Fan Round Thermostat until  
26 sometime near the end of 1987 culminating in an agreement between Hunter Fan and Honeywell  
27 whereby Hunter Fan acknowledged that Honeywell possessed trademark rights over round  
28 thermostats and agreed to withdraw from the market. However, Honeywell knew that it owned

1 no trademark rights in the circular shape of the HRT and that its attempts to register such rights  
2 had been rejected in 1968. Honeywell also knew that because the circular shape of the HRT was  
3 functional, Honeywell had no opportunity to legally obtain trademark rights in the circular shape  
4 of the HRT. Nevertheless, as part of a pattern of sham and baseless litigation, Honeywell  
5 threatened Hunter Fan with expensive trademark infringement litigation should Hunter Fan  
6 continue to produce the Hunter Fan Round Thermostat which resulted in an agreement requiring  
7 Hunter Fan to acknowledge Honeywell’s trademark rights over the HRT. Furthermore, the  
8 agreement contained a confidentiality clause which prevented Honeywell from disclosing the  
9 terms or existence of the agreement. Combined with Hunter Fan’s embarrassment over being  
10 forced out of the round thermostat market, the confidentiality clause effectively concealed the  
11 agreement between Hunter Fan and Honeywell until the onset of the Eco litigation in 2003,

12 52. As was intended by Honeywell, by coercing rival thermostat manufacturers into  
13 not competing and agreeing not to enter or compete in the circular thermostat market, including,  
14 but in no way limited to the combinations or agreements with Emerson, Quad Six and Hunter,  
15 Honeywell was able to prevent the PTO and TTAB from learning about competing round  
16 thermostats and further monopolize that market and sell HRT at supra-competitive prices.

17 53. The coercion of Quad Six and Hunter Fan, as described above, prevented  
18 competition in the sale of circular thermostats and formed part of a pattern of sham and baseless  
19 litigation, cemented by anti-competitive agreements, understandings or concert of action against  
20 rival thermostat manufacturers who attempted to compete against Honeywell. In subsequent  
21 court proceedings, the District Court for the Southern District of Indiana (“District Court”)  
22 characterized this pattern of litigation as “aggressive lawyering” which reflected, “the  
23 intimidating power of Honeywell in the market.” The District Court also commented that:

24 The evidence before this court also shows that whenever  
25 Honeywell learned that a competitor was selling or planned to sell  
26 a round thermostat, it responded with threats of expensive  
27 litigation, and it managed to eliminate the competing design either  
28 by settlements or by buying the competitor outright. (Emphasis  
added.)

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1 **D. Deception of the PTO**

2 54. In 1986, Honeywell again attempted to register a trademark for its HRT (the “108  
3 Trademark Application”). The PTO’s examining attorney denied the 1986 application holding  
4 that the circular shape of the HRT was functional. As described above, functional or utilitarian  
5 characteristics of a product are virtually certain never to secure trademark protection because of  
6 the benefit they offer to the public at large.

7 55. Honeywell appealed the denial of its application to the TTAB, and submitted  
8 materially false and misleading information to the TTAB concerning the functionality of the  
9 HRT. Relying on the false and misleading information supplied to it by Honeywell, the TTAB  
10 approved the 108 Trademark Application and registered the trademark for the HRT in 1988 (the  
11 “108 Trademark”).

12 56. Honeywell’s 108 Trademark Application was severely hampered by the  
13 Company’s previous receipt of the HRT Utility Patent, which emphasized the utility of the  
14 HRT’s circular design. When applying for the 108 Trademark, Honeywell stressed to the PTO  
15 that no competitor had utilized a circular design for thermostats, despite being able to do so since  
16 the expiration of the HRT Design Patent in 1970. According to papers filed in subsequent  
17 litigation, Honeywell stated to the TTAB that, “Competitors have been free to copy this  
18 unprotected round thermostat design for sixteen years...but that no-one in the trade adopted this  
19 round design for their thermostats during the many years after the patent and the filing of this  
20 application. The fact that competitors have not used this design and have not been hampered in  
21 their competition with [Honeywell] is convincing proof of the non-functionality [sic] of  
22 [Honeywell’s] thermostat design.” These statements were deceptive and inequitable and  
23 concealed the anti-competitive agreements.

24 57. Honeywell also misrepresented to the PTO that the Company had entered into no  
25 “settlement agreements” with competitors involving circular shaped thermostats (which would  
26 demonstrate a desire by competitors to manufacture such thermostats). The TTAB relied on  
27 Honeywell’s materially false and deceptive comments when it granted the 108 Trademark.

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1           58.     Contrary to its representations to the TTAB, as described above, Honeywell knew  
2 of competing circular thermostats at the time of the 108 Trademark Application, and had entered  
3 into multiple agreements with rival manufacturers to suppress competition. Honeywell thus  
4 deceived the TTAB, which granted approval of the 108 Trademark believing the *complete*  
5 absence of competition in the circular thermostat market.

6           59.     EMERSON ELECTRIC: Pursuant to the 108 Trademark Application, Honeywell  
7 published the application for opposition. According to patent and trademark law, a proposed  
8 trademark is published in a recognized journal to solicit objections. If no opposition is filed  
9 within a designated period of time (e.g. one month) the application is registered. A major  
10 competitor of Honeywell, Emerson Electric, objected to the 108 Trademark Application and  
11 offered to inform the TTAB of competing circular thermostats existing in the marketplace and of  
12 evidence it had that Honeywell had threatened competitors with litigation if they marketed  
13 competing circular thermostats. However, Honeywell entered into a confidential agreement with  
14 Emerson Electric that Emerson Electric would not offer its testimony to the TTAB in exchange  
15 for patent rights over an unrelated product. As part of the agreement with Honeywell, Emerson  
16 Electric withdrew its opposition to the 108 Trademark Application and the TTAB did not  
17 consider the evidence initially offered by Emerson Electric. The agreement contained a  
18 confidentiality clause which prohibited either party from disclosing the terms and conditions of  
19 the agreement. This confidentiality clause concealed the agreement until the Eco litigation in  
20 2003.

21           60.     As the District Court of Indiana found in subsequent trademark litigation:

22                   It is equally clear that the false statements about the absence of  
23 competing round thermostats were material to the application and  
24 the TTAB's decision. The examining attorney repeatedly asked for  
25 detailed information about competitors' designs and even  
26 settlement agreements regarding competing round designs. The  
27 TTAB expressly relied upon Honeywell's false statements in  
28 deciding to issue the '108 registration. First, despite the earlier  
denial of registration for the round design, the TTAB decided not  
to apply the doctrine of *res judicata* because of Honeywell's  
evidence of the absence of competing round designs in the  
intervening years. Second, in applying [the third factor]



1 addressing the availability of alternative designs to competitors,  
2 the TTAB emphasized Honeywell's evidence:

3 *Despite the apparent availability of the rounded*  
4 *thermostat cover since that time [1976], an*  
5 *availability that provided more than the usual*  
6 *degree of certainty that the design did not enjoy*  
7 *either patent or trademark protection, the Examining*  
8 *Attorney has been unable to provide evidence of the*  
9 *use of a rounded circular cover configuration by*  
10 *any party other than applicant and its related*  
11 *companies. On the contrary, applicant has provided*  
12 *extensive evidence of its competitors' various*  
13 *thermostat designs and in none of the various*  
14 *catalogues and other literature are there any*  
15 *thermostats having a circular cover. The mere fact*  
16 *that the number of alternative designs is limited is*  
17 *not a per se bar to the registration of a particular*  
18 *configuration, but must be viewed in the context of*  
19 *the entire record presented.*

20 **E. The ECO Thermostat.**

21 61. Through the use of cleverly drafted licensing agreements, threats of litigation and  
22 coerced settlements and agreements, Honeywell was skillfully able to avoid judicial scrutiny of  
23 its claims and practices regarding the HRT until the ECO litigation.

24 62. ECO introduced the ECO Round Thermostat at a trade show in January 2003.  
25 Eco expected to sell ECO Round Thermostats for approximately 50% of the price of the HRT,  
26 but with more technology and without the environmentally unsound mercury utilized in the  
27 HRT.

28 63. After Honeywell learned of the ECO Round Thermostat, Honeywell threatened to  
sue ECO for trademark infringement. ECO filed an action in the District Court seeking a  
declaration that the ECO Thermostat would not infringe on any trademark rights that might be  
owned by Honeywell (the "ECO Litigation"). Honeywell responded by seeking a preliminary  
injunction to prevent the ECO Thermostat from being manufactured. Honeywell contended that  
they had a registered U.S. trademark, the 108 registration had become "incontestable", as the  
trademark had been registered in the federal system for a period of five years and therefore  
provided conclusive evidence of the registrant's exclusive right to use the mark, subject to

1 certain statutory defenses. Two of the statutory defenses available to incontestability are  
2 functionality and fraudulent procurement of a trademark registration.

3 64. The District Court denied Honeywell’s motion for preliminary injunction and held  
4 that:

5 a. the circular shape of the HRT was functional and could not be protected  
6 by a valid trademark;

7 b. the circular shape of the HRT was the subject of a long expired utility  
8 patent; and

9 c. ECO and other competitors are entitled to copy the “useful and functional  
10 [circular] shape”.

11 65. The District Court determined that the TTAB had improperly granted the 108  
12 Trademark because it had been materially deceived by Honeywell during the 108 Trademark  
13 application process and had not been provided with information about competing circular  
14 thermostats in the market place since 1970. The District Court also denied Honeywell’s motion  
15 for a preliminary injunction because it found the TTAB had: granted the 108 Trademark in an *ex*  
16 *parte* proceeding (without the benefit of rigorous contest); applied the wrong legal standard to  
17 determine functionality; and misread evidence from the HRT Utility Patent by not considering  
18 the functionality of the HRT circular design.

19 66. The District Court was highly critical of Honeywell and declared that the  
20 Company had:

21 a. made wrongful factual assertions and “false statements” to the TTAB  
22 when informing the TTAB of a lack of competition in the circular thermostat market, and  
23 that the TTAB had relied on such “decisive” falsities when granting the 108 Trademark;

24 b. issued information to the TTAB related to Quad Six Round Thermostats  
25 that while being “literally correct”, “seems to have been designed to leave the wrong  
26 impression”;

27 c. made at least one statement about the Quad Six competition that was  
28 “inconsistent with the true facts”; and

1           d.       used “careful phrasing and hedging” to steer the TTAB away from  
2 evidence relating to the Hunter Fan Thermostat.

3           67.     Honeywell appealed the District Court’s holding. The United States Court of  
4 Appeals for the Seventh Circuit affirmed the District Court’s decision and reiterated that  
5 functional aspects of a product cannot be trademarked. As a result of the findings of the federal  
6 courts, the matter of Honeywell’s trademark rights, if any, have been determined and such that  
7 plaintiff’s right to relief does not depend upon resolution of any substantial questions of federal  
8 law.

9           68.     Honeywell and ECO thereafter entered into a non-transferable agreement  
10 whereby Honeywell granted Eco permission to produce a non-mercury round thermostat in  
11 exchange for ECO’s promise not to challenge the validity of the HRT trademark and the right of  
12 first refusal in the event that ECO was sold to a third party. Additionally, ECO received a  
13 payment as part of the agreement. As with Honeywell’s other agreements, the ECO agreement  
14 also contained a confidentiality clause forbidding either party from releasing the details of the  
15 agreement without the consent of the other.

16 **F.     Other Anti-Competitive Acts**

17           69.     HVAC OEM EXCLUSIVE DEALING CONTRACTS: Honeywell also entered  
18 into numerous exclusive dealing contracts with HVAC OEMs, premised in part on the bogus  
19 trademark claims, which further foreclosed competition in the relevant market. In exchange for  
20 the right to sell a round thermostat bearing the OEM logo, the OEMs were required to covenant  
21 that Honeywell was the sole owner of enforceable trademark protection over round shaped  
22 thermostats and to purchase all of their round thermostats exclusively from Honeywell. These  
23 agreements were unreasonable restraints of trade and substantially lessened competition or  
24 tended to create a monopoly by having the effect of foreclosing the OEMs from manufacturing  
25 their own round thermostats or contracting with other thermostat manufacturers to make a round  
26 thermostat. These exclusive agreements erected further barriers to entry into the round  
27 thermostat market by foreclosing a significant portion of the market - OEMs - from new entrants.

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1           70.    SNC, INC./STAT-ID: SNC, Inc., a small OEM in the thermostat market, had  
2 designed, marketed, and sold a round replacement cover for the HRT. In 1993 Honeywell  
3 threatened SNC with litigation should it continue to produce a competing round thermostat  
4 cover. When SNC did not accede to Honeywell’s demands, Honeywell brought a trademark  
5 infringement suit in the Northern District of Ohio against SNC. As a result of the litigation, SNC  
6 and Honeywell entered into an agreement whereby SNC acknowledged the validity of the HRT  
7 trademark and agreed to stop marketing and producing a round thermostat cover. This  
8 agreement was a combination in unreasonable restraint of trade which further reduced  
9 competition in the round thermostat market driving up the price of the HRT and limiting  
10 consumer choice.

11           71.    As stated above, Honeywell acquired and maintained its monopoly through  
12 pervasive practices of inequitable conduct, misrepresenting its trademark rights, instituting or  
13 threatening to institute sham and baseless legal proceedings for the purpose of excluding rivals  
14 from the thermostat market and entered into anti-competitive agreements to cement their  
15 exclusion of rivals and their monopoly.

16           72.    Defendants engaged in a concert of action, combination, trust, agreement or  
17 understanding, the purpose of which was to fix and raise, elevate and maintain the prices of  
18 circular thermostats at supra-competitive levels.

19           73.    Independent of monopolization or the aforesaid trust, defendants further engaged  
20 in business acts and practices that were unlawful, unfair or deceptive and inured consumers by  
21 limiting their choices and forcing them to pay supra-competitive prices for circular thermostats.

22                                   **THE INJURY TO COMPETITION AND CONSUMERS**

23           74.    Honeywell’s conduct harmed consumers because consumers were forced to pay  
24 supra-competitive prices and their choices were limited.

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1 **VIOLATIONS ALLEGED**

2 **FIRST CAUSE OF ACTION**

3 **Violations of the Cartwright Act,**  
4 **California Business & Professions Code §16720, *et seq.***  
5 **(Against All Defendants)**

6 75. Plaintiffs incorporate by reference and reallege paragraphs 1 through 74 above, as  
7 fully set forth herein.

8 76. Beginning at a time presently unknown to plaintiffs, and continuing thereafter to  
9 the present, defendant and others entered into and engaged in a continuing unlawful trust in  
10 restraint of the trade and commerce described above in violation of California Business and  
11 Professions Code section 16720.

12 77. The aforesaid violations of California Business and Professions Code section  
13 16720 consisted, without limitation, of a continuing combination, trust, agreement,  
14 understanding, and concert of action among the defendants, and others, concerning the sale or  
15 distribution of thermostats including circular thermostats, in California.

16 78. For the purpose of forming and effectuating the aforesaid unlawful trust, the  
17 defendants and others have done those things to which they agreed, combined, and conspired to  
18 do as described herein.

19 79. The aforesaid unlawful trust has had the following effects, among others,  
20 including the effects described above:

21 a. Competition in the sale of thermostats, including circular thermostats, has  
22 been suppressed, restrained, or eliminated;

23 b. Prices of thermostats, including circular thermostats, paid by plaintiffs and  
24 other members of the Plaintiff Class have been raised, fixed, maintained, and stabilized at  
25 artificial and non-competitive levels;

26 c. By virtue of the exclusive dealing agreements as alleged above,  
27 competition in the sale of thermostats, including circular thermostats, has been substantially  
28 lessened and such agreements have tended to create a monopoly.

d. By virtue of the agreements, combinations and conspiracy as alleged

1 above, defendant has formed and operated an unlawful trust that has unreasonably restrained  
2 trade and competition, has substantially lessened competition or has tended to create a monopoly  
3 in the sale of thermostats, including circular thermostats.

4 80. During the period covered by this Complaint, plaintiffs and the other members of  
5 the Plaintiff Class purchased thermostats, including circular thermostats, indirectly from the  
6 defendants. By reason of the alleged violations of the antitrust laws, plaintiffs and other  
7 members of the Plaintiff Class paid more for thermostats, including circular thermostats than  
8 they would have paid in the absence of the illegal trust, have had their choices limited and, as a  
9 result, have been injured in their business and property and have suffered damages in an amount  
10 according to proof at trial.

## 11 **SECOND CAUSE OF ACTION**

### 12 **Common Law Monopolization** 13 **(Against All Defendants)**

14 81. Plaintiffs incorporate by reference and reallege paragraphs 1-80 above, as though  
15 fully set forth herein.

16 82. Defendants, through the exercise and abuse of their monopoly power, have  
17 engaged in acts and practices as described above without justification that operate to exclude  
18 competition in the thermostat and circular thermostat markets, to substantially lessen competition  
19 or tend to create a monopoly and to acquire, maintain, and increase their monopoly. Both the  
20 purpose and the effect of these acts and practices have been to restrain or lessen competition in  
21 the relevant markets for thermostats and circular thermostats, thereby enabling Honeywell to  
22 acquire and maintain a monopoly of that market and to charge supra-competitive prices.

23 83. Defendants, through the abuse of their market power, have engaged in acts and  
24 practices as described above without justification that operate to exclude competition in the  
25 thermostat and circular thermostat markets, to substantially lessen competition or tend to create a  
26 monopoly and to attempt to obtain a monopoly and there is a substantial probability that they  
27 will succeed in obtaining such a monopoly. Both the purpose and the effect of these acts and  
28 practices have been to restrain or lessen competition and to attempt achieve a monopoly in the

1 relevant markets for thermostats and circular thermostats, thereby enabling Honeywell to charge  
2 supra-competitive prices.

3 84. By engaging in such acts of exclusion, defendants have engaged in unlawful  
4 monopolization.

5 85. These exclusionary acts and practices lack legitimate business justification are not  
6 reasonably necessary to further any legitimate procompetitive purpose, and impair competition in  
7 an unnecessarily restrictive way.

8 86. The defendants' exclusionary and restrictive practices described herein have  
9 caused significant harm to class members by increasing the prices they have paid for thermostats  
10 including circular thermostats above competitive levels and by denying them a free choice in a  
11 competitive market. As a result of the exclusionary and restrictive practices it has imposed on  
12 others, including those described herein, defendants have succeeded in raising and reinforcing  
13 barriers to market entry so as to forestall the development of actual competition in the relevant  
14 markets. The resultant monopoly power has enabled the defendants to price their circular  
15 thermostats virtually without regard to the prices of competing products. Distributors and  
16 contractors have passed these monopoly prices on to consumers, including particularly to the  
17 class members.

18 87. As a direct and proximate result of defendants' acts of monopolization as alleged  
19 herein, plaintiffs and the members of the Plaintiff Class have suffered actual damages in an  
20 amount to be proven at trial.

21 88. Defendants' acts of monopolization as described herein were intended to  
22 monopolize and suppress competition in the relevant markets and to injure consumers.  
23 Defendants' acts of monopolization were and included acts of fraud, malice and oppression and  
24 were done with conscious disregard of the rights upon consumers, including plaintiffs and the  
25 Plaintiff Class. Accordingly, an award of punitive damages is justified in order to make an  
26 example of defendants, to punish defendants, and to deter defendants, and others, from engaging  
27 in the same or similar conduct. Plaintiffs, and the members of the Plaintiff Class, seek an award  
28 of punitive damages in an amount according to proof at trial.

1 **THIRD CAUSE OF ACTION**

2 **Unfair Competition Law**  
3 **California Business & Professions Code §17200, et seq.**  
4 **(Against all Defendants)**

5 89. Plaintiffs incorporate by reference and reallege paragraphs 1-88 above, as though  
6 fully set forth herein.

7 90. This Complaint is filed and these proceedings are instituted, pursuant to sections  
8 17203 and 17204 of the California Business and Professions Code, to obtain restitution, and  
9 other available remedies from defendants for acts and business practices, as alleged herein, in  
10 violation of section 17200 of the California Business and Professions Code, commonly known as  
11 the Unfair Competition Law.

12 91. The conduct alleged herein violates California Business and Professions Code  
13 section 17200. Independent of the other violations of law alleged herein, the acts and business  
14 practices described herein constituted and constitute a common course of conduct of unfair  
15 competition by means of unfair, unlawful and/or fraudulent business acts or practices within the  
16 meaning of California Business and Professions Code section 17200, et seq., including, but in no  
17 way limited to, the following:

18 A. Unlawful:

- 19 1. violations of California Business and Professions Code section  
20 16720, et seq. including section 16727 thereof.

21 B. Unfair:

- 22 1. incipient violations of antitrust law;  
23 2. violation of the spirit of antitrust laws because the effects are the  
24 same as or comparable to violation of the antitrust laws;  
25 3. threat or harm to competition and consumers.

26 C. Fraudulent:

- 27 1. false and deceptive statements to rivals regarding the validity of  
28 trademarks and associated rights;  
2. false and deceptive statements to the United States PTO and the



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TTAB.

92. Plaintiffs and the Plaintiff Class are entitled to full restitution and other equitable remedies as a result of such business acts or practices.

**PRAYER FOR RELIEF**

WHEREFORE, plaintiffs pray:

1. This Court certify the Plaintiff Class;
2. This Court declare that defendants have engaged in combinations of capital, skill and acts with others constituting a trust for the purpose of creating or carrying out unreasonable restrictions in trade or commerce, limiting and reducing the production and increasing the price of merchandise, preventing competition in manufacturing, making, sale or purchase of merchandise or products, to make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they bind themselves not to sell, dispose of or transport any article of trade, commerce or consumption below a common standard figure, or fixed value; agree in any manner to keep the price of such article, at a fixed or graduated figure; establish or settle the price of any article between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale of any such article; agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale of any such article, that its price might in any manner be affected; to make a sale or contract for the sale of goods, merchandise or machinery for use within the State, or to fix a price charged therefore, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise or machinery of a competitor or competitors where the effect may be to substantially lessen competition or tend to create a monopoly within this State. in violation of the common law (monopoly), the Cartwright Act (California Business and Professions Code section 16720 *et*

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*seq.*) and unfair competition and unlawful and unfair business acts and practices in violation of the California Unfair Competition Act (California Business and Professions Code section 17200 *et seq.*);

3. On the First Cause of Action (Cartwright Act): Plaintiffs and the members of the Class recover their actual damages, in an amount to be determined at trial, and said amount be trebled pursuant to California Business and Professions Code section 16750;

4. On the Second Cause of Action (Monopolization): Plaintiffs and the members of the Class recover their actual damages, in an amount to be determined at trial, and punitive damages in an amount to be determined at trial;

5. On the Third Cause of Action (Unfair Competition Law): This Court order defendants to make full restitution to the class members who have been and continue to be injured by defendants' violations of section 17200, pursuant to Business and Professions Code section 17203 and section 17204;

6. That the sale of thermostats including circular thermostats not be in a manner that tends to lessen competition or create a monopoly;

7. That defendants be ordered to engage in other remedial actions due to their unfair competition and violations of the Cartwright Act pursuant to California Business and Professions Code sections 16750(a), 17203 and 17204;

8. That plaintiffs and the members of the Class recover their reasonable attorneys' fees and costs of suit;

9. That plaintiffs and the members of the Class recover pre-judgment and post-judgment interest on the above sums at the highest rate allowed by law; and

10. That plaintiffs and the members of the Class be granted such other and further relief as this Court deems to be just and equitable.

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Dated: February 4, 2008

By: Dan Mogin / NPS

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**JURY TRIAL DEMAND**

Plaintiffs hereby demand a trial by jury.

Dated: February 4, 2008

By: *Dan Mogin, LRS*

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1 **PROOF OF SERVICE**

2 *Roos, et al. v. Honeywell International Inc., et al.*  
3 SFSC Case No. CGC-04-436205 (RAK)

4 I, Steven Ejercito, declare as follows:

5 I am over the age of 18 years and not a party to the within action. I am employed in the  
6 County of San Diego, California, where the mailing occurs; and my business address is 110  
7 Juniper Street, San Diego, California, 92101.

8 I further declare that I am readily familiar with the business' practice for collection and  
9 processing of correspondence for mailing with the United States Postal Service; and that the  
10 correspondence shall be deposited with the United States Postal Service this same day in the  
11 ordinary course of business.

12 On February 8, 2008, I served a true and correct copy of the following document(s):

- 13 • **Second Amended Complaint**

14 by sending a true copy of said document to each of the parties listed on the **ATTACHED**  
15 **SERVICE LIST** in the manner described below:


16  **BY MAIL:** I placed a true copy of each document in a separate envelope addressed to  
17 each addressee. I then sealed each envelope and, with first-class postage thereon  
18 fully prepaid, placed the envelope for deposit in the United States Postal Service  
19 this same day, at my business address shown above, following ordinary business  
20 practices.

21  **BY E-MAIL:** I served said document(s) via electronic mail pursuant to the agreement  
22 among the parties. The e-mail addresses to which the document(s) was/were  
23 delivered are indicated on the attached service list.

24  **FEDERAL:** I declare that I am employed in the office of a member of the bar of this  
25 court at whose directions this service is made.

26  **STATE:** I declare under penalty of perjury under the laws of the State of California that  
27 the foregoing is true and correct.  
28

Executed February 8, 2008, at San Diego, California.

  
Steven Ejercito

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