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6 and the Certified Plaintiff Class
(Additional Counsel Appear on Signature Page)

7 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
8 COUNTY OF SAN FRANCISCO

9 JOEL I. ROOS and TOM SANTOS, on
10 behalf of themselves and all others similarly
11 situated,

12 Plaintiffs,

13 v.

14 HONEYWELL INTERNATIONAL, INC.
15 and DOES 1-100, inclusive,

16 Defendants.

Case No. CGC-04-436205

**PLAINTIFFS' SUPPLEMENTAL
RESPONSE TO OBJECTIONS**

Date: May 2, 2014
Time: 9:00 am
Dept: 304
Judge: Hon. Curtis E.A. Karnow

17
18
19 **I. INTRODUCTION**

20 Plaintiff Tom Santos, individually and as a representative of the Certified Class (the
21 "Class" or "Plaintiffs"), submits this Supplemental Response to Objections received to the
22 Settlement between Plaintiffs and Defendant Honeywell International, Inc. ("Defendant" or
23 "Honeywell") (the "Settlement Agreement" or "Settlement") and in support of his motions for
24 final approval of the Settlement and request for attorneys' fees and reimbursement of costs.
25 Plaintiffs' Supplemental Response to Objections is necessary because the parties received an
26 additional objection from Art Rogers on April 30, 2014, after the deadline set by the Court for
27 filing responses to the objections to the Settlement. A true and correct copy of Mr. Rogers'
28 objection is attached hereto as Exhibit A. See Supplemental Declaration of April Hyduk in

1 Support of Plaintiffs’ Motion for Final Approval of Class Action Settlement (“Hyduk Supp.
2 Decl.”) ¶5. As a threshold matter, Mr. Rogers does not appear to be a Class Member to have
3 standing to object to the Settlement. First, he does not reside in California.¹ Second, even if Mr.
4 Rogers were a California resident, he admittedly did not comply with the rudimentary proof of
5 purchase requirements as ordered by this Court to determine Class Membership status.² As
6

7 ¹ The California Certified Class is defined as:
8

9 All persons **residing in California** who purchased one or more Honeywell Round
10 Thermostats (“HRT”) indirectly from Defendant Honeywell International Inc., in
11 California during the Class Period for their own use and not for resale.

12 Specifically excluded from the Plaintiff Class are persons who purchased a
13 building with a HRT pre-installed and who have not otherwise acquired an HRT.

14 Also specifically excluded are the Defendant herein; officers, directors, or
15 employees of any Defendant; any entity in which any defendant has a controlling
16 interest; the affiliates, legal representatives, attorneys, heirs or assigns of any
17 defendant. Also excluded are any federal, state or local governmental entity, and
18 any judge, justice, or judicial officer presiding over this matter and the members
19 of their immediate families and judicial staffs.

20 The Class Period is defined as June 30, 1986 through and including December 5,
21 2013.

22 (**Emphasis added**). Paragraph 6 of the long form notice of Settlement to Class Members further
23 instructs that potential Class Members are only included in the Class if they are residents of
24 California. *See* Declaration of Daniel J. Mogin In Support of Plaintiffs’ Motion for Final
25 Approval of Class Action Settlement (“Mogin Decl.”) ¶30 and Exhibit 1.C. thereto. Mr. Rogers’
26 objection indicates that he resides in Nocona, Texas. *See* Hyduk Supp. Decl. ¶5 and Exhibit A
27 thereto.

28 ² Paragraph 9 of the Court’s Order and Paragraph 15 of the long form notice of Settlement to
Class Members direct objectors to submit proof of purchase along with their objection. *See*
Order Granting Supplemental and Revised Motion for Preliminary Approval of Class Action
Settlement (“Order”), ¶9; Mogin Decl. ¶30 and Exhibit 1.C. thereto. The claim form likewise
instructs Class Members to state the number of Honeywell Round Thermostats (“HRTs”)
purchased, the name of the store where purchased, and the state where purchased. *See* Mogin
Decl. ¶30 and Exhibit 1.F. thereto. Although Mr. Rogers stated that he filed a claim, the Claims

1 discussed below, the proof of purchase requirement does not place an onerous burden on Class
2 Members and was appropriate given that the objections have the potential to delay the Effective
3 Date of the Settlement to the detriment of actual Class Members as well as the Defendant. *See*
4 Section II, below. Further, this objection is not timely as it was postmarked on April 22, 2014,
5 four days after the deadline for objections to be postmarked. *See* Hyduk Supp. Decl. ¶¶5-6 and
6 Exhibit A thereto. Mr. Rogers, who was assisted by an unidentified attorney in preparing his
7 objection,³ therefore waived any right he may have to object to the Settlement.⁴ Order ¶9.

8 Notwithstanding all of the above, substantively Mr. Rogers' objections lack merit.
9 Plaintiffs' request for attorneys' fees is reasonable, and his objection is an attempt to misapply a
10 minority view of federal law to this state law case. Similarly, his objection to the plan of
11 distribution is based on an erroneous understanding of *cy pres* and the California Code of Civil
12 Procedure. These objections should not preclude the Court from finding that the Settlement
13 Agreement is fair, adequate and reasonable, or that Class Counsel should be awarded the
14 requested attorneys' fees.

15 **II. MR. ROGERS' OBJECTIONS LACK MERIT**

16 Mr. Rogers' objection is four-fold: (1) the proof of purchase requirement discourages
17 Class Members from submitting objections; (2) the requested attorneys' fees are excessive; (3)
18 Class Members should have had the opportunity to review Plaintiffs' Motion for Attorneys' Fees
19 and Reimbursement of Costs prior to submitting objections; and (4) the distribution plan
20
21

22 Administrator does not have record of this claim and therefore it is not possible to verify his
23 membership status. *See* Order, ¶9; Mogin Decl. ¶30 and Ex. 1.C. thereto; Hyduk Supp. Decl. ¶5.

24 ³ Rogers Objection (Exhibit A), p. 3, lines 12-13.

25 ⁴ Paragraph 15 of the long form notice of Settlement to Class Members clearly instructs that
26 "[a]ny response must be postmarked by **April 18, 2014**". *See* Mogin Decl. ¶30 and Exhibit 1.C.
27 thereto (emphasis in original). Although Mr. Rogers' objection was dated April 18, 2014, the
28 postmark on the envelope to Mr. Rogers' objection, which is controlling per the Court's Order, is
dated April 22, 2014. *See* Rogers Objection (Exhibit A); Hyduk Supp. Decl. ¶¶5-6 and Exhibit A
thereto; Order ¶9.

1 improperly benefits unnamed *cy pres* recipients. Mr. Rogers' objections are not grounded in
2 California law and should be overruled.

3 **A. Mr. Rogers' Objection is Not Timely**

4 Mr. Rogers' objection was not timely submitted. All objections must have been
5 postmarked by April 18, 2014 [Order, ¶9], and Mr. Roger's objection, in fact, bears a postmark of
6 April 22, 2014. Hyduk Supp. Decl. ¶6. Although the date of the signature on the objection is
7 stated as April 18, 2014, and the stamp was ostensibly purchased on the same day, the objection
8 was not mailed or received by the United States Postal Service until April 22, 2014. *See* Hyduk
9 Supp. Decl. ¶¶5-6 and Exhibit A thereto. Although, Mr. Rogers was assisted by an attorney, who
10 appears to have provided a pleading template, there is no sworn proof of service. Under the
11 circumstances he is not entitled to the leniency that might otherwise be accorded to a pro per
12 litigant and the Class Members are entitled to have the objection strictly construed. Mr. Rogers
13 therefore waived any right he may have had to object to the Settlement. *See* Order, ¶9.

14 **B. Mr. Rogers Has Not Demonstrated That He is a Class Member With Standing**

15 In order for an objection to be valid, the objector is required to submit proof of his or her
16 purchase(s) of the HRT with the objection. Order, ¶9. *See also* Mogin Decl. ¶30 and Exhibit 1.C.
17 thereto. Mr. Rogers erroneously claims that the proof of purchase requirement is a burden placed
18 only on objectors, which "discourages class members without proof of purchase from objecting".
19 *See* Rogers Objection, Section A (Exhibit A). Mr. Rogers cites to no authority in support of his
20 objection and has not complied with the basic requirements to be deemed a Class Member in this
21 case. He therefore has no standing to object to the Settlement.

22 All Class Members are required to submit a proof of purchase along with their claims in
23 order for Class Counsel and the Court to properly ascertain Class Membership. *See* Mogin Decl.
24 ¶30 and Exhibits 1.C, 1.F. thereto. For Class Members submitting claims for one or two HRTs,
25 proof of purchase may be in the form of a declaration, stating under penalty of perjury that the
26 information provided concerning the Class Members' purchase is true and correct while
27 submitting to the jurisdiction of this Court. *See* Mogin Decl. ¶30 and Exhibit 1.F. thereto. Class
28 Members submitting claims for three or more HRTs as well as objectors must submit independent

1 proof of purchase along with the claim and/or objection. *See* Mogin Decl. ¶30 and Exhibits 1.C.,
2 1.F. thereto. Mr. Rogers has done neither. Although Mr. Rogers states that he filed a claim form,
3 the Settlement Administrator has no record of this filing. Hyduk Supp. Decl. ¶5. Mr. Rogers
4 likewise admittedly did not submit a proof of purchase with his objection. *See* Rogers Objection,
5 Section A (Exhibit A). Aside from his self-serving, unsworn objection, Plaintiffs have no record
6 from Mr. Rogers indicating Class Membership.

7 Importantly, there is also no record from Mr. Rogers submitting to the jurisdiction of this
8 Court. As noted above, Mr. Rogers resides in Nocona, Texas, which effectively excludes him as a
9 Class Member. *See* Rogers Objection (Exhibit A). Moreover, Plaintiffs do not have a declaration
10 from Mr. Rogers or a statement from him otherwise submitting to the jurisdiction of this Court.
11 *See* Hyduk Decl. ¶5 and Exhibit A thereto. Strangely, while Mr. Rogers uses an address in
12 Nocona, Texas, the postmark indicates that the objection was mailed from San Diego, California.
13 *See* Hyduk Supp. Decl. ¶5 and Exhibit A thereto. And, while Mr. Rogers concedes that an
14 unidentified attorney assisted in preparation of the document, just as there is no sworn proof of
15 purchase of any kind, there is also no sworn proof of service. Given Mr. Rogers' legal assistance,
16 it is not implausible that his failure to submit a declaration or file a claim was not unintentional or
17 inconsistent with the tactics of the professional objectors' bar.

18 Finally, and contrary to Mr. Rogers' objection, the proof of purchase requirement ensures
19 that only Class Members object to the Settlement, and is appropriate given that a single objection
20 has the ability to delay the Effective Date and postpone the benefits of the Settlement. The
21 requirement does not impose an onerous burden on Class Members and in fact serves to protect
22 them from fraudulent objectors. This Court carefully scrutinized Plaintiffs' notice plan, including
23 the plan for submitting objections, and acted within its broad discretion in requiring objectors to
24 submit proofs of purchase with the objection. *See 7-Eleven Owners for Fair Franchising v.*
25 *Southland Corp.*, 85 Cal. App. 1135, 1164 (2001) (*quoting Handschu v. Special Services Div.*,
26 787 F. 2d 828, 833 (2d Cir. 1986) (the Court has ““virtually complete discretion as to the manner
27 of giving notice to class members””). Moreover, the required proof of purchase is the same as for
28 other Class Members.

1 **C. Mr. Rogers’ Objections to Plaintiffs’ Request for Attorneys’ Fees and the**
2 **Distribution Plan Lack Merit**

3 Mr. Rogers further claims that the requested percentage for attorneys’ fees, 37.5%, is
4 excessive, and states that “25% of the net fund would be more than enough”. *See* Rogers
5 Objection, Section B (Exhibit A). Here too, Mr. Rogers provides no authority in support of his
6 position. Notwithstanding, and as discussed in Plaintiffs’ Response to Objections, the requested
7 percentage here falls well within the range of what is reasonable for complex indirect purchaser
8 antitrust class action cases, and Class Counsel are seeking only a small fraction of their lodestar in
9 attorneys’ fees. *See* Plaintiffs’ Response to Objections, Section II.B. *See also* Plaintiffs’
10 Supplemental and Revised Motion for Preliminary Approval of Class Action Settlement; Plaintiffs’
11 Motion for Attorneys’ Fees and Reimbursement of Costs, Section III.B. Contrary to Mr. Rogers’
12 objection, the entire Settlement Fund is considered a common fund for the benefit of the Class.
13 *See In Re California Indirect Purchaser X-Ray Film Antitrust Litigation*, Alameda County
14 Superior Court Case No. 960886, 1998 WL 1031494, at *3, 1998-2 Trade Cases ¶72, 336 (Oct. 22,
15 1998). Although some federal courts have adopted a 25% “benchmark” for class action cases
16 arising under Federal Rules of Civil Procedure Rule 23, California courts have not adopted Federal
17 Rule of Civil Procedure Rule 23 [*see Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240
18 (2001)], and even the Ninth Circuit has recognized that the 25% benchmark “may be inappropriate
19 in some cases.” *Vizcaino v. Microsoft Corp.*, 290 F. 3d 1043, 1047 (9th Cir. 2002).

20 Mr. Rogers’ objection concerning the deadline to submit objections relative to the Motion
21 for Attorneys’ Fees and Reimbursement of Costs is likewise a misapplication of the Federal Rules
22 of Civil Procedure to state law. *See* Rogers Objection, Section C (Exhibit A). As discussed in
23 Plaintiffs’ Response to Objections, although the Ninth Circuit has interpreted Federal Rules of
24 Civil Procedure Rule 23(h) as requiring that Class Members be given an opportunity to object to
25 the fees motion prior to its filing [*see Mercury Interactive Corp. Securities Litigation v. Mercury*
26 *Interactive Corp.*, 618 F. 3d 988 (9th Cir. 2010)], as noted above, California courts have not
27 adopted this Rule and, to the contrary, are urged to “exercise pragmatism and flexibility in
28 dealing with class actions.” *Wershba*, 91 Cal. App. 4th at 240. The Ninth Circuit’s decision in

1 *Mercury Interactive Corp. Securities Litigation v. Mercury Interactive Corp* has not been adopted
2 by a federal court in any other jurisdiction [*see Bower v. MetLife, Inc.*, Case No. 1:09-cv-351,
3 2012 U.S. Dist. LEXIS 149117 at *15-17 (S.D. Ohio Oct. 17, 2012) (“In re Mercury is not
4 binding on this Court, and it appears that no court outside the Ninth Circuit has ever followed its
5 conclusion that Rule 23(h) requires a fee petition to be filed before the objection deadline”)
6 (emphasis in original)], and this Court was well within its discretion to set the deadline for
7 submitting objections prior to Class Counsel’s motion for attorneys’ fees being due.

8 Finally, Mr. Rogers objects to the plan of distribution, arguing that Class Members should
9 receive a second distribution and the *cy pres* nominees should have been disclosed prior to the
10 deadline for submitting objections. *See* Rogers Objection, Section D (Exhibit A). Mr. Rogers’
11 objections are contrary to California law. Code of Civil Procedure §384 governs cases where the
12 class award allows for distribution to class members and settlement funds remain after that
13 procedure is completed. *See In re Vitamins Cases*, 107 Cal. App. 4th 820, 828 (2003). Under the
14 California Code of Civil Procedure §384, the Court is to direct the residue, if any, to be paid to *cy*
15 *pres* after all Class Members have been paid the allocated amounts of the Settlement. Cal. Code
16 Civ. Proc. §384(b). There is no requirement that the *cy pres* beneficiaries be designated prior to
17 the determination that a residue exists, and the Settlement Agreement here fully comports with the
18 Code. *See* Mogin Decl. ¶30 and Exhibit 1 thereto at ¶51. Mr. Rogers’ objection that *cy pres*
19 nominees should have previously been disclosed is contrary to California Code of Civil Procedure
20 §384 and is premature, directed at a contingency that has not yet occurred. *See Bell v. Farmers*
21 *Insurance Exchange*, 115 Cal. App. 4th 715, 761 (2004).

22 With respect to a second distribution to Class Members, Mr. Rogers appears to be seeking
23 a windfall. As Plaintiffs explained in their Response to Objections and their Motion for Final
24 Approval, the Settlement amount captures approximately 78% of the estimated Class aggregate
25 damages. *See* Plaintiffs’ Response to Objections, Section II.C.; Plaintiffs’ Motion for Final
26 Approval of Class Action Settlement, Section V.A.3. In addition, Plaintiffs’ economics expert,
27 Dr. Roger G. Noll, testified that Class-wide overcharges ranged from approximately \$7-\$9 per
28 HRT, with a regression-indicated weighted average of \$8.33. *See* Mogin Decl. ¶36. The amount

1 that each Class member is set to receive per claim here, \$18, is more than double the estimated
2 individualized damages. The amount distributed to each Class Member per HRT sufficiently
3 compensates them for their damages in this case, and need not be increased or otherwise
4 reexamined.

5 **III. CONCLUSION**

6 Mr. Rogers is not a Class Member with standing to object to the Settlement; his objection
7 was untimely submitted and should not be considered. Further, Mr. Rogers' objection is contrary to
8 California law. Plaintiffs respectfully request that the Court dismiss his objection and grant their
9 Motion for Final Approval of Class Action Settlement, as well as their Motion for Attorneys' Fees
10 and Reimbursement of Costs.

11
12 Respectfully Submitted,

13
14 Dated: May 1, 2014

By: Jodie M. Welch

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Plaintiffs' Class Counsel

Exhibit A



4065-ADMIN-000008

4065 - Honeywell ADMIN Cover Sheet

Matter: 4065 - Honeywell
PO Box: 3053

Note:



PAGEBREAK



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2 Nocona, Tx 76255
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4 Objector Pro Se

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6
7 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
8 **COUNTY OF SAN FRANCISCO**
9

10 JOEL I. ROOS and TOM SANTOS, On Behalf of)
Themselves and All Others Similarly Situated,)

11 Plaintiffs,)

12 v.)

13 HONEYWELL INTERNATIONAL, INC., and)
14 DOES 1-100, inclusive)

15 Defendant.)
16

Case No. CGC-04-436205 (RAK)

**OBJECTION TO PROPOSED SETTLEMENT
AND NOTICE OF INTENT TO APPEAR**

Date: May 2, 2014

Time: 9:00 a.m.

Place: Dept. 304

Judge: Hon. Curtis E.A. Karnow

17
18 I bought a Honeywell round thermostat in California during the class period and filed a claim.

19 ***A. The Class Notice is Misleading and Improperly Discourages Objections by Stating that a Proof***
20 ***of Purchase Must be Attached to the Objection***

21 I do not have proof of purchase of the Honeywell Thermostat. This settlement covers purchases
22 since June 30, 1986 so most class members not have a proof of their purchase. I submitted a claim form
23 which only required proof of purchase for more than two thermostats. The instructions for objections
24 found in the Notice state that a proof of purchase should be included with any objections. This
25 discourages class members without proof of purchase from objecting. Any class member has a right to
26 object to a class action settlement requiring court approval. Class counsel cannot differentiate between
27 the subclasses; class counsel must allow all class members to object.
28

1 ***B. The Attorneys' Fee Request is Excessive***

2 Class counsel want 37.5% of the total settlement fund. 25% of the net fund would be more than
3 enough. I also object that the attorneys are asking for a percentage of the whole settlement fund, rather
4 than the amount that actually benefits the class. The class should not pay a surcharge on administrative
5 costs. This is not a cost plus arrangement.
6

7 The attorneys claim they are asking for only a fraction of their lodestar. See Memorandum Of
8 Points And Authorities In Support Of Their Supplemental And Revised Motion For Preliminary
9 Approval Of Class Action Settlement (Transaction Id # 54882141), page 20 lines 17-18. Unfortunately,
10 Plaintiffs have not yet filed their Motion in Support of Attorneys' Fees, so class members are unable to
11 evaluate these claims.
12

13 ***C. Class Members should have an opportunity to review the Attorneys' Fee Motion prior to the***
14 ***deadline to object or opt out of the Settlement***

15 Class members should have an opportunity to review the Attorneys' Fee Motion prior to the
16 deadline to object or opt out of the Settlement. Although the deadline to object to the Settlement is April
17 18, 2014, the fee motion unavailable for class member review. Hiding the fee application from the class
18 is prejudicial to the class. Federal courts in California have found that class members should be given
19 the opportunity to review attorneys' fee motions prior to the deadline for filing objections. In *In re*
20 *Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 898 (2010), for example, the Ninth Circuit found that
21 "the district court abused its discretion when it erred as a matter of law by misapplying Rule 23(h) in
22 setting the objection deadline for class members on a date before the deadline for lead counsel to file
23 their fee motion. Moreover, the practice borders on a denial of due process because it deprives objecting
24 class members of a full and fair opportunity to contest class counsel's fee motion." The due process
25 rights the court referred to need to be observed in California superior courts as well as in federal courts.
26 The attorneys' fee motion should be made available for class members to review prior to the deadline
27
28

1 for filing an objection. Without detailed information and billing records to support their claims, it is
2 impossible to review the fairness of the settlement.

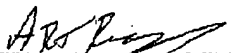
3 ***D. Much of the Settlement is likely to benefit unnamed Cy Pres recipients.***
4

5 It is possible much of the settlement fund will be distributed to cy pres recipients. This device
6 should be a last resort. The court should require a second distribution to class members and like the fee
7 application, the *cy pres* nominees should be disclosed before the objection deadline. All such nominees
8 should have a connection to the underlying claims and the class, factually supported by evidence and
9 class members should have an opportunity to object. *Dennis v. Kellogg*, 697 F.3d 858, 865 (9th Cir.
10 2012)
11

12 I have obtained assistance from an attorney in the preparation of this document. See ABA
13 Opinion 07-446. I do not seek any advantage in presenting this document myself.

14 I respectfully request the settlement be rejected until these issues are resolved.
15

16
17 Dated: April 18, 2014

By: 
Art Rogers

18
19 Sent via U.S. Mail, Postage Prepaid to:
20 Honeywell Objections
21 P.O. Box 3053
22 Faribault, MN 55021-2653
23
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544 01850
CA 920
22 APR '14
PM 2 1

Honeywell Objections
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Faribault, MN 55021-2653



U.S. POSTAGE
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