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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

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR FINAL
APPOVAL OF CLASS ACTION
SETTLEMENT**

Date: May 2, 2014

Time: 9:00 a.m.

Dept: 304

Judge: Hon. Curtis E.A. Karnow

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CGC-04-436205

**MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION FOR FINAL APPOVAL OF CLASS ACTION SETTLEMENT**

TABLE OF CONTENTS

PAGE

I. INTRODUCTION 1

II. LITIGATION HISTORY 2

 A. Overview of California Allegations and Claims..... 2

 B. Overview of Claims, Procedural Background,
 Discovery and Motion Practice..... 4

 C. California Procedural Background, Motion Practice,
 Discovery and Settlement 6

III. SUMMARY OF SETTLEMENT 10

IV. NOTICE TO THE CLASS WAS ADEQUATE..... 11

V. SETTLEMENT SHOULD BE FINALLY APPROVED 12

 A. The Settlement is Fair, Adequate and Reasonable..... 13

 1. No Collusion: The Settlement is the product of
 arms-length negotiations 14

 2. The lawsuit was well investigated and thorough
 discovery was conducted 15

 3. The monetary value of the Settlement adequately
 compensates the Class..... 15

 4. Plaintiffs’ case is strong, but litigation risks remain..... 16

 5. Plaintiffs’ counsel is highly experienced 17

 6. The Settlement is well-received by Class members 17

VI. CONCLUSION..... 18

TABLE OF AUTHORITIES

PAGE

California Cases

7-Eleven Owners for Fair Franchising v. Southland Corp.,
85 Cal. App. 4th 1135 (2000)11-14, 16

Apple Computer, Inc. v. Superior Court,
124 Cal. App. 4th 1253 (2005) 16

Cellphone Termination Fee Cases,
180 Cal. App. 4th 1110 (2009) 13, 16

Chavez v. Netflix, Inc.,
162 Cal. App. 4th 43 (2008) 11, 14

Dunk v. Ford Motor Co.,
48 Cal. App. 4th 1794 (1996) 13, 14

Nordstrom Com’n Cases,
186 Cal. App. 4th 576 (2010) 13

Trotsky v. Los Angeles Federal Savings & Loan Association,
48 Cal. App. 3d 134 (1975) 11

Wershba v. Apple Computer, Inc.,
91 Cal. App. 4th 224 (2001) 11, 13, 14, 16

Federal Cases

PAGE

Adoma v. Univ. of Phoenix,
913 F. Supp. 2d 964 (E.D. Cal. 2012)..... 16, 17

Handschu v. Special Services Div.,
787 F. 2d 828 (2d Cir. 1986)..... 11

In re Circular Thermostat Litigation,
2005 WL 2043022 (N.D. Cal., Aug. 24, 2005) 6

In re Mego Fin. Corp. Sec. Litig., Inc.,
213 F. 3d 454 (9th Cir. 2007) 16

Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.,
221 F.R.D. 523 (C.D. Cal. 2004) 16

Officers for Justice v. Civil Service Com.,
688 F. 2d 615 (9th Cir. 1982) 12, 16

Statutes and Rules

Cal. Bus. & Prof. Code § 16720 6

Cal. Bus. & Prof. Code § 17200 6

Cal. Civ. Code § 1781(d) 11

Cal. Rules of Court, Rule 3.766(f) 11

Cal. Rules of Court, Rule 3.769(e)-(g) 11-13

1 **I. INTRODUCTION**

2 Plaintiff Tom Santos, individually and as a representative of a Certified Class (the “Class”
3 or “Plaintiffs”) seeks final approval of the Proposed Settlement Agreement between Plaintiffs and
4 Defendant Honeywell International, Inc. (“Honeywell” or “Defendant”) (the “Settlement
5 Agreement” or “Settlement”) on behalf of California residents, who have purchased Honeywell
6 Round Thermostats (“HRT”) since June 30, 1986. *See* Declaration of Daniel J. Mogin in Support
7 of Plaintiffs’ Motion for Final Approval of Class Action Settlement (“Mogin Decl.”) ¶1.
8 Plaintiffs instituted the present action against Honeywell in 2004 to address Defendant’s alleged
9 anticompetitive conduct in connection with the sale of HRT. After nearly nine years of
10 contentious litigation, the parties have reached a proposed Settlement that, if approved by the
11 Court, will finally resolve Plaintiffs’ claims against Defendant.¹

12 The proposed Settlement establishes an \$8.15 million Settlement Fund that will be used to
13 compensate Class Members, issue reasonable service awards for the Class representatives,
14 provide notice and administration services to the Class, and cover court-approved attorneys’ fees
15 and costs. Mogin Decl. ¶24. Pursuant to the Settlement Agreement and Plan of Distribution,
16 Class Members will be eligible to receive up to \$18.00 for each thermostat purchased. For claims
17 of one or two thermostats, no proof of purchase is required. Class Members with claims of three
18 or more thermostat purchases can apply for the full claim amount by providing proof of purchase
19 records. Mogin Decl. ¶24(. Pro rata adjustments can be made if the Settlement is oversubscribed;
20 however, Plaintiffs’ counsel and the Claims Administrator believe that over-subscription is
21 unlikely based on available data. *See* Mogin Decl. ¶24; Declaration of April Hyduk In Support of
22 Plaintiffs’ Motion for Final Approval Of Class Action Settlement (“Hyduk Decl.”) ¶10.

23 The terms of the Settlement reflect an agreement that provides exceptional relief to the
24 Class Members while ensuring resolution to all involved parties and the Court. Final approval is

25 ¹ A substantially similar matter is pending in Vermont, styled as *Wright v. Honeywell*
26 *International Inc.* (Superior Court for the State of Vermont, Orange County, Case No. 201-11-04
27 OECV) (“*Wright*”). The proposed resolution is global, and the *Wright* case is encompassed in the
28 Settlement Agreement. A corresponding motion for final approval is scheduled before the
Vermont court on May 16, 2014. *See* Section II.B., below.

1 warranted here since the Settlement was the result of arm's-length negotiations, ultimately
2 mediated by the Honorable John E. Munter of the San Francisco Superior Court, significant
3 investigation and discovery were conducted over the past nine years to allow both counsel and the
4 Court to act intelligently, Class Counsel is highly experienced in antitrust class action litigation,
5 and there have been only three objections submitted in this case, and those objections lack any
6 merit. Although Plaintiffs remain confident in the strength of their claims, they recognize the
7 uncertainty attendant with class action litigation of this nature, particularly given that Defendant
8 denies liability, contests the amount of damages and continues to vigorously defend the action. In
9 light of these considerations, the Settlement provides a fair, reasonable, and adequate resolution to
10 all concerned parties.

11 In addition, Plaintiffs' notice plan provided comprehensive, adequate, and effective notice
12 to Class Members in accordance with California law and the Court's February 4, 2014 Order. *See*
13 Section IV, below. Notice was published in multiple newspapers, on a Settlement website, and
14 via a direct mail campaign to over 1,000 Class Members. It apprised Class Members of the
15 proposed settlement terms and the options for dissenting Class Members, and was designed with a
16 view to enhancing claims by Class Members. *See Mogin Decl.* ¶¶24(c), 30. *See generally*
17 *Wheatman Declaration.*

18 The proposed Settlement well exceeds the requirements for final approval by the Court.
19 Accordingly, Plaintiffs request that the Court grant final approval of the proposed Settlement
20 Agreement and enter judgment upon dismissing the action while retaining jurisdiction to enforce
21 the Settlement.

22 **II. LITIGATION HISTORY**

23 **A. Overview of California Allegations and Claims²**

24 In this antitrust and unfair competition case, Plaintiffs, on behalf of a certified class of
25 indirect purchasers (end-users), allege that Honeywell engaged in a long-running and continuous
26

27 ² This overview section was adopted from the parties' respective settlement conference briefs,
28 submitted to the Honorable John E. Munter on July 1, 2013 for Defendants, and July 3, 2013, for
Plaintiffs.

1 course of conduct that foreclosed competitors from manufacturing and selling circular
2 thermostats. Succinctly, Plaintiffs allege that Honeywell misrepresented the status of and
3 fraudulently procured and defended its trademark for the HRT to its competitors, which precluded
4 competitors from participating in the market for round thermostats and allowed Honeywell to
5 charge supra-competitive prices for the HRT to Class Members.

6 The HRT is the best-selling residential thermostat in history. Honeywell developed the
7 HRT in the 1940s and first patented it for its utility in 1946. Honeywell obtained a design patent
8 for the HRT's circular shape in 1956. All of Honeywell's patents for the HRT expired by 1970,
9 leaving its intellectual property rights unprotected. The events that ensued have been highly
10 debated and contested by the parties.

11 Plaintiffs contend that Honeywell applied unsuccessfully for decades to obtain federal
12 trademark registration for the HRT's design. In the interim, Honeywell sent cease-and-desist
13 letters to potential market participants and new entrants into the market claiming infringement on
14 then non-existent trademark rights. In one instance, Honeywell purchased a potential competitor
15 in an effort to foreclose competition in the HRT market and suppress evidence that would have
16 negated its trademark claims. In another instance, Honeywell negotiated a patent exchange
17 agreement to keep potential competitor Emerson Electric out of the market. Notably, Emerson
18 Electric had threatened to reveal damaging evidence to the Trademark Trial and Appeal Board
19 regarding the existence of competing circular thermostats, information that Honeywell neglected
20 to disclose in its pending trademark application. Honeywell's trademark registration was finally
21 approved in 1990, despite falsely representing in its application that no other thermostat
22 manufacturer had made a circular round thermostat after the HRT patents had expired.

23 Plaintiffs also contend that Honeywell's anticompetitive behavior continued after
24 procuring its trademark. It entered into numerous exclusive dealing contracts with Heating
25 Ventilation and Air Conditioning Original Equipment Manufacturers ("HVAC OEMS"), in which
26 the HVAC OEMS received the right to sell a circular thermostat bearing their logos in exchange
27 for agreeing that Honeywell was the sole owner of enforceable trademark protection over HRTs
28 and agreeing to purchase all HRTS exclusively from Honeywell. Honeywell further engaged in

1 sham litigation with potential competitors to prevent new entrants into the round thermostats
2 market. As a result of Honeywell’s anticompetitive conduct, the HRT became the biggest selling
3 thermostat in the United States, giving Honeywell 100% of the market share for round
4 thermostats. Honeywell’s conduct suppressed competition, suppressed innovation, and allowed it
5 to charge supra-competitive prices for its HRT and sell larger quantities of them for an artificially
6 prolonged period of time.

7 Defendant vehemently contests Plaintiffs’ allegations. Honeywell maintains that, since
8 the Round was introduced in the 1950s, it has exercised its lawful intellectual property rights to
9 protect this iconic product as it was entitled, and in some cases required, to do. The cease and
10 desist letters, negotiated settlements, and litigation noted above were in defense of its legally
11 procured common law and registered trademark rights. Honeywell maintains that Plaintiffs have
12 no evidence to establish violations of California’s Cartwright Act, Unfair Competition Law, and
13 common law monopolization. Instead of a 100% market share for round thermostats as alleged
14 by Plaintiffs, Honeywell contends that there is no round thermostat market, and its competitors
15 include numerous manufacturers of thermostats that come in all shapes and sizes, from square to
16 round to rectangular. Further, Defendant believes that Plaintiffs cannot demonstrate antitrust
17 injury since it sells HRTs through three different channels of trade, which often involve
18 intermediaries who employ different pricing and cost pass-through practices. According to
19 Defendant, Plaintiffs cannot demonstrate how much, if any, of the alleged product-premium these
20 intermediaries passed on to consumers. Even if Plaintiffs could show that they paid a premium,
21 they would not be able to show that the premium was the result of unlawful exclusion because the
22 HRT enjoyed a lawful premium due to its superior quality and iconic status. Additionally,
23 Honeywell maintains that many plaintiffs, like Plaintiff Roos, would have no idea what they paid
24 for their thermostat and would not have been able to prove they were overcharged.

25 **B. Overview of Vermont Claims, Procedural Background, Discovery and Motion**
26 **Practice**

27 As noted above, the *Wright* case is a similar indirect purchaser class action pending in
28 Vermont pursuant to its Consumer Fraud Act (“CFA”), 9 V.S.A. §2451 et seq. The allegations in

1 the *Wright* case are substantially similar to those in the California case. Like the California case,
2 discussed below, the Vermont case was removed and submitted to the Judicial Panel on
3 Multidistrict Litigation, which transferred the cases to the United States District Court for the
4 Northern District of California in May 2005. Craig Decl. ¶¶4-5. Plaintiffs succeeded in breaking
5 the Multidistrict Litigation for lack of federal subject matter jurisdiction and, in August 2005, it
6 was remanded to the Vermont Superior Court. Craig Decl. ¶6. Extensive discovery ensued.³
7 Craig Decl. ¶¶9-16.

8 Also similar to the California case, discussed below, the Vermont plaintiffs engaged in
9 extensive, highly contentious law and motion. Honeywell filed a motion for summary judgment
10 against Plaintiffs on September 16, 2006, which was summarily denied on May 15, 2008. Craig
11 Decl. ¶¶14-16. Plaintiffs' motion for class certification was initially denied by the Vermont trial
12 court on May 15, 2008. Craig Decl. ¶12-B. Plaintiffs appealed the decision to the Supreme Court
13 of Vermont which, on December 10, 2009, reversed the lower court and ordered the class to be
14 certified.⁴ Craig Decl. ¶¶17-18. Notice of pendency was completed by January 31, 2012, and
15 only seven Class Members chose to be excluded from the lawsuit. Craig Decl. ¶20.

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20 ³ On or about December 22, 2005, the California and Vermont plaintiffs and Honeywell
21 stipulated that discovery conducted in one case shall be deemed to have been conducted and may
22 be used in both cases. Craig Decl. ¶8. The discovery conducted in this case is described in more
23 detail in Section II.C.

24 ⁴ The Supreme Court of Vermont certified the following class, which is substantially similar to
25 the California Class:

26 All Vermont consumers (as defined in 9 V.S. A. 2451a (a)) residing in the State of
27 Vermont who indirectly purchased a Round Thermostat from Honeywell, for their
28 own use and not for resale, during the period between June 30, 1986 and October
31, 2011. The class includes consumers who purchased a new home directly from
the builder so long as they are still the owner of the home. Excluded from the class
are governmental entities, Defendant and subsidiaries and affiliates of Defendant.

1 The Settlement with Honeywell encompasses the *Wright* case. The Vermont Court
2 granted preliminary approval of the Settlement on December 23, 2013.⁵ Craig Decl. ¶24. A
3 hearing on final approval of the Settlement is set for May 16, 2014. Craig Decl. ¶25.

4 **C. California Procedural Background, Motion Practice, Discovery and Settlement**

5 In November 2004, former class representative Bryan Brock brought this action against
6 Honeywell for alleged violations of the Cartwright Act (Cal. Bus. & Prof. Code § 16720, *et seq.*),
7 the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.*), and California’s common
8 law of monopolization based on the aforementioned conduct. (“Mogin Decl.”) ¶10.

9 After filing an Answer on December 16, 2004, Honeywell removed this case (as well as
10 the *Wright* case, discussed *supra*) to the United States District Court for the Northern District of
11 California and filed a Petition to the Judicial Panel on Multidistrict Litigation pursuant to 28
12 U.S.C. §1407. Mogin Decl. ¶11. Plaintiffs contested both the MDL proceedings and federal
13 jurisdiction. Mogin Decl. ¶11. Over Plaintiffs’ objections, the JPMDL initiated MDL
14 Proceedings and assigned the matter to the Northern District of California.⁶ Mogin Decl. ¶11. In
15 a rare occurrence, Plaintiffs succeeded in breaking the MDL and, on August 24, 2005, each case
16 was remanded to its respective state court. Mogin Decl. ¶11. On October 21, 2005, this case was
17 assigned to this Department as a complex matter. Mogin Decl. ¶11.

18 After remand to this Court, Plaintiffs successfully opposed, in part, Honeywell’s motion
19 for judgment on the pleadings or, in the alternative, motion to strike. Mogin Decl. ¶12. Plaintiffs
20 subsequently filed a First Amended Complaint, which also withstood Honeywell’s demurrer and
21 motion to strike. Mogin Decl. ¶14. After seeking leave to amend, Plaintiffs filed a Second
22 Amended Complaint on or about February 8, 2008, substituting Plaintiffs Joel I. Roos and Tom
23 Santos as the new class representatives for Mr. Brock. Mogin Decl. ¶15. Over the next several
24 years, Plaintiffs participated in numerous contentious court proceedings and substantial motion

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26 ⁵ The Vermont court also granted a supplemental order on preliminary approval on February 18,
27 2014, in which it granted preliminary approval of additional dates, deadlines and notice forms
28 pertaining to the Settlement. Craig Decl. ¶ 24.

⁶ *In Re Circular Thermostat Litigation*, 2005 WL 2043022 (N.D. Cal., Aug. 24, 2005).

1 practice and writ proceedings, including opposing Defendants' Anti-SLAPP motion and related
2 Petition for Writ of Mandate, both of which were denied. Mogin Decl. ¶¶ 4, 16, 17.

3 On November 12, 2009, Honeywell filed a Motion for Summary Judgment, or, in the
4 Alternative, Summary Adjudication, contending that Plaintiffs' claims were barred by the
5 litigation privilege under Civil Code section 47(b), the *Noerr-Pennington* doctrine, and the
6 *Walker Process* doctrine, that Plaintiff Roos did not adequately demonstrate antitrust injury, and
7 that his claims were barred by the statute of limitations. Mogin Decl. ¶18. On March 15, 2011,
8 the Court denied Defendant's motion with respect to the litigation privilege, the *Noerr-*
9 *Pennington* doctrine, and the *Walker Process* doctrine, but granted their motion with respect to
10 Plaintiff Roos, stating that he failed to demonstrate sufficient antitrust injury and that his claims
11 were barred by the statute of limitations. Mogin Decl. ¶18. Honeywell contested the decision in a
12 Petition for Writ of Mandate and/or Prohibition filed in the Court of Appeal on April 4, 2011,
13 which was summarily denied after extensive briefing by the parties. Mogin Decl. ¶18.

14 On November 7, 2011, the Court held a hearing on Plaintiffs' Renewed Motion for Class
15 Certification at which time Defendant vigorously contested Plaintiffs' ability to demonstrate
16 impact to Class Members on a class-wide basis. Mogin Decl. ¶19. Despite significant opposition
17 from Honeywell, the Court certified the class on February 21, 2012. Mogin Decl. ¶19. Notably,
18 the class period dates back 28 years, to 1986. The complete definition of the California Certified
19 Class is:

20 All persons residing in California who purchased one or more Honeywell Round
21 Thermostats ("HRT") indirectly from Defendant Honeywell International Inc., in
22 California during the Class Period for their own use and not for resale.

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

25 Also specifically excluded are the Defendant herein; officers, directors, or
26 employees of any Defendant; any entity in which any defendant has a controlling
27 interest; the affiliates, legal representatives, attorneys, heirs or assigns of any
28 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.

1 The Class Period is defined as June 30, 1986, through and including December 5, 2013.
2 Defendant contested certification by filing a Petition for Writ of Mandate and/or Prohibition with
3 the Court of Appeal on April 23, 2012, and a Petition for Review with the California Supreme
4 Court on July 30, 2012. Mogin Decl. ¶19. Although both courts ultimately denied Honeywell’s
5 petitions, the proceedings signaled Honeywell’s continued resolve to challenge class certification
6 and Plaintiffs’ ability to prove injury. Mogin Decl. ¶19.

7 Plaintiffs also engaged in extensive discovery and investigation. Plaintiffs commissioned
8 expert analyses, reviewed millions of pages of documentary evidence, defended and took multiple
9 depositions (including expert depositions), and propounded approximately seven sets of Requests
10 for Production of Documents, seven sets of Interrogatories, and two sets of Requests for
11 Admission. Mogin Decl. ¶¶5-9. Plaintiffs’ counsel also thoroughly investigated the various
12 factual and legal issues involved in this case and became familiar with the strengths and
13 weaknesses of Plaintiffs’ position. Mogin Decl. ¶9.

14 Cognizant of the inherent risks of litigation, the parties attempted formal and informal
15 negotiations on several occasions. Mogin Decl. ¶¶20-22. Despite these efforts, which included a
16 private mediation session in 2010, the parties could not reach an agreement. Mogin Decl. ¶22. At
17 the Court’s suggestion, the parties attended a settlement conference on July 9, 2013, before the
18 Honorable Judge John E. Munter, a San Francisco Superior Court Judge in the Complex Civil
19 Litigation Division. Mogin Decl. ¶23. With Judge Munter’s substantial assistance, the parties
20 reached an agreement in principle on July 17, 2013, memorialized in the November 8, 2013,
21 Settlement Agreement. Mogin Decl. ¶23. Plaintiff Tom Santos and Class Counsel have reviewed
22 the Settlement Agreement and believe it to be fair, adequate, and reasonable to settle the instant
23 litigation according to the terms set forth herein. Declaration of Tom Santos in Support of
24 Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement (“Santos Decl.”) ¶10;
25 Mogin Decl. at ¶¶25, 26.

26 Plaintiffs initially sought preliminary approval of the Settlement Agreement through a
27 properly noticed motion, heard on December 5, 2013. Mogin Decl. ¶27. The Court denied
28 Plaintiffs’ Motion without prejudice in light of some concerns with the proposed notice plan and

1 proposed Order. Mogin Decl. ¶27. Having fully addressed the Court’s concerns, preliminary
2 approval of the Settlement Agreement was granted on February 4, 2014. Mogin Decl. ¶27.

3 Notice of the Settlement was disseminated to Class Members pursuant to the notice plan
4 approved by the Court on February 4, 2014. Mogin Decl. ¶28; Declaration of Shannon R.
5 Wheatman, Ph.D. in Support of Plaintiffs’ Motion for Final Approval of Class Action Settlement
6 re: Implementation of Notice Plan (“Wheatman Decl.”) ¶¶18-23, 29. In accordance with the
7 Court’s Order, the Class website, www.RoundThermostats.com, went live on February 25, 2014.
8 Wheatman Decl. ¶19; Hyduk Decl. ¶7. Through the website, Class Members are able to obtain
9 related Court documents, learn of important court dates and, most importantly, access and submit
10 claim forms. Wheatman Decl. ¶19; Hyduk Decl. ¶7. A hotline was also activated for Class
11 Members, 1-855-287-1280, which provides information pertaining to the Settlement and allows
12 Class Members to ask questions about the Settlement or request a claim form. Wheatman Decl.
13 ¶21; Hyduk Decl. ¶8. Notice of the Settlement Agreement was posted on Facebook on March 3,
14 2014, published in the March 9, 2014, editions of Parade and USA Weekend magazines, and
15 published in the March 17, 2014, edition of People magazine (available on newsstands for
16 purchase on March 7, 2014).⁷ Wheatman Decl. ¶9. Finally, over 1,000 Class Members were
17 directly notified of the Settlement by mail. Wheatman Decl. ¶22; Hyduk Decl. ¶¶3-4. To date,
18 thousands of claims have been received. Hyduk Decl.¶9. All claims must be post-marked by July
19 18, 2014. *See* Mogin Decl.¶30 and Ex. 1.C, D. F., thereto. Any objections to or requests for
20 exclusions from the Settlement were sent to the Claims Administrator, postmarked by April 18,
21 2014. Wheatman Decl. ¶29. As of the date of filing this motion, only three objections has been
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24 ⁷ The March 7, 2014, and March 9, 2014, magazine publication dates identified above were the
25 earliest practicable dates on which Plaintiffs could place notice of the Settlement after the Court’s
26 February 4, 2014, ruling. Mogin Decl. ¶28; Wheatman Decl. ¶4. Plaintiffs did not believe that
27 the few days’ delay in issuing notice would be materially inconsistent with the Court’s February
28 4, 2014, Order, but rather was within their authorization to “utilize all reasonable procedures in
connection with the administration of the settlement”. Mogin Decl. ¶28; *see* Order Granting
Supplemental and Revised motion for Preliminary Approval of Class Action Settlement, filed
February 4, 2014, ¶15.

1 received, and no Class Members have requested to be excluded from this Settlement. Hyduk
2 Decl. ¶9.

3 **III. SUMMARY OF SETTLEMENT**

4 As specified in the attached Settlement Agreement and supporting documents [*see* Mogin
5 Decl. ¶30, Ex. 1], the parties have agreed, subject to the Court’s approval, to the following terms:

6 1. Defendant will deposit \$8,150,000 into an escrow account (the “Settlement Fund”),
7 to be administered for the benefit of Plaintiffs and Class Members under the supervision and
8 control of the Court. The Settlement Fund is the source for notice to the Class, disbursements to
9 Class Members, service awards to Plaintiffs, administrative costs, and attorneys’ fees and costs, as
10 approved by the Court. In consideration for the benefits obtained under the Settlement, Plaintiffs
11 and Class Members agree to release all claims against Defendant with respect to HRT products.

12 2. Each Class Member to submit a valid and timely claim shall be eligible to receive
13 up to an \$18.00 payment per thermostat purchased. Class Members claiming one or two
14 thermostat purchases may do so without proof of purchase. Valid claim submissions, regardless
15 of the number of thermostats claimed, must include a declaration indicating the number of
16 thermostats purchased and the location where such thermostats were purchased. Claims for more
17 than two thermostats may be approved if the claimant provides proof of purchase documents.
18 Payments of approved claims shall be distributed from the Settlement Fund upon final approval of
19 the Settlement, entry of judgment, and the close of the claims filing period. If the aggregate
20 number of claims exceeds the Settlement Fund, payments may be subject to a pro rata reduction.

21 3. Notice was disseminated pursuant to the Court-approved notice plan and included
22 a short form notice and a long form notice. Mogin Decl. ¶30, Ex. 1.C, D. The short form notice
23 contained a general description of the lawsuit, the Settlement, and the procedure for filing a claim,
24 opting out of the Settlement, and sending objections to the Settlement terms. The short form
25 notice also directed consumers to the Settlement Website (www.roundthermostats.com) or to call
26 1-855-287-1280, where Class Members can obtain additional information. Through the
27 Settlement Website, Class Members are able to access a long form notice and/or submit an
28 electronic claim form.

1 4. The Settlement also provides that the named Plaintiffs may seek service awards in
2 the amount of \$2,500 for participation in this proceeding. Such awards will be paid from the
3 Settlement Fund subject to the Court’s approval. Pursuant to the Settlement, attorneys’ fees and
4 costs will also be paid from the Settlement Fund to the extent they are awarded and approved by
5 the Court.⁸

6 **IV. NOTICE TO THE CLASS WAS ADEQUATE**

7 As noted above, the Court preliminarily approved the Settlement on February 4, 2014, and
8 directed Plaintiffs to disseminate notice of the Settlement to the Class. The California Rules of
9 Court require that notice of final approval be given to class members in a manner specified by the
10 Court [Cal. R. Ct. R. 3.769(f)], and the Court has ““virtually complete discretion as to the manner
11 of giving notice to class members””. *7-Eleven Owners for Fair Franchising v. Southland Corp.*,
12 85 Cal. App. 4th 1135, 1164 (2001) (*quoting Handschu v. Special Services Div.* 787 F. 2d 828,
13 833 (2d Cir. 1986)). *See also Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 57 (2008). California
14 law permits notice to be given in a manner reasonably calculated to apprise class members of the
15 settlement, and notice by publication in a newspaper or magazine, or by broadcasting on
16 television, radio, or the Internet, is sufficient where it appears that all class members cannot be
17 notified personally. Cal. R. Ct. R. 3.766(f); Cal Civ. Code 1781(d). The content of the notice to
18 the Class must fairly apprise them of the terms of the proposed compromise and of the options
19 available to dissenting class members. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224,
20 251-252 (2001) (*quoting Trotsky v. Los Angeles Federal Savings & Loan Association*, 48 Cal.
21 App. 3d 134, 151-152 (1975)).

22 Notice given to the Class here fully complies with the Court’s February 4, 2014, Order as
23 well as California law. Notice by publication was appropriate in this case given the length of the
24 Class Period, spanning nearly 28 years, and, in fact, was approved by the Court in the February 4,
25 2014, Order. Notwithstanding, over 1,000 Class Members were notified directly of the Settlement
26 by mail. Wheatman Decl. ¶22. In addition, and in accordance with the Court’s Order, notice was

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28 ⁸ Justification for the requested service awards and attorneys’ fees and costs is contained in
Plaintiffs’ Motion for Attorneys’ Fees and Reimbursement Costs, filed concurrently herewith.

1 published to the Class as follows: (1) extensive Internet banner ads and ads in Facebook were
2 posted; (2) publication of a short form notice ran in multiple newspaper weekly-edition
3 magazines; (3) a state-wide media press release was issued on March 3, 2014; (4) publication of a
4 long form notice and claim form ran in the California state edition of People magazine; (5) a
5 dedicated Settlement website, www.RoundThermostats.com, was created, in which Class
6 Members could obtain critical information concerning the case as well as submit claim forms
7 online; and (6) a hotline was established, 1-855-287-1280, which Class Members could call to
8 request claim forms or ask questions. Wheatman Decl. ¶¶8-25.

9 In terms of content, the short form notice included a brief explanation of the case, the
10 Settlement, the procedure for filing a claim, information regarding Class Members' legal rights
11 with respect to the Settlement, a link to the dedicated Settlement website, and the hotline number.
12 See Mogin Decl. ¶30 and Exhibit 1.D thereto; Wheatman Decl. ¶27. The long form notice
13 provided, *inter alia*: (1) a more detailed statement of the case; (2) a statement that the Court will
14 exclude a Class member from the case if he/she mails such a request to the Claims Administrator,
15 postmarked by April 18, 2014; (3) a statement that by not requesting exclusion, the Class member
16 waives the right to bring a separate lawsuit concerning the released claims; (4) a statement that
17 Class Members who wish to object to the settlement are to send objections to the Claims
18 Administrator, postmarked by April 18, 2014; and (5) the date, time and place of the final
19 approval hearing. Mogin Decl. ¶30 and Exhibit 1.C thereto; Wheatman Decl. ¶29. These forms
20 fully apprised Class Members of the terms of the Settlement and the options available to them
21 should they wish to exclude themselves from this lawsuit, and supports granting final approval of
22 the Settlement.

23 V. SETTLEMENT SHOULD BE FINALLY APPROVED

24 “Voluntary conciliation and settlement are the preferred means of dispute resolution.
25 This is especially true in complex class action litigation.” *7-Eleven Owners for Fair*
26 *Franchising*, 85 Cal. App. 4th at 1151 (*quoting Officers for Justice v. Civil Service Com.*, 688
27 F.2d 615, 625 (9th Cir. 1982)). California Rules of Court Rule 3.769 sets forth the two-step
28 process for approval of class action settlements. First, the Court preliminarily approves the

1 settlement and notice is given to Class Members. Cal. R. Ct. R. 3.769(e)-(f); *Cellphone*
2 *Termination Fee Cases*, 180 Cal. App. 4th 1110, 1118 (2009). As discussed above, the Court
3 preliminarily approved the Settlement on February 4, 2014, and notice was given to the Class in
4 compliance with the Court’s Order and California law. Next, the Court conducts a final approval
5 hearing, the purpose of which is to inquire into the fairness of the proposed settlement. Cal. R. Ct.
6 R. 3.769(g); *Cellphone Termination Fee Cases*, 180 Cal. App. 4th at 1118. If the settlement is
7 deemed fair, judgment is to be entered with the provision for continued jurisdiction for the
8 enforcement of the judgment. Cal. R. Ct. R. 3.769(h); *Cellphone Termination Fee Cases*, 180
9 Cal. App. 4th at 1118. For reasons discussed below, the Settlement Agreement exceeds the
10 presumption of fairness and final approval is warranted.

11 **A. The Settlement Is Fair, Adequate and Reasonable**

12 Due regard should be given to what is otherwise a private consensual agreement between
13 the parties. *7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th at 1144-1145. To that end,
14 the Court’s inquiry on final approval is limited to the extent necessary to make a reasoned
15 judgment that the agreement is not the product of fraud or overreaching by, or collusion between,
16 the negotiating parties, and that the Settlement as a whole is fair, adequate, and reasonable.
17 *Nordstrom Commission Cases*, 186 Cal. App. 4th 576, 581 (2010); *Cellphone Termination Fee*
18 *Cases*, 180 Cal. App. 4th at 1117-1118; *Wershba*, 91 Cal. App. 4th at 245; *Dunk v. Ford Motor*
19 *Company*, 48 Cal. App. 4th 1794, 1801 (1996).

20 Trial courts possess “broad discretion” to determine the fairness of a settlement. *7-Eleven*
21 *Owners for Fair Franchising*, 85 Cal. App. 4th at 1146. Courts are to consider a “mix” of
22 relevant considerations in determining whether a settlement is fair, including “[1] the strength of
23 plaintiffs’ case, [2] the risk, expense, complexity and likely duration of further litigation, [3] the
24 risk of maintaining class action status through trial, [4] the amount offered in settlement, [5] the
25 extent of discovery completed and the stage of the proceedings, [6] the experience and views of
26 counsel, and [7] the reaction of the class members to the proposed settlement.” *7-Eleven Owners*
27 *for Fair Franchising*, 85 Cal. App. 4th at 1146 (quoting *Dunk*, 48 Cal. App. 4th at 1801). See
28 also *Nordstrom Commission Cases*, 186 Cal. App. 4th at 581; *Cellphone Termination Fee Cases*,

1 180 Cal. App. 4th at 1117-1118; *Wershba*, 91 Cal. App. 4th at 244-245. This list of factors is not
2 exhaustive, and a presumption of fairness exists where (1) the settlement is reached through arms-
3 length bargaining; (2) investigation and discovery are sufficient to allow the Court to act
4 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is
5 small. *7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th at 1146, 1151. *See also Dunk*, 48
6 Cal. App. 4th at 1802 (determining the settlement was fair when, applying the factors, the case
7 was three years old when settled, extensive discovery and pre-trial litigation [including a demurrer
8 and motion for summary judgment] had been conducted, the plaintiffs' counsel were experienced
9 attorneys, there remained litigation risks such as statute of limitations issues that could have
10 negatively impacted the chances of recovery, and an independent mediator who was a highly
11 regarded retired superior court judge and appellate justice recommended the settlement); *Chavez*,
12 162 Cal. App. 4th at 53-53 (upholding final approval of the settlement since the settlement met
13 the presumption of fairness). "A settlement need not obtain 100 percent of the damages of the
14 damages sought in order to be fair and reasonable." *Wershba*, 91 Cal. App. 4th at 250-251.

15 **1. No Collusion: The Settlement is the product of arms-length negotiations**

16 The Settlement reached in this case follows on the heels of nearly nine years of highly
17 active, protracted litigation between adversarial parties. Nearly every aspect of this case was
18 highly contested, as demonstrated by the myriad of pretrial motions and related writ petitions. *See*
19 *Mogin Decl.* ¶¶4, 6, 10-19. The parties' prior settlement efforts, which included unsuccessful
20 discussions in 2008 and an equally unsuccessful private mediation in July of 2010, were indeed
21 futile. Collusion or fraud in this case was simply not possible, as the parties could not agree on
22 anything absent substantial assistance. To be sure, the Settlement was only reached after
23 attending a Court-requested settlement conference before the Honorable John E. Munter on July
24 9, 2013. *Mogin Decl.* ¶23. That Judge Munter, a well-respected, neutral sitting judge who is
25 highly knowledgeable in antitrust and class action litigation as both a jurist and practitioner,
26 recommended the Settlement further establishes that the agreement is fair and devoid of collusion
27 or fraud. *See Dunk*, 48 Cal. App. 4th at 1802-1803 (determining that a settlement is more likely
28

1 to be fair when recommended by an independent mediator who is a retired superior court judge
2 with substantial experience); Mogin Decl. ¶23.

3 **2. The lawsuit was well investigated and thorough discovery was conducted**

4 As discussed above, this case was vigorously litigated for almost nine years. In that time
5 period, Plaintiffs propounded over 125 Requests for Production of Documents, more than 115
6 Requests for Admission, and over 148 Special Interrogatories. Mogin Decl. ¶5. Plaintiffs’
7 counsel reviewed millions of pages of documents and data produced in discovery, took the
8 depositions of Honeywell employees and former employees, including, but not limited to, Paul
9 Nurnberger, Kris Ruminsky, and John Shefchik, and took and defended numerous expert witness
10 depositions. Mogin Decl. ¶¶6-7. Indeed, the massive court file on this case reflects the
11 substantial litigation that occurred over the years.

12 In addition, Plaintiffs’ counsel conducted extensive research into the market structure for
13 circular thermostats, Honeywell’s history with market competitors, and Honeywell’s filings with
14 the U.S. Patent and Trademark Office, among other things. Mogin Decl. at ¶9. Plaintiffs’ counsel
15 worked closely with qualified experts to develop a substantial understanding of Honeywell’s
16 pricing structures, the economic evidence and effects of Defendant’s alleged anticompetitive
17 behavior, and the potential methods for assessing damages experienced by purchasers as a result
18 of these actions. Mogin Decl. ¶8. For example, Plaintiffs sought the expertise of Dr. Roger Noll,
19 a professor emeritus of economics at Stanford University who is also the author of several
20 publications regarding antitrust economics. Mogin Decl. ¶8. After careful study of the
21 aforementioned issues, Dr. Noll prepared extensive reports and declarations regarding his
22 findings, which were used to evaluate and litigate Plaintiffs’ case. Mogin Decl. ¶8. The extensive
23 discovery and investigation conducted in this case, and the advanced stage of these proceedings
24 supports the determination that the Settlement is fair, adequate and reasonable.

25 **3. The monetary value of the Settlement adequately compensates the Class**

26 The \$8,150,000 all-cash settlement more than sufficiently compensates Class Members, as
27 the Settlement captures nearly 78% of the estimated damages, a remarkable result. Dr. Noll
28 testified that based on his analysis of the relevant markets and products, Honeywell’s improper

1 claims of trademark in the round thermometer raised the price of such thermometers by
2 approximately \$8.33 per unit. *See* Mogin Decl. ¶26. During the class period 1,256,054 round
3 thermostats were sold in California and Vermont. Mogin Decl. ¶36. The recovery of \$8,150,000
4 constitutes \$6.49 for each and every round thermometers sold in the two states, or approximately
5 78% of the estimated overcharge. Courts routinely approve settlements that recover much smaller
6 percentages of the estimated damages. *Wershba*, 91 Cal. App. 4th at 250 (noting that courts
7 approve settlements that amount to a fraction of the claimed damages). *See also In re Mego Fin.*
8 *Corp. Sec. Litig., Inc.* 213 F. 3d 454 (9th Cir. 2007) (finding settlement amount constituting 16%
9 of the potential recovery was fair and reasonable).⁹ By any measure, the result obtained on behalf
10 of the Class is fair, adequate and reasonable, and supports final approval.

11 **4. Plaintiffs’ case is strong, but litigation risks remain**

12 In assessing this factor, the Court should not reach any ultimate conclusions on the merits
13 of the case. *7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th at 1145. “In other words,
14 ‘the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the
15 merits.’” *7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th at 1145 (*quoting Officers for*
16 *Justice*, 688 F. 2d at 625). Rather, the trial court evaluates the time and costs required to litigate a
17 case through trial, mindful that acceptance and approval of a settlement are preferable to lengthy
18 and expensive litigation with uncertain results. *See Adoma v. University of Phoenix, Inc.*, 913 F.
19 Supp. 2d 964, 976 (E.D. Cal. 2012) (*quoting Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*,
20 221 F.R.D. 523, 526 (C.D. Cal. 2004) (“*DIRECTV Inc.*”)).

21 Plaintiffs believe very strongly in their case, as demonstrated by their vigorous prosecution
22 of this case for nearly nine years. However, Plaintiffs also appreciate that pursuing trial would be
23 particularly expensive, time-consuming, and risky because of the complexities of the allegations
24 and the lengthy class period involved. As noted above, the parties have engaged in extensive law
25 and motion since the inception of this lawsuit, and further litigation would entail additional

26 _____
27 ⁹ “California courts may look to federal authority for guidance on matters involving class action
28 procedures.” *Cellphone Termination Fee Cases*, 180 Cal. Ap. 4th 1110, 1119, n.4 (2009)
(*quoting Apple Computer, Inc. v. Superior Court*, 124 Cal. App. 4th 1253, 1264, n.4 (2005)
(internal quotations omitted)).

1 motion practice and potential added discovery. *See* Mogin Decl. ¶26. Furthermore, Honeywell
2 indicated plans to file an additional motion for summary judgment or summary adjudication based
3 on the Court’s prior summary judgment ruling against Mr. Roos. Mogin Decl. ¶18. Although
4 Plaintiffs planned to further contest the prior ruling and believe they would have prevailed on any
5 future summary judgment motions, the continued dispute would certainly prolong the case and
6 increase the expense of litigating this matter. Mogin Decl. ¶18. Based on the foregoing, while
7 Plaintiffs believe in the merits of their case, the all-cash settlement reached here is more than
8 adequate and reasonable to compensate their damages.

9 **5. Plaintiffs’ counsel is highly experienced**

10 Courts give great weight to the recommendation of experienced counsel when assessing
11 the fairness of a proposed settlement. *Adoma*, 913 F. Supp. 2d at 977. ““This is because parties
12 represented by competent counsel are better positioned than courts to produce a settlement that
13 fairly reflects each party’s expected outcome in the litigation.”” *Adoma*, 913 F. Supp. 2d at 977
14 (*quoting DIRECTV, Inc.*, 221 F.R.D. at 528). This case has been litigated by competent counsel
15 for both sides who believe the Settlement is favorable to their respective clients. Class Counsel is
16 highly experienced in this type of litigation, collectively having participated in hundreds of class
17 action cases, including many large antitrust and consumer protection cases. Mogin Decl. ¶2.
18 Counsel was able to thoroughly evaluate the strengths and weaknesses of the case due to the
19 discovery and investigation conducted into the various factual and legal issues involved here.
20 Based on this well-informed assessment, Plaintiffs’ counsel believes the proposed settlement is
21 fair, reasonable, and adequate. Mogin Decl. ¶¶9, 25-26.

22 **6. The Settlement is well-received by Class Members**

23 Notice in this case was published multiple newspapers through two different supplements,
24 published in the California edition People magazine, posted the Internet, and mailed directly to
25 over 1,000 Class Members. *See* Wheatman Decl. ¶¶8-25. The reaction of the Class in response to
26 this notice program has been extremely positive, unusual for a Class this size. Through
27 submitting claim forms, thousands of Class Members have already come forward in approval of
28 the Settlement. To date, zero Class Members have requested to be excluded from the Class, and

1 only three Class Members have submitted objections, which lack merit. See Plaintiffs' Response
2 to Objections, filed concurrently herewith. The few objections to and lack of exclusions from the
3 Settlement support the determination that it is fair, adequate and reasonable, and should be
4 granted final approval.

5 **VI. CONCLUSION**

6 The Settlement is comprehensive in scope, not a product of fraud or collusion, fair, and
7 substantially beneficial to the class. If approved, it will wholly resolve the instant case and put to
8 end nearly nine years of litigation. For the foregoing reasons, Plaintiffs respectfully request that
9 the Court finally approves the Settlement.

10 Respectfully Submitted,

11 Dated: April 23, 2014

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