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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

JOEL I. ROOS and TOM SANTOS, on behalf of themselves and all others similarly situated, Plaintiffs, v. HONEYWELL INTERNATIONAL INC. and DOES 1-100, inclusive, Defendants.	Case No. CGC 04-436205 **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR SUPPLEMENTAL AND REVISED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** **Date:** **February 14, 2014** **Time:** **2:00 p.m.** **Dept:** **304**

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Plaintiff Tom Santos, individually and as a representative of a certified Class (the "Class" or "Plaintiffs") hereby respectfully submits this Memorandum in support of Plaintiffs' Supplemental and Revised Motion for Preliminary Approval of the Proposed Settlement Agreement (the "Settlement Agreement" or "Settlement") between Plaintiffs and Defendant Honeywell International Inc. ("Honeywell" or "Defendant"). *See* Declaration of Daniel J. Mogin in Support of Plaintiffs' Supplemental and Revised Motion for Preliminary Approval of Class Action Settlement ("Mogin Decl.") ¶30, Exhibit 1.

I. INTRODUCTION

Plaintiffs seek preliminary approval of a class action settlement on behalf of California residents, who have purchased over one million Honeywell Round Thermostats ("HRT") since June 30, 1986. Mogin Decl. ¶ 31, Ex. 2 at ¶ 24; ¶32, Ex. 3 at 10:7-18. Plaintiffs instituted the present action against Honeywell in 2004 to address Defendant's alleged anticompetitive conduct in connection with the sale of Honeywell Round Thermostats. After nearly nine years of contentious litigation, which included numerous lengthy substantive motions, production and analysis of millions of pages of documents and data, copious discovery, substantial investigation, and repeated arm's-length negotiations, the parties have reached a proposed class action settlement that, if approved by the Court, will finally resolve Plaintiffs' claims against Defendant.

The Court should also note that the proposed resolution is global, and that a substantially similar matter pending in Vermont, styled as *Wright v. Honeywell International Inc.* (Superior Court for the State of Vermont, Orange County, Case No. 201-11-04 OECV), is encompassed in the Settlement Agreement. A corresponding motion for preliminary approval has been granted by the Vermont court.

The proposed Settlement establishes an $8.15 million Settlement Fund that will be used to compensate Class members, issue reasonable service awards for the Class representatives, provide notice and administration services to the Class, and cover court-approved attorneys' fees and costs. Mogin Decl. ¶30, Ex. 1 at ¶36-37, 46. The Settlement Fund is apportioned according to the relative sales of the HRT in each state. According to the best data available to the parties,

the ratio of relevant sales of HRTs between California and Vermont was 91.8% and 8.2%, respectively. Pursuant to the Settlement Agreement and Plan of Distribution, Class members will be eligible to receive up to $18.00 for each thermostat purchased. For claims of one or two thermostats, no proof of purchase is required. *See generally* Declaration of Kim Schmidt ("Schmidt Decl.") (explaining the procedures implemented by the Claims Administrator to prevent fraudulent claims). Class members with claims of three or more thermostat purchases can apply for the full claim amount by providing proof of purchase records. Mogin Decl. ¶30, Ex. 1. As discussed at the prior hearing, pro rata adjustments can be made if the settlement is oversubscribed. However, based on the best estimates of Plaintiffs' counsel and the Claims Administrator, over-subscription is unlikely.

As a result of the parties' arm's-length negotiations, the aforementioned terms reflect a settlement that provides exceptional relief to the Class members while ensuring resolution to all involved parties and the Court. Although Plaintiffs remain confident in the strength of their claims, they recognize the uncertainty attendant with class action litigation of this nature, particularly given that Defendant denies liability, contests the amount of damages and continues to vigorously defend the action. In light of these considerations, the Settlement provides a fair, reasonable, and adequate resolution to all concerned parties.

In addition, Plaintiffs' proposed notice plan, prepared by recognized experts, provides comprehensive, adequate, and effective notice to the Class members and has been revised per the Court's December 5, 2013 Order denying without prejudice Plaintiffs' initial Motion for Preliminary Approval. *See* Mogin Decl. ¶30. The proposed notice will be published in multiple newspapers and on a Settlement Website. It will fairly apprise Class members of the proposed settlement terms and the options for dissenting Class members. Mogin Decl. ¶30, Ex. 1C-1F, Supplemental and Revised Declaration of Shannon R. Wheatman, Ph.D. on Adequacy of Notice Plan ("Supp. Wheatman Decl.") ¶¶37, 40-41, 44-46. Accordingly, Plaintiffs' proposed notice dissemination plan and notice forms fully conform to the Court's December 5, 2013 Order, statutory requirements and established precedent governing class settlement notice. Moreover,

the Notice Plan has been designed with a view to enhancing claims by class members. *See* Mogin Decl. ¶¶24, 30. *See generally* Supp. Wheatman Declaration.

The proposed Settlement satisfies, and in fact well exceeds, the requirements for preliminary approval by the Court. Accordingly, Plaintiffs request that the Court: (1) grant preliminary approval of the proposed Settlement Agreement; (2) approve the proposed forms and plan of notice to the Class; and (3) schedule a hearing date for final approval.

II. NATURE OF THE CASE[1]

In this antitrust and unfair competition case, Plaintiffs, on behalf of a certified class of indirect purchasers (end-users), allege that Honeywell engaged in a long-running and continuous course of conduct that foreclosed competitors from manufacturing and selling circular thermostats. Succinctly, Plaintiffs allege that Honeywell misrepresented the status of and fraudulently defended its trademark for the HRT to its competitors, which precluded competitors from participating in the market for round thermostats and allowed Honeywell to charge supra-competitive prices for the HRT to class members.

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

Plaintiffs contend that Honeywell applied unsuccessfully for decades to obtain federal trademark registration for the HRT's design. In the interim, Honeywell sent cease-and-desist letters to potential market participants and new entrants into the market claiming infringement on then non-existent trademark rights. In one instance, Honeywell purchased a potential competitor in an effort to foreclose competition in the HRT market. In another instance, Honeywell negotiated a patent exchange agreement to keep potential competitor Emerson Electric out of the market. Notably, Emerson Electric had threatened to reveal damaging evidence to the

[1] This statement of facts section was adopted from the parties' respective settlement conference briefs, submitted to the Honorable John E. Munter on July 1, 2013 for Defendants, and July 3, 2013, for Plaintiffs.

Trademark Trial and Appeal Board regarding the existence of competing circular thermostats, information that Honeywell neglected to disclose in its pending trademark application. Honeywell's trademark registration was finally approved in 1990, despite falsely representing in its application that no other thermostat manufacturer had made a circular round thermostat after the HRT patents had expired.

Plaintiffs also contend that Honeywell's anticompetitive behavior continued after procuring its trademark. It entered into numerous exclusive dealing contracts with Heating Ventilation and Air Conditioning Original Equipment Manufacturers ("HVAC OEMS"), in which the HVAC OEMS received the right to sell a circular thermostat bearing their logos in exchange for agreeing that Honeywell was the sole owner of enforceable trademark protection over HRTs and agreeing to purchase all HRTS exclusively from Honeywell. Honeywell further engaged in sham litigation with potential competitors to prevent new entrants into the round thermostats market. As a result of Honeywell's anticompetitive conduct, the HRT became the biggest selling thermostat in the United States, giving Honeywell 100% of the market share for round thermostats. Honeywell's conduct suppressed competition, suppressed innovation, and allowed it to charge supra-competitive prices for its HRT and sell larger quantities of them for an artificially prolonged period of time.

Defendants vehemently contest Plaintiffs' allegations. Honeywell maintains that, since the Round was introduced in the 1950s, it has exercised its lawful intellectual property rights to protect this iconic product as it was entitled, and in some cases required, to do. The cease and desist letters, negotiated settlements, and litigation noted above were in defense of its legally procured common law and registered trademark rights. Honeywell maintains that Plaintiffs have no evidence to establish violations of California's Cartwright Act, Unfair Competition Law, and common law monopolization. Instead of a 100% market share for round thermostats, there is no round thermostat market, and its competitors include numerous manufacturers of thermostats that come in all shapes and sizes, from square to round to rectangular. Further, Plaintiffs cannot demonstrate antitrust injury since it sells HRTs through three different channels of trade, which often involve intermediaries who employ different pricing and cost pass-through practices.

Plaintiffs cannot demonstrate how much, if any, of the alleged product-premium these intermediaries passed on to consumers. Even if Plaintiffs could show that they paid a premium, they would not be able to show that the premium was the result of unlawful exclusion because the HRT enjoyed a lawful premium due to its superior quality and iconic status. Additionally, Honeywell maintains that many Plaintiffs, like Roos, would have no idea what they paid for their thermostat and would not have been able to prove they were overcharged.

III. CASE HISTORY

In November 2004, former class representative Bryan Brock brought this action against Honeywell for alleged violations of the Cartwright Act (Cal. Bus. & Prof. Code § 16720, *et seq.*), the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.*), and California's common law of monopolization based on the aforementioned conduct. After removal to federal court, initiation of proceedings before the Judicial Panel on Multi-District Litigation and a subsequent remand,[2] a motion for judgment on the pleadings, a motion to strike, a demurrer, a First Amended Complaint, and a motion for leave to amend, Plaintiffs filed a Second Amended Complaint, on or about February 8, 2008, substituting Plaintiffs Joel I. Roos and Tom Santos as the new class representatives. Mogin Decl. ¶¶ 10-15. Over the next several years, Plaintiffs engaged in contentious court proceedings and substantial motion practice and writ proceedings, including opposing Defendants' Anti-SLAPP motion and related Petition for Writ of Mandate, both of which were denied. Mogin Decl. ¶¶ 12-16.

On November 12, 2009, Honeywell filed a Motion for Summary Judgment, or, in the Alternative, Summary Adjudication, contending that Plaintiffs' claims were barred by the litigation privilege under Civil Code section 47(b), the *Noerr-Pennington* doctrine, and the *Walker Process* doctrine, that Plaintiff Roos did not adequately demonstrate antitrust injury, and that his claims were barred by the statute of limitations. Mogin Decl. ¶18. On March 15, 2011, the Court denied Defendant's motion with respect to the litigation privilege, the *Noerr-Pennington* doctrine, and the *Walker Process* doctrine, but granted their motion with respect to

[2] In a rare occurrence, Plaintiffs succeeded in breaking the MDL and having each case individually remanded to the respective state courts.

Plaintiff Roos, stating that he failed to demonstrate sufficient antitrust injury and that his claims were barred by the statute of limitations. Defendant contested the decision in a Petition for Writ of Mandate and/or Prohibition filed in the Court of Appeal on April 4, 2011, which was summarily denied after extensive briefing by the parties. Mogin Decl. ¶18.

On November 7, 2011, the Court held a hearing on Plaintiffs' Renewed Motion for Class Certification at which time Defendant vigorously contested Plaintiffs' ability to demonstrate impact to class members on a class-wide basis. Mogin Decl. ¶19; ¶32, Ex. 3 at 24:21 – 25:4. Despite significant opposition from Honeywell, the Court certified the class on February 21, 2012. Mogin Decl. ¶19. Notably, the class period dates back 28 years, to 1986. Defendant contested certification by filing a Petition for Writ of Mandate and/or Prohibition with the Court of Appeal on April 23, 2012, and a Petition for Review with the California Supreme Court on July 30, 2012. Although both courts ultimately denied Honeywell's petitions, the proceedings signaled Honeywell's continued resolve to challenge class certification and Plaintiffs' ability to prove injury. Mogin Decl. ¶19.

During this time, Plaintiffs also engaged in extensive discovery and investigation. Plaintiffs commissioned expert analyses, reviewed copious documentary evidence, defended and took multiple depositions, and propounded approximately seven sets of Requests for Production of Documents, seven sets of Interrogatories, and two sets of Requests for Admission. Mogin Decl. ¶¶4-8. Plaintiffs' counsel also thoroughly investigated the various factual and legal issues involved in this case and became familiar with the strengths and weaknesses of Plaintiffs' position. Mogin Decl. ¶9.

Realizing the inherent risks of litigation, the parties attempted formal and informal negotiations on several occasions. Mogin Decl. ¶¶20-23. Despite these efforts, which included a private mediation session in 2010, the parties could not reach an agreement. Mogin Decl. ¶21-22. Recognizing the costs and uncertainty of further litigation, at the Court's suggestion, the parties attended a settlement conference on July 9, 2013, before the Honorable Judge John E. Munter, a San Francisco Superior Court Judge in the Complex Civil Litigation Division. Mogin Decl. ¶23. With Judge Munter's substantial assistance, the parties reached an agreement in

principle on July 17, 2013, which was later memorialized in the Settlement Agreement. Supp. Mogin Decl. ¶23; ¶30, Ex. 1. After weighing the costs and benefits of settlement against the risks of further protracted litigation, Plaintiff Tom Santos and Class Counsel have determined it to be fair, adequate, and reasonable to settle the instant litigation according to the terms set forth herein. Santos Decl. ¶10; Mogin Decl. at ¶¶25-26.

Plaintiffs initially sought preliminary approval of the Settlement Agreement through a properly noticed motion, heard on December 5, 2013. The Court denied Plaintiffs' Motion without prejudice in light of some concerns with the proposed notice plan and proposed Order. As discussed in more detail below, all of the Court's concerns have been addressed and remedied. *See* Mogin Decl. ¶30; [Proposed] Order Granting Plaintiffs' Supplemental and Revised Motion for Preliminary Approval of Class Action Settlement.

IV. SUMMARY OF THE SETTLEMENT TERMS

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

1. Defendant will deposit $8,150,000 into an escrow account (the "Settlement Fund"), to be administered for the benefit of Plaintiffs and Class members under the supervision and control of the Court. The Settlement Fund will be the source for notice to the class, disbursements to Class members, service awards to Plaintiffs, administrative costs, and attorneys' fees and costs, as approved by the Court. In consideration for the benefits obtained under the Settlement, Plaintiffs and Class members agree to release all claims against Defendant with respect to Honeywell Round Thermostat products.

2. Each Class member to submit a valid and timely claim shall be eligible to receive up to an $18.00 payment per thermostat purchased. Class members claiming one or two thermostat purchases may do so without proof of purchase. *See generally* Schmidt Decl. (explaining the procedures implemented by the Claims Administrator to prevent fraudulent claims). Valid claim submissions, regardless of the number of thermostats claimed, must include a declaration indicating the number of thermostats purchased and the location where such thermostats were purchased. Claims for more than two thermostats may be approved if the

claimant provides proof of purchase documents. Payments of approved claims shall be distributed from the Settlement Fund upon final approval of the Settlement, entry of judgment, and the close of the claims filing period. If the aggregate number of claims exceeds the Settlement Fund, payments may be subject to a pro rata reduction.

3. Notice will be disseminated pursuant to the proposed notice plans and will include a short form notice and a long form notice. Mogin Decl. ¶30, Ex. 1C-1F. The short form notice will contain a general description of the lawsuit, the Settlement, and the procedure for filing a claim, opting out of the Settlement, and sending objections to the Settlement terms. The short form notice will also direct consumers to a Settlement Website (www.roundthermostats.com) or to call 1-855-287-1280, where Class members can obtain additional information. Through the Settlement Website, Class members will be able to access a long form notice and an electronic claim form.

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

V. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

California courts have long recognized a strong public policy in favor of settlement, particularly with complex class action litigation. *7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1151 (2000); *Neary v. Regents of Univ. of Cal.*, 3 Cal. 4th 273, 277 (1992); *In re Syncor ERISA Litig.*, 516 F. 3d 1095, 1101 (9th Cir. 2008). In order to protect the interests of absent class members, however, class action settlements require court approval, which is granted where the settlement is fair, reasonable, and adequate. *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1800-01 (1996). The preliminary approval process begins with the Court's review of the proposed settlement for obvious deficiencies. The Court makes a "preliminary determination of whether to give notice of the proposed settlement to members of the class and whether to schedule a hearing at which to receive evidence in support of and in

opposition to the proposed settlement." *In re Mid-Atlantic Toyota*, 564 F. Supp. 1379, 1384 (D. Md. 1983) (citing *Manual for Complex Litigation* § 1.46 at 62, 64-65 (5th ed. 1982));[3] see *In re Crocs Securities Litig.*, Case No. 07-cv-02351-PAB-KLM, 2013 WL 4547404, at * 3 (D. Colo. Aug. 28, 2013); *In re Tablewere Antitrust Litig.*, 484 F. Supp. 2d 1079, 1079-80 (N.D. Cal. 2007). Preliminary approval should be granted unless there is a substantial reason to believe that the proposed settlement is demonstrably not within the range of possible approval. *In re Mid-Atlantic Toyota*, 564 F. Supp. at 1384 (citing *Manual for Complex Litigation* § 1046 at 62, 64¬65 (5th ed. l982)); see, e.g., *Gautreaux v. Pierce*, 690 F. 2d 616, 621 n.3 (7th Cir. 1982) (preliminary approval requires a court simply to find that the proposed settlement fits "within the range of possible approval" and should be given further consideration); see also *Hanlon v. Chrysler Corp*., 150 F. 3d 1011, 1027 (9th Cir. 1988). Preliminary approval "is simply a determination that there is, in effect, 'probable cause' to submit the proposal to members of the class and to hold a full-scale hearing on its fairness." *In re Mid-Atlantic Toyota*, 564 F. Supp. at 1384 (citing Manual for Complex Litigation § 1.46 at 62, 64-65 (5th ed. 1982)); see *In re Crocs Securities Litig*., 2013 WL 4547404 at *3.

Courts generally afford a presumption of fairness where (1) the settlement is reached through arm's-length negotiations; (2) sufficient investigation and discovery have occurred such that counsel and the court can act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small. *Dunk*, 48 Cal. App. 4th at 1802. Since the court cannot fully assess many of the fairness factors prior to notice and the opportunity for objection, the preliminary approval stage does not require a comprehensive fairness evaluation. *Dennis v. Kellogg Co.*, No. 09-CV-1786-IEG (WMC), 2013 WL 1883071, at *4-5 (S.D. Cal. 2013); *Malta v. Fed. Home Loan Mortg. Corp.*, No. 10-CV-1290-BEN (NLS), 2013 WL 444619, at *5 (S.D. Cal. 2013); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079-80 (N.D. Cal. 2007). Rather, the court need only find that the proposed settlement falls within the range of possible

[3] California courts have latitude in interpreting the state authorities that direct class action management, and may look to federal authorities for non-dispositive guidance on class action procedure. See, e.g., *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695 (1967); *Vasquez v. Superior Court*, 4 Cal. 3d 800 (1971).

final approval such that notice should be sent to class members. (*Ibid.*) The proposed class action settlement put forth in this case fully satisfies this requirement and therefore warrants preliminary approval.

At the final approval hearing, the Court determines whether a proposed settlement is fair, reasonable and adequate, and considers several relevant factors, including the strength of the plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the amount of the proposed settlement, the risk of maintaining class action status through trial, the extent of the discovery completed, the stage of the legal proceedings, the presence of a governmental participant, and the reaction of the class members to the proposed settlement. *Dunk*, 48 Cal. App. 4th at 1801. This list, however, is not exhaustive and courts are "free to engage in a balancing and weighing of the factors depending on the circumstances of each case." *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 225 (2001).

A. <u>The Settlement Is the Product of Arm's-Length Negotiations</u>

The parties' proposed Settlement Agreement is entitled to a presumption of fairness because it is the product of arm's-length negotiations following years of protracted litigation between adversarial parties. Since the fairness inquiry is ultimately intended to ensure that class action settlements are not the result of fraud and/or collusion between the parties, a proposed settlement is more likely to meet the preliminary approval threshold where it is the result of arm's-length negotiations. *See Nordstrom Com'n Cases*, 186 Cal. App. 4th 576, 581 (2010); *Wershba*, 91 Cal. App. 4th at 245. In this case, nearly every aspect of the parties' proceedings has been highly contested, as indicated by the myriad pretrial motions and several related writ petitions. Mogin Decl. ¶¶10-19. Additionally, the proposed Settlement Agreement follows nine years of active and contested litigation, prior unsuccessful settlement discussions in 2008, and an equally unsuccessful round of private mediation in July of 2010. Mogin Decl. ¶¶ 20-22. Only after their settlement conference before the Honorable John E. Munter on July 9, 2013, were the parties eventually able to reach an agreement on or about July 17, 2013. Mogin Decl. ¶23. The participation of a respected, neutral sitting judge, highly knowledgeable in antitrust and class action litigation both as a jurist and a practitioner, provides strong evidence of the non-collusive

nature of the parties' negotiations given the parties' long-standing disagreement and the involvement of experienced Class counsel who are familiar with antitrust litigation and class action cases. *See Dunk,* 48 Cal. App. 4th at 1802-03 (suggesting that a settlement is more likely to be fair where it is recommended by an independent mediator who is a retired superior court judge with substantial experience); Mogin Decl. ¶26. Accordingly, the parties' arm's-length negotiations further support a presumption of fairness.

B. Sufficient Investigation and Discovery Have Been Conducted to Allow Counsel and the Court to Accurately Evaluate the Fairness of the Settlement

The presumption of fairness will also be reinforced where the parties have conducted sufficient investigation and discovery to allow counsel and the court to intelligently assess the merits and value of the case and the proposed settlement. *Dunk,* 48 Cal. App. 4th at 1802. In *Wershba,* for example, the court found sufficient discovery to warrant a presumption of fairness where the "plaintiffs served numerous interrogatories, document demands, and requests for admission, producing several thousand pages of documents." *Wershba,* 91 Cal. App. 4th at 245. Similarly, in *Chavez v. Netflix,* the First District Court of Appeal held that plaintiffs' extensive pre-filing investigation into Netflix's delivery practices and advertising materials apprised them of the critical facts and therefore supported a finding that the proposed settlement was fair. *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 53 (2008).

Here, the parties developed an equal or greater appreciation of the case through extensive pre-trial investigation and discovery. Mogin Decl. ¶¶5-9. As previously indicated, the parties have been litigating this case for nearly nine years. In that time period, Plaintiffs propounded over 125 Requests for Production of Documents, more than 115 Requests for Admission, and over 148 Special Interrogatories. Mogin Decl. ¶5; ¶33, Ex. 4 at pp. 2-3. Plaintiffs' counsel also reviewed millions of pages of documents produced as a result of their extensive discovery and took the depositions of Honeywell employees and former employees, including but not limited to Paul Nurnberger, Kris Ruminsky, and John Shefchik. Mogin Decl. ¶7; ¶33, Ex. 4 at pp. 2-3. Plaintiffs also took and defended numerous expert depositions.

In pursuing the case, Plaintiffs' counsel also conducted extensive investigation by researching the market structure for circular thermostats, Honeywell's history with market competitors, and its filings with the U.S. Patent and Trademark Office, among other things. Mogin Decl. at ¶9. In addition, Plaintiffs' counsel worked closely with qualified experts to develop a substantial understanding of Honeywell's pricing structures, the economic evidence and effects of Defendant's alleged anticompetitive behavior, and the potential methods for assessing damages experienced by purchasers as a result of these actions. Mogin Decl. ¶¶8, 34, Ex. 5 at ¶6. For example, Plaintiffs' counsel sought the expertise of Dr. Roger Noll, a professor emeritus of economics at Stanford University who received a Ph.D. in economics from Harvard University and who is also the author of several publications regarding antitrust economics. Mogin Decl. ¶34, Ex. 5 at ¶2. After careful study of the aforementioned issues, Dr. Noll prepared extensive reports and declarations regarding his findings, which Class counsel utilized in evaluating and litigating Plaintiffs' case. Mogin Decl. ¶8. In filing and responding to the numerous motions and other substantive pleadings, including motions for class certification, summary judgment, and a demurrer, Plaintiffs' counsel also thoroughly analyzed the many legal and factual issues pertaining to this case. Mogin Decl. ¶9. Given the extensive discovery and investigation performed by Plaintiffs, Class counsel had sufficient information to accurately evaluate the strengths and weaknesses of their claims in reaching the proposed settlement.

C. The Judgment of Experienced Counsel Further Supports Preliminary Approval of the Proposed Settlement

The views of Class counsel also support a presumption of fairness given their considerable experience with class action litigation. In assessing the fairness of a proposed settlement, courts give great weight to the recommendation of experienced counsel. *Dunk*, 48 Cal. App. 4th at 1802; *Adoma v. Univ. of Phoenix*, 913 F. Supp. 2d 964, 977 (E.D. Cal. 2012) (explaining that this is because they are most familiar with the facts underlying the litigation and therefore better positioned to "produce a settlement that fairly reflects each party's expected outcome in the litigation"). The present case has been litigated by competent counsel for both sides who believe the Settlement is favorable to their respective clients. Furthermore, Class

counsel is highly experienced in this type of litigation, having participated in hundreds of class action cases, including many large antitrust and consumer protection cases. Mogin Decl. ¶2. Through their extensive discovery and investigation into the various factual and legal issues in the case, Plaintiffs' counsel has evaluated the strengths and weaknesses of their case. Based on this well-informed assessment, Plaintiffs' counsel believes the proposed settlement is fair, reasonable, and adequate, which further supports its preliminary approval by the Court. Mogin Decl. ¶25-26.

D. The Proposed Settlement Appropriately Balances the Risks of Litigation Against the Benefits of a Certain Recovery

The benefits conferred through the proposed Settlement provide a fair, reasonable, and adequate recovery given the risks, expenses, complexity, and potential duration of continued litigation. To evaluate the fairness, adequacy, and reasonableness of a proposed settlement, courts weigh the benefits afforded to Class members through an immediate and certain recovery against the continuing risks of litigation. *Rigo v. Kason Indus., Inc.*, No. 11-CV-64-MMA (DHB), 2013 WL 3761400, at *4 (S.D. Cal., July 16, 2013); *Greko v. Diesel U.S.A., Inc.*, No. 10-CV-02576 NC, 2013 WL 1789602, at *4 (N.D. Cal., Apr. 26, 2013) (recognizing that even with a strong case, the risks and expense of continued litigation weighed in favor of settlement where the defendant had and would continue to vigorously defend against the action).

In this case, nine years of tenacious litigation has yielded a Settlement that captures nearly 78% of the estimated damages, a remarkable result. Plaintiffs' expert economist, Dr. Roger Noll, testified that based on his analysis of the relevant markets and products, Honeywell's improper claims of trademark in the round thermometer raised the price of such thermometers by approximately $8.33 per unit. *See* Mogin Decl. ¶35, Ex. 6 at 141:6-25; ¶37. During the class period 1,256,054 round thermostats were sold in California and Vermont. Mogin Decl. ¶37. The recovery of $8,150,000 constitutes $6.49 for each and every round thermometers sold in the two states – 78% of the estimated overcharge. Courts routinely approve settlements that recover much smaller percentages of the estimated damages. *Wershba*, 91 Cal. App. 4th at 250 (noting that courts approve settlements that amount to a fraction of the

claimed damages); *see also In re Mego Fin. Corp. Sec. Litig., Inc.* 213 F. 3d 454 (9th Cir. 2007) (finding settlement amount constituting 16% of the potential recovery was fair and reasonable).

By contrast, pursuing trial would be particularly expensive, time-consuming, and risky because of the complexities of the allegations and the lengthy class period involved. While extensive law and motion activity has occurred since the lawsuit's commencement in 2004, further litigation would entail additional motion practice, the dissemination of class notice, and potential added discovery. *See* Mogin Decl. ¶¶18, 33, Ex. 4 at 2-4. Furthermore, Defendant indicated plans to file an additional motion for summary judgment or summary adjudication based on the Court's prior summary judgment ruling against Mr. Roos. Mogin Decl. ¶33, Ex. 4 at 2-4. Although Plaintiffs planned to further contest the prior ruling and believe they would have prevailed on any future summary judgment motions, the continued dispute would certainly prolong the case and increase the expense of litigating this matter. Mogin Decl. ¶33, Ex. 4 at 2-4.

The consideration that will be paid by Defendant is substantial, particularly when compared to the relatively modest amount of any given Class member's individual damages, and renders this a very valuable settlement.

Therefore, while Plaintiffs believe in the merits of their case, they urge approval of the Settlement after carefully weighing: (1) the legal defenses available to Defendant; (2) the difficulties Plaintiffs and Class members might encounter in establishing damages; (3) the potential costs, benefits and risks involved with further litigation; (4) the substantial benefits the Class members will receive pursuant to the Settlement; and (5) the benefit of immediate and certain recovery associated with the Settlement. With these considerations in mind, Plaintiffs believe the settlement is fair, reasonable, and adequate and, therefore, request the Court's preliminary approval.

E. The Court's Concerns with Plaintiffs' Motion for Preliminary Approval of Class Settlement Have Been Remedied.

In addition to the foregoing, Plaintiffs took great care to remedy the issues outlined in the Court's December 5, 2013 Order denying without prejudice their initial motion for preliminary approval. The following alterations have been made to Plaintiffs' proposed notice plan, documents related to this motion, and [Proposed] Order granting Plaintiffs' Supplemental and Revised Motion for Preliminary Approval of Class Action Settlement:

Notice Plan – Long Form Notice

- Actual dates are used to reference the Class Period, identified as June 30, 1986 through December 5, 2013;
- All terminology that an item must be *mailed* or *postmarked* or *received* is now uniformly identified as "postmarked by"; and
- All objections and opt-outs are now directed to the claims administrator for collection, which will be filed and served by Plaintiffs' counsel as a group at least one week in advance of the full fairness hearing.

Notice Plan – Short Form Notice

- As with the Long Form Notice, all terminology that an item must be *mailed* or *postmarked* or *received* is now uniformly identified as "postmarked by";
- All objections and opt-outs are now directed to the claims administrator for collection, which will be filed and served by Plaintiffs' counsel as a group at least one week in advance of the full fairness hearing;
- The answer to the question "What does the Settlement Provide?" now explains that "California claimants will receive 91.8% of the Settlement *after fees and costs*", per the Court's Order (emphasis added);
- The answer to the question "How can I get a payment" now explains that readers may find claim forms and an address for submission online at www.RoundThermostats.com or by calling 1-855-287-1280; and

- The certification on the Short Form Notice with Claim Form now reads "I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct", in compliance with Code of Civil Procedure §2015.5.

Other Issues:

- A declaration from Kim Schmidt, Vice President of Rust Consulting, the proposed claims administrator in this case, is being submitted in support of Plaintiffs' Supplemental and Revised Motion. Ms. Schmidt's declaration explains in detail the processes and procedures implemented by the claims administrator to screen for, prevent, and deter fraudulent claims;
- A supplemental declaration from Dr. Shannon Wheatman is also being submitted in support of Plaintiffs' Supplemental and Revised Motion. Dr. Wheatman's supplemental declaration explains, *inter alia*, the sums of money spent on outreach to specified ethnic and/or national groups with sufficient detail to ensure the Court that no group is being disproportionately targeted such that some other ethnic group is less likely to receive notice;
- Both Dr. Wheatman's and Ms. Schmidt's declarations conform with California law and specifically Code of Civil Procedure §2015.5; and
- A discussion of the case is included in the Supplemental and Revised Points and Authorities In Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement to enable the Court to discharge its duties consistent with *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 128 (2008).

Proposed Order

- Paragraph 1 of the Supplemental and Revised Proposed Order explains that the Court finds that the proposed settlement amount appears within the reasonable range in light of Defendant's potential liability for Plaintiffs' injuries or damages;
- All references to an order being "subject to" preliminary approval of the proposed class settlement by either this Court or the Superior Court for the State of Vermont have been eliminated;

- The parties no longer seek the Court's approval of an escrow agent;
- As with the proposed notice forms, all terminology that an item must be *mailed* or *postmarked* or *received* is now uniformly identified as "postmarked by";
- All objections and opt-outs are now directed to the claims administrator for collection, to be filed and served by Plaintiffs' counsel as a group at least one week in advance of the full fairness hearing;
- Objectors are now directed to submit "proof of purchase" of the HRT within the Class period to the Claims Administrator, and the phrase "proof of membership in the class" has been eliminated;
- Paragraph 9 of the Supplemental and Revised Proposed Order clearly states that one may object without having to appear or file a notice of intention to appear; and
- The requested stay of litigation in this case no longer references other actions which are "in connection with the prosecution of the Action" and potentially outside of this Court's jurisdiction.

See Mogin Decl. ¶30. *See also* Supplemental and Revised Proposed Order Granting Plaintiffs' Supplemental and Revised Motion for Preliminary Approval of Class Action Settlement.

VI. NOTICE TO THE CLASS

Plaintiffs also request approval of the proposed notice forms and the notice dissemination plan, as they fully comport with due process requirements and have been revised per the Court's December 5, 2013 Order. California statutes and case law give the Court broad discretion in fashioning the appropriate notice plan. With regard to the method of notice, courts need not guarantee that notice reaches each and every class member, but merely that the proposed method has a reasonable chance of reaching a substantial number of class members. *Cartt v. Super. Ct.*, 50 Cal. App. 3d 960, 974 (1975); *Wershba*, 91 Cal. App. 4th at 251; *see also* Cal. Rules of Court, Rule 3.766(f). Where class membership is particularly large, courts have repeatedly held that publication of notice alone is adequate. *Wershba*, 91 Cal. App. 4th at 251; *Cooper v. Am. Sav. & Loan Assn.*, 55 Cal. App. 3d 274, 285 (1976); *Dunk*, 48 Cal. App. 4th at 1805. Furthermore, where direct mailing of notice is infeasible, courts have approved notice through publication in

newspapers, magazines, and Internet websites. *Beck-Ellman v. Kaz USA, Inc.*, No. 3:10-CV-02134-H-DHB, 2013 WL 1748729, at *8 (S.D. Cal. 2013) (permitting notice via publication in multiple mediums where plaintiffs purchased defendants' products through third party retailers and were thus difficult to identify).

Plaintiffs' proposed notice fully meets these requirements. Direct notice is not feasible in this case because the Class is comprised of indirect purchasers and stretches back to 1986. Honeywell sells thermostats to direct purchasers, who then sell to a number of other individuals and entities in the various chains of distribution before the thermostats are eventually acquired by end users. Honeywell thus has little to no information about the identities of end users who make up the Class. Accordingly, the proposed notice plan relies primarily on publication notice.

In order to ensure the proposed notice reaches the class and informed them clearly, Class Counsel retained noted notice experts Kinsella Media to develop the notice program. Mogin Decl. ¶24. *See also Kaufman v. American Express Travel Related Services*, 283 F.R.D. 404, 408 (N.D. Ill. 2012) (recognizing Dr. Wheatman's, of Kinsella Media, expertise and appointing her as the expert in class action notification in that case). The proposed notice plan contemplates disseminating notice to Class members by: (1) extensive Internet banner ads and ads in Facebook; (2) publication of a short form notice in multiple newspapers, including newspapers targeted to non-English speaking populations;[4] (3) a state-wide media press release; (4) publication of a long form notice and claim form in the California state edition of *People* magazine; and (5) a dedicated Settlement Website at www.roundthermostats.com. Mogin Decl. ¶30, Ex. 1 at ¶30, 1C, 1D, 1F; Supp. Wheatman Decl. ¶¶17-41. As a result, Plaintiffs' notice is likely to reach a substantial number of Class members. Supp. Wheatman Decl. ¶¶40-41.

In regard to the contents of notice, California courts require that the notice given "fairly apprise the class members of the terms of the proposed compromise and of the options open to the dissenting class members." *Wershba*, 91 Cal. App. 4th at 251-52. The California Rules of Court reiterate this requirement and further specify that a settlement notice must explain the

[4] As discussed below, over 35% of California's population is comprised of Spanish and Asian speaking people. Supp. Wheatman Decl. ¶19-21.

procedures for filing written objections to the proposed settlement and appearing at the settlement hearing. Cal. Rules of Court, Rule 3.769. Courts have repeatedly allowed plaintiffs to use short form notices that provide only basic summary information and direct class members to a website where they can access a claim form and obtain a more detailed notice containing other necessary information regarding the Settlement procedure. *In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th 1380, 1392 (2010); *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 57 (2008).

Here, the proposed short form notice published in newspapers and magazines, such as California state's edition of *People* magazine, will include a brief explanation of the case, the Settlement, the procedure for filing a claim, and information regarding Class members' legal rights with respect to the Settlement. Mogin Decl. ¶30, Ex. 1D; Supp. Wheatman Decl. ¶44. As permitted in the *Chavez* and *In re Cellphone Fee Termination* cases, the short form notice will also provide a link to a dedicated Settlement Website, where Class members can obtain more information through a long form notice and can access the claim form. The long form notice will provide: (1) a more detailed statement of the case; (2) a statement that the Court will exclude a Class member from the case if they mail a letter postmarked by a specified date to an address created for "Honeywell Round Thermostat Exclusions"; (3) a statement that by not requesting exclusion the Class member waives the right to bring a separate lawsuit concerning the released claims; (4) a statement that Class members who wish to object to the settlement can send objections to the Class Administrator by a specified date; and (5) the time and place of the hearing on final approval. Mogin Decl. ¶30, Ex. 1C; Supp. Wheatman Decl. ¶46. In light of the aforementioned case law and revisions per the Court's Order noted above, Plaintiffs' proposed notice fully comports with California law and sufficiently apprises Class members of their rights and options under the Settlement through the plain language of the proposed notice forms.

Finally, Class Counsel has gone well beyond merely providing notice, and has requested that Kinsella Media add features to the notice program to enhance the reach of the notice and the ease of claims filing. According to Dr. Wheatman's Supplemental Declaration, 38% of California homeowners are Asian or Hispanic. Supp. Wheatman Decl. ¶19. Spanish is spoken

by 28.5% of people in California, and the top five Asian languages (which include Tagalog (Filipino), Chinese, Vietnamese, Korean and Japanese) are spoken by 7.94% of the people in California. Supp. Wheatman Decl. ¶21. As a result, the notice program includes publication in a significant number of newspapers whose readership is primarily Asian or Hispanic, even though those newspapers do not contribute to the "reach" percentages calculated by Kinsella Media. Supp. Wheatman Decl. ¶¶27, 41. The media budget is divided between the California general and multi-cultural markets as follows: 89.3% of the media budget is allocated to the general market; 6.3% of the media budget is allocated to the Hispanic market (strictly targeting non-English speaking consumers); and 4.4% of the media budget is allocated to the Asian market (also strictly targeting non-English speaking consumers). Supp. Wheatman Decl. ¶27. Accordingly, Plaintiffs request that the Court approve the proposed notice forms and the notice dissemination plan.

VII. THE PAYMENT OF ATTORNEYS' FEES AND SERVICE AWARDS IS APPROPRIATE UNDER THE CIRCUMSTANCES

Pursuant to the parties' Settlement Agreement the notices provide that Plaintiffs will apply for reasonable attorneys' fees of up to 37.5% of the Settlement Fund, which will only be a fraction of their lodestar accumulated approximately 36,000 hours to be awarded from the common fund. Plaintiffs will also seek reimbursement of costs of litigation. Under the common fund doctrine, a court may distribute attorneys' fees and costs from an established settlement fund to compensate class counsel and prevent unjust enrichment of absent class members. Newberg On Class Actions: Attorneys' Fees in Class Actions, § 14:6, p. 546-547; *Serrano v. Priest*, 20 Cal. 3d 25, 35 (1977) ("one who expends attorneys' fees in winning a suit which creates a fund from which others derive benefits, may require those passive beneficiaries to bear a fair share of the litigating costs"). The Court will make its determination as to the amount of fees and costs to be awarded at the final approval hearing, based upon Plaintiffs' application which will be filed in advance of that hearing.

Plaintiffs will also request approval of the $2,500 service awards proposed in the Settlement Agreement in light of the considerable time and effort invested in this litigation.

Courts have repeatedly approved the issuance of service awards to class representatives recognizing that named plaintiffs "should be compensated for the expense and risk they have incurred in conferring a benefit on other members of the class." *In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th at 1394 (2010) (approving $10,000 service awards for each of the four class representatives). In determining whether a service award is appropriate, courts may consider the following factors: (1) the risk to class representatives in commencing the suit; (2) the personal difficulties encountered by the class representatives; (3) the amount of time and effort spent by the plaintiffs; (4) the duration of the litigation; and (5) the personal benefit or lack thereof enjoyed by the class representative as a result of the litigation. *Id*. at 1394-95.

In this case, the last three factors particularly weigh in favor of approving the proposed service award given the length of the litigation, the involvement of the named Plaintiff, and the lack of benefit conferred for the efforts expended. By way of example, Plaintiff Tom Santos spent approximately 60 hours reviewing the complaint, reviewing discovery requests, producing and reviewing various documents, attempting to locate purchase records and conducting related investigation, preparing and sitting for a deposition, preparing declarations, and meeting with counsel on numerous occasions over the course of the litigation. Santos Dec., at ¶ 6-7. Plaintiff Roos spent a comparable amount of time fulfilling his obligations as a Class representative and but for his participation, the lawsuit might have been terminated after the original plaintiff, Mr. Brock, withdrew. *See* Mogin Decl. ¶36, Ex. 7 at ¶2. To date, neither has received any benefit for subjecting himself to this lengthy litigation or for performing these demanding tasks on behalf of the Class. Given the considerable time and risks involved with this litigation, a $2,500 service award is appropriate to compensate Plaintiffs Santos and Roos. *In re Cellphone Fee Termination Cases*, 186 Cal. App. 4th at 1394. The requested service award is fair and reasonable in light of these circumstances. As with attorneys' fees and costs, granting preliminary approval merely provides a mechanism for giving the Class notice of Plaintiffs' application for service awards. The determination or approval thereof is appropriately determined at the final approval stage.

VIII. CONCLUSION

This settlement is comprehensive in its scope, fair and even-handed in its application, and substantially beneficial to the Class. Furthermore, the settlement wholly resolves the instant case against Defendant and provides a fair, adequate, and reasonable resolution to all concerned parties. For the foregoing reasons, Plaintiffs respectfully request the Court's preliminary approval of the proposed settlement.

Respectfully Submitted,

Dated: January 22, 2014

By: _____

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