

1 Richard M. Heimann (Cal. Bar No. 063607)
 rheimann@lchb.com
 2 Robert J. Nelson (Cal. Bar No. 132797)
 rnelson@lchb.com
 3 Nimish R. Desai (Cal. Bar No. 244953)
 ndesai@lchb.com
 4 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
 275 Battery Street, 29th Floor
 5 San Francisco, CA 94111-3339
 Telephone: (415) 956-1000
 6 Facsimile: (415) 956-1008

7 David M. Birka-White (Cal. Bar No. 85721)
 dbw@birka-white.com
 8 Mindy M. Wong (Cal. Bar No. 267820)
 mwong@birka-white.com
 9 BIRKA-WHITE LAW OFFICES
 65 Oak Court
 10 Danville, CA 94526
 Telephone: (925) 362-9999
 11 Facsimile: (925) 362-9970

12 *Attorneys for Plaintiffs and the Proposed Class*

13
 14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN FRANCISCO DIVISION

18 MICHAEL ALLAGAS, ARTHUR RAY
 BRETT MOHRMAN, and BRIAN
 19 DICKSON, on behalf of
 themselves and all others similarly situated,

20 Plaintiffs,

21 v.

22 BP SOLAR INTERNATIONAL, INC.,
 23 HOME DEPOT U.S.A., INC. and
 DOES 1-10, inclusive,

24 Defendants.

Case No. 3:14-cv-00560-SI (EDL)

**~~PROPOSED~~ ORDER AND JUDGMENT
 GRANTING FINAL APPROVAL OF
 CLASS ACTION SETTLEMENT AND
 DISMISSING CLASS ACTION WITH
 PREJUDICE**

1 Upon review and consideration of Plaintiffs' Unopposed Motion for Final Approval, the
2 Class Action Settlement Agreement and Release ("Settlement"), and all declarations and exhibits
3 submitted therewith, which have been filed with the Court, it is hereby ORDERED and
4 ADJUDGED as follows:

5 1. The parties have agreed to settle this action set forth in the proposed nationwide
6 class action settlement agreement ("Settlement" or "Agreement"). This Court has jurisdiction
7 over the subject matter and parties to this action pursuant to 28 U.S.C. § 1332(d)(2) and 28 U.S.C.
8 § 1453. Except where otherwise noted, all capitalized terms used in this ORDER AND
9 JUDGMENT GRANTING FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND
10 DISMISSING CLASS ACTION WITH PREJUDICE (the "Final Order and Judgment") shall
11 have the meanings set forth in the Settlement Agreement which is incorporated by reference
12 hereto.

13 2. The Settlement, including all exhibits thereto, is finally approved as fair,
14 reasonable, and adequate. The Plaintiffs, by and through their counsel, have investigated the
15 pertinent facts and law, have engaged in substantial motion practice and discovery, and have
16 evaluated the risks associated with continued litigation, trial, and/or appeal. The Court finds that
17 the Settlement was reached in the absence of collusion, is the product of informed, good-faith,
18 arm's-length negotiations between the parties and their capable and experienced counsel, and was
19 reached with the assistance of an experienced mediator. The Court further finds that the proposed
20 Class meets the requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(3) and should
21 be certified for settlement purposes only; that the named Plaintiffs should be appointed as Class
22 Representatives; that the attorneys identified below should be appointed as Class Counsel; and
23 that the notice program constituted the best practicable notice to the Class.

24 **A. Certification of Settlement Class**

25 3. The Settlement Class (or "Class") this Court previously preliminarily certified in
26 its Preliminary Approval Order is hereby finally certified for settlement purposes under Fed. R.
27 Civ. P. 23(b)(3). The Class consists of:

28 All persons or entities in the United States (a) who purchased Class

1 Panels for initial installation on a property or who purchased
2 properties on which Class Panels had first been installed, and (b)
3 who currently own some or all of those Panels.

4 Notwithstanding the foregoing, excluded from the Class are: (1) Defendants, any entity in which
5 Defendants have a controlling interest, and their legal representatives, officers, directors,
6 employees, assigns and successors; (2) the United States government and any agency or
7 instrumentality thereof; (3) the judge to whom this case is assigned and any member of the
8 judge's immediate family; and (4) persons who timely and validly opt to exclude themselves from
9 the Settlement Class. In addition, Class Members' claims for personal injury and wrongful death
10 are initially reserved, and shall be released only pursuant to the terms § XII of the Settlement
11 Agreement.

12 4. The Court finds that the prerequisites for a class action under Rules 23(a) and
13 (b)(3) of the Federal Rules of Civil Procedure have been satisfied.

14 a. Class Members are ascertainable based on BP solar panels' model numbers
15 and serial numbers.

16 b. The members of the Class are so numerous that joinder of all members is
17 impractical. Fed. R. Civ. P. 23(a)(1). The parties estimate that there are several thousands of
18 Class Members, based on the hundreds of thousands of Class Panels still installed throughout the
19 country.

20 c. This litigation involves common class-wide issues that would drive the
21 resolution of the claims absent the Settlement, satisfying the commonality and predominance
22 requirements. Fed. R. Civ. P. 23(a)(2), (b)(3); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541,
23 2551 (2011). Common issues include the alleged common design defect, BP Solar's alleged
24 knowledge of the defect, and its alleged failure to disclose known information about the defect.

25 d. The claims of the named Plaintiffs are typical of the claims of the Class,
26 and the named Plaintiffs are adequate representatives of the Class. Fed. R. Civ. P. 23(c), (d). The
27 typicality and adequacy requirements are satisfied because the Plaintiffs are owners of the Class
28 Panels, and BP Solar's conduct at issue is alleged to have caused similar harm to Plaintiffs and

1 the Class. Accordingly, the Court appoints as Settlement Class Representatives Michael Allagas,
2 Arthur Ray, Brett Mohrman, and Brian Dickson.

3 e. Plaintiffs' counsel have the qualifications and experience to represent the
4 Settlement Class. Fed. R. Civ. P. 23(d). Accordingly, the Court appoints the following firms as
5 Class Counsel for purposes of effectuating the Settlement: Lief Cabraser Heimann & Bernstein,
6 LLP and Birka-White Law Offices.

7 f. The Court also finds that common issues predominate and the proposed
8 Settlement is a superior way to resolve this national controversy. Fed. R. Civ. P. 23(b)(3). The
9 common issues include those identified above. Further, given the inefficiencies and difficulties in
10 pursuing thousands of individual claims, the class mechanism is superior to any other for
11 resolution of these common disputes.

12 g. In making these findings, the Court has considered, among other factors: (i)
13 the interests of Class Members in individually controlling the prosecution or defense of separate
14 actions; (ii) the impracticability or inefficiency of prosecuting or defending separate actions; (iii)
15 the extent and nature of any litigation concerning these claims already commenced; and (iv) the
16 desirability of concentrating the litigation of the claims in a particular forum.

17 **B. Class Notice**

18 5. The Court finds that the distribution of the Class Notice in accordance with the
19 terms of the Settlement Agreement and this Court's Preliminary Approval Order, and as
20 explained in the declarations and affidavits filed before the Fairness Hearing:

21 a. constituted the best practicable notice to Class Members under the
22 circumstances of this action;

23 b. was reasonably calculated, under the circumstances, to apprise Class
24 Members of (i) the pendency of this class action, (ii) their right to exclude themselves from the
25 Class and the proposed settlement, (iii) their right to object to any aspect of the proposed
26 settlement (including final certification of the settlement class, the fairness, reasonableness or
27 adequacy of the proposed settlement, the adequacy of the Class's representation by Plaintiffs or
28 Class Counsel, and/or the award of attorneys' and representative fees), (iv) if they did not exclude

1 themselves from the Class, their right to appear at the Fairness Hearing (either on their own or
2 through counsel hired at their own expense), and (v) the binding effect of the orders and Final
3 Order and Judgment in this action, whether favorable or unfavorable, on all persons who do not
4 request exclusion from the Class;

5 c. was reasonable and constituted due, adequate and sufficient notice to all
6 persons entitled to be provided with notice; and

7 d. fully satisfied the requirements of the Federal Rules of Civil Procedure,
8 including Fed. R. Civ. P. 23(c)(2) and (e), the United States Constitution (including the Due
9 Process Clause), the Rules of this Court, and any other applicable law.

10 6. The Parties have provided the necessary notice under the Class Action Fairness
11 Act, 28 U.S.C. § 1712.

12 **C. Final Settlement Approval**

13 7. The Ninth Circuit has identified factors that govern the Court's analysis at final
14 approval to determine whether a settlement is fair, reasonable, and adequate: the strength of the
15 plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of
16 maintaining class action status throughout the trial; the amount offered in settlement; the extent of
17 discovery completed and the stage of the proceedings; the experience and views of counsel; the
18 presence of a governmental participant; and the reaction of the class members to the proposed
19 settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)

20 8. The terms and provisions of the Settlement Agreement, including any and all other
21 amendments, addendums and exhibits, have been entered into in good faith and are hereby fully
22 and finally approved as fair, reasonable and adequate as to, and in the best interests of, the
23 Plaintiffs and the Class Members, and in full compliance with all applicable requirements of the
24 Federal Rules of Civil Procedure, the United States Constitution (including the Due Process
25 Clause), and any other applicable law.

26 9. The Settlement confers substantial benefits upon the Settlement Class and avoids
27 the costs, uncertainty, delays, and other risks associated with continued litigation, trial, and likely
28 appeals.

1 a. First, Defendants will contribute \$45.33 million into a common fund that
2 will be utilized to replace all FDK+ Panels, as defined in the Settlement Agreement, irrespective
3 of whether they show any sign of failure. Claims will be paid until the fund is depleted.

4 b. Second, Defendants will fund the administration of a claims made program
5 that entitles Class Members to a visual inspection of all Non-FDK+ Panels, as defined in the
6 Settlement Agreement, and will remove, replace, and dispose of those that have failed due to
7 junction box failure. If more than 20% of the Non-FDK+ panels on a property have failed due to
8 junction box failure, inclusive of past failures documented in BP's warranty database, the
9 Settlement will fund the replacement of all remaining Non-FDK+ panels on the property. If the
10 Class Member does not receive full replacement following the initial inspection, he or she will
11 receive a free arc-fault detection inverter, fully installed, which is designed to preemptively arrest
12 any "arc-faults" in the panels. Finally, the Class Member remains eligible to submit further
13 claims while the program remains active (either three years or once the \$20 million fund is
14 depleted, whichever is earlier), and to obtain full replacement should the failure rate of panels on
15 the property exceed 20%, subject only to a credit back to Defendants for the cost of a new
16 inverter if previously provided. After the claims made program ends, Non-FDK+ Class Members
17 will still be able to pursue warranty claims pursuant to Defendant BP Solar's standard warranty
18 program, meaning that they will continue to get failed panels replaced for the remainder of their
19 warranties.

20 c. Third, for any Class Members with large, non-residential systems (i.e.,
21 more than 400 panels not used in a residential setting) ("LNR"), Defendants have agreed to enter
22 negotiations to settle the claims, mediated by a Special Master or another mutually agreed person.
23 If the negotiations do not resolve the Class Member's claims, a LNR Class Member remains free
24 to opt out of the Settlement, notwithstanding the official opt-out deadline, but agrees not to
25 commence class litigation against Defendants during this period of negotiations.

26 10. The Settlement was reached only after full briefing on a class certification motion
27 supported by numerous expert and class member declarations and 93 exhibits; extensive fact and
28 expert discovery, including over twenty depositions; and voluminous document discovery.

1 Based on the stage of the proceedings and the amount of investigation and discovery completed,
2 the parties had developed a sufficient factual record to evaluate their chances of success at trial
3 and to negotiate the Settlement.

4 11. The complexity, expense and likely duration of the litigation favors the Settlement,
5 which provides meaningful and substantial benefits on a much shorter time frame than otherwise
6 possible, and avoids risk to class certification and the Class's case on the merits.

7 12. The response to the Settlement by the Class further supports final approval. Of the
8 estimated 8,000 Class Members, only five (5) opted out and not a single Class Member objected.
9 *Cf. Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575 (9th Cir. 2004). The support of Class
10 Counsel, who are highly skilled in class action litigation such as this, and the Class
11 Representatives, who have participated in this litigation and evaluated the Settlement, also favors
12 final approval. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992).

13 13. Finally, there is no evidence of collusion in the Settlement. *Allen v. Bedolla*, 787
14 F.3d 1218, 1224 (9th Cir. 2015); *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 946
15 (9th Cir. 2011). The Settlement was the product of informed, good-faith, arm's-length
16 negotiations between the parties and their capable and experienced counsel, and was reached with
17 the assistance of an experienced mediator. Further, as discussed in a separate order, the
18 attorneys' fees request is fair and reasonable under governing standards.

19 **D. Administrative Matters, Release, and Dismissal**

20 14. Appointments. The Court appoints Jennifer Keough of JND Legal Administration
21 to serve as the Independent Claims Administrator ("ICA") as provided under the Settlement. All
22 reasonable fees, costs, and expenses of notice and claims administration shall be paid as provided
23 in the Settlement. Judge Richard Kramer (Ret.) shall serve as Special Master, pursuant to § V of
24 the Settlement Agreement.

25 15. Release. The Release contained in § XII of the Settlement Agreement is expressly
26 incorporated herein in all respects, is effective as of the date of this Final Order and Judgment,
27 and forever discharges the Released Parties from any claims or liabilities as described therein.
28

1 16. Binding Effect. The terms of the Settlement Agreement, and of this Final Order
2 and Judgment shall be forever binding on Plaintiffs and all other Class Members, as well as their
3 heirs, executors and administrators, successors and assigns, and those terms shall have res
4 judicata and other preclusive effect with respect to all Released Claims.

5 17. Permanent Injunction. All Class Members who have not been timely excluded
6 from the Class are hereby permanently barred and enjoined from (a) filing, commencing,
7 prosecuting, maintaining, intervening in, participating in (as class members or otherwise), or
8 receiving any benefits or other relief from, any other lawsuit, arbitration, or administrative,
9 regulatory or other proceeding or order in any jurisdiction for the Released Claims, and (b)
10 organizing or soliciting the participation of any Class Members in a separate class for purposes of
11 pursuing as a purported class action (including by seeking to amend a pending complaint to
12 include class allegations, or by seeking class certification in a pending action) any lawsuit or
13 other proceeding for the Released Claims. The Court finds that issuance of this permanent
14 injunction is necessary and appropriate in aid of the Court's jurisdiction over this action and to
15 protect and effectuate the Court's Final Order and Judgment.

16 18. Attorneys' and Class Representative's Fees and Expenses. The Agreement
17 provides for attorneys' fees and reimbursement of their expenses in the amount of \$11,600,000,
18 and stipends to the Class representatives as follows: \$7,500 to Plaintiffs Allagas, Mohrman, and
19 Ray, and \$3,500 to Plaintiff Dickson. The Court will issue a separate order addressing these fees
20 and stipend requests.

21 19. Enforcement of Settlement and Retention of Jurisdiction. Nothing in this Final
22 Order and Judgment shall preclude any action to enforce the terms of the Settlement Agreement.
23 Without affecting the finality of this Order, this Court expressly retains exclusive jurisdiction as
24 to all matters relating to the administration, consummation, enforcement and interpretation of the
25 Settlement Agreement and of this Final Order and Judgment, including, without limitation, for the
26 purpose of:
27
28

1 a. enforcing the terms and conditions of the Settlement Agreement and
2 resolving any disputes, claims or causes of action that, in whole or in part, are related to or arise
3 out of the Settlement Agreement, and/or this Final Order and Judgment;

4 b. entering such additional orders, if any, as may be necessary or appropriate
5 to protect or effectuate this Final Order and Judgment and the Settlement Agreement, or to ensure
6 the fair and orderly administration of the Settlement; and

7 c. entering any other necessary or appropriate orders to protect and effectuate
8 this Court's retention of continuing jurisdiction.

9 20. No Admissions. Section XIII of the Agreement, "No Admission of Liability," is
10 expressly incorporated herein in all respects.

11 21. Dismissal of Action. This Action is hereby dismissed in its entirety on the merits
12 and with prejudice against Plaintiffs and all other Class Members, without fees or costs to any
13 party except as otherwise provided in this Final Order and Judgment and the Court's separate
14 order regarding attorneys' fees and costs and Class Representative stipends.

15 22. Status Reports to Court. Plaintiffs are ordered to provide regular reports to the
16 Court, on June 30 and December 30 annually, updating the Court as to the status of claims and
17 the administrative costs of the settlement.

18 23. Entry of Final Judgment. The Court finds, pursuant to Rules 54(a) and (b) of the
19 Federal Rules of Civil Procedure, that Final Judgment should be entered as to the entirety of this
20 Action, and further finds that there is no just reason for delay in the entry of Final Judgment.
21 Accordingly, the Clerk's entry of this Order shall constitute Final Judgment and dismissal of the
22 Action.

23 IT IS SO ORDERED this 22nd day of December, 2016.

24 

25 _____
26 The Honorable Susan Illston
27 United States District Judge
28