

1 BIRKA-WHITE LAW OFFICES
David M. Birka-White (SBN 85721)
2 dbw@birka-white.com
3 178 E. Prospect Avenue
Danville, CA 94526
4 Telephone: 925.362.9999
Facsimile: 925.362.9970

5
6 Attorneys for Plaintiffs MICHAEL ALLAGAS,
ARTHUR RAY, BRETT MORHMAN, and the
7 SETTLEMENT CLASS

8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 MICHAEL ALLAGAS, ARTHUR RAY and
13 BRETT MOHRMAN, on behalf of
themselves and all others similarly situated,

14 Plaintiffs,

15 vs.

16 BP SOLAR INTERNATIONAL, INC.,
17 HOME DEPOT U.S.A., INC. and DOES 1 -
18 10, inclusive,

19 Defendants.

Case No. 3:14-cv-00560-SI

**DECLARATION OF DAVID M. BIRKA-
WHITE IN SUPPORT OF FINAL
APPROVAL OF ADDENDUM TO CLASS
SETTLEMENT AGREEMENT AND FOR
ATTORNEYS' FEES AND COSTS AND
INCENTIVE AWARDS**

Judge: Hon. Susan Illston
Crtrm: 1
Date: June 19, 2020
Time: 10:00 a.m.

Action Filed: January 9, 2014

20
21
22 I, David M Birka-White, declare as follows:

23 1. I am the principal attorney in the Birka-White Law Offices, ("BWLO"), and counsel
24 to Plaintiffs and Class Representatives Michael Allagas, Brett Mohrman and Arthur Ray.

25 2. I am a member in good standing of the Bar of the State of California and admitted to
26 practice in numerous district courts, including this Court. I respectfully submit this Declaration in
27 support of the Joint Stipulation for Final Approval of the Addendum to the original Class Settlement
28 Agreement.

1 3. My practice focuses on complex and class-action litigation involving product
2 liability, consumer and personal injury matters. I have been practicing law for over 40 years, more
3 than 30 of which have been devoted to product failure and consumer fraud class actions. I have
4 extensive experience in the litigation, trial, and settlement of class actions. During that time, I have
5 served as lead or co-lead court-appointed class in dozens of class actions and related complex cases.
6 Over the years, I have been recognized by several publications and by my peers for my work.

7 4. All three of these class representatives retained my office to represent them in the
8 underlying class action for the manufacture and sale of allegedly defective solar panels. As set forth
9 below, I have discussed all aspects of the proposed addendum to the class action settlement with
10 each of the class representatives and all support the requested Addendum.

11 5. This proposed modification to the settlement represents over two years of
12 discussions and negotiations between my office and counsel for Defendants, Alex Beroukhim, in
13 conjunction with extensive discussions with the settlement fund administrator and further
14 discussions and meetings with our solar consultants and class members.

15 6. I have personally overseen all of the legal work performed in this case since the
16 initial filing. BWLO has exclusively undertaken the responsibility of Class Counsel to oversee all
17 aspects of the administration of the underlying settlement consistent with this Court's orders.

18 7. Over the last 3+ years, I have worked regularly with Jennifer Keough, President of
19 JND, administrator of the settlement and her staff to implement the original settlement. My office
20 has also worked closely with defense counsel to ensure that the terms of the settlement have been
21 rigorously followed while remaining keenly responsive to the rights of class members. In that
22 context, I am very familiar with all aspects of the administration of the settlement funds and all
23 payments from the settlement fund trust accounts.

24 8. All attorney time for which reimbursement is now requested relates only to our work
25 to secure the BP365TS Addendum to the Settlement Agreement and is separate from our extensive
26 work to assist with the administration of the underlying settlement.

27 9. Since December 22, 2016, the independent claims administrator, in conjunction with
28 class counsel, have filed reports to this court regarding the status of the settlement fund

1 administration on June 29, 2017, December 22, 2017, July 2, 2018, December 30, 2018, June 30,
2 2019, and December 28, 2019.

3 **SOLAR PANEL MODEL BP365TS**

4 10. In the course of overseeing the administration of the settlement, my office has been
5 contacted by numerous individuals who own what is commonly referred to as BP Building
6 Integrated Solar Panels. These panels are known as BP365TS and were not part of the original
7 settlement. Unlike the other solar panel models in the settlement, the BP365TS panels are not
8 installed on racks. Rather, the BP365TS panels are installed directly on the roof and serve in the
9 capacity of both a solar panel and watershed and roofing material.

10 11. The BP365TS panels manufactured between 2005 and 2007, were designed and
11 manufactured with the same allegedly defective S-type junction box which was at the center of the
12 underlying litigation. In that sense, it is plaintiffs' contention that the BP365TS models
13 manufactured between 2005 and 2007 experienced the same defect as all other panels in this action.
14 In point of fact, it would have been appropriate to have included the BP365TS pounds manufacture
15 between 2005 and 2007 in the original class definition.

16 12. After nearly 3 years of administering the common funds settlement, the pace of the
17 incoming claims has significantly wound down. Through the voluntary exchange of internal BP
18 Solar documentation, we have been able to determine with a high degree of confidence the total
19 volume of potential claims for owners of the BP365TS solar panels. We have calculated the total
20 amount of money that such claims would reduce the common fund, assuming a 100% claims rate.

21 13. BP Solar business records revealed that between 2005 and 2007 BP Solar
22 manufactured and sold just over 8,400 panels, each of which contains 65 watts, or approximately
23 550,000 watts relating to the BP365TS solar panels.

24 14. In conjunction with our solar consultants and contractors, we have carefully assessed
25 the per watt replacement cost of the BP365TS solar modules manufactured between 2005 and 2007.
26 The parties have agreed to an average cost for replacing the monitor modules at \$4.50 per watt,
27 including cost of disposal. This amount was negotiated through the assistance of JAMS Mediator,
28 Judge Carl West.

1 15. There are approximately 520,000 remaining watts still in circulation of the BP365TS
2 modules manufactured between 2005 and 2007.

3 16. There is approximately \$15 million remaining in the common fund. Assuming the
4 highly unlikely event of a 100% claims rate, the maximum amount of money that will be used from
5 the common fund to replace the BP365TS panels is approximately \$2.3 million (520,000 watts
6 times \$4.50), or approximately 15% of the remaining fund.

7 17. Given the dwindling claims rate from the members of the original common fund
8 class, the inclusion of the owners of the BP365TS modules manufactured between 2005 and 2007
9 into the class definition will have virtually no impact on any remaining claims of the original class
10 members. With considerable confidence, I can represent to the Court that there will be substantial
11 remaining funds in the commons fund settlement after paying all the potential claims from
12 BP365TS owners.

13 18. As class counsel, I have thoroughly considered my responsibility to the underlying
14 class members and to the owners of the BP365TS panels manufacture between 2005 and 2007. The
15 proposed modification is fair and reasonable to both the original class members and the proposed
16 new class members and represents the highest and best use of this small portion of the remaining
17 proceeds in the settlement.

18 19. I have discussed the potential impact of the Addendum to the Settlement Agreement
19 with each of the three class representatives, Michael Allagas, Arthur Ray and Brett Mohrman. All
20 agree that it is an excellent use of a relatively small portion of the remaining common fund
21 settlement proceeds and all support the proposed Addendum to the Settlement Agreement.

22 20. Recognizing the need to assist owners of BP365TS model owners, my firm
23 conceived the concept of amending the class Settlement Agreement to include the BP365TS model
24 as part of the class definition.

25 21. This amendment represents a creative and principled mechanism to include the
26 owners of BP365TS modules into the original settlement without posing any risk to the original
27 class members.

28 ///

1 22. All of the work necessary to bring this settlement into fruition was performed by my
2 firm on a purely contingent basis, forgoing other work in order to bring this amendment to fruition
3 with no guarantee of recovery.

4 23. I report below BWLO's summary time, lodestar and costs incurred in and
5 attributable to achieve this addendum to the settlement agreement. There were only two attorneys
6 from my office and one paralegal that were engaged in the work to achieve this amended settlement,
7 myself, Attorney Mindy Wong and Paralegal Sonya Hernandez. At all times during which Mindy
8 Wong performed work on this matter, she was an associate attorney of my office with substantial
9 experience in class action and complex cases. Ms. Wong worked on the underlying class action
10 settlement from its inception and was completely informed and conversant regarding all aspects of
11 the case and administration of the settlement.

12 24. No contract lawyers contributed any time to secure the Addendum to the class action
13 settlement.

14 25. All members of my office keep a record of our time in six-minute increments,
15 regularly and contemporaneously.

16 26. The hourly rates charged by BWLO fall within the range of market rates charged by
17 attorneys of equivalent experience, skill and expertise in the San Francisco Bay Area. These rates
18 have been approved by numerous District Courts throughout California and various District Court
19 of other states.

20 27. According to my firm's time records, BWLO has invested 240.30 hours of attorney
21 time and 12.10 hours of paralegal for a total of 252.40 hours. At BWLO's customary and court-
22 approved rates, the resulting lodestar is \$189,170.00, plus expenses in the amount of \$8,160.46. A
23 summary of my firm's lodestar is set forth herein below:

24 ///

25 ///

26 ///

27 ///

28 ///

ATTORNEY/STAFF	HOURS	HOURLY RATE	TOTAL
Attorney David M. Birka-White	150.40	\$900.00	\$135,360.00
Attorney Mindy Wong	89.90	\$575.00	\$ 51,692.50
Paralegal Sonya Hernandez	12.10	\$175.00	\$ 2,117.50
Total	252.40		\$189,170.00
Expenses			Expert: \$4,010.57 Mediator: \$3,950.00 Postage/Copies: \$ 199.89 \$8,160.46
TOTAL ATTORNEYS FEES & EXPENSES			\$197,330.46

28. In general, over the last three years our work included conversing with numerous class members with BP365TS models installed on their homes regarding all aspects of the product and the status of the case. This included dozens of emails and numerous status calls. We also conducted site inspections and numerous meetings with our solar experts and consultants wherein all aspects of the panels and protocols for replacement were thoroughly considered.

29. We have engaged in innumerable conversations with BP Solar counsel and the administrator to fully understand the trends of the underlying claims rate in the common fund settlement in order to fashion a fair and reasonable addendum to the class Settlement Agreement as opposed to commencing new litigation with the associated complexities.

30. After nearly two years of negotiations, the parties informed the Court on July 27, 2019 that approximately \$16 million remained in the common fund of the underlying settlement and that the parties would seek to expand the definition of the class panels to include the roof integrated solar panels model number BP365TS. After various case management conferences were held, on

1 September 10, 2019 the Court ordered the parties to file a stipulation modifying the settlement
2 terms to include the BP365TS panels and prepare a third notice for the underlying settlement.

3 31. The court ordered that the parties file all necessary documents related to the
4 addendum of the class settlement agreement by November 22, 2019.

- 5 a. The parties prepared a Joint Stipulation for approval of the proposed
6 modification.
- 7 b. The parties worked with Jeanne Finegan to develop a notice program including
8 long and short form notices to include BP365TS class members. Jeanne Finegan
9 is the notice provider responsible for the two previous notices sent to the original
10 class. The notice plan to the BP365TS class members consists of the initial notice
11 which has already been undertaken. A second notice will follow 18 months after
12 the initial notice. The notice is now being delivered throughout the United States
13 with emphasis on states in which the BP365TS class panels principally were
14 sold. Notice costs will be paid by the common fund trust account up to a cap of
15 500,000.00.
- 16 c. Our office has worked with BP Solar and third-party solar contractors to
17 maximize identification of BP365TS.
- 18 d. The parties negotiated an amended Settlement Agreement.
- 19 e. The parties determined the appropriate compensation for the replacement of the
20 BP365TS models.
- 21 f. The parties conducted a mediation with the Honorable Judge Carl J. West and
22 agreed upon a cost per watt for the replacement of the BP365TS panels.
- 23 g. The parties negotiated and drafted a Conditional Fourth Amended Complaint for
24 damages and injunction including various joint stipulations to file the Amended
25 Complaint and Motion for Preliminary Approval.
- 26 h. With the assistance of the Mediator, the parties negotiated an arm's-length
27 agreement to pay BWLO the sum of \$237,500.00 for attorney fees and
28

1 reimbursement of costs related to modifying the class definition and negotiating
2 the addendum to the class Settlement Agreement.

3 i. The parties drafted the Notice of Joint Stipulation and Joint Stipulation for Final
4 Approval of Addendum to Class Settlement Agreement and the Proposed Order.

5 32. BWLO will continue to oversee the administration of the notice and claims program
6 for all class members consistent with the Court orders. We will continue to do so as long as the
7 settlement is active, which is anticipated to continue for at least two to three more years. All of the
8 time for which compensation is now requested is separate from the considerable additional time that
9 my office has expended on the administration the underlying settlement, nor does the current fees
10 request include the time that will be expended involving the owners of the BP365TS panels and the
11 associated administration.

12 **CLASS REPRESENTATIVES INCENTIVE AWARD**

13 33. As noted, the parties negotiated an attorney fee for BWLO for the work performed
14 and reimbursement of costs relating to the Addendum to the Settlement Agreement in the sum of
15 \$237,500.00. I have requested, and defendants have agreed, to reduce my fees and reimbursement
16 of costs to \$235,000.00 in order that each class representative, Allagas, Ray and Mohrman receive a
17 \$750.00 incentive award for their participation in working with my office to be informed of and
18 analyze the Addendum to the Settlement Agreement.

19 34. I have maintained a relationship with each of the class representatives throughout the
20 administration of the underlying case. All three class representatives unselfishly made themselves
21 available to consider the complex issues associated with the Addendum to the original settlement in
22 order to expand the definition to include the owners of the BP365TS modules. All of the class
23 representatives support the Addendum to the settlement. A stipend in the amount of \$750.00 is
24 modest but fairly represents compensation for their essential contribution to the modification of the
25 settlement which has conferred a substantial benefit to other class members.

26 ///

27 ///

28 ///

CONCLUSION

35. All of the attorney time spent to secure the addendum to the underlying settlement was reasonable and performed by experienced counsel. The time spent was reasonable and necessary. By ordering a fee in the sum of \$226,839.54, the lodestar multiplier is 1.24 and is well within the appropriate range in this circuit and warranted.

Requested Fees (multiplier 1.24)	\$226,839.54
Requested Costs	<u>\$8,160.46</u>
TOTAL	\$235,000.00

36. On behalf of the class representatives, the existing settlement class and the owners of the proposed BP365TS panels manufactured between 2005 2007, I respectfully request that the Court grant final approval of the Proposed Addendum to the class Settlement Agreement, order attorney fees and reimbursement of costs to be paid by Defendants in the sum of \$235,000.00 to Birka-White Law Offices and to further order that the sum of \$750.00 be paid to each of the three class representatives, Michael Allagas, Arthur Ray and Brett Mohrman.

I declare under penalty of perjury under the laws of the United States at the foregoing is true and correct. Executed on March 4, 2020 in Danville, California.



DAVID M. BIRKA-WHITE