

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 GRANTING
 PLAINTIFFS' UNOPPOSED MOTION
 FOR PRELIMINARY APPROVAL OF
 CLASS ACTION SETTLEMENT

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

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

22 3. The Settlement Class includes all persons or entities in the United States who
23 purchased Class Panels, as defined in the Settlement Agreement, for installation on a property or
24 who purchased a property on which Class Panels had previously been installed and (in either
25 case), currently some or all of such Class Panels. Excluded from the Class are: (1) Defendants,
26 any entity in which they have a controlling interest, and such entity's legal representatives,
27 officers, directors, employees, assigns and successors; (2) the United States government and any
28 agency or instrumentality thereof; (3) the judge to whom this case is assigned and any member of

1 the judge's immediate family; and (4) persons who timely and validly opt to exclude themselves
2 from the Settlement Class..

3 4. The Settlement confers substantial benefits upon the Settlement Class and avoids
4 the costs, uncertainty, delays, and other risks associated with continued litigation, trial, and likely
5 appeals. The Court finds that the Settlement falls within the range of reasonableness and, as
6 such, merits preliminary approval.

7 a. First, Defendants will contribute \$45.33 million into a common fund that
8 will be utilized to replace all FDK+ Panels, as defined in the Settlement Agreement, irrespective
9 of whether they show any sign of failure. This amount is intended to cover the removal and
10 disposal of the Class Panels, and purchase and installation of the replacement panels, based on a
11 cost of \$2.35 per watt. Claims will be paid until the fund is depleted.

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

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

7 5. The Court finds that the prerequisites for a class action under Rules 23(a) and
8 (b)(3) of the Federal Rules of Civil Procedure have been satisfied, and therefore certifies the
9 Settlement Class under Rules 23(a) and 23(b)(3) for settlement purposes only.

10 a. Class Members are ascertainable based on BP solar panels’ model numbers
11 and serial numbers.

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

16 c. This litigation involves common class-wide issues that would drive the
17 resolution of the claims absent the Settlement, satisfying the commonality and predominance
18 requirements. Fed. R. Civ. P. 23(a)(2), (b)(3); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541,
19 2551 (2011). Common issues include the alleged common design defect, BP’s alleged knowledge
20 of the defect, and its alleged failure to disclose known information about the defect.

21 d. The claims of the named Plaintiffs are typical of the claims of the Class,
22 and the named Plaintiffs are adequate representatives of the Class. Fed. R. Civ. P. 23(c), (d). The
23 typicality and adequacy requirements are satisfied because the Plaintiffs are owners of the Class
24 Panels, and BP’s conduct at issue is alleged to have caused similar harm to Plaintiffs and the
25 Class. Accordingly, the Court appoints as Settlement Class Representatives Michael Allagas,
26 Arthur Ray, Brett Mohrman, and Brian Dickson.

27 e. Plaintiffs’ counsel have the qualifications and experience to represent the
28 Settlement Class. Fed. R. Civ. P. 23(d). Accordingly, the Court appoints the following firms as

1 Class Counsel for purposes of effectuating the Settlement: Lieff Cabraser Heimann & Bernstein,
2 LLP; and Birka-White Law Offices.

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

8 6. The Court finds that the Notice Plan is reasonable and provides due, adequate and
9 sufficient notice to all persons entitled to receive notice, and meets the requirements of due
10 process and Rule 23. The Notice Plan includes individualized first-class mail and email service to
11 Class Members known to BP and Class Counsel, a settlement website maintained by the Claims
12 Administrator and linked to Class Counsel, a toll-free telephone line staffed by the Claims
13 Administrator, internet and social media advertisements, and publication notice in numerous
14 periodicals throughout the United States where the Class Panels were installed. The Notice
15 Program complies with Rule 23(c)(2)(B) because it constitutes the best notice practicable under
16 the circumstances, provides individual notice to all Class Members who can be identified through
17 reasonable effort, and is reasonably calculated under the circumstances to apprise the Class
18 Members of the nature of the action, the claims it asserts, the Class definition, the Settlement
19 terms, the right to appear through an attorney, the right to opt out of the Class or to comment on
20 or object to the Settlement and how to do so, and the binding effect of a final judgment upon
21 Class Members who do not opt out. The Court approves for dissemination to the Class the notices
22 filed with the Court with Plaintiffs' preliminary approval motion, and directs the Claims
23 Administrator and the Parties to carry out the Notice Plan as provided for in the Settlement.

24 7. The Court appoints Jennifer Keough of JND Legal Administration to serve as the
25 Independent Claims Administrator ("ICA") as provided under the Settlement. All reasonable fees,
26 costs, and expenses of notice and claims administration shall be paid as provided in the
27 Settlement. The Parties are ordered to finalize the publication notice dates as soon as practicable
28 after the entry of this Order. Notice shall be completed within 75 days of the entry of this Order.

1 8. Class Counsel shall file their Motion for Final Approval and Motion for Class
2 Counsel's Attorneys' Fees and Costs and Service Awards to Class Representatives on or before
3 65 days after the date of this Preliminary Approval Order.

4 9. Any Class Member may opt out of the proposed Settlement in the manner
5 prescribed in the Settlement Agreement and provided their request is postmarked by not later than
6 the date indicated in the Long Form Notice (which corresponds to no less than 85 days following
7 commencement of the Notice Program). Any Class Member may object to the Settlement and/or
8 to Class Counsel's request for attorneys' fees and costs in the manner prescribed in the Settlement
9 Agreement and Long Form Notice, and provided any such objection is postmarked to the Court,
10 Counsel, and the ICA by the date indicated in the Long Form Notice (which corresponds to no
11 less than 85 days following the commencement of the Notice Program). Plaintiffs' and
12 Defendants' responses to Objections and Reply Briefs, if any, shall be filed 9 days after the opt-
13 out and objection deadline. Any Class Member that wishes to appear at the Fairness Hearing
14 must so state in their objection, or if the Class Member has no objection, in a letter addressed to
15 Class Counsel and Defendants by the objection deadline.

16 10. The Fairness Hearing shall be held no less than 100 days after commencement of
17 the Notice Program to (i) consider the fairness, reasonableness, and adequacy of the Settlement;
18 (ii) consider entry of a Final Order and Judgment approving the Settlement and the dismissal with
19 prejudice of the Action; (iii) consider any objections to the Settlement filed by Class Members;
20 (iv) consider Class Counsel's application for an award of attorneys' fees and reimbursement of
21 costs and expenses; (v) consider the payment of service awards to the Class Representatives; and
22 (vi) consider such other matters as the Court may deem necessary or proper under the
23 circumstances in accordance with Federal Rule of Civil Procedure 23.

24 11. The Fairness Hearing may be postponed, adjourned, or continued by Order of the
25 Court without further notice to the Class. After the Fairness Hearing, the Court may enter a Final
26 Order and Judgment in accordance with the Settlement.

27 12. Pending the Fairness Hearing, other than proceedings necessary to carry out or to
28 enforce the terms and conditions of the Settlement, this matter is stayed.

