

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

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

11 *Attorneys for Plaintiffs and the Class*

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

15 MICHAEL ALLAGAS, ARTHUR RAY  
16 and BRETT MOHRMAN, on behalf of  
17 themselves and all others similarly situated,

18 Plaintiffs,

19 v.

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

23 Defendants.

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

**~~[PROPOSED]~~ ORDER GRANTING  
MOTION FOR ATTORNEYS' FEES AND  
COSTS AND CLASS REPRESENTIVE  
SERVICE AWARDS**

Judge: Hon. Susan Illston  
Date: December 22, 2016  
Time: 10:00 AM  
Crtm: 1

23 Plaintiffs' Motion for Attorneys' Fees and Costs and Incentive Awards ("Fee Motion")  
24 came before the Court for hearing on December 22, 2016. The Court has read and considered the  
25 Fee Motion, all supporting declarations and all related materials. For the reasons stated herein,  
26 the motion is granted.  
27  
28

1           **A. The requested fee is reasonable and supported under the percentage-of-fund**  
 2           **and lodestar methods.**

3           “While attorneys’ fees and costs may be awarded in a certified class action where so  
 4 authorized by law or the parties’ agreement, Fed. R. Civ. P. 23(h), courts have an independent  
 5 obligation to ensure that the award, like the settlement itself, is reasonable, even if the parties  
 6 have already agreed to an amount.” *Jordan v. Paul Fin., LLC*, No. C 07-04496 SI, 2013 WL  
 7 6086037, at \*2 (N.D. Cal. Nov. 19, 2013) (quoting *In re Bluetooth Headset Products Liab. Litig.*,  
 8 654 F.3d 935, 941 (9th Cir. 2011)).

9           The Ninth Circuit has approved two different methods to calculate reasonable attorneys’  
 10 fees: the percentage-of-recovery or the lodestar method. *Id.* “Where a settlement produces a  
 11 common fund for the benefit of the entire class, courts have discretion to employ either the  
 12 lodestar method or the percentage-of-recovery method.” *In re Bluetooth*, 654 F. 3d at 942. The  
 13 Ninth Circuit has repeatedly noted that 25% of the common fund is the “benchmark” for a  
 14 reasonable fee award. *See id*; *see also Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d  
 15 1301, 1311 (9th Cir.1990). Under the lodestar method, by contrast, the “figure is calculated by  
 16 multiplying the number of hours the prevailing party reasonably expended on the litigation (as  
 17 supported by adequate documentation) by a reasonable hourly rate for the region and for the  
 18 experience of the lawyer.” *Id.* Though not mandatory, the Ninth Circuit has “encouraged courts  
 19 to guard against an unreasonable result by cross-checking their calculations against a second  
 20 method.” *Id.* at 944; *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050–51 (9th Cir.  
 21 2002).

22           The Settlement establishes a \$45.33 million common fund to be used for Class Members  
 23 with higher failure rate, FDK+ panels, and makes available another \$20 million for lower failure  
 24 rate, Non-FDK+ panels. The Settlement also provides that Defendants will not oppose Class  
 25 Counsel’s fee request of up to \$11 million, plus \$600,000 in costs and expenses.<sup>1</sup>

26           Though it has both common fund and claims made elements, the Settlement is  
 27 predominantly a common fund settlement warranting a percentage of recovery award. Under that

28 <sup>1</sup> The Settlement Agreement provides that \$9 million of the fee award will be paid from the  
 Common Fund, and that Defendants will separately pay the additional \$2 million.

1 analysis, the Court finds the requested fee award to be reasonable and supported. The Settlement  
2 has created a minimum fund value of \$47.33 million (\$45.33 million common fund plus \$2  
3 million separate fee payment), making the \$11 million fee approximately 23.2% of the minimum  
4 fund value. When accounting for the \$20 million in additional relief made available to Class  
5 Members with lower failure rate models (which only reverts to Defendants if it is not exhausted  
6 within the lengthy three-year claims period punctuated by a second notice program half-way  
7 through), the overall percentage sought by Class Counsel is 16.3% (= \$11M/\$67.33M).

8 Both of these percentages are below the Ninth Circuit's 25% benchmark, and the Court  
9 finds that either percentage is warranted based on the relevant factors, which include (1) the  
10 results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the  
11 contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards  
12 made in similar cases. *Vizcaino*, 290 F.3d at 1048-50.

13 First, Class Counsel has secured certain and substantial benefits for the Class, as detailed  
14 in the Court's final approval order, and it is notable that no Class Member objected to the  
15 Settlement or the requested fees, costs, and service awards. Class Members who own models  
16 with relatively higher failure rates, referred to as FDK+ or Category 1 Class Panels, will receive  
17 full replacement of all of their Class Panels whether or not they show signs of failure, or they can  
18 opt for a cash payment. Class Members with Non-FDK+ or Category 2 panels receive a series of  
19 benefits: a free inspection to identify failed panels; free replacement of any failed panels, or full  
20 replacement if the documented failure rate exceeds 20% at any time during the claims period; and  
21 for any system that does not receive full replacement, installation of a new inverter with advanced  
22 safety technology. Finally, Large Non-Residential (LNR) Class Members, *i.e.*, those with 400 or  
23 more panels in a non-residential setting, are invited to participate in mediated commercial  
24 negotiations with BP Solar, a valuable procedural mechanism that short circuits expensive  
25 litigation.

26 Second, Class Counsel achieved this result in the face of significant litigation hurdles and  
27 risks, including developing a uniform defect theory applicable to hundreds of thousands of Class  
28 Panels, overcoming BP's arguments regarding non-uniform marketing of its products, obtaining

1 and maintaining class certification through trial and appeal, proving liability at trial, and  
2 developing a damages model for panels in service for a decade or more. Third, Class Counsel are  
3 highly experienced in prosecuting and settling complex class actions, including product defect  
4 cases. *See* Nelson Decl., ¶¶ 3-9, 16-17; Birka-White Decl., ¶¶ 3-7 and Ex. A. Fourth, their  
5 representation was contingent in nature, meaning they took on substantial risk of nonpayment  
6 over the course of many years. In light of these factors, the Court finds that the requested  
7 payment of 16.3% of the total settlement value, or 23.2% of the absolute minimum settlement  
8 value, to be reasonable and supported.

9 The Court has also conducted a lodestar cross-check to ensure the reasonableness of the  
10 requested fee. Class Counsel have spent approximately 12,570 hours investigating, analyzing,  
11 researching, litigating, and negotiating a resolution of this action. Birka-White Decl., ¶ 49;  
12 Nelson Decl., ¶ 17. Class Counsel's hourly rates, used to calculate the lodestar here, are in line  
13 with prevailing rates in this District, and have recently been approved by federal and state courts.  
14 Birka-White Decl., ¶ 35; Nelson Decl., ¶ 16; *see United Desert Charities, Inc., et al. v. Sloan*  
15 *Valve Company, et al.*, 2:12-cv-06878 SJO (SHx) (C.D. Cal. August 25, 2014) (approving Birka-  
16 White Law Offices rates); *Gutierrez v. Wells Fargo Bank, N.A.*, 2015 WL 2438274, at \*5 (N.D.  
17 Cal. May 21, 2015) (finding reasonable rates for Bay Area attorneys, including those from Lief  
18 Cabraser Heimann & Bernstein, LLP ("LCHB"), of between \$475-\$975 for partners, \$300-\$490  
19 for associates, and \$150-\$430 for litigation support and paralegals); *In re A-Power Energy*  
20 *Generation Systems, Ltd. Securities Litig.*, No. MDL 11-2302-GE (CWx), Dkt. No. 123 (C.D.  
21 Cal. Aug. 29, 2013) (granting LCHB's requested attorneys' fees); *In re Toyota Motor Corp.*  
22 *Unintended Acceleration Marketing, Sales Practices, and Products Liability Litig.*, No. 10-ml-  
23 02151 NS (FMOx), Dkt. No. 3933 (C.D. Cal. June 24, 2013) (awarding LCHB's requested fees  
24 and finding that "[c]lass counsel's experience, reputation, and skill, as well as the complexity of  
25 the case" justified their rates that ranged from \$150 to \$950); *White v. Experian Information*  
26 *Solutions, Inc.*, No. CV 05-1070 DOC (MLGx), Dkt. No. 775 (C.D. Cal. June 15, 2011)  
27 (approving LCHB's billing rates as justified "in light of the attorney's reputation and experience"  
28 and the prevailing rates in the district); *Berger v. Property ID. Corp.*, No. CV 05-5373-GHK

1 (CWx), Dkt. No. 899 (C.D. Cal. Jan. 28, 2009) (awarding LCHB's requested fees).

2 The resulting total lodestar is \$7,220,010.00. The requested \$11 million fee constitutes a  
3 multiplier of 1.52, which is well within the limits established by precedent. *See In re LinkedIn*  
4 *User Privacy Litigation*, 309 F.R.D. 573, 591 (N.D. Cal. 2015) ("most multipliers range between  
5 1.0 and 4.0" (citing *Vizcaino*)); *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-  
6 LHK, 2015 WL 5158730, at \*10-11 (N.D. Cal. Sept. 2, 2015) (awarding a \$40.043 million fee  
7 with a 2.2 (net 2.5) multiplier, and praising the work of class counsel, including LCHB); *Moore v.*  
8 *Verizon Commc'ns Inc.*, No. C 09-1823 SBA, 2014 WL 588035, at \*9 (N.D. Cal. Feb. 14, 2014)  
9 (awarding a \$7.5 million fee with a 1.58 multiplier, and noting that class counsel, including  
10 LCHB, deserved a multiplier of at least 1.5 "given the results achieved, Class Counsel's efforts  
11 on behalf of the class, and the substantial risk that Plaintiffs would not succeed at the class  
12 certification or merits stage of the litigation"). Further, the current 1.52 multiplier will inevitably  
13 decrease over time given the additional work Class Counsel will expend in monitoring and  
14 helping to implement the Settlement terms. Under a lodestar analysis, this multiplier is warranted  
15 here for all the reasons described above: the quality of the result, and the sustained effort by  
16 Class Counsel in achieving that result in the face of significant risks and difficulties, including the  
17 real risk of nonpayment in this contingency matter. *See Hanlon v. Chrysler Corp.*, 150 F.3d  
18 1011, 1029 (9th Cir. 1998) (lodestar figure may be adjusted upward to account for several factors  
19 including the quality of the representation, the benefit obtained for the class, the complexity and  
20 novelty of the issues presented, and the risk of nonpayment). Because the lodestar multiplier is  
21 warranted and well within the appropriate range in this Circuit, the lodestar cross-check verifies  
22 the reasonableness of the requested fee award.

23 **B. The requested costs and expenses reimbursement is reasonable.**

24 Class Counsel are entitled to recover the out-of-pocket costs reasonably incurred in  
25 investigating, prosecuting, and settling this action. *Deatrick v. Securitas Security Services USA,*  
26 *Inc.*, No. 13-CV-05016-JST, 2016 WL 5394016, at \*7 (N.D. Cal., Sept. 27, 2016). During the  
27 course of their representation, Class Counsel have incurred reasonable costs and expenses of  
28 approximately \$650,000 in connection with investigating claims, retention of experts, performing

1 extensive legal research, electronic discovery, filing fees, photocopies, faxes, mail, and telephone  
2 calls. Birka-White Decl., ¶ 38; Nelson Decl., ¶ 18. Based on a review of Class Counsel’s  
3 summary expense reports, the attorney declarations, and the Court’s familiarity with the extent of  
4 litigation and discovery in this matter, the Court is satisfied that the requested costs and expenses  
5 reimbursement of \$600,000 is reasonable.

6 **C. The requested class representative service awards are reasonable and**  
7 **appropriate.**

8 “[N]amed plaintiffs, as opposed to designated Class members who are not named  
9 plaintiffs, are eligible for reasonable incentive payments.” *Staton v. Boeing Co.*, 327 F.3d 938,  
10 977 (9th Cir. 2003); *Rodriguez v. West Pub’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (noting  
11 that such service awards “are fairly typical in class action cases.”). They are “intended to  
12 compensate class representatives for work done on behalf of the class [and] make up for financial  
13 or reputational risk undertaken in bringing the action.” *Id.*

14 Here, the Class representatives have each devoted a substantial amount of time, effort, and  
15 expense in assisting Class Counsel’s efforts to prosecute this case. Birka-White Decl., ¶¶ 52-58.  
16 Plaintiffs Allagas, Ray and Mohrman each dedicated hundreds of hours over two and a half years  
17 working on the case, including responding to numerous requests, sitting for depositions,  
18 reviewing briefs and pleadings, attending site inspections, opening up their homes to invasive  
19 inspections of their solar systems, discussing settlement options, and reviewing settlement  
20 documents.<sup>2</sup> Birka-White Decl., ¶ 56. Plaintiff Brian Dickson worked with Class Counsel at  
21 length to review the amended complaint, discuss the proposed settlement terms, learn about  
22 inverters with arc fault protection, allow experts onto his property for testing, and review  
23 settlement documents. Birka-White Decl., ¶ 54. Their efforts in bringing and diligently  
24 prosecuting the lawsuit have conferred a substantial benefit to the other Class Members. Birka-  
25 White Decl., ¶ 57.

26 Accordingly, service awards of \$7,500 each for Plaintiffs Michael Allagas, Arthur Ray,  
27 and Brett Mohrman, and \$3,500 for Plaintiff Brian Dickson, are reasonable and in line with

28 <sup>2</sup> Additionally, Plaintiff Brett Mohrman worked with Class Counsel for nearly a year before  
litigation was commenced. Birka-White Decl., ¶ 57.

1 precedent. *In re LinkedIn User Privacy Litigation*, 309 F.R.D. at 592 (“a \$5,000 payment is  
2 presumptively reasonable”); *Jacobs v. California State Auto. Ass’n Inter-Ins. Bureau*, No. C 07-  
3 00362 MHP, 2009 WL 3562871, at \*5 (N.D. Cal., Oct. 27, 2009) (approving \$7,500 service  
4 award); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 268 (N.D. Cal. 2015) (approving  
5 \$10,000 incentive award).

6 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

7 1. This Court hereby finds and concludes that due and adequate notice was directed  
8 to Class Members, advising them of Class Counsel’s intent to seek attorneys’ fees and expenses,  
9 the proposed Class representatives’ stipends, and of their right to object thereto.

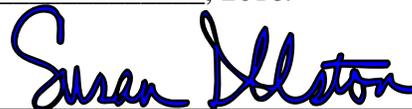
10 2. A full and fair opportunity was accorded to all such persons and entities to be  
11 heard with respect to the Fee Motion.

12 3. The Court hereby grants Class Counsel’s request for reimbursement of \$600,000  
13 in out-of-pocket costs, plus attorneys’ fees in the amount of \$11,000,000, for a combined total of  
14 \$11,600,000.

15 4. In addition to any relief they may receive under the Settlement Agreement, the  
16 Court approves payment of a \$7,500 service award each to Plaintiffs Michael Allagas, Arthur  
17 Ray, and Brett Mohrman, and \$3,500 to Plaintiff Brian Dickson.

18 5. Without affecting the finality of this Order, the Court reserves continuing and  
19 exclusive jurisdiction over parties to the Settlement Agreement to settle any disputes related to  
20 the allocation of the costs and fees awarded by this Order.

21  
22 IT IS SO ORDERED this 22<sup>nd</sup> day of December, 2016.

23 

24 \_\_\_\_\_  
The Honorable Susan Illston  
United States District Judge