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14 UNITED STATES DISTRICT COURT

16 CENTRAL DISTRICT OF CALIFORNIA

17 GLENN TIBBLE et al., individually and  
 18 as representatives of a class of similarly  
 situated persons and on behalf of the  
 19 Plan,

20 *Plaintiffs,*

21 v.

22 EDISON INTERNATIONAL et al.,

23 *Defendants.*

Case No. CV 07-5359 SVW (AGR<sub>x</sub>)

**NOTICE OF MOTION AND  
 MOTION FOR REIMBURSEMENT  
 OF EXPERT WITNESS FEES AND  
 FOR INCENTIVE AWARDS**

DATE: February 5, 2018

TIME: 1:30 p.m.

Courtroom: 10A

Judge: Hon. Stephen V. Wilson

1           **NOTICE OF MOTION AND MOTION FOR REIMBURSEMENT OF**  
2           **EXPERT WITNESS FEES AND FOR INCENTIVE AWARDS**

3           PLEASE TAKE NOTICE THAT on February 5, 2018, at 1:30 p.m. in  
4           Courtroom 10A, 350 W. 1<sup>st</sup> Street, Los Angeles, California 90012. Class Counsel  
5           Schlichter, Bogard & Denton LLP will move this Court to award reimbursement  
6           from the common fund of the expert witness fees in the amount of \$964,212 that  
7           are not recoverable from Defendants under 29 U.S.C. §1132(g) and Fed. R. Civ. P.  
8           54(d). The experts retained by Schlichter, Bogard & Denton include both testifying  
9           and non-testifying experts who provided crucial assistance to Class Counsel in this  
10          complex and hard-fought action. Schlichter, Bogard & Denton has borne these costs  
11          through all stages of this litigation, including appeals to the Ninth Circuit and  
12          Supreme Court, and through a second trial on remand, all without any guarantee  
13          that these or any costs it expended in this case ever would be recovered. After  
14          obtaining victory for the Class at trial, and proving damages of over \$13 million,  
15          Schlichter, Bogard & Denton’s expert witness fees should now be reimbursed,  
16          especially as the firm is not seeking any attorneys’ fees or any other expenses from  
17          the damages award. Doc. 573.

18          Plaintiffs also will move the Court to award \$25,000 to each of the class  
19          representatives—Glenn Tibble, William Bauer, William Izral, Henry Runowiecki,  
20          Frederick Suhadolc, and Hugh Tinman, Jr.—as incentive awards for the work they  
21          provided and their perseverance representing the Class, including by bringing this  
22          action so that their fellow class members may benefit, responding to discovery  
23          requests, providing testimony at depositions, and staying engaged with the case for  
24          over a decade.<sup>1</sup>

25          This motion is made following the conference of counsel pursuant to L.R. 7-3,  
26          which took place on October 30, 2017. This motion is accompanied by Plaintiffs’

27          <sup>1</sup> On behalf of Hugh Tinman, Jr., who is deceased, Plaintiffs request that his  
28          incentive award be paid to his surviving spouse, Carol Tinman, who was substituted  
        as named plaintiff. Doc. 526.

1 Memorandum in Support attached hereto.

2

3 DATED: November 6, 2017      Respectfully submitted,

4

/s/ Jerome J. Schlichter

5

Jerome J. Schlichter (SBN 054513)

6

Michael A. Wolff (admitted *pro hac vice*)

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Kurt C. Struckhoff (admitted *pro hac vice*)

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SCHLICHTER, BOGARD & DENTON LLP

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21 EDISON INTERNATIONAL et al.,

22 *Defendants.*

Case No. CV 07-5359 SVW (AGR<sub>x</sub>)

**PLAINTIFFS' MEMORANDUM IN  
SUPPORT OF MOTION FOR  
REIMBURSEMENT OF EXPERT  
WITNESS FEES AND FOR  
INCENTIVE AWARDS**

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## INTRODUCTION

1  
2 Class counsel Schlichter, Bogard & Denton LLP (SBD) respectfully requests that  
3 this Court award reimbursement from the common fund of the expert witness fees  
4 in the amount of \$964,212 that are not recoverable from Defendants under 29  
5 U.S.C. §1132(g) and Fed. R. Civ. P. 54(d) it paid over the ten years this case has  
6 been pending.<sup>1</sup> The experts retained by SBD include both testifying experts who  
7 prepared expert reports (including two who testified at trial), as well as confidential  
8 non-testifying experts who, while not offering expert opinions in court, provided  
9 critical assistance to Plaintiffs' counsel in this complex and hard-fought action.  
10 These experts assisted Plaintiffs' counsel in their investigation of potential claims,  
11 understanding complex financial issues, developing their litigation strategy and  
12 presentation of the case, and ultimately proving losses to the Plan based on  
13 Defendants' fiduciary breaches. Expert witness fees are of the type typically billed  
14 to fee-paying clients in non-contingency arrangements, and SBD is entitled to  
15 reimbursement of those fees here. SBD has borne these costs through pre-filing  
16 investigation, discovery, summary judgment, trial, appeal to the Ninth Circuit, the  
17 Supreme Court, the Ninth Circuit again, and finally through a second trial, all  
18 without any guarantee that these or any costs it expended in this case ever would be  
19 recovered. After obtaining victory for the Class at trial, and proving damages of  
20 over \$13 million, SBD's expert fees should now be reimbursed, especially as SBD  
21 seeks no attorneys' fees or any other expenses from the common fund. Doc. 573.

22 The Court also should award \$25,000 to each of the class representatives—Glenn  
23 Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick Suhadolc, and  
24 Hugh Tinman, Jr.—as incentive awards for the work they provided and their

25  
26 <sup>1</sup> Due to the parties' Joint Stipulation for payment of Plaintiffs' attorneys' fees  
27 and costs under 29 U.S.C. §1132(g) and Fed. R. Civ. P. 54(d) from Defendants  
28 [Doc. 573], and as noted in the Declaration of Jerome J. Schlichter, SBD is not  
seeking any amounts from the common fund that may be recovered as taxable costs  
from Defendants or any other out-of-pocket expenses that were charged by  
Plaintiffs' experts and paid by SBD. Schlichter Decl. ¶¶13–16.

1 perseverance representing the Class, including by bringing this action so that their  
2 fellow class members may benefit, responding to discovery requests, providing  
3 testimony at depositions, and staying engaged with the case for over a decade.<sup>2</sup>

#### 4 **BACKGROUND**

5 Plaintiffs filed this action on August 16, 2007 on behalf of the Edison 401(k)  
6 Savings Plan (“Plan”) against Defendants Edison International (“Edison”),  
7 Southern California Edison Company (“SCE”), the Southern California Edison  
8 Company Benefits Committee, the Edison International Trust Investment  
9 Committee, and other fiduciaries to the Plan. Doc. 1.

10 On July 15, 2008, the Court granted in part and denied in part Defendants’  
11 motion to dismiss. Doc. 26. Plaintiffs filed their First Amended Complaint on  
12 August 5, 2008 [Doc. 35], which Defendants answered on September 4, 2008 [Doc.  
13 44]. Plaintiffs filed their Second Amended Complaint on April 15, 2009 [Doc. 116-  
14 2, Doc. 124], which Defendants answered on April 29, 2009 [Doc. 121]. Plaintiffs  
15 claimed that Defendants: received revenue sharing payments from the Plan’s retail  
16 mutual funds in order to offset recordkeeping expenses, in violation of 29 U.S.C.  
17 §§1106(b)(2)–(3) and 1104(a)(1)(D); allowed the Plan’s trustee to retain “float”  
18 derived from Plan investments, in violation of 29 U.S.C. §§1104(a)(1)(D),  
19 1106(a)(1)(D) and (b)(1); provided underperforming investments, including retail  
20 mutual funds, sector funds, a money market fund and a unitized company stock  
21 fund, in violation of 29 U.S.C. §1105(a)(1)(B); and maintained retail mutual funds  
22 as Plan investment options for their own benefit when lower-cost options were  
23 available, in violation of 29 U.S.C. §1104(a)(1)(A). Doc. 116-2; Doc. 295.<sup>3</sup>

24 <sup>2</sup> On behalf of Hugh Tinman, Jr., who is deceased, Plaintiffs request that his  
25 incentive award be paid to his surviving spouse, Carol Tinman, who was substituted  
as named plaintiff. Doc. 526.

26 <sup>3</sup> On June 30, 2009, the Court certified a class of “[a]ll persons, excluding the  
27 Defendants and other individuals who are or may be liable for the conduct  
described in this Complaint, who were or are participants or beneficiaries of the  
28 Plan and who were, are, or may have been affected by the conduct set forth in the  
Second Amended Complaint.” Doc. 286 at 22. It also appointed Plaintiffs Tibble,  
Bauer, Suhadolc, Izral, Runowiecki and Tinman as class representatives. *Id.* at 21;

1 It is important to put this case in context. This case is one of a series of cases  
2 filed in late 2006 and 2007 by undersigned Plaintiffs' counsel. Schlichter Decl. ¶3.  
3 Prior to late 2006, there had never been a case filed for excessive 401(k) fees. *Id.*;  
4 Doc. 426-22 at 7–8, ¶14. In breaking new ground, Plaintiffs' counsel knew that  
5 there would be formidable expert testimony and backup documentary evidence to  
6 take on. On April 30, 2009, Plaintiffs disclosed the reports of three experts whose  
7 opinions they intended to rely on at trial. Dr. Steve Pomerantz offered opinions  
8 related to excessive investment management fees charged by the retail mutual funds  
9 included in the Plan and calculated the underperformance of imprudent investment  
10 options included in the Plan, including the Money Market Fund. Schlichter Decl.  
11 ¶7(a); Doc. 215, Ex. 1 (sealed). David Witz offered opinions related to Defendants'  
12 fiduciary violations based on their failure to pay all administrative expenses of the  
13 Plan and using the revenue sharing payments from the Plan's retail mutual funds to  
14 offset the Plan's recordkeeper's expenses in violation of the Plan document;  
15 allowing the Plan's trustee to retain float; and whether Defendants satisfied the  
16 requirements of 29 U.S.C. §1104(c) [ERISA §404(c)] Schlichter Decl. ¶7(b); Doc.  
17 213, Ex. 1 (sealed). Dr. Ross Miller opined on the imprudent management of the  
18 Edison International Stock Fund that maintained a unitized structure with  
19 significant cash holdings, and calculated the resulting losses from this imprudent  
20 management. Schlichter Decl. ¶7(c); Doc. 214, Ex. 1 (sealed).

21 Plaintiffs' counsel also retained other non-testifying experts who were initially  
22 engaged to offer expert opinions in this case.<sup>4</sup> Consultant A was engaged to offer  
23 expert opinions relating to the alleged imprudent Money Market Fund included in  
24 the Plan. He reviewed documents and materials Defendants produced and prepared

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25 Doc. 308. On June 27, 2017, the Court granted Plaintiffs' Motion for Substitution  
26 of Named Plaintiff Tinman and substituted his surviving spouse, Carol Tinman, as  
named plaintiff to replace Mr. Tinman, who is deceased. Doc. 526.

27 <sup>4</sup>As set forth in the Declaration of Jerome J. Schlichter, and attached thereto as  
28 Exhibit 1, Plaintiffs refer to the non-testifying experts as Consultant A–F to  
preserve their identities based on the confidential nature of the relationship. *See*  
Schlichter Decl. ¶6.

1 an initial report containing his opinions, but Plaintiffs ultimately did not use him as  
2 a testifying expert. Schlichter Decl. ¶8(a). SBD also retained Consultant B, an  
3 expert on the mutual fund industry, to research and analyze 401(k) costs and the  
4 performance of the Plan’s investment options. Although he was not used as a  
5 testifying expert, his analysis assisted SBD in identifying underperforming  
6 investments included in the Plan and developing Plaintiffs’ legal theories. *Id.* ¶8(b).  
7 SBD also retained Consultant C to analyze revenue sharing rates from Plan mutual  
8 funds and expenses identified on invoices from the Plan’s recordkeeper. Following  
9 his analysis, he consulted with counsel to develop legal theories and potential  
10 expert opinions. *Id.* ¶8(c). Although none of these individuals were used as  
11 testifying experts, they all provided crucial support to Plaintiffs’ counsel’s  
12 development of their legal theories, litigation strategy and evaluation of potential  
13 damages. *Id.* ¶¶4, 8, 12.

14 In addition, SBD also retained Consultant D, a forensic investigation expert with  
15 a focus on excessive fees and conflicts of interest. After Plaintiffs filed this case,  
16 and leading up to summary judgment, Consultant D researched revenue sharing  
17 practices, reviewed thousands of pages of documents, consulted with industry  
18 professionals, reviewed deposition transcripts and other documents produced by  
19 Defendants, reviewed Defendants’ experts’ reports and provided insight to assist  
20 counsel in preparation for their depositions. He also prepared memoranda for SBD  
21 outlining his findings based on his analysis of the evidence, and had ongoing  
22 communication with counsel to discuss litigation strategy, but was unwilling to  
23 serve as a testifying expert. *Id.* ¶9(a). Before filing this action, SBD retained  
24 Consultant E, an expert on 401(k) plan fees, retirement plan investment options and  
25 fiduciary practices, to research and analyze fees paid by the Plan. After the  
26 litigation commenced, he continued to assist counsel in litigating the case,  
27 reviewing deposition transcripts, thousands of pages of documents, committee  
28 minutes and other relevant materials produced by Defendants. He also consulted

1 with SBD to provide guidance on prudent fiduciary practices based on his extensive  
2 experience in the retirement industry and serving as a fiduciary. Although he had  
3 preliminary discussions with counsel regarding his expert opinions, Plaintiffs'  
4 counsel decided not to use him for testifying. *Id.* ¶9(b).

5 On July 16, 2009, the Court entered partial summary judgment in favor of  
6 Defendants, dismissing several of Plaintiffs' claims. Docs. 295, 303. The Court also  
7 found that the ERISA §404(c) safe harbor did not apply. Doc. 295 at 93. The Court  
8 barred any claims of fiduciary breach as to retail mutual funds Defendants had  
9 included in the Plan before August 16, 2001 under ERISA's statute of limitations  
10 (29 U.S.C. §1113). Doc. 295 at 74:18–75:3, 88:23–24. The Court allowed Plaintiffs  
11 to proceed on claims that Defendants breached their duty of loyalty in maintaining  
12 retail mutual funds in the Plan in order to maximize the benefit to Edison. *Id.* at  
13 93:11–13. The Court also allowed Plaintiffs to proceed as to whether the fees  
14 charged on the Money Market Fund were imprudent. Doc. 303 at 2.

15 On October 20, 2009, the Court conducted a bench trial of Plaintiffs' claims that  
16 survived summary judgment. In advance of the trial, Dr. Pomerantz submitted  
17 direct testimony outlining his opinions related to excess investment management  
18 fees charged by certain retail share class mutual funds and the Money Market Fund.  
19 Doc. 354. He also testified at trial. Doc. 452 at 19–71. Following the submission of  
20 post-trial supplemental declarations by Defendants' experts Dr. John Peavy and  
21 Daniel Esch, Dr. Pomerantz prepared a rebuttal declaration addressing Defendants'  
22 failure to switch to institutional share classes and the Plan's damages. Doc. 402-02.  
23 Because of the Court's summary judgment order narrowing Plaintiffs' claims, and  
24 Defendants' representation that they would not present an affirmative defense under  
25 29 U.S.C. §1104(c) at trial, Plaintiffs did not call Mr. Witz or Dr. Miller at trial.  
26 Doc. 321 at 2 & n.2.

27 After trial, the Court found that Defendants breached their duty of prudence in  
28 selecting as Plan investment options retail shares instead of institutional shares of



1 three mutual funds (William Blair Small Cap Growth Fund, PIMCO RCM Global  
2 Technology Fund, and MFS Total Return A Fund) after August 16, 2001. Findings  
3 Of Fact And Conclusions Of Law, Doc. 405 at 64:1–12. It also found, however,  
4 that Plaintiffs had failed to prove that a prudent fiduciary would have reviewed the  
5 available share classes and associated fees of three other funds due to a change in  
6 circumstances. *Id.* at 70:2–6. In accordance with its summary judgment order, the  
7 Court did not consider whether Defendants had a continuing duty to switch the Plan  
8 to cheaper share classes on or after August 16, 2001 for mutual funds that  
9 Defendants had included in the Plan before August 16, 2001 absent a significant  
10 change in circumstances.<sup>5</sup>

11 Plaintiffs appealed the Court’s judgment, summary judgment and denial of  
12 Plaintiffs’ request for attorneys’ fees and costs. Docs. 422, 470. The Ninth Circuit  
13 affirmed the Court’s judgment and summary judgment in all respects. *Tibble v.*  
14 *Edison Int’l*, 729 F.3d 1110 (9th Cir. 2013). Upon petition by Plaintiffs, the United  
15 States Supreme Court vacated the Ninth Circuit’s affirmance of the Court’s  
16 summary judgment order regarding the statute of limitations and held that an  
17 ERISA fiduciary has a continuing duty to monitor plan investments and remove  
18 imprudent ones regardless of how long they have been in the Plan or have been  
19 imprudent. *Tibble v. Edison Int’l*, 135 S.Ct. 1823 (2015). The Supreme Court  
20 remanded to the Ninth Circuit for further proceedings consistent with its opinion.  
21 *Id.* at 1829.

22 On remand, the Ninth Circuit held that Plaintiffs forfeited their claim that  
23 Defendants failed to prudently monitor Plan investments and remove higher-cost  
24 retail share class mutual funds. *Tibble v. Edison Int’l*, 820 F.3d 1041, 148–49 (9th  
25 Cir. 2016). The Ninth Circuit panel sitting *en banc* vacated this Court’s summary  
26

27 <sup>5</sup> The Court also found that Defendants did not violate their duty of prudence by  
28 causing Plan participants to pay excessive investment management fees on the  
Money Market Fund. *Id.* at 78:12–18. The Court entered judgment on August 9,  
2010. Doc. 413.

1 judgment ruling that Plaintiffs’ claims as to Plan mutual funds that were selected  
2 outside the limitations period (before August 16, 2001) were barred. It remanded  
3 the case back to this Court to determine on an open record whether, “regardless of  
4 whether there was a significant change in circumstances, Edison should have  
5 switched from retail-class fund shares to institutional-class fund shares to fulfill its  
6 continuing duty to monitor the appropriateness of the trust investments.” *Tibble v.*  
7 *Edison Int’l*, 843 F.3d 1187, 1199 (9th Cir. 2016). The Ninth Circuit also  
8 “direct[ed] the district court to reconsider the [attorneys’] fee issue in light of the  
9 significant amount of work that has been required to vindicate an important ERISA  
10 principle in our court and the Supreme Court.” *Id.*

11 On remand from the Ninth Circuit, Dr. Pomerantz submitted an expert report  
12 detailing his opinions related to Defendants’ failure to switch to institutional share  
13 classes of the Plan’s retail mutual funds that were added to the Plan prior to August  
14 16, 2001 and the Plan’s losses based on Defendants’ fiduciary breaches. He also  
15 offered a report rebutting opinions offered by Defendants’ experts. He submitted  
16 direct testimony derived from those opinions in advance of the second trial, and  
17 also testified live at trial. Doc. 558; Schlichter Decl. ¶7(a). Mr. Witz submitted a  
18 report rebutting Defendants’ experts’ opinions, opining on prudent fiduciary  
19 practices when retail share class mutual funds are provided in a 401(k) plan and the  
20 time to switch share classes. In forming his rebuttal opinions, he relied on his prior  
21 opinions from his April 30, 2009 report related to the terms of the Plan document  
22 and the payment of revenue sharing from the Plan’s retail mutual funds. This  
23 provided necessary background for his rebuttal opinions. Schlichter Decl. ¶7(b).  
24 Like Dr. Pomerantz, he too submitted direct testimony derived from that report in  
25 advance of trial and also testified live. Doc. 557; Schlichter Decl. ¶7(a).

26 The second trial in this case was held on July 5 and July 14, 2017. Docs. 560,  
27 562. Following that trial, the Court found that Defendants violated their duty of  
28 prudence by maintaining retail shares of 17 of the Plan’s mutual funds that were



1 added to the Plan prior to August 16, 2001 for which a lower-cost institutional  
2 share class was available, or subsequently became available during the statutory  
3 period. Doc. 567. The Court found \$7,524,424 in Plan losses as of January 2011,  
4 and awarded lost investment opportunity on these damages based on the Plan's  
5 overall returns to the present. *Id.* at 24. On September 5, 2017, the parties stipulated  
6 that the Plan's losses, including interest, amounted to \$13,161,491. Doc. 570.

7 In its Findings Of Fact And Conclusions Of Law following the second trial, the  
8 Court ordered Plaintiffs to submit a request for attorneys' fees within 60 days. Doc.  
9 567 at 25. SBD retained Consultant F to prepare a declaration in support of  
10 Plaintiffs' fee petition to address issues related to the reasonableness of Plaintiffs'  
11 anticipated request. Schlichter Decl. ¶10. He had begun preparing his declaration  
12 when the parties reached a stipulation on October 16, 2017 that Defendants would  
13 pay Plaintiffs' attorneys' fees and taxable costs under 29 U.S.C. §1132(g) and  
14 Federal Rule of Civil Procedure 54(d), but not expert witness fees, in the amount of  
15 \$5.8 million. Doc. 573. The stipulation provided that Plaintiffs separately would  
16 move for reimbursement of expert witness fees and incentive awards for class  
17 representatives. *Id.* at 3.

## 18 ARGUMENT

### 19 I. SBD should be reimbursed for its expert witness fees.

20 Payment of Plaintiffs' expert witness fees cannot be shifted to Defendants under  
21 29 U.S.C. §1132(g). *Agredano v. Mutual of Omaha Cos.*, 75 F.3d 541, 543–44 (9th  
22 Cir. 1996). However, “an attorney who has created a common fund for the benefit  
23 of the class is entitled to reimbursement of reasonable litigation expenses from that  
24 fund.” *In re Heritage Bond Litig.*, No. 02-ML-1475-DT, 2005 U.S. Dist. LEXIS  
25 13555, \*75 (C.D. Cal. June 10, 2005) (quoting *In re Gen. Instrument Sec. Litig.*, 209  
26 F. Supp.2d 423, 434 (E.D. Pa. 2001)); *Ontiveros v. Zamora*, 303 F.R.D. 356, 375  
27 (E.D. Cal. 2014) (“There is no doubt that an attorney who has created a common  
28 fund for the benefit of the class is entitled to reimbursement of reasonable litigation

1 expenses from that fund.”); Alba Conte, 1 Attorney Fee Awards §2:19 (3d ed.).

2 Reimbursable expenses are “those out-of-pocket expenses that ‘would normally  
3 be charged to a fee paying client.’” *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.  
4 1994)(quoting *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1215 n.7 (9th Cir.  
5 1986)). These include fees paid to experts. *Asghari v. Volkswagen Grp. of Am.,*  
6 *Inc.*, No. 13-2529-MMM-VJKx, 2015 U.S.Dist.LEXIS 188824, \*150 (C.D.Cal.  
7 May 29, 2015)(courts “have discretion to reimburse consulting and expert witness  
8 fees”); *In re Media Vision Tech. Securities Litig.*, 913 F.Supp. 1362, 1366–67  
9 (N.D.Cal. 1995)(“most jurisdictions have held that district courts have the  
10 discretion to reimburse consulting and expert witness fees”, citing *Farmer v.*  
11 *Arabian Am. Oil Co.*, 379 U.S. 227 (1964), and *Thornberry v. Delta Air Lines*, 676  
12 F.2d 1240, 1244 (9th Cir. 1982)). It is thus appropriate for the Court to award  
13 reimbursement of expert witness fees from the common fund.

14 In *Tussey v. ABB, Inc.*, the court awarded \$1.7 million—a significantly greater  
15 amount—from the common fund to reimburse SBD for expert costs after awarding  
16 attorneys’ fees to be paid by defendants. No. 06-4305, 2012 U.S.Dist.LEXIS  
17 157428, \*31–33 (W.D. Mo. Nov. 2, 2012), rev’d and remanded on other grounds,  
18 746 F.3d 327 (8th Cir. 2014). There is thus clear precedent for this in the only other  
19 401(k) excessive fee case tried to judgment following the initial trial herein (also  
20 handled by undersigned counsel).

21 The Court has discretion to reimburse expert witness fees if the expert’s services  
22 were “crucial or indispensable” to the action. *United States v. City of Twin Falls,*  
23 *Idaho*, 806 F.2d 862, 878 (9th Cir. 1986), overruled on other grounds as recognized  
24 by *Ass’n of Flight Attendants v. Horizon Air Indus., Inc.*, 976 F.2d 541, 551–52 (9th  
25 Cir. 1992); see also *In re Media Vision Tech. Sec. Litig.*, 913 F.Supp. at 1367  
26 (citing *City of Twin Falls, Idaho*, 806 F.2d at 864, and *Paschall v. Kansas City Star*  
27 *Co.*, 695 F.2d 322, 338 (8th Cir.1982), rev’d on other grounds 727 F.2d 692  
28

1 (1984)).<sup>6</sup> In factually “complex” cases and where there are “extensive disputes  
2 over liability”, expert testimony has been found “crucial or indispensable to the  
3 litigation at hand.” *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales*  
4 *Practices, & Prods. Liab. Litig.*, No. 10-ML-2151-JVS-FMOx, 2013 U.S. Dist.  
5 LEXIS 123298, \*319 (C.D.Cal. July 24, 2013); *In re Immune Response Sec. Litig.*,  
6 497 F.Supp.2d 1166, 1178 (S.D.Cal. 2007)(“reimbursement for experts and  
7 consultants” reasonable given “complex nature of case”). “[C]areful scrutiny”  
8 should be given to an application for expert witness fees. *Rodriguez*, 649 F.Appx at  
9 620 (quoting *City of Twin Falls, Idaho*, 806 F.2d at 878).

10 Reimbursement for Plaintiffs’ experts is appropriate here. This fiduciary breach  
11 action under ERISA presented “complex” financial issues related to a 401(k) plan’s  
12 bargaining power to obtain lower-cost institutional share classes of retail mutual  
13 funds, the excessive investment management fees charged to a large institutional  
14 investor, the imprudent management of a unitized company stock fund, and the  
15 underperformance of investment options, including retail mutual funds, a sector  
16 fund, and a money market fund. *See Krueger v. Ameriprise Fin., Inc.*, No. 11-  
17 02781, 2015 U.S. Dist. LEXIS 91385, \*6 (D.Minn. July 13, 2015)(noting the  
18 “complex issues” involved in an ERISA 401(k) fiduciary breach action). Plaintiffs’  
19 prudence claims under 29 U.S.C. §1104(a)(1)(B) based on Defendants’ failure to  
20 provide institutional share class mutual funds, and their related claim under  
21 §1104(a)(1)(D) based on Defendants’ improper use of revenue sharing from the  
22 Plan’s mutual funds to offset Edison’s administrative expenses, required a firm  
23 understanding of mutual fund revenue sharing practices that are “opaque to both  
24 individual investors and many 401(k) plan sponsors.” *Leimkuehler v. Am. United*  
25 *Life Ins. Co.*, 713 F.3d 905, 907 (7th Cir. 2013). This opaque nature of revenue  
26 sharing practices and other complexities are demonstrated by the complete lack of

27 <sup>6</sup> These precedents were cited with approval by the Ninth Circuit in an  
28 unpublished decision, *Rodriguez v. Farmers Ins. Co.*, 649 Fed.Appx. 620, 620 (9th  
Cir. 2016); 9th Cir. R. 96-3(b).

1 401(k) excessive fee cases ever being filed prior to Plaintiffs' counsel doing so in  
2 late 2006. Given the complex nature of this case, Plaintiffs' counsel was required to  
3 use both testifying and consulting experts to assist them when investigating their  
4 potential claims, developing their legal theories, taking on Defendants' experienced  
5 experts' opinions, and proving losses to the Plan. Without their services, Plaintiffs  
6 could not have brought or maintained this action.

7 Plaintiffs' three disclosed experts, Dr. Pomerantz, Mr. Witz, and Dr. Miller,  
8 provided necessary support to SBD. Each submitted expert reports. Dr. Pomerantz  
9 opined on sophisticated financial management issues and calculated Plan losses,  
10 while Mr. Witz addressed fiduciary violations related to the improper payment of  
11 administrative costs through revenue sharing and Defendants' failure to comply  
12 with the detailed requirements of §404(c). Doc. 215, Ex. 1 (Pomerantz; sealed);  
13 Doc. 213, Ex. 1 (Witz; sealed). Dr. Pomerantz testified at both trials, and Mr. Witz  
14 testified at the second trial. Had Defendants maintained their §404(c) defense at the  
15 first trial, Mr. Witz would have testified. The Court also credited both of their  
16 testimony, at least in part. Doc. 405 at 13:18–14:1, 53:13–16, 60:11–61:11, 63:3–7  
17 (Pomerantz); Doc. 567 at 20:10–12 (Witz). Indeed, their testimony was crucial to  
18 litigating this case and to Plaintiffs' ultimate success.<sup>7</sup>

19 That Dr. Miller's opinions related to a claim that was dismissed on summary  
20 judgment should not preclude SBD from being reimbursed for his fees. Plaintiffs'  
21 unitized stock fund claim could not have been pursued without his pre-filing  
22 investigative work and the expert opinions he offered in this case. Schlichter Decl.  
23 ¶7(c). He provided complex financial analysis to pursue this claim. Doc. 214, Ex. 1

24 \_\_\_\_\_  
25 <sup>7</sup> In fact, this Court recently approved the reimbursement of SBD's costs,  
26 including for expert witnesses, in another ERISA fiduciary breach case. *In re*  
27 *Northrop Grumman Corp. ERISA Litig.*, No. 06-6213, Doc. 803 at 12 (C.D.Cal.  
28 Oct. 24, 2017)(awarding SBD \$1,159,114 in costs, including \$279,958 for expert  
witnesses). Prior to settlement, that case actually was scheduled to feature the trial  
testimony of Dr. Pomerantz and Mr. Witz, just as this case did. No. 06-6213, Doc.  
748 at 3. There is no reason SBD should not similarly be reimbursed for fees paid  
to these experts in this case.

1 (sealed). Although Plaintiffs were ultimately unsuccessful on their stock fund  
2 claim, and other claims related to Dr. Pomerantz and Mr. Witz’s initial expert  
3 opinions, fee-paying clients regularly pay for experts even when on issues which  
4 that party loses on the merits. Indeed, corporate defendants in ERISA fiduciary  
5 breach cases routinely pay their experts, even when the defendants are unsuccessful  
6 on the merits. *See, e.g., Tussey v. ABB, Inc.*, No. 06-4305, Doc. 567 at 174:20–  
7 175:3 (Trial Tr. 2110:20–2111:3)(W.D.Mo. Feb. 24, 2010)(defendants paid one  
8 testifying expert and the litigation consulting firm that assisted that expert over \$2  
9 million even though plaintiffs prevailed at trial); *cf. In re Omnivision Techs.*, 559  
10 F.Supp.2d 1036, 1048–49 (N.D.Cal. 2007)(expenses for which “[a]ttorneys  
11 routinely bill clients” include fees spent on “experts and consultants”).

12 Plaintiffs’ experts who were initially consulted to serve as testifying experts (and  
13 other non-testifying consulting experts) provided crucial assistance at every stage of  
14 the litigation, and the fees SBD paid them likewise should be reimbursed.  
15 Schlichter Decl. ¶¶4, 7–10, 12. Consultant E provided expert research and analysis  
16 before this case was filed that informed Plaintiffs’ allegations. *Id.* ¶9(b). After the  
17 litigation commenced, Plaintiffs consulted Consultants A–C and E to potentially  
18 serve as testifying experts. They performed valuable research and analysis that  
19 assisted Plaintiffs’ counsel in developing their litigation strategy. *Id.* ¶¶7–9.  
20 Consultant D, as a consulting expert, also performed ongoing services that aided  
21 Plaintiffs’ counsel in understanding complex financial issues and further  
22 developing their claims. *Id.* ¶9(a). Although Consultant F’s work ultimately was not  
23 needed in light of the stipulation the parties reached on attorneys’ fees, his  
24 declaration would have informed the Court (and the Class) as to the reasonableness  
25 of Plaintiffs’ counsel’s attorney fee request from Defendants. *Id.* ¶10; *Mardirossian*  
26 *v. Guardian Life Ins. Co. of America*, 457 F.Supp.2d 1038, 1046 (C.D.Cal.  
27 2006)(“Declarations regarding the prevailing market rate in the relevant community  
28 suffice to establish a reasonable hourly rate.”).



1 SBD has detailed the professional services performed by each testifying or non-  
2 testifying expert retained in this litigation. Schlichter Decl. ¶¶4, 7–10, 12. SBD also  
3 has itemized the payments made to these experts with a description of the work  
4 performed based on information reflected on the invoices. *Id.* ¶6, Exhibit 1.<sup>8</sup> The  
5 explanation and documentation provided by SBD firmly demonstrates how these  
6 experts were used and why their services were indispensable to the prosecution of  
7 this complex action. *See Stetson v. Grissom*, 821 F.3d 1157, 1167 (9th Cir.  
8 2016)(“Class Counsel provided almost two full pages explaining how these experts  
9 were used and why their input was crucial or indispensable.”); *In re Am. Apparel*  
10 *Shareholder Litig.*, No. 10-6352-MMM-JCGx, 2014 U.S.Dist.LEXIS 184547, \*94  
11 (C.D.Cal. July 28, 2014)(awarding reimbursement for fees paid to experts  
12 “necessary to prosecute” the action). Their services were “a reasonable and  
13 necessary part of the litigation[.]” *Scott v. ZST Digital Networks, Inc.*, No. 11-3531-  
14 GAF-JCx, 2013 U.S.Dist.LEXIS 197940, \*29 (C.D.Cal. Aug. 5, 2013)(citations  
15 and internal quotations omitted, approving reimbursement of “expert consulting  
16 fees”); *see also* Schlichter Decl. ¶¶4,12.

17 Additionally, the retainer agreement between SBD and each of the named  
18 plaintiffs in this case provide for SBD to be reimbursed for all expenses related to  
19 this matter from the gross recovery. Schlichter Decl. ¶19; Doc. 460 (Exs. 1–  
20 6)(sealed). This includes fees paid to non-testifying and confidential consulting  
21 experts.

22 Moreover, the \$964,212 SBD seeks is substantially less than expert fees awarded  
23 in *Tussey*, the other ERISA fiduciary breach case SBD handled at which the  
24 plaintiffs prevailed after trial. *See Tussey*, 2012 U.S.Dist.LEXIS 157428, \*33  
25 (approving \$1.7 million for testifying and consulting experts to be paid from  
26 common fund following trial). Indeed, this Court has approved reimbursement of

27 \_\_\_\_\_  
28 <sup>8</sup> Upon request by the Court, SBD will provide all invoices of the testifying and  
non-testifying experts with their names for in-camera review.

1 expert fees much greater than what SBD seeks here. *See In re Broadcom Corp.*  
2 *Secs. Litig.*, No. 01-275-DT-MLGx, 2005 U.S. Dist. LEXIS 41993, \*27 (C.D. Cal.  
3 Sept. 12, 2005) (approving reimbursement of over \$1.5 million for experts and  
4 consultants).

5 **II. The Court should approve incentive awards for the class representatives.**

6 “Incentive awards that are intended to compensate class representatives for work  
7 undertaken on behalf of a class are fairly typical in class actions.” *In re Online*  
8 *DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2014) (internal quotation  
9 marks and citation omitted). Such awards recognize class representatives’  
10 “willingness to act as a private attorney general.” *Rodriguez v. West Publishing*  
11 *Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). Glenn Tibble, William Bauer, William  
12 Izral, Henry Runowiecki, and Frederick Suhadolc have been active participants in  
13 this litigation (as was Hugh Tinman, Jr. prior to his passing), spending significant  
14 time to benefit the Class. They came forward to initiate this action, undertook  
15 substantial risk of having to pay Defendants’ costs if this case failed, and remained  
16 in contact with SBD throughout the litigation. They responded to document  
17 requests and interrogatories, reviewed and approved pleadings, and assisted with  
18 discovery, including sitting for depositions.

19 The \$25,000 award SBD requests for each of the class representatives is only  
20 .19% of the total damages the parties have stipulated to, and combined are only  
21 1.14%. The Ninth Circuit and this Court have approved similar incentive awards.  
22 *Online DVD-Rental*, 779 F.3d at 948 (approving incentive awards that were “a  
23 mere .17% of the total settlement fund”); *Ingalls v. Hallmark Retail, Inc.*, No. 08-  
24 4342-VBF-Ex, 2009 U.S. Dist. LEXIS 131078, \*6 (C.D. Cal. Oct. 16, 2009)  
25 (awarding total of \$60,000 to 6 named plaintiffs out of \$5.625 million settlement  
26 (10.6%)). Indeed, this Court has approved much larger total awards. *Trujillo v. City*  
27 *of Ontario*, No. 04-1015-VAP-SGLx, 2009 U.S. Dist. LEXIS 79309, \*13–14  
28 (C.D. Cal. Aug. 24, 2009) (\$30,000 each to 6 class representatives, plus \$10,000 to

1 10 other plaintiffs). Courts presiding over ERISA fiduciary breach cases SBD has  
2 handled have provided class representatives \$25,000 awards, including this Court  
3 just last month. *In re Northrop Grumman*, No. 06-6213 Doc. 803 at 15; *Kruger v.*  
4 *Novant Health, Inc.*, No. 14-208, Doc. 61 at 18 (M.D.N.C. Sept. 29, 2016); *Spano*  
5 *v. Boeing Co.*, No. 06-743, Doc. 587 at 8–9 (S.D.Ill. Mar. 31, 2016); *Abbott v.*  
6 *Lockheed Martin Corp.*, No. 06-701, 2015 U.S. Dist. LEXIS 93206, \*14–15 (S.D.Ill.  
7 July 17, 2015); *Krueger*, 2015 U.S. Dist. LEXIS 91385, \*10–11; *Beesley v. Int’l*  
8 *Paper Co.*, No. 06-703, 2014 U.S. Dist. LEXIS 12037, \*13–14 (S.D.Ill. Jan. 31,  
9 2014); *Nolte v. Cigna Corp.*, No. 07-2046, 2013 U.S. Dist. LEXIS 184622, \*14–16  
10 (C.D.Ill. Oct. 15, 2013); *Will v. Gen. Dynamics Corp.*, No. 06-698, 2010  
11 U.S. Dist. LEXIS 123349, \*12–13 (S.D. Ill. Nov. 22, 2010).

## 12 CONCLUSION

13 For the foregoing reasons, Plaintiffs request that the Court approve the  
14 reimbursement of \$964,212 in expert witness fees to Class Counsel, Schlichter,  
15 Bogard & Denton LLP, and incentive awards of \$25,000 to class representatives  
16 Glenn Tibble, William Bauer, William Izral, Henry Runowiecki, Frederick  
17 Suhadolc, and Hugh Tinman, Jr.

18  
19 DATED: November 6, 2017

Respectfully submitted,

20 /s/ Jerome J. Schlichter

Jerome J. Schlichter (SBN 054513)

21 Michael A. Wolff (admitted *pro hac vice*)

22 Kurt C. Struckhoff (admitted *pro hac vice*)

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12 *Local Counsel for Plaintiffs*

14 UNITED STATES DISTRICT COURT

15 CENTRAL DISTRICT OF CALIFORNIA

16 GLENN TIBBLE et al., individually and  
17 as representatives of a class of similarly  
situated persons and on behalf of the  
18 Plan,

19 *Plaintiffs,*

20 v.

21 EDISON INTERNATIONAL et al.,

22 *Defendants.*

Case No. CV 07-5359 SVW (AGR<sub>x</sub>)

**DECLARATION OF JEROME J. SCHLICHTER**

DATE: February 5, 2018  
TIME: 1:30 p.m.  
Courtroom: 10A

Judge: Hon. Stephen V. Wilson

1 I, Jerome J. Schlichter, under penalty of perjury pursuant to 28 U.S.C. §1746,  
2 declare as follows:

3 1. I am the founding partner of the law firm of Schlichter, Bogard and  
4 Denton LLP, counsel for the Plaintiffs. I am licensed to practice in the States of  
5 California, Missouri and Illinois, and admitted to numerous federal courts. If called  
6 as a witness, I could and would competently testify to the facts set forth below as I  
7 know them to be true based upon my own personal knowledge or upon my review  
8 of the records and files maintained by the firm in the regular course of its  
9 representation of Plaintiffs in this case.

10 2. This declaration is submitted in support of Plaintiffs' Motion for  
11 Expert Witness Fees and For Incentive Awards.

12 3. This case was among a group of cases filed by Schlichter, Bogard and  
13 Denton on September 11, 2006 and in the months thereafter. Before that, no other  
14 case had ever been brought for excessive 401(k) fees.

15 4. As a result of this case being among the first ever filed for excessive  
16 401(k) fees and the need for a deep understanding and thorough development of the  
17 facts and legal theories, it was important to use multiple experts in investment  
18 management, recordkeeping, fiduciary practices, and 401(k) industry practices.  
19 Also, many potential experts were unwilling to be experts of record because of  
20 fears of a negative impact on their practices.

21 5. During this litigation, Plaintiffs disclosed three expert witnesses under  
22 Fed. R. Civ. P. 26(a)(2): (1) Dr. Steve Pomerantz; (2) David Witz; and (3) Dr. Ross  
23 Miller. Schlichter, Bogard and Denton also retained confidential non-testifying  
24 experts who were initially consulted for the purpose of submitting expert opinions  
25 in this case but were not retained as testifying experts and/or served in a consulting  
26 capacity to assist counsel in investigating potential claims, developing their legal  
27 theories and understanding complex financial issues.

28

1           6. Attached hereto as Exhibit 1 is an itemized spreadsheet summarizing  
2 the invoices for the testifying and non-testifying experts engaged by Schlichter,  
3 Bogard and Denton in this litigation. Invoice Date, Invoice Number, Expert, Billing  
4 Entity (or affiliated company) and Amount are provided. Plaintiffs' counsel also  
5 provided a description of the work performed based on the information reflected on  
6 the invoices. Because of the confidential nature of the work performed by the non-  
7 testifying experts, the identities of these experts have not been disclosed. On  
8 Exhibit 1, and noted in this Declaration, Plaintiffs' counsel refers to these non-  
9 testifying experts as Consultant A–F. Upon request by the Court, the invoices of the  
10 testifying and non-testifying experts with their names can be provided to the Court  
11 for in-camera review.

12           7. Testifying experts: A summary of the professional services performed  
13 by the three testifying experts retained by Plaintiffs' counsel is provided below. The  
14 billing entity reflected on the corresponding invoices, and shown on Exhibit 1, is  
15 noted in parentheses.

16           a. Dr. Steve Pomerantz (Steve Pomerantz, LLC)

17           Dr. Pomerantz has over 25 years of experience in the investment industry. He  
18 has held positions in research and management at several major investment  
19 management firms and specifically served as a portfolio manager. Dr. Pomerantz  
20 has provided investment and asset allocation advice to high net worth and  
21 institutional clients. Currently, he is President of Steve Pomerantz LLC, a firm that  
22 provides litigation consulting involving securities and investment-related issues. He  
23 has authored articles related to investment management and spoken at investment  
24 seminars on various areas of portfolio management, asset allocation and related  
25 issues. Dr. Pomerantz has testified as an expert witness in proceedings throughout  
26 the United States.<sup>1</sup>

27 \_\_\_\_\_  
28 <sup>1</sup> For an overview of Dr. Pomerantz's qualifications, see Doc. 542 at 2–4 and  
Doc. 544.

1 Dr. Pomerantz submitted his initial expert report on April 30, 2009. Doc. 215  
2 (sealed). Dr. Pomerantz offered opinions related to the alleged excessive investment  
3 management fees charged by the retail mutual funds included in the Edison 401(k)  
4 Savings Plan (“the Plan”) and the underperformance of certain alleged imprudent  
5 investment options included in the Plan, including the Money Market Fund. Doc.  
6 215, Ex. 1 (sealed). In advance of the first trial in this case, Dr. Pomerantz  
7 submitted direct testimony outlining his opinions related to excess investment  
8 management fees charged by certain retail share class mutual funds and the Money  
9 Market Fund. Doc. 354. He also testified at trial. Doc. 452. Following the  
10 submission of post-trial supplemental declarations by Defendants’ experts Dr. John  
11 Peavy and Daniel Esch, Dr. Pomerantz prepared a rebuttal declaration addressing  
12 Defendants’ failure to switch to institutional share classes and the Plan’s damages.  
13 Doc. 402-02.

14 On remand from the Ninth Circuit, Dr. Pomerantz was engaged to offer opinions  
15 related to Defendants’ failure to switch to institutional share classes of the Plan’s  
16 retail mutual funds that were added to the Plan prior to August 16, 2001 and the  
17 resulting losses to the Plan caused by Defendants’ alleged fiduciary breaches. He  
18 submitted his initial expert report on May 5, 2017, and his rebuttal report on May  
19 19, 2017 rebutting certain opinions offered by Defendants’ experts Dr. Susan  
20 Mangiero and Dr. Lassaad Turki. In advance of trial, Dr. Pomerantz submitted  
21 direct testimony derived from those opinions expressed in his May 5 and 19 expert  
22 reports. Doc. 542. Dr. Pomerantz also testified at trial. Doc. 568.

23 Schlichter, Bogard and Denton paid \$162,936.43 to Dr. Pomerantz for these  
24 services.

25 b. David Witz (FRA Plan Tools and Fiduciary Risk Assessment,  
26 LLC)

27 David Witz has worked in the employee benefits industry for over 36 years. He  
28 has provided independent fiduciary, recordkeeping and consulting services to

1 retirement plans and service providers. Mr. Witz has worked for four different third  
2 party administrators who provide administrative and recordkeeping services on  
3 behalf of retirement plans. Currently, he is managing director of PlanTools LLC  
4 and Fiduciary Risk Assessment (“FRA”). FRA provides expert witness services and  
5 support to advisors, and PlanTools is a software company that licenses software  
6 solutions to assist industry service providers. Mr. Witz has provided expert  
7 testimony in numerous cases throughout the United States.<sup>2</sup>

8 Mr. Witz submitted his initial expert report in this case on April 30, 2009. Doc.  
9 213 (sealed). He offered opinions related to Defendants’ alleged fiduciary  
10 violations based on their failure to pay all administrative expenses of the Plan and  
11 using the revenue sharing payments from the Plan’s retail mutual funds to offset  
12 Hewitt’s recordkeeping expenses in violation of the Plan document; allowing the  
13 Plan’s trustee to retain float; and whether Defendants satisfied the requirements of  
14 29 U.S.C. §1104(c) [ERISA §404(c)]. Doc. 213, Ex. 1 (sealed). As a result of the  
15 Court’s summary judgment order narrowing Plaintiffs’ claims, and Defendants’  
16 representation that they would not be presenting an affirmative defense under  
17 §404(c) at trial, Plaintiffs did not call Mr. Witz as a witness at trial. Doc. 321 at 2  
18 n.2.

19 On remand from the Ninth Circuit, Mr. Witz was engaged to rebut the expert  
20 opinions offered by Defendants’ experts Mangiero and Turki. He submitted his  
21 rebuttal report on May 19, 2017, opining on prudent fiduciary practices in 401(k)  
22 plans when institutional share classes are available for retail mutual funds included  
23 in a plan and the time needed to switch share classes. This rebuttal report  
24 incorporated his findings from his April 30, 2009 report regarding the terms of the  
25 Plan document and payment of revenue sharing expenses from the Plan’s retail  
26 investments to provide the necessary background for his opinions. In advance of

27 \_\_\_\_\_  
28 <sup>2</sup> For an overview of Mr. Witz’s qualifications, see Doc. 541 at 2–4 and Doc. 543.

1 trial, Mr. Witz submitted direct testimony that incorporated his rebuttal opinions  
2 offered in this case. Doc. 542. Mr. Witz also testified at trial. Doc. 567 at 20:12.

3 Schlichter, Bogard and Denton paid \$223,374.49 to Mr. Witz for these services.

4 c. Dr. Ross Miller (Miller Risk Advisors)

5 Prior to his death in 2013, Dr. Ross Miller was a Clinical Professor of Finance at  
6 the State University of New York, at Albany. He was the President of Miller Risk  
7 Advisors, which provided risk management and related consulting services. During  
8 his career, Dr. Miller published books and articles related to active management in  
9 mutual funds, economic modeling, financial valuation and other related topics. He  
10 also presented at conferences on these and other investment-related areas.<sup>3</sup>

11 Prior to the filing of this case, Dr. Miller conducted a preliminary analysis of the  
12 performance of the unitized Edison International Stock Fund and the effect of that  
13 Fund's cash holdings on its performance. After the commencement of this action,  
14 Dr. Miller was engaged as a testifying expert. He submitted an expert report on  
15 April 30, 2009. Doc. 214 (sealed). He opined on the alleged imprudence of the  
16 unitized structure of the Edison International Stock Fund and the resulting losses  
17 from this structure. Doc. 214, Ex. 1 (sealed). Due to the Court's summary judgment  
18 order dismissing Plaintiffs' claim related to the unitized stock fund, Doc. 295 at 88,  
19 Dr. Miller was not called to testify at trial, Doc. 321 at 2 n.1.

20 Schlichter, Bogard and Denton paid \$103,901.80 to Dr. Miller for these services.

21 8. Non-Testifying Experts Who Were Initially Retained: Apart from the  
22 three disclosed experts noted above, Schlichter, Bogard and Denton also engaged  
23 certain expert witnesses for the purposes of potentially serving as a testifying expert  
24 witness in this litigation. In my experience serving as class counsel in complex  
25 litigation, plaintiffs' attorneys commonly engage expert witnesses to conduct an  
26 initial review and analysis of the facts. As their opinions are formulated on a

27 \_\_\_\_\_  
28 <sup>3</sup> For an overview of Dr. Miller's qualifications, see Doc. 214, Ex. 1 (Appendix A).



1 preliminary basis, and the opinions of other disclosed experts are finalized, these  
2 experts may not ultimately be retained as testifying experts and disclosed during the  
3 litigation. Because they are not disclosed, their identities and professional services  
4 performed remain confidential. Although they do not serve as testifying experts,  
5 their work assists counsel in developing their legal theories, addressing and  
6 rebutting Defendants' theories, and evaluating potential damages. These non-  
7 testifying experts that were initially engaged by Schlichter, Bogard and Denton in  
8 this litigation are summarized below.

9 a. Consultant A

10 Consultant A was the founder of a firm that specialized in providing consulting  
11 services to service providers of 401(k) plans and had extensive experience in the  
12 employee benefits industry. He worked with employee benefit plans and assisted  
13 plan sponsors in the selection and performance evaluation of investment managers  
14 while at two asset management consulting firms.

15 Consultant A was initially consulted to render opinions related to the prudence  
16 of maintaining the Money Market Fund in the Plan. Although he was ultimately not  
17 used as a testifying expert, he was actively engaged in analyzing documents  
18 exchanged in this case to support the preparation of an initial report.

19 Schlichter, Bogard and Denton paid \$60,500 to Consultant A for these services.

20 b. Consultant B

21 Consultant B is a principal at an economics consulting firm that provides  
22 consulting and expert witness services to support law firms in litigation. He is a  
23 recognized mutual fund industry expert and has been quoted in national  
24 publications, including the Wall Street Journal, USA Today, the Washington Post,  
25 and Barron's. He also has published articles in peer-reviewed journals, such as the  
26 Journal of Financial Economics, the Journal of Portfolio Management, and the  
27 Journal of Investing.

28 Consultant B was consulted to conduct an in-depth analysis of the performance

1 of the Plan investment options. He conducted research and analysis of 401(k) costs  
2 and the performance of all Plan investment options. This analysis assisted  
3 Plaintiffs' counsel in identifying underperforming investment options included in  
4 the Plan and developing their claims. Following his preliminary analysis,  
5 Consultant B was not used as a testifying expert witness.

6 Schlichter, Bogard and Denton paid \$42,735 to Consultant B for these services.

7 c. Consultant C

8 Consultant C has over 30 years of experience consulting clients on retirement  
9 plan design, administration and fiduciary responsibilities under ERISA. He also  
10 founded his own consulting firm and is the majority owner of a registered  
11 investment advisory firm.

12 Consultant C, in coordination with his assistant, conducted an analysis of the  
13 revenue sharing rates from Plan mutual funds and the expenses identified on the  
14 invoices from Hewitt. Following his analysis, he consulted with counsel regarding  
15 litigation strategy and potential expert opinions to be provided in this case.  
16 Following this preliminary analysis, Consultant C was not used as a testifying  
17 expert witness.

18 Schlichter, Bogard and Denton paid \$13,125 in total to Consultant C and his  
19 assistant for these services.

20 9. Non-Testifying Consulting Experts: Apart from experts engaged to  
21 potentially serve as disclosed testifying experts, Plaintiffs also engaged confidential  
22 consulting experts to assist Plaintiffs' counsel in developing their claims and  
23 theories in this case. These consulting services involved pre-filing investigation  
24 work to support the filing of Plaintiffs' complaint and ongoing professional services  
25 to assist counsel throughout this litigation. In my practice and experience as class  
26 counsel in numerous ERISA 401(k) class actions, plaintiffs' attorneys commonly  
27 engage consulting experts prior to and during a lawsuit to assist those attorneys in  
28 understanding complex financial issues and industry practices, investigating



1 potential claims, addressing Defendants' theories, and evaluating potential  
2 recoveries under applicable legal theories. The non-testifying consulting experts  
3 that were engaged by Schlichter, Bogard and Denton for purposes of this litigation  
4 are summarized below.

5 a. Consultant D

6 Consultant D is a former Securities and Exchange Commission lawyer who has  
7 served as an expert in forensic investigations of pension plans, with a focus on  
8 excessive fees and conflicts of interest. He is the founder of a formerly registered  
9 investment advisory and brokerage firm. He has been regarded as an authority on  
10 investment management and securities matters. He also has appeared in national  
11 publications, including the Wall Street Journal, New York Times, BusinessWeek,  
12 and the Institutional Investor. Consultant D has held various securities licenses,  
13 including Series 7, Series 24, Series 28, Series 53, and Series 66.

14 After the filing of this lawsuit, and leading up to summary judgment, Consultant  
15 D was engaged by Plaintiffs' counsel to assist in their investigation of the claims  
16 asserted in this case. He conducted research into revenue sharing practices,  
17 fiduciary practices, and standards of fiduciary conduct; consulted with industry  
18 professionals; reviewed and analyzed deposition transcripts; reviewed and analyzed  
19 voluminous documents produced by Defendants; reviewed and analyzed  
20 Defendants' expert reports; and provided his insight in preparation for their experts'  
21 depositions. He also prepared memoranda for counsel detailing his findings after  
22 his analysis of relevant evidence, which included his insight into relevant industry  
23 practices. Throughout his engagement as a consulting expert, he maintained  
24 ongoing communication with counsel to discuss litigation strategy, but was  
25 unwilling to serve as a testifying expert.

26 Schlichter, Bogard and Denton paid \$348,975 to Consultant D for these services.  
27  
28

1                   b. Consultant E

2           Consultant E is a consultant at an independent investment advisory firm and co-  
3 founder of a company offering web-based tools to assist plan sponsors and  
4 investment advisors and consultants to retirement plans. Over his 37-year career,  
5 Consultant E has served as an expert witness and published articles and presented  
6 on issues related to 401(k) plan fees and investment options provided to retirement  
7 plans. He also was the founder of a consulting firm that provided investment  
8 advice, fiduciary risk management, and retirement plan consulting to retirement  
9 plan sponsors. Consultant E is an Accredited Investment Fiduciary Analyst.

10           Prior to the filing of this action, Consultant E was engaged to provide consulting  
11 services to assist Plaintiffs' counsel in their investigation of the fees charged to the  
12 Plan. In particular, he conducted research and performed recordkeeping and  
13 administrative fee analyses of the Plan. After this litigation commenced, Consultant  
14 E also performed further research and analysis of the Plan, reviewed deposition  
15 transcripts, and reviewed and analyzed committee meeting minutes and other  
16 relevant materials exchanged during this litigation. He consulted with counsel  
17 following his review of relevant materials to provide his insight on prudent  
18 fiduciary practices based on his extensive experience in the retirement plan industry  
19 and serving as a fiduciary. Plaintiffs' counsel also had preliminary discussions with  
20 Consultant E regarding his expert opinions. However, he was not used as a  
21 testifying expert witness.

22           Schlichter, Bogard and Denton paid \$19,744.40 to Consultant E for these  
23 services.

24           10. In preparation for the filing of Plaintiffs' motion for attorneys' fees  
25 following the Court's Findings of Fact and Conclusions of Law [Doc. 567],  
26 Plaintiffs' counsel engaged the services of Consultant F to prepare an affidavit in  
27 support of Plaintiffs' fee petition to address issues related to the reasonableness of  
28 Plaintiffs' requested hourly rates. Consultant F is a senior partner at a California

1 law firm with extensive experience handling complex class action cases, has served  
2 as an expert on attorneys' fee matters, and is highly familiar with attorney billing  
3 rates nationwide. At the time Consultant F was engaged and began performing  
4 professional services, the parties had not reached a joint stipulation for payment of  
5 Plaintiffs' attorneys' fees and taxable and non-taxable costs from Defendants under  
6 29 U.S.C. §1132(g) and Fed. R. Civ. P. 54(d). Doc. 573. Schlichter, Bogard and  
7 Denton paid \$6,775 to Consultant F for these services.

8 11. The total amount paid to testifying and non-testifying expert witnesses  
9 retained by Schlichter, Bogard and Denton was \$982,067.12.

10 12. It is my opinion that each of these experts was necessary to bring this  
11 case forward and present the best case possible. This is particularly true because  
12 this case was among a group which were the first ever filed 401(k) excessive fee  
13 cases, and Defendants defended it vigorously. Further, Defendants had broad access  
14 to many experts in the fields of investment management, mutual fund industry  
15 practices, and revenue sharing.

16 13. Due to the Joint Stipulation for Payment of Plaintiffs' Attorneys Fees  
17 and Costs [Doc. 573], Plaintiffs' counsel reduced the amount for reimbursement  
18 based on the amount that could be recovered from Defendants as taxable costs for  
19 expert witnesses under Fed. R. Civ. P. 54(d) and through a Bill of Costs in  
20 accordance with 28 U.S.C. §§1920 and 1821. *See also* L.R. 54-3.5(c). The total  
21 amount of these costs is itemized below.

Witness Location and Date	Attendance Fee		Subsistence Allowance		Travel Expense	Total
	Days	Total	Days	Total		
Witz, David, 6/8/2017 (Deposition) Travel	1	\$40	1	\$117	\$234.20	\$391.20
Witz, David, 6/9/2017 (Deposition) Attendance, St. Louis, MO	1	\$2,763 <sup>4</sup>	1	\$42		\$2,763
Pomerantz, Steve, 5/23/2017 (Deposition) Attendance, New York, NY	1	\$3,600				\$3,600
Witz, David, 7/5/2017 (Trial) Travel and Attendance, Los Angeles, CA	2	\$80 <sup>5</sup>	2	\$193	\$1,562	\$1,835.00
Pomerantz, Steve, 7/5/2017 (Trial) Travel and Attendance, Los Angeles, CA	2	\$80	2	\$193	\$2,255.40	\$2,528.40
Pomerantz, Steve, 10/21/2009 (Trial) Travel and Attendance, Los Angeles, CA	2	\$80	2	\$193	\$1,688.36	\$1,961.36
<b>Total</b>						<b>\$13,120.46</b>

14. Schlichter, Bogard and Denton has further reduced the amount sought for reimbursement to account for all other expenses invoiced by Plaintiffs' experts and paid by the firm, such as for travel or other out-of-pocket expenses. This is a

<sup>4</sup> The actual amount paid to the expert for attendance at deposition. L.R. 54-3.5(c).

<sup>5</sup> For travel to and for appearance at trial, \$40 per day. 28 U.S.C. §1821(b).

1 conservative approach to exclude any amounts that could be accounted for in the  
2 taxable costs shown above. These other out-of-pocket expenses total \$4,733.99.

3 15. After the reductions for taxable costs (\$13,120.46) and other out-of-  
4 pocket expenses (\$4,733.99), the net fees paid to each expert are itemized below.

5 <b>Expert</b>	<b>Billing Entity</b>	<b>Amount</b>
6 Dr. Steve Pomerantz	Steve Pomerantz, LLC	\$ 150,816.50
7 David Witz	Fiduciary Risk Assessment, LLC / FRA Plan Tools	\$ 217,639.47
8 Dr. Ross Miller	Miller Risk Advisors	\$ 103,901.80
9 Consultant A		\$ 60,500.00
10 Consultant B		\$ 42,735.00
11 Consultant C		\$ 13,125.00
12 Consultant D		\$ 348,975.00
13 Consultant E		\$ 19,744.40
14 Consultant F		\$ 6,775.00
<b>Total</b>		<b>\$ 964,212.17</b>

15 16. After the reductions for out-of-pocket expenses incurred by Plaintiffs'  
16 experts and the amounts that could be recovered from Defendants under fee-  
17 shifting, the total amount that Schlichter, Bogard and Denton requests  
18 reimbursement from the common fund is \$964,212.

19 17. This amount does not include court reporter costs for depositions,  
20 copying costs, e-discovery costs, travel and lodging, or any expenses other than  
21 expert witness fees.

22 18. The payment of this amount will mean that Plaintiffs have obtained a  
23 \$13.1 million recovery without paying any attorneys' fees in this case.

24 19. Under the Contingent Fee Agreement for Class Action Suit entered  
25 into between the Named Plaintiffs and Schlichter, Bogard and Denton, the Named  
26 Plaintiffs agreed to reimburse counsel for all expenses related to this matter from  
27 the gross recovery. See Doc. 460 (Exhibits 1-6)(sealed).  
28

1 I declare under penalty of perjury that the foregoing is true and correct to the  
2 best of my knowledge and belief.

3 Executed on November 6, 2017.  
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5 /s/ Jerome J. Schlichter  
6 Jerome J. Schlichter  
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Invoice Date	Invoice No.	Expert	Billing Entity	Description	Total Amount Paid
12/10/2006	6531	Consultant E		Fee analysis research October 2006 - Southern California Edison	\$ 166.40
12/10/2006	6610	Consultant E		Southern California Edison - Nov-06	\$ 130.00
1/10/2007	No Invoice Number	Consultant E		Fee analysis research Southern California Edison - Nov-06	\$ 130.00
1/31/2007	No Invoice Number	Ross Miller	Miller Risk Advisors	Edison International - consulting time	\$ 2,500.00
2/17/2007	6687	Consultant E		So. Cal. Edison - Jan-07	\$ 260.00
2/28/2007	No Invoice Number	Ross Miller	Miller Risk Advisors	Edison International - consulting time	\$ 500.00
4/23/2007	No Invoice Number	Consultant E		So. Cal. Edison - Feb-07	\$ 65.00
2/28/2008	0920	David Witz	Fiduciary Risk Assessment, LLC	Organize, catalog and research	\$ 35,081.25
11/3/2008	No Invoice Number	Ross Miller	Miller Risk Advisors	Edison International - consulting time	\$ 675.00
11/30/2008	No Invoice Number	Ross Miller	Miller Risk Advisors	Edison International - consulting time	\$ 1,125.00
11/30/2008	ED1108	Steve Pomerantz	Steve Pomerantz, LLC	Analysis; document review; and research	\$ 15,234.00
12/1/2008	No Invoice Number	Consultant D		Review Form 11(k)s; conversations with counsel; conversations with industry professionals re: stable value, IPS, mid cap funds, company stock benchmark, and Russell funds; draft memos; research re: stock performance, and Plan mutual funds; review documents; and review expert analysis	\$ 54,562.50
12/8/2008	10403	Consultant B		Research on 401(k) plan costs and performance	\$ 9,625.00
12/29/2008	ED1208	Steve Pomerantz	Steve Pomerantz, LLC	Conference and analysis	\$ 6,102.00
12/31/2008	0917	David Witz	Fiduciary Risk Assessment, LLC	Organize, catalog and research	\$ 26,116.25
12/31/2008	No Invoice Number	Ross Miller	Miller Risk Advisors	Edison International - consulting time	\$ 5,850.00
1/1/2009	259	Consultant E		Edison Plan research and analysis	\$ 9,009.00
1/5/2009	No Invoice Number	Consultant D		Research revenue sharing re: mutual fund window; review documents; conversations with counsel; conversations with experts; and conversations with industry professional re: mutual fund offerings; research re: 404(c) and sector funds; draft memos and notes; and online research	\$ 46,125.00
1/5/2009	0812303	Consultant E		Edison Plan research and analysis	\$ 3,744.00
1/12/2009	10009	Consultant B		Research on 401(k) plan costs and performance	\$ 15,785.00
1/31/2009	0919	David Witz	Fiduciary Risk Assessment, LLC	Organize, catalog and research	\$ 29,337.50
1/31/2009	No Invoice Number	Ross Miller	Miller Risk Advisors	Edison International - consulting time	\$ 6,075.00
2/10/2009	No Invoice Number	Consultant A		Calls and document review	\$ 19,250.00
2/13/2009	10038	Consultant B		Research on 401(k) plan costs and performance	\$ 17,325.00
2/28/2009	No Invoice Number	Ross Miller	Miller Risk Advisors	Edison International - consulting time	\$ 3,600.00
2/28/2009	EDI0209	Steve Pomerantz	Steve Pomerantz, LLC	Conference; analysis; and document review	\$ 4,477.50
3/3/2009	267	Consultant E		Edison document review	\$ 1,820.00

Invoice Date	Invoice No.	Expert	Billing Entity	Description	Total Amount Paid
3/4/2009	No Invoice Number	Consultant D		Review deposition transcripts and exhibits of multiple deponents; conversations with counsel; conversations with experts; conversations with industry professional re: stable value; research re: Russell DOL/SEC violations and securities lending; research re: Hewitt conflicts of interest; document review; and draft notes	\$ 31,275.00
3/31/2009	0921	David Witz	Fiduciary Risk Assessment, LLC	Organize, catalog and research	\$ 42,600.00
3/31/2009	No Invoice Number	Ross Miller	Miller Risk Advisors	Edison International - consulting time	\$ 17,655.00
3/31/2009	EDI309	Steve Pomerantz	Steve Pomerantz, LLC	Conferences; document review; and analysis	\$ 15,338.50
4/1/2009	272	Consultant E		Edison document review	\$ 2,600.00
4/2/2009	No Invoice Number	Consultant D		Draft notes; review documents; review deposition transcripts and exhibits of multiple deponents; conversations with counsel; conversations with expert; conversations with industry professionals re: Russell, Hewitt, and transition management fees; and review industry literature	\$ 68,737.50
4/2/2009	001SCE	Consultant C		Discussion with counsel; review Plan documents and facts of case; and review documents supplied by counsel and assistant	\$ 8,925.00
4/23/2009	006	Consultant C		Review documents and discussion with expert; review and analyze revenue sharing information from 1999 to 2008; and review and analyze Hewitt's invoices from 1999 to 2005 and discuss with expert	\$ 4,200.00
4/24/2009	No Invoice Number	Consultant A		Calls; preparation; and report	\$ 41,250.00
4/30/2009	No Invoice Number	Ross Miller	Miller Risk Advisors	Edison International - consulting time	\$ 40,685.00
5/1/2009	No Invoice Number	Consultant D		Review deposition transcripts and exhibits of multiple deponents; draft notes; conversations with counsel; conversations with expert; conversations with industry professionals; meeting with industry professional; document review; research re: market fund market timing; and document review	\$ 63,675.00
5/1/2009	EDI409	Steve Pomerantz	Steve Pomerantz, LLC	Report; analysis; and document review	\$ 29,835.00
5/5/2009	306	Consultant E		Edison-Review committee minutes	\$ 1,820.00
5/26/2009	0922	David Witz	Fiduciary Risk Assessment, LLC	Organize, catalog and research	\$ 24,962.50
5/29/2009	EDI509	Steve Pomerantz	Steve Pomerantz, LLC	Deposition; analysis; document review; and travel expense	\$ 11,987.00
5/31/2009	0923	David Witz	Fiduciary Risk Assessment, LLC	Organize, catalog and research	\$ 15,225.00
6/1/2009	No Invoice Number	Consultant D		Document review; research re: Hewitt surveys; draft notes; conversations with counsel; conversations with expert; conversations with industry professionals re: company stock fiduciary and performance standards; research re: Defendants' expert; review Defendants' experts' reports; review Plaintiffs' experts' reports; and review Defendants' expert's deposition transcript and exhibits	\$ 63,337.50
6/1/2009	No Invoice Number	Ross Miller	Miller Risk Advisors	Edison International - consulting time	\$ 21,861.80
6/30/2009	No Invoice Number	Consultant D		Review Defendants' expert's deposition and exhibits; review documents; email to counsel; and conversations with counsel	\$ 21,262.50
6/30/2009	0924	David Witz	Fiduciary Risk Assessment, LLC	Organize, catalog and research	\$ 2,500.00
7/1/2009	No Invoice Number	Ross Miller	Miller Risk Advisors	Edison International - consulting time	\$ 2,925.00
7/22/2009	EDI709	Steve Pomerantz	Steve Pomerantz, LLC	Document review	\$ 540.00
7/31/2009	0925	David Witz	Fiduciary Risk Assessment, LLC	Organize, catalog and research	\$ 2,775.00
7/31/2009	No Invoice Number	Ross Miller	Miller Risk Advisors	Edison International - consulting time	\$ 450.00
9/29/2009	EDI909	Steve Pomerantz	Steve Pomerantz, LLC	Conference; report; analysis; and document review	\$ 6,439.50
10/27/2009	EDI1009	Steve Pomerantz	Steve Pomerantz, LLC	Report; document review; conferences; deposition; research; and travel time and expense	\$ 23,680.00
4/2/2010	EDI1310	Steve Pomerantz	Steve Pomerantz, LLC	Conference; report; analysis; and document review	\$ 7,033.50



Invoice Date	Invoice No.	Expert	Billing Entity	Description	Total Amount Paid
4/30/2010	ED1410	Steve Pomerantz	Steve Pomerantz, LLC	Conference; report; trial; and document review	\$ 9,027.00
7/29/2010	ED1710	Steve Pomerantz	Steve Pomerantz, LLC	Conference; analysis; and document review	\$ 2,533.50
5/23/2017	ED 517	Steve Pomerantz	Steve Pomerantz, LLC	Document review; analysis; work on expert report/disclosure; conference with counsel; and deposition	\$ 21,870.00
6/6/2017	4007	David Witz	FRA Plan Tools	Consulting and prepare revenue sharing report on 3 funds	\$ 11,131.25
6/20/2017	4020	David Witz	FRA Plan Tools	Research and preparation for deposition; travel expense; deposition preparation call; and review deposition materials	\$ 9,224.22
7/12/2017	ED Trial	Steve Pomerantz	Steve Pomerantz, LLC	Work on expert report/disclosure; review documents; and trial	\$ 8,838.93
7/13/2017	4094	David Witz	FRA Plan Tools	Finalize engagement; court appearance and preparation; review of direct testimony and ERRATA; and travel expenses	\$ 24,421.52
10/10/2017	15991	Consultant F		Telephone conferences and email communications with counsel; review court docket; research and collect materials on rates to support declaration; and review declaration	\$ 6,775.00
<b>Total</b>					<b>\$ 982,067.12</b>

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12  
13 *Local Counsel for Plaintiffs*

14  
15 UNITED STATES DISTRICT COURT

16 CENTRAL DISTRICT OF CALIFORNIA

17  
18 GLENN TIBBLE et al., individually and  
as representatives of a class of similarly  
19 situated persons and on behalf of the  
Plan,

20 *Plaintiffs,*

21 v.

22 EDISON INTERNATIONAL et al.,

23 *Defendants.*

Case No. CV 07-5359 SVW (AGRx)

**[PROPOSED] ORDER GRANTING  
PLAINTIFFS' MOTION FOR  
REIMBURSEMENT OF EXPERT  
WITNESS FEES AND FOR  
INCENTIVE AWARDS**

DATE: February 5, 2018

TIME: 1:30 p.m.

Courtroom: 10A

Judge: Hon. Stephen V. Wilson

1 Having reviewed Plaintiffs’ Motion and Memorandum in Support of Motion for  
2 Reimbursement of Expert Witness Fees and for Incentive Awards, and supporting  
3 materials, Plaintiffs’ Motion is hereby GRANTED. Class Counsel Schlichter,  
4 Bogard & Denton LLP is awarded reimbursement of \$964,212 in expert witness  
5 fees, and each of the class representatives, Glenn Tibble, William Bauer, William  
6 Izral, Henry Runowiecki, Frederick Suhadolc, and Hugh Tinman, Jr,<sup>1</sup> are awarded  
7 \$25,000 as case contribution awards, from the judgment.

8  
9 IT IS SO ORDERED.

10  
11 Dated: \_\_\_\_\_, 2018

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12 Honorable Stephen V. Wilson  
13 United States District Judge  
14 Central District of California

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28 <sup>1</sup> The incentive award to Hugh Tinman, Jr., who is deceased, shall be paid to his surviving spouse, Carol Tinman, who was substituted as named plaintiff. Doc. 526.