

Appeal No. 18-55974

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

GLEN TIBBLE, et al.,
Plaintiffs-Appellants,

v.

EDISON INTERNATIONAL, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE STEVEN V. WILSON, JUDGE
CASE No. 2:07-CV-05359-SVW-AGR

**DEFENDANTS-APPELLEES'
ANSWERING BRIEF**

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STATEMENT OF THE ISSUE

Whether the district court's denial of Class Counsel's motion for reimbursement of expert witness fees was within the discretion of the district court and should be affirmed. Doc. 589.

STATEMENT OF THE CASE

This is an appeal from the district court's denial of Class Counsel's motion for reimbursement of expert witness fees in a class action on behalf of the Edison 401(k) Savings Plan (the "Plan") for breach of fiduciary duties under the Employee Retirement Income Security Act ("ERISA"), specifically 29 U.S.C. § 1132(a)(2).

On remand from this Court, the district court conducted a bench trial on Plaintiffs' reinstated claim for breach of the fiduciary duty of prudence and entered its findings of fact and conclusions of law on August 16, 2017. (ER 40) Doc. 567. The district court found that Defendants breached the fiduciary duty of prudence under ERISA, (ER 63) Doc. 567 at 24, and accepted the parties' joint stipulation that the Plan's losses totaled \$13,161,491. Doc. 572. On October 16, 2017, the parties filed a joint stipulation for the payment \$5,800,000 in Plaintiffs' attorneys' fees, Doc. 573, which Defendants subsequently paid directly to Class Counsel.

All other issues having been resolved, on November 6, 2017, Plaintiffs filed a motion seeking to deduct approximately \$1 million from the class' recovery and pay it to Class Counsel for reimbursement of expert witness fees and to the named

Plaintiffs as incentive awards. Doc. 576. Defendants opposed the request for reimbursement of expert witness fees, and noted that the \$5,800,000 in attorneys' fees to which the parties had stipulated was "more than sufficient to cover the costs of the failed expert work in question." Doc. 585. On June 27, 2018, following notice to the class and an opportunity to object, the district court granted Plaintiffs' request for incentive awards but denied Class Counsel's request for expert witness fees. Doc. 589. On July 12, 2018, Class Counsel filed a notice of appeal of the district court's denial of expert witness fees in this Court. (ER 9) Doc. 590. The district court entered judgment on October 25, 2018. Pending resolution of this appeal, Defendants have deposited the judgment amount with the district court pursuant to Federal Rule of Civil Procedure 67.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's denial of Class Counsel's request for reimbursement of their expert witness fees. Upon consideration of the motion for fees and supporting papers, the district court determined that it "did not rely on any particular expert's conclusions in coming to a decision in this matter," Doc. 589 at 2, and denied Class Counsel's request for reimbursement. The trial court's ruling was well within its wide discretion, as this Court has recognized in affirming denials grounded in similar reasoning. *See, e.g., Rodriguez v. Farmers Ins. Co. of AZ*, 649 F. App'x 620, 620-21 (9th Cir. 2016) (affirming denial where

Plaintiffs’ motion failed to disclose “why each expert was crucial to the settlement,” among other things); *Strategic Diversity, Inc. v. Alchemix Corp.*, 664 F. App’x 660, 665 (9th Cir. 2016) (applying abuse of discretion standard to affirm denial where plaintiffs did not rely on expert opinion at trial).

STANDARD OF REVIEW

This Court must review the district court’s denial of expert witness fees for an abuse of discretion. *See Hohlbein v. Utah Land Res. LLC*, 432 F. App’x 655, 657 (9th Cir. 2011) (applying abuse of discretion standard in reviewing denial of expert witness fees).¹

ARGUMENT

The district court did not abuse its discretion in denying Class Counsel’s request for reimbursement of expert witness fees. As Class Counsel conceded below, Doc. 576-1 at 9, such matters are firmly within the discretion of the district court. *See, e.g., Rodriguez*, 649 F. App’x at 620 (“[A]pplication for expert witness fees should be given ‘careful scrutiny,’ and district courts should *exercise their discretion* ‘sparingly.’”) (emphasis added; citation omitted); *see also K-S-H*

¹ Citing cases pertaining to denials of motions for class certification or motions for new trials, Class Counsel argue that an abuse of discretion can be found if the district court “(1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in weighing the correct mix of factors.” Br. of Appellants at 19 (citations omitted). Those cases and the factor-based analysis they articulate are inapplicable here.

Plastics, Inc. v. Carolite, Inc., 408 F.2d 54, 60 (9th Cir. 1969) (“We have said that the trial court has a wide discretion in awarding costs and that we are hesitant to say that the discretion has been abused.”); *A. T. Smith & Sons v. N. P. Van Valkenburgh Co.*, 337 F.2d 702, 705 (9th Cir. 1964) (“An award of costs is largely in the discretion of the trial court. We always hesitate to intrude on such a large discretion.”).

Here, the district court properly exercised its discretion in denying Class Counsel’s request for expert fees and provided a reasonable explanation for its ruling. Specifically, the district court found that Class Counsel offered “no evidence regarding which, if any, expert’s work was ‘crucial or indispensable’ to [their] share class claim” and “concede[d] that much of the expert work was unrelated to the sole claim.” Doc. 589 at 2. The court also cited its previous determination that “Plaintiffs succeeded minimally on only part of one of ten of their claims,” and observed that “Plaintiffs’ partial victory . . . represented only a fraction of Plaintiffs’ damages claims.” Doc 589 at 1-2 (citation omitted). Finally, the district court explained that “it did not rely on any particular expert’s conclusions in coming to a decision in this matter” and that “the [court’s] Findings of Fact and Conclusions of Law d[id] not rely at all on Plaintiff’s expert testimony as provided during trial.” *Id.* at 2 (citation omitted). On these grounds, the district court declined to award expert witness fees. *Id.*

This Court has affirmed denials of expert witness fees supported by similar reasoning. For example, there was no abuse of discretion in denying fees where plaintiffs' motion "failed to disclose (1) how many hours the experts worked, (2) what precisely each expert did, (3) why each expert was crucial to the settlement, or (4) which experts actually worked on the case." *Rodriquez*, 649 F. App'x at 620–21. Likewise, a district court acted within its discretion to deny fees where "costs expended on the damages expert were unnecessary to the ultimate recovery because [plaintiff-appellant] did not rely on a single piece of evidence or expert opinion adduced at the bench trial." *Strategic Diversity, Inc.*, 664 F. App'x at 665; *see also Stetson v. W. Publ'g Corp.*, 714 F. App'x 681, 683 (9th Cir. 2017) (affirming denial of expert fees in common fund case where "the amount requested for two experts was not justified and the time records submitted by Appellants did not reveal which fees were attributed to which expert").

Where this Court has found a denial of expert witness fees to constitute an abuse of discretion, it is often because such fees were "denied without explanation." *Hohlbein*, 432 F. App'x at 657. Here, where the district court articulated an explanation for its denial that is along the lines of others this Court has affirmed, there is no basis for finding an abuse of discretion, particularly where these fees will be taken out of the class' recovery.

To avoid application of this precedent, Class Counsel argues at great length that the district court's application of the "crucial or indispensable" standard in analyzing class counsel's claim for expert fees was legal error—even though they argued for application of that standard below. *See* Doc. 576-1 at 9-10. This Court need not address arguments raised for the first time on appeal. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("As a general rule, we will not consider arguments that are raised for the first time on appeal."). In any case, the "reasonableness" standard Class Counsel now advocates would lead to the same result, as it would be in no way "reasonable" to award expert fees for expert work on which the district court did not rely in adjudicating the case, and which related largely to claims on which plaintiffs failed entirely.

CONCLUSION

The district court's denial of Class Counsel's motion for reimbursement of expert witness fees was well within the court's discretion and should be affirmed.

Respectfully submitted,

Dated: November 29, 2018

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6(b), three appeals have been previously heard in this Court which concern the case being briefed: Appeal Nos. 10-56406(L), 10-56415, and 11-56628. *See Tibble v. Edison Int'l*, 843 F.3d 1187 (9th Cir. 2016) (*en banc*); *Tibble v. Edison Int'l*, 729 F.3d 1110 (9th Cir. 2013), *vacated*, 135 S. Ct. 1823 (2015).

/s/ Catalina C. Vergara
Catalina C. Vergara

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-55974

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The brief is words or pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
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Signature of Attorney or
Unrepresented Litigant

/s/ Catalina J. Vergara

Date

11/29/2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 2018, I filed the Defendants-Appellees' Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Catalina C. Vergara
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