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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GLEN BARNES, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

vs.

EDISON INTERNATIONAL, et al.,

Defendants.

Case No. 2:18-cv-09690-CBM-FFM

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNDERWRITER DEFENDANTS' MOTION TO DISMISS CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

Date: October 1, 2019
Time: 10:00 a.m.
Ctrm: 8B
Judge: Hon. Consuelo B. Marshall

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Defendants J.P Morgan Securities LLC, Morgan Stanley & Co. LLC, RBC Capital Markets, LLC, Wells Fargo Securities, LLC, Citigroup Global Markets Inc., Mizuho Securities USA LLC, MUFG Securities Americas Inc., PNC Capital Markets LLC, TD Securities (USA) LLC, U.S. Bancorp Investments, Inc., Academy Securities, Inc., C.L. King & Associates, Inc., Drexel Hamilton, LLC, and Samuel A. Ramirez & Company, Inc. (collectively, the "Underwriter Defendants") respectfully submit this memorandum of points and authorities in support of their motion to dismiss the Consolidated Amended Complaint.

The Underwriter Defendants are defendants only with respect to Plaintiffs' claims under Sections 11 and 12(a)(2) of the Securities Act and join in the motion to dismiss filed by Edison International ("Edison"), Southern California Edison ("SCE," and together with Edison, the "Company"), SCE Trust VI (the "Trust") and certain of their officers (collectively with the Company and the Trust, the "Edison Defendants") as it relates to the Securities Act claims.[1] The Underwriter Defendants respectfully submit this separate memorandum to underscore certain grounds for dismissing those claims as to them.

INTRODUCTION

For years, the Company disclosed to investors that its electrical facilities posed a risk of wildfires that had grown more acute due to climate change in the Company's service territory. The Company also disclosed that it could be held strictly liable for wildfire damage caused by its equipment and might not be able to

[1] "Edison Br." shall refer to the Edison Defendants' memorandum of points and authorities, and "Ex." shall refer to the exhibits appended to the Declaration of Lauren C. Barnett in support of the Edison Defendants' motion to dismiss.

recover the cost of those liabilities from ratepayers. Prior to the class period, multiple wildfires were attributed to the Company, and, in 2017, the California Public Utilities Commission ("CPUC") refused a request by another California utility company to recover for wildfire liabilities from its ratepayers. All this information was in the public domain.

In December 2017, the Thomas Fire broke out in the Company's service territory. Forewarned of the risk that the Company might cause wildfires and be held responsible for resulting property damage, the market reacted negatively, and the Company's stock price fell in anticipation of possible losses. While unfortunate for investors, that stock price drop is not recoverable under the federal securities laws. The Amended Complaint does not allege any materially false or misleading statement in the relevant offering documents and demonstrates on its face that Plaintiffs' investment losses were not caused by the corrective disclosure of any alleged misstatements.

Plaintiffs' Securities Act claims also fail because they are untimely. The Securities Act claims relate solely to SCE's public offering of certain Trust Preference Securities in June 2017 (the "Offering") and specific alleged misstatements in the Company's registration statement and prospectus for the Offering. As Plaintiffs admit, they discovered the alleged basis for their Securities Act claims no later than December 2017. They accordingly were required to bring them within one year of discovery, no later than December 2018. Yet Plaintiffs first filed their Securities Act claims—and first named the Underwriter Defendants—on April 29, 2019, outside the Securities Act's one-year statute of limitations.

For these reasons, and for the reasons set forth in the Edison Defendants'

memorandum, the Court should dismiss Plaintiffs' Securities Act claims.

BACKGROUND[2]

A. The June 2017 Offering

As alleged in the Amended Complaint, on June 19, 2017, SCE raised $475 million in a public offering of 5.00% Trust Preference Securities. Am. Compl. ¶¶ 334-35. Pursuant to a June 14, 2017 registration statement and a June 19, 2017 Prospectus (collectively, the "Offering Documents"), SCE issued 5.00% Series L preferred stock to the Trust, which in turn issued the Trust Preference Securities to investors. *Id.* ¶ 335; *see* Ex. 10. According to the Amended Complaint, "[t]he Underwriter Defendants purchased the preferred shares from SCE Trust VI, and then offered the Trust Preference Securities to the public at the public offering price of $25 per share." Am. Compl. ¶ 336. Plaintiff Irving Lichtman, on behalf of the Irving Lichtman Revocable Living Trust ("Lichtman"), allegedly purchased 12,000 Trust Preference Securities on June 19, 2017 at the offering price. *Id.* ¶ 33; Dkt. No. 48.

B. Alleged Misstatements and Omissions in the Offering Documents

The Offering Documents describe the Trust Preference Securities and incorporate by reference the Company's 2016 Form 10-K and Q1 2017 Form 10-Q filings. *See* Am. Compl. ¶¶ 338-39. The Securities Act claims are based solely on alleged misstatements and omissions in those filings.

[2] The following facts are derived from the allegations in the Amended Complaint, and the documents referenced therein. The Underwriter Defendants do not concede the accuracy of these allegations but accept them as true for purposes of this motion.

The challenged statements in the Offering Documents fall into two general categories: (1) statements about SCE's commitment to improving safety; and (2) risk disclosures about SCE's potential wildfire liability. Plaintiffs specifically challenge six statements regarding these topics:

- ***Investments in Safety:*** SCE stated that its planned capital expenditures sought to increase the "safety and reliability" of its electrical infrastructure, *see id.* ¶¶ 306-11;
- ***CPUC Risk Assessment:*** SCE noted that the CPUC was conducting a "triennial safety model assessment proceeding" to evaluate SCE's risk assessment and mitigation programs, *see id.* ¶¶ 312-13;
- ***Aging Infrastructure:*** SCE disclosed that its aging infrastructure posed a material risk if not successfully managed as part of its "significant and ongoing infrastructure investment program," *see id.* ¶¶ 314-16, 328(a), 329;
- ***Dangers of Transmitting Electricity:*** SCE warned that the electricity business poses inherent risks to public safety and that SCE could be penalized by the CPUC for safety violations, *see id.* ¶¶ 317-18, 328(b), 330;
- ***Increased Wildfire Liability:*** SCE warned that its potential liability for wildfires had increased due to California's strict liability laws and drought conditions and that losses could exceed insurance coverage and may not be recoverable in rates, *see id.* ¶¶ 319-20, 325-26; and
- ***Anticipated Long Beach Penalties:*** SCE expected to incur penalties in connection with the 2015 Long Beach power outages caused by underground vault fires and equipment failures, *see id.* ¶¶ 321-22.

Plaintiffs assert that these statements were misleading because they did not disclose SCE's purported "reckless disregard of safety." *See id.* ¶¶ 306-22, 325-30.

C. The Company Repeatedly Warned About Potential Liability for Causing Wildfires

The Offering Documents and other public statements made by SCE prior to and during the class period repeatedly warned that SCE's aging infrastructure and possible equipment failures might cause wildfires that could result in substantial liability for the Company:

> SCE's infrastructure is aging and could pose a risk to system reliability. In order to mitigate this risk, SCE is engaged in a significant and ongoing infrastructure investment program. . . . SCE's financial condition and results of operations could be materially affected if it is unable to successfully manage these risks as well as the risks inherent in operating and maintaining its facilities, the operation of which can be hazardous.

Am. Compl. ¶ 328(a); Ex. 7-322.

> Severe wildfires in California have given rise to large damage claims against California utilities for fire-related losses alleged to be the result of the failure of electric and other utility equipment. Invoking a California Court of Appeal decision, plaintiffs pursuing these claims have relied on the doctrine of inverse condemnation, which can impose strict liability (including liability for a claimant's attorneys' fees) for property damage. Drought conditions in California have also increased the duration of the wildfire season and the risk of severe wildfire events. SCE has approximately $1 billion of insurance coverage for wildfire liabilities for the period ending on May 31, 2017. SCE has a self-insured retention of $10 million per wildfire occurrence. SCE or its contractors may experience coverage reductions and/or increased insurance costs in future years. No assurance can be given that future losses will not exceed the limits of SCE's or its contractors' insurance coverage.

Am. Compl. ¶ 325; Ex. 7-389; Ex. 8-473. The Offering Documents also incorporated by reference the following risk factors:

- "Electricity is dangerous for employees and the general public . . . if equipment malfunctions. Injuries and property damage caused by such events can subject SCE to liability that, despite the existence of insurance coverage, can be significant."

- "Edison International has experienced increased costs and difficulties in obtaining insurance coverage for wildfires that could arise from SCE's ordinary operations. . . . Uninsured losses and increases in the cost of insurance may not be recoverable in customer rates."

Am. Compl. ¶¶ 319, 328(b); Ex. 7-323.

These warnings in the Offering Documents were not new ones. For example, in 2013, SCE had announced a multi-year Pole Loading Program ("PLP") to inspect and remediate all 1.4 million of its poles. Am. Compl. ¶¶ 155, 157. In regulatory filings that year, SCE reported that nearly a quarter of its poles did not meet applicable standards.[3] *See id.* ¶¶ 152, 159. SCE stated that it "should be replacing over 31,000 poles every year," but had replaced only as few as 8,000 per year, which was "*simply not enough*." *Id.* ¶ 139 (emphasis in original). Three years later, in 2016, SCE reported that it had inspected and repaired fewer poles than originally projected. *Id.* ¶¶ 165, 167.

As the Amended Complaint itself pleads, the public was well aware prior to the June 2017 Offering that SCE's equipment could lead to wildfires. Between 1993 and 2017, at least eight wildfires were blamed on SCE's electrical equipment, *see id.* ¶¶ 91-99, 104-05, and SCE had been fined $37 million in connection with the 2007 Malibu Canyon Fire, *id.* ¶ 97.

[3] SCE's 2015 General Rate Case ("GRC") was filed in November 2013. *See* Am. Compl. ¶ 127 n.21. Its 2018 GRC was filed in September 2016. *See id.* ¶ 125 n.19.

D. The December 2017 Thomas Fire

The Thomas Fire began on December 4, 2017. *Id.* ¶¶ 218-28. According to Plaintiffs, the "truth emerge[d]" on that date, and Edison's stock price immediately fell because "[t]he market understood that Edison, which has previously been held responsible for recklessly causing multiple fires, had also caused the Thomas Fire." *Id.* ¶ 11; *see also id.* ¶ 409 (alleging that Edison's stock price dropped on December 5 "on the market's understanding . . . that SCE had caused the Thomas Fire"). Within days, SCE disclosed that it believed investigations into the Thomas Fire "include the possible role of [SCE's] facilities," a statement which Plaintiffs claim was a "partial confirmation of the market's informed reaction to the Thomas Fire" and allegedly caused Edison's stock to drop again. *Id.* ¶¶ 410-11.

E. The November 2018 Complaint and the April 2019 Amended Complaint

On November 16, 2018, plaintiff Glen Barnes filed a putative class action complaint (the "Original Complaint") against the Company and certain of its officers that alleged securities fraud claims under Sections 10 and 20 of the Securities Exchange Act of 1934 ("Exchange Act"). The Original Complaint made no mention of the Offering, the Offering Documents, the Trust Preference Securities or the Underwriter Defendants, and it did not assert any Securities Act claims. Barnes owned only Edison common stock. Original Compl. ¶ 14; Dkt. No. 1. Iron Workers Local 580 Joint Funds, which also owned only Edison common stock (Dkt. No. 25, Ex. B), was subsequently appointed as Lead Plaintiff.

Plaintiffs filed the Amended Complaint on April 29, 2019. The Amended Complaint added, for the first time, new claims under Sections 11, 12 and 15 of the

Securities Act based on alleged misstatements in the Offering Documents. These new claims were brought by a new named plaintiff, Lichtman, as representative of a purchaser of Trust Preference Securities. Am. Compl. ¶ 33; Dkt. No. 48. Also for the first time, the Amended Complaint named Underwriter Defendants and certain additional Edison Defendants. Am. Compl. ¶¶ 45-60.

ARGUMENT

Claims under Sections 11 and 12(a)(2) of the Securities Act must be "brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m. A Securities Act plaintiff also must allege that the relevant offering documents contain a material misstatement or omission that "would have misled a reasonable investor about the nature of his or her investment." *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403-04 (9th Cir. 1996) (internal quotation marks omitted); *accord In re Verifone Sec. Litig.*, 11 F.3d 865, 868-69 (9th Cir. 1993). Negative causation is an affirmative defense to these claims, which can be resolved on a motion to dismiss "if [Defendants] can show that, on the face of the complaint, the absence of loss causation is apparent." *Brown v. Ambow Educ. Holding Ltd.*, No. CV 12-5062, 2014 WL 523166, at *14 (C.D. Cal. Feb. 6, 2014).

A. The Securities Act Claims Are Time-Barred

Plaintiffs' Securities Act claims are untimely because Plaintiffs themselves allege that they had discovered the alleged misstatements in the Offering Documents more than a year before the Amended Complaint was filed on April 29, 2019. In a section of the Complaint entitled "The Truth Emerges," Plaintiffs assert that the Thomas Fire, which started on December 4, 2017, was "a partial materialization of

the risks" that the Company had purportedly concealed. Am. Compl. ¶ 409. They allege that on December 5, the next trading day, Edison's stock price dropped because "[t]he market understood that Edison . . . had also caused the Thomas Fire." *Id.* ¶¶ 11, 409. Accepting these allegations as true, Plaintiffs by their own admission discovered their claims no later than December 2017. The Amended Complaint asserts, for this reason, that Plaintiffs "could not have reasonably discovered these facts more than one year prior to the filing of the *initial complaint* in this action" filed on November 16, 2018—i.e., not before *November 16, 2017*. *See id.* ¶¶ 438, 447. Plaintiffs did not assert any Securities Act claims until April 29, 2019, nearly 17 months later. The Securities Act claims are untimely under the one-year statute of limitations.

B. The Securities Act Claims Do Not Relate Back to the Original Complaint

The newly added Securities Act claims were asserted in the Amended Complaint for the first time by a new plaintiff against new defendants based on new allegations. They cannot be defended as timely on a theory that they somehow "relate back" to the filing of the Original Complaint. Under Federal Rule of Civil Procedure 15(c), an amendment adding new defendants relates back only if (i) it "asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading" and (ii) "within the period provided by Rule 4(m) for serving the summons and complaint," the newly joined defendants "received such notice of the action that [they] will not be prejudiced in defending on the merits" and "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper

party's identity." Fed. R. Civ. P. 15(c)(1)(B)-(C). Further, an amendment can add a new plaintiff only if "1) the original complaint gave the defendant adequate notice of the claims of the newly proposed plaintiff; 2) the relation back does not unfairly prejudice the defendant; and 3) there is an identity of interests between the original and newly proposed plaintiff." *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 935 (9th Cir. 1996).

Plaintiffs cannot meet any of these requirements.

1. The Original Complaint Did Not Omit the Underwriter Defendants by Mistake

An amendment adding a new defendant may relate back only if the defendant "knew or should have known that the action would have been brought against it, *but for a mistake* concerning the proper party's identity." Fed. R. Civ. P. 15(c)(1)(C) (emphasis added). The claims against the Underwriter Defendants cannot relate back to the Original Complaint because the Underwriter Defendants were not omitted from that Complaint by mistake. Rather, they were omitted because plaintiff Barnes alleged only Exchange Act claims for which the Underwriter Defendants have no liability. There was no "mistake" by Barnes. Barnes never alleged that he purchased Trust Preference Securities sold in the Offering and thus never had a Securities Act claim to assert against the Underwriter Defendants. A conscious choice to omit a potential defendant is not a "mistake" within the meaning of Rule 15(c). *See La.-Pac. Corp. v. ASARCO, Inc.*, 5 F.3d 431, 434-35 (9th Cir. 1993) (affirming denial of relation back where "[t]here was no mistake of identity, but rather a conscious choice of whom to sue"); *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 857-58 (9th Cir. 1986) ("Rule 15(c) was intended to protect a plaintiff

who mistakenly names a party and then discovers, after the relevant statute of limitations has run, the identity of the proper party. Rule 15(c) was never intended . . . to permit a plaintiff to engage in piecemeal litigation.").

There was never any "mistake" as to the Underwriter Defendants' "identities," nor does the Amended Complaint allege that such a mistake was made. To the contrary, the Underwriter Defendants' role in the Offering was disclosed on the face of the Offering Documents, *see id.* ¶¶ 335-36; Ex. 10-498, 10-544, yet Barnes did not name *anyone* in connection with the Offering. The Original Complaint made no mention of the Offering, the Trust Preference Securities or the Underwriter Defendants. Courts have consistently rejected attempts to tack untimely Securities Act claims against underwriters onto earlier filed complaints. *See In re Infonet Servs. Corp. Sec. Litig.*, 310 F. Supp. 2d 1106, 1120 n.15 (C.D. Cal. 2003) (amended claims against underwriters did not relate back "given that the Underwriters and [other new defendants] were listed on the Prospectus and Registration Statement"); *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 431, 449 (S.D.N.Y. 2003) ("Plaintiffs knew the identities of the Additional Underwriter Defendants, were not required to name them to make their original complaint legally sufficient, and chose not to name them."), *rev'd on other grounds*, 496 F.3d 245 (2d Cir. 2007).

2. The Underwriter Defendants Did Not Have Timely Notice of the Original Complaint

Plaintiffs' Securities Act claims also do not relate back because the Underwriter Defendants did not receive timely notice of any Securities Act claims. Under Federal Rule 15(c)(1)(C), new defendants can be added after the limitation

period has expired only if, among other things, they received notice of the claims "within the period provided by Rule 4(m) for serving the summons and complaint." The Underwriters Defendants did not receive notice of the claims against them until they were served with the Amended Complaint in May 2019, long after the 90-day period to serve the November 16, 2018 Original Complaint had expired. *See* Fed. R. Civ. P. 4(m). Plaintiffs have not alleged that the Underwriter Defendants were on prior notice of the Original Complaint, much less that Plaintiffs intended to assert Securities Act claims related to the Offering.

3. There Is No Identity of Interests Between Lichtman and Barnes or the Lead Plaintiff

When an amendment adds a new plaintiff, there must be "an identity of interests between the original and newly proposed plaintiff." *Syntex*, 95 F.3d at 935.

Lichtman, the new plaintiff who allegedly purchased Trust Preference Securities, has different interests from Barnes, the initial plaintiff behind the Original Complaint, and from the Lead Plaintiff, both of whom allegedly purchased only Edison common stock. Lichtman purchased different securities than did these other plaintiffs—at different times and purportedly in reliance on different filings. The other plaintiffs could not have asserted the same claims as Lichtman even if they had wanted to do so. As a result, Lichtman and the original Plaintiffs do not share an identity of interests. *See, e.g.*, *Thomas v. Magnachip Semiconductor Corp.*, 167 F. Supp. 3d 1029, 1054 (N.D. Cal. 2016) (finding "no identity of interests" between the earlier filed fraud plaintiffs and the later filed Securities Act plaintiffs who purchased different securities in purported reliance on different SEC filings); *In re DDi Corp. Sec. Litig.*, No. CV 03-7063 NM, 2005 WL 3090882, at *7-8 (C.D.

Cal. July 21, 2005) ("[T]here is a lack of an 'identity of interest' between the 'original plaintiffs'—i.e., those who purchased DDi common stock pursuant to or traceable to the Prospectus—and the 'newly proposed plaintiffs'—i.e., those who purchased Convertible Notes. In fact, these two groups purchased entirely different securities."); *see also Syntex*, 95 F.3d at 935 (no identity of interest among two different proposed classes of common stock purchasers, because they "bought stock at different values and after different disclosures and statements").

4. The Securities Act Claims Arise from a Different Transaction

The Securities Act claims do not relate back to the Original Complaint because they do not arise "out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). Under Rule 15, the two sets of claims must "'share a common core of operative facts' such that the plaintiff will rely on the same evidence to prove each claim." *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 (9th Cir. 2008); *see also Howard v. Hui*, No. C 92-3742-CRB, 2001 WL 1159780, at *6 (N.D. Cal. Sept. 24, 2001) ("Where a new plaintiff with a new claim is sought to be added, the adversary must have notice about the operational facts as well as 'fair notice that a legal claim existed in and was in effect being asserted by, the party belatedly brought in.'").

The Securities Act claims require proof regarding the Offering, proof that there were material misstatements in the Offering Documents and proof that the Underwriter Defendants served as underwriters for the Offering. 15 U.S.C. §§ 77k(a)(5), 77l(a)(2); *see In re Stac*, 89 F.3d at 1403-04 (9th Cir. 1996). The Original Complaint never mentioned the Offering, the Offering Documents or the

Underwriter Defendants, nor was evidence of these facts necessary to prove any of the Exchange Act claims asserted in the Original Complaint. Courts have consistently rejected attempts to add untimely Securities Act claims based on offering documents that were never identified in the original complaint. *See, e.g.*, *SEC v. Seaboard Corp.*, 677 F.2d 1301 (9th Cir. 1982) (affirming district court's determination that notice was lacking where new complaint "alleged for the first time the misrepresentations and omissions in the prospectus"); *In re Xchange Inc. Sec. Litig.*, No. CIV.A.00-10322-RWZ, 2002 WL 1969661, at *4 (D. Mass. Aug. 26, 2002) (concluding that Section 11 claims did not relate back to earlier fraud complaint that "made no reference" to the relevant offerings); *In re Commonwealth Oil/Tesoro Petroleum Corp. Sec. Litig.*, 467 F. Supp. 227, 259-60 (W.D. Tex. 1979) (concluding that Section 11 claims did not arise from same set of facts as original Exchange Act claims because the legal bases were different and the Section 11 claims were based on "misstatements in the Registration Statement and prospectus" that were not mentioned in original complaint).

* * *

Plaintiffs cannot satisfy any, much less all, of the requirements to establish that the Securities Act claims in the Amended Complaint "relate back" to the Exchange Act claims in the Original Complaint. Those different claims were asserted against other defendants, by a different plaintiff, with respect to different securities. Plaintiffs' Securities Act claims are untimely and should be dismissed with prejudice.

C. Plaintiffs Fail to Allege Any Misstatement or Omission in the Offering Documents

As explained in the Edison Defendants' motion to dismiss, the Amended Complaint fails to identify any material misstatement or omission in the Offering Documents. *See* Edison Br. at 8-15, 24-25. None of the six statements underlying Plaintiffs' Securities Act claims are actionable.

Plaintiffs allege that these statements were misleading because they did not disclose the Company's purported "reckless disregard of safety." As the Edison Defendants have explained, this allegation is not supported by any particularized alleged facts. *See id.* at 13-14. Plaintiffs' conclusory assertion of "recklessness" rests on several isolated incidents that occurred over the course of many years across SCE's 50,000 square-mile service territory, and Plaintiffs fail to show that they reflected systemic, company-wide "recklessness" or that the Company's statements about improving safety and mitigating risk were misleading. Further, Plaintiffs fail to plead any facts showing that any of the alleged failures cited in the Complaint was *concealed*. Each of the alleged incidents was a matter of public record by the time of the June 2017 Offering. *See Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162-63 (9th Cir. 2009) ("[I]t is pointless and costly to compel firms to reprint information already in the public domain." (quoting *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 517 (7th Cir. 1989)).

As noted above, and in the Edison Defendants' briefs, the Company repeatedly warned investors that its electrical equipment posed an inherent risk to public safety, including in particular a risk of wildfires; that the age of its equipment exacerbated that risk; and that there was a possibility that the Company might not

successfully manage that risk. *See supra* at 4-6. The Company had also disclosed that the CPUC had increased its enforcement of safety regulations and could impose material penalties on the Company for safety violations. Am. Compl. ¶ 265. Having disclosed these risks, the Company had no obligation to go further and accuse itself of a "reckless disregard of safety" that Plaintiffs have failed to support with any well-pled allegation of fact. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, 258 F. Supp. 3d 1037, 1043 (N.D. Cal. 2017) ("[T]he federal securities laws do not require a company to accuse itself of wrongdoing." (quoting *In re Citigroup, Inc. Sec. Litig.*, 330 F. Supp. 2d 367, 377 (S.D.N.Y. 2004)).

Plaintiffs' assertions that the statements incorporated into the Offering Documents were false or misleading fail for these additional reasons as well:

Investments in Safety: As explained in the Edison Defendants' memorandum, the Company's statements about its commitment to safety are non-actionable puffery. *See* Edison Br. at 9-10. Nor have Plaintiffs explained how these statements were misleading. *See* Am. Compl. ¶¶ 306-11. The Amended Complaint has no allegations suggesting that SCE's planned improvements would not increase safety. Plaintiffs point to previous safety violations, but those alleged *past* failures do not show that SCE's professed commitment to improving in the *future* were false. *See In re Plains All Am. Pipeline, L.P. Sec. Litig.*, 307 F. Supp. 3d 583, 626 (S.D. Tex. 2018) ("[G]eneral commitments to improving safety and legal compliance . . . . are not specific or objective factual representations, much less 'unambiguous representations' that every Plains pipeline was safely maintained or fully complied with all applicable laws."); *In re BP p.l.c. Sec. Litig.*, 843 F. Supp. 2d

712, 762 (S.D. Tex. 2012) ("Simply citing prior examples of safety failures does not render false or misleading generalized statements about BP's risk profile or the riskiness of its operations. Even a company operating in a risky industry can manage risk, and Plaintiffs have pointed to no facts undermining BP's assertions that it intended to do so."). These violations were all matters of public record.

CPUC Risk Assessment: Plaintiffs allege no facts contradicting the Company's statement that the CPUC was evaluating SCE's risk assessment programs. *See* Am. Compl. ¶¶ 312-13. Plaintiffs assert that the Company should have disclosed that the CPUC had criticized these programs. *Id.* But the CPUC's criticisms were a matter of public record long before the June 2017 Offering. *See id.* ¶ 193 n.54 (citing report on CPUC's website). The CPUC has publicly confirmed the Company's statement that the CPUC's review was ongoing. *See* Ex. 2-26.[4]

Aging Infrastructure: Plaintiffs concede that SCE disclosed the risk posed by its aging infrastructure, but argue that the Company did not disclose its alleged failures to mitigate that risk. *See* Am. Compl. ¶¶ 314-16, 328(a), 329. No specific pleaded facts show any such failures, and this argument overlooks the Company's warning—in the very same statement—that "SCE's financial condition and results of operations could be materially affected *if it is unable to successfully manage these risks*." *Id.* ¶ 314 (emphasis altered). SCE had previously disclosed that its

[4] *See Friedman v. AARP, Inc.*, 855 F.3d 1047, 1051 (9th Cir. 2017) (court may consider "a document not attached to a complaint . . . if the plaintiff refers extensively to [it] or [it] forms the basis of the plaintiff's claim" (quoting *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)).

pole replacement efforts were "*simply not enough*" and that it would not complete its replacement program until 2025 at the earliest. *Id.* ¶¶ 139, 157; *see supra* at 6.

Dangers of Transmitting Electricity: Plaintiffs argue that the Company did not disclose that SCE had already been penalized for earlier safety incidents. *See* Am. Compl. ¶¶ 317-18, 328(b), 330. Those incidents and the associated penalties were all matters of public record. They were entirely consistent with the Company's warning that such accidents could occur in the ordinary course of its business.

Increased Wildfire Liability: Plaintiffs acknowledge that the Offering Documents disclosed that SCE equipment could cause wildfires, but argue that SCE failed to state that its own "reckless disregard of safety" exacerbated this risk. As noted above, Plaintiffs have not alleged any concealed facts indicating any "reckless disregard of safety" by SCE. *See supra* at 15-16. And according to Plaintiffs, investors *knew* that SCE "had previously been held responsible for recklessly causing multiple fires." Am. Compl. ¶ 11; *see also id.* ¶¶ 91-99, 104-05, 367.

Anticipated Long Beach Penalties: Plaintiffs allege that the Company's statement that it expected to incur penalties in connection with the 2015 Long Beach blackout was misleading because it did not disclose that as many as 30,000 customers were affected by those outages and therefore "downplayed the scope of its safety violations." *See* Am. Compl. ¶¶ 321-22. But the brief description in the 2016 10-K could not have been materially misleading when the Company had provided the full details long before, including in its 2015 10-K and in two lengthy investigative reports disclosed in November 2015. *See* Am. Compl. ¶ 269; Ex. 14-825 ("On July 15, 2015, approximately 30,700 [SCE] customers in Long Beach lost

power after two electrical circuits shut down and fires started in three underground vaults.").

* * *

For all these reasons, and the reasons set forth more fully in the Edison Defendants' memorandum of points and authorities, Plaintiffs have failed to allege that any of these six statements in the Offering Documents were false or misleading.

D. The Amended Complaint Negates Any Inference of Loss Causation

As explained by the Edison Defendants, the Amended Complaint on its face demonstrates a lack of loss causation with respect to any of the alleged misstatements. Plaintiffs assert that the "undisclosed" truth emerged (i) when news broke about the Thomas Fire on December 4, 2017; (ii) when the Company confirmed on December 11 that it believed regulators were investigating SCE's equipment as a possible source of the Thomas Fire; and (iii) when the CPUC announced on the weekend prior to November 12, 2018 that it was investigating SCE's possible role in causing the Woolsey Fire. None of these events revealed anything about the Company's allegedly concealed "reckless disregard" for safety. *See* Edison Br. at 19-23.

In fact, according to Plaintiffs, the Company's public track record "informed [the market's] reaction to the Thomas Fire," *id.* ¶¶ 410-11, and investors' purported understanding that "Edison, which had previously been held responsible for recklessly causing multiple fires, had also caused the Thomas Fire," *id.* ¶ 11. The Amended Complaint thus negates any inference that Plaintiffs' losses resulted from concealed facts allegedly revealed by the Thomas and Woolsey Fires.

E. Plaintiffs Fail to Plead Standing Under Section 12(a)(2)

Plaintiffs' claims under Section 12(a)(2) of the Securities Act also fail for lack of standing, because Plaintiffs have not pled that they purchased the Trust Preference Securities in the Offering from any of the Underwriter Defendants. "In order to have standing under § 12(a)(2) . . . plaintiffs must have purchased securities directly from the defendants." *Freidus v. Barclays Bank PLC*, 734 F.3d 132, 141 (2d Cir. 2013); *see also Yates v. Mun. Mortg. & Equity LLC*, 744 F.3d 874, 899-900 (4th Cir. 2014) ("[P]laintiffs should plead that they directly purchased securities in the relevant offering, and . . . a failure to do so implies that the securities were in fact purchased on the secondary market."). Plaintiff Lichtman alleges that he "purchased 12,000 shares of Edison Trust Preference Securities at $25 per share on June 19, 2017," but does not allege that he purchased those shares from any of the Underwriter Defendants. Am. Compl. ¶¶ 33, 441-42; Dkt. No. 48, Ex. A. Thus, Lichtman has not alleged that he purchased shares in the Offering—as opposed to the secondary market—as required for Section 12(a)(2) standing. *See In re China Intelligent Lighting & Elecs., Inc. Sec. Litig.*, No. 11-2768 PSG (SSx), 2012 WL 12893520, at *5 (C.D. Cal. Feb. 16, 2012) ("[T]he fact that [plaintiffs] purchased shares at the same price as the price at which shares were offering during the IPO does not prove the shares were purchased during the IPO."); *see also Yates*, 744 F.3d at 899 (allegations about sales date and purchase price that are "consistent with the possibility that [plaintiff] purchased his shares directly in the [offering] . . . are

not sufficient" (citing *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013)).[5]

CONCLUSION

For all these reasons, and for the reasons set forth in the Edison Defendants' Motion to Dismiss, the Underwriter Defendants respectfully request that the Court dismiss the Securities Act claims asserted against them with prejudice.

[5] Courts in this jurisdiction have rarely had occasion to consider this question, but have acknowledged that complaints fail to allege Section 12 standing if they do not plead participation in an offering—facts that are well within plaintiffs' personal knowledge. *See In re CytRx Corp. Sec. Litig.*, No. CV 14-1956-GHK (PJWx), 2015 WL 5031232, at *14 (C.D. Cal. July 13, 2015) ("[W]ishy-washy-allegations are insufficient to demonstrate that Plaintiffs have Section 12 standing—either the [plaintiffs] purchased shares directly from one of the Section 12 Defendants in the . . . Offering or they did not."). Although the Ninth Circuit has not yet addressed this specific question, it has endorsed a similar approach with respect to Section 11 claims. *See In re Century Aluminum*, 729 F.3d at 1108 (9th Cir. 2013) ("When faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are 'merely consistent with' their favored explanation but are also consistent with the alternative explanation."). *But see Flynn v. Sientra, Inc.*, No. CV 15-07548 SJO (RAOx), 2016 WL 3360676, at *18 (C.D. Cal. June 9, 2016) (inferring participation in the offering based on the circumstances of plaintiffs' stock purchase).

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Respectfully submitted,

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