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 FIDELITY INVESTMENTS CHARITABLE  
 14 GIFT FUND

15 **UNITED STATES DISTRICT COURT**  
 16 **NORTHERN DISTRICT OF CALIFORNIA**  
 17 **SAN FRANCISCO DIVISION**

19 EMILY FAIRBAIRN and  
 20 MALCOLM FAIRBAIRN,

21 Plaintiffs,

22 v.

23 FIDELITY INVESTMENTS  
 24 CHARITABLE GIFT FUND,

25 Defendant.

Case No. 3:18-cv-04881-JSC

**DEFENDANT FIDELITY INVESTMENTS  
 CHARITABLE GIFT FUND’S TRIAL BRIEF**

TRIAL DATE: October 19, 2020  
 COURTROOM: F  
 JUDGE: Hon. Jacqueline Scott Corley

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1 Pursuant to the Court’s Pretrial Order (ECF No. 184), Defendant Fidelity Investments  
2 Charitable Gift Fund (“Fidelity Charitable”) submits this brief regarding the controlling issues of  
3 law relevant to the upcoming trial in this matter. As discussed herein, Plaintiffs’ claims—all of  
4 which rest on the Fairbairns’ uncorroborated allegations that Justin Kunz made four promises  
5 preceding their donation of Energous stock to Fidelity Charitable—will fail as a matter of law.

6 **I. FACTUAL BACKGROUND**

7 In mid-December 2017, Emily and Malcolm Fairbairn (“Plaintiffs”) raised the idea of  
8 making an end-of-the-year donation to a Fidelity Charitable donor-advised fund (“DAF”) with  
9 Justin Kunz, their relationship manager at Fidelity Family Office Services, which serves high net  
10 worth individuals. Although he is not an employee of, or otherwise affiliated with Fidelity  
11 Charitable, Mr. Kunz had assisted other clients through the process of donating to Fidelity  
12 Charitable and was familiar with the rules surrounding donations to DAFs (as were Plaintiffs).

13 On December 20, 2017, Plaintiffs received word from the CEO of Energous Corp.  
14 (“Energous” or “WATT”), a company in which they had accumulated millions of shares of stock,  
15 that Energous’ technology had received FCC approval. At that point, Plaintiffs decided that part  
16 of their end-of-year donation to Fidelity Charitable would consist of Energous stock. By donating  
17 their Energous stock—which Plaintiffs expected to increase in value when the FCC approval was  
18 announced to the public—Plaintiffs could both take a large tax deduction based on the value of the  
19 donated stock and also avoiding paying capital gains taxes on the appreciated stock.

20 On the evening of December 26, 2017, after the market closed, the FCC’s approval of  
21 Energous’ technology was announced publicly. Energous’ stock price spiked in after-hours  
22 trading (and in the days that followed). That evening, Ms. Fairbairn called Fidelity Family Office  
23 Services about beginning the process that would enable a donation of Energous stock—a process  
24 that took several days to unfold in large part because the Fairbairns had loaned their Energous  
25 shares to short-sellers in exchange for a share of the interest those short-sellers paid to borrow the  
26 shares.

27 On December 28, 2017, Plaintiffs made their donation to Fidelity Charitable and Mr.  
28 Fairbairn signed a Contribution Form and Letter of Instruction. As part of that form, Mr. Fairbairn

1 acknowledged that he had read Fidelity Charitable’s Program Circular, and agreed to its terms.  
2 Ex. A, Contribution Form and Letter of Instruction, at FID-FRBN0002809.<sup>1</sup> The Program Circular  
3 laid out Fidelity Charitable’s policies with respect to donations of public stock, including that all  
4 donations to Fidelity Charitable are “irrevocable” and “owned and controlled by the Trustees,”  
5 who maintain “exclusive legal control over all contributed assets.” Ex. B, Fidelity Charitable’s  
6 2017 Program Circular, at FID-FRBN-0039498. It further provides that “Fidelity Charitable will  
7 generally *sell the securities at the earliest date possible*” and that it “processes contributions  
8 throughout the day and *will liquidate contributions as quickly as possible.*” *Id.* at FID-FRBN-  
9 0039499-500 (emphases added).

10 The Fairbairns ultimately donated 1.9 million shares of Energous stock to Fidelity  
11 Charitable. Consistent with the policy set forth above, Fidelity Charitable liquidated the donated  
12 stock as quickly as possible—on December 29, 2017—by working with Fidelity Capital Markets  
13 to sell the donated shares. The large number of total Energous shares traded in the market that day  
14 (over 28 million) allowed Fidelity Charitable to sell the 1.9 million shares of donated stock while  
15 adhering to its general practice of trading less than 10% of daily volume. In fact, the shares donated  
16 by the Fairbairns and sold by Fidelity Charitable constituted less than 6.8% of Energous’ daily  
17 trading volume for December 29. The cash received in exchange for the stock—over \$44  
18 million—was transferred into the Fidelity Charitable DAF, and the Fairbairns took a \$52 million  
19 deduction on their 2017 federal tax returns as a result of the donation.

20 Plaintiffs now allege that over the course of conversations on December 27 and 28, 2017,  
21 Mr. Kunz made certain promises to them about how the Energous shares would be traded after the  
22 donation that induced them to donate the shares. Specifically, Plaintiffs allege that Mr. Kunz  
23 promised on behalf of Fidelity Charitable that: “(1) it would employ sophisticated, state-of-the-art  
24 methods for liquidating large blocks of stock, (2) it would not trade more than 10% of the daily  
25 trading volume of Energous shares, (3) it would allow the Fairbairns to advise on a price limit (i.e.,  
26 a point below which Fidelity would not sell shares without first consulting the Fairbairns), and (4)

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27  
28 <sup>1</sup> All exhibits cited in this Trial Brief are attached to the Declaration of David Marcus,  
which is filed herewith.

1 it would not liquidate *any* shares until the new year.” ECF No. 1, Complaint, ¶ 65.

2 Mr. Kunz categorically denies making *any* promises to the Fairbairns regarding their  
3 donation of Energous stock, and the only evidence to the contrary is Plaintiffs’ own self-serving  
4 testimony; no independent witnesses or contemporaneous documents corroborate Plaintiffs’ claim.  
5 And in fact, Plaintiffs’ own recollections and testimony do not support their allegations. With  
6 respect to the promise regarding sophisticated, state-of-the-art methods for liquidating large blocks  
7 of stock, both Mr. and Ms. Fairbairn admit to being unable to recall precisely what the alleged  
8 promise was—testifying at various times that Mr. Kunz assured them Fidelity Charitable would  
9 be “gentle,” “very gentle,” “careful,” “very careful,” “knowledgeable [and] expert,” and/or “use  
10 best-proven practices” when liquidating the donated stock. *See* Ex. C, E. Fairbairn Tr. 12:5-11,  
11 42:13-21, 148:25 – 149:4, 157:25 – 158:3 (“It was a very long time ago, so I can’t tell you for sure  
12 what his precise words were.”); Ex. D, M. Fairbairn Tr. 12:5 –14:4, 47:10 – 48:2, 48:4 – 49:2 (“I  
13 know the meaning of the words, but not the exact words that he would have used.”).

14 With respect to the promise regarding a “price limit,” Plaintiffs similarly cannot  
15 demonstrate even through their own testimony that such a promise was made. Ms. Fairbairn does  
16 not recall any such promise (Ex. C, E. Fairbairn Tr. 176:8-15, 176:20-22); and Mr. Fairbairn—the  
17 only person to claim the promise was even made—cannot remember the terms of the alleged  
18 representation. *See* Ex. D, M. Fairbairn Tr. 92:16-24 (admitting he does not recall if representation  
19 was that he could advise as to “price” or “price limit,” but testifying he believed he would be “kept  
20 in the loop”).

21 Further, Plaintiffs themselves did not even accuse Mr. Kunz of making or breaking any  
22 promises until they filed their Complaint in this case in August of 2018. Instead, they continued  
23 to work with both Mr. Kunz and Fidelity Charitable in the months after their donation and  
24 repeatedly praised his integrity and work ethic. *See, e.g.*, Ex. E, FID-FRBN-0004918 (email from  
25 Ms. Fairbairn to Justin Kunz on January 23, 2018 praising his “integrity and efforts”).

26 The evidence at trial will also show that Plaintiffs did not rely on any alleged promises in  
27 making their donation to Fidelity Charitable. To the contrary, the evidence will show that by mid-  
28 December Plaintiffs were committed to making a substantial donation by year’s end to offset their

1 tax liability and talked *exclusively* to Fidelity Charitable about doing so. Despite also having an  
2 account at JP Morgan Charitable Giving Fund, at no point did the Fairbairns contact their JP  
3 Morgan account manager, or any other charity, regarding a possible donation in December 2017.

4 **II. FIDELITY CHARITABLE DID NOT MAKE ANY INTENTIONAL**  
5 **MISREPRESENTATIONS.**

6 Plaintiffs' claim for intentional misrepresentation rests on the four promises allegedly made  
7 by Mr. Kunz to the Fairbairns in December of 2017. But with respect to each of the four, the  
8 Fairbairns fall short of proving even that the promises were ever made—let alone the remaining  
9 elements required to prevail on such a claim.

10 *First*, the Fairbairns allege that Fidelity Charitable “would employ sophisticated, state-of-  
11 the-art methods for liquidating large blocks of stock.” Compl. ¶ 65. While Mr. Kunz denies  
12 making this or any other promise to the Fairbairns regarding their donation, as discussed above the  
13 Fairbairns themselves cannot even provide testimony to support this allegation. *See supra* p. 3.  
14 Plaintiffs' vague recollections are insufficient to establish that a representation was made. *See*  
15 *Conrad v. Bank of America*, 45 Cal. App. 4th 133, 156 (1996) (finding no “misrepresentation”  
16 where “[t]he alleged promise was oral and, other than [plaintiff], there were no witnesses and no  
17 documentary evidence to establish such a promise,” and plaintiff’s “testimony with respect to the  
18 promise was vague”). And without knowing *which* variation of the promise was allegedly made,  
19 it is impossible to evaluate the veracity of the representation. Even assuming the representation  
20 was made as alleged in Plaintiffs' Complaint (it was not), Fidelity Charitable did in fact use  
21 sophisticated, state-of-the art methods for liquidating large blocks of stock, including advanced  
22 trading algorithms. Thus, unable to show that the representation was made, or that it was false,  
23 Plaintiffs' claim for intentional misrepresentation as to the first promise fails as a matter of law.

24 *Second*, the Fairbairns allege that Mr. Kunz promised that Fidelity Charitable would “not  
25 trade more than 10% of the daily trading volume of Energous shares.” Compl. ¶ 65. But as Mr.  
26 Kunz has testified, and as reflected in contemporaneous documents, Mr. Kunz told Ms. Fairbairn  
27 that Fidelity Charitable *typically* trades less than 10% of the daily volume of any one stock; he did  
28 not make any promises regarding the sale of the donated Energous stock, and he made clear that

1 the donation was irrevocable and Fidelity Charitable was free to liquidate as it saw fit.<sup>2</sup> Ex. F,  
 2 Kunz Tr. 251:17-21. And while Mr. Kunz did not guarantee that Fidelity Charitable would stay  
 3 under that general target when trading the WATT shares, even if he had, the Fairbairns claims still  
 4 fails because it is undisputed that Fidelity Charitable *did* sell less than 10% of the daily trading  
 5 volume of WATT on December 29, 2017. There were 28,413,632 shares of WATT stock traded  
 6 on December 29, 2017, and Fidelity Charitable traded 1,931,985 of them. *See* Ex. G, WATT  
 7 Historical Price Chart; Ex. H, Domowitz Expert Rep. ¶ 6. Accordingly, Fidelity Charitable traded  
 8 less than 7% of the daily volume—far less than 10%. Plaintiffs’ expert reaches a different  
 9 conclusion only by calculating Fidelity Charitable’s share of the volume for *a portion* of the day.  
 10 But “daily trading volume,” as the term suggests, and as Ms. Fairbairn admitted under oath, means  
 11 the volume traded *in a day*. Ex. C, E. Fairbairn Tr. 174:15-23. Accordingly, the Fairbairns’  
 12 allegation regarding the second promise fails before even reaching questions regarding Mr. Kunz’s  
 13 state of mind, the Fairbairns’ reliance, or any harm supposedly suffered.

14 *Third*, the Fairbairns allege that Mr. Kunz promised that Fidelity Charitable “would allow  
 15 the Fairbairns to advise on a price limit (i.e., a point below which Fidelity would not sell shares  
 16 without first consulting the Fairbairns).” Compl. ¶ 65. Here, too, Plaintiffs cannot prove any such  
 17 promise was made. Mr. Kunz categorically denies it (Ex. F, Kunz Tr. 306:7-10, 12); Ms. Fairbairn  
 18 does not recall any such promise (Ex. C, E. Fairbairn Tr. 176:8-15, 176:20-22); and Mr.  
 19 Fairbairn—the only person to claim the promise was even made—cannot remember the terms of  
 20 the alleged representation.<sup>3</sup> *See* Ex. D, M. Fairbairn Tr. 92:16-24. Further, the Fairbairns could  
 21 not have reasonably relied on any such promise. Ms. Fairbairn was unaware of this alleged

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22  
 23 <sup>2</sup> In the Joint Pretrial Order, the Fairbairns have changed course and now allege that Mr.  
 24 Kunz only promised that Fidelity Charitable would trade 10% of volume, not daily volume.  
 25 While Plaintiffs should not be allowed to amend their claims at this late stage, Mr. Kunz did not  
 make the promise originally pled or the promise now alleged; Plaintiffs’ inconsistency regarding  
 the alleged promise is further corroboration that their account of this—and the other promises—  
 is not reliable.

26 <sup>3</sup> As with their second promise, Plaintiffs have also changed the terms of this alleged  
 27 misrepresentation in the Joint Pretrial Statement; Plaintiffs now allege that the promise was to  
 28 “keep Mr. Fairbairn in the loop.” While Mr. Kunz similarly denies making this promise,  
 Plaintiffs should not be permitted to substitute claims at this late stage simply because they do  
 not have evidence to support the claims they did plead. The fact that it took over 2 years of  
 litigation for Plaintiffs to decide what promises were allegedly made to them is telling.

1 promise and therefore was incapable of relying on it. And any reliance by Mr. Fairbairn is *per se*  
2 *unreasonable* in view of his admissions that he understood by making the donation he was ceding  
3 control over the stock to Fidelity Charitable. Ex. D, M. Fairbairn Tr. 18:1-14 (stating that he  
4 understood the donation was irrevocable, meaning “that it cannot be changed after it’s made”);  
5 21:11 – 22:4 (“It is my understanding that the position is owned by Fidelity. They have technical  
6 control.”). Put simply, it would not have been reasonable for Mr. Fairbairn to rely on a  
7 representation that would have given him back rights with respect to the donated stock that he  
8 understood he was ceding in order to get the tax benefit of the donation.

9 In any event, even assuming the Fairbairns could overcome these other deficiencies, there  
10 is no evidence from which the Court can conclude that this alleged representation was a substantial  
11 factor in causing any harm to the Fairbairns. Mr. Fairbairn admits that the alleged  
12 misrepresentation did not obligate Fidelity Charitable to *take* any advice he may have offered. *See*  
13 Ex. D, M. Fairbairn Tr. 19:15-18. It is thus entirely speculative to assume that any advice—even  
14 if sought—would have affected the liquidation of Energous stock. To conclude as much requires  
15 assumptions as to what advice, if any, Mr. Fairbairn would have given, whether Fidelity Charitable  
16 would have followed that advice, and what the outcome of the liquidation would have been if it  
17 had. Such speculation cannot form the basis for a finding of intentional misrepresentation. *Kauai*  
18 *Scuba Ctr., Inc. v. PADI Americas, Inc.*, 2011 WL 13225132, at \*2 (C.D. Cal. Mar. 15, 2011)  
19 (dismissing intentional misrepresentation claim because the allegations did not “rise beyond the  
20 level of pure speculation”); *Am. Student Fin. Grp., Inc. v. Aequitas Capital Mgmt., Inc.*, 2015 WL  
21 11237638, at \*6 (S.D. Cal. Feb. 12, 2015) (granting summary judgment on fraud claim based on  
22 intentional misrepresentations where “plaintiffs’ theory is too speculative to support the damages  
23 element of a fraud claim”).

24 **Fourth**, the Fairbairns allege that Mr. Kunz represented that Fidelity Charitable “would  
25 not liquidate any shares until the new year.” Compl. ¶ 65. This alleged representation—that the  
26 Fairbairns could control the timing of the liquidation after the stock was donated—is at odds with  
27 a large body of evidence in the case. As with the other promises, Mr. Kunz denies making this  
28 promise and there is no contemporaneous writing that supports the Fairbairns’ claim; to the



1 contrary, the relevant documentary evidence that does exist contradicts the Fairbairns' story. Most  
2 importantly, Fidelity Charitable's Program Circular provides that all donations to Fidelity  
3 Charitable are "irrevocable" and "owned and controlled by the Trustees," who maintain "exclusive  
4 legal control over all contributed assets." Ex. B, Fidelity Charitable's 2017 Program Circular, at  
5 FID-FRBN-0039498. It further provides that "Fidelity Charitable will generally *sell the securities*  
6 *at the earliest date possible*" and "*liquidate contributions as quickly as possible.*" *Id.* at FID-  
7 FRBN-0039499-500 (emphases added). Mr. Fairbairn acknowledged that he had read this  
8 Program Circular, and agreed to its terms when he signed a Contribution Form and Letter of  
9 Instruction. Ex. A, Contribution Form and Letter of Instruction, at FID-FRBN0002809. The  
10 United States Tax Court has recently recognized both that: (1) donors of public stock to Fidelity  
11 Charitable transfer all rights to the shares; and (2) Fidelity Charitable has an internal policy of  
12 selling donated stock for cash "shortly after each donation." *Dickinson v. Comm'r of Internal*  
13 *Revenue*, T.C.M. (RIA) 2020-128 (T.C. 2020).

14 The Fairbairns' allegations that they retained the ability to impose upon Fidelity Charitable  
15 a "price limit," and that Fidelity Charitable would refrain from selling the shares until 2018, are  
16 flatly inconsistent with the policies set forth in the Circular. It is not reasonable to rely on a promise  
17 the alleged promisee knows to be inconsistent with the law, nor is it reasonable to rely on an oral  
18 representation that is directly contradicted by a written agreement. *See, e.g., Cameron v. Cameron*,  
19 88 Cal. App. 2d 585, 594, 199 P.2d 443 (1948) ("If [one] becomes aware of facts that tend to  
20 arouse his suspicion, or if he has reason to believe that any representations made to him are false  
21 or only half true, it is his legal duty to complete his investigation and he has no right to rely on  
22 statements of the other contracting party."); *Roberts v. UBS AG*, 2013 WL 1499341, at \*10 (E.D.  
23 Cal. Apr. 11, 2013) (finding that plaintiffs could not have justifiably relied on representations that  
24 contradicted the IRS's tax disclosure requirements); *Shapiro v. Wells Fargo Realty Advisors*, 152  
25 Cal. App. 3d 467, 482 (Ct. App. 1984) ("[Plaintiff] could not have reasonably relied on any implied  
26 promise by Wells Fargo which contradicted the express provisions of the written Stock Option  
27 Agreement which he signed.") (disapproved of on other grounds).

28 Consistent with Mr. Kunz's recollection and the documentary record, the Fairbairns

1 themselves admitted that they understood how DAFs operate and that in order to claim the tax  
2 benefits they were seeking, they had to relinquish control over the donated Energous stock. Ex.  
3 D, M. Fairbairn Tr. 18:1-14 (stating that he understood the donation was irrevocable, meaning  
4 “that it cannot be changed after it’s made”); 21:11 – 22:4 (“It is my understanding that the position  
5 is owned by Fidelity. They have technical control.”). This inconsistency undermines both the  
6 Fairbairns’ claim that the representation was ever made, and any argument that they reasonably  
7 relied on it. Accordingly, Plaintiffs’ fail to satisfy the requirements of an intentional  
8 misrepresentation claim.

9 **III. THE FAIRBAIRNS’ CONTRACT CLAIM IS BASELESS.**

10 Plaintiffs’ claim for breach of contract improperly seeks to convert the four purported  
11 representations (that Mr. Kunz denies making) into a contract. *Compare* Compl. ¶ 91 (alleging four  
12 promises as basis for misrepresentation claim), *with id.* ¶ 102 (alleging same promises provide basis  
13 for contract claim). But for the same reasons the alleged misrepresentations are not actionable in  
14 the first place (*see supra* § II), they cannot provide the basis for a breach of contract claim. Indeed,  
15 Plaintiffs’ account of the purported misrepresentations provides no bases on which to conclude that  
16 Fidelity Charitable even entered into a contract with Plaintiffs relating to the sale of the WATT  
17 shares.

18 To prevail on any claim for breach of contract, a party must first prove that the parties  
19 entered into a contract. Plaintiffs cannot make that showing with respect to any of the alleged  
20 representations. Their testimony of a series of oral promises is unsupported by any independent  
21 witnesses or contemporaneous documentary evidence (despite the Fairbairns’ history of seeking  
22 written confirmation of important agreements) and is flatly contradicted by Mr. Kunz’s denial that  
23 he made any of the promises. On these facts, it is clear there was no meeting of the minds as the  
24 law requires. *See, e.g., Simar Shipping Ltd. v. Global Fishing, Inc.*, 540 Fed. App’x 565, 567 (9th  
25 Cir. 2013) (“[T]he legal principle that a valid contract requires a meeting of the minds on essential  
26 terms [is] a proposition finding ample support . . . at common law.”) (citation and punctuation  
27 omitted).

28 Further, with respect to the first alleged promise—that Fidelity Charitable would use

1 “sophisticated methods” in liquidating the shares—no factfinder could find that “the contract terms  
2 were clear enough that the parties could understand what each was required to do,” as the law  
3 requires. CACI No. 302. Rather, this promise is insufficiently definite as shown by Plaintiffs’ own  
4 shifting testimony about its terms. Indeed, California law is settled that a contract’s terms must be  
5 sufficiently precise “that the performance promised is reasonably certain”—that is, the terms of the  
6 contract must “provide a basis for determining the existence of a breach and for giving an  
7 appropriate remedy.” *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 811 (1998). “If, by  
8 contrast, a supposed ‘contract’ does not provide a basis for determining what obligations the parties  
9 have agreed to, and hence does not make possible a determination of whether those agreed  
10 obligations have been breached, there is no contract.” *Id.*; see also *Halvorsen v. Aramark Uniform*  
11 *Services, Inc.*, 65 Cal. App. 4th 1383, 1389 (1998) (“An alleged oral contract with vague and  
12 uncertain terms is not binding.”); *Barajas v. Carriage Servs., Inc.*, 2019 WL 6699737, at \*6 (N.D.  
13 Cal. Dec. 9, 2019) (“in order to support [the] position that a binding oral contract was ... created,  
14 ... it must appear from the evidence that the essential terms of the contract were sufficiently  
15 definite[.]”) (quoting *Jaffe v. Albertson Co.*, 243 Cal. App. 2d 592, 600 (1966) (internal quotation  
16 marks omitted)).<sup>4</sup>

17       Moreover, even if Plaintiffs could establish that a contract was formed (they cannot), they  
18 would still be unable to satisfy the remaining elements necessary to support their claim. With  
19 respect to the first alleged promise, because Fidelity Charitable *did* use sophisticated methods in  
20 liquidating the WATT stock, there is no evidence that—had such a contract been formed—Fidelity  
21 Charitable failed to uphold its end of the bargain.

22       Likewise, with respect to the second alleged promise—that Fidelity Charitable would not  
23 sell “more than 10% of the daily trading volume” of WATT stock—basic arithmetic shows that  
24 Fidelity Charitable represented less than 7% of the daily volume of WATT stock sold on December

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25  
26 <sup>4</sup> Fidelity Charitable recognizes that the Court rejected this argument at summary  
27 judgment after “drawing all inferences in the Fairbairns’ favor.” ECF No. 171 at 6. The  
28 Fairbairns are not entitled to any inferences at trial, and instead will bear the burden of proof.  
Fidelity Charitable anticipates that after the close of Plaintiffs’ case-in-chief, the Court will not  
be able to conclude that the promise more likely than not was made, let alone that it was  
“sufficiently definite” as a matter of law.

1 29, 2017. This is dispositive of Plaintiffs’ claim for breach of contract with respect to the second  
2 promise.

3 A breach of contract claim premised on the third alleged promise—that Fidelity Charitable  
4 “would allow the Fairbairns to advise on a price limit”—likewise fails. Even assuming there was  
5 evidence that a contract had been formed and breached, the speculative nature of any harm flowing  
6 from the alleged breach of that promise defeats any claim for breach of contract. *See Ladas v.*  
7 *California State Auto. Ass’n*, 19 Cal. App. 4th 761, 770 (1993) (“To be enforceable, a promise must  
8 be definite enough that a court can determine the scope of the duty and the limits of performance  
9 must be sufficiently defined to provide a rational basis for the assessment of damages.”). An  
10 “amorphous promise” that obligates the promisor to “consider” something “cannot rise to the level  
11 of a contractual duty” when the contract does not establish what that consideration must entail. *Id.*  
12 at 771.<sup>5</sup>

13 Finally, the fourth alleged promise—that Fidelity Charitable “would not liquidate any  
14 shares until the new year” (Compl. ¶ 65)—also fails as a breach of contract claim. As discussed  
15 above, not only does Mr. Kunz deny making the promise, but such a promise is inconsistent with  
16 the Fairbairns’ understanding that (1) they were relinquishing control over the stock by virtue of  
17 the donation; and (2) it was Fidelity Charitable’s policy to “generally sell the securities *at the*  
18 *earliest date possible.*” Ex. B, FID-FRBN-0039500 (emphasis added); *see supra* p. 6-7. There  
19 could not have been a meeting of the minds on this point given that the Fairbairns understood that  
20 it was Fidelity Charitable’s right and intent to liquidate as soon as possible, and that it was Fidelity  
21 Charitable’s written policy to do so.

22 **IV. FIDELITY CHARITABLE WAS NOT NEGLIGENT IN ITS LIQUIDATION OF**  
23 **THE ENERGOUS STOCK.**

24 The evidence at trial will show that Fidelity Charitable was not negligent in its sale of the  
25

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26 <sup>5</sup> Fidelity Charitable recognizes that the Court rejected this argument at summary judgment  
27 on the basis of “a genuine dispute as to whether Fidelity Charitable would have followed the  
28 Fairbairns’ advice had it been sought.” ECF No. 171 at 6. Fidelity Charitable expects that after the  
close of Plaintiffs’ case-in-chief, the Court will be able to resolve this legal question decisively in  
favor of Fidelity Charitable.

1 donated Energous stock. As a preliminary matter, Plaintiffs' negligence claim rises and falls with  
2 its claims for intentional misrepresentation and breach of contract. If no misrepresentations were  
3 made and no contract was formed, there can be no negligence. That is because Fidelity Charitable  
4 owed no general duty *to the Fairbairns* regarding the liquidation of the donated stock. *See, e.g.,*  
5 *Toomer v. United States*, 615 F.3d 1233, 1237 (9th Cir. 2010) ("Where there is no duty, there can  
6 be no negligence."). At the time of the trading, the WATT shares had been irrevocably donated  
7 and were owned solely by Fidelity Charitable. Fidelity Charitable therefore did not owe any general  
8 duty to the Fairbairns with respect to the manner of liquidation of those shares.

9 To the extent Fidelity Charitable assumed any duty to the Fairbairns regarding the donation  
10 of the Energous stock, that duty was set forth in the written agreement between the parties as  
11 memorialized in the Program Circular, which Fidelity Charitable provided to the Fairbairns, and  
12 the Fairbairns acknowledged they understood and agreed to be bound by its terms. For instance, in  
13 the Program Circular, Fidelity Charitable agreed to provide certain tax forms and confirmations  
14 after the donation, agreed that the net proceeds from the sale of donated securities would be  
15 allocated to the donor's giving account, and provided information regarding where and how  
16 liquidated assets could be invested in pre-approved pools. However, the Program Circular notably  
17 did not establish a duty with respect to how or over what period of time Fidelity Charitable would  
18 sell the Energous shares, as the Circular made clear that Fidelity Charitable reserved the right to  
19 sell the shares "at any time" and stated that the information provided regarding the liquidation of  
20 securities "should serve as general guidelines." Even so, Fidelity Charitable complied with its  
21 policy with respect to how it typically sells donated assets, as represented to the Fairbairns (and to  
22 the rest of the world), and sold the Energous stock "as quickly as possible" (although it was under  
23 no legal obligation to do so). *See Ex. B, 2017 Fidelity Charitable Program Circular, at FID-FRBN-*  
24 *0039499.*

25 Because no duty was imposed on Fidelity Charitable by law, no special relationship existed  
26 between Plaintiffs and Fidelity Charitable, and the Program Circular did not impose a duty with  
27 respect to the details of the liquidation, the only way Fidelity Charitable could have owed a duty to  
28 the Plaintiffs would be if it had assumed one through specific representations made by Mr. Kunz.

1 *See Doe v. United States Youth Soccer Assn., Inc.*, 8 Cal. App. 5th 1118, 1128 (2017) (stating that  
2 a duty “may be imposed by law, be assumed by the defendant, or exist by virtue of a special  
3 relationship”); *see also* ECF No. 39 at 13-14 (providing the Court’s ruling on Fidelity Charitable’s  
4 Motion to Dismiss that Plaintiffs’ allegations of specific representations regarding the liquidation  
5 of the shares are “sufficient to plausibly allege a duty of care under California law”). But as  
6 discussed above (*see supra* §§ II and III), the evidence will show that Mr. Kunz did not make the  
7 alleged representations, that no contract was formed, and that therefore no duty existed as a result  
8 of the alleged promises. Therefore, Fidelity Charitable’s duty was simply to follow the terms of  
9 the agreement set forth in the Program Circular (such as allocating the proceeds of the sale of  
10 Energous shares to Plaintiffs’ giving account), which it did. Fidelity Charitable owed no further  
11 duty to Plaintiffs regarding the details of the liquidation and therefore was not negligent in its selling  
12 of the Energous shares.

13 Plaintiffs’ negligence claim relies on the theory that Fidelity Charitable owed them a duty  
14 of care as a “professional.” But Fidelity Charitable’s duty as it relates to the liquidation of the  
15 donated Energous stock (which was owned by Fidelity Charitable) was not a duty *to the Fairbairns*.  
16 And in any event, Fidelity Charitable satisfied any applicable standard of care by not only following  
17 its own liquidation policy, but by acting consistently with the liquidation policies typical of other  
18 DAFs. A professional can only be found negligent if it “fails to use the skill and care that a  
19 reasonably careful” person or entity in the same profession “would have used in similar  
20 circumstances.” *See* CACI No. 600. And compliance with both internal organizational policies  
21 and practices within the applicable industry is relevant evidence that the organization complied with  
22 the standard of care. *See Bullis v. Security Pac. Nat. Bank*, 21 Cal.3d 801, 809 (1978) (trial court  
23 properly considered defendant’s procedures, as stated in its operations manual, and the customs and  
24 practices of the banking industry in evaluating whether bank’s actions complied with appropriate  
25 standard of care). The evidence will prove conclusively that Fidelity Charitable used the same skill  
26 and care used by other sponsoring organizations of DAFs, and sold the stock in precisely the manner  
27 it tells donors it will in the Program Circular. Therefore, it did not act negligently.

28 Fidelity Charitable’s expert on DAFs, Ben Pierce, will testify that nearly all of the largest

1 DAFs in the United States have a policy of selling donated stock as quickly as possible. *See* Ex.  
2 I, Pierce Expert Rpt., Section V.A. And for good reason: the policy to sell as quickly as possible  
3 sensibly minimizes risk to the charity. *See* Ex. J, McLean Tr. 63:4-25 (“We don’t speculate on  
4 whether or not a price is going to go up or down. We simply sell the stock to eliminate the market  
5 risk and market exposure.”); Ex. K, Podvojsky Tr. 268:15 – 269:3 (“We are not taking an  
6 investment lens on an individual security or speculating on whether or not that security is going to  
7 go up or is going to go down.”). Therefore, by selling the WATT shares on December 29, 2017,  
8 Fidelity Charitable acted with the same skill and care as other DAFs would have.

9 Finally, Fidelity Charitable’s trading experts will testify that there is no evidence that  
10 Fidelity Charitable’s trading of Energous stock had a negative effect on its stock price. Therefore,  
11 even to the extent Fidelity Charitable had some duty to not affect Energous’ stock price, Plaintiffs  
12 will be unable to show that the charity violated any standard of care or that any alleged breach  
13 caused any harm to the Fairbairns.

14 **V. THE FAIRBAIRNS CANNOT ESTABLISH A CLAIM FOR PROMISSORY**  
15 **ESTOPPEL.**

16 In California, promissory estoppel is defined by the following elements: “A promise which  
17 the promisor should reasonably expect to induce action or forbearance of a definite and substantial  
18 character on the part of the promisee and which does induce such action or forbearance is binding  
19 if injustice can be avoided only by enforcement of the promise.” *C & K Eng'g Contractors v.*  
20 *Amber Steel Co.*, 23 Cal. 3d 1, 6 (1978). Because Plaintiffs will not be able to establish any of these  
21 elements at trial, their promissory estoppel claim will fail.

22 **First**, as discussed above (*see supra* §§ II and III) the evidence will show that Mr. Kunz did  
23 not make any promises to the Fairbairns. Mr. Kunz will testify that he made no such promises, and  
24 Plaintiffs will not be able to present any evidence other than their own self-serving, imprecise  
25 recollections that these promises occurred. Those recollections themselves, as evidenced by  
26 Plaintiffs’ deposition testimony, are fuzzy regarding what exactly Mr. Kunz said about how the  
27 donated stock would be traded, further proving that no actual promises were made. Unable to prove  
28 that Mr. Kunz even made any promise, Plaintiffs’ promissory estoppel claim must fail.

1           **Second**, even assuming the promises were made, Plaintiffs could not have reasonably been  
2 induced to donate the Energous stock based on representations that were inconsistent with their  
3 understanding of the operation of DAFs, the applicable tax laws, and the written agreement between  
4 the parties. The Fairbairns are sophisticated financial professionals who understood that once the  
5 donation was made it was irrevocable and that Fidelity Charitable would own and control the  
6 Energous stock. Additionally, the tax laws regarding DAFs—the very laws the Fairbairns sought  
7 to take advantage of with their donation—mandated that the Fairbairns would only be entitled to a  
8 tax deduction if they gave up all control over the Energous shares. *See* 26 U.S.C. § 170(f)(18)(B)  
9 (stating that “[a] deduction ... for any contribution to a donor advised fund ... shall only be allowed  
10 if ... the taxpayer obtains a contemporaneous written acknowledgment ... from the sponsoring  
11 organization ... of such donor advised fund that such organization has exclusive legal control over  
12 the assets contributed.”); *Dickinson v. Comm’r of Internal Revenue*, T.C.M. (RIA) 2020-128 (T.C.  
13 2020) (stating that a donor can donate appreciated stock without paying capital gains taxes only “if  
14 the donor (1) gives the property away absolutely and parts with title thereto (2) before the property  
15 gives rise to income by way of a sale”) (citing *Humacid Co. v. Commissioner*, 42 T.C. 894, 913  
16 (1964)). It is simply implausible to think the Fairbairns were induced to make a donation based on  
17 representations they themselves knew to be inconsistent with the fundamental terms on which the  
18 donation was based. Further, at least some of the promises the Fairbairns allege were made  
19 explicitly contradicted the written agreement between the parties as described in the Program  
20 Circular, by which Mr. Fairbairn agreed to be bound. As a matter of law, it is not reasonable to  
21 rely on oral promises if they are contradicted by the provisions of a written agreement signed by  
22 the parties. *See, e.g., Shapiro*, 152 Cal. App. 3d at 482. Therefore, it would not have been  
23 reasonable for Plaintiffs to rely on the promises they allege, even if they had been made.

24           Moreover, the evidence will show that no promises were needed to “induce” Plaintiffs to  
25 make their donation. The Fairbairns were determined to make a donation by year’s end to a DAF  
26 in order to offset tax penalties they were facing, and as of December 2017 when the alleged  
27 promises were supposedly made, Fidelity Charitable was the **only** DAF they were considering.  
28 Plaintiffs’ made-for-litigation allegation that they were debating between making their donation to



1 Fidelity Charitable and JP Morgan finds no support in the record; Plaintiffs never emailed with their  
2 JP Morgan relationship manager in December 2017, never discussed donating Energous stock with  
3 their relationship manager in December 2017, and never took any steps to prepare for making a  
4 donation of Energous shares to JP Morgan in December 2017. *See, e.g.*, Ex. C, E. Fairbairn Tr.  
5 317:20-24, 319:3-6; Ex. D, M. Fairbairn Tr. 321:3 – 323:6. Accordingly, there is no evidence that  
6 Plaintiffs ever considered donating their Energous shares to any other charity, and thus no evidence  
7 that the alleged promises induced a donation that Plaintiffs otherwise would not have made.

8 Nor will the evidence show that Plaintiffs relied on any alleged promises to their detriment.  
9 “[D]etrimental reliance is an essential feature of promissory estoppel.” *Zierolf v. Wachovia Mortg.*,  
10 2012 WL 6161352, at \*8 (N.D. Cal. Dec. 11, 2012) (quoting *Youngman v. Nevada Irr. Dist.*, 70  
11 Cal. 2d 240, 249–50, 74 Cal. Rptr. 398, 449 P.2d 462 (1969)). Plaintiffs will be unable to prove  
12 that they *detrimentally* relied on any alleged promises because expert testimony will conclusively  
13 demonstrate that Fidelity Charitable’s traders sold the Energous stock competently and achieved  
14 among the highest prices WATT ever recorded. Indeed, Fidelity Charitable’s liquidation provided  
15 Plaintiffs with over \$44 million in proceeds to their DAF account, and their gift allowed them to  
16 take a tax deduction of over \$52 million. Because Plaintiffs cannot show that they detrimentally  
17 relied on Fidelity Charitable’s promises, their promissory estoppel claim must fail. *See Zierolf*,  
18 2012 WL 6161352, at \*8 (dismissing plaintiff’s promissory estoppel claim for failing to allege  
19 detrimental reliance).

20 ***Finally***, even if Plaintiffs were able to satisfy the other elements of promissory estoppel  
21 (they cannot), their claim would still fail because there is no evidence that “injustice can be avoided  
22 only by enforcement of the promise.” *C & K Eng’g Contractors v. Amber Steel Co.*, 23 Cal. 3d 1,  
23 6 (1978). Promissory estoppel is an equitable doctrine, and therefore it is only appropriately applied  
24 if it is necessary to prevent injustice. *Id.* Such is not the case here. For one, Plaintiffs will not be  
25 able to prove that they have been damaged by Fidelity Charitable’s actions for the same reason they  
26 will not be able to prove detrimental reliance: Fidelity Charitable proficiently sold the Energous  
27 shares and received a historically high sale price. There will be no credible evidence to suggest an  
28 alternative liquidation strategy could have yielded a better result. And in fact, because Fidelity

1 Charitable’s liquidation of the Energous stock not only did not harm Plaintiffs but enabled them to  
2 grant more than \$44 million to charity, there is no injustice that applying the doctrine of promissory  
3 estoppel could serve to avoid. Further, Plaintiffs’ breach of contract and misrepresentation claims  
4 will both be decided on the same grounds as their promissory estoppel claims – whether Fidelity  
5 Charitable in fact made the oral representations alleged by Plaintiffs and whether Plaintiffs  
6 reasonably relied on those representations. Plaintiffs cannot show that also prevailing on a  
7 promissory estoppel claim will avoid an injustice they would otherwise suffer. Therefore,  
8 regardless of the factual determinations made at trial, Plaintiffs’ promissory estoppel claim is  
9 doomed to fail.

10 **VI. THE FAIRBAIRNS ARE NOT ENTITLED TO RECOVER DAMAGES FOR ANY**  
11 **ALLEGED LOSS TO THE DAF.<sup>6</sup>**

12 Plaintiffs are not entitled to seek damages for any alleged loss to the DAF because they  
13 cannot obtain damages for injury *to Fidelity Charitable*—the sole owner of the WATT stock when  
14 it was liquidated and the only party that could have suffered any loss resulting from the sale of that  
15 stock. As Plaintiffs must concede, once they donated the shares of Energous to Fidelity Charitable,  
16 those shares became the exclusive property of Fidelity Charitable. *See* Ex. D, M. Fairbairn Tr.  
17 23:21-24:1 (“It is my understanding that I no longer own the stock when it’s donated.”); Ex. C, E.  
18 Fairbairn Tr. 177:2-4 (“Q. You understood that once donated, the stock was no longer yours, right?  
19 [Ms. Fairbairn:] It belonged to the charity.”). The Fairbairns “relinquish[ed] all right, title, and  
20 interest in the assets, in exchange for [the] 100% dollar for dollar tax deduction” they claimed.  
21 *Nat’l Heritage Found. Inc. v. Behrmann*, 2013 WL 1390822, at \*1 (E.D. Va. Apr. 3, 2013); *see*  
22 *also* 26 U.S.C. § 4966(d)(2) (defining DAF as an account “owned and controlled by a sponsoring  
23 organization”). Indeed, Fidelity Charitable’s Program Circular explained to the Fairbairns that

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24  
25 <sup>6</sup> For the reasons stated in its motion to dismiss briefing, Fidelity Charitable also contends  
26 that Plaintiffs lack standing to sue Fidelity Charitable at all and that the right to sue a public  
27 charity for the mismanagement of charitable assets resides exclusively with the state Attorney  
28 General. *See* ECF No. 21. However, because the Court has previously considered and rejected  
that argument, *see* ECF No. 39, Fidelity Charitable does not repeat it here, but continues to  
contend that Plaintiffs lack standing to sue and preserves its right to challenge the Court’s  
findings with respect to standing on appeal.

1 “[o]nce Fidelity Charitable accepts a contribution, it is irrevocable and is owned and controlled by  
2 the Trustees. The Trustees have exclusive legal control over all contributed assets.” Ex. B, Fidelity  
3 Charitable Program Circular, at FID-FRBN-0039498.

4 Fidelity Charitable’s subsequent sale of the Energous stock was thus indisputably a sale of  
5 Fidelity Charitable’s *own property*. Any alleged harm to the DAF from that sale was harm to  
6 Fidelity Charitable—the owner of that stock and the proceeds from its sale. Plaintiffs have no  
7 claim for “damages” to the DAF under California’s “long-standing rule that one who is not the  
8 owner of the property and was not damaged cannot sue for injury to property.” *Jasmine Networks,*  
9 *Inc. v. Superior Court*, 180 Cal. App. 4th 980, 994, 103 Cal. Rptr. 3d 426, 435 (2009) (quoting  
10 *Vaughn v. Dame Constr. Co.*, 223 Cal. App. 3d 144, 147, 272 Cal. Rptr. 261, 262 (1990), modified  
11 (Aug. 23, 1990)).

12 Indeed, it is a requisite element of every cause of action on which the Fairbairns seek a  
13 damages award that they—the *Fairbairns*—were injured, not a third party, and certainly not the  
14 very party from which they seek damages. As the California Supreme Court has explained, “[t]he  
15 primary object of an award of damages in a civil action, and the fundamental principle or theory  
16 on which it is based, is just compensation or indemnity for the loss or injury sustained *by*  
17 *complainant*, and no more.” See *In re De Laveaga’s Estate*, 50 Cal. 2d 480, 488, 326 P.2d 129,  
18 133 (1958) (emphasis added); see also *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 872 (9th  
19 Cir. 2017) (“[C]ompensatory damages are measured by the harm the defendant has caused the  
20 plaintiff.”). Thus, contract damages are designed to compensate a plaintiff for the injury the  
21 *plaintiff* suffered. Likewise, one of the elements of a negligence claim is a showing of damages.  
22 *Peredia v. HR Mobile Servs., Inc.*, 25 Cal. App. 5th 680, 687, 236 Cal. Rptr. 3d 157, 162 (Ct. App.  
23 2018). For purposes of establishing that element, “[i]t is fundamental that a negligent act is not  
24 actionable unless it results in injury *to another*.” *Corona v. Sony Pictures Entm’t, Inc.*, No. 14-  
25 CV-09600 RGK EX, 2015 WL 3916744, at \*3 (C.D. Cal. June 15, 2015) (quoting *Fields v. Napa*  
26 *Milling Co.*, 164 Cal. App. 2d 442, 330 P.2d 459 (1958)) (emphasis added); see also *Lederer v.*  
27 *Gursey Schneider LLP*, 22 Cal. App. 5th 508, 521, 231 Cal. Rptr. 3d 518, 528 (Ct. App. 2018),  
28 *review denied* (July 11, 2018) (“[A]ctual harm is required before a [negligence] cause of action

1 accrues: ‘If the allegedly negligent conduct does not cause damage, it generates no cause of action  
 2 in tort.’” (quoting *Budd v. Nixen*, 6 Cal. 3d 195, 200, 491 P.2d 433 (1971) (superseded by statute  
 3 on other grounds)). Misrepresentation also requires a plaintiff to prove that, “as a result of relying  
 4 on the [defendant’s] representation, *the plaintiff* must have sustained damages.” *Williamson v.*  
 5 *Gen. Dynamics Corp.*, 208 F.3d 1144, 1156 n.3 (9th Cir. 2000) (emphasis added). Consequently,  
 6 even if the Court were to find the sale of the Energous stock resulted in damages to the giving  
 7 account, it could not award damages to Plaintiffs.<sup>7</sup> Any claims for mismanagement of the assets  
 8 after the donation was made could still be brought by the state Attorney General, as with all claims  
 9 for the mismanagement of charitable assets.

10 **VII. PLAINTIFFS CANNOT PROVE A NON-SPECULATIVE AMOUNT OF**  
 11 **DAMAGES.**

12 Because Plaintiffs cannot prove liability on any of their claims, the Court’s inquiry should  
 13 end there. However, even if the Court were to find liability on one of Plaintiffs’ claims, Plaintiffs  
 14 cannot prove that Fidelity Charitable’s actions negatively affected their tax donation, and any  
 15 attempt to quantify such harm would be entirely too speculative to allow the Court to calculate an  
 16 actual amount that would compensate Plaintiffs’ for their alleged harm. *See Bigelow v. RKO Radio*  
 17 *Pictures*, 327 U.S. 251, 264 (1946) (damages may not be based on guesswork or speculation but  
 18 must be a just and reasonable estimate based on relevant data).

19 The value of the donated stock for purposes of Plaintiffs’ tax deduction was calculated  
 20 based on the average of the high and the low sales price of Energous stock on the day the stock  
 21 was donated. Thus, to conclude there was any harm to the Fairbairns’ deduction as a result of the  
 22 allegedly breached promises, it is first necessary to show not only that Fidelity Charitable’s

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23  
 24 <sup>7</sup> Plaintiffs do not purport to, and could not, bring a claim on Fidelity Charitable’s behalf  
 25 to recover damages for injury to property they did not own. “[A] party ‘must assert his own  
 26 legal rights’ and ‘cannot rest his claim to relief on the legal rights of third parties,’” subject to  
 27 exception only where “(1) the party asserting the right has a close relationship with the person  
 28 who possesses the right and (2) there is a hindrance to the possessor’s ability to protect his own  
 interests.” *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 764 (9th Cir. 2018) (quoting  
*Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689, 198 L. Ed. 2d 150 (2017)). Any attempt by  
 Plaintiffs to assert third-party standing to sue on Fidelity Charitable’s behalf would founder at  
 the first prong, since Fidelity Charitable is the opposing party in their lawsuit.

1 liquidation of the donated Energous stock on December 29, 2017 negatively affected the price of  
 2 Energous stock that day, but that Fidelity Charitable’s liquidation caused the *lowest* price of  
 3 Energous that day to be *lower* than it otherwise would have been. There is no evidence of either.

4         And even if it could be shown that Fidelity Charitable’s liquidation of the Energous stock  
 5 on December 29, 2017 did negatively impact the low of the day for Energous stock (it did not),  
 6 there is no rational basis on which to assess how much of that negative impact could be attributed  
 7 to the alleged breach of any particular promise or promises. *See Ladas v. California State*  
 8 *Automobile Association*, 19 Cal. App. 4th 761, 770 (1993) (“To be enforceable, a promise must be  
 9 definite enough that a court can determine the scope of the duty and the limits of performance must  
 10 be sufficiently defined to provide a rational basis for the assessment of damages.”). Indeed,  
 11 Plaintiffs themselves do not attempt to quantify the difference in Energous’ stock price (and their  
 12 consequent deduction) in a “but for” world where Fidelity Charitable used whatever  
 13 “sophisticated, state-of-the-art methods” Plaintiffs believed would be used (beyond those that were  
 14 used). Nor have Plaintiffs proposed any rational basis on which to assess the alleged harm caused  
 15 by Fidelity Charitable’s supposed promise to allow Plaintiffs to advise on a price limit, as there is  
 16 no evidence regarding what limit Plaintiffs would have advised or whether Fidelity Charitable  
 17 would have followed the never given and altogether hypothetical advice (which even Mr. Fairbairn  
 18 admits Fidelity Charitable would have been under no obligation to follow). Ex. D, M. Fairbairn  
 19 Tr. 19:15-18. Requiring the Court to now guess what Plaintiffs’ tax deduction or giving account  
 20 proceeds would have been if Fidelity Charitable had kept the allegedly broken promises is simply  
 21 too speculative a task to be permitted under California law.<sup>8</sup>

22 **VIII. ANY DAMAGES FOR MISREPRESENTATION AND/OR NEGLIGENCE ARE**  
 23 **LIMITED TO \$20,000 PER CLAIM.**

24         A Massachusetts statute limits damages awards for tort claims against charitable  
 25 organizations and trusts to \$20,000 per claim. *See Mass. Gen. Laws Ann. ch. 231, § 85K.* Under  
 26

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27         <sup>8</sup> As explained in Fidelity Charitable’s Motion *in Limine* No. 4 Plaintiffs’ expert  
 28 Lawrence’s Harris’ calculations are rooted in speculation and guesswork and should not be  
 considered by the Court.

1 California choice-of-law rules, that provision (and not California substantive law) governs the  
2 question of whether a damages award against Fidelity Charitable is subject to a cap. Because the  
3 Massachusetts limitation applies to the Fairbairns' misrepresentation and negligence claims, their  
4 recovery on each of those claims should be limited to \$20,000.

5 **A. Massachusetts Law Governs the Question of Charitable Damages.**

6 Massachusetts law governs the issue of charitably immunity and limitation on damages  
7 awards against a charity. Courts apply the choice-of-law rules of the forum state. *Atl. Marine*  
8 *Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 65 (2013) (citing *Klaxon Co. v.*  
9 *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 494-96 (1941)). California follows the Second Restatement  
10 of the Law, which, in the absence of an agreement with a choice-of-law clause, applies a  
11 "governmental interests" test. Under that three-step test, the Court must first ask if the legal  
12 regimes of California and the foreign state are "materially different." *Washington Mut. Bank, FA*  
13 *v. Superior Court*, 24 Cal.4th 906, 920, 15 P.3d 1071, 1080-81 (Cal. 2001). If they are not, the  
14 Court applies California law. *Id.* If the two states' laws are materially different, the Court must  
15 determine, second, whether both states have an interest in applying their law to the dispute. *Id.*  
16 Third, if the Court determines that both states have an interest in having their law applied, the  
17 Court must "select the law of the state whose interests would be 'more impaired' if its law were  
18 not applied." *Id.* In conducting that comparative impairment analysis, "the ... court must  
19 determine 'the relative commitment of the respective states to the laws involved' and consider 'the  
20 history and current status of the states' laws' and 'the function and purpose of those laws.'" *Id.*  
21 (quoting *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal.3d 157, 166 (1978)).

22 The first step is easily satisfied: the laws are materially different. Whereas Massachusetts  
23 limits damages for torts committed by charitable trusts to \$20,000 per cause of action, Mass. Gen.  
24 Laws Ann. ch. 231, § 85K, California has abrogated charitable immunity and has not limited  
25 recovery against charities, see *Malloy v. Fong*, 37 Cal.2d 356, 366, 232 P.2d 241, 247 (1951); *Silva*  
26 *v. Providence Hosp. of Oakland*, 14 Cal.2d 762, 775, 97 P.2d 798, 805 (1939).

27 With respect to the second step, both jurisdictions concededly have some interest in  
28 applying their law to this dispute. Fidelity Charitable is incorporated in Massachusetts and its

1 Declaration of Trust subjects it to Massachusetts law. Ex. L (Decl. of Trust § 6.4). Moreover,  
2 because the corpus of the trust resides in Massachusetts, any alleged loss to the DAF itself that  
3 resulted from Fidelity Charitable’s trading was sited in Massachusetts. As the Fairbairns will  
4 likely note, they are California residents and suffered the alleged injury to their tax deduction there.

5 As to the third step, however, it is clear that Massachusetts law must apply to the issue of  
6 charitable immunity. Massachusetts has a much greater commitment to its statutory charitable  
7 damages limitation than California has to its judicial abrogation of charitable immunity, and  
8 Massachusetts’ interests would be more seriously harmed were California’s law applied.

9 The Massachusetts Supreme Judicial Court has repeatedly—and recently—explained that  
10 the Commonwealth’s damages cap implements a robust legislative intent to “protect the funds of  
11 charitable institutions so they may be devoted to charitable purposes.” *English v. New England*  
12 *Med. Ctr., Inc.*, 541 N.E.2d 329, 333 (Mass. 1989); *see also Keene v. Brigham & Women’s Hosp.,*  
13 *Inc.*, 786 N.E.2d 824, 837 (Mass. 2003) (rejecting protest that application of cap was inequitable  
14 based on state public policy); *Offshore Rental Co. v. Cont’l Oil Co.*, 22 Cal.3d 157, 166, 583 P.2d  
15 721, 726 (Cal. 1978) (explaining that “the current status of a statute” and the frequency with which  
16 it is enforced may demonstrate a strong state interest in policy choice). The legislature considered  
17 the policy so important it “adopted section 85K in order to preserve the contours of common law  
18 charitable immunity in the face of a threat of judicial abolition.” *Mason v. S. New England*  
19 *Conference Ass’n of Seventh-Day Adventists of Town of S. Lancaster, Com. of Massachusetts*, 696  
20 F.2d 135, 138–39 (1st Cir. 1982). Massachusetts courts routinely apply the damages limitation.  
21 *See, e.g., Kurtz v. Kripalu Ctr. for Yoga & Health, Inc.*, No. 3:17-CV-30109-KAR, 2019 WL  
22 454594, at \*12-13 (D. Mass. Feb. 5, 2019) (capping negligence damages against nonprofit yoga  
23 center for injuries student incurred while stacking chairs after lesson); *Mazzone v. Boston Univ.*,  
24 352 F. Supp. 3d 141, 144 (D. Mass. 2019) (limiting recovery for slip and fall at university lacrosse  
25 stadium).

26 Indeed, Massachusetts is so committed to its protection of charities from limitless liability  
27 that its charitable limitation applies to *all* torts regardless of the mental state element; as the  
28 Massachusetts Appeals Court has reasoned, “[t]he effect on the charity’s funds is the same whether

1 the ... tort is negligent, reckless, wanton, or intentional.” *St. Clair v. Trustees of Bos. Univ.*, 25  
2 Mass. App. Ct. 662, 668, 521 N.E.2d 1044, 1048 (Mass. App. Ct. 1988); *see also Martin v. Kelley*,  
3 No. 02684, 2004 WL 1895116, at \*4 (Mass. Super. Aug. 12, 2004). Accordingly, even fraud and  
4 other intentional torts are subject to the cap. *See In re Boston Reg’l Med. Ctr., Inc.*, 328 F. Supp.  
5 2d 130, 154-55 (D. Mass. 2004). In short, Massachusetts has a broad and consistent policy of  
6 protecting charities from financial exposure for torts. The Massachusetts legislature struck a  
7 different balance from California’s Supreme Court, and the Commonwealth’s highest court has  
8 consistently emphasized the importance of protecting charities—even those that allegedly  
9 intentionally harm others.

10 In contrast, California’s current policy abrogating charitable immunity was not enacted by  
11 the State Legislature. Instead, the California Supreme Court abrogated charitable immunity based  
12 on its interpretation that state legislative policy reflected in the California statute codifying  
13 negligence liability, which provides that “[e]veryone is responsible ... for an injury occasioned to  
14 another by his want of ordinary care or skill,” *Malloy*, 37 Cal.2d at 366 (quoting Cal. Civ. Code  
15 § 1714(a)), suggests that charities should not be exempt from liability. The court reasoned that the  
16 legislature’s admonition “admits of no exception based upon the objectives, however laudable, of  
17 the tortfeasor,” and that to hold otherwise would force the plaintiff to effectively subsidize a  
18 charitable defendant’s operations. *Id.* A decade later, the court reaffirmed this rationale in  
19 rejecting a research hospital’s effort at exemption from negligence liability, which the hospital  
20 claimed would reallocate funds that should be used for the “extension of medical knowledge.”  
21 *Tunkl v. Regents of Univ. of Cal.*, 60 Cal.2d 92, 104, 383 P.2d 441, 448 (1963); *see also Brown v.*  
22 *Merlo*, 8 Cal.3d 855, 870-71, 506 P.2d 212, 223 (1973) (*Malloy* “teach[es] that ... it is irrational  
23 to reward [a charity’s] generosity by subjecting beneficiaries to a greater risk of uncompensated  
24 injury than is faced by other individuals”). But although California has not abandoned that rule,  
25 there are few cases from recent decades discussing the State’s abrogation of charitable immunity—  
26 and none from the California Supreme Court.

27 Fidelity Charitable is a Massachusetts charity that was established against Massachusetts’  
28 legal backdrop protecting charities from tort liability. *See supra* p. 20 (discussing that Fidelity



1 Charitable was incorporated in Massachusetts and its Declaration of Trust subjects it to  
2 Massachusetts law). Applying California’s rule of limitless potential monetary damages in this  
3 case would thwart the Commonwealth’s protectionist policy, which was designed expressly to  
4 shield Massachusetts charities and their funds from attack by tort plaintiffs like the Fairbairns.

5 Indeed, that is the conclusion other courts outside of Massachusetts have routinely reached  
6 when adjudicating claims against Massachusetts charities. *See e.g., Nelson v. Massachusetts Gen.*  
7 *Hosp.*, No. 04-CV-5382 (CM), 2007 WL 2781241, at \*12 (S.D.N.Y. Sept. 20, 2007) (explaining  
8 that, despite New York’s strong policy against limiting tort damages, because the plaintiff had  
9 deliberately brought suit in New York to avoid Massachusetts’s charitable damages cap “[i]t is ...  
10 far from a foregone conclusion that this court, were it to retain the case, would decline to enforce  
11 the Massachusetts charitable immunity statute,” but dismissing on personal jurisdiction grounds),  
12 *aff’d*, 299 F. App’x 78 (2d Cir. 2008); *Kathryn P. v. City of Philadelphia*, No. CIV. A. 97-6710,  
13 1999 WL 391492, at \*7 (E.D. Pa. May 27, 1999) (applying Massachusetts law to Pennsylvania  
14 residents’ claims stemming from abuse of a Pennsylvania ward of the State at a nonprofit school  
15 in Massachusetts, and explaining that the charitable damages cap “must be given the broad scope  
16 intended for it by the Massachusetts Legislature”); *see also Perloff v. Symmes Hosp.*, 487 F. Supp.  
17 426, 429 (D. Mass. 1980) (applying California choice-of-law principles and determining that  
18 Massachusetts tort law, including the Commonwealth’s prior rule of complete charitable immunity  
19 from tort liability, applied).

20 Likewise, courts in states that have abrogated charitable immunity routinely permit  
21 charities incorporated in states that have preserved immunity to invoke the doctrine. For instance,  
22 in *Schultz v. Boy Scouts of America*, the New York Court of Appeals extended New Jersey’s  
23 charitable immunity to torts committed in New York, reasoning that New Jersey had “weighed the  
24 interests of charitable tort-feasors and their victims and decided to retain the defense of charitable  
25 immunity,” whereas New York’s abrogation was a mere loss-allocation rule relevant to  
26 transactions between New York residents. 480 N.E.2d 679, 686 (N.Y. 1985). Moreover, applying  
27 a state’s charitable immunity or damages limitation in out-of-state disputes respects the parties’  
28 choice to avail themselves of that rule. As the Second Circuit has explained,

1 Charitable immunity reduces the cost at which an institution can provide its  
2 services, and, because the institution has no profit motive, these savings are  
3 presumably passed on to some extent to the institution's beneficiaries; in return,  
4 individuals who choose to take advantage of the institution's services bear the risk  
5 that any injury they suffer due to the negligence of the charitable institution will  
6 not be compensated by the institution. By electing to attend an institution that is  
7 protected by and benefits from New Jersey charitable immunity laws, [plaintiff]  
8 has presumably obtained a better value for his (or his parents') money than he  
9 would have obtained if Seton Hall did not enjoy charitable immunity. Because  
10 [plaintiff] has indirectly availed himself of the charitable law of New Jersey and  
11 benefitted from it, New Jersey has a strong interest in having him bear a related  
12 burden.

13 *Gilbert v. Seton Hall Univ.*, 332 F.3d 105, 110 (2d Cir. 2003) (applying New Jersey charitable  
14 immunity to Connecticut resident's tort claim for injury at a sporting event in New York).  
15 California's abrogation of charitable immunity, though longstanding, is likewise a loss-allocation  
16 rule based on the State's determination that a tort victim should not be compelled to make a  
17 charitable donation in the amount of denied compensation. *See Malloy*, 37 Cal.2d at 366. *Malloy's*  
18 holding forms the background rule between California parties, but Massachusetts charities like  
19 Fidelity Charitable are incorporated in the expectation that their assets would not be depleted by  
20 tort payouts. Massachusetts law should apply here, because its interests would be "more  
21 impaired," *Washington Mut. Bank*, 24 Cal.4th at 920, if the Court applied California law to claims  
22 against Fidelity Charitable than vice versa.

23 **B. The Charitable Damages Cap Applies to the Fairbairns' Claims.**

24 Given the application of Massachusetts law to the issue, it is clear that Massachusetts'  
25 damages limitation applies and, even if liability is found, recovery on two of the Fairbairns' five  
26 claims—intentional misrepresentation and negligence—must be limited to \$20,000 each. Each of  
27 these three claims falls squarely within the ambit of Massachusetts' statutory cap on charitable  
28 damages, which provides that:

It shall not constitute a defense to any cause of action based on tort brought  
against a corporation, trustees of a trust, or members of an association that said  
corporation, trust, or association is or at the time the cause of action arose was a  
charity; provided, that if the tort was committed in the course of any activity  
carried on to accomplish directly the charitable purposes of such corporation,  
trust, or association, liability in any such cause of action shall not exceed the sum  
of twenty thousand dollars exclusive of interest and costs. ... Notwithstanding

1 any other provision of this section, the liability of charitable corporations, the  
2 trustees of charitable trusts, and the members of charitable associations shall not  
3 be subject to the limitations set forth in this section if the tort was committed in  
4 the course of activities primarily commercial in character even though carried on  
5 to obtain revenue to be used for charitable purposes.

6 Mass. Gen. Laws Ann. ch. 231, § 85K. Under the two-step inquiry the statute sets forth, a  
7 charitable organization is entitled to application of the limitation if (1) it is a charity, and (2) “the  
8 injury ... occurred in the course of activities that ‘accomplish directly’ its charitable  
9 purposes.” *Blauvelt v. AFSCME Council 93, Local 1703*, 910 N.E.2d 956, 960 (Mass. 2009).

10 The first prong requires that “the dominant purpose of [Fidelity Charitable’s] work is for  
11 the public good and [its work] is but the means adopted for this purpose.” *Connors v. Northeast  
12 Hosp. Corp.*, 439 Mass. 469, 479, 789 N.E.2d 129 (Mass. 2003). That standard is easily satisfied  
13 here. Fidelity Charitable is incorporated as a charitable trust in Massachusetts; it is a 501(c)(3)  
14 tax-exempt organization; and its Declaration of Trust provides that Fidelity Charitable was created  
15 “to raise funds from donors” in order to “support charitable activities” and to “afford donors the  
16 opportunity” to pool their contributions in funds that are efficiently managed and invested to grow  
17 the assets available for charitable purposes. Ex. L (Decl. of Trust) at 1; *see also id.* art. 2.1 (trust  
18 is organized for “Charitable Purposes,” and will “seek contributions from donors, make  
19 distributions to Qualified Beneficiaries and seek to raise public awareness about the benefits of  
20 philanthropy”). That is more than enough to conclusively show that Fidelity Charitable is a  
21 charitable entity entitled to Section 85K’s protection. *See Tep v. Southcoast Hosps. Grp., Inc.*, No.  
22 CV 13-11887-LTS, 2014 WL 12573547, at \*3-4 (D. Mass. Sept. 22, 2014) (“The Court simply  
23 may not, consistent with Massachusetts law, look beyond Southcoast’s organizational documents  
24 and the charitable purposes set forth therein to determine whether its revenue renders it a  
25 commercial, rather than a charitable, enterprise. Accordingly, Southcoast is entitled to a finding  
26 that it is a charitable organization within the scope of § 85K, as a matter of law.”). Although that  
27 is sufficient to satisfy the first prong of section 85K’s test, Fidelity Charitable’s Form 990s and  
28 annual giving reports also document billions of dollars in charitable grantmaking, and its giving  
reports demonstrate the services it offers to donors to recommend grants to a variety of

1 philanthropic entities. *See* Ex. M, 2019 Fidelity Charitable Giving Report, at FID-FRBN-0031288  
2 (noting total grants in 2018 of \$5.2 billion); Ex. N, 2018 Fidelity Charitable Giving Report, at FID-  
3 FRBN-0042933 (noting that “Last year, Fidelity Charitable made a record 1 million donor  
4 recommended grants, totaling \$4.5 billion. These grants supported more than 127,000 charitable  
5 organizations.”); Ex. O, 2017 Fidelity Charitable Form 990, at FID-FRBN-0043440 (listing grants  
6 and similar amounts paid in prior year of \$3,764,811,986 and in current year of \$4,798,368,744).

7         The second prong requires that the tort “was committed in the course of *any activity* carried  
8 on to accomplish directly the charitable purposes of ... [the] trust.” Gen. Laws Ann. ch. 231,  
9 § 85K (emphasis added). Under that standard, Fidelity Charitable’s sale of the donated WATT  
10 stock—its own property—to raise funds to be invested and distributed to charities plainly qualifies.  
11 That liquidation generated funds for Fidelity Charitable, and was tied to the trust’s stated goal of  
12 “afford[ing] donors the opportunity” to pool assets designated for charity in managed funds, and  
13 most of the donated assets were not collected as fees but remain available for philanthropic causes.  
14 Ex. L (Decl. of Trust) at 1. Likewise, Mr. Kunz’s alleged promises to the Fairbairns, even if made  
15 (they were not), would be subject to the limitation on damages because, even crediting the  
16 Fairbairns’ allegations, they were made in order to encourage the Fairbairns to make a charitable  
17 deduction.

18         Indeed, the only time the limitation does not apply to a charity’s conduct is “if the tort was  
19 committed in the course of activities *primarily* commercial in character.” Gen. Laws Ann. ch.  
20 231, § 85K (emphasis added). For the “primarily commercial” exception to apply, an activity must  
21 be “*entirely disconnected*” from the defendant’s charitable purpose. *Linkage Corp. v. Trustees of*  
22 *Boston Univ.*, 679 N.E.2d 191, 209 n.37 (Mass. 1997) (emphasis). Far from being “entirely  
23 disconnected” from Fidelity Charitable’s charitable purpose, Mr. Kunz’s communications with the  
24 Fairbairns supported the core purpose of the DAF “to raise funds from donors” in order to “support  
25 charitable activities.” *See* Ex. L (Decl. of Trust) at 1. Fidelity Charitable’s payments to a “Fidelity”  
26 entity to provide necessary services related to Plaintiffs’ donation does not render Fidelity  
27 Charitable’s motivation “*primarily* commercial,” Gen. Laws Ann. ch. 231, § 85K (emphasis  
28 added).

1 To the extent Plaintiffs argue that Fidelity Charitable’s solicitation of charitable donations  
2 (including Mr. Kunz’s alleged statements to convince the Fairbairns to donate the shares to the  
3 DAF) and liquidation of donated assets to generate funds for charitable giving are revenue-  
4 generating, that is not enough to render them “primarily commercial” or overcome the cap. As a  
5 preliminary matter, cash donations and the proceeds from the sale of non-cash donations (including  
6 stock) are reported as “revenue” for accounting purposes; but this “revenue” flows into Fidelity  
7 Charitable’s Giving Accounts for eventual granting other charities. Even if Fidelity Charitable’s  
8 fundraising efforts with the Fairbairns were considered revenue-generating, they are still subject  
9 to the limitation on liability because the “critical question is whether the revenue-generating  
10 activity is in conformity with the corporation’s charitable corporate purposes.” *Connors*, 789  
11 N.E.2d at 137. Mr. Kunz’s alleged statements “accomplish[ed] directly [Fidelity Charitable’s]  
12 purpose” by helping facilitate the Fairbairns’ stated desire to donate funds *to charity*, specifically  
13 a donor advised fund. *Id.* Accordingly, “the activity, ipso facto, is subject to the limitation on  
14 liability.” *Id.* at 136.

15 Indeed, the Massachusetts Supreme Judicial Court has consistently applied the damages  
16 limitation expansively and its exception narrowly, including with respect to activities that, unlike  
17 the case here, are only tangentially related to a charity’s mission. In *Connors*, for instance, snow  
18 removal on a nonprofit hospital’s property that injured the plaintiff was subject to the cap, since it  
19 still facilitated the charity’s purpose of caring for the sick by enabling patient access. 798 N.E.2d  
20 at 137. *See also, e.g., Mason*, 696 F.2d at 140-41 (building and maintaining church facility falls  
21 within the organization’s charitable purpose). Similarly, a recent Massachusetts district court case  
22 capped claims for personal injury brought by a spectator to a paid university athletic event, because  
23 “the university, consistent with its mission as a charitable organization, diligently endeavors to  
24 operate its school-sponsored sporting events as part of that mission.” *See Mazzone*, 352 F. Supp.  
25 3d at 143. Another recent case explained that the limitation applied to an injury following a paid  
26 yoga class, since the class was an “educational program[] ... that directly accomplished  
27 Defendant’s stated charitable mission” and only “incidentally yield[ed] revenue.” *Kurtz*, 2019 WL  
28 454594, at \*12 (citing *McKay v. Morgan Mem’l Co-op. Indus. & Stores, Inc.*, 172 N.E. 68, 69

1 (Mass. 1930)). As those cases demonstrate, the actions Plaintiffs allege led to their pleaded injuries  
2 are protected conduct for which Fidelity Charitable's liability must be capped.

3 **IX. THE DOCTRINE OF JUDICIAL ESTOPPEL BARS PLAINTIFFS' CLAIMS.**

4 As explained in Fidelity Charitable's motion for summary judgment, the Fairbairns should  
5 be estopped from arguing that they relied on Fidelity Charitable's supposed promises to liquidate  
6 the shares in conformity with the Fairbairns' demands, which is inconsistent with the Fairbairns'  
7 claim of a tax deduction that required they relinquish control over the shares. *See* Dkt. 158 at 13;  
8 Dkt. 151 at 6-8. Fidelity Charitable recognizes that the Court denied Fidelity Charitable summary  
9 judgment on that issue, but believes that at trial, upon a full showing of the facts and equities,  
10 estoppel should apply to bar the Fairbairns' claims. At a minimum, the Fairbairns' decision to  
11 claim a tax deduction for the full fair market value of their donation to Fidelity Charitable is  
12 relevant to the credibility of any testimony that they believed and reasonably relied on the alleged  
13 promises when deciding to make the donation.

14 Under federal statute, donors to a DAF are entitled to take a tax deduction only if they  
15 "obtain[] a contemporaneous written acknowledgment ... from the sponsoring organization ... that  
16 such organization has *exclusive legal control* over the assets contributed." 26 U.S.C.  
17 § 170(f)(18)(B) (emphasis added). Upon donation, donors may only retain (consistent with a tax  
18 deduction) "advisory privileges with respect to the distribution or investment of amounts held in  
19 such fund or account," *id.* § 4966(d)(2)(A), which "are distinct from a legal right or obligation."  
20 Joint Comm. on Taxation, Pension Protection Act of 2006, Title XII: Provisions Relating to Tax  
21 Exempt Organizations, 2006 WL 4791686, at \*67 (Aug. 3, 2006). A donor who secures  
22 "enforceable rights ... with respect to a gift ... will not be treated as having 'advisory privileges.'" *Id.*  
23 Thus, "[w]hen a donor contributes to a particular DAF, the donor must relinquish all right,  
24 title, and interest in the assets, in exchange for a 100% dollar for dollar tax deduction," but "may  
25 make non-binding recommendations with respect to the distribution or investment of the amounts  
26 held in the DAF." *Nat'l Heritage Found. Inc. v. Behrmann*, 2013 WL 1390822, at \*1 (E.D. Va.  
27 Apr. 3, 2013) (emphasis added) (internal citations omitted).

28 By claiming a charitable contribution deduction, the Fairbairns thus affirmatively certified

1 to the IRS, under penalty of perjury, 26 U.S.C. § 6065, that they *relinquished* “exclusive legal  
2 control” over the WATT shares to Fidelity Charitable, *id.* § 170(f)(18)(B). That representation  
3 enabled the Fairbairns to reap a \$52 million tax deduction based on their WATT donation.  
4 Plaintiffs’ alleged promises—under which Fidelity Charitable supposedly agreed to give the  
5 Fairbairns control over when the stock could be sold after it was donated, how much could be sold  
6 in a day and the manner in which it could be sold—are irreconcilable with that representation. If  
7 made, those promises would have deprived Fidelity Charitable of the ability to exercise  
8 independent judgment as to those aspects of the sale, which would make a mockery of Congress’s  
9 requirement that a DAF sponsoring organization obtain “exclusive legal control.” Under settled  
10 law in the Ninth Circuit, the Fairbairns are “estopped from taking one position on [their] tax  
11 returns, gaining a benefit from that tax return, and then seeking another benefit in court by taking  
12 a position incompatible with that taken on the tax return.” *Carpet Supermarket, Inc. v. Nat’l Fire*  
13 *Ins. Co. of Hartford*, 2009 WL 10675718, at \*1 (C.D. Cal. Sept. 17, 2009) (citing *Marks v. Am.*  
14 *Airlines, Inc.*, 313 F. App’x 933, 934 (9th Cir. 2009) (affirming district court’s grant of summary  
15 judgment on tax estoppel grounds)). They should not be awarded damages based on the breach of  
16 promises that contradict what they told the IRS.

17 **X. THE FAIRBAIRNS ARE NOT ENTITLED TO PREJUDGMENT INTEREST ON**  
18 **ANY DAMAGES AWARD FOR BREACH OF CONTRACT.**

19 Prejudgment interest in this action is governed by Section 3287 of the California Civil  
20 Code, under which Plaintiffs are not entitled to prejudgment interest for any award for breach of  
21 contract. Section 3287(a) provides for interest where damages are “certain, or capable of being  
22 made certain by calculation.” As courts have made clear, Section 3287(a) applies only “where  
23 there is essentially no dispute between the parties concerning the basis of computation of damages  
24 if any are recoverable.” *Wisper Corp. v. California Commerce Bank*, 49 Cal. App. 4th 948, 958  
25 (1996). That clearly is not the case here with respect to Plaintiffs’ alleged contractual damages (or  
26 any other category of damages), as the parties contest the appropriate calculation of damages, if  
27 any.

28 Accordingly, the only remaining potential source for an award of prejudgment interest on

1 Plaintiffs’ contract claim is Section 3287(b), which gives the court discretion to award  
 2 prejudgment interest on “damages based upon a cause of action in contract where the claim was  
 3 unliquidated,” as is the case here. *See Segura v. McBride*, 5 Cal. App. 4th 1028, 1040 (1992)  
 4 (damages are unliquidated when they need “to be ascertained and settled through the trial  
 5 process”); *In re Pago Pago Aircrash of Jan. 30, 1974*, 525 F. Supp. 1007, 1015 (C.D. Cal. 1981)  
 6 (damages are unliquidated if they “are not ascertainable prior to the verdict”).<sup>9</sup> When determining  
 7 whether to award prejudgment interest under Section 3287(b), courts consider, among other  
 8 factors, “whether awarding interest will penalize the defendant for litigating a bona fide dispute”—  
 9 exactly what Fidelity Charitable has done for the past two years. *Forouzan v. BMW of N. Am.*,  
 10 *LLC*, No. CV173875DMGGJSX, 2019 WL 856395, at \*3 (C.D. Cal. Jan. 11, 2019) (denying  
 11 prejudgment interest where the jury reached a verdict about 19 months after the Complaint was  
 12 filed and the case involved multiple “legitimately contested issues” similar to those in this case)  
 13 (citing *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 496-97 (1982)). No amount of  
 14 prejudgment interest would be appropriate even if Plaintiffs prevailed.

15 **XI. PLAINTIFFS’ ARE NOT ENTITLED TO RECOVER ATTORNEYS’ FEES.**

16 Plaintiffs contend that they are entitled to recover attorneys’ fees under California’s “Private  
 17 Attorney General” doctrine. This case is plainly inappropriate for such an award. California’s  
 18 private attorney general statute provides that:

19 Upon motion, a court may award attorneys’ fees to a successful party against one  
 20 or more opposing parties in any action which has resulted in the enforcement of an  
 21 important right affecting the public interest if: (a) a significant benefit, whether  
 22 pecuniary or nonpecuniary, has been conferred on the general public or a large class  
 23 of persons, (b) the necessity and financial burden of private enforcement, or of  
 enforcement by one public entity against another public entity, are such as to make  
 the award appropriate, and (c) such fees should not in the interest of justice be paid  
 out of the recovery, if any.

24 Cal. Civ. Proc. Code § 1021.5. To determine whether a fee award is appropriate, courts  
 25 look to three factors: whether “(1) the litigation resulted in the enforcement of an important right  
 26 affecting the public interest; (2) a significant benefit has been conferred on the general public or a  
 27

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28 <sup>9</sup> Section 3287(b) further provides that any interest award can be calculated from a date  
 no “earlier than the date the action was filed.”



1 large class of individuals; and (3) the necessity and financial burden of private enforcement renders  
2 the award appropriate.” *New W. Charter Middle Sch. v. Los Angeles Unified Sch. Dist.*, 187 Cal.  
3 App. 4th 831, 848–49 (2010).

4 Both the nature of Plaintiffs’ claims and the relief they seek militate against an award of  
5 attorneys’ fees here. **First**, the Fairbairns do not allege that Fidelity Charitable made any  
6 misrepresentation or omission that broadly applies to charitable donations in Fidelity Charitable’s  
7 donation materials, such as the Program Circular. Instead, Plaintiffs allege that Justin Kunz made  
8 individual promises to them regarding the liquidation of their donation. Those alleged promises, if  
9 made, actually **contradicted** Fidelity Charitable’s general statements to donors about how it  
10 liquidates assets, and a finding of liability will therefore have no effect on the rights of other Fidelity  
11 Charitable donors. Indeed, in opposing Fidelity Charitable’s standing argument at the motion to  
12 dismiss stage, the Fairbairns emphasized that their claims were distinct from the interest of the  
13 general public. *See* ECF No. 29, Plaintiffs’ Opposition to Defendant’s Motion to Dismiss, at 20  
14 (arguing that Plaintiffs have statutory standing because “the Fairbairns assert their distinct personal  
15 interest – including their lost tax deduction – not a generalized public interest”); *id.* (arguing that  
16 the general rule that a donor cannot sue a charity does not apply because “[w]here a donor asserts  
17 a **personal** right, distinct from any rights or interest held by the general public, she may bring suit  
18 against the charity”). Having asserted their standing to bring suit by stating that they sought to  
19 vindicate a personal interest while expressly denying an assertion of a generalized public interest,  
20 Plaintiffs should be precluded from seeking attorneys’ fees based on the public interest they  
21 previously disclaimed.

22 Moreover, Plaintiffs did not allege in their negligence claim (and have adduced no evidence  
23 suggesting) that Fidelity Charitable mismanages the liquidation of donated assets generally. But to  
24 recover under Section 1021.5, a plaintiff’s litigation objective “must go beyond[, or] transcend[,]  
25 those things that concretely, specifically and significantly affect the litigant.” *Bradley v. Perrodin*,  
26 106 Cal. App. 4th 1153, 1165 (2003). For instance, a California appellate court held it insufficiently  
27 beneficial to the “general public” that a charter school prevailed in its lawsuit seeking to lease space  
28 from the LA public school district under contract principles and state statute, because it did not

1 enforce other charter schools’ rights to lease space or “charter school students’ rights to district  
 2 facilities in general.” *New W. Charter Middle Sch. v. Los Angeles Unified Sch. Dist.*, 187 Cal. App.  
 3 4th at 850. Likewise, even if the Fairbairns prevail, their suit will not benefit a “broad class of  
 4 citizens.” *Millview County Water Dist. v. State Water Resources Control Bd.*, 4 Cal. App. 5th 759,  
 5 768 (2016).

6 **Second**, the Fairbairns cannot obtain an attorneys’ fees award as a private attorney general  
 7 because they seek a multimillion-dollar financial recovery in the form of their allegedly reduced  
 8 tax deduction, in addition to the “return” of funds to the DAF itself.<sup>10</sup> Thus, their personal benefit  
 9 should they prevail is certain, direct, and substantial. But an award of attorney fees under Section  
 10 1021.5 is only appropriate “if the cost of the claimant’s legal victory transcends his personal  
 11 interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff out of  
 12 proportion to his individual stake in the matter.” *Charlebois v. Angels Baseball LP*, 993 F. Supp.  
 13 2d 1109, 1114 (C.D. Cal. 2012) (holding that \$18,000 damages for plaintiff to take on two-year  
 14 litigation enforcing ADA wheelchair accessibility requirements justified award of attorneys’ fees).  
 15 Thus, “Section 1021.5 is intended as a ‘bounty’ for pursuing public interest litigation, not a reward  
 16 for litigants motivated by their own interests who coincidentally serve the public. ... To encourage  
 17 such suits, attorneys fees are awarded when a significant public benefit is conferred through  
 18 litigation pursued by one whose personal stake is insufficient to otherwise encourage the action.”  
 19 *Galante Vineyards v. Monterey Peninsula Water Management Dist.*, 60 Cal. App. 4th 1109, 1126-  
 20 27 (1997) (citation omitted); *see also Conservatorship of Whitley*, 50 Cal.4th 1206, 1219, 241 P.3d  
 21 840, 849 (2010) (“[S]ection 1021.5 ... address[es] ... the problem of affordability of such lawsuits.  
 22 Because public interest litigation often yields nonpecuniary and intangible or widely diffused  
 23 benefits, and because such litigation is often complex and therefore expensive, litigants will be  
 24 unable either to afford to pay an attorney hourly fees or to entice an attorney to accept the case with  
 25 the prospect of contingency fees, thereby often making public interest litigation ‘as a practical  
 26 matter ... infeasible.’” (citation omitted)). But the Fairbairns have a strong personal financial

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27  
 28 <sup>10</sup> Plaintiffs are, in fact, precluded from seeking the “return” of funds to their Fidelity  
 Charitable account, as discussed above. *Supra* § VI.

1 incentive to litigate this action (and the financial wherewithal to retain counsel to assist them), and  
2 any alleged public benefit is entirely theoretical and, at best, “coincidental to the attainment of ...  
3 [the Fairbairns’] personal goals.” See *Roybal v. Governing Bd. of Salinas City Elementary School*  
4 *Dist.*, 159 Cal. App. 4th 1143, 1151 (2008) (citation omitted).

5 **Third**, the interests of justice require that any attorneys’ fees should be paid out of Plaintiffs’  
6 recovery, if any. As described above, Plaintiffs seek a multi-million-dollar financial recovery,  
7 which can and should be used to pay their attorneys’ fees, as with any civil litigant. No public  
8 benefit will accrue as a result of the Fairbairns’ attempt to secure compensation for their own  
9 allegedly diminished tax deduction. Further, if Fidelity Charitable were forced to pay Plaintiffs’  
10 attorneys’ fees, the money would be diverted from important charitable causes in order to pay  
11 Plaintiffs’ personal legal expenses that they voluntarily incurred in pursuit of their personal claims.  
12 Such a result cannot serve the interests of justice.

13 Because any benefit achieved in this case will flow to Plaintiffs directly and not the general  
14 public, Plaintiffs are not entitled to any award of attorneys’ fees under California’s Private Attorney  
15 General doctrine.

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Respectfully submitted,

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27 *Attorneys for Defendant*  
28 FIDELITY INVESTMENTS

CHARITABLE GIFT FUND

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