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FIDELITY INVESTMENTS CHARITABLE
GIFT FUND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

EMILY FAIRBAIRN and
MALCOLM FAIRBAIRN,

Plaintiffs,

v.

FIDELITY INVESTMENTS
CHARITABLE GIFT FUND,

Defendant.

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

**DEFENDANT FIDELITY INVESTMENTS
CHARITABLE GIFT FUND'S MOTION *IN*
LIMINE NO. 5 TO PRECLUDE
PLAINTIFFS FROM PURSUING DAMAGES
TO THE DONOR-ADVISED FUND
ACCOUNT**

I. INTRODUCTION

Emily and Malcolm Fairbairn (“Plaintiffs”) seek damages under two theories, both of which relate to Fidelity Charitable’s sale of shares of the Energous Corporation donated by Plaintiffs. The first is that Plaintiffs’ \$52 million tax deduction would have been greater if Fidelity Charitable had sold the shares in accordance with Plaintiffs’ preferences, potentially resulting in damages of more than \$3 million. The second is that—again, if Fidelity Charitable had sold the donated shares of Energous stock as Plaintiffs claim it should have—the proceeds Fidelity Charitable received would have been somewhere between \$2.6 million to \$9.5 million greater (depending on the damages scenario advanced by their damages expert), and that this amount should be awarded to the Fidelity Charitable donor-advised fund (“DAF”) account bearing their name. This Motion concerns Plaintiffs’ second damages theory (“DAF damages”).

There is no dispute that Plaintiffs’ donation of WATT stock was irrevocable and that Fidelity Charitable owned the stock once the donation was complete. In exchange, the Plaintiffs were entitled to a tax deduction, which they took in the amount of \$52 million. But after the donation, Fidelity Charitable’s sale of the stock was a sale of its own assets, and any alleged shortfall in proceeds from the sale of the WATT shares reduced Fidelity Charitable’s assets, not the assets of Plaintiffs.

To be sure, Plaintiffs retained specific advisory privileges with respect to the proceeds of the stock sale, relating to how those proceeds are invested and when and to whom they are granted. But enforcing those advisory rights is not what Plaintiffs seek here. Instead, Plaintiffs seek an award of the additional amount of money that they claim would have been in the DAF account had Fidelity Charitable traded differently. But because Plaintiffs have no basis for asserting an ownership interest in the WATT shares post-donation, let alone the proceeds from the liquidation of the shares, they cannot seek DAF damages. Indeed, the amount sought as DAF damages is not money Fidelity Charitable obtained at the expense of Plaintiffs or anyone else—or ever even had in the first place. It is money that, according to Plaintiffs, Fidelity Charitable should have made, but did not. It is black-letter law that a plaintiff can only sue for harm to herself, not harm to another. Plaintiffs thus have no basis to pursue DAF damages, however they may now attempt to

1 style them.

2 Contrary to Plaintiffs’ claim in their Trial Brief (and presumably in opposition to this
3 Motion), the Court’s ruling at the motion to dismiss stage did not resolve this question and does
4 not support Plaintiffs’ request for DAF damages. The Court simply allowed liability claims to
5 proceed. It did not decide the legitimacy of any specific remedy, let alone Plaintiffs’ right to
6 pursue DAF damages in addition to damages for any alleged impact to their tax returns. ECF
7 No. 39 at 11. Because Plaintiffs may not recover damages allegedly incurred by the party they
8 have sued (as distinct from damages that they personally have suffered), the Court should grant
9 Fidelity Charitable’s motion and preclude Plaintiffs from seeking DAF damages.

10 **II. ARGUMENT**

11 **A. The Fairbairns Are Not Entitled to Recover Any Alleged Loss to the DAF.**

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

23 Fidelity Charitable’s subsequent sale of the Energous stock was thus indisputably a sale of
24 Fidelity Charitable’s *own property*. Any alleged harm to the DAF from that sale was harm to
25 Fidelity Charitable—the owner of that stock and the proceeds from its sale. Indeed, Plaintiffs
26 themselves have characterized their request for DAF damages as a request for money to
27 compensate for “the loss to the Donor Advised Fund Charitable Account” and distinct from the
28 request for tax damages to compensate for “the loss to Emily and Malcolm Fairbairn.” *See* Ex.

C, Pls.’ Final Proposed Jury Instructions at 22. Plaintiffs, however, can have no claim for damages to the DAF under California’s “long-standing rule that one who is not the owner of the property and was not damaged cannot sue for injury to property.” *Jasmine Networks, Inc. v. Superior Court*, 180 Cal. App. 4th 980, 994 (2009) (quoting *Vaughn v. Dame Constr. Co.*, 223 Cal. App. 3d 144, 147 (1990), modified (Aug. 23, 1990)).

Indeed, it is a requisite element of all of the Fairbairns’ causes of action that they—the **Fairbairns**—were injured, not a third party, and certainly not the very party from which they seek damages. As the California Supreme Court has explained, “[t]he primary object of an award of damages in a civil action, and the fundamental principle or theory on which it is based, is just compensation or indemnity for the loss or injury sustained **by complainant**, and no more.” *See In re De Laveaga’s Estate*, 50 Cal. 2d 480, 488 (1958) (emphasis added); *see also Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 872 (9th Cir. 2017) (“[C]ompensatory damages are measured by the harm the defendant has caused the plaintiff.”). Thus, contract damages are designed to compensate a plaintiff for the injury the **plaintiff** suffered. *See, e.g.*, Ex. C, Pls.’ Final Proposed Jury Instructions at 17 (Plaintiffs’ listing as element for contract claim: “[t]hat Emily and Malcolm Fairbairn were harmed”).

Likewise, one of the elements of a negligence claim is a showing of harm **to the plaintiff**. *Peredia v. HR Mobile Servs., Inc.*, 25 Cal. App. 5th 680, 687 (Ct. App. 2018). For purposes of establishing that element, “[i]t is fundamental that a negligent act is not actionable unless it results in injury to another.” *Corona v. Sony Pictures Entm’t, Inc.*, No. 14-CV-09600 RGK EX, 2015 WL 3916744, at *3 (C.D. Cal. June 15, 2015) (quoting *Fields v. Napa Milling Co.*, 164 Cal. App. 2d 442 (1958)); *see also Lederer v. Gursey Schneider LLP*, 22 Cal. App. 5th 508, 521 (Ct. App. 2018), *review denied* (July 11, 2018) (“[A]ctual harm is required before a [negligence] cause of action accrues: ‘If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort.’”) (quoting *Budd v. Nixen*, 6 Cal. 3d 195, 200 (1971) (superseded by statute on other grounds)); *see also* Ex. C, Pls.’ Final Proposed Jury Instructions at 6 (Plaintiffs identifying as essential factual element of negligence “[t]hat Emily and Malcolm Fairbairn were harmed”). Misrepresentation also requires a plaintiff to prove that, “as a result of relying on the [defendant’s]

representation, *the plaintiff* must have sustained damages.” *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1156 n.3 (9th Cir. 2000) (emphasis added); *see also* Ex. C, Pls.’ Final Proposed Jury Instructions at 11 (Plaintiffs identifying as element of intentional misrepresentation “[t]hat Emily and Malcolm Fairbairn were harmed”). Consequently, even if the Court were to find the sale of the Energous stock resulted in a shortfall in the proceeds ultimately deposited in the DAF, Plaintiffs have no right to seek DAF damages.

B. The Court’s Prior Ruling on Standing Does Not Support Recovery of DAF Damages.

Plaintiffs contend that the Court decided that Plaintiffs can seek the restoration of losses to the DAF account when it denied Fidelity Charitable’s motion to dismiss. *See* ECF No. 203 at 23-26. But the Court made no such determination. It addressed Plaintiffs’ standing, not any specific damages theory or remedy.

In general, under both California and Massachusetts law, responsibility for ensuring charities’ compliance with the law rests with the state attorney general. Cal Gov’t Code § 12598(a); Mass. Gen. L. c. 12, § 8. An exception to this rule may be found in limited circumstances in which a plaintiff has a “special interest” with respect to the charity. Here, the Court held that Plaintiffs “alleged a special relationship sufficient to confer standing to sue regarding the disposition of their donation” because they “retained certain future rights to the donation” and “allege[d] that their special right was impaired by Fidelity Charitable’s negligent liquidation of the shares.”¹ ECF No. 39 at 10-11. The Court’s ruling was specific to Plaintiffs’ negligence claim. *Id.* It did not address questions of remedies, and of course, “a plaintiff must demonstrate standing separately for each form of relief sought.” *Friends of the Earth, Inc. v. Laidlaw Environmental Svcs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).

Critically, the “special interest” doctrine underlying the Court’s ruling on standing is

¹ For the purposes of this Motion, Fidelity Charitable assumes that the Court’s previous order on standing was correctly decided. However, it maintains its position that Plaintiffs had no standing to sue Fidelity Charitable for negligence at all, and reserves its right to revisit this issue on appeal. In addition, although Fidelity Charitable disputes that Plaintiffs retain all the rights described in the Court’s order (*see* ECF No. 39 at 10), it will not dispute those findings for the purposes of this Motion.

1 limited. It allows donors to seek to ensure that funds that have been directed to be used for certain
 2 charitable purposes are in fact used for those purposes, and that the specific terms of charitable
 3 trusts can be enforced even if the Attorney General does not bring suit. *See, e.g., Holt v. Coll. of*
 4 *Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 754 (1964). For instance, in *Holt*, which this
 5 Court cited in its motion to dismiss ruling, the California Supreme Court authorized three of the
 6 charity’s own trustees to bring an action against the charity and 23 other trustees seeking to enjoin
 7 the “wrongful diversion of corporate assets in breach of a trust for charitable purposes.” *Id.* at
 8 752-53, 757. The charity in that case was dedicated to the study of “osteopathic medicine,” and
 9 the plaintiffs alleged that the defendant trustees were seeking to “abandon[] and repudiate[] the
 10 charitable purpose . . . and to convert [the charity] into a school teaching nonosteopathic medicine
 11” *Id.* at 759. Similarly, in *San Diego County Council, Boy Scouts of America v. City of*
 12 *Escondido*, the court found that a chapter of the Boy Scouts could sue “**to enforce a charitable**
 13 **trust**” that required certain property to be used for the benefit of the Boy Scouts, when the
 14 defendant allegedly sought to use the property for different purposes. 14 Cal. App. 3d 189, 195
 15 (1971) (emphasis added). And in the case that this Court directly compared to the rights allegedly
 16 granted to Plaintiffs, the Appeals Court found that the donor would have had standing to enforce
 17 the terms of the charitable trust that was created. *See L.B. Research & Educ. Found. v. UCLA*
 18 *Found.*, 130 Cal. App. 4th 171, 180-181 (2005).

19 The Massachusetts cases the Court cited in its ruling on the motion to dismiss also establish
 20 that the remedy Plaintiffs seek is not available to them. *Lopez* is especially instructive. In *Lopez*
 21 *v. Medford Community Center, Inc.*, 384 Mass. 163, 167 (1981), the Massachusetts Supreme
 22 Judicial Court found that “the plaintiffs had standing only to litigate their claim that they were
 23 unlawfully denied membership in [the community center]” in violation of the center’s by-laws,
 24 but **did not** have standing to sue the community center for general mismanagement due to the
 25 “general rule that ‘it is the exclusive function of the Attorney General to correct abuses in the
 26 administration of a public charity by the institution of proper proceedings.’” *Id.* at 167-168 (citing
 27 *Ames v. Attorney Gen.*, 332 Mass. 246, 250-251 (1955)); *see also Jessie v. Boynton*, 372 Mass.
 28 293, 305 (1977) (holding that although members of a charitable corporation “had a vote concerning

1 the operation of the hospital to the extent the by-laws provide” which “should not be taken away
 2 except in accordance with lawful procedures and practices,” they had no property interest in their
 3 right to vote).

4 Thus, while Plaintiffs may have enforceable rights regarding their “special” advisory
 5 privileges relating to the investment and granting of the funds in the DAF account, they have no
 6 standing to pursue damages to Fidelity Charitable based on alleged negligence in the liquidation
 7 of the WATT stock. Indeed, Plaintiffs do not allege that Fidelity Charitable failed to honor their
 8 rights to advise on disbursements out of the giving account or seek to enforce the specific terms of
 9 those advisory rights; they want a monetary award for a liquidation they claim Fidelity Charitable
 10 should have performed more effectively.² But without a legal interest in the DAF funds
 11 themselves, Plaintiffs cannot recover such funds in this action. Plaintiffs may only pursue damages
 12 based on harm to themselves and are doing so.

13 Nor are Plaintiffs entitled to recover such funds simply by characterizing the recovery as
 14 “restitution.” In their trial brief, Plaintiffs argue that they may recover restitution under the UCL,
 15 and that such relief “is necessary to prevent Fidelity Charitable from holding onto its ill-gotten
 16 gains.” Pls.’ Trial Brief at 42. But this argument fails for at least three reasons.

17 First, Plaintiffs are not suing to enforce the advisory rights that granted them standing in
 18 the first place, and are not entitled to recover funds that are unrelated to those advisory rights. *See*
 19 *supra* at 5-6. They have no standing to pursue such funds regardless of the technical
 20 characterization of that recovery for the reasons stated above. Second, none of the proceeds from
 21 the liquidation of the donated Energeous shares remain at Fidelity Charitable.³ And third, rather
 22 than having obtained “ill-gotten gains,” Fidelity Charitable is accused of not having gained
 23

24 ² At the same time, Plaintiffs claim that they are entitled to enforce promises that are not
 25 only separate and apart from the “advisory rights” they maintain with respect to the DAF
 26 account, but that are inconsistent with—or at least not derived from—written Fidelity Charitable
 27 policy and the tax code. Even if they somehow prove these (unwritten) promises at trial,
 Plaintiffs still cannot recover damages *to Fidelity Charitable* that purportedly resulted from any
 breach for all of the reasons set forth above.

28 ³ Shortly after filing the Complaint, Plaintiffs recommended that Fidelity Charitable grant
 almost the entire balance of the giving account to JP Morgan Charitable, which it did.

1 enough. There is therefore no factual basis for an award of restitutionary disgorgement, which is
2 the only monetary relief allowed by the UCL. *See* Def.’s Proposed Findings of Fact and
3 Conclusions of Law at 46; *see also Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134,
4 1144 (2003) (stating that remedies under the UCL are “generally limited to injunctive relief and
5 restitution”); *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 336 (2011) (“A restitution order
6 against a defendant ... requires both that money or property have been lost by a plaintiff, on the
7 one hand, and that it have been acquired by a defendant, on the other.”).

8 * * *

9 Plaintiffs will seek at trial millions of dollars allegedly attributable to damage to the value
10 of their tax deduction. Plaintiffs previously also sought damages based on the purported impact
11 to their remaining holdings in Energous caused by Fidelity Charitable’s liquidation. Ex. D, M.
12 Fairbairn Response to Interrogatory No. 8 (Jan. 24, 2019) (“Emily and Malcolm Fairbairn were
13 harmed in the following ways by Fidelity Charitable’s sale of shares of WATT stock on December
14 29, 2017... Had Fidelity Investments Charitable handled the sale of the WATT stock prudently
15 and in accordance with representations made to the Fairbairns, the Fairbairns’ remaining holdings
16 in WATT would have retained a higher value”). But Plaintiffs abandoned that claim. Ex. E, M.
17 Fairbairn Response to Request for Admission No. 32 (May 8, 2019) (admitting “that the Fairbairns
18 are not seeking to recover from Fidelity the loss that the Fairbairns incurred as a result of the
19 diminution in economic value of the WATT shares that they continued to own after the December
20 2017 donation to Fidelity Investments Charitable Gift Fund”). Seeking to remedy alleged harm to
21 Plaintiffs’ property is one thing; the pursuit of damages based on harm to Fidelity Charitable is
22 another. Because Plaintiffs are not entitled to recover damages relating to property *owned by the*
23 *charity*, they should be precluded from seeking DAF damages.

1 DATED: September 22, 2020

Respectfully submitted,

2 By: /s/ David. C. Marcus

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13 CHARITABLE GIFT FUND

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GIFT FUND

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

EMILY FAIRBAIRN and
MALCOLM FAIRBAIRN,

Plaintiffs,

v.

FIDELITY INVESTMENTS
CHARITABLE GIFT FUND,

Defendant.

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

**DECLARATION OF CHRISTOPHER T.
CASAMASSIMA IN SUPPORT OF
DEFENDANT FIDELITY INVESTMENTS
CHARITABLE GIFT FUND'S MOTION *IN
LIMINE* NO. 5 TO PRECLUDE
PLAINTIFFS FROM PURSUING DAMAGES
TO THE DONOR-ADVISED FUND
ACCOUNT**

1 I, Christopher T. Casamassima, declare as follows:

2 1. I am a member of the California Bar and am admitted to practice before this Court.
3 I am an attorney at Wilmer Cutler Pickering Hale and Dorr LLP (“WilmerHale”), counsel to
4 Fidelity Investments Charitable Gift Fund (“Fidelity Charitable”). I have personal knowledge of
5 each of the matters set forth below, and, if called as a witness, I could and would testify to each of
6 them under oath.

7 2. Attached hereto as **Exhibit A** is a true and correct copy of excerpts from the July
8 25, 2019 Deposition of Malcolm Fairbairn.

9 3. Attached hereto as **Exhibit B** is a true and correct copy of excerpts from the July
10 18, 2019 Deposition of Emily Fairbairn.

11 4. Attached hereto as **Exhibit C** is a true and correct copy of Plaintiffs’ Final Proposed
12 Jury Instructions, which were served on Fidelity Charitable by Plaintiffs on March 5, 2020.

13 5. Attached hereto as **Exhibit D** is a true and correct copy of excerpts from Plaintiffs’
14 Responses and Objections to Fidelity Charitable’s First Set of Interrogatories to Malcolm
15 Fairbairn, dated January 24, 2019.

16 6. Attached hereto as **Exhibit E** is a true and correct copy of excerpts from Malcolm
17 Fairbairn’s Objections and Responses to Fidelity Charitable’s Third Set of Requests For
18 Admissions, dated May 8, 2019.

19 I declare under penalty of perjury that the foregoing is true and correct.

20 Executed on September 22, 2020.

21 /s/ Christopher T. Casamassima
CHRISTOPHER T. CASAMASSIMA

Exhibit A

CONFIDENTIAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EMILY FAIRBAIRN and MALCOLM) Case No.
FAIRBAIRN,) 3:18-cv-04881-JSC
Plaintiffs,)
vs.)
FIDELITY INVESTMENTS)
CHARITABLE GIFT FUND,)
Defendant.)
-----)

C O N F I D E N T I A L

VIDEOTAPED DEPOSITION OF MALCOLM FAIRBAIRN
San Francisco, California
Thursday, July 25, 2019

Reported by:

ASHALA TYLOR, CSR #2436, CLR, CRR, RPR

JOB NO. 3454702

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CONFIDENTIAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EMILY FAIRBAIRN and MALCOLM) Case No.
FAIRBAIRN,) 3:18-cv-04881-JSC
Plaintiffs,)
vs.)
FIDELITY INVESTMENTS)
CHARITABLE GIFT FUND,)
Defendant.)
_____)

Videotaped deposition of MALCOLM FAIRBAIRN, taken
at Wilmer Cutler Pickering Hale and Dorr LLP, 1 Front
Street, Suite 3500, San Francisco, California,
commencing at 8:58 a.m. and ending at 5:56 p.m., on
Thursday, July 25, 2019, before Ashala Tylor, CSR No.
2436, RPR, CRR, CLR.

CONFIDENTIAL

1 A. Correct. That's what my understanding is. 09:23

2 Q. Once you made the irrevocable gift, it 09:23

3 belonged to Fidelity Charitable, right? 09:23

4 MR. STRIS: Objection. Calls for an 09:23

5 expert opinion. Vague. 09:23

6 BY MR. MARCUS: 09:23

7 Q. Your understanding. 09:23

8 MR. STRIS: You can answer. 09:23

9 THE WITNESS: Timing of when it belongs to 09:23

10 Fidelity? What is -- what do you mean by the timing 09:23

11 of the -- 09:23

12 BY MR. MARCUS: 09:23

13 Q. Once you've made the irrevocable gift of 09:23

14 WATT stock to Fidelity Charitable, it belongs to 09:23

15 them, not you, right? 09:23

16 MR. STRIS: Same objections. 09:23

17 You can answer. 09:23

18 THE WITNESS: What do you mean by 09:23

19 "belongs"? 09:23

20 BY MR. MARCUS: 09:23

21 Q. You have -- you have no ownership of it 09:23

22 anymore, right? 09:24

23 MR. STRIS: Same objections. 09:24

24 You can answer. 09:24

25 THE WITNESS: It is my understanding that 09:24

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1 I no longer own the stock when it's donated. 09:24

2 BY MR. MARCUS: 09:24

3 Q. Thank you. 09:24

4 MR. MARCUS: We can take a break now, if 09:24

5 you need one. 09:24

6 MR. STRIS: I appreciate it. Thank you. 09:24

7 THE VIDEOGRAPHER: Going off the record. 09:24

8 The time is 9:24. 09:24

9 (Recess.) 09:28

10 (Off record: 9:24 a.m.) 09:28

11 (On record: 9:33 a.m.) 09:28

12 THE VIDEOGRAPHER: Back on the record. 09:33

13 The time is 9:33. 09:33

14 BY MR. MARCUS: 09:33

15 Q. Mr. Fairbairn, you just described a series 09:33

16 of representations that you say Mr. Kunz made to you 09:33

17 in December 2017. Do you have that in mind? 09:34

18 A. Yes. 09:34

19 Q. In December 2017, you did not confirm any 09:34

20 representations made by Mr. Kunz to you in writing, 09:34

21 correct? 09:34

22 A. To my knowledge, I did not confirm any of 09:34

23 the representations that he made to me in writing. 09:34

24 Q. You did not send an email to confirm the 09:34

25 substance of any of your conversations in December, 09:34

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CERTIFICATE OF REPORTER

I, ASHALA TYLOR, CSR No. 2436, in and for the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that a verbatim record of the proceedings were made by me using machine shorthand which was thereafter transcribed under my direction; further that the foregoing is an accurate transcription thereof.

That before the completion of the deposition, review of the transcript was requested.

I further certify that I am neither financially interested in this action nor a relative or employee of any attorney or any of the parties hereto.

In compliance with Section 8016 of the Business and Professions Code, I certify under penalty of perjury that I am a Certified Shorthand Reporter with California License No. 2436 in full force and effect. WITNESS my hand this 7th day of August, 2019.



Ashala Tylor, CSR #2436, RPR, CRR, CLR

Exhibit B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

)
EMILY FAIRBAIRN and MALCOLM)
FAIRBAIRN,)
)
Plaintiffs,)
)
vs.) Case No.:
) 3:18-cv-04881-JSC
FIDELITY INVESTMENTS)
CHARITABLE GIFT FUND,)
)
Defendant.)
_____)

CONFIDENTIAL - PURSUANT TO PROTECTIVE ORDER

VIDEOTAPED DEPOSITION OF EMILY FAIRBAIRN
San Francisco, California
Thursday, July 18, 2019
Volume I

Reported by: SUZANNE F. GUDELJ
CSR No. 5111
Job No. 3454698
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

)
EMILY FAIRBAIRN and MALCOLM)
FAIRBAIRN,)
)
Plaintiffs,)
)
vs.) Case No.:
) 3:18-cv-04881-JSC
FIDELITY INVESTMENTS)
CHARITABLE GIFT FUND,)
)
Defendant.)
_____)

Videotaped deposition of EMILY
FAIRBAIRN, Volume I, taken on behalf of
Defendant, at 1 Front Street, Suite 3500,
San Francisco, California, beginning at 9:01
a.m. and ending at 5:44 p.m., on Thursday,
July 18, 2019, before SUZANNE F. GUDELJ,
Certified Shorthand Reporter No. 5111.

1 representation was made, quote, "that it," meaning
2 Fidelity Charitable, "would allow the Fairbairns to
3 advise on a price limit."

4 Do you see that?

5 A Fairbairns -- okay. 01:28:36

6 Q That's your Complaint, right?

7 A Yes.

8 Q Do you recall Justin Kunz telling you that
9 Fidelity Charitable would allow the Fairbairns to
10 advise on a price limit? 01:28:47

11 A Well, Justin Kunz doesn't talk to me about
12 the Fairbairns. He tells me what the promises were,
13 and I don't remember him telling me that Malcolm
14 could or the Fairbairns or any of us could advise on
15 a price limit. 01:29:20

16 Q Okay. So let me just -- so with respect to
17 that promise, which I'll call promise No. 3 -- do
18 you understand what I'm talking about?

19 A Yes.

20 Q You don't recall Justin Kunz making that 01:29:29
21 promise to you?

22 A I don't have -- no.

23 Q Okay. Now, Ms. Fairbairn, back in
24 December 2017, you understood that your donation to
25 Fidelity Charitable was irrevocable, correct? 01:30:12

1 A Correct.

2 Q You understood that once donated, the stock
3 was no longer yours, right?

4 A It belonged to the charity.

5 Q Now, you also claim in your Complaint that 01:30:26
6 Mr. Kunz told you that Fidelity Charitable, quote,
7 "would not liquidate any shares until 2018,"
8 unquote, correct?

9 A Yes.

10 Q When did Mr. Kunz tell you that? 01:30:38

11 A In December 2017.

12 Q Can you be any more specific as to the date
13 and time that Mr. Kunz told you that?

14 A There was -- there were only three days, so
15 it had to be before we made the decision to donate. 01:30:54

16 Q Can you be any more specific?

17 A No.

18 Q Did Mr. Kunz tell you that on a phone call?

19 A I believe so.

20 Q Do you recall whether you made the phone 01:31:10
21 call or received it?

22 A No idea.

23 Q Do you recall where you were when Mr. Kunz
24 told you that on the phone?

25 A No, I do not recall where I was at the 01:31:22

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby
3 certify:

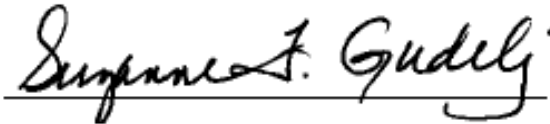
4 That the foregoing proceedings were taken
5 before me at the time and place herein set forth;
6 that any witnesses in the foregoing proceedings,
7 prior to testifying, were duly sworn; that a record
8 of the proceedings was made by me using machine
9 shorthand which was thereafter transcribed under my
10 direction; that the foregoing transcript is a true
11 record of the testimony given.

12 Further, that if the foregoing pertains to
13 the original transcript of a deposition in a Federal
14 Case, before completion of the proceedings, review
15 of the transcript [] was [] was not requested.

16 I further, certify I am neither financially
17 interested in the action nor a relative or employee
18 of any attorney or party to this action.

19 IN WITNESS WHEREOF, I have this date
20 subscribed my name.

21 Dated: July 22, 2019.

22 
23

24 SUZANNE F. GUDELJ

25 CSR No. 5111

Exhibit C

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EMILY AND MALCOLM FAIRBAIRN

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

EMILY FAIRBAIRN and MALCOLM
FAIRBAIRN,

Plaintiffs,

v.

FIDELITY INVESTMENTS CHARITABLE
GIFT FUND,

Defendant.

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

**PLAINTIFFS' PROPOSED JURY
INSTRUCTIONS**

PRELIMINARY INSTRUCTIONS (BEFORE TRIAL)

Ninth Circuit Model Jury Instructions (2017 version, updated Dec. 2019)

- 1.3
- 1.5
- 1.6
- 1.9
- 1.10
- 1.12
- 1.13
- 1.14
- 1.15
- 1.16
- 1.17
- 1.18
- 1.20
- 2.2
- 2.3

CONCLUDING INSTRUCTIONS (AFTER TRIAL)

Ninth Circuit Model Jury Instructions (2017 version, updated Dec. 2019)

- 1.4
- 1.6
- 1.9
- 1.10
- 1.12
- 1.14
- 1.15
- 1.20
- 2.2
- 2.3
- 2.4 (as amended below)
- 2.9 (subject to objection)
- 2.11
- 2.12
- 2.13
- 2.14
- 2.15
- 3.1
- 3.2
- 3.3
- 3.5

2.4 DEPOSITION IN LIEU OF LIVE TESTIMONY

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. ~~[When a person is unavailable to testify at trial, the deposition of that person may be used at the trial.]~~

~~The deposition of [name of witness] was taken on [date].~~ Insofar as possible, you should consider deposition testimony presented to you in court in lieu of live testimony in the same way as if the witness had been present to testify.

~~[Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.]~~

2.9 IMPEACHMENT EVIDENCE—WITNESS

[Plaintiffs object to the inclusion of this instruction. To the extent this instruction is given, however, Plaintiffs would propose the following instruction.]

The evidence that a witness has been convicted of a crime or lied under oath on a prior occasion may be considered, along with all other evidence, in deciding whether or not to believe the witness and how much weight to give to the testimony of the witness and for no other purpose.

4.2 LIABILITY OF CORPORATIONS—SCOPE OF AUTHORITY NOT IN ISSUE

Under the law, a corporation is considered to be a person. It can only act through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority.

The defendant in this case, Fidelity Investments Charitable Gift Fund, conducts its business through employees of other Fidelity entities. Thus, Fidelity Investments Charitable Gift Fund is responsible for the acts of the employees, agents, directors, and officers of those other Fidelity entities.

CACI NO. 400. NEGLIGENCE—ESSENTIAL FACTUAL ELEMENTS

Emily and Malcolm Fairbairn claim that they were harmed by Fidelity Investments Charitable Gift Fund's negligence. To establish this claim, Emily and Malcolm Fairbairn must prove all of the following:

1. That Fidelity Investments Charitable Gift Fund was negligent;
2. That Emily and Malcolm Fairbairn were harmed; and
3. That Fidelity Investments Charitable Gift Fund's negligence was a substantial factor in causing Emily and Malcolm Fairbairn's harm.

CACI NO. 600. STANDARD OF CARE

An organization or finance professional that liquidates stock is negligent if it or he fails to use the skill and care that a reasonably careful organization or finance professional would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”

CACI NO. 413. CUSTOM OR PRACTICE

[Plaintiffs object to the inclusion of this instruction. To the extent a custom or practice instruction is given, however, Plaintiffs would propose the unmodified form instruction. If the Court defines the community, Fidelity's definition is incorrect, and the community should be defined as "other donor-advised funds that utilize institutional trading desks to liquidate stock."]

You may consider customs or practices in the community in deciding whether Fidelity Investments Charitable Gift Fund acted reasonably. Customs and practices do not necessarily determine what a reasonable person would have done in Fidelity Investments Charitable Gift Fund's situation. They are only factors for you to consider. Following a custom or practice does not excuse conduct that is unreasonable. You should consider whether the custom or practice itself is reasonable.

CACI NO. 430. CAUSATION: SUBSTANTIAL FACTOR

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.

CACI NO. 431. CAUSATION: MULTIPLE CAUSES

A person's negligence may combine with another factor to cause harm. If you find that Fidelity Investments Charitable Gift Fund's negligence was a substantial factor in causing Emily and Malcolm Fairbairn's harm, then Fidelity Investments Charitable Gift Fund is responsible for the harm. Fidelity Investments Charitable Gift Fund cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing Emily and Malcolm Fairbairn's harm.

CACI NO. 1900. INTENTIONAL MISREPRESENTATION

Emily and Malcolm Fairbairn claim that Fidelity Investments Charitable Gift Fund made one or more false representations that harmed them. To establish this claim, Emily and Malcolm Fairbairn must prove all of the following:

~~1. That [name of defendant] represented to [name of plaintiff] that a fact was true;~~

~~2. That [name of defendant]'s representation was false;~~

1. That Fidelity Investments Charitable Gift Fund made one or more false representations to Emily and Malcolm Fairbairn;

32. That Fidelity Investments Charitable Gift Fund knew that the representation was false when it made it, or that it made the representation recklessly and without regard for its truth;

43. That Fidelity Investments Charitable Gift Fund intended that Emily and Malcolm Fairbairn rely on the representation;

54. That Emily and Malcolm Fairbairn reasonably relied on Fidelity Investments Charitable Gift Fund's representation;

65. That Emily and Malcolm Fairbairn were harmed; and

76. That Emily and Malcolm Fairbairn's reliance on Fidelity Investments Charitable Gift Fund's representation was a substantial factor in causing their harm.

A representation may be made orally, in writing, or by nonverbal conduct. [Included as directed by Directions for Use for CACI 1900.]

CACI NO. 1903. NEGLIGENT MISREPRESENTATION

Emily and Malcolm Fairbairn claim they were harmed because Fidelity Investments Charitable Gift Fund negligently made one or more representations that were not true ~~misrepresented a fact~~. To establish this claim, Emily and Malcolm Fairbairn must prove all of the following:

~~1. That [name of defendant] represented to [name of plaintiff] that a fact was true;~~

~~2. That [name of defendant]'s representation was not true;~~

1. That Fidelity Investments Charitable Gift Fund made one or more representations to Emily and Malcolm Fairbairn that were not true;

32. That although Fidelity Investments Charitable Gift Fund may have honestly believed that the representation was true, Fidelity Investments Charitable Gift Fund had no reasonable grounds for believing the representation was true when it made it;

43. That Fidelity Investments Charitable Gift Fund intended that Emily and Malcolm Fairbairn rely on this representation;

54. That Emily and Malcolm Fairbairn reasonably relied on Fidelity Investments Charitable Gift Fund's representation;

65. That Emily and Malcolm Fairbairn were harmed; and

76. That Emily and Malcolm Fairbairn's reliance on Fidelity Investments Charitable Gift Fund's representation was a substantial factor in causing their harm.

A representation may be made orally, in writing, or by nonverbal conduct.

CACI NO. 1907. RELIANCE

Emily and Malcolm Fairbairn relied on Fidelity Investments Charitable Gift Fund's misrepresentation if:

1. The misrepresentation substantially influenced them to make their donation of Energous stock to Fidelity Investments Charitable Gift Fund; and

2. They would probably not have made the donation without the misrepresentation. It is not necessary for a misrepresentation to be the only reason for Emily and Malcolm Fairbairn's conduct.

CACI NO. 1908. REASONABLE RELIANCE

In determining whether Emily and Malcolm Fairbairn's reliance on the misrepresentation was reasonable, they must first prove that the matter was material. A matter is material if a reasonable person would find it important in determining his or her choice of action.

If you decide that the matter is material, you must then decide whether it was reasonable for Emily and Malcolm Fairbairn to rely on the misrepresentation. In making this decision, take into consideration Emily and Malcolm Fairbairn's intelligence, knowledge, education, and experience.

However, it is not reasonable for anyone to rely on a misrepresentation that is preposterous. It also is not reasonable for anyone to rely on a misrepresentation if facts that are within their observation show that it is obviously false.

CACI NO. 300: BREACH OF CONTRACT—INTRODUCTION

Emily and Malcolm Fairbairn claim that they and Fidelity Investments Charitable Gift Fund entered into a contract for the donation of stock.

The Fairbairns claim that Fidelity Investments Charitable Gift Fund breached this contract by liquidating that stock in a manner inconsistent with their representations.

The Fairbairns also claim that Fidelity Investments Charitable Gift Fund's breach of this contract caused harm to the Fairbairns for which Fidelity Investments Charitable Gift Fund should pay.

Fidelity Investments Charitable Gift Fund denies that it made any misrepresentations to the Fairbairns or formed a contract about how the stock would be liquidated.

CACI NO. 302. CONTRACT FORMATION—ESSENTIAL FACTUAL ELEMENTS

Emily and Malcolm Fairbairn claim that the parties entered into a contract. To prove that a contract was created, Emily and Malcolm Fairbairn must prove all of the following:

1. That the contract terms were clear enough that the parties could understand what each was required to do;
2. That the parties agreed to give each other something of value. A promise to do something or not to do something may have value; and
3. That the parties agreed to the terms of the contract.

When you examine whether the parties agreed to the terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement. You may not consider the parties' hidden intentions.

If Emily and Malcolm Fairbairn did not prove all of the above, then a contract was not created.

CACI NO. 303. BREACH OF CONTRACT—ESSENTIAL FACTUAL ELEMENTS

To recover damages from Fidelity Investments Charitable Gift Fund for breach of contract, Emily and Malcolm Fairbairn must prove all of the following:

1. That Emily and Malcolm Fairbairn and Fidelity Investments Charitable Gift Fund entered into a contract;

~~2. That Emily and Malcolm Fairbairn did all, or substantially all, of the significant things that the contract required them to do;~~

23. That Fidelity Investments Charitable Gift Fund failed to do something that the contract required it to do; or that Fidelity Investments Charitable Gift Fund did something that the contract prohibited it from doing;

34. That Emily and Malcolm Fairbairn were harmed; and

45. That Fidelity Investments Charitable Gift Fund's breach of contract was a substantial factor in causing Emily and Malcolm Fairbairn's harm.

CACI NO. 304. ORAL OR WRITTEN CONTRACT TERMS

Contracts may be written or oral. Contracts may be partly written and partly oral. Oral contracts are just as valid as written contracts.

CACI NO. 307: CONTRACT FORMATION—OFFER

Both an offer and an acceptance are required to create a contract. Fidelity Investments Charitable Gift Fund contends that a contract was not created because there was never any offer. To overcome this contention, Emily and Malcolm Fairbairn must prove all of the following:

1. That the Fairbairns communicated to Fidelity Investments Charitable Gift Fund that they were willing to enter into a contract with Fidelity Investments Charitable Gift Fund;

2. That the communication contained specific terms; and

3. That, based on the communication, Fidelity Investments Charitable Gift Fund could have reasonably concluded that a contract with these terms would result if it accepted the offer.

If the Fairbairns did not prove all of the above, then a contract was not created.

CACI NO. 328. BREACH OF IMPLIED DUTY TO PERFORM WITH REASONABLE CARE—ESSENTIAL FACTUAL ELEMENTS

The parties' contract requires that Fidelity Investments Charitable Gift Fund liquidate the shares of stock donated by Emily and Malcolm Fairbairn. It is implied in the contract that this performance will be done competently and with reasonable care. Emily and Malcolm Fairbairn claim that Fidelity Investments Charitable Gift Fund breached this implied condition. To establish this claim, Emily and Malcolm Fairbairn must prove all of the following:

1. That Emily and Malcolm Fairbairn and Fidelity Investments Charitable Gift Fund entered into a contract;
2. That Emily and Malcolm Fairbairn did all, or substantially all of the significant things that the contract required them to do;
4. That Fidelity Investments Charitable Gift Fund failed to use reasonable care in liquidating the shares of stock donated by Emily and Malcolm Fairbairn; and
5. That Emily and Malcolm Fairbairn were harmed by Fidelity Investments Charitable Gift Fund's conduct.

PROMISSORY ESTOPPEL

Emily and Malcolm Fairbairn claim that they were harmed when they relied on one or more promises made by Fidelity Investments Charitable Gift Fund.

In order to establish a claim for promissory estoppel, Emily and Malcolm Fairbairn must prove all of the following:

1. That one or more promises were made by Fidelity Investments Charitable Gift Fund, which were clear and unambiguous in their terms;
2. That Emily and Malcolm Fairbairn relied on one or more promises;
3. That Emily and Malcolm Fairbairn's reliance was both reasonable and foreseeable;
4. That Emily and Malcolm Fairbairn were harmed; and
5. That Emily and Malcolm's reliance on one or more promises by Fidelity Investments Charitable Gift Fund was a substantial factor in causing their harm.

5.1 DAMAGES—PROOF

[Plaintiffs propose this single modified instruction based on Model Ninth Circuit Instructions 5.1 and 5.2 on damages in contrast to Defendant's proposal to give modified versions of Model Ninth Circuit Instruction 5.1, CACI 350, and CACI 1923.]

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiffs on one or more of their negligence, intentional misrepresentation, negligent misrepresentation, breach of contract, or promissory estoppel claims, you must determine the plaintiffs' damages. The plaintiffs have the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. ~~You should consider the following~~ Emily and Malcolm Fairbairn are seeking the following items of damages:

Loss to Emily and Malcolm Fairbairn's Donor Advised Fund Charitable Account:

If you award damages to the Donor Advised Fund Charitable Account, that amount will be placed into the charitable account.

If you find for the plaintiffs on their negligence claim, the loss to the Donor Advised Fund Charitable Account is measured by:

The difference between (a) the proceeds Fidelity Investments Charitable Gift Fund would have obtained if it had sold Emily and Malcolm Fairbairn's donated shares of WATT stock with reasonable care and (b) the proceeds actually obtained by Fidelity Investments Charitable Gift Fund after selling the shares.

If you find for the plaintiffs on their intentional misrepresentation, negligent misrepresentation, breach of contract, or promissory estoppel claim, the loss to the Donor Advised Fund Charitable Account is measured by:

The difference between (a) the proceeds Fidelity Investments Charitable Gift Fund would have obtained if it had sold Emily and Malcolm Fairbairn's donated shares of WATT stock without breaching one or more promises or representations made by Fidelity Investments Charitable Gift Fund and (b) the proceeds actually obtained by Fidelity Investments Charitable Gift Fund after selling the shares.

Loss to Emily and Malcolm Fairbairn:

If you find for the plaintiffs on their negligence claim, the loss to Emily and Malcolm Fairbairn is measured by:

Such sum as will reasonably compensate Emily and Malcolm Fairbairn for the difference between (a) the tax deduction Emily and Malcolm Fairbairn would have received if the donated

shares of WATT stock had been sold with reasonable care and (b) the tax deduction Emily and Malcolm Fairbairn actually obtained after Fidelity Investments Charitable Gift Fund sold the shares.

If you find for the plaintiffs on their intentional misrepresentation, negligent misrepresentation, breach of contract, or promissory estoppel claim, the loss to Emily and Malcolm Fairbairn is measured by:

Such sum as will reasonably compensate Emily and Malcolm Fairbairn for the difference between (a) the tax deduction Emily and Malcolm Fairbairn would have received if the donated shares of WATT stock had been sold without breaching one or more promises or representations made by Fidelity Investments Charitable Gift Fund and (b) the tax deduction Emily and Malcolm Fairbairn actually obtained after Fidelity Investments Charitable Gift Fund sold the shares.

* * *

To recover damages for any harm resulting from a breach of contract, Emily and Malcolm Fairbairn must prove that when the contract was made, both parties knew or could reasonably have foreseen that the harm was likely to occur in the ordinary course of events as result of the breach of the contract.

It is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

CACI NO. 3935. PREJUDGMENT INTEREST (CIV. CODE § 3288)

If you decide that Emily and Malcolm Fairbairn are entitled to recover damages for past economic loss in one or more of the categories of damages that they claim, then you must decide whether they should also receive prejudgment interest on each item of loss in those categories.

Prejudgment interest is the amount of interest the law provides to a plaintiff to compensate for the loss of the ability to use the funds. If prejudgment interest is awarded, it is computed from the date on which each loss was incurred until the date on which you sign your verdict.

Whether Emily and Malcolm Fairbairn should receive an award of prejudgment interest on all, some, or none of any past economic damages that you may award is within your discretion. If you award these damages to Emily and Malcolm Fairbairn, you will be asked to address prejudgment interest in the special verdict form.

Exhibit D

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Attorneys for Plaintiffs
 Emily and Malcolm Fairbairn

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EMILY FAIRBAIRN and MALCOLM
 FAIRBAIRN,

Plaintiffs,

v.

FIDELITY INVESTMENTS CHARITABLE
 GIFT FUND,

Defendant.

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

[Hon. Jacqueline Scott Corley]

**PLAINTIFF’S RESPONSES AND
 OBJECTIONS TO DEFENDANT’S FIRST
 SET OF INTERROGATORIES TO
 MALCOLM FAIRBAIRN**

PROPOUNDING PARTY: Defendant Fidelity Investments Charitable Gift Fund
 RESPONDING PARTY: Plaintiff Malcolm Fairbairn
 SET NUMBER: One (1)

2. The request seeks documents and communications protected by the attorney-client privilege and the work product doctrine.

3. The interrogatory does not accurately re-state the allegation in Paragraph 74(b).

INTERROGATORY NO. 8:

DESCRIBE why and how YOU believe YOU were harmed by FIDELITY CHARITABLE's sale of shares of WATT stock on December 29, 2017, including why waiting until 2018 to begin selling the shares of WATT stock would have mitigated or prevented such harm.

RESPONSE TO INTERROGATORY NO. 8:

In addition to the General Objections, the Responding Party objects as follows:

1. The interrogatory is vague and ambiguous.
2. The interrogatory seeks premature disclosure of expert information.
3. The interrogatory is compound in asking about multiple causes of harm and thus violates Fed. R. Civ. P. 33(a)(1).

Subject to and without waiving the foregoing objections, the Responding Party responds as follows:

Fidelity Charitable's actions in selling off 1,933,585 shares of WATT stock in a brief period on the afternoon of December 29, 2017 depressed the market price for WATT. The sales represented 34.9% of the exchange trading volume for that time period and the sales orders effectively competed with each other, driving the price further down. The volume, speed, and manner of the sales affected other participants in the market and caused a loss of confidence in WATT that further depressed the share price.

Emily and Malcolm Fairbairn were harmed in the following ways by FIDELITY CHARITABLE's sale of shares of WATT stock on December 29, 2017:

- Had Fidelity Investments Charitable handled the sale of the WATT stock prudently and in accordance with representations made to the Fairbairns, the sale of the stock would have yielded greater returns. That, in turn, would have increased the value of the Fairbairns' DAF account and allowed the Fairbairns to direct more money to charities they support.
- Had Fidelity Investments Charitable handled the sale of the WATT stock prudently and in accordance with representations made to the Fairbairns, the Fairbairns' donation would have been valued at a higher amount for tax purposes and the Fairbairns would have received a larger tax deduction on their 2017 income taxes.
- Had Fidelity Investments Charitable handled the sale of the WATT stock prudently and in accordance with representations made to the Fairbairns, the Fairbairns' remaining holdings in WATT would have retained a higher value.

Fidelity Investments Charitable promised the Fairbairns that it would not sell the stock until 2018. Its breach of that promise harmed the Fairbairns for all of the reasons given above. Delaying the sale of the WATT stock until January 2018 would have avoided the substantial harm caused by rapidly dumping all of the stock on the market in the last few trading hours of 2017. That rapid liquidation of a huge volume of stock caused downward pressure on the stock price and cut short the price increase following the FCC's critical regulatory approval. If the stock had been sold in January 2018 in a careful, professional manner that comported with industry standards, the stock would have sold at a higher price that yielded more money for charity.

As Fidelity Investments Charitable knew, the Fairbairns' tax deduction for shares donated on December 29, 2017 would be calculated based on the average of the high and low stock prices on that day. Well over half of the shares, 1,233,585 in total, were donated on December 29, 2017. Even knowing that the share price on December 29, 2017, would determine the value of the Fairbairns' tax deduction, Fidelity Investments

1 Charitable chose to liquidate all of the WATT shares, nearly 10% of the outstanding
 2 shares for that company, in a brief period that afternoon before the market closed.
 3 Fidelity Investments Charitable knew or should have known that doing so would
 4 decrease the stock price that day and thus decrease the Fairbairns' tax deduction. Had
 5 they delayed selling the stock until January 2018, the Fairbairns would have received a
 6 higher tax deduction based on a higher stock price.

7
 8 Dated: January 24, 2019

STRIS & MAHER LLP

9
 10
 11 /s/ Rachana A. Pathak

Peter K. Stris

Brendan S. Maher

Bridget Asay

Rachana A. Pathak

Dana Berkowitz

John Stokes

Joshua Michelangelo Stein

Attorneys for Plaintiffs

12
 13
 14
 15
 16 I declare under penalty of perjury that the foregoing is true and correct.

17
 18 Executed on January 24, 2019

19
 20 /s/ Malcolm Fairbairn

Malcolm Fairbairn.

ATTESTATION

I, Rachana A. Pathak, attest the signatory above has authorized the placement of his signature on this document. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: January 24, 2019

/s/ Rachana A. Pathak
Rachana A. Pathak

S T R I S | 725 S. FIGUEROA ST, STE 1830
MAHER | LOS ANGELES, CA 90017

Exhibit E

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Emily and Malcolm Fairbairn

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EMILY FAIRBAIRN and MALCOLM
FAIRBAIRN,

Plaintiffs,

v.

FIDELITY INVESTMENTS CHARITABLE
GIFT FUND,

Defendant.

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

[Hon. Jacqueline Scott Corley]

**PLAINTIFF'S RESPONSES AND
OBJECTIONS TO DEFENDANT'S THIRD
SET OF REQUESTS FOR ADMISSION TO
MALCOLM FAIRBAIRN**

PROPOUNDING PARTY: Defendant Fidelity Investments Charitable Gift Fund

RESPONDING PARTY: Plaintiff Malcolm Fairbairn

SET NUMBER: Three (3)

3. The request as phrased is beyond the scope of Fed. R. Civ. P. 36 and not a proper request for admission, because by rule requests for admission are limited to facts, the application of law to fact, opinions about either, and the genuineness of any described documents.

Subject to and without waiving the foregoing objections:

Admit.

REQUEST FOR ADMISSION NO. 32:

Admit that YOU are not seeking any equitable or monetary relief in this ACTION based on YOUR contention that “[h]ad Fidelity Charitable handled the sale of the WATT stock prudently and in accordance with representations made to the Fairbairns, the Fairbairns’ remaining holdings in WATT would have retained a higher value.” (Malcolm Fairbairn Response to Interrogatory No. 8.).

RESPONSE TO REQUEST FOR ADMISSION NO. 32:

In addition to the General Objections, Responding Party objects on the following grounds:

1. The proffered definition of “YOU” as including anyone acting on Malcolm Fairbairn’s behalf is overly broad and unintelligible. The response defines “YOU” as Malcolm Fairbairn.
2. The request is vague and ambiguous, in particular with respect to the phrase, “based on.” Responding Party objects to any attempt to use the response below to limit Responding Party’s ability to seek monetary and equitable relief for Defendant’s conduct that resulted in the Fairbairns’ diminished tax deduction and lower DAF account balance.
3. The request as phrased is beyond the scope of Fed. R. Civ. P. 36 and not a proper request for admission, because by rule requests for admission are limited to facts, the application of law to fact, opinions about either, and the genuineness of any described documents.

Subject to and without waiving the foregoing objections:

Admit that the Fairbairns are not seeking to recover from Fidelity the loss that the Fairbairns incurred as a result of the diminution in economic value of the WATT shares that they continued to

own after the December 2017 donation to Fidelity Investments Charitable Gift Fund. Otherwise denied.

Dated: May 8, 2019

STRIS & MAHER LLP

/s/ Rachana A. Pathak

Peter K. Stris
Bridget Asay
Rachana A. Pathak

Attorneys for Plaintiffs

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 8, 2019

/s/ Malcolm Fairbairn

Malcolm Fairbairn.

STRIS | 725 S. FIGUEROA ST., STE 1830
MAHER | LOS ANGELES, CA 90017

ATTESTATION

I, Rachana A. Pathak, attest the signatory above has authorized the placement of his signature on this document. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: May 8, 2019

/s/ Rachana A. Pathak

Rachana A. Pathak

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